AUGUST 1996

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

B. Unemployment Compensation[14]

In *Meek v. Essroc Corp.*, 15 FMSHRC 606 (April 1993), a three-member majority of the Commission adopted as agency policy the deduction of unemployment compensation from backpay awards. *Id.* at 618. The majority reasoned that the issue was a matter of agency discretion and that such a deduction comports with the Mine Act's goal of making miners whole. *Id.* at 616-18. It noted that the "Commission seeks to fashion relief that is just and does not overcompensate the discriminatee." *Id.* at 617 (citation omitted). The majority stated that the employer would still be required to place the discriminatee in the position he was in but for the unlawful discrimination, but that the employer should not additionally compensate the miner for funds that he or she received as earnings for working during the interim or as unemployment compensation. *Id.* at 617-18. The majority noted that when "an individual receives unemployment compensation, his previous employer is, as a result, taxed at an increased rate, depending upon the degree of experience rating." *Id.* at 618 n.11 (citation omitted).

Commissioner Backley dissented in *Meek*, concluding that, although the deduction of unemployment compensation was a matter of agency discretion, the majority had abused its discretion. *Id.* at 621. He concluded that the majority had acted arbitrarily by relying upon a rationale rejected by the Supreme Court in *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951). Commissioner Backley explained that, in finding that the NLRB acted properly within its discretion by refusing to deduct unemployment compensation from back pay, the Supreme Court rejected the arguments that unemployment compensation should be treated as earnings or considered as direct payments from the employer and properly set off against back pay. *Id.* at 621-22, *citing Gullett*, 340 U.S. at 363, 364. Commissioner Backley further concluded in his *Meek* dissent that the majority's policy failed to fairly balance the interests of the parties, noting that by ensuring that "illegally discharged miners not receive a windfall, [the majority] has adopted a *national* policy which will at times provide an employer with a windfall" under state unemployment compensation laws, and that their choice of employer over the victim of wrongdoing seemed "illogical and unfair." *Id.* at 625 (emphasis in original). Commissioner Backley also noted the majority of courts of appeals have opted not to deduct unemployment compensation, and that four circuits (the Third, Fourth, Ninth, and Eleventh) have removed the

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[14] All Commissioners reverse the judge's deduction of unemployment compensation from Poddey's backpay award. Commissioner Marks and I reach our determination based on the rationale set forth in the dissents in *Meek v. Essroc Corp.*, 15 FMSHRC 606, 621-26 (April 1993), and *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2221-29 (November 1994). All Commissioners reverse based on the applicability of the court's holding in *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996) to the instant case, which arises in the Fourth Circuit.

AUGUST 1996

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

Day Branch Coal Company, Inc., and Bobby Joe Hensley v. Secretary of Labor, MSHA, Docket Nos. KENT 94-1077-R through KENT 94-1190-R. (Judge Maurer, June 27, 1996)

Asarco, Inc. v. Secretary of Labor, MSHA, Docket Nos. CENT 95-8-RM, etc. (Judge Manning, July 16, 1996)

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 94-57. (Judge Barbour, July 19, 1996)

No cases were filed in which Review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 5, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of PERRY PODDEY	:	
v.	:	Docket No. WEVA 93-339-D
TANGLEWOOD ENERGY, INC.	:	

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

DECISION

BY: Riley, Commissioner[2]

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the question of whether Administrative Law Judge Arthur Amchan properly considered and applied certain penalty criteria in section 110(i) of the Mine Act[3] in assessing a $100 civil penalty against Tanglewood

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[1] Chairman Jordan has recused herself in this matter. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), Commissioners Holen, Marks and I have designated ourselves a panel of three Commissioners to exercise the powers of the Commission.

[2] I am the only Commissioner in the majority on all issues presented.

[3] Section 110(i) sets forth six criteria for assessment of penalties under the Act.

> The Commission shall have authority to assess all civil penalties provided in [the Act]. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Energy, Inc. ("Tanglewood") for discharging Perry Poddey in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), and whether the judge erred in deducting unemployment compensation from back pay he awarded Poddey.[4] 15 FMSHRC 2401 (November 1993) (ALJ). For the reasons that follow, the Commission vacates the penalty and remands for assessment consistent with this decision, and reverses the judge's deduction of unemployment compensation.

I.

Factual and Procedural Background

Tanglewood operates the Coal Bank 12 Mine, an underground coal mine in Randolph County, West Virginia. On November 3, 1992, Kenneth Tenney, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a citation to Tanglewood alleging a violation of 30 C.F.R. § 75.523-3(a) (1995) because a scoop operated by Poddey was not equipped with an automatic emergency-parking brake.[5] 15 FMSHRC at 2403; Gov't Ex. 1. Although the brake was subsequently installed, the bolt securing it to the scoop repeatedly became loose, rendering the brake ineffective. *Id.* at 2403-04. Poddey reported the problem to the operator's mechanic, Doug McCoy, who tightened the bolt on several occasions. *Id.* at 2404. On January 4, 1993, Poddey again reported the problem to McCoy and to Section Foreman Jeff Simmons, suggesting installation of a second bolt on the brake assembly. *Id.* The maintenance crew was informed of the request, but the work was not performed before the following morning. *Id.*

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30 U.S.C. § 820(i).

[4] Section 105(c)(1) provides in part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this [Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1).

[5] Section 75.523-3(a) provides in part that, "[e]xcept for personnel carriers, rubber-tired, self-propelled electric haulage equipment used in the active workings of underground coal mines shall be equipped with automatic emergency-parking brakes . . . ."

On January 5, Inspector Tenney inspected the scoop and discovered that the brake was inoperable. *Id.* Poddey informed him that the brake assembly bolt was loose and that he had previously reported the problem. *Id.* The inspector issued a citation alleging a violation of section 75.523-3(a). *Id.*; Gov't Ex. 3.

At the end of the shift, Simmons installed the second bolt on the brake assembly. 15 FMSHRC at 2404. Simmons later recounted the circumstances surrounding issuance of the citation to his supervisor, Randy Key, and indicated that Poddey had a month within which to repair the brake himself. *Id.* at 2405.

On January 6, upon reporting to work, Poddey was directed to telephone Key. *Id.* During the conversation, Key chastised Poddey for complaining to MSHA and advised him that it was his responsibility to have installed the bolt. *Id.* at 2405-06. Poddey then confronted Simmons, accusing him of falsely informing Key that he had deliberately reported the brake problem to MSHA. *Id.* at 2406. Poddey told Simmons that if the foreman had a problem with him, they should settle it "outside the gate." *Id.*; Tr. I 116.[6] Simmons immediately called Key to inform him of the incident. 15 FMSHRC at 2407. Key traveled to the mine and, at the end of the shift, discharged Poddey. *Id.*

Poddey filed a discrimination complaint with MSHA and the Secretary of Labor filed the present complaint pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).[7] The Secretary proposed that a civil penalty be assessed against Tanglewood in the range of $2,500 to

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[6] References to "Tr. I" are to the transcript of the hearing that took place on September 1, 1993; "Tr. II" references are to the September 2 transcript.

[7] Section 105(c)(2) provides in part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination or interference and propose an order granting appropriate relief.

30 U.S.C. § 815(c).

$3,000. S. Amend. Complaint at 3-4. On May 25, 1993, Poddey was temporarily reinstated to his job. 15 FMSHRC at 2407-08. The matter proceeded to hearing before Judge Amchan.

The judge determined that Tanglewood had violated section 105(c) by discharging Poddey. *Id.* at 2414. He concluded Poddey had engaged in protected activity when he reported the malfunctioning brake to the mechanic, Simmons and Inspector Tenney, and that Poddey's discharge was motivated in part by that protected activity. *Id.* at 2408-09. He determined that, although Tanglewood fired Poddey "for what it perceived to be a threat to . . . Simmons, or at least insubordinate behavior," Tanglewood had failed to rebut the prima facie case of discrimination. *Id.* at 2409, 2414. He reasoned that Poddey had been unjustly blamed for not repairing the brake, and that Poddey's invitation to fight Simmons and other remarks did not forfeit Poddey's statutory rights to protection from retaliation. *Id.* at 2409-14.

The judge determined that, although Tanglewood had a "relatively large number of previous violations," assessment of a $100 civil penalty was appropriate based on his findings of gravity and negligence. *Id.* at 2415. He reasoned that, while Key and Simmons provoked the outburst leading to Poddey's discharge by unjustifiably blaming Poddey for the violation, there was no evidence that they "did so with the intention of generally discouraging safety complaints or cooperation with MSHA." *Id.* The judge observed that the penalty was warranted nonetheless because Poddey's discharge did, in fact, tend to inhibit employees in exercising their rights under the Act. *Id.* The judge also ordered Tanglewood to pay Poddey "full backpay and benefits with interest, less the payments he received in unemployment compensation." *Id.* at 2416.

The Secretary filed a petition for discretionary review, challenging the civil penalty assessment and backpay award.[8]

II.

Disposition

A. Civil Penalty

1. General Principles

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). The Commission has cautioned, however, that the exercise of such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act. *Id., citing Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). In reviewing a judge's penalty assessment, the Commission must

[8] Tanglewood declined to file a brief.

determine whether the judge's findings are supported by substantial evidence.[9] Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . ." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). The judge must make findings of fact on the criteria that "not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg*, 5 FMSHRC at 292-93.

2. Negligence[10]

The Secretary argues that, in applying the negligence criterion, the judge should have considered whether the operator intended to commit the violation of section 105(c) rather than whether it intended to generally discourage protected activities. S. Br. at 10. The Secretary asserts that Tanglewood's violation was intentional, and that the judge "ignored both logic and the law" in finding low negligence. *Id.* at 11-12.

Commissioner Marks and I agree with the Secretary that the proper inquiry before the judge in his consideration of negligence was whether Tanglewood intended to commit the violation rather than whether it intended to chill future protected activities. Commissioner Marks and I disagree, however, that a finding that the operator engaged in certain intentional conduct in violation of section 105(c) necessarily leads to a determination of high negligence.

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[9] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While the Commission does not lightly overturn a judge's factual findings and credibility resolutions, neither is it bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). The Commission is guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[10] All Commissioners vote to affirm the judge's finding of low negligence. Commissioners Marks and I agree that the proper inquiry before the judge was whether Tanglewood intended to commit the violation of section 105(c). Commissioner Holen concludes that the proper inquiry was whether the violation resulted from more than ordinary negligence. Slip op. at 13 (Commissioner Holen, concurring).

The Commission has previously recognized that a finding of high negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (February 1991). Although Key's actions in discharging Poddey were intentional, there were mitigating circumstances that do not support a finding that such actions demonstrated an aggravated lack of care. Tanglewood discharged Poddey for what it perceived to be a threat, or at least insubordinate behavior, toward Simmons. 15 FMSHRC at 2409. Poddey confronted Simmons, yelling at him, accusing Simmons of lying when he told Key that Poddey had deliberately informed MSHA about the brake problem, and invited Simmons to fight "outside the gate." 15 FMSHRC at 2406-07; Tr. I 116, 273; Tr. II 19-21. In view of these mitigating circumstances, Commissioner Marks and I conclude that substantial evidence supports the judge's finding that Tanglewood's violation of section 105(c) involved a low level of negligence.[11] Accordingly, the Commission affirms, in result, the judge's negligence finding.

3. Gravity[12]

The Secretary argues that, in determining gravity, the judge erred in considering whether the operator "intended to 'generally discourag[e] safety complaints or cooperation with MSHA'" and that, rather, a chilling effect on protected activities should be presumed for any violation of section 105(c). S. Br. at 12-15, *quoting* 15 FMSHRC at 2415. The Secretary submits that the judge should have considered "what effect on miners the violation in fact created." *Id.* at 12. He asserts that the gravity of Tanglewood's violation was serious because there was compelling evidence that Poddey's discharge had a severe chilling effect on Poddey and other miners at the No. 12 Coal Bank. *Id.* at 15-18.

Contrary to the Secretary's assertions, it appears that the judge's reference to the operator's intent to discourage safety complaints or cooperation with MSHA was related only to his consideration of the negligence criterion. Consistent with the Commission's recent holding in *Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 558 (April 1996), Commissioner Holen and I reject the Secretary's argument that a chilling effect on protected activities should be presumed for any violation of section 105(c). In *Carroll Johnson*, the Commission explained that the Mine Act does not provide for such a presumption and that references to chilling effect in the legislative history are made in connection with the temporary reinstatement provision "to protect miners from the adverse and chilling effect of loss

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[11] Commissioner Marks and I note that the Secretary in his regulations for proposing civil penalties defines high negligence in part by the lack of mitigating circumstances: *See* 30 C.F.R. § 100.3(d).

[12] Commissioner Holen and I affirm in result the judge's finding of low gravity. Commissioner Marks would recognize a presumption of chilling effect on protected activities in every instance of a section 105(c) violation and would reverse the judge's finding of low gravity.

of employment." *Id.* (citations omitted). The Commission noted that "Congress intended that section 105(c) would protect miners against the chilling effect of employment loss they might suffer as a result of illegal discharge" and that Congress did not intimate that a chilling effect should be presumed for every violation. *Id.* The Commission concluded that determinations of whether a chilling effect resulted from a section 105(c) violation should be made on a case-by-case basis. *Id.*

In making such a determination, the Commission held that both subjective and objective evidence should be considered and that a finding of chilling effect does not *a fortiori* mean the gravity of the violation is high. *Id.* at 558-59. For objective evidence, the Commission recognized the appropriateness of considering whether the adverse action "reasonably tended to discourage miners from engaging in protected activities," citing by analogy authority relating to the enforcement of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1994). *Id.* at 558, *citing in part Teamsters Local Union No. 171 v. NLRB,* 863 F.2d 946, 954 (D.C. Cir. 1988), *cert. denied sub nom. A.G. Boone Co. v. NLRB*, 490 U.S. 1065 (1989); *Southwest Regional Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970). Subjective evidence of a chilling effect includes testimony of the complainant or other miners. *Id.* at 559.

Applying this test, Commissioner Holen and I reject the Secretary's contention that Poddey's discharge created a chilling effect at the mine. The Secretary relies upon Inspector Tenney's testimony that, after Poddey's discharge, he received such comments from miners at Coal Bank No. 12 as, "Don't tell anybody I said so." S. Br. at 16. Such subjective evidence reveals that, although miners were cautious and wary of retaliation, they were nonetheless communicating their safety and health concerns. Nor do Commissioner Holen and I find objective evidence of a chilling effect. As the judge found, "there is no indication that [Tanglewood] would have so retaliated but for the unusual circumstances of this case." 15 FMSHRC at 2415. Because Poddey was discharged in part as a result of his heated confrontation with Simmons, the discharge would not "reasonably tend[] to discourage miners from engaging in protected activities." *Carroll Johnson*, 18 FMSHRC at 558.

To the extent the judge found that Poddey's discharge tended to create a chilling effect (15 FMSHRC at 2415), Commissioner Holen and I conclude for the reasons discussed above that such a finding is not supported by substantial evidence. Accordingly, the Commission affirms the judge's finding of low gravity.

4. History of Previous Violations[13]

The Secretary argues that, although the judge correctly found the operator had a "relatively large number of previous violations," the judge erred in failing to give weight to those violations because there was no evidence of violations of section 105(c). S. Br. at 18. The Secretary avers that an operator's complete history of violations should be considered and that the judge ignored such evidence including that the operator was delinquent in the payment of penalties, and that numerous prior violations involved "a significant threat to miner safety." *Id.* at 18-23.

All Commissioners agree with the Secretary that the judge's consideration of previous violations is not limited to only those involving section 105(c). The Commission has explained that "section 110(i) requires the judge to consider the operator's general history of previous violations . . . . Past violations of *all* safety and health standards are considered for this component." *Carroll Johnson,* 18 FMSHRC at 557, *quoting Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992) (emphasis added). All Commissioners disagree with the Secretary, however, that the judge was required to consider evidence of the operator's alleged delinquency in the payment of civil penalties. As the Commission recently held in *Secretary of Labor on behalf of James Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 841, 850 (June 1996), an operator's delinquency in regard to payment of civil penalties "is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties." Commissioner Holen and I also reject the Secretary's argument that the judge was constrained to consider the seriousness of the previous violations. Such consideration is not required by section 110(i) of the Act or by the Secretary in his regulations for proposing penalties. *See, e.g.,* 30 C.F.R. § 100.3(c).

Nonetheless, the judge's terse finding that Tanglewood had "a relatively large number of previous violations" (15 FMSHRC at 2415) does not provide the necessary foundation for our review of the appropriateness of the $100 penalty, which was a significant reduction of the $2,500 to $3,000 penalty proposed by the Secretary. *See Dolese Bros. Co.*, 16 FMSHRC 689, 695 (April 1994) (adequate findings are "critical" where a judge assesses a penalty that significantly departs from that proposed by the Secretary). Accordingly, the Commission vacates the penalty and remands for the assessment of a civil penalty with further findings.

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[13] All Commissioners remand the judge's history of previous violations determination for further findings. All Commissioners reject the Secretary's argument that the judge erred in failing to consider the operator's payment history. Commissioner Holen and I also reject the Secretary's argument that the judge was required to consider the seriousness of past violations. Commissioner Holen further rejects his argument that the judge erred in failing to consider that the mine had been targeted under MSHA's Joint Mine Assistance Program.

B. Unemployment Compensation[14]

In *Meek v. Essroc Corp.*, 15 FMSHRC 606 (April 1993), a three-member majority of the Commission adopted as agency policy the deduction of unemployment compensation from backpay awards. *Id.* at 618. The majority reasoned that the issue was a matter of agency discretion and that such a deduction comports with the Mine Act's goal of making miners whole. *Id.* at 616-18. It noted that the "Commission seeks to fashion relief that is just and does not overcompensate the discriminatee." *Id.* at 617 (citation omitted). The majority stated that the employer would still be required to place the discriminatee in the position he was in but for the unlawful discrimination, but that the employer should not additionally compensate the miner for funds that he or she received as earnings for working during the interim or as unemployment compensation. *Id.* at 617-18. The majority noted that when "an individual receives unemployment compensation, his previous employer is, as a result, taxed at an increased rate, depending upon the degree of experience rating." *Id.* at 618 n.11 (citation omitted).

Commissioner Backley dissented in *Meek*, concluding that, although the deduction of unemployment compensation was a matter of agency discretion, the majority had abused its discretion. *Id.* at 621. He concluded that the majority had acted arbitrarily by relying upon a rationale rejected by the Supreme Court in *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951). Commissioner Backley explained that, in finding that the NLRB acted properly within its discretion by refusing to deduct unemployment compensation from back pay, the Supreme Court rejected the arguments that unemployment compensation should be treated as earnings or considered as direct payments from the employer and properly set off against back pay. *Id.* at 621-22, *citing Gullett*, 340 U.S. at 363, 364. Commissioner Backley further concluded in his *Meek* dissent that the majority's policy failed to fairly balance the interests of the parties, noting that by ensuring that "illegally discharged miners not receive a windfall, [the majority] has adopted a *national* policy which will at times provide an employer with a windfall" under state unemployment compensation laws, and that their choice of employer over the victim of wrongdoing seemed "illogical and unfair." *Id.* at 625 (emphasis in original). Commissioner Backley also noted the majority of courts of appeals have opted not to deduct unemployment compensation, and that four circuits (the Third, Fourth, Ninth, and Eleventh) have removed the

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matter from district court discretion, holding as a matter of law that unemployment compensation should not be deducted from backpay awards.[15] *Id.* at 623.

In *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208 (November 1994), the Commission again considered the appropriateness of deducting unemployment compensation from backpay awards. Before the Commission, the Secretary urged the Commission "to adopt Commissioner Backley's position" in *Meek*.[16] *Id.* at 2221. Two Commissioners voted to affirm the judge's decision to deduct unemployment compensation based on the reasoning and conclusions set forth in *Meek*. 16 FMSHRC at 2216-20. Two Commissioners voted to reverse based on the rationale of Commissioner Backley's dissent in *Meek*.[17] *Id.* at 2221-29. The effect of the tie vote was to let stand the judge's ruling. *Id.* at 2208 n.1 (citation omitted).

The Commission's decision in *Nantz* was appealed to the U.S. Court of Appeals for the Sixth Circuit. The appeal was dismissed on motion, without resolution of the issue of deduction of unemployment compensation. *Secretary of Labor v. Nally & Hamilton Enterprises*, No. 94-4325, 6th Cir. (June 21, 1995).

In *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996), the court reversed that portion of a Commission administrative law judge's decision directing the Secretary to deduct unemployment compensation from the backpay awards of five miners who had been discharged in violation of section 105(c) of the Act. *Id.* at 116. The administrative law judge's decision had adhered to *Meek*, 15 FMSHRC at 616-18. *Id.* at 113. In reaching its conclusion, the Court relied upon *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991), in which the Supreme Court recognized that the Secretary's reasonable interpretation of a regulation promulgated by the Secretary, pursuant to her authority under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1994) ("OSH Act"), was entitled to deference over a reasonable, but conflicting, interpretation by the

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[15] Meek did not appeal the Commission's decision.

[16] The Secretary was not a party to *Meek*.

[17] The dissenting Commissioners also noted that subsequent to the issuance of *Meek*, the Eighth Circuit reversed the district court's deduction of unemployment compensation from a backpay award in a case arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1994), stating in part that, "no circuit that has considered the matter has determined that unemployment benefits should, as a general rule, be deducted from backpay awards in discrimination cases." 16 FMSHRC at 2227-28, *quoting Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1113 (8th Cir. 1994) (emphasis omitted). The Eighth Circuit joined the majority of circuits in holding as a matter of law that unemployment benefits should not be deducted from backpay awards. *Gaworski*, 17 F.3d at 1114.

Occupational Safety and Health Review Commission ("OSHRC"). *Wamsley*, 80 F.3d at 114. The *Wamsley* Court analogized that this Commission, which it considered a "neutral arbiter" that possesses "nonpolicy-making adjudicative powers," should have deferred to the interpretation disallowing deduction of unemployment compensation advanced by the Secretary, whom it considered to be endowed with "historical familiarity and policymaking expertise."[18] *Id.* at 114-15, *quoting Martin*, 499 U.S. at 153, 154, 155.[19]

In the instant case, Judge Amchan, citing *Meek*, directed that Poddey's backpay award be reduced by the amount of unemployment compensation he had received. 15 FMSHRC at 2416. Commissioner Marks and I are persuaded by the rationale of the dissents in *Meek*, 15 FMSHRC at 621-26, and *Nantz*, 16 FMSHRC at 2221-29, that unemployment compensation should not be deducted from backpay awards. Therefore, the Commission's holding that unemployment compensation benefits should be deducted, enunciated in *Meek* and *Nantz,* is overruled. Accordingly, the Commission reverses the judge's deduction of unemployment compensation from Poddey's backpay award. Because the instant case arises within the Fourth Circuit, the court's holding in *Wamsley* also requires reversal of the judge's deduction.

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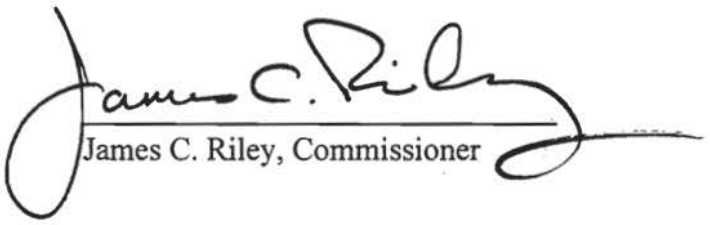
[18] I do not subscribe to the rationale enunciated by the court in *Wamsley.* As the Commission recognized in *Drummond Co.*, 14 FMSHRC 661, 674-75 (May 1992), the "Mine Act expressly empowers the Commission to grant review of 'question[s] of law, policy or discretion,' and to direct review *sua sponte* of matters that are 'contrary to . . . Commission policy' or that present a 'novel question of policy . . . .'" *Id.*, *quoting* 30 U.S.C. §§ 823(d)(2)(A)(ii)(IV) & (B). I agree that, since Congress authorized the Commission to direct such matters for review, it intended that the Commission possess "the necessary adjudicative power to resolve them." *Drummond*, 14 FMSHRC at 675. I suggest that the Supreme Court expressly applied its holding in *Martin* only to the "division of powers between the Secretary and the Commission under the OSH Act" (499 U.S. at 157) because no comparable policy jurisdiction was expressly granted to OSHRC. *Drummond*, 14 FMSHRC at 675 n.15.

[19] I observe that the Supreme Court in *Martin* and the Fourth Circuit in *Wamsley* reached their determinations without citing and applying the analytical framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

III.

Conclusion

For the reasons discussed above, the Commission affirms in result the judge's finding of low negligence, affirms his finding of low gravity, vacates the penalty and remands for assessment with further findings on the operator's history of previous violations. The Commission reverses the judge's deduction of unemployment compensation from Poddey's backpay award.



James C. Riley, Commissioner

Commissioner Holen, concurring:

I agree with the majority in result on all issues but disagree with their rationale on the issues of negligence, history of violations, and the deduction of unemployment compensation from back pay awards.

I.

Negligence

Commissioners Marks and Riley conclude that the proper inquiry before the judge in determining negligence was whether the operator intended to commit the violation. Slip op. at 5. Although the operator did so intend, they affirm the judge's conclusion of low negligence only because there were mitigating circumstances. Slip op. at 5-6.

I agree in result that the operator's negligence here was low, but I disagree that the proper inquiry before the judge was whether the violation resulted from intentional conduct or that an intentional violation absent mitigating circumstances necessarily establishes high negligence. Under Commission case law, the proper inquiry as to negligence is whether the violation resulted from more than ordinary negligence. Higher levels of negligence and unwarrantable conduct are found only when the operator's conduct is determined to have been aggravated. In *Mettiki Coal Corp.*, 13 FMSHRC 760 (May 1991), the Commission stated:

> 'Highly negligent' conduct involves more than ordinary negligence and would appear, on its face, to suggest unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

13 FMSHRC at 770, *quoting Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (February 1991). In *Mettiki*, the Commission found that the operator's intentional conduct in modifying electrical equipment, although violative, did not result from high negligence. 13 FMSHRC at 770-71. *See also American Mine Services, Inc.*, 15 FMSHRC 1830, 1831-33 (September 1993), and cases cited therein.

II.

History of Violations

I agree with the majority that, in assessing a civil penalty, the judge should consider an operator's previous violations of all standards and that an operator's delinquency in the payment of civil penalties should not be considered because delinquency is not one of the section 110(i) criteria. I agree with Commissioner Riley that the judge did not err in failing to consider the

seriousness of the operator's previous violations because such consideration is not required under section 110(i) of the Mine Act. Slip op. at 8.

The opinion does not address the Secretary's argument that the judge erred in his penalty assessment in failing to consider that the mine had been targeted as a problem mine under MSHA's Joint Mine Assistance Program. S. Br. at 23. I would reject the Secretary's argument because such consideration is not specified under section 110(i). I note, in addition, that such consideration also is absent from the Secretary's regulations that govern his penalty proposals. 30 C.F.R. § 100.3.

III.

Deduction of Unemployment Compensation

Commissioners Marks and Riley reverse the judge's deduction of unemployment compensation from Mr. Poddey's back pay award because they disagree with the Commission's precedent. Slip op. at 11. I take strong exception to their casual approach in overruling the Commission's established law.

I concur with the majority's disposition of deduction of unemployment compensation because I am constrained to do so by the decision of the United States Court of Appeals for the Fourth Circuit in *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996). *See RNS Services, Inc.*, 18 FMSHRC 523, 531 (April 1996) (Commissioner Doyle, concurring). I join Commissioner Riley, however, in respectfully disagreeing with the court's reasoning. Slip op. at 11 n.18.

A. *Wamsley* Decision

In *Wamsley*, the Fourth Circuit reversed the Commission's deduction of unemployment compensation from back pay awards in discrimination cases filed pursuant to section 105(c) of the Mine Act, 30 U.S.C. § 815(c). The court concluded that the Supreme Court's decision in *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991), controlled and it held that the Commission was required to defer to the Secretary's interpretation of the Act if it found that interpretation to be reasonable. 80 F.3d at 114. In so concluding, the court stated that the Commission's duties under the Mine Act were those of a "'neutral arbiter' that possesses 'nonpolicymaking adjudicatory powers.'" *Id., quoting Martin*, 499 U.S. at 154, 155. Without deciding whether the Commission's or the Secretary's interpretation was the "correct" one, the court found that the Secretary's reading of the Act was "reasonable" and reversed the Commission. 80 F.3d at 115.

The *Wamsley* decision, in my opinion, misinterprets the Commission's role in administering the Mine Act. *Wamsley* also incorrectly applies the Supreme Court's holding in *Martin*.

The Mine Act plainly sets forth the Commission's authority and responsibility to fashion remedial relief in discrimination cases:

> The Commission shall afford an opportunity for a hearing . . . , and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, *granting such relief as it deems appropriate*, including, but not limited to, an order requiring the rehiring or reinstatement . . . with back pay and interest or such remedy as may be appropriate. . . . Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . shall be assessed against the person committing such violation.

30 U.S.C. § 815(c)(3) (emphasis added). *See* 30 U.S.C. § 815(c)(2). *See also* S. Rep. No. 181, 95th Cong., 1st Sess. 37 (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 625 (1978) ("*Leg. Hist.*"). As the Supreme Court stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* where "Congress has directly spoken to the precise question at issue" and "the intent of Congress is clear, that is the end of the matter." 467 U.S. 837, 842 (1984). Such unambiguously expressed Congressional intent is present in sections 105(c)(2) and (3).

Moreover, the Commission, as the administrative agency vested with authority to decide Mine Act discrimination complaints, is always present in such proceedings; the Secretary, however, may or may not be present. Section 105(c)(3) provides that, where the Secretary has refused to proceed with a discrimination complaint, a miner may file an action on his own behalf before the Commission, i.e., he may hire private counsel or appear *pro se.* The Commission's paramount role in directing relief in discrimination cases is consistent with its authority independent of the Secretary in assessing penalties for all violations, including those involving discrimination against miners. Section 110(i) of the Mine Act provides, "The Commission shall have authority to assess all civil penalties provided in this [Act]." 30 U.S.C. § 820(i). Similarly, section 110(k) states that the Secretary may not compromise, mitigate, or settle any proposed

penalty that has been contested without the Commission's approval. 30 U.S.C. § 820(k).[1] *E.g.*, *Knox County Stone Co.*, 3 FMSHRC 2478, 2478-82 (November 1981).

At issue in *Martin* was an ambiguous regulation[2] issued by the Secretary under the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 651 et seq. (1994), and adjudicated before the Occupational Safety and Health Review Commission. In deferring to the Secretary's interpretation of the regulation, the Supreme Court relied on both the Secretary's role in drafting it, which placed her in a better position to be familiar with its purpose, and on her role in enforcing the regulation, which gave her expertise to assess the effect of a particular interpretation. 499 U.S. at 152-53.

The issue of deducting unemployment compensation does not involve the choice of conflicting interpretations of a regulation. Rather, the issue involves interpretation of a remedial provision of the Mine Act. The Supreme Court's primary rationale for deferring to the Secretary's interpretation of a regulation in *Martin* is absent here. The Secretary holds no advantage over the Commission in discerning the meaning of the statutory provision authorizing the Commission to structure appropriate relief to miners who are victims of discrimination. Moreover, the Supreme Court in *Martin* emphasized that its holding was limited to "the division of powers between the Secretary and the Commission under the OSH Act."[3] 499 U.S. at 157. The Supreme Court stated in *Thunder Basin Coal Co. v. Reich* that this Commission "was established as an independent-review body to 'develop a uniform and comprehensive interpretation' of the Mine Act." 510 U.S. __, 114 S.Ct. 771, 127 L. Ed. 2d 29, 42 (1994), *quoting Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Committee on Human Resources*, 95th Cong., 2d Sess., 1 (1978).

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[1] The Mine Act contains other references to the Commission's role in making policy. For example, in specifying the procedures for the Commission's *sua sponte* review of judges' decisions, 30 U.S.C. § 823(d)(2)(B) states that the Commission may, in its discretion, grant review of decisions that "may be contrary to law or Commission policy" or that present a "novel question of policy." *See Thunder Basin Coal Co. v. Reich,* 510 U.S. __, 114 S.Ct. 771, 127 L. Ed. 2d 29, 38 n.9 (1994).

[2] The regulation at issue involved the use of respirators by employees who were exposed to coke oven emissions exceeding certain limits. The employer was charged with failing to assure that employees were supplied with properly fitting respirators, thereby exposing them to impermissible emission levels. The Occupational Safety and Health Review Commission ("OSHRC") vacated the citation, holding that assurance of a properly fitting respirator was not required by the regulation cited as the basis for liability but by another regulation. 499 U.S. at 148-49.

[3] No policy jurisdiction comparable to that granted to this Commission was expressly granted to OSHRC. *Drummond Co.*, 14 FMSHRC 661, 674-75 & n.15 (May 1992).

The Commission, by a majority of three Commissioners, adopted its policy of subtracting unemployment compensation from back pay awards in *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616-18 (April 1993).[4] The Secretary was not a party to that case, either before the administrative law judge or before the Commission on review. Thus, even if *Wamsley* were correct as to deference, the Secretary had not presented the Commission with a position or interpretation to which it might defer. Nor was it apparent from other Commission cases dealing with back pay awards that the Secretary had established any position on the deduction issue. *See, e.g., id.* at 618 n.12, *citing Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 15 FMSHRC 237, 241 (February 1993) (ALJ); *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972 (June 1993) (complaint filed under section 105(c)(3)). Indeed, in *Nantz*, the Secretary stipulated that whether or not unemployment compensation should be deducted from a miner's back pay award was within the discretion of the presiding judge. *Nantz*, 15 FMSHRC at 241. Similarly, when the Commission extended its policy of reimbursing discriminatees for expenses reasonably incurred in pursuing their claims, to include wages lost due to attendance at deposition and hearing (*Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 560-61 (April 1996)), the Secretary had taken no position on this issue of remedial relief. The Commission in *Carroll Johnson* agreed with the argument of the intervenor, United Mine Workers of America.

Congress clearly assigned the Commission responsibility in discrimination cases to grant "such relief as it deems appropriate." 30 U.S.C. § 815(c)(3). That responsibility does not allow the Commission to abandon its statutory interpretations adopted in the course of its adjudications in order to defer to the Secretary when he chooses to offer an interpretation.[5]

---

[4] The Commission concluded in *Meek* that it had the authority under the Mine Act's remedial scheme "to adopt an appropriate policy concerning the deduction of unemployment compensation," *Meek,* 15 FMSHRC at 616, and that such deduction "is a reasonable and sound policy that fully effectuates the Mine Act's goal of making whole miners who have been wrongfully discharged in violation of the Act," *id.* at 618.

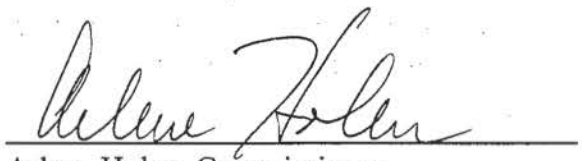
[5] The Mine Act's legislative history states, "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." *Leg. Hist.* at 637. This general admonition, however, does not overcome the statutory provisions of the Mine Act and the more specific legislative history. Nor can I agree with the Fourth Circuit that the Mine Act so severely limits the Commission's review authority that it cannot decide which of two statutory interpretations is "correct" but simply must adopt the Secretary's if his interpretation is "reasonable." *Wamsley*, 80 F.3d at 115.

B. Reversal of Precedent

The Commission's rule of deducting unemployment compensation from back pay awards, adopted in *Meek*, 15 FMSHRC at 616-18, was reaffirmed in *Ross,* 15 FMSHRC at 976-77, and *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2216-20 (November 1994). A majority of two here overrules the Commission's precedent because they are "persuaded by the rationale of the dissents in *Meek* and *Nantz*." Slip op. at 11, *citations omitted.* Commissioners Marks and Riley change the law according to their policy preferences, placing little weight on the Commission's prior holdings.

In the past, membership changes generally occurred at the Commission without major disruption to the decisional process or disturbance of earlier holdings. Thus, the Commission built a sound and stable body of law. When the Commission changed its law, it did so for sound reasons such as rulings made by the Supreme Court. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (October 1993) (Secretary's authority to vacate citations is unreviewable based on *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985)).

On the merits of the issue, I would reaffirm *Meek.* I note, moreover, that it is likely the state unemployment fund will require Mr. Poddey to repay to it the amount of unemployment compensation that is restored to him by this decision. *See Meek*, 15 FMSHRC at 617 n.10.



Arlene Holen, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur with my colleagues in the disposition of the negligence criterion.

With respect to the gravity criterion, Commissioners Holen and Riley have again rejected the Secretary's call for Commission recognition that violations of section 105(c) serve to chill miners' future invocation of protected activities because of a fear of similar adverse action. I dissent for the same reasons expressed in my dissent in *Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 563 (April 1996). I have concluded that a presumption of a chilling effect should be made in every instance of a section 105(c) violation.

With respect to the previous history criterion, I concur with the majority opinion, except that I do not join Commissioners Holen and Riley in their rejection of the Secretary's argument that the judge failed to consider the seriousness of past violations. What is the effect of their ruling? Are our judges now relegated to merely *counting* the number of previous violations with no consideration given to the circumstances surrounding the past violations? Do my colleagues conclude that all violations are fungible? Certainly no one could dispute that a previous history of ten roof control violations resulting in injury and loss of life is far more significant than a previous history of twenty roof control violations that arose because specific plan provisions were not followed, e.g., bolting pattern deficiencies that posed non-S&S risks. Their lapse of judgement is serious. It is clearly relevant and most important for the trial judge to be made aware of and to consider, not only the *quantity* of past instances of violation, but also any circumstances that may suggest that such past violations constituted serious health or safety threats to miners.

I am in agreement with the majority disposition regarding the unemployment compensation issue. However, because of the views espoused by Commissioner Holen and the notation of Commissioner Riley, I am compelled to set forth the following to ensure that the Commission's institutional integrity be maintained.

Both of my colleagues have an apparent difficulty embracing the concept that this Commission has the obligation to **defer** to the Secretary's reasonable statutory interpretations as enunciated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Notwithstanding Commissioner Holen's expression of deep consternation, stemming from her perception that the majority in this case fails to adhere to the "Commission's established law" (by rejecting her policy choice to require a set off of unemployment compensation from back pay awards made under section 105(c) of the Act), Commissioner Holen, herself, fails to adhere to controlling Supreme Court precedent. Nowhere

in her concurring opinion is the *Chevron* case considered or even cited for this purpose![1] Yet that case, and its mandate to appellate courts to defer to agency interpretations of statutory provisions squarely applies to this case.

By my colleagues' failure to apply *Chevron*, one could conclude that *Chevron* has been deleted from our jurisprudence. However that's not the case and to be sure there is no misunderstanding, I submit the following which I suggest provides unequivocal direction to this Commission in the disposition of this issue!

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, **the court does not simply impose its own construction on the statute**, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. ([footnote] **The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.**)
>
> 'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

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[1] However, in her concurring opinion Commission Holen does cite *Chevron* in connection with her conclusion that the intent of Congress, regarding the meaning of sections 105(c)(2) and (3) of the Act is clear and unambiguous. This, however, is curious in view of the fact that both majority opinions in *Meek* and *Nantz* were grounded only on Commissioner Holen's *policy preferences* after concluding that the Act is silent on the issue of unemployment compensation. *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616 (April 1993); *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2216 (November 1994). See also *infra* n.4.

> Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations
>
> > 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'
> >
> > '. . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'

Chevron, 467 U.S. at 842-45 (footnotes and citations omitted, emphasis supplied). *Accord*, *Smiley v. Citibank*, 517 U.S. ___, 116 S.Ct. 1730, 135 L. Ed. 2d 25, 31 (1996), *citing Chevron*, 467 U.S. at 843-44 ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

Notwithstanding the foregoing, Commissioner Holen unsuccessfully attempts to demonstrate that the Commission has controlling policy authority in "directing relief in discrimination cases." Slip op. at 15 (Commissioner Holen, concurring). Support for her position is based on the fact that Congress provided the miners with a private right under section 105(c)(3), independent of the Secretary, if the Secretary finds no violation occurred. Commissioner Holen's reliance on that provision of the Act for her contention is woefully off the mark.

In authorizing a private right of action to miners under section 105(c)(3), Congress was clearly providing a tangible means by which miners could obtain that which Congress intended -- that access to **all** relief necessary to make the miner whole be assured.[2] Commissioner Holen's position in this case, and in the two Commission decisions being overruled[3] today, only frustrate that Congressional intention.

Last, but by no means least, Commissioner Holen's invective suggesting that my position on this issue (to not set off unemployment compensation received by the miner from back pay awards) is based merely on superficial "policy preferences" is astonishing! Slip op. at 18. (Commissioner Holen, concurring). The Commission's majority decisions in *Meek* and *Nantz* admittedly relied on the policy preferences of Commissioner Holen.[4] However, by some process

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[2] It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The special relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

S. Rep. No.181, 95th Cong., 1st Sess. 37 (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 625 (1978).

[3] *Meek v. Essroc Corp.*, 15 FMSHRC 606 (April 1993); *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208 (November 1994).

[4] "[W]e conclude that deducting unemployment compensation from a backpay award is a reasonable and sound policy that fully effectuates the Mine Act's goal . . . ." *Meek,* 15 FMSHRC at 618 (emphasis supplied). "The Commission . . . now adopts a policy for its administrative law judges, in order to ensure equality of treatment . . . ." *Id.* (emphasis supplied). "The Commission recently decided . . . that, as a matter of agency policy, unemployment compensation . . . should be deducted in determining backpay awards." *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 976 (June 1993) (emphasis supplied). "[T]he Commission determined [in *Meek*] that a policy of deducting unemployment benefits comports with the Mine Act's goal of making the miners whole. It adopted this policy to be followed by its judges." *Nantz*, 16 FMSHRC at 2216 (citations omitted, emphasis supplied). "The Commission, by a majority of three Commissioners, adopted its policy of subtracting unemployment compensation from back pay awards in *Meek v. Essroc Corp* . . . ." Slip op. at 17 (Commissioner Holen, concurring) (emphasis supplied).

known only to Commissioner Holen, those ill chosen policy choices, that flagrantly ignored the vast preponderance of federal case law, are apparently believed by her to have become ensconced into the "Commission's established law," that should forever be held inviolate! Nonsense.

For the reasons clearly and convincingly set forth in former Commissioner Backley's dissent in *Meek* and for the same reasons amplified in the *Nantz* dissent, an opinion I am pleased to have signed, I continue to conclude that unemployment compensation received by the miner should not be set off from back pay awards.

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 7, 1996

DAY BRANCH COAL COMPANY, INC. and BOBBY JOE HENSLEY	:	
	:	Docket Nos. KENT 94-1077-R
v.	:	through KENT 94-1190-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	

Before: Jordan, Chairman; Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

These contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 30, 1994, the Secretary of Labor filed an unopposed motion to hold the contest cases in abeyance pending the issuance of proposed civil penalties. Administrative Law Judge Roy J. Maurer granted the motion on October 7, 1994. On December 5, 1994, the Secretary filed an unopposed request for stay of proceedings. This was based on the request of the United States Attorney for the Eastern District of Kentucky, who asked that the civil litigation be held in abeyance during the pendency of potential criminal proceedings involving individuals at the mine.

On June 19, 1996, the Secretary filed a motion to dismiss the notices of contest, asserting that the operator did not file notices of contest of the proposed penalties. The Secretary contended that proposals for assessment of civil penalties regarding the above-captioned citations were made on January 17, and September 17, 1995. On June 27, 1996, the judge issued an order lifting the stay and dismissing the cases.

On July 2, 1996, Day Branch Coal Company and Bobby Hensley (collectively "operators") filed with the administrative law judge a Motion to Reconsider and Vacate Order Entered June 27, 1996 ("Mot. to Reconsider"). The operators subsequently filed a petition for discretionary review on August 2, 1996. Counsel for operators contends that he did not contest penalties filed in these proceedings because he never received notice that penalties had been assessed. PDR at 1-2; Mot. to Reconsider at 1. Indeed, as recently as February 5, 1996, an

attorney in the Secretary's Office of the Solicitor represented to the judge that the Secretary had not yet assessed civil money penalties. Letter from Malecki to Judge Maurer of 2/5/96. Counsel for operators also states that, pursuant to 29 C.F.R. §§ 2700.8 and 2700.10, the time to respond to the Secretary's June 19 motion had not expired when the judge issued his order on June 27, 1996. Mot . to Reconsider at 2. On July 16, 1996, the Secretary filed his opposition to the motion to reconsider.

The Commission's procedural rules, codified at Part 2700 of 29 C.F.R., state that an opposition to a motion may be filed within ten days after service upon the party. 29 C.F.R. § 2700.10(c). Furthermore, the rules permit an additional five days for filing a response when the initial document was served by mail. 29 C.F.R. § 2700.8. The Secretary served his motion by mail on June 19, 1996. S. Certificate of Service to Motion to Dismiss. By issuing his order on June 27, the judge did not allow operators the time permitted to respond under the Commission's rules.

Accordingly, we grant the operators' petition for discretionary review, vacate the dismissal order, and remand this matter to the judge for further appropriate proceedings. Operators' motion for reconsideration, which requests the same relief as its petition, is moot.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 19, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. CENT 92-329
v.	:	CENT 93-272
BHP MINERALS INTERNATIONAL INC.	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), involves a citation issued to BHP Minerals International Inc. ("BHP") alleging a significant and substantial ("S&S")[1] violation of 30 C.F.R. § 77.506 (1995).[2] Administrative Law Judge Arthur Amchan found that BHP had not violated the standard. 16 FMSHRC 1177 (May 1994) (ALJ). For the reasons that follow, we reverse and remand.

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

[2] 30 C.F.R. § 77.506, entitled, "Electric equipment and circuits; overload and short-circuit protection," provides:

> Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads.

I.

Factual and Procedural Background

BHP operates the Navajo mine, a surface coal mine in northwestern New Mexico. 16 FMSHRC at 1177. On April 28, 1992, during an electrical inspection of the mine, Inspector David Head, with the Department of Labor's Mine Safety and Health Administration ("MSHA"), examined a high-wall drill. *Id.* at 1179; Tr. 55, 61. The circuit for the motor was protected by a circuit breaker that provided both instantaneous and thermal overcurrent protection. Tr. 91-92. The instantaneous breaker had a "low" and "high" setting with eight intermediate settings. Tr. 64, 74. The trip unit on the instantaneous breaker provided settings that ranged from 1800 to 6000 amperes ("amps"). Tr. 74. The breaker had been set on 6000, the highest setting. Tr. 64.

Based upon calculations performed in accordance with the National Electric Code ("NEC"), Inspector Head determined that adequate instantaneous overcurrent protection had not been provided for the motor. Tr. 65-67. The inspector stated that section 430-52 of the NEC provides that an instantaneous breaker must be set at the lowest setting capable of carrying the "normal starting load" of the motor. Tr. 65, 67. This setting is calculated by multiplying the full-load current of the motor by 700%. Tr. 65. If the motor cannot operate at that level, the setting may be increased only as necessary by increments, but in no event shall it exceed 1300% of the motor's full-load current.[3] 16 FMSHRC at 1179; Tr. 65-67. From the nameplate of the drill motor, the inspector determined that the full-load current of the motor was 400 amps. 16 FMSHRC at 1180. He then calculated that 1300% of the full-load current was 5200 amps (400 multiplied by 1300%). Because the breaker had been set on high, or at 6000 amps, he concluded that it had been set in excess of 1300% of the full-load current of the motor (5200 amps). Tr. 65-67, 81.

The inspector explained that an instantaneous breaker automatically trips when there is a short circuit and that, if it were set too high, the breaker would not stop electrical current until dangerous amounts had flowed to the motor. Tr. 66, 68-70. A delay of only fractions of a second in tripping the breaker would increase miners' exposure to the hazards of fire, electrical burns or shock. 16 FMSHRC at 1179. Accordingly, Inspector Head issued a citation alleging an S&S violation of section 77.506. *Id.* The citation was terminated after the operator adjusted the breaker to the "low" setting. Tr. 71. BHP challenged the citation and the matter proceeded to hearing before Judge Amchan.

The judge determined that the instantaneous circuit breaker had been set in excess of 1300% of the full-load current of the motor. 16 FMSHRC at 1180. In reaching this determination, the judge credited testimony that the full-load current was approximately 438 amps and that the breaker would stop the flow of electricity to the motor at 6000 amps at the high

[3] Section 430-52 of the NEC was not admitted as an exhibit into the official record.

setting.[4] *Id.* at 1179, 1180. Nonetheless, the judge found that the standard did not provide the operator with sufficient notice of its requirements and that a "reasonably prudent operator's electrician" would not have recognized that the circuit breaker had been set in violation of the standard or the NEC. *Id.* at 1180-81. He explained that neither section 77.506 nor the NEC was clear in specifying the allowable settings for BHP's circuit breaker. *Id.* at 1180. Accordingly, the judge vacated the citation. *Id.* at 1184.

The Secretary filed a petition for discretionary review challenging the judge's determination, which the Commission granted.

II.

Disposition

The Secretary argues that the judge erred in finding that BHP did not violate section 77.506 and in holding that application of the standard and NEC were not clear. PDR at 3-5.[5] The Secretary notes that the judge found that the instantaneous circuit breaker setting exceeded 1300% of the full-load current of the motor and that the parties agreed on the meaning of the standard and the applicability of the NEC. *Id.* at 5. BHP responds that the judge correctly determined that the standard failed to give adequate notice of its requirements, as supported by the witnesses' differing testimony on whether the instantaneous breaker had been set beyond the limit allowed by the NEC. BHP Br. at 3-5. BHP asserts that it never agreed that a setting in excess of 1300% amounted to a violation of section 77.506. It contends it presented testimony that the setting, which was below 1300%, did not amount to a violation. *Id.* at 6. BHP explains that neither the NEC nor the regulation set forth a particular setting for the breaker. *Id.* In addition, neither the NEC nor the regulation specify that a setting exceeding 1300% will fail to "protect all electrical equipment and circuits [against] short circuits and overloads." *Id., quoting* 30 C.F.R. § 77.506. It contends that, regardless of the setting of the instantaneous breaker, overcurrent protection was provided by the thermal breaker. *Id.* at 7.

Applicability of the NEC is undisputed in determining compliance with section 77.506. Title 30 C.F.R. § 77.506-1, entitled, "Electric equipment and circuits; overload and short circuit protection; minimum requirements," provides that "[d]evices providing either short circuit protection or protection against overload shall conform to the minimum requirements for protection of electric circuits and equipment of the National Electric Code, 1968." In addition, as

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[4] Under the judge's findings, 1300% of the full-load current of the motor is 5694 amps (438 multiplied by 1300%). 16 FMSHRC at 1180. Because the judge found that the breaker had been set at 6000 amps, it had been set in excess of 1300% of the motor's full-load current.

[5] Pursuant to Commission Procedural Rule 75(a)(1), 29 C.F.R. § 2700.75(a)(1) (1995), the Secretary designated his petition for discretionary review as his brief.

the judge found, the "parties agree that the criteria for complying with section 77.506 are found in the National Electric Code (NEC) and, more specifically, NEC section 430-52." 16 FMSHRC at 1179.

Witnesses had differing opinions on whether the breaker had been set in excess of 1300% of the full-load current of the drill motor in violation of section 430-52 of the NEC. Lynn Byers, BHP's chief mechanic, testified that the full-load current of the motor was 438 amps, that the breaker would trip at 5400 amps and that, accordingly, the breaker had been set at 1232% of the full-load current of the motor. 16 FMSHRC at 1180; Tr. 113. In contrast, the Secretary's witnesses testified that the full-load current was 400 amps, that the breaker would trip at 6000 amps, and that the breaker had been set in excess of 1300%. 16 FMSHRC at 1180. The judge found that the full-load current was approximately 438 amps and that the breaker was set at 6000 amps. *Id.* Neither party disputes these findings. *See* BHP Br. at 5; PDR at 4-5. Therefore, under the judge's findings, the instantaneous breaker had been set in excess of 1300% of the full-load current of the drill's motor (which equaled a ceiling of 5694 amps) in violation of the requirements of the NEC and section 77.506.

Although section 77.506 and the NEC do not specify the exact setting for the instantaneous breaker and witnesses disagreed on whether the breaker setting exceeded that allowed by the NEC, we reject BHP's argument that section 77.506 did not provide it with adequate notice that BHP had violated the regulation. When faced with a challenge that a standard fails to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission has explained that the appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). In order "to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id., quoting Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citations omitted). The Commission has recognized that the various factors that bear upon what a reasonable person would do include accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. *See U.S. Steel Corp.*, 5 FMSHRC 3, 5 (January 1983).

Inspector Head and the Secretary's expert witness, Terrence Dinkel, testified that the NEC requires an instantaneous circuit breaker to be set at 700% of its full-load current and then to have that setting increased only as necessary to start the motor, but never exceeding the 1300% maximum limit. Tr. 74-75, 117-18. Inspector Head estimated that 98% of all equipment should be able to start at 700% of the full-load current. Tr. 79. Dinkel also stated that 700% is almost always a sufficient setting to start a motor and that the higher settings are reserved for rare cases involving high-torque motors that cannot start at lower settings. Tr. 118-19. Byers, BHP's

chief mechanic, acknowledged that "[t]he code [NEC] wants to give you what you need, but they don't want to give you anything more." Tr. 112.

BHP's instantaneous breaker had been set at the highest setting. Tr. 64. There was no indication in the operator's records of the reasons for that setting or whether lower settings had been tried. Tr. 90. When the breaker was placed on the lowest setting, or 1800 amps, in order to abate the citation, the motor was able to function. Tr. 71. In light of the testimony of all witnesses that the breaker was required to be placed on the lowest possible setting to start the motor and unrebutted testimony that the higher settings are reserved only for rare cases involving special equipment that cannot start at lower settings, we conclude that a reasonably prudent person would have recognized that placing the instantaneous breaker on the highest setting would not provide adequate overcurrent protection as required by section 77.506.

We find unpersuasive BHP's argument that, regardless of the setting of the instantaneous breaker, BHP did not violate section 77.506 because overcurrent protection was also provided by the thermal breaker. BHP Br. at 7. It is not clear from the record that the instantaneous breaker and thermal breaker provided identical protection. *See* Tr. 106-07. In any event, even if their protection were identical, section 77.506 does not provide that automatic circuit-breaking devices need not adequately protect against short circuits and overloads if a functioning backup system exists. Rather, the standard's broad language requires that any automatic circuit-breaking device must protect against short circuits and overloads. Thus, BHP was required to properly set the instantaneous breaker independent of its requirement to properly set the thermal breaker.[6]

[6] Evidence that the thermal breaker also provided overcurrent protection would be relevant to the determination of whether BHP's violation was S&S.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that BHP did not violate section 77.506. We remand for consideration of whether the violation was S&S and for the assessment of a civil penalty.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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August 22, 1996

SECRETARY OF LABOR, on behalf of RONALD A. MARKOVICH	:	
v.	:	Docket No. LAKE 96-139-DM
MINNESOTA ORE OPERATIONS, USX CORPORATION	:	

BEFORE: Jordan, Chairman; Holen, Marks, and Riley, Commissioners

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (1994) ("Mine Act"), the Secretary of Labor, on behalf of Ronald A. Markovich, timely filed a petition for review of Administrative Law Judge Arthur J. Amchan's July 26, 1996, order denying complainant's application for temporary reinstatement pursuant to Commission Procedural Rule 45(f), 29 C.F.R. § 2700.45(f). Minnesota Ore Operations, USX Corporation ("USX") timely filed its opposition to the petition. Upon consideration of the petition and USX's opposition to it, we grant the petition for review. For reasons that follow the judge's decision stands as if affirmed.

On September 26, 1995, Ronald A. Markovich was suspended with the intent to be discharged. He had been employed by USX as a millwright since 1969.

On October 12, 1995, Markovich timely filed a complaint of illegal discharge with the Secretary of Labor pursuant to section 105(c)(2) of the Mine Act. 30 U.S.C. § 815 (c)(2). Following an investigation, the Secretary determined that the complaint of illegal discharge filed by Markovich was not frivolous. On June 27, 1996, the Secretary filed an application for temporary reinstatement with the Commission. On July 18, 1996, an evidentiary hearing on the application for temporary reinstatement was held. On July 26, 1996, the judge issued an order denying complainant's application for reinstatement.

The Secretary alleges that Markovich was illegally discharged from his job and that USX's asserted basis for discharge, i.e., Markovich's unprotected activity of removing and/or tampering with "No Smoking" signs in a company elevator was a pretext. The Secretary asserts that the suspension and discharge of Markovich was in retaliation for his protected activity as a miners' representative and that, under the circumstances of this case, the sanction for his unprotected activity was disparate. On the very same day that Markovich was suspended, September 26, 1995, he had served as a miners' representative accompanying a MSHA inspector who issued 22 citations, 12 of which were S&S. USX maintains that the suspension and discharge of Markovich was based solely on his unprotected activity and that the treatment of Markovich vis-a-vis other miners who also engaged in unprotected activity was fair and rationally applied.

Commissioner Holen and Commissioner Riley would affirm the judge's ruling. Chairman Jordan and Commissioner Marks would reverse the judge's ruling. Under *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3rd Cir. 1992) (*"Penelec"*), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

The opinions of the Commissioners follow.

Commissioners Holen and Riley, affirming the decision of the administrative law judge:

The Secretary has filed a petition appealing the judge's denial of temporary reinstatement of a miner who, the Secretary concedes, engaged in a series of insidious acts of vandalism. *See* Dec. at 2, 9; Pet. at 12.

The Mine Act at 30 U.S.C. § 815(c)(2) instructs the Secretary to file an application for temporary reinstatement of a miner when he finds that the underlying discrimination complaint has not been "frivolously brought." [1] The judge cited the correct legal test in reviewing the Secretary's application. He cited the decision of the Eleventh Circuit Court of Appeals, in which that court concluded the standard for review of an application for reinstatement was a "reasonable cause to believe standard." Dec. at 6, *citing Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738, 747-48 & nn. 8-10. The "reasonable cause to believe" standard was also used by the judge and approved by the Commission when the *Jim Walter Resources* case was before it. *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987). To review the Secretary's application under any less rigorous standard would raise due process concerns (*see Jim Walter Resources*, 920 F.2d at 747-48) and would relegate the

[1] The legislative history sheds no light on the standard for the Commission's granting of such a temporary reinstatement order. It only instructs the Secretary to seek temporary reinstatement when a miner's complaint "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (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 624-25 (1978).

Commission's role to rubber-stamping the Secretary's application.[2]

The judge also correctly applied the standard of review in this matter. He concluded that the "[c]omplainant's claim of disparate treatment . . . is simply without merit." Dec. at 9. The Secretary acknowledges the complainant participated more frequently than any other miner in removing the no-smoking signs from the mine elevator--an act antithetical to complainant's position as miners' safety representative. Pet. at 12. As the judge found, the complainant's offenses were of "a totally different order" than those of other rank-and-file miners, including one miner whom USX discharged but who was reinstated following an arbitration decision. Dec. at 9. Additionally, USX discharged a foreman for engaging in fewer instances of the same misconduct. *Id.* at 8. On this record, even viewing the facts most favorably to the Secretary's position, we find no reasonable cause to believe that the complainant was the victim of disparate or discriminatory treatment. *Compare Jim Walter Resources, Inc.*, 9 FMSHRC at 1306. *See also Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512-13 (November 1981).

We note, moreover, that the complainant had been employed by USX for 26 years and engaged openly in protected activity for 19 years as a miners' representative. Dec. at 1, 3, 7. There is no indication as to why the complainant's role as miners' representative suddenly became intolerable. *Id.* at 7-8. There was little evidence of animus or hostility caused by the complainant's communication with MSHA that allegedly gave rise to the retaliatory discharge. Finally, USX's initial determination to discipline the complainant, as well as the other employees who removed the no-smoking signs, was made prior to its awareness of the complainant's role in the MSHA inspection that is the basis for the Secretary's complaint. *Id.* at 7 & n.1. Once a determination has been made that discipline for a punishable offense is warranted, it is not the Commission's role to judge the appropriateness of the severity of that discipline, in the absence of disparate treatment. *See also United Mine Workers of America on behalf of Rowe v. Peabody Coal Co.*, 7 FMSHRC 1357, 1364 (September 1985), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987).

Arlene Holen, Commissioner

James C. Riley, Commissioner

[2] The Secretary's argument, that the Commission is to review the Secretary's application based on whether it "appears" to have merit, confuses the standard under which the Secretary is to determine whether to file an application with the standard under which the Commission is to review that application. Pet. at 6. *See* n. 1, *supra*. *Neitzke v. Williams*, 490 U.S. 319 (1989), cited by the Secretary, Pet. at 6, is not applicable in establishing an appropriate standard of review of reinstatement applications. That case involved prisoner *in forma papueris* complaints.

Chairman Jordan and Commissioner Marks reversing the decision of the judge.

We conclude that the judge improperly applied the test for determining whether the complaint of discrimination is frivolous. The only issue before the judge was whether Markovich's complaint of illegal discharge was frivolously brought. In ruling on that issue, we find that the judge required the Secretary to effectively establish that an illegal discharge occurred.

We have consistently stated in our decisions on review of temporary reinstatement proceedings that "[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987), *aff'd, Jim Walter Resources, Inc. v.* FMSHRC, 920 F.2d.738 (11th Cir. 1990). *See Secretary of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (December 1993); *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 15 FMSHRC 1816, 1817 (September 1993); *Secretary of Labor on behalf of Bowling v. Perry Transport, Inc.*, 15 FMSHRC 196, 197 (February 1993). Moreover, as recited by the judge, the Eleventh Circuit, in *Jim Walter Resources* concluded that "not frivolously brought" is essentially equated with "reasonable cause to believe," "not insubstantial," and "not clearly without merit." Dec. at 6, Citing 920 F.2d at 747 & n.9. In that decision the Court also indicated that "[t]he legislative history of the Act defines the 'not frivolously brought standard' as whether a miner's 'complaint appears to have merit.'" *Id.* at 747.

Although the judge set forth the pertinent legal standard by which this proceeding was to be evaluated, he failed to apply that standard. But for the caption and textual references to "temporary reinstatement," the judge's order is not unlike a decision on the merits of a complaint of discrimination. The judge made all the necessary findings and conclusions to dispose of the matter in its entirety. Indeed, the judge ultimately concluded that "there is no reason on the record before me to conclude that Respondent did not discharge Mr. Markovich for reasons other than those it articulated." Dec. at 9. This effort by the judge would have been entirely appropriate if the complaint of illegal discharge was before the judge. It was not. The judge was merely required to determine if the complaint was frivolous. This should not have been difficult to do. The uncontroverted evidence established that the operator knew that Markovich had engaged in protected activity at the time it took the adverse action of discharging him. These events occurred within a short time of each other. We believe that the Secretary exceeded his burden of demonstrating that the complaint was not frivolous.

In reaching his conclusion that the complaint was frivolous, the judge engaged in an indepth analysis of the evidence that manifestly demonstrates that his consideration of the evidence went well beyond the scope of whether there was "reason to believe," i.e., whether the complaint was frivolously brought. For example, the judge conceded that although "[i]t is possible that Respondent was irritated enough by the September 26 citations that it decided to fire Markovich rather than merely suspend him," the evidence was too speculative to support the theory. *Id.* We find that the judge, in so concluding, held the Secretary to an evidentiary burden that is not required for the purpose of establishing that the complaint is not frivolous. By the judge's own words, he effectively agreed that the Secretary had established that a colorable theory of retaliatory animus existed. That should have been enough to demonstrate that the claim was not frivolous. The Secretary should not, at this juncture, be expected to present that which is

necessary to prove that a violation occurred, or to prove that retaliatory animus existed. The temporary reinstatement hearing is supposed to "determine[e] whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." 920 F.2d at 744. (emphasis added). However, that was, in reality, the standard imposed upon the Secretary by the judge. As such we conclude that the judge committed reversible error.[3]

Accordingly, we conclude that the Secretary has demonstrated that the complaint is not frivolous and that, therefore, an order of immediate temporary reinstatement should issue.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

[3] As stated previously, the only issue before us is whether Markovich's complaint was frivolously bought. We intimate no view as to the ultimate merits of this case.

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August 28, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 94-55 LAKE 94-79
AMAX COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), and involves four citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Amax Coal Company ("Amax"), alleging violations of 30 C.F.R. § 75.400.[2] Amax contested the citations and the matter went to hearing before Administrative Law Judge Jerold Feldman. Judge Feldman sustained the citations and determined that one violation was significant and substantial ("S&S"). 16 FMSHRC 1837, 1848 (August 1994) (ALJ). For the reasons set forth below, we

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[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

[2] Section 75.400 states:

> Coal dust, including float coal, dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

"Active workings" is defined in 30 C.F.R. § 75.2 as "[a]ny place in a coal mine where miners are normally required to work or travel."

affirm in result the judge's determination that Amax violated section 75.400, and we vacate the judge's S&S determination and remand for further proceedings.

I.

On September 22, 1993, Inspector Steven Miller issued Citation Nos. 4054082, 4054083, and 4054084 to Amax, alleging violations of section 75.400 for accumulation of combustible materials. The citations alleged that Amax allowed loose coal saturated with oil, float coal dust and grease to accumulate on three pieces of diesel-powered equipment: two diesel scoops and a diesel ram car.

On October 7, 1993, Inspector Michael Dean Rennie issued Citation No. 4054831 to Amax, alleging a violation of section 75.400 for accumulation of combustible materials. The citation alleged that Amax allowed loose coal and oil soaked loose coal to accumulate on its continuous miner and that the alleged violation was S&S. At the time the citation was issued the continuous miner was in permissible condition and was equipped with a fire suppression system. 16 FMSHRC at 1840.

At the hearing, Amax conceded that it violated section 75.400 in connection with the continuous miner; however, it contended that the violation was not S&S. *Id.* at 1838. Noting that the cited accumulations had existed for approximately two weeks, the judge found a "positive correlation between the duration of a hazardous condition and the likelihood of an event precipitated by that hazard." *Id.* at 1843. The judge held that an intervening incident, such as a permissibility defect or a cable rupture, "could occur which would create an ignition source and cause combustion." *Id.* at 1843.[3] The judge further concluded that the fire suppression system on the continuous miner would not prevent a serious injury or death in the event of an explosion. *Id.* The judge determined that the violation was S&S and assessed a penalty of $309. *Id.*

In connection with accumulations on diesel-powered equipment, the judge found that section 75.400 prohibits accumulations on diesel-powered equipment, affirmed the citations, as modified by the parties' stipulation,[4] and assessed a $100 civil penalty for each citation. *Id.* at 1848.

The Commission granted Amax's petition for discretionary review, which challenged the judge's holding that the accumulation on the continuous miner was an S&S violation and that

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[3] The judge noted that his determination would have been different if the accumulation had existed for only one or two shifts. 16 FMSHRC at 1843.

[4] The parties stipulated that the accumulations on the diesel-powered equipment were not S&S. 16 FMSHRC at 1848.

Amax violated section 75.400 in connection with the accumulations of combustible materials on three pieces of diesel-powered equipment.

II.

Citation No. 4054831

Amax contends on review that the judge failed to apply the proper test for determining whether a violation is S&S. Specifically, citing *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), Amax argues that the judge improperly couched his discussion of S&S in the context of possibility, "could occur," rather than in the definitive, "will result," as required under the third element of the formula set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984).[5] A. Br. at 24. Amax also argues that the judge's S&S determination is not supported by substantial evidence. *Id.*

The Secretary argues that the judge applied the correct legal standard in concluding that Amax's violation was S&S. S. Br. at 13. Conceding that the judge used the word "could" instead of "will" in his recitation of the third element of the *Mathies* test, the Secretary asserts that there is not a qualitative difference between these two words. *Id.* at 15. In support of this contention, the Secretary cites section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).[6] In the

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[5] In *Mathies*, the Commission explained:

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

6 FMSHRC at 3-4 (footnote omitted).

[6] Section 104(d)(1) of the Mine Act provides in 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 a violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the

Secretary's view, this section's use of the word "could" and the Commission's use of this word in *Mathies* -- in which "the Commission used both 'could' and 'will' interchangeably" -- demonstrates this point. *Id.* (citing *Mathies*, 6 FMSHRC at 3-4). The Secretary also asserts that the judge's S&S determination is supported by substantial evidence because he reasonably concluded that Amax allowed the extensive accumulations to remain unabated for two weeks and there was no indication that, absent the inspector's intervention, it would have abated the accumulation in the near future. *Id.* at 16-18. The Secretary argues that, based on the above finding, the judge's conclusion that a permissibility defect or cable rupture was reasonably likely to occur over time and under normal mining operations is supported by substantial evidence. *Id.* at 18-19.

We agree with Amax that the judge erred in analyzing the third element of the *Mathies* test based on whether an injury-causing event "*could* occur." "The third prong of the test for S&S is whether there exists a reasonable likelihood that the hazard contributed to *will* (not *could*) result in an injury or illness of a reasonably serious nature." *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1118 (July 1995) (citations omitted).

We also conclude that the judge erred in failing to consider relevant record evidence in reaching his S&S determination.[7] In determining that the Secretary satisfied the third *Mathies* element, the judge discussed only the effect of the passage of time. He failed to discuss the impact of other relevant evidence that: (1) the continuous miner was in permissible condition (Tr. 69, 114); (2) the electric cables on the continuous miner were insulated and did not produce any heat (Tr. 136, 138); (3) the continuous miner's various motors and lights operated under the maximum permitted temperature of 302 degrees Fahrenheit (Tr. 137-38, 145-46, 189-92); (4) Amax's coal has an ignition temperature of over 470 degrees Centigrade (Tr. 188); (5) Amax's

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> 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.

[7] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994). That standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision. *Wyoming Fuel*, 16 FMSHRC at 1627; *see also, Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951)). A judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Wyoming Fuel,* 16 FMSHRC at 1627; *Mid-Continent*, 16 FMSHRC at 1222 (citing *Anaconda Co.*, 3 FMSHRC 299, 299-300 (February 1981)).

hydraulic oil has a flash point of 356 degrees Fahrenheit (Tr. 177); and (6) the continuous miner is equipped with several dust control/suppression systems which keeps coal on the continuous miner wet (Tr. 90-91, 119-20, 138, 144-147).[8]

A finding that the passage of time increases the likelihood of an injury-producing event cannot, standing alone, satisfy the requirements of either the substantial evidence test or the third element of *Mathies*. Inasmuch as the judge based his determination solely on the passage of time and failed to analyze other record evidence, we conclude that his determination is not supported by substantial evidence.

For the foregoing reasons, we vacate the judge's S&S determination in Citation No. 4054831 and remand for an analysis of that issue consistent with this opinion.[9]

III.

Citation Nos. 4054082, 4054083, and 4054084

Amax asserts that the judge erred in determining that section 75.400's prohibition against accumulations "in active workings, or on electric equipment therein" also prohibits accumulations on diesel-powered equipment. A. Br. at 4. Amax argues that section 75.400 does not cover diesel-powered equipment and contends that the Secretary's efforts to enforce this standard against diesel-powered equipment deprives it of due process. *Id.* at 9-10, 12.

The Secretary argues that the judge's finding that section 75.400 prohibits accumulations on diesel-powered equipment is consistent with the Secretary's interpretation. S. Br. at 24-28. He states that the term "in active workings" is broad enough to prohibit accumulations on diesel-powered equipment when such equipment is situated in active workings. *Id.* at 28. The Secretary asserts that his interpretation is reasonable and, thus, entitled to deference. *Id.* at 25.

The Commissioners agree, in result, to affirm the judge's conclusion that the accumulations on diesel-powered equipment located in active workings violated section 75.400, but differ as to the rationale for that determination. The opinion of Chairman Jordan and

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[8] We reject Amax's contention that the judge erred in assigning no weight to evidence that its redundant fire suppression system reduced the likelihood of serious injury. In *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995), the court held that "safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners."

[9] Commissioner Marks agrees that the judge failed to consider relevant evidence and that therefore remand is necessary. However, for reasons set forth in his concurring opinion in *United States Steel Mining Co.*, 18 FMSHRC 862, 868 (June 1996), he finds that remand for the judge's consideration and application of the third *Mathies* prong is unnecessary.

Commissioner Marks and that of Commissioner Holen and Commissioner Riley, setting forth their separate views, follow.

Chairman Jordan and Commissioner Marks:

The legislative history of the Mine Act provides that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978). The Supreme Court has stated that the promulgating agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Court has emphasized that an agency is emphatically due this respect when it interprets its own regulations. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *See also Secretary of Labor ex rel. Bushnell v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1433, 1435 (D.C. Cir. 1989).

Both the Secretary and Amax agree that the resolution of these citations hinge on the interpretation of section 75.400. S. Br. at 25; A. Br. at 4. Specifically, the interpretive issue is whether section 75.400's prohibition against accumulations "in active workings, or on electric equipment therein" is broad enough to include diesel-powered equipment found in active workings. The competing interpretation asserts that the term "or" restricts that prohibition to places and electric-powered equipment only, excluding all other types of equipment from the standard. Thus, the inquiry here is not whether the diesel-powered equipment itself *is* an active working, but rather whether accumulations on diesel-powered equipment *located in* an active working are prohibited under section 75.400.[1]

Under the Secretary's interpretation of section 75.400, the phrase "in active workings" is broad enough to prohibit accumulations on diesel-powered equipment when such equipment is in active workings, i.e., where miners are normally required to "travel or work." S. Br. at 28 (quoting section 304(a) of the Mine Act). The Secretary reasonably reads the standard prohibiting accumulations in active workings to include both the relevant physical area of the mine itself *and* all equipment located within it. As the Secretary points out, under a contrary reading of the statute, an operator could comply by sweeping up accumulations on the floor of a

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[1] *Jones & Laughlin Steel Corp.*, 5 FMSHRC 1209 (July 1983), *rev'd on other grounds sub nom. UMWA v. FMSHRC and Vista Mining Co.*, 731 F.2d 995 (D.C. Cir. 1984) (table), cited by Amax, is inapposite. In *Jones & Laughlin*, the Commission held only that an unmanned conveyor belt was not *itself* an active working under 30 C.F.R. § 75.303(a) (1991) (redesignated as 30 C.F.R. § 75.360 in 1992).

mine (located in active workings) and putting them on ignition sources on the diesel equipment located there. Such a reading of the standard can hardly be viewed as a reasonable one.

The Secretary interprets the phrase "or on electric equipment therein" as nondisjunctive. According to the Secretary, it is intended to emphasize the standard's prohibition against accumulations on electric-powered equipment but should not be read so narrowly that it allows accumulations on any other type of "equipment." S. Br. at 29-30. Rather, according to the Secretary, it was used to make clear that the term preceding it ("in active workings") explicitly included "electric equipment therein." *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 358-59 (1987) (Congress used the word "or" to make it clear that the statute reached the particular circumstance described in the phrase following the term)).

If a statute is ambiguous or silent on a point in question, an inquiry is required to determine whether an agency interpretation of the statute is a reasonable one. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); *Donald Guess, employed by Pyro Mining Co.*, 15 FMSHRC 2440, 2442 n.2 (December 1993); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (January 1994).[2] Here, the Secretary's interpretation of the standard is reasonable and entitled to deference. It furthers safety objectives of the Mine Act by prohibiting accumulations in active workings, regardless of whether such accumulations exist on the mine floor, on pallet loads of supplies such as rock dust bags, on stacks of material such as concrete blocks, or on powered equipment working or stored in active workings. Accumulations on diesel-powered equipment are equally or more dangerous than accumulations on the mine floor. According deference to the Secretary's interpretation of the standard, which is a statutory provision, is appropriate because it is not plainly erroneous or inconsistent with the regulation and it is a reasonable interpretation which furthers the prime objective of the Mine Act, protecting the health and safety of miners. *Dolese Brothers Co.*, 16 FMSHRC 689, 693 (April 1994) (quoting *Emery Mining Co. v. Secretary of Labor,* 744 F.2d 1411, 1414 (10th Cir. 1984)).

Amax's assertion that the term "or" is disjunctive and thus restricts section 75.400's prohibition to places and electric-powered equipment would thwart the objectives of the Mine Act by prohibiting accumulations on the floor of active workings but not those accumulations on diesel-powered equipment in those workings. Inasmuch as the Secretary's interpretation is reasonable and furthers the purposes of the Mine Act, we give it weight and conclude, as did the judge, that section 75.400 prohibits the accumulation of combustible materials on diesel-powered equipment in active workings.

We reject Amax's assertion that the Secretary's interpretation deprives it of due process. In ascertaining whether an operator has received fair warning of a standard, the Commission has applied an objective standard of notice, the "reasonably prudent person" test. *BHP Mining Co.*,

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[2] This is commonly referred to as a "*Chevron II*" analysis. *See, e.g., Keystone,* 16 FMSHRC at 13.

18 FMSHRC ___, slip op. at 4, Docket Nos. CENT 92-329, CENT 93-272 (August 19, 1996). The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). We conclude that an operator familiar with the purpose of prohibiting coal accumulations in active workings would have fair warning that the regulation applies to accumulations of coal dust on diesel equipment.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Commissioners Holen and Riley:

We agree with Chairman Jordan and Commissioner Marks' opinion in result but disagree with their rationale as it applies to the issue of deference.

We would affirm the judge's conclusion that Amax violated section 75.400 because we believe the Secretary's interpretation of the standard is reasonable and furthers the safety objectives of the Mine Act. *See Dolese Brothers Co.*, 16 FMSHRC 689, 693 (April 1994) (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). Chairman Jordan and Commissioner Marks, in our view, have articulated an overly broad concept of deference to which they say the Secretary is entitled for his interpretations of the statute as well as the regulations. Slip op. at 6-7. Our colleagues would have deference to the Secretary become a vow of obedience that obliges the Commission to acquiesce to virtually any interpretation of law advanced by the Secretary. Such a sweeping concept of deference cannot be reconciled with the Supreme Court's statement in *Thunder Basin Coal Co. v. Reich* that this Commission "was established as an independent-review body to 'develop a uniform and comprehensive interpretation' of the Mine Act." 510 U.S. __, 114 S. Ct. 771, 127 L. Ed. 2d 29, 42 (1994) (quoting *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Committee on Human Resources*, 95th Cong., 2d Sess., 1 (1978)).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 29, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:		
v.	:	Docket Nos.	PENN 93-199-R
	:		PENN 93-308
NEW WARWICK MINING CO.	:		

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

DECISION

BY: Jordan, Chairman; Holen and Riley, Commissioners

This consolidated contest and 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"), involves the issue of whether New Warwick Mining Company ("New Warwick") violated 30 C.F.R. § 70.207(a)[1] by taking bimonthly designated occupation respirable dust samples inside a miner's airstream helmet, and whether the alleged violation resulted from its unwarrantable failure to comply with the standard. Administrative Law Judge Arthur Amchan concluded that New Warwick violated the regulation and that the violation resulted from unwarrantable failure. 16 FMSHRC 1083 (May 1994) (ALJ). The Commission granted New Warwick's petition for discretionary review, which challenges the judge's determinations. For the reasons that follow, we affirm those determinations.

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[1] Section 70.207(a) provides, as pertinent:

> Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bimonthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.

Factual and Procedural Background

New Warwick owns the Warwick Mine, which is located in Greene County, Pennsylvania. 16 FMSHRC at 1083. On January 15, 1993, Rod Rodavich, the safety director at the mine, asked Robert Newhouse, a supervisor at the Mine Safety and Health Administration ("MSHA") field office in Waynesburg, Pennsylvania, whether respirable dust sampling could be conducted inside a RACAL airstream helmet, a battery-powered air-purifying respirator. *Id.* at 1083-84; Tr. 61-62. Newhouse responded that samples taken inside a respirator had not been acceptable to MSHA in the past, but he could not cite a specific regulation that forbade the practice. 16 FMSHRC at 1084 & n.1. Later in January, Rodavich discussed the question with MSHA Inspector William Wilson, also of the Waynesburg office. *Id.* at 1084; Tr. 11-12. Wilson indicated that sampling inside the helmet was unacceptable to MSHA, but was also unable to point to a specific regulation that such sampling would violate. 16 FMSHRC at 1084-85 & n.2. On February 5, Rodavich raised the issue with MSHA Supervisory Inspector Tom Light of the Waynesburg office. *Id.* at 1084-85. Light told Rodavich that such sampling was against MSHA policy and that New Warwick would be cited if it took such samples for compliance purposes. *Id.* at 1085 & n.3. Light also told Rodavich that MSHA regulations require sampling in the mine atmosphere and that samples taken underneath the helmet were not samples taken in the mine atmosphere. *Id.* Light further suggested that Rodavich read the preamble to MSHA's Part 70 regulations. *Id.* at 1085. Light was unable to specify the regulation that would be violated by sampling under the helmet. *Id.*

On February 8, 9, and 10, pursuant to Rodavich's directions, New Warwick took five respirable dust samples inside the RACAL airstream helmet respirators worn by the longwall shear operators on the tailgate side. 16 FMSHRC at 1085; Jt. Ex. 1 at 3-Stips. 11 and 12; Gov't Ex. 8. The longwall shear operator position is a designated occupation for purposes of respirable dust sampling. Tr. 8. Although Rodavich had previously informed MSHA personnel that he intended to take such samples unless they were able to point him to a regulation prohibiting them, he did not advise that the sampling would be done on February 8-10. 16 FMSHRC at 1085-86.

A few days after New Warwick completed the sampling, Inspector Wilson saw copies of the mine's dust data cards. 16 FMSHRC at 1086. Wilson suspected that the samples had been taken inside the helmet and, with Light's assistance, obtained the results of the samples; the highest reading was 0.5 mg/m^3. *Id.*; Gov't Ex. 9. On February 22, a New Warwick miner, upon questioning by Wilson, indicated that the samples had been taken underneath the helmet. 16 FMSHRC at 1086; Tr. 28. The next day Light asked Rodavich to confirm this, which he did. 16 FMSHRC at 1086; Tr. 86.

On February 24, dust samples were taken on the longwall face with the sampling cassette placed outside the helmet. 16 FMSHRC at 1087; Tr. 30-31. The results, which were reported

several days later, showed concentrations as high as 4.4 mg/m^3 of air, far in excess of the 2.0 mg/m^3 ceiling established by 30 C.F.R. § 70.100(a).[2] 16 FMSHRC at 1087. On February 25, Wilson issued a section 104(d)(1) order alleging a violation of section 70.207(a) on the ground that New Warwick failed to take valid respirable dust samples during the January/February bimonthly sampling period because New Warwick's dust samplings were taken inside the helmet. 16 FMSHRC at 1083, 1086-87, 1092; Gov't Exs. 1, 2; Jt. Ex. 1 at 3-Stip. 11.

The judge concluded that taking respiratory dust samples underneath the helmet violated section 70.207(a), based on his consideration of the Part 70 regulations in their totality, including 30 C.F.R. §§ 70.100(a) and 70.300, and the preamble to the Part 70 regulations.[3] 16 FMSHRC at 1089. He also found that the record established that MSHA policy, prohibiting the substitution of the airstream helmet for environmental controls, had not changed. *Id.* In concluding that the violative conduct resulted from New Warwick's unwarrantable failure, the judge found that Rodavich's sampling was "intentional," "highly unreasonable under the circumstances," and "sufficiently aggravated to constitute an 'unwarrantable failure.'" *Id.* at 1090-92. The judge assessed a penalty of $500. *Id.* at 1093.

II.

Disposition

A. Violation

New Warwick argues that taking respirable dust samples under the helmet does not violate the requirements of sections 70.207(a), 70.100(a), or 70.300, and that the preamble to the Part 70 regulations does not prohibit use of the helmet as an aid to compliance. N.W. Br. at 5-9. In response, the Secretary argues that the judge correctly concluded New Warwick violated section 70.207(a). S. Br. at 9-18. The Secretary contends his interpretation is consistent with the purpose of the Mine Act and the regulations implementing the Mine Act, and that he has consistently interpreted section 70.207(a) to prohibit the practice in question ever since the regulation was promulgated. *Id.* at 11-13, 15.

The Commission has recognized that, where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989), *citing Chevron U.S.A., Inc. v. Natural Resources Defense*

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[2] Wilson issued a citation for this condition. Tr. 33.

[3] The judge also concluded that New Warwick's samples violated section 70.207(a) because they were not taken with an approved sampling device. 16 FMSHRC at 1087. That ruling is not before the Commission on review.

Council, Inc., 467 U.S. 837, 842-43 (1984). In ascertaining the plain meaning of a regulation, the Commission must look to the particular regulatory language at issue, as well as the language and design of the Secretary's regulations as a whole. *See Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996), *citing K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The Secretary's regulations should be interpreted to give comprehensive, harmonious meaning to all provisions. *See* 2 Am. Jur. 2d *Administrative Law* § 239 (1994); *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161, 168 (1st Cir. 1987).

We agree with the judge that the Part 70 sampling scheme as a whole clearly prohibits an operator from taking respiratory dust samples underneath the helmet. 16 FMSHRC at 1088. Section 70.207(a) establishes MSHA's designated occupation sampling program, requiring the operator to take five valid respirable dust samples from the designated occupation in each mechanized mining unit (e.g., longwall) bimonthly. "Valid respirable dust sample" is defined by 30 C.F.R. § 70.2(p) as a sample collected and submitted pursuant to part 70 and not voided by MSHA. The "designated occupation" is the occupation determined to have the greatest respirable dust concentration. 30 C.F.R. § 70.2(f).

The designated occupation sampling program contained in section 70.207(a) is an area sampling program, not a personal sampling program. *American Mining Congress v. Marshall*, 671 F.2d 1251, 1256 (10th Cir. 1982); preamble to the Part 70 regulations, 45 Fed. Reg. 23,990, 23,991, 23,993, 23,998 (1980); Tr. 181, 185-86, 191-92, 195. Area sampling programs are premised on the assumption that if the concentration of dust in the atmosphere of the highest risk occupation is not excessive, then the dust concentration in the atmosphere of other occupations with lower concentrations will be below the prescribed maximum. *American Mining Congress*, 671 F.2d at 1256; Tr. 181, 191. The preamble to Part 70 further indicates that designated occupation samples "measure the mine atmosphere . . . rather than the exposure of any individual miner . . . ." 45 Fed. Reg. 23,998. In considering the predecessor provision under the Federal Coal Mine Health and Safety Act of 1969 ("1969 Coal Act"), the Senate Committee indicated its intention that "the average dust level at any job, *for any miner, in any active working place* during each and every shift, shall be no greater than the standard." S. Rep. No. 411, 91st Cong., 1st Sess. 20 (1969) ("S. Rep."), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 1 *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 146 (1975) ("*1969 Coal Act Legis. Hist.*") (emphasis supplied).

The judge correctly determined that a sample or sampling technique not in compliance with section 70.100(a) would not be valid for purposes of section 70.207(a). 16 FMSHRC at 1088-89. Section 70.100(a) requires the operator to "maintain the average concentration of respirable dust *in the mine atmosphere* . . . to which *each miner in the active workings* . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . . ." 30 C.F.R. § 70.100(a) (emphasis supplied). The samples taken pursuant to section 70.207(a) are the primary means by which MSHA and the operator monitor compliance with section 70.100(a). Thus, a sample taken underneath a respirator cannot be considered a sample taken "in the mine

atmosphere." The locality applicable under section 70.100(a) is the "active workings," which is defined as "any place . . . where miners are normally required to work or travel." 30 C.F.R. § 70.2(b). Because the RACAL airstream helmet is an air-purifying respirator and New Warwick's dust sampling device measured only respirable dust inside the helmet face shield after purification, we agree with the judge that New Warwick's device did not measure respirable dust concentrations in the "mine atmosphere." *See* 16 FMSHRC at 1088-89.

In addition, the judge correctly reasoned that the Part 70 preamble further supports the proposition that the helmet may not serve as a means of compliance with section 70.100(a). *See* 16 FMSHRC at 1089. During the course of the Part 70 public hearings, MSHA had been urged to accept the use of the airstream helmet as a means of compliance with the respirable dust standard in certain longwall mining operations. MSHA rejected this proposal, indicating in the preamble that it would "continue to require implementation of engineering controls in coal mines as the means of achieving compliance with the applicable dust standard." 45 Fed. Reg. at 23,993.

The use of the airstream helmet for purposes of respirable dust sampling is not consistent with the language and purposes of section 70.300.[4] *See* 16 FMSHRC at 1089. Section 70.300 prohibits the substitution of respirators, which do not materially alter the dust concentration in the mine atmosphere (Tr. 43), for environmental controls (e.g., ventilation, water sprays, and other mechanisms regulating the concentration of dust in the mine atmosphere) in the active workings. Section 70.300 also requires that respiratory equipment be made available to persons exposed to respirable dust in excess of the levels required to be maintained in Part 70. This requirement indicates that the maximum permissible respirable dust levels under section

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[4] Section 70.300 provided:

> Respiratory equipment approved by the Secretary and by the Secretary of Health and Human Services shall be made available to all persons whenever exposed to concentrations of respirable dust in excess of the levels required to be maintained under this part 70. Use of respirators shall not be substituted for environmental control measures in the active workings. Each operator shall maintain a supply of respiratory equipment adequate to deal with occurrences of concentrations of respirable dust in the mine atmosphere in excess of the levels required to be maintained under this part 70.

30 C.F.R. § 70.300 (1994). Effective July 10, 1995, section 70.300 was revised. 60 Fed. Reg. 30,401 (1995). Under the revised regulation, the National Institute of Occupational Safety and Health has the sole responsibility for approving respiratory equipment. Otherwise, the substantive provisions of the regulation are essentially the same.

70.100(a) are determined independent of respirators.[5] Thus, we reject New Warwick's contention that, because section 70.100(a) limits the concentration of respirable dust "to which each miner in the active workings . . . is exposed," sampling underneath the helmet complies with the regulation. *See* N.W. Br. at 5. The use of the helmet only protects the user, and is not indicative of the respirable dust exposure of other miners in the active workings.

In sum, taking dust samples underneath the helmet is clearly prohibited by section 70.207(a) and its related Part 70 provisions. We therefore affirm the judge's conclusion that New Warwick violated section 70.207(a).

B. Unwarrantable Failure.

New Warwick argues that Rodavich did not intentionally violate the cited regulation or the Mine Act. N.W. Br. at 10. New Warwick also contends that Rodavich attempted a good faith challenge of MSHA's interpretation of the regulation and wished to have the issue clarified by receiving a citation. *Id.* at 11, 13. New Warwick further asserts that Rodavich made every attempt that a reasonably prudent person would have made to determine whether he would be violating the law if he took samples under the helmet. *Id.* at 11-13. In response, the Secretary stresses that New Warwick's conduct was deliberate, and that New Warwick was not acting in an objectively reasonable manner in taking the test samples. S. Br. at 20-23.

Unwarrantable failure constitutes aggravated conduct, exceeding ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission has required that an operator's efforts in trying to achieve compliance with a standard be reasonable. *Peabody Coal Co.*, 18 FMSHRC 494, 498 (April 1996).

New Warwick contends that it acted in good faith in challenging the regulation, but its actions were not reasonable. Samples collected inside a miner's respirator cannot measure the

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[5] The language of the standard is essentially derived from section 202(h) of the Mine Act, 30 U.S.C. § 842(h), which was carried over without significant change from the 1969 Coal Act. The Coal Act's legislative history indicates that personal respirators should not be used as substitutes for environmental controls because they are "extremely uncomfortable to the workers and impracticable for the type of operations [they] must generally perform." H. Rep. No. 563, 91st Cong., lst Sess. 15 (1969), *reprinted in 1969 Coal Act Legis. Hist.* at 1045. The Senate Report concluded that the equipment "should be used only in those specialized occasional situations specifically authorized . . . ." S. Rep. at 21, *reprinted in 1969 Coal Act Legis. Hist.* at 147.

respirable dust exposure of other miners working on the section. *See* Tr. 182. New Warwick's sampling inside the helmet is also contrary to the clear regulatory requirement. Further, Rodavich knew beforehand that sampling from inside a respirator was a major departure from conventional practice. 16 FMSHRC at 1091. Rodavich further acknowledged he had never heard of MSHA accepting respirable dust samples collected inside a respirator. Tr. 218. In addition, New Warwick's failure to identify the source of the samples is inconsistent with its assertion that its challenge to the regulation was made in good faith. Thus, we cannot conclude that Rodavich acted in an objectively reasonable manner.

We reject New Warwick's argument that it made every reasonable attempt to determine whether it would be violating the law. The judge did not err in concluding that Rodavich should have gone to MSHA's District Office for further consultation. *See* 16 FMSHRC at 1091. MSHA personnel had advised Rodavich to take various steps if New Warwick intended to challenge the regulations, including: (1) submitting a plan to MSHA's District Manager requesting an evaluation of the proposed sampling procedure; (2) requesting permission to sample from inside the respirator for test purposes; and (3) contacting MSHA's District Health Supervisor for further advice. Tr. 42, 78-79, 106-07, 110, 112, 118-19. Rodavich was advised not to sample on his own. Tr. 119. Nothing in the record indicates Rodavich took any of these steps or followed Supervisory Inspector Light's suggestion to read the preamble to Part 70. 16 FMSHRC at 1091. Accordingly, we conclude that the violation resulted from New Warwick's unwarrantable failure.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that New Warwick violated section 70.207(a) and that the violation resulted from unwarrantable failure.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

James C. Riley, Commissioner

Commissioner Marks, concurring:

I concur with the opinion of my colleagues. I write separately to address an additional concern about the operator's sampling of air filtered through personal protective equipment.

New Warwick's sampling method would run directly counter to an important Congressional mandate by permitting miners in active working places to be exposed to dust in excess of the 2.0 mg/m^3 specified in 30 C.F.R. § 70.100(a). Sampling inside a respiratory device worn by a miner is a *personal* sampling program, not an *area* sampling program. *American Mining Congress v. Marshall*, 671 F.2d 1251, 1255 (10th Cir. 1982); Tr. 182. I agree with the Secretary (S. Br. at 16-18, 23-24) that, if operators were permitted to collect samples from underneath the face shield of the respirator worn by the designated high risk miner, miners in less risky occupations who may be wearing a different helmet or no helmet at all would not be protected. *See* Tr. 182-83. Sampling within an individual's respirator measures an atmosphere unique to the individual wearing that respirator, not the general atmosphere at the mine. Tr. 181-82. The record shows that section foremen, spending close to 65 percent of their time near the shear operator, were not wearing the helmet. 16 FMSHRC 1083, 1092 n.6 (May 1994) (ALJ); Tr. 241-42 . Indeed, New Warwick did not have a requirement that its miners wear the helmet. Tr. 242. Therefore, the fact that the shear operator may not have been exposed to excessive dust concentrations beneath his airstream helmet provides no assurance that other miners were not exposed to excessive concentrations, Tr. 182, and sampling underneath the helmet would defeat the area-sampling basis of 30 C.F.R. § 70.207(a). *See also American Mining Congress*, 671 F.2d at 1257; 45 Fed. Reg. at 23,998 (advantages of area sampling over personal sampling). New Warwick's sampling inside the airstream helmet was therefore clearly inconsistent with section 70.207(a).

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 93-646 KENT 93-884
MANALAPAN MINING COMPANY, INCORPORATED	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

DECISION

BY THE COMMISSION:

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"), raises the issue of whether violations of three safety standards, 30 C.F.R. §§ 75.1101[1], 77.1109(c)(1)[2], and

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[1] Section 75.1101, entitled "Deluge-type water sprays, foam generators; main and secondary belt-conveyor drives," provides:

> Deluge-type water sprays or foam generators automatically actuated by rise in temperature, or other no less effective means approved by the Secretary of controlling fire, shall be installed at main and secondary belt-conveyor drives.

[2] Section 77.1109(c)(1), entitled "Quantity and location of firefighting equipment," provides:

> Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher.

75.360(a)[3] (1995), by Manalapan Mining Company, Inc. ("Manalapan"), were significant and substantial ("S&S").[4] Administrative Law Judge Avram Weisberger found that the three violations were not S&S. 16 FMSHRC 1669 (August 1994) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determinations.[5] For the reasons that follow, the judge's decision with respect to the first two S&S determinations stands as if affirmed, and the Commission reverses the third S&S holding with respect to the preshift violation.

I.

Factual and Procedural Background

Manalapan operates underground coal mines in Harlan County, Kentucky. This consolidated proceeding involved approximately 45 citations and orders that arose from inspections conducted by the Department of Labor's Mine Safety and Health Administration ("MSHA") of the Manalapan mines. The judge held evidentiary hearings in this proceeding on March 1-3, and April 26-28, 1994.[6] Three violations remain at issue involving Manalapan Mines No. 1 and No. 7 in Highsplint, Kentucky.

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[3] Section 75.360(a), entitled "Preshift examination," provides:

> Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination.

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

[5] Manalapan also successfully filed a petition for review of two docket numbers that were part of this proceeding. The Secretary and Manalapan subsequently moved the Commission to approve their settlement of those matters and Manalapan sought to dismiss its appeal. The Commission remanded the motion to the judge (16 FMSHRC 2027, 2028 (October 1994)), and the judge subsequently granted the motion (16 FMSHRC 2308 (November 1994) (ALJ)). Accordingly, only the Secretary's petition is now before the Commission.

[6] "Tr. I" refers to the transcript for March 1, 1994; "Tr. II" refers to the transcript for March 2, 1994; "Tr. III" refers to the transcript for March 3, 1994; "Tr. IV" refers to the transcript for April 26, 1994; "Tr. V" refers to the transcript for April 27, 1994; and "Tr. VI" refers to the transcript for April 28, 1994.

A. Violations of Sections 75.1101 and 77. 1109(c)(1); Citation Nos. 3164716 and 3835998

1. Deluge Fire Suppression System

On February 22, 1993, MSHA Inspector Jim Langley visited Manalapan's No. 1 Mine. He observed that the belt drive for the mechanized mining unit number 006 was not provided with a deluge fire suppression system. 16 FMSHRC at 1691. A deluge fire suppression system consists of two parallel branch lines, approximately 50 feet long, with water nozzles at eight foot intervals. Tr. IV 132. The system is activated automatically by fire sensors and sprays the upper and lower sides of the top belt and the upper side of the bottom belt. *Id.* Inspector Langley issued a citation pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging an S&S violation of section 75.1101. Gov't Ex. 49.

2. Fire Extinguisher

On June 28, 1993, MSHA Inspector Elmer Thomas conducted an inspection at Manalapan's No. 7 Mine. 16 FMSHRC at 1700. Inspector Thomas observed a front-end loader scooping up and loading coal into trucks. *Id.* at 1700-01; Tr. V 354. He determined that the loader lacked a fire extinguisher. 16 FMSHRC at 1700. Thomas issued a citation charging a violation of section 77.1109(c)(1) and designated the violation as S&S. Gov't Ex. 12A.

B. Violation of Section 75.360(a); Order No. 4238749 (Preshift Examination)

On April 20, 1993, at approximately noon, MSHA Inspector Adron Wilson was traveling to section 707 of Manalapan Mine No. 7 and observed four employees in the mine repairing a roof bolting machine. 16 FMSHRC at 1676, 1701; Gov't Ex. 7A. The men had entered the mine at approximately 8:00 a.m. Tr. V 397. No preshift examination had been performed before they entered the mine. 16 FMSHRC at 1701. At 12:05 p.m., the inspector issued an order, pursuant to section 104(d)(1) of the Mine Act, alleging a violation of section 75.360(a) for failure to perform the preshift inspection. *Id.*; Gov't Ex. 7A. The order was terminated at 12:40 p.m., after Allen Johnson, the mine superintendent, conducted a preshift examination and observed no hazardous conditions. 16 FMSHRC at 1702; Gov't Ex. 7A.

Manalapan challenged the citations and order, and the matters were consolidated for hearing. In his decision, the judge affirmed the citations with regard to the deluge fire suppression system and the fire extinguisher. 16 FMSHRC at 1691, 1700. He vacated the S&S designations, however. *Id.* at 1692-93, 1701. The judge found that the Secretary had shown only that potential fire sources were present and, therefore, had not proved an injury-producing event was likely to occur. *Id.* He assessed penalties of $2,000 for the lack of a fire deluge system, and $400 for the absence of a fire extinguisher. *Id.* at 1693, 1701. With regard to the operator's failure to conduct a preshift examination, the judge also affirmed the citation. *Id.* at 1701. He concluded, however, that the violation was not S&S, noting that the inspection conducted

immediately after the order revealed no hazardous conditions in the affected area of the mine. *Id.* at 1702. Finding that the violation resulted from aggravated conduct, the judge assessed a penalty of $3,000. *Id.*

II.

Disposition[7]

A. Deluge Fire Suppression System and Fire Extinguisher

Commissioner Holen and Commissioner Riley would affirm the judge's decision. Chairman Jordan and Commissioner Marks would vacate and remand the judge's decision. Under *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

B. Preshift Examination

All Commissioners reverse the judge's determination that Manalapan's preshift violation was not S&S. All Commissioners remand for reassessment of penalties for this violation.

Chairman Jordan and Commissioner Marks would reverse on the ground that there is a presumption that violations of the preshift examination standard are S&S. Commissioner Holen and Commissioner Riley would reverse on the ground that substantial evidence does not support the judge.

III.

Separate Opinions of the Commissioners

Commissioners Holen and Riley, in favor of affirming in part and reversing in part the decision of the administrative law judge:

A. Deluge Fire Suppression System and Fire Extinguisher

The Secretary argues that, in analyzing the S&S designations of the two citations, the only logical approach is to assume the occurrence of a fire. He further asserts that, if violations of safety standards designed to respond to emergency situations are not analyzed in the context

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[7] We direct the judge to correct a clerical oversight with respect to Docket No. KENT 93-882, which was settled, and to indicate that Citation No. 3003352 was vacated by the Secretary. *See* S. Br. at 6 n.5; Tr. IV 5.

of the emergency having occurred, those violations only rarely will be found to be S&S. S. Br. at 10-15.

Manalapan argues that the Secretary, in effect, seeks an irrebuttable presumption as to the occurrence of an emergency condition and that such a presumption violates the constitutional requirements of due process. *See* M. Br. at 7-16. Manalapan further asserts that the Commission may adopt such a presumption only through notice-and-comment rulemaking. *Id.* at 16-17. In response, the Secretary disagrees with Manalapan's contention that the use of a factual presumption in analyzing S&S designations of violations of emergency standards raises constitutional questions. S. Reply Br. at 1-9. The Secretary also argues in rebuttal that administrative agencies can adopt presumptions through case adjudication and are not constrained to do so by rulemaking. *Id.* at 9-12.

The S&S terminology is taken from section 104(d)(1) of the Act and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

We reject the Secretary's argument that the Commission, in determining whether there is a reasonable likelihood that a hazard would result in an injury, must presume the occurrence of an emergency, in the instant case a fire.[8] The Secretary bears the burden of proving that a

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[8] The Commission rejected on procedural grounds the Secretary's arguments in previous cases that it examine the S&S nature of violations in the context of the presumed occurrence of an emergency. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306, 1314 (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300, 1304 (August 1992).

violation is S&S. *See, e.g., Peabody Coal Co.* 17 FMSHRC 26, 28 (January 1995), *citing Union Oil of Cal.*, 11 FMSHRC 289, 298-99 (March 1989). As the Secretary notes, "A presumption is a device for allocating the burden of proof and often shifts the burden of proof to the party opposing the presumption." S. Reply Br. at 2 (citations omitted). The Secretary urges the Commission to presume an emergency for an undefined and potentially large class of health and safety standards without indicating what situations under those standards would qualify as an emergency. We decline to modify the time-tested Commission precedent that guides our analysis of violations alleged to be S&S by adopting such a broad-based presumption.

Further, the Secretary has failed to develop a record that establishes the need for such a change in the law. In *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987), the Commission held that, when the Secretary proves a violation of the respirable dust standard, 30 C.F.R. § 70.100(a), "a presumption arises that the third element of the significant and substantial test -- a reasonable likelihood that the health hazard contributed to will result in an illness -- has been established." 8 FMSHRC at 899. The Commission adopted the presumption because of the virtual impossibility of determining the contribution of a single incident of overexposure to respirable dust to the development of respiratory diseases, including pneumoconiosis. "[I]t is not possible to assess the precise contribution that a particular overexposure will make to the development of respiratory disease." *Id.* at 898. The Secretary has not shown here a similar need for the use of a presumption in analyzing violations of standards that address emergency situations. Indeed, the Secretary has prevailed in cases where the S&S designation of such standards has been challenged. *E.g., Consolidation Coal Co.*, 6 FMSHRC 189, 194-195 (February 1984) (violation of fire fighting equipment standard affirmed as S&S based on substantial evidence). Thus, we decline to decide on the present record that, in determining whether violations of certain standards are properly designated S&S, we should presume the occurrence of an emergency.

We note, moreover, an observation by the Secretary that appears to render his suggested S&S framework irrelevant to the deluge system violation:

> [E]ven assuming the occurrence of a fire, a violation of 30 C.F.R. 75.1101 might not be significant and substantial. For example, if other fire extinguishers were present, the failure to have a deluge-type fire suppression system might not result in a reasonable likelihood of serious injuries . . . .

S. Br. at 14 n.7. As Manalapan points out, Inspector Langley admitted that there were fire extinguishers located at the belt. M. Br. at 2, *citing* Tr. IV at 162-63. The Secretary's exception appears to fit the facts in this case.

As in previous cases in which the Secretary has asked the Commission to examine the S&S nature of a violation in the context of a presumed emergency, he has not argued that the judge's S&S findings are not supported by the record. *Beech Fork Processing, Inc.*, 14

FMSHRC 1316, 1318-19 (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306, 1310 (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300, 1302 (August 1992). Thus, the Commission is precluded from reviewing those findings on a substantial evidence basis. Accordingly, we affirm the judge's determinations that Manalapan's violations of sections 75.1101 and 77.1109(c)(1) were not S&S.

B. Preshift Examination

The Secretary argues that the Commission should conclude that a failure to conduct a preshift examination is presumptively S&S. S. Br. 15-21. With respect to this violation, unlike the two preceding violations, the Secretary contends that the judge incorrectly applied the *Mathies* criteria; he notes that the judge relied on an inspection performed after the citation, which showed no hazardous conditions. S. PDR at 16-17.

Manalapan argues that the presumption the Secretary seeks violates due process because there is no rational connection between the violation and the presumption of reasonable likelihood of serious injury. M. Br. at 10-11. Manalapan further asserts that the presumption is arbitrary because it is contrary to the record facts. *Id.* at 11-12. Manalapan also points out that the Secretary did not raise his argument that the failure to conduct a preshift examination is presumptively S&S before the administrative law judge. *Id.* at 18.

We reject the Secretary's argument that the Commission should apply a presumption to the S&S designation of the citation involving Manalapan's failure to conduct the preshift examination. First, the Secretary did not raise his presumption argument to the administrative law judge. Section 113 of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), provides, "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." Commission precedent also prohibits consideration of new theories raised on appeal. *Beech Fork*, 14 FMSHRC at 1321, *citing Ozark-Mahoning Co.*, 12 FMSHRC 376, 379 (March 1990). *See also* 29 C.F.R. § 2700.70(d) (1995). We see no reason to ignore the Mine Act's statutory review provisions and depart from settled Commission precedent to reach the Secretary's belatedly-raised theory.

Again, the Secretary suggests a rebuttal to his proposed presumption that fits the facts of this case: "The mine operator may then rebut the presumption that hazards existed by producing evidence indicating that no hazards existed." S. Reply Br. at 5. Here, upon immediate examination after the violation, "no hazardous conditions were observed." 16 FMSHRC at 1702. Thus, adoption of the Secretary's proposed presumption may achieve a result contrary to that intended and preclude a finding of S&S for Manalapan's failure to conduct a preshift examination.

Viewing the record as a whole, we find it does not support the judge's finding that Manalapan's violation was not reasonably likely to result in an injury and thus that the Secretary

had not proven the third element of the *Mathies* test. *Id.* Substantial evidence does not support the judge's S&S determination.[9] In addition, the judge's analysis of mine conditions erroneously considered subsequent conditions as they existed when the operator abated the citation.

In concluding that Manalapan's failure to conduct a preshift examination was not S&S, the judge relied on the fact that, following the citation, the area involved was inspected "and no hazardous conditions were observed." 16 FMSHRC at 1702. The judge's reliance on post-citation events to vacate the S&S designation is incorrect as a matter of law. The question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations. *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (February 1991); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985). Moreover, certain conditions that a preshift examination would disclose, such as methane or inadequate ventilation, are transitory in nature and the results of a subsequent inspection may have little relevance to conditions at the time of violation.

The Secretary's evidence showed that four miners entered the 707 section of the mine to perform maintenance and repair work on a roof bolter. 16 FMSHRC at 1701. The mine had been out of production for several days. Tr. V 415. Although two of the miners were certified inspectors, no preshift examination was performed. 16 FMSHRC at 1701-02. They were in the mine for four hours without such an inspection. *See* Tr. V 397, Gov't Ex. 7A. The miners' equipment included welding and cutting torches for their work on the roof bolter. Tr. V 370-71, 379-80. The roof bolter was energized. Tr. V 420. Inspector Wilson testified that, because the 707 section was adjacent to a section that had been mined previously, there was a possibility that the oxygen would be low or blackdamp (a mixture of carbon dioxide and nitrogen) would be present. Tr. V 389-90. Bottle samples also indicated that the mine liberated methane. Tr. V 391-92, 426. During idle periods, methane can build up, and other unforseen hazards can develop. *See Buck Creek Coal Co.*, 17 FMSHRC 8, 14 (January 1995).[10] Inspector Langley testified that the mine roof had a tendency to fall and that the mine had experienced several roof

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[9] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[10] In *Buck Creek*, Chairman Jordan was part of the majority, which concluded on substantial evidence grounds that a preshift violation was S&S. 17 FMSHRC at 14. Commissioner Marks, dissenting, concluded that Buck Creek's failure to conduct a preshift examination had not been proven to be violative. 17 FMSHRC at 18-19.

falls. 16 FMSHRC at 1701. In evaluating the presence of a hazard, the Commission has considered conditions on a mine-wide basis. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1614 (August 1994).

We also conclude that the fourth element of *Mathies* is established: injuries resulting from the hazards posed were reasonably likely to be of a reasonably serious nature. Accordingly, we reverse the judge's determination that the violation was not S&S. *See Buck Creek*, 17 FMSHRC at 14.

Conclusion

For the foregoing reasons, we affirm the judge's S&S determinations in Citation Nos. 3164716 and 3835998. We reverse his S&S determination in Order No. 4238749 and remand accordingly for penalty reassessment.

Arlene Holen, Commissioner

James C. Riley, Commissioner

Chairman Jordan and Commissioner Marks, in favor of vacating and remanding in part and reversing in part the decision of the administrative law judge:

A. Deluge Fire Suppression System and Fire Extinguisher

The Secretary alternates between the terms "presumption" and "assumption" in proposing his analytical framework for the fire suppression violations (*see* S. Br. at 7, 11, 13; S. Reply Br. at 1-4, 6-8) and couples that argument with his argument calling for a *presumption* of S&S as to all preshift violations. We see a significant distinction between the two forms of relief requested in this case and therefore have separately analyzed the issues.

Notwithstanding the Secretary's imprecision in describing the relief he seeks regarding the fire suppression violations, we conclude that the Secretary is merely urging the Commission to make a factual *assumption* when evaluating whether a fire suppression violation is S&S. The assumption sought is *not* regarding a fact that is in issue. The Secretary must still prove that there was no functioning deluge system or fire extinguisher and that the absence of the fire suppression equipment at the cited location creates a risk of a serious injury.[1] Nor is the assumption related to a legal issue, as was the case in *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987), wherein the Commission recognized a rebuttable presumption of S&S regarding violations of 30 C.F.R. § 70.100(a), the respirable dust standard. Rather, the assumption sought by the Secretary is to evaluate the effect of the violation under the circumstances and conditions in which the standard was intended to provide protection. In this case, where a fire deluge system was not provided and where a fire extinguisher was not provided, the assumption sought is the existence of a fire or explosion.

The judge determined that Manalapan violated section 75.1101 because the 006 section belt drive was not provided with a deluge fire suppression system. 16 FMSHRC at 1691. Among other facts, the judge accepted the MSHA inspector's testimony that: (1) numerous ignition sources existed at the cited location, including belt drives, rollers, belt boxes, cables, drive rollers and bottom rollers and (2) that the cited area also contained accumulated float dust and loose coal, float dust in the starter box, the absence of a sensor line and the absence of a fire hose. *Id.* at 1692. Notwithstanding the foregoing, the judge concluded "[A]lthough they (sic) were *potential* fire sources present, there is no evidence to predicate a conclusion that these sources were in such a physical condition as to render an ignition or explosion reasonably likely to have occurred." *Id.* at 1692-93 (emphasis in original). Therefore, he determined that the violation was not S&S.

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[1] Notwithstanding Commissioner Marks' disagreement with the Commission's existing test in *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984) (*see U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996) (Marks, M., concurring)), this opinion is rendered within the existing *Mathies* framework of S&S analysis.

Regarding the violation of section 75.1109(c)(1), the judge determined that Manalapan had failed to equip its front-end loader with a portable fire extinguisher. 16 FMSHRC at 1700. The judge accepted the MSHA inspector's testimony that the loader was being used in an area that contained battery wires, oil hoses, brake lines containing combustible brake fluid, as well as combustible engine and hydraulic oil. *Id.* at 1701. Notwithstanding the foregoing, the judge concluded, "The record establishes the presence of only *potential* fire ignition sources. I thus find that it has not been established that the violation was significant and substantial." *Id.* (emphasis in original).

In reaching the foregoing negative S&S conclusions, the judge failed to address the Secretary's argument that consideration of the seriousness of fire suppression violations should be made within the context of the circumstances in which the required fire suppression equipment is to be used, i.e., in the event of a fire or explosion.

The Secretary has reiterated this position before the Commission. With respect to both violations, the Secretary stresses that the standards are designed to "provide protection only in the event of an emergency." S. Br. at 12. Therefore, the Secretary argues, the only logical approach in evaluating whether the violations pose an "S&S risk" is to assume that the contemplated emergency has already occurred." *Id.* at 11. Further, unless the analysis is based upon that assumption, "violations of these critically important standards will rarely if ever be found to be significant and substantial, because the likelihood of the emergency occurring should always be remote." *Id.* Underscoring his point, the Secretary notes, "Indeed, were there to be a fire at the belt conveyor drive, the failure to have a fire suppression system at that location would likely be an imminent danger." *Id.* at 11 n.6. Accordingly, the Secretary urges that in evaluating whether a violation of this type is S&S, the Commission should recognize that:

> *The likelihood of a fire or explosion occurring is not the relevant question.* Rather, the relevant question is, given the occurrence of a fire or explosion, whether the failure to have any fire suppression system . . . is reasonably likely to result in serious injuries or deaths that would not occur if a fire suppression system had been installed as required by the standard.

Id. at 13-14 (emphasis supplied).

If such an approach is adopted, the Secretary recognizes that:

> Assuming the occurrence of the underlying emergency, i.e., a fire or explosion, does not itself establish the Secretary's prima faci[e] case on the third element of the Commission's significant and substantial test [*Mathies*]. The Secretary is still required to demonstrate that, assuming the underlying emergency, the failure

> conveyor belt or a fire extinguisher on a front-end loader is reasonably likely to contribute to an injury under the circumstances presented by each case. Once the Secretary has established his prima faci[e] case, the *burden shifts*[2] to the mine operator to produce evidence that the violation will not result in an injury. The operator could meet this burden by showing that there were effective alternative means of combating the hazard addressed by the violation cited. In other words, the mine operator could rebut the presumption by proving that there were equivalent alternate fire suppression systems or equipment available. Whether any alternative fire suppression system or equipment was equivalent to the protections provided in the safety standard which was violated would be a matter for the judge to decide on the basis of all of the evidence.

S. Reply Br. at 6-7 (emphasis supplied).

We have considered the Secretary's argument and Manalapan's opposition to it and we conclude that the Secretary is entirely correct in arguing that the only logical way to evaluate the gravity or seriousness of a fire suppression violation is to consider the effect the violation would have in the event that the occasion for its use arises. This is, in our opinion, no different from the situation where an MSHA inspector alleges an S&S violation after determining that a truck is being operated without an emergency brake. In evaluating the seriousness of that violation we routinely consider the risk presented to the equipment operator and to the other miners working or traveling near the cited truck *should the need arise to use the emergency brake*. Clearly the truck can operate without the use of an emergency brake, just as the coal carrying belt and the end-loader functioned properly without the use of the fire suppression equipment. However, in gauging the seriousness of the violation, we consider what would happen if the truck, while being operated during continued mining operations, required the use of the emergency brake, i.e., if an emergency arose! *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Similarly, the Secretary urges that we apply that approach when evaluating the seriousness of a fire suppression violation. To do otherwise is to fail to recognize and adhere to the overriding mandate of the Mine Act -- to ensure that we construe the law in a fair way that provides the maximum protection to our nation's miners.

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[2] The Secretary's imprecision here and at page 2 of his reply brief must be clarified. Although the "burden shift[s]," it is NOT a shifting of the burden of proof. That burden always remains with the Secretary. The referenced shift to the operator to "produce evidence" relates to the *burden of going forward with evidence* intended to rebut the Secretary's evidence.

Regrettably, in rejecting the Secretary's position our colleagues do not appear to have recognized the logic of the argument. When distilled to the core, the reasons offered by Commissioners Holen and Riley for their rejection of the Secretary's call for an assumption are:

> (1) the Secretary urges the Commission "to presume an emergency for an undefined and potentially large class of health and safety standards without indicating what situations under those standards would qualify as an emergency;"
> (2) the Secretary's need for the presumption here is not like the need demonstrated in *Consolidation;*
> (3) the facts in this case "appear[] to render [the Secretary's] suggested S&S framework irrelevant to the deluge system violation."

Slip op. at 6.

For the reasons set forth below, we conclude that our colleagues' failure, or refusal, to adopt the Secretary's argument is grounded on irrelevancies and a misunderstanding of the Secretary's position.

Notwithstanding the vague perception of the issue offered by our colleagues, it is clear that the Secretary's argument relates to the *one* circumstance delineated in this case, i.e., the assumption of a fire or explosion when considering whether fire suppression violations are S&S. If our colleagues are troubled by the prospect that future cases may present the issue of *what constitutes a fire suppression violation*, or what type of equipment *constitutes fire suppression equipment,* that is irrelevant to this case and should not influence the disposition here. There seems to be no dispute by the parties that the cited equipment is fire suppression equipment.

The second basis set forth by Commissioners Holen and Riley for their rejection of the Secretary's call for the assumption of a fire or explosion is simply that this case is unlike the circumstances presented in *Consolidation.* "[T]he Secretary has failed to develop a record that establishes the need for such a change in the law." Slip op. at 6. Do our colleagues need some documentation demonstrating what happens when a belt fire occurs in a mine where there is no deluge fire suppression protection? Do they seriously doubt that the absence of that protection heightens the risk of injury and death to the miners exposed to that unprotected condition? We do not. Accordingly, we find this concern of our colleagues to be misguided and unfounded.

Finally, and most disturbing, our colleagues grossly misapprehend the Secretary's argument which aptly demonstrates that the assumption of a fire or explosion would not, by itself, establish that the violation is S&S -- that the operator would still have the opportunity to defend itself from the charge.

> [E]ven assuming the occurrence of a fire, a violation of [section] 75.1101 might not be significant and substantial. For example, if

> other fire extinguishers were present, the failure to have a deluge-type fire suppression system might not result in a reasonable likelihood of serious injuries [or deaths depending upon all of the circumstances surrounding the violation.]

Slip op. at 6, *quoting* S. Br. at 14 n.7.

In quoting the foregoing, our colleagues conclude that the Secretary's observation "appears to render his suggested S&S framework irrelevant to the deluge system violation." Slip op. at 6. With all due respect, our colleagues have failed to comprehend the argument and have completely inverted its purpose. We find the Secretary's description of how the assumption would be applied to be not only relevant, but also persuasive, in that it assures us that the adoption of such a framework would not be at the expense of fairness to all cited operators.[3]

For the foregoing reasons, we conclude that the assumption of a fire or explosion should be made when the Commission evaluates whether a fire suppression violation is S&S. In light of the above, we would vacate the judge's conclusions on these issues and remand for an analysis that applies the foregoing legal conclusions.

B. Preshift Examination

The Secretary argues that the Commission should conclude that a failure to conduct a preshift examination is presumptively S&S. S. Br. at 15-21. The Secretary further contends that the judge incorrectly applied the criteria in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); he notes that the judge relied on an inspection performed after the citation, which showed no hazardous conditions. S. PDR at 16-17.

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[3] Manalapan argues that it is a violation of due process to assume the existence of a fire in determining whether the fire suppression violations were S&S. M. Br. at 7-16. We reject this assertion.

Manalapan's contentions regarding the fire suppression system violations are completely misplaced because the Secretary is not even asking us to create a presumption in this context. He is simply asking us to assume a fact -- the existence of a fire -- when examining the third element of the *Mathies* test (a reasonable likelihood that the hazard contributed to will result in an injury). The Secretary admits that this will not establish his prima facie case on the third element of the S&S test. S. Reply Br. at 6-7. He acknowledges that he would still be required to show that, assuming the fire, the failure to have a deluge system or fire extinguisher is reasonably likely to contribute to an injury. *Id.* The operator would of course have the opportunity to rebut this evidence by demonstrating that the violation will not result in injury. Accordingly, we find Manalapan's due process argument in this context inapposite.

Manalapan argues that the presumption the Secretary seeks violates due process because there is no rational connection between the violation and the presumption of reasonable likelihood of serious injury. M. Br. at 10-11. Manalapan also asserts that the presumption is arbitrary because it is contrary to the record facts. *Id.* at 11-12. Manalapan also notes that the Secretary did not raise his argument that the failure to conduct a preshift examination is presumptively S&S before the administrative law judge. *Id.* at 18.

We first address Manalapan's contention that we may not consider the presumption argument because the Secretary did not raise it before the administrative law judge. Although the Mine Act generally precludes us from reviewing issues not raised before the judge, there is an exception "for good cause shown." 30 U.S.C. § 823(d)(2)(A)(iii). Here, the "good cause" standard is met because the issue before us "raises a legal question fundamental in this and future cases." *Brennan v. Occupational Safety & Health Review Comm'n*, 511 F.2d 1139, 1143 n.4 (9th Cir. 1975). The question of whether a violation of the preshift standard is S&S comes before the Commission on a regular basis. Because, as we explain below, the traditional method of determining S&S is not appropriate for this particular type of violation, we must provide timely guidance on this question.

The Mine Act's bar against appellate review of issues not first decided by a trial judge is based on the need for "further factfinding where warranted" and the desire "to adequately develop the record." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (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 637 (1978). We wholeheartedly embrace this principle. However, the question of whether or not to create this legal presumption does not require any additional factfinding. We can conceive of no additions to the record that are necessary for us to rule on this question. We are confident that the statutory provisions, legislative history, and the briefs submitted clearly suffice to make this determination.

Although generally bound by the same constraints, federal appellate courts have demonstrated a flexible approach in this area. *See, e.g., State of New Jersey, Dept. of Educ. v. Hufstedler,* 724 F.2d 34, 36 n.1 (3d Cir. 1983) ("[O]ur practice has been to hear issues not raised in earlier proceedings when special circumstances warrant an exception to the general rule. [citations omitted]. Since [the issue raised] is singularly within the competence of appellate courts and is not predicated on complex factual determinations, we will consider the . . . argument . . . ."); *R.R. Yardmasters of America v. Harris*, 721 F.2d 1332, 1337 (D.C. Cir. 1983) ("[B]ecause the issue . . . is one of law, requires no further factual development, has been fully briefed by both parties, and can be resolved beyond any doubt, we will exercise our discretion to address the issue."). Accordingly, because the issue is a legal one, to which Manalapan has fully responded, we agree to address it on the merits. *See Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984).

The S&S terminology is taken from section 104(d)(1) of the Act and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation,

there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies,* the Commission further explained:

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

6 FMSHRC at 3-4. (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC,* 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

To evaluate the Secretary's request for a presumption that a failure to perform a preshift inspection is S&S, we first review the rationale underlying the establishment of presumptions by courts and administrative agencies. There are several reasons why courts and agencies create presumptions. Presumptions are created to remedy an imbalance due to one party's superior access to evidence, because of notions of probability (when a judge believes that proof of fact B makes the inference of the existence of fact A probable) or for social policy reasons. 2 Kenneth S. Broun et al., *McCormick on Evidence* § 343, at 454-55 (4th ed. 1992). Most presumptions are created for a combination of these reasons. *Id.*

The creation of a legal presumption is not a novel concept in mine litigation. For example, the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. (1994), contains a rebuttable presumption that a miner who worked for 25 years or more in a coal mine shall be entitled to black lung benefits unless it is established that he or she was not disabled due to pneumoconiosis. In rejecting a due process challenge to this presumption, the Third Circuit stated:

> By [enacting the presumption], Congress recognized the difficulties involved in diagnosing respiratory impairments due to coal mine employment and the problems inherent in proving survivors' claims. Congress acted rationally by enacting the rebuttable presumption contained in § 411(c)(5).

U. S. Steel Corp. v. Oravetz, 686 F.2d 197, 202 (3d Cir. 1982). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975) (upholding the constitutionality of sections of the Black Lung Benefits Act providing that a miner with 10 years' employment in the mine suffering from pneumoconiosis is presumed to have contracted the disease from his employment and that if a

miner with 10 years' mining employment dies from a respiratory disease he or she is presumed to have died from pneumoconiosis).

The Commission itself embraced the concept that violations of certain standards may be presumptively S&S in its opinion in *Consolidation.* In *Consolidation,* the Commission held that, instead of requiring the Secretary to prove all four prongs of the *Mathies* test in every case involving a violation of section 70.100(a) (the respirable dust standard), it would institute a rebuttable presumption that the violation is S&S. 8 FMSHRC at 899. The Commission based its creation of this presumption on "the nature of the health hazard at issue, the potentially devastating consequences for affected miners, and strong concern expressed by Congress for eliminating respiratory illnesses in miners." *Id.* Similar policy and evidentiary concerns lead us to the conclusion that a presumption of S&S is warranted when an operator is cited for failure to conduct a preshift inspection.

The preshift inspection requirement is the linchpin of Mine Act safety protections. Without a timely preshift inspection, unwary miners may be sent into areas containing hazardous conditions. Congress explicitly acknowledged the importance of the preshift inspection by making it a longstanding statutory mandate, dating back to the Federal Coal Mine Safety Act of 1952, 30 U.S.C. § 471 et seq. (1955). These provisions were strengthened in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), and carried over in identical fashion to the Mine Act. The Senate Report on the 1969 Coal Act emphasized the importance of these inspections, stating that "[c]hanges occur so rapidly in the mines that it is imperative that the examinations be made as near as possible to the time the workmen enter the mine." S. Rep. 411, 91st Cong., 1st Sess. 57 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969,* at 183 (1975) (*"Coal Act Legis. Hist."*).

Both the Senate Report and the Conference Report emphasized:

> No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected.

Coal Act Legis. Hist. at 183 and 1610.

In its recent 1996 revision of safety standards for the ventilation of underground coal mines, the Mine Safety and Health Administration acknowledged that:

> [t]he preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine's ventilation system

> and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof.

61 Fed. Reg. 9790 (1996).[4]

In a previous discussion of an earlier version of this standard, MSHA stated:

> An examination of these areas [to be preshifted] allows miners on the oncoming shift to be notified if hazards exist and allows corrective actions to be taken. In addition to methane accumulations and oxygen deficiency, other hazards that can be detected during the preshift examination are loose roof or ribs, water accumulation that affects air courses or escapeways, electrical hazards from trolley wires, and fire hazards from damaged or improperly operating belt conveyors.

57 Fed. Reg. 20893 (1992).

In its comment on the March 1996 final rule, MSHA acknowledged several accidents which occurred at least in part because the area in question received no examination or only an inadequate examination under the standards in effect at the time.[5] 61 Fed. Reg. 9798 (1996). MSHA noted that the preshift and supplemental exam requirements of the rule it was promulgating "would have served well to prevent these accidents." *Id.*

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[4] Prior to 1992, the preshift requirement was located at 30 C.F.R. § 75.303 and tracked the statutory language at 30 U.S.C. § 863(d)(1). In 1992, MSHA revised the safety standards for ventilation of underground coal mines. The preshift standard was redesignated at section 75.360(a) and, instead of one continuous paragraph, the requirements were separated into various subsections. The language was updated, and the areas to be examined were clarified and expanded. The 1996 revision further clarified the areas subject to the preshift requirement and the manner in which the examination is to be performed.

[5] These included explosions at Greenwich Collieries No. 1 Mine in February 1984, in which 3 miners were killed; the explosion at Day Branch Mine in 1994 where 2 miners died, and an ignition at the Loveridge No. 22 Mine in 1992 that burned 1 miner. 61 Fed. Reg. 9798 (1996).

MSHA also recognized that explosions at the Red Ash Mine in 1973, the Scotia Mine in 1976, the P&P Mine in 1977, the Ferrell #17 Mine in 1980, the Greenwich #1 Mine in 1984, and the Day Branch No. 9 Mine in 1994, were situations in which miners were sent into an area that had not been preshift-inspected. 61 Fed. Reg. 9794 (1996).

In *Emerald Mines Corp.*, 7 FMSHRC 437 (March 1985) (ALJ), Administrative Law Judge Broderick recognized the importance of the preshift examination in the arsenal of protections afforded to those working in the mines. In holding that the failure to conduct a preshift inspection was S&S, he stated that:

> [t]he whole rationale for requiring preshift examinations is the fact that underground coal mines are places of unexpected, unanticipated hazards: roof hazards, rib hazards, ventilation and methane hazards. I conclude that failure to make the required preshift examination of active workings in an underground coal mine contributes to "a measure of danger to safety" which is reasonably likely to result in a reasonably serious injury.

7 FMSHRC at 444.

This Commission has recently had occasion to pronounce the preshift requirement "unambiguous" and of "fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (January 1995). Thus, the policy considerations, as articulated by Congress, MSHA and the Commission, lead us to conclude that an S&S presumption in this area is appropriate.[6]

Evidentiary considerations lead us to adopt the presumption as well. Violations of the preshift requirement generally do not fit the *Mathies* format because the mandatory safety standard is designed to detect and correct potential, unknown hazards, whereas the *Mathies* test demands evidence of demonstrated dangers which will likely result in serious injury. Arguably, under the *Mathies* test, the only way the Secretary should prevail in proving a preshift violation S&S is to present evidence that the operator's failure to conduct the required exam resulted in the miners being exposed to a hazardous condition. Only in this way could MSHA prove "a measure of danger to safety . . . contributed to by the violation" and demonstrate a "reasonable likelihood that the hazard contributed to will result in an injury." *Mathies*, 6 FMSHRC at 3-4.

Except on rare occasion, it is doubtful whether MSHA would be able to meet this evidentiary burden. Unless the inspector has examined the area himself and is waiting underground to greet the miners, he will not be in a position to describe the conditions that actually confronted the miners when they arrived in the area in question. Violations of the

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[6] Several state mining laws include preshift requirements that parallel the federal mandate. A review of the West Virginia mining statute, for example, reveals the singular importance of the preshift examiner or "fire boss." Adequate examinations by the fire bosses are considered so essential that while performing their duties the fire bosses "shall have no superior officers, but all the employees working inside of such mine or mines shall be subordinate to them in their particular work." W. Va. Code § 22A-2-21 (1994).

preshift requirements are generally discovered only after the miners are permitted to work in the unexamined area. Sometimes the violation is detected when the inspector decides to review the operator's preshift examination reporting book. *See, e.g., Emerald Mines*, 7 FMSHRC at 442. Sometimes it is discovered when the inspector notices the lack of the examiner's initials in the underground area in question or, as here, when the inspector observes that the person who allegedly conducted the preshift exam did not have any of the proper examination equipment. Tr. V 372. By the time the inspector detects the violation, hours, days or even weeks may have passed and the conditions present at the time the inspector issues the citation may bear little resemblance to those present at the time the violation occurred. Moreover, there would be no way for MSHA to know if the lack of hazardous conditions at the time the violation is detected is a result of corrective actions the operator may have taken after miners entered the unexamined area. Because of these factors, inspectors will rarely be able to ascertain whether specific hazards existed at the time of the preshift violation.

Just as the Commission's respirable dust presumption is based on the fact that "the development of respirable dust induced disease is insidious, furtive and incapable of precise prediction" (*Consolidation*, 8 FMSHRC at 898), the failure to perform a preshift inspection will, in many cases, expose miners to potential serious hazards but yet deprive the inspector of any feasible way to establish that the specific hazards existed when the shift in question entered the mine. *See also Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 158 (1987) (when it enacted the statutory presumption in the Black Lung Act, "Congress was aware that it is difficult for coal miners whose health has been impaired by the insidious effects of their work environment to prove that their diseases are totally disabling and coal mine related, or that those diseases are in fact pneumoconiosis"). Similarly, in a case dealing with the unwarrantable failure aspects of a section 104(d) violation, the Commission held "[t]o read out of the Act the protections and incentives of section 104(d) because an inspector is not physically present to observe a violation while it is occurring distorts the force and blunts the effectiveness of section 104(d). We discern no warrant for such a formalistic approach." *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (September 1987).

Although the Secretary in this case was unable to adduce evidence of hazardous conditions awaiting the miners when they entered the No. 707 section, the Secretary did present evidence that the mine liberated methane, had a roof which could fall, and included a mined out area which could contain an oxygen-deficient atmosphere. In voting to reverse the judge, our colleagues have necessarily concluded that this evidence compels a finding that an injury producing event was reasonably likely to occur as a result of Manalapan's violation. We submit that the conditions relied on by our colleagues would apply to virtually any underground mine. Indeed these are the very conditions that the Secretary and Congress have cited in explaining the rationale for imposing the preshift requirements in the first place.

We take issue, not with our colleagues' finding of S&S, but with how they choose to reach their conclusion. We suggest that, in spite of their protestations to the contrary, our colleagues have for all practical purposes applied a presumption of S&S to violations citing a

failure to conduct the preshift exam. If the Commission will uphold the Secretary's S&S designation because the mine is capable of liberating methane (even though the Secretary presented no evidence that the unexamined area contained methane, Tr. V 388, 420), and because the roof may be unstable (even though the Secretary presented no evidence that the roof in the unexamined area posed a hazard, *Id.*), and because adjacent mined out areas could contain dangerous atmosphere (even though the Secretary presented no evidence that such areas were actually oxygen-deficient or that miners were even likely to encounter the atmosphere, *Id.*), it is disingenuous to claim, as our colleagues do, that we are applying *Mathies,* which requires that the S&S determination be based on "the particular facts surrounding that violation . . . ." *Mathies,* 6 FMSHRC at 3 (citing *Nat'l Gypsum*, 3 FMSHRC at 825).[7] Thus, because of the inherent potential hazards existing in underground mining, we conclude that violations of the preshift standard are presumptively S&S. Moreover, to claim to decide this issue under *Mathies,* as our colleagues do, is to engage in a transparent fiction that can only foster more confusion.[8]

Our decision to apply a presumption of S&S to preshift violations does not end our inquiry. In the instant case, the judge vacated the Secretary's S&S determination because the inspection conducted immediately after the order revealed no hazardous conditions in the affected area of the mine. 16 FMSHRC at 1701-02. We must therefore address the issue of whether the operator can rebut the S&S presumption for preshift violations by evidence tending to prove that the area in question did not contain hazards when the miners entered it. Assuming the judge is allowed to consider the condition of the area at noon, we believe a reasonable mind

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[7] Moreover, it is difficult to see how our colleagues can square their S&S analysis here with their recent holding in *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996), in which they restricted consideration of the S&S nature of a violation to surrounding circumstances which were themselves also violative. They refused to consider evidence of a massive accumulation in an inactive area because it did not constitute a violation. *Id.* at 511. Although a mine's ability to liberate methane, and its potential to contain unsafe roof and dangerous atmosphere are conditions which can pose hazards to miners, they are not necessarily violations. Indeed, one could argue that, by their holding today, our colleagues have overruled *Jim Walter Resources,* sub silentio.

[8] Although *Manalapan* has correctly cited the standard for a due process violation, it applied it incorrectly. We agree that due process is denied if a presumption does not have "some rational connection between the fact proved and the ultimate fact presumed, and [if] the influence of one fact from proof of another [is] . . . so unreasonable as to be a purely arbitrary mandate." M. Br. at 9-10, *citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976). In light of our extensive discussion regarding the importance of the preshift and its role in preventing accidents, *supra* at 17-18, we believe that it is clearly rational to assume that if an operator fails to conduct a preshift inspection (the fact proven), that there is a reasonable likelihood of serious injury to the miners, and thus an S&S violation (the fact presumed). We therefore find that this presumption does not violate due process.

might accept the demonstrated lack of hazards at that time as a basis for inferring that dangerous conditions did not exist when the miners entered the area four hours earlier. While it is true many hazardous conditions are transient in nature, a judge would not be unreasonable in inferring, for example, that a roof that was weak or unstable at 8:00 a.m. would not (without human intervention) appear safe at noon. Likewise, if a disruption in the ventilation had caused methane to accumulate at 8:00 a.m. then, unless the problem were corrected, it is reasonable to conclude that methane would be present in an even greater amount four hours later. A lack of methane and roof problems at noon could therefore provide a basis for inferring the lack of methane and roof problem at 8:00 a.m. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v NLRB*, 305 U.S. 197, 229 (1938). True, the evidence of the conditions at noon would have to be weighed against MSHA's evidence regarding the mine's potential for methane liberation and the propensity of the roof to fall, but we are not able to say that the only conclusion a reasonable mind weighing all the evidence could reach is that an injury-producing event was likely to occur at the time the miners entered the area in question.

That being said, however, we agree with our colleagues that the judge's reliance on the condition of the area at noon is incorrect as a matter of law. We reach our determination not, as our colleagues conclude, because such evidence results from a "post-citation event[]" (slip op. at 8), but because allowing such evidence to rebut the S&S presumption would eviscerate the important prophylactic purpose behind requiring preshift examinations in the first place. Whether a preshift violation is S&S should be determined on the basis of the serious potential for harm that can confront miners when they enter an unexamined area of an underground mine. The risk associated with the operator's failure to preshift the area should be assessed not on the basis of the condition of the area itself but on the action of assigning miners to an unexamined area. Would we not assess the risk associated with playing Russian roulette by considering the potential for harm involved in holding a loaded gun up to one's head and pulling the trigger, rather than by considering what happened after the trigger was pulled? We conclude that the determination of risk to be accorded to a failure to conduct the preshift exam should not turn on the fortuitous circumstance that the unexamined area did not contain the hazardous conditions the exam was designed to detect.[9]

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[9] This was the approach taken by Judge Broderick who, when he reviewed the S&S designation on a preshift violation, posed the following query:

> How does one evaluate the hazard to which the violation contributes? By what is disclosed on an examination of the area after the examination? Emerald contends that this is the test. But the hazard and the violation here involve, not the condition of the area as such, but rather the assigning of miners to work in an uninspected area. . . . Can it seriously be argued that failure to

Excluding post-hoc evidence because of its potential to undermine the prophylactic purpose of the preshift exam is consistent with several provisions of the Federal Rules of Evidence that exclude certain types of evidence based mainly on policy considerations. For example, pursuant to Fed. R. Evid. 407, evidence of repairs made after an accident is not admissible as evidence of negligence before the accident. This is based on the policy that encourages potential defendants to fix hazardous conditions without fearing these actions will be used as evidence against them. 10 James W. Moore, *Moore's Federal Practice* § 407.02, at IV-152 (2d ed. 1996); 29 Am. Jur. 2d *Evidence* § 464, at 534 (1994). Similarly, Fed. R. Evid. 408 excludes evidence of settlement discussions to promote the public policy "favoring the compromise and settlement of disputes" (10 James W. Moore, *Moore's Federal Practice* § 408.01[9], at IV-167 (2d ed. 1996)) and to "foster full and free discussion and negotiations in order to encourage out-of-court settlements" (29 Am. Jur. 2d *Evidence* § 508, at 588 (1994)). Finally, Fed. R. Evid. 409 states that evidence of payment or promises to pay medical expenses is not admissible to prove liability for the injury. The rule is based on policy considerations and "humanitarian motives" (10 James W. Moore, *Moore's Federal Practice* § 409.02, at IV-176 (2d ed. 1996)), because to hold otherwise "would tend to discourage assistance to the injured individual" (29 Am. Jur. 2d *Evidence* § 480, at 560 (1994)). Accordingly, our refusal to take into account evidence concerning the lack of hazards in the relevant area in determining whether a failure to preshift is S&S is based on equally important policy concerns, as we articulated above.[10]

> perform one of these examinations is not significant and substantial if a post-violation examination does not show hazardous conditions?

Emerald Mines, 7 FMSHRC at 444.

[10] To the extent the Secretary suggests that the presumption of S&S may be rebutted by evidence showing that hazards did not exist in the unexamined area (S. Reply Br. at 4-5), we reject such suggestion for the reasons enunciated above. To the extent the Secretary suggests that other theoretical bases exist for rebutting an S&S presumption (S. Br. at 19 n.11), we decline to issue a declaratory type opinion in this case.

Conclusion

In light of the forgoing, we would vacate and remand the judge's S&S determinations pertaining to Citation No. 3164716 and No. 3835998. We would reverse his S&S determination pertaining to Citation No. 4238749 and remand for reassessment of penalties.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 1, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 96-9-M A. C. No. 08-01058-05528
v.	:	White Rock Quarries
VECELLIO & GROGAN INCORPORATED, Respondent	:	

DECISION

Appearances: Karen E Mock, Esq., Office of the Solicitor, U. S. Department Of Labor, Atlanta, Georgia, for Petitioner;
Roger L. Sabo, Esq., Schottenstein, Zox & Dunn, Columbus, Ohio for Respondent.

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Vecellio & Grogan, Incorporated, under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. A hearing was held on May 8, 1996, and the parties have submitted post hearing briefs.

Section 110(a) of the Act, 30 U.S.C. § 820(a), provides that a mine operator of a facility covered under the Act where a violation of a mandatory health or safety standard occurs, shall be assessed a civil penalty. It is well settled that the Secretary has the burden of proving a violation. Keystone Coal Mining Corp., 17 FMSHRC 1819, 1838 (November 1995); Southern Ohio Coal Co., 14 FMSHRC 1781, 1785 (November 1992); Garden Creek Pocahontas, 11 FMSHRC 2148, 2152 (November 1989); Consolidation Coal Co., 11 FMSHRC 966, 973 (June 1989); Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). Where a violation is proved, section 110(i), 30 U.S.C. § 820(i), sets forth six factors to be

considered in determining the appropriate amount of a civil penalty as follows: gravity, negligence, prior history of violations, size, ability to continue in business, and good faith abatement.

The alleged violation in this case is contained in a citation issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). This section provides that where there is a violation that is both significant and substantial and due to unwarrantable failure, a citation shall be issued containing such findings. If within 90 days the Secretary finds another violation due to unwarrantable failure, a withdrawal order must be issued.

The subject citation charges a violation of section 56.12071 of the Secretary's mandatory standards, 30 C.F.R. § 56.12071, which provides as follows:

> When equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken.

Citation No. 4088141, dated April 13, 1995, charges a violation for the following condition or practice:

> A fatal accident occurred at this mine at about 12:05 P.M. on April 10th 1995, when a Manitex Boom Truck, Model No. 1461, boom came in contact with, 13,200, Volt Overhead Power Line. The victim was holding onto the boom cable preparing to hook up for a lift when the extended boom was swung into the power line resulting in an electrocution.
>
> The foreman (victim) was aware of the vicinity of the power lines and was also directing the boom operator by hand signals, this is an unwarrantable failure.

The inspector who issued the citation found the violation was significant and substantial and due to high negligence.

At the hearing the parties agreed to the following stipulations (Tr. 5-6):

> 1. The operator is the owner and operator of the subject mine, and for purposes of this proceeding the

operator is White Rock Quarries, a division of Vecellio & Grogan, Inc.;

2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

3. I have jurisdiction of this case;

4. The inspector who issued the subject citation was a duly authorized representative of the Secretary of Labor;

5. A true and correct copy of the subject citation was properly served upon the operator;

6. Payment of a penalty will not affect the operator's ability to continue in business;

7. The operator demonstrated good faith abatement;

8. The operator has a low history of prior violations for an operator its size;

9. The operator is medium in size;

10. The power lines identified in the subject citation were a three phase wire, 13,200 volts, and not de-energized at the time in question.

Statement of Facts

White Rock Quarries, where the fatality occurred, is a limestone quarry that has been in operation for approximately 10 years (Tr. 56). The limestone is in a lake and respondent hires a blasting company to do the shooting which is the first step in the extraction process (Tr. 56). When blasting is completed, respondent uses draglines sitting on the lake to remove the material and then leaves it on the bank to be carried to the bag plant (Tr. 56, 169). Caterpillar or Euclid 85 ton trucks haul the material from the lake to the aggregate or processing plant where the material is broken down into various sizes and fed onto different belts depending on the size desired (Tr. 57). The trucks go up a 400 foot ramp which rises about 65 or 70 feet (Tr. 29, 59). When they reach the top of the ramp, the trucks back

into the primary crusher where the truck beds are raised and the loads deposited (Tr. 59-60). The ramp is located next to the parts storage yard (Tr. 27, 30-32, 180).

In early February 1995, Florida Power and Light, at the request of respondent, installed a three phase power line with a voltage of 13,200 volts (Tr. 21-22, 25-26, Stip. 10). The power was needed to assemble an electric shovel (Tr. 22). Florida Power decided where the line would go and respondent agreed to the location (Tr. 24-25). The line ran along the toe of the slope created by the ramp and along the edge of the parts storage area (Tr. 27, 36-38). The weight of the evidence indicates that the power line passed over an area immediately adjacent to that part of the storage area where mantels were kept (Tr. 28, 35, 39-40, 139). Mantels are liners used in the crushing process (Tr. 61).

Before the power lines were installed, the operator's employees were told about their installation (Tr. 26-27, 231). Several meetings were held to discuss the lines (Tr. 26-27, 181). The employees were told to be careful around the lines (Tr. 222, 230-231). As a general matter, safety meetings were held weekly and safety materials, including the Employment and Safety Policy Handbook, were given to new employees (Tr. 51, 65, 217, Exhs. R-A, R-B). The corporate safety director furnished foremen with a list of suggested topics for the meetings (Tr. 27). Also, each new employee was placed with an experienced employee for a minimum of 40 hours and if large equipment was involved, the period could be longer. An employee would be suspended for three days for his first safety violation and terminated for his second offense (Tr. 197-198). Foremen were given the same training as regular employees, but there was an increased emphasis on overall safety supervision (Tr. 67, 179). New foremen were put with experienced foremen for two weeks and, in addition, the operations manager to whom all foreman report, spent time with foreman trainees before they were turned loose (Tr. 174-175). Foremen were told to make sure that areas were kept clean and safe and that the employees worked safely in a safe environment (Tr. 179). There were quarterly safety meetings for foremen and they were given safety materials to hand out at their meetings with the employees under their supervision (Tr. 68).

The decedent, James Knapp, was the day shift foreman in charge of production at the operator's aggregate plant (Tr. 171). He had worked at the quarry for over seven years and had been a foreman for six years (Tr. 69). Prior to becoming a foreman,

decedent had been the aggregate plant operator from the time the plant was opened (Tr. 176-177). When the plant was opening and later as foreman, decedent spent time with the operations manager, learning and going over how the aggregate plant should be run (Tr. 177-178). He was very familiar with everything that occurred at the plant (Tr. 177-178). Because of his skills, abilities, and attitude decedent was promoted to foreman (Tr. 177). As foreman, his immediate supervisor was the operations manager (Tr. 171). Decedent supervised 12 to 14 people and oversaw the running of the plant, including sizing the limestone (Tr. 69, 70, 172). There were seven foremen, all of whom were working foremen and had been cross trained (Tr. 45, 70). Decedent had been cross trained in all operational matters, but his primary responsibilities were at the aggregate end (Tr. 177). As part of his supervisory duties, decedent conducted weekly safety meetings (Tr. 94-96).

James Jean was a boom truck operator who had worked for the operator for approximately six years when the accident occurred (Tr. 183, 214). First, he had been a grounds man who cleaned things up and helped wherever needed, and then a mechanic's helper (Tr. 215). He subsequently became a boom operator and performed that job for about three to four years before the accident (Tr. 218). He was not a supervisor (Tr. 72). He had gone through standard job and safety training for new employees (Tr. 183). Decedent had trained him in all the positions he had occupied (Tr. 216). Initially, decedent spent 40 hours with the boom operator, going with him all over the place and showing him everything until he was ready to do his own work (Tr. 216). Decedent also trained him in the safe operation of the boom truck (Tr. 218). Decedent had been the boom operator's supervisor for five or six years and they worked together three or four times a week (Tr. 102, 216, 218).

Respondent's Employment and Safety Policy Handbook requires that when a spotter is necessary, one designated person shall do all the signaling and use standard hand signals (Exh. R-B, p. 37). The handbook further directs that safe clearances from electrical lines always be maintained and that allowances be made for boom sway, rock or sag and for electrical line swaying. Finally, the handbook provides that a clearance of at least 10 feet horizontally and vertically must always be maintained between any part of the crane, loadline or load and any electrical line carrying up to 50,000 volts (Exh. R-B, pp. 38-39). According to the manual for boom truck operators, signals shall be as they are delineated in the manual's drawings. Also, under

the manual the signal person must be qualified by experience with the operations, be knowledgeable of the standard signals, position himself in clear view of the operator and have a clear view of the load, crane and operating area (Exhs. P-15, R-I).

On April 10, 1995, decedent and the boom operator were moving mantels from the storage yard onto the boom truck (Tr. 43, 44). As already noted, the mantels were in an area immediately adjacent to a point directly under the 13,200 volt powerline (Tr. 28, 35, 39-40, 139). Decedent directed the operation (Tr. 44). The boom operator swung the boom to pick up the first mantel without receiving hand signals as required by the boom operator's manual and the Employment and Safety Policy Handbook (Tr. 220, Exhs. R-B and R-I). The boom operator knew he was supposed to have a signalman (Tr. 225). The foreman attached the mantel to the chain at the end of the boom, walked over to the truck, waited there until the boom operator lowered the mantel onto the bed of the truck, and then unhooked the mantel from the chain (Tr. 220-221).

After the first mantel was unhooked, decedent did not let go of the chain at end of the boom (Tr. 220). When the boom operator swung the boom to get the second mantel, decedent gave him hand signals with one hand while holding the chain with the other (Tr. 44-45, 219). The operator watched the signals and followed them (Tr. 219). The operator watched decedent and expected decedent to watch the wires (Tr. 226, 227). When lifting mantels onto the truck, decedent usually told the operator to lower the boom, but in this instance he did not. The boom was swung over in an upright position and hit the high voltage line (Tr. 46-48, 120, 220, 225). The operator saw decedent lying on the ground and then looked up to see the boom touching the high voltage wire (Tr. 226). Because decedent was holding the chain, he was electrocuted when the boom touched the wire (Tr. 110, 163).

Conclusions

Section 56.12071, supra, requires that high voltage power lines be deenergized or other precautionary measure taken, when equipment must be moved or operated near energized high voltage power lines and clearance is less than 10 feet. There is no dispute in this case that the boom truck which was being operated in connection with moving the mantels came closer than 10 feet to the high voltage power lines. The boom truck actually touched the wire. There is also no disagreement that the wires were

energized. The issue presented is, therefore, whether respondent took precautionary measures.

The inspector testified that precautions were not taken because there should have been three people engaged in moving the mantels, one to operate the crane, a second to signal, and a third to attach the mantel (Tr. 120). However, the inspector admitted that using three people is not standard procedure in this type of task and he agreed that there was nothing wrong with a two person team (Tr. 125, 144). In light of the inspector's admissions, I conclude that the use of two persons to move the mantels was permissible and did not constitute a failure to take precautionary measures.

The inspector further stated that the failure to wear protective gloves and boots constituted a failure to take precautions (Tr. 120). At one point he expressed the belief that if the decedent had worn gloves, he would not have been electrocuted (Tr. 124). But he also stated that wearing boots and gloves was not standard procedure and that he did not know if gloves would have protected decedent from 13,200 volts (Tr. 124-125, 141-142). In view of the contradictions in the inspector's testimony, I conclude that the absence of protective boots and gloves was not a failure to take precautionary measures.

Finally, the inspector said that different equipment should have been used and that a boom truck smaller than the one in this case is ordinarily used (Tr. 125-126). However, he also stated that trucks of this size are used and there is no prohibition against them (Tr. 126). The use of the boom truck was therefore, not improper and cannot serve as the basis for finding that precautionary measures were not taken.

The inspector's reasons for finding a violation are however, not determinative in this proceeding. A hearing has now been held at which documentary evidence was received and testimony given. The matter is before me for a de novo decision based on all evidence presently of record.

Respondent has submitted evidence showing that weekly safety meetings were held and that new employees, including new supervisors, had a period of training during which they were accompanied and trained by an experienced person. I accept this evidence. I further accept evidence that safety meetings were held before placement of the power lines to advise company employees of the installation. As already set forth, the boom operator described

his training including the instructions he received from decedent who was his foreman. Finally, I accept the statements of respondent's operations manager that decedent was trained as an aggregate plant operator and as a foreman.

Turning to the events of the day the fatality occurred, the conduct of the individuals involved must be examined to determine whether there was a violation of the mandatory standard. The boom operator was watching decedent's signals, as he had been taught and trained to do (Tr. 77-78, 99-100, 105, 182, 188, 223). The boom operator looked to the rear of the truck so that he was facing the signaler and watching his signals (Tr. 77). The signaler is the boom operator's eyes (Tr. 182). No blame attaches to the boom operator with respect to the cited condition or practice and I conclude that there was no failure on his part to take precautionary measures.

With respect to decedent's conduct, the evidence demonstrates that because he held the chain at the end of the boom, he signaled the boom operator with only one hand (Tr. 85, 219-220, 221). Holding the chain with one hand while signaling with the other was improper (Tr. 81, 250-251). And holding the chain was the reason decedent was electrocuted when the boom hit the wire (Tr. 110, 163). Testimony shows that although one man could signal and hook the mantels, the two tasks were not intended to be performed at the same time, but rather in sequence (Tr. 75, 81-82). There was no reason for decedent to have held the chain while he was signaling and no one knew why he did so (Tr. 79, 81, 151, 225). Under normal operating procedures signaling requires two hands (Tr. 85). Drawings of standard hand signals in the boom operator's manual show that either two hands are required or that one hand is used to signal while the other is at the signaler's side (Exh. R-I). No drawing shows a signaler performing another task while he is signaling. The Employment and Safety Policy Handbook which respondent gives its employees, requires that safe distances be maintained between power lines and equipment and that there be at least a 10 foot clearance horizontally and vertically between any part of a crane and any electrical line (Exh. R-B, pp. 38-39). Decedent failed to give signals that would have maintained the requisite clearance. Based upon the foregoing, I conclude that decedent violated the mandatory standard by failing to take precautionary measures as required by the standard. On the contrary, he engaged in extremely dangerous behavior which resulted in the fatal accident.

The Commission has long held that operators are liable without regard to fault for violations of the Mine Act. Fort Scott Fertilizer Inc., 17 FMSHRC 1112, 1115 (July 1995). The Commission's decisions on this point have been upheld by the courts. Asarco, Inc., 8 FMSHRC 1632, 1634-36 (November 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989); Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-894 (5th Cir. 1982). It is therefore, established that an individual miner's misconduct in causing a violation is not a defense against operator liability. Particularly instructive for present purposes is the Commission's determination that under the liability scheme of the Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct. Ideal Cement Co., 13 FMSHRC 1346, 1351 (September 1991). So too, the Court of Appeals for the Fifth Circuit has held that an operator is liable for a violation even where significant employee misconduct caused the violation and it is irrelevant whose act precipitated the violation. Allied Products, supra at 894. The existence or degree of fault may be taken into account in determining the amount of penalty when negligence is evaluated. Asarco, supra at 1636. In light of the foregoing, I conclude the operator is responsible and liable for the violation.

The Act mandates that where there is a violation, a penalty must be assessed. Old Ben Coal Company, 7 FMSHRC 205, 208 (February 1985); Tazco, Inc., 3 FMSHRC 1895, 1897 (August 1981); Van Mulverhill Coal Company, Inc., 2 FMSHRC 283, 284 (February 1980); Island Creek Coal Company, 2 FMSHRC 279, 280 (February 1980). As set forth above, section 110(i) of the Act specifies six factors to be considered in setting the amount of penalty. Gravity is one of the factors. Since the violation in this case resulted in a fatality, I conclude that it represents the ultimate in gravity. Moreover, the evidence establishes the four elements necessary to sustain a significant and substantial finding. Peabody Coal Company, 17 FMSHRC 508, 510-511 (April 1995); Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984); National Gypsum Company, 3 FMSHRC 822, 825-826 (April 1981). A violation existed which presented the discrete safety hazard of electrocution. In addition, there was a reasonable likelihood the hazard would result in a reasonably serious injury. The fatality was not a fluke, but a reasonably likely consequence of the foreman's hazardous conduct.

The next factor to be considered is negligence. As set forth supra, decedent acted in a reckless and irresponsible manner by engaging in conduct which, in light of his training and experience, he must have known was very risky and dangerous. I conclude therefore, that decedent was guilty of the highest degree of negligence and that his conduct constituted unwarrantable failure as that term has been defined by the Commission. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). The issue is whether decedent's negligence is imputable to the operator for purposes of fixing an appropriate penalty amount. Under Commission precedent negligence of a rank and file miner cannot be imputed unless the operator fails to discharge its responsibilities with respect to training, supervision or discipline. U.S. Coal, Inc., 17 FMSHRC 1684, 1686 (October 1995); Rochester & Pittsburgh Coal Company, 13 FMSHRC 189, 197 (February 1991); A. H. Smith Stone Company, 5 FMSHRC 13, 15 (January 1983); Southern Ohio Coal Company, 4 FMSHRC 1459, 1464 (August 1982). However, negligence of a supervisor is imputable to the operator unless the operator can demonstrate that no other miners were put at risk by the supervisor's conduct and that the operator took reasonable steps to avoid the particular class of accident. Nacco Mining Co., 3 FMSHRC 848, 849-850 (April 1981). This has been referred to as the Nacco defense. The Commission has emphasized that an agent's unexpected misconduct may result in a negligence finding where his lack of care exposed others to risk or harm. Id. at 851. Even wilful and intentional misconduct of employees may be imputed. Rochester & Pittsburgh, supra at 197.

By his misconduct decedent not only put himself in peril. He also placed the boom operator at risk. Testimony from the operator's corporate safety manager and the MSHA inspector indicates that confronted with a situation where his supervisor was electrocuted before his eyes, the boom operator in the stress of the movement could have left the truck and stepped onto the ground, thereby running the risk of becoming an electrical ground (Tr. 107, 165). I find that the boom operator was put at risk because under the circumstances there was a distinct possibility he could have stepped from the truck, making himself a ground. I recognize that in this instance the boom operator did not leave

the truck, but I do not believe the risk has to mature for it to have been present. Accordingly, on this basis I conclude that the Nacco defense is not available to the operator in this case.

In addition, the corporate safety manager believed that despite outriggers which served as grounds, the boom operator would have been in danger even on the truck because electricity might not always go to ground (Tr. 107-109). The inspector also believed the boom operator was at risk because high power jumps (Tr. 163). In light of this evidence, I again find that the boom truck operator was put at risk by decedent's actions, precluding a Nacco defense.

The Nacco defense also is not applicable where the operator does not take reasonable steps to avert the particular type of accident that occurred. Evidence regarding the operator's orientation and training of new employees as well as its subsequent safety meetings has been set forth and accepted. However, the evidence also shows that in the area of the aggregate plant respondent was not conducting a safe operation. Decedent's unsafe behavior was not an aberration or isolated instance. The boom truck operator testified that decedent often held the chain while signaling (Tr. 221). Sometimes decedent held the chain and sometimes he did not (Tr. 225). Other signalers also held the chain while directing the boom operator (Tr. 228-229). The corporate safety director was not aware that signalers held the chain while signaling (Tr. 249). He was not sure whether the operator's policy regarding holding the chain was spelled out, but he believed that the general practice was not to hold the chain (Tr. 249). The operations manager, who was decedent's supervisor and who was on site, did not know how decedent and other foreman performed their duties (Tr. 249, 252). Thus, the record demonstrates that those in management above the foremen had no idea what was actually happening on the ground. I conclude that the operator did not take reasonable steps to prevent the type of accident that occurred because holding the chain while signaling was an ongoing practice. The operator is obliged not only to train new employees and hold safety meetings, but also to monitor the activities of miners and foremen to insure that the safety procedures they have been told about are followed. I conclude that on this basis also the Nacco defense is not available to respondent. In light of the foregoing, decedent's extremely negligent conduct which constituted unwarrantable failure is imputable to the operator for purposes of determining an appropriate penalty amount.

Even more importantly, I conclude that apart from imputation of negligence, the operator itself was highly negligent because it failed to keep itself apprised of how its quarry was actually being run. As set forth above, the operator did not provide on the ground oversight of the actions of its miners and first level supervisors. It is not sufficient for the operator to initially train its foremen and have them conduct safety meetings, but then leave them to their own devices on site when the work is being performed. The operator's deficient and aggravated conduct constituted a very high degree of negligence and unwarrantable failure.

The stipulations of the parties which I have accepted, address the other criteria specified in section 110(i), supra. I particularly note the operator's low history of prior violations. After considering all the 110(i) factors, I determine that a penalty of $6,000 is appropriate.

The excellent post-hearing briefs filed by the parties have been reviewed and were most helpful. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDER

It is ORDERED that the finding of a violation for Citation No. 4088141 be AFFIRMED.

It is further ORDERED that the significant and substantial finding for Citation No. 4088141 be AFFIRMED.

It is further ORDERED that the high negligence finding for Citation No. 4088141 be AFFIRMED.

It is further ORDERED that the unwarrantable failure finding for Citation No. 4088141 be AFFIRMED.

It is further ORDERED that a penalty of $6,000 be ASSESSED and that the operator PAY $6,000 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 2 1996

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	
CLETIS R. WAMSLEY,	:	Docket No. WEVA 93-394-D
	:	Hope CD 93-01, 93-05
	:	
ROBERT A. LEWIS,	:	Docket No. WEVA 93-395-D
	:	Hope CD 93-02
	:	
JOHN B. TAYLOR,	:	Docket No. WEVA 93-396-D
	:	Hope CD 93-04
	:	
CLARK D. WILLIAMSON, AND	:	Docket No. WEVA 93-397-D
	:	Hope CD 93-07
	:	
SAMUEL COYLE,	:	Docket No. WEVA 93-398-D
Complainants	:	Hope CD 93-11
v.	:	
	:	Mutual Mine I
MUTUAL MINING, INC.,	:	
Respondent	:	

DECISION ON DAMAGES FOLLOWING REMAND

Before: Judge Amchan

On June 24, 1994, I found that Respondent had violated section 105(c) of the Act in discharging the Complainants on December 21, 1992. Subsequently, on November 30, 1994, I granted the Secretary of Labor's motion for summary judgment on the issue of damages. I ordered Respondent to pay the following amounts to the respective Complainants:

Cletis Wamsley	$35,880.88
Clark D. Williamson	$ 5,203.31
Samuel Coyle	$19,667.81
John B. Taylor	$23,132.15
Robert A. Lewis	$46,825.73

16 FMSHRC 2371, 2372.

However, in accordance with Commission precedent at the time, I stated that Complainants must subtract any amounts received in unemployment compensation benefits from the back pay award and return those amounts to Respondent, if such amounts had been paid, 16 FMSHRC 2372 n. 1.

In accordance with the decision of the Court of Appeals decision in Secretary of Labor v. Mutual Mining, Inc., 80 F.3d 110(4th Cir. 1996) and the ensuing Commission remand order, I hereby order Respondent to pay the amounts stated above in full. If any back-pay has been returned to Respondent pursuant to my November, 1994 decision, Respondent is ORDERED to pay these amounts back to the individual Complainants within 45 calendar days of this decision. Upon payment of these amounts these cases are dismissed.

Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 5 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 95-112-M
Petitioner	:	A.C. No. 30-00610-05515
v.	:	
	:	No. 2 Mine
GOUVERNEUR TALC CO., INC.	:	
Respondent	:	

DECISION

Appearances: James A. Magenheimer, Esq., U.S. Department of Labor, Office of the Solicitor, New York, New York, for the Petitioner;
Sanders D. Heller, Esq., Gouverneur, New York, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging violations by the Gouverneur Talc Co., Inc. (Gouverneur) of 30 C.F.R. §§ 56.3130 and 56.3200. Subsequent to notice, the case was heard in Watertown, New York, on December 5-7, 1995, and in Syracuse, New York, on March 26, 1996.

The parties filed post hearing briefs on June 7, 1996. Gouverneur's reply brief was received on June 24, 1996.

Findings of Fact and Discussion

I. Introduction

The subject surface talc mine operated by Gouverneur consists of a series of benches located at various elevations. Each bench consists of a floor or travelway, and a vertical highwall. In April 1995, the Pioneer Bench was the highest

bench, the 617 was below it, and the No. 4 was below that. Four other benches were located below the No. 4 bench. The No. 617 and 4 benches were created by a contractor sometime between the fall of 1992, and the spring of 1993. In normal mining operations, muck, or loose material resulting for the blasting of the highwall, was removed by a loader or backhoe.

II. Citation No. 4288343

A. Violation of 30 C.F.R. § 56.3130

On April 4, 1995, William L. Korbel, Jr., an MSHA Inspector, inspected Gouverneur's operation. At about 7:30 a.m., while standing on top of the No. 617 bench, he looked down at the No. 4 bench, and observed a number of large loose pieces of material above where a 996D Caterpillar front-end loader ("loader") was loading muck. Korbel went down to the No. 4 bench. From a position about thirty-five to forty feet away from the highwall, he observed a piece of loose material, ("chunck") ten feet by twelve feet by eight feet, approximately thirty feet above the floor of the bench. Korbel stated the chunck piece was resting on loose material, and that the area below the loose material was, "nearly vertical" (Tr. 24). Korbel indicated that this chunk was larger than the bucket of the loader, and was above the reach of the loader.[1]

According to Korbel, the highwall of the bench extended vertically from the floor a variable distance of approximately thirty to forty feet, and then extended diagonally a linear distance of approximately eighteen feet.

Korbel issued a Section 104(d)(1) citation alleging a violation of 30 C.F.R. § 56.3130 which provides as follows:

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

---

[1] The maximum reach of the loader is eighteen feet.

1. Whether Gouverneur was using "mining methods" that will maintain wall and slope stability

Korbel testified that he observed Mark Trombley digging into a muck pile with the loader. According to Korbel, digging into the muck pile with the loader was not a safe mining method, because it did not maintain wall stability of the muck pile. He opined that this method was exposing Trombley to the danger of being injured or killed by falling rock. In this connection, Petitioner argues that Trombley was exposed to the danger of being crushed by the chunk, located above him on a vertical wall, and that this piece could not have been controlled by the loader.

Although Trombley might have been exposed to the hazard of the large chunk in the pile, there is no empirical evidence that Gouverneur's method of removing material from the muck pile had any detrimental effect on the stability of the pile, wall, or slope. Neither party presented any substantial, convincing evidence regarding how the term "stability" is commonly understood in the mining industry. A Dictionary of Mining, Mineral and Related Terms (1968) ("DMMRT"), defines "stability," as pertinent, as follows: "The resistance of a . . . spoil heap . . . to sliding, over terming, or collapsing . . . *See also*, angle of repose:" . . . "angle of repose" is defined in the DMMRT as follows: "The maximum slope at which a heap of any loose or fragmented solid material will stand without sliding or come to rest when poured or dumped in a pile or on a slope." There is no evidence that the muck pile was not at rest. Accordingly, I find that when cited, the pile was stable.

Korbel explained Gouverneur's mining method as follows:

> A. Yes. There was more loose. This whole area had started at what we would call an angle of repose from the cast off of the shot that cascaded down over the sides; had a pretty good angle. The problems came when they started digging in . . . This material would not come down that easy, and they were getting fairly vertical heights where they were mucking. And that was what created the exposure; because in order to be there and to clean this, as you're raising your bucket loader your loader has to come in underneath. It's just the way it functions. And that was bringing the

operator into very close proximity of this loose, and the proximity was almost -- nearly vertical, which is just a very bad situation (sic.) (Tr. 27-28).

Korbel did not specifically explain how Gouverneur's method of mining would not maintain stability of the muck pile. Nor did Petitioner adduce any other evidence on this point. I thus conclude that Petitioner has not established that Gouverneur's mining method would not maintain stability of the muck pile or the wall.

2. The width and height of the bench based on the 996D loader used for cleaning of benches or scaling of slopes

In essence, Petitioner next argues that Gouverneur violated the second sentence of Section 56.3130 supra which provides as follows: "When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks and slopes."

a. Scaling of Walls, Banks, and Slopes

Neither party presented any evidence as to whether the operations at issue constituted "scaling" as that term is commonly understood in the mining industry. The DMMRT, defines "scaling," as pertinent, as follows: "a. The plucking down of loose stones or coal adhering to the solid face after a shot or a round of shots has been fired . . . (b) removal of loose rocks from the roof or walls . . . " Based on this definition, I conclude that there is no evidence that Trombley was performing any scaling, or that any scaling was being performed at the specific area cited.

b. Cleaning of benches

Similarly, there is no evidence in the record as to whether Gouverneur's mucking operation is within the meaning of the term "cleaning of benches", as commonly understood in the mining industry. However, Gouverneur has not asserted this point in its defense. Accordingly, it is assumed that this is no disagreement that the operation performed by Trombley was within the purview of the term "cleaning of benches".

c. Height of the bench relative to the operation of the loader

Petitioner argues that since, according to the testimony of Korbel, the height of the bench was more than double the maximum reach of the front end loader, it was not based upon the type of equipment used. Petitioner cites Korbel's testimony that as a result there was no way to safely bring the large chunk down by way of the loader. Petitioner also relies on the testimony of Harold vonColln, Gouverneur's Mining Superintendent, who indicated that he would not assign a 966D loader to a muck pile if it is "substantially" above the loader, as "that would constitute a hazard" (Tr. 671).

In essence, Gouverneur argues, inter alia, that as part of its operation, only the lower portion of the muck pile was being mucked with the 966D loader, and that it had planned to bring in another piece of equipment of handle the elevated Section of the muck pile. However, even should these steps be taken some time in the future, it does not negate the fact that, when cited, the height of the bench was well beyond the capacity of the 996D loader. I thus find that the height of the pile was not based on the equipment being used i.e., the 996D loader, and as such Gouverneur did violate Section 56.3130, supra.

B. Significant and Substantial

According to Petitioner the violation herein is significant and substantial.

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

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

Applying the Mathies, supra, holding to the instant case, due to the fact that the large chunk was beyond the reach of the loader, I find that the violative condition contributed to the hazard of the chunk falling and injuring Trombley or some other miner in the area. The question to be resolved is the likelihood of an injury producing event i.e., the chunk or some other hazardous object falling and causing injuries. According to

Korbel, the chunk was unpredictable and unmanageable. However, on cross-examination, he recognized that a number of rocks under the chunk were "doing a certain amount of support" (Tr. 146). He was asked whether the chunk can move, and he indicated as follows: "As long as everything stays right there, you would be good (sic)" (Tr. 146). He elaborated as follows: "As long as the face is left this would fairly stay there, unless you had different changes, such as your weather, or vibrations, or something thats going to effect it" (sic) (Tr. 147).

Although the chunk could have become dislodged, there is an absence of specific evidence in the record to base a conclusion that this event was reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial.

C. Unwarrantable Failure

As discussed above, (I (A) infra), the essence of the violative condition was that the height of the muck pile was not based on the reach of the loader. It is incumbent upon Petitioner to establish that this violation resulted from Gouveneur's aggravated conduct which is more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997 (1987)). In his brief, Petitioner argues, in essence, that aggravated conduct is predicated upon Gouverneur's management refusing to take action knowing that the nature of Trombley's work was unsafe. Specifically, Petitioner refers to Trombley's testimony that he had previously complained to his foreman, Craig Woodard, and to the Safety Director, Terry Jacobs that he "didn't like the looks of that chunk" (Tr. 399), but that Woodard did not take care of it.

Petitioner also refers to Trombley's testimony that when he was mucking the day prior to the issuance of the order at issue, Leonard Zeller, told him that where I was mucking "it was -- it was similar -- like the same type of inciden that it was when -- when the stuff come down on his loader" (sic) (Tr. 415). Trombley told this to Jacobs who told him to take it up with his foreman, Woodard. According to Trombley, when he spoke to Woodard the next day. " . . . he gave me an ultimatum: If you want to go down to the other bench, if you felt more comfortable, go down there" (sic.) (Tr. 416).

I find that the incident referred to by Zeller, and Woodard's reaction to Trombley's concerns, cannot form the basis of any aggravated conduct. As noted above, (I (A) infra), the specific violative condition found herein was that the height of the bench was not based on the reach of the 996D loader. In contrast, Trombley's expressed concerns related to the hazards associated with the chunk.[2] Also, the Zeller incident in February 1995 related to the collapse of a sidewall. There is no evidence that the Zeller incident related to the cited condition herein i.e., the height of a bench/muck pile as it related to the 996D loader.

Donald Fuller, Governeur's General Mine Foreman indicated that a front-end loader mucks from the bottom of the pile; that Gouvernor did not intend for the loader to be used to muck the top of the pile, and that other equipment would be used for that task.

In discussions with Korbel subsequent to the Zeller incident regarding avoiding another similar situation, Fuller stated that "We said we would try to cut down the height of the benches that we were working on, on the - starting with the upper benches" (sic.) (Tr. 589).

According to Fuller, normally, in lowering the benches, one starts with the highest bench. He indicated that the approximately 200 feet of the top 617 bench had been lowered down to thirty four feet. He indicated that it would take probably a couple of years before the No. four bench, would be lowered.

Randy Gadway, an MSHA supervisor, testified that on February 9, he met with Harold vonColln, Governeur's Mine Superintendent, and observed the bench where the Zeller incident had occurred. Gadway indicated that vonColln explained the corrective measures that Gouverneur was going to take. He

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[2]In response to Trembley's concerns about the chunk, Woodard told Tremble to place berm rocks approximately 15 feet from the face of the wall, and to munk to the left side of the chunk.

indicated that vonColln told him that Gouverneur intended to replace the front-end loader with a Caterpillar 235 excavator ("235 excavator") to load and scale. This excavator has a longer reach than the loader at issue.

VonColln testified later on at the hearing, and did not rebut Gadway's testimony regarding the conversations between the two of them. Accordingly, Gadway's testimony on this point is accepted.

Michael Anthony Guida Jr., a mining engineer employed by Gouverneur, opined that the 996D loader was safer than a 235 excavator, as the latter is slower, and requires the building of a barrier for protection before it can be used to remove materials located above it. He also indicated that, in general, in the normal operation of the 235 excavator, its operator would face away from the muck pile. According to Guida, it would have been dangerous to have used the 235 excavator to muck the pile at issue. He explained that the operator would have to place the 235 excavator close to the toe of the muck pile to reach the keystones that were supporting the chunk. According to Guida, once the keystones would be removed, the chunk would probably come down and "if he had his bucket in a manner that that rock would roll over the back of his bucket, it could -- slide down the stick of the boom and right into his cab. That is completely the wrong way to approach those, that chunk" (sic.)(Tr. 767). In the same fashion, Woodard explained that the 235 excavator would not have been the proper piece of equipment for use on the bench at issue as "you would have been working over your head with no protection in front of you" (Tr. 495).

Although there was conflict in the testimony between Woodward and Guida on one hand, and vonColln on the other regarding the use of a 235 excavator with a larger reach rather than the 996D loader, it can be inferred, that vonColln, was aware of the relationship between the equipment in use ie., the 996D loader, and the height of the pile. In opting for the use of the 235 excavator with a larger reach, it can be inferred that vonColln realized that the height of the bench, as constituted on the date at issue, was too high at a point in time when the cleaning or mucking was being performed by the 996D loader.

Within the context of the above evidence, I conclude that the level of Gouverneur's negligence reached the point of aggravated conduct, and would be considered to constitute an unwarrantable failure. (See, Emery, supra). As such, this finding would properly be included in a citation issued under Section 104(d)(1) of The Federal Mine Safety and Health Act of 1977 ("the Act") only if the violation would also have been found to have been significant and substantial. Since I have decided that the evidence has failed to establish that the violation was significant and substantial, (See, (I)(B) infra), I conclude that the 104(d)(1) citation at issue should be amended to a Section 104(a) citation.

D. Penalty

For the reasons set forth above, (I (C), infra.), I find that the level of Gouverneur's negligence reached the level of aggravated conduct. I find that the gravity of the violation was moderately high because any type of rock fall associated with this violation could result in a serious injury, or death. Considering the remaining factors set forth in Section 110(i) of the Act, I find that a penalty of $2,000 is appropriate.

II. Order No. 4288344

A. Violation of 30 C.F.R. § 56.3200.

Korbel indicated that in the course of his inspection he observed "a large amount of loose" (Tr. 65) dispersed throughout a 500 foot area above the travelway on the No. 4 bench. He said that the largest pieces were two feet by four feet by four feet, and that ten of these were dispersed through the area. He indicated that most were lying on loose material. Korbel said that a number of loose rocks were approximately three feet by three feet by one foot. Korbel noted that he also saw pebbles, and fist sized material. Korbel stated that there were loose rocks about two feet back from the face or top of the vertical wall.

Korbel indicated that two trucks travel on the thirty to forty foot wide roadway directly below the loose material. Korbel also observed truck tracks within five feet of the wall.

Korbel described the wall of the bench as being vertical, and forty feet high. According to Korbel, the loose material was above the vertical wall on a slope that was eighteen feet long, and at a forty to fifty degree angle. According to Korbel, the largest concentration of material was located in an area whose slope was forty to forty-five degrees.

Korbel indicated that at the top of the diagonal portion of the wall he lobbed five to ten pound basketball sized rocks at some rocks located ten to fifteen feet away. Korbel said that the largest of these were approximately one foot by six inches by eight inches, and that they moved when he hit them with the rocks that he was lobbing. Korbel also threw at other rocks about fourteen inches in diameter and most of these moved. Others were knocked off the edge of the wall.

Korbel said that the loose material can come down as a result of the vibration caused by vehicles traveling on the roadway underneath. Korbel also said that weather conditions such as alternating rain, cold weather, and warm weather, can erode material underneath the loose rocks and can cause the loose material to fall down due to lack friction.

Korbel issued an order under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. § 56.3200 which provides as follows:

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

According to Woodward, the day prior to the issuance of the instant order, Trombley had told him that he and other workers were concerned about material in the 500 foot area at issue. In response to these concerns, Woodard walked up to the area in issue. Woodward took with him a four foot long, one and a half inch diameter, aluminum scaling bar that had a steel tip. Using the scaling bar, Woodard attempted to move rocks that were approximately four feet by four feet by three feet. He was

unable to move these pieces. However, he was able to move about four or five basketball sized pieces, and send them below the highwall. Woodard indicated that he could not get any material to move in the area that he described as being in a valley. In general, Woodward described the material in the area in question as being at rest. He opined that there was no danger of the loose material moving by itself.

After the issuance of the order at issue, Guida and Korbel walked along the edge of the bench for about a hundred feet. Korbel pointed out some material. Guida opined that there was no danger of the objects falling down without "some large physical force trying to move it" (sic.) (Tr. 792), as these objects were lying at less than their angle of repose.

None of Gouverneur's witnesses rebutted or impeached Korbel's testimony that some of the loose material could have fallen down as a result of exposure to vibration caused by the trucks operating on the travelway below, or as the result of various weather conditions. Also, Gouverneur did not offer any eyewitness testimony to contradict the testimony of Korbel that he threw rocks at some of the material he cited and that some of the objects moved.[3] I therefore accept Korbel's testimony and find that some of the loose material cited could have fallen below onto the roadway. Accordingly, this condition created a hazard to the men operating the trucks that travel in the roadway below. There is no evidence that the cited area was posted with a warning against entry or that any barriers were installed. I thus find that Gouverneur did violate Section 56.3200 supra.

B. Significant and Substantial

According to Korbel, the presence of the loose material at issue could have resulted in a fatality should some of this material have fallen down and injured the trunk drivers who drive on the roadway below. Clearly this hazard was contributed to by

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[3]Fuller testified that normally when he has thrown rocks at larger objects he had not been able to move the larger objects. I find this testimony insufficient to rebut Korbel's testimony as to what he actually did. In this connection I observed Korbel's demeanor, and I find his testimony credible.

the violative conditions. However, the record is devoid of any evidence to predicate a finding that an injury producing event · i.e., some of the material falling on the roadway would have been reasonably likely to have occurred. Korbel indicated that the vibration of the vehicles traveling on the roadway below, and the effect of alternating rain, coal and warm weather can cause the material to fall down. On the other hand, Petitioner did not rebut or impeach the testimony of Woodard and Guida that, in essence, although the rocks were loose, they were at rest and at, or less than, the angle of repose. I thus find that although the cited loose rocks can fall, there is an absence of evidence in the record that this event was reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial.

C. Penalty

I find that in the event of a any of the material falling, a fatality could have resulted. Hence, I find that the violation was of a moderately high level of gravity.

The day prior to the issuance of the citation at issue Trombley had told Woodard that he and other drivers were concerned about a few chunks, four feet by four feet, by five feet, that were thirty to forty feet above the roadway. In response, Woodard went up to the area in question, spent about a half hour there, and tested various loose objects with a scaling bar. Since Woodard inspected and tested the area in response to Trombley's concerns, I find that Gouverneur's negligence herein to have been only moderate.[4] Considering the remaining factors set forth in Section 110(i) of the Act, I find that a penalty of $1,000 is appropriate.

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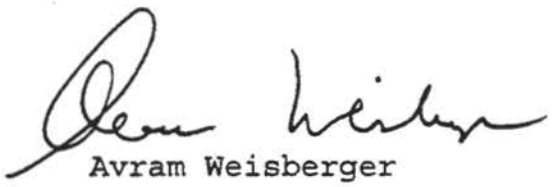
[4]The order at issue was issued pursuant to Section 104(d)(1) of the Act. Since Gouverneur's negligence was only of a moderate degree it did not reach the level of aggrevated conduct, and cannot be characterized as an unwarrantable failure. Since the violation also was not significant and substantial (II)(A) infra) the order should be reduced to a Section 104(a) citation that is not significant and substantial.

ORDER

It is ORDERED that Citation No. 4288343, and Order No. 4288344 shall be amended to Section 104(a) citations that are not significant and substantial. It is FURTHER ORDERED that Gouverneur shall, within 30 days of this decision, pay a civil penalty of $3,000.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

AUG 8 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-500
Petitioner	:	A. C. No. 24-00106-03516
v.	:	
	:	Savage Mine
KNIFE RIVER COAL MINING CO.,	:	
Respondent	:	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Laura E. Beverage, Esq., and Rebecca Graves Payne, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Knife River Coal Mining Company pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $2,000.00. For the reasons set forth below, I affirm the citation and order and assess a penalty of $2,000.00.

A hearing was held on March 1, 1996, in Billings, Montana. In addition, the parties filled post-hearing briefs in this matter.

Background

The Basic facts are not disputed. On February 8, 1995, Bryan Carr and another miner were blasting in the Savage Mine pit. They were not able to detonate their last shot before quitting time. Carr suggested to Rich Kalina, Mine Superintendent, that since Kalina was a certified blaster he could set off the shot.

Carr then proceeded to the bath house to shower and go home. As he was combing his hair after showering, Kalina came into the bath house and requested that Carr return to the pit with him because the shot had not detonated. Kalina was in a hurry. As he was leaving the bath house, Carr turned to go back in and get his hard hat and hard toe boots. At that point Kalina said, "We don't have time, let's go." (Tr. 52, 434.)[1]

Carr accompanied Kalina to the pit without his hard hat or hard toe boots. Once there, he proceeded to detonate the shot. He then returned to the bath house. The whole incident took about 20 minutes.

Carr filed a 103(g), 30 U.S.C. § 813(g), request concerning this incident.[2] MSHA Inspector James Beam conducted an investigation of this request on April 19, 1995. As a result of his investigation, he issued Citation No. 3591319 and Order No.

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[1] The transcript in this case consists of 66 pages. In addition, the parties agreed that certain transcript pages from the hearing in Docket No. WEST 96-130-D would be considered as evidence in this case. Those transcript pages are 427-438, 442-443, 457-460, 467-483, 486-489, 492-496, 581-583, 611-622, 626-629, 693-702, 707-721, 754-758, 769-770, 785 and 794-796.

[2] Section 103(g) provides, in pertinent part, that: "Whenever . . . a miner has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists . . ., such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

3591320 under section 104(d)(1) of the Act.[3]

The citation alleges a violation of section 77.1710(d), 30 C.F.R. § 77.1710(d), because "[a] miner was transported to the pit by the mine superintendent to assist in a coal shot on February 8, 1995. The miner was not wearing a suitable hard hat. The Superintendent said he knows the miner should of [*sic*] had a hard hat on." (Govt. Ex. 2.) The order sets out a violation of section 77.1710(e) in that "[a] miner was transported to the pit by the mine superintendent on February 8, 1995 to assist with a coal shot. The miner was not wearing suitable protective footwear. The Superintendent said he knows the miner should have had protective footwear on." (Govt. Ex. 3.)

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[3] Section 104(d)1) provides:

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

The regulation states that:

> Each employee working in a surface coal mine or in the surface work area of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> . . . .
>
> (d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. . . .
>
> (e) Suitable protective footwear.

Findings of Fact and Conclusions of Law

There can be little doubt that these two sections of the regulation were violated when Carr went to the pit and detonated a blast without his hard hat and hard toe boots. Indeed, the Respondent does not even address the issue of whether the regulation was violated in its brief. Accordingly, I conclude that this conduct violated the regulation. The company does, however, contest the allegations that the violations were "significant and substantial" and resulted from an "unwarrantable failure."

Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); Austin *Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin*

Power, Inc., 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As is usually the case, it is the third and fourth *Mathies* criteria, *i.e.*, whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury and whether there was a reasonable likelihood that the injury would be of a reasonably serious nature, which are at issue. The Respondent concedes that the first two criteria, a violation of a mandatory health standard and a discrete health or safety hazard contributed to by the violation, are present in this case. (Resp. Br. at 14.)

The inspector testified that the hazards that a hard hat and protective shoes would have shielded against were rocks falling from the highwall and flyrock or coal propelled through the air by the blast. He submitted that "[i]t wouldn't be very difficult, it would be easy to be injured" under the facts in this case. (Tr. 12.) He stated that a fractured skull, broken toes, cuts or bruises serious enough to result in lost work time could occur.

The Respondent argues that Carr was not working near the highwall or falling material, that injuries sustained when failing to wear protective footwear would not be reasonably serious and that Carr was only exposed to a potential hazard for a short period of time. These arguments are not persuasive.

The testimony indicated that the highwall was approximately 55 feet high. Carr testified that he went within 15 feet of the highwall to check the misfire and to make sure that the deta cord was properly attached to the charges. He estimated that this took him five or six minutes. He then went about 30 feet from the highwall to attach the blasting cap to the deta cord. After the shot, he related that he again went within 15 feet of the highwall to make sure that all rounds of the explosive had detonated.

In addition, both Carr and the inspector testified that there was a lot of sloughage off of the highwall. Carr stated that the highwall was at the worst end of the pit for sloughage because there was a significant gravel pocket and a spring at the top of the highwall. Furthermore, both asserted that February was a bad time for sloughage because of the thawing and freezing that occurs. Carr explained that, in walking near the highwall he kept his head up because he expected something to fall.

Add to the danger of sloughage the possibility that the blast could send flyrock farther than the miners anticipated, and it becomes apparent that an injury as the result of not wearing a hard hat or protective footwear is reasonably likely. I find that this is so even in the short time that Carr was at the pit. I further find that bruised or broken toes or feet could result in lost work time and are, therefore, reasonably serious injuries. Accordingly, I conclude that these two violations were "significant and substantial."

Unwarrantable Failure

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

When Kalina went to the bathhouse to get Carr after the misfire, he was in a hurry. Carr was in his street clothes. Carr was not sure whether he told Kalina whether he wanted to return to get his hard hat and protective shoes. He testified:

> Q. Do you remember if you said anything to him about not having hard-toed shoes or a hard hat?
>
> A. I don't think he would have -- I don't think he would have said, "We don't have time for that, let's go," if I wouldn't have said that.

Q. Okay. Do you have a specific recollection of whether you said it or not?

A. I really have a hard time with that one. I would like to say yes, but the only thing I do remember for sure is when Rich said, "We don't have time for that, let's go." And that makes me feel that, yes, that is what I said.

Q. And are you sure that you indicated to him that you were about to go back?

A. Oh, yeah.

Q. Was that through you physical motion?

A. Yeah, we were walking out the door at the same time.

(Tr. 52.)

On the other hand, Kalina could only state that he could "not recall" Carr specifically stating that he wanted to get his protective gear. (Tr. 616, 617.) He did not testify concerning whether Carr attempted to return to the bath house or whether he told Carr, "We don't have time for that, let's go." He did testify, however, that he was not "thinking about hard toes and hard hat," he was thinking about the misfire. (Tr. 616.) He further testified that he "was not concerned with" the fact that Carr was in street clothes and did not have a hard hat on. (Tr. 694.)

Mr. Kalina was the superintendent of the mine. He had 21 years of mining experience. Wearing a hard hat and protective boots was not a sometime requirement at the mine, it was required every day. I find that if Carr did not specifically tell Kalina that he wanted to get his protective gear, he indicated such by turning to go back into the bath house. Kalina told him they did not have time for that even though he was aware that Carr was in his street clothes. I find that this was inexcusable on the part of Kalina.

Accordingly, I determine that requiring Carr to go to the pit to set off a shot that had just misfired without his

protective equipment, was aggravated conduct. Therefore, I conclude that the two violations resulted from the Respondent's unwarrantable failure to comply with the regulations.

Civil Penalty Assessment

The Secretary has proposed a civil penalty of $1,000.00 for each of these violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the six criteria, the parties have stipulated that the proposed penalties will not affect the Respondent's ability to continue in business and that the Respondent is a large mine operator with 5,200,979 tons/hours of production in 1994. (Tr. 6.) The *Assessed Violation History Report* for the two years preceding these violations indicates only one citation, for a technical reporting violation. (Govt. Ex. 1.) Nonetheless, the gravity and negligence involved in these violations are very serious. Therefore, taking all of this into consideration, I conclude that a penalty of $1,000.00 for each violation is appropriate.

ORDER

Accordingly, Citation No. 3591319 and Order No. 3591320 are **AFFIRMED**. Knife River Coal Mining Company is **ORDERED TO PAY** a civil penalty of **$2,000.00** within 30 days of the date of this decision. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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AUG 9 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-781
Petitioner	:	A.C. No. 15-11121-03504 DHO
v.	:	
	:	Roxana Plant
GLENN'S TRUCKING CO., INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $2,000 to $1,350 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $1,350 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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

Mr. Glenn Baker, Glenn's Trucking Co., Inc., 717 Kentucky Blvd., Hazard, KY 41701

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 1 2 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 96-165
	:	A.C. No. 15-17231-03530
v.	:	
	:	Mine No. 9
MANALAPAN MINING CO., Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Richard D. Cohelia, Safety Director, Manalapan Mining Company, Inc., Brookside, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Manalapan Mining Company, Inc. (Manalapan) with six violations of the mandatory standard at 30 C.F.R. § 50.20 for failing to report certain accidents and/or occupational injuries.

A settlement motion was presented at hearing with respect to four of the six violations. In this regard Respondent agreed to pay the proposed penalty of $200 for Citation Nos. 4252587 and 4252592 in full and the Secretary has agreed to reduce the penalty proposed for Citations No. 4252590 and 4252591 from $200 to $50. I have considered the representations and documentation submitted with regard to these violations and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed amount will accordingly be incorporated in this decision.

As noted, two citations remain at issue. Citation No. 4252588, issued July 11, 1995, charges as follows:

> As a result of a Part 50 audit it is determined that a reportable injury occurred to Rodney Sturgill on 4/22/94. The injury was a low back strain which resulted in extensive medical treatment, including follow-up visits and physical therapy. The injury was not reported to MSHA on Form 7000-1.

There is no dispute that the cited injury was not reported to MSHA as required and that it was indeed a "reportable" injury within the meaning of the cited standard. Respondent maintains only that "it did not realize that these injuries were reportable under Part 50 until after this case was already in litigation" (Joint Exhibit No. 1). The violation was alleged to be of low gravity and was not considered "significant and substantial." The issues before me are the degree of operator negligence and the amount of penalty to be assessed within the framework of Section 110(i) of the Act.

According to Inspector Adron Wilson of the Mine Safety and Health Administration (MSHA), during a "Part 50 audit" on July 11, 1995, at the Manalapan No. 9 Mine he examined the medical records of miner Rodney Sturgill. It was stipulated at hearing that the documents incorporated in Joint Exhibit No. 6 were the medical records on file with Manalapan's No. 9 Mine and the records examined during Wilson's audit. Date stamps on the documents show their receipt by Manalapan on June 20, 1994, and in July 1994. These documents clearly show that Sturgill received treatment by a physical therapist. According to Wilson eight visits to a physical therapist were recorded.

Wilson maintains that the violation was the result of high operator negligence. He notes that the documents in Manalapan's possession showed that the injury was reportable and this fact was made obvious by the large number of Sturgill's visits to a physical therapist and that the amount of workers' compensation exceeded $200. Wilson further considered, in this regard, the "large" number of violations (seven) he cited at this time. He noted that he averaged only two to three violations on audits at other mines. Wilson did not however compare the number of violations to the size of a particular mine's work force in his estimation.

According to Jim Enlow, Manalapan's Workers' Compensation Administrator, at the time of the noted injury and citation, company procedures were not adequate to flag an injury such as the one at bar for reporting to MSHA because it only became apparent that it was reportable upon receipt by the company of subsequent physical therapy reports. Under the system then existing, Enlow knew a condition was reportable only when the safety director, Richard Cohelia, wrote "reportable" on the initial "SF-1 Form" (a state workers' compensation form) prepared following an injury. Enlow conceded that he did not know the law well enough to determine whether follow-up medical reports later showed that an injury became "reportable" for MSHA purposes. Presumably, as in this case, since the initial injury as reported on the "SF-1 Form" did not on its face indicate a "reportable" injury, that injury was not reported by Manalapan to MSHA. The fact that subsequent physical therapy reports thereupon made

Sturgill's condition a "reportable" condition was not picked up under the existing Manalapan system.

Under the circumstances I find that Manalapan's failure to report Sturgill's injury was the result of a negligent business practice. I note that there is no history of violations of the instant standard at the Manalapan No. 9 Mine nor other evidence that Manalapan had prior notice of its deficient procedures. Manalapan also maintains that it has now corrected its reporting procedures to catch all "reportable" injuries including those that only later become reportable after subsequent medical treatment. A civil penalty of $150 is accordingly appropriate for the violation herein.

Citation No. 4252589, also issued by Inspector Adron Wilson on July 11, 1995, also charges a violation of the standard at 30 C.F.R. § 50.20. It alleges as follows:

> As a result of a Part 50 audit, it is determined that a reportable injury occurred to Claude Hickson 4/29/93. The injury is a degree six injury that requed [sic] splint and was not reported to MSHA on Form 7000-1. Mr. Hickson received three weeks restricted duty cleaning around the feeder and driving a ram car. This is a degree five injury.

In accordance with the stipulation of the parties (Joint Exhibit No. 1) I find that the injuries to Claude Hickson were indeed "reportable" within the meaning of the cited standard. Respondent maintains that "it did not realize that these injuries were reportable under Part 50 until after this case was already in litigation". Under the circumstances only the degree of operator negligence and the amount of penalty are at issue.

According to Inspector Wilson, Claude Hickson's medical records that he examined on July 11 at the Manalapan No. 9 Mine (Joint Exhibit No. 8) showed an "obvious reportable injury" requiring sutures. He therefore concluded that the failure to report the injury was the result of high operator negligence. It is noted, however, that what Inspector Wilson interpreted and relied upon to be the word "stitches", appears on the fifth page of Joint Exhibit No. 8 to be spelled "stnica". I find his reliance in this regard to have therefore been misplaced. Moreover Richard Cohelia, Safety Director for Manalapan, testified credibly that he personally drove Hickson to the doctor after Hickson injured his hand and that Hickson received no stitches. Hickson also told Inspector Wilson that he did not recall having stitches.

Under the circumstances I do not find that Hickson had, in fact, received sutures or stitches as a result of the instant injury nor did the medical reports indicate that Hickson had

received stitches for this injury. Accordingly it is apparent that the operator was not thereby placed on notice that Hickson suffered a "reportable" injury.

The Secretary also argues however that Manalapan was highly negligent because it should have known that Hickson suffered a "reportable" injury because he had been placed on "restricted duty" shoveling coal and was not performing his regular job of roof bolter operator. Cohelia testified however that subsequent to Wilson's Part 50 audit he talked to Ken Clark, the mine foreman for whom Hickson worked, who told him that they were, in fact, retreat mining at this time. Hickson was not then roof bolting but was shoveling coal because of the status of mining activity and not because of his injury. Moreover, if, indeed, Hickson had seriously injured his hand as alleged it would be highly unlikely that he would have been transferred from his regular job on a roof bolter to the task of shoveling coal. It may reasonably be inferred that with a hand injury Hickson could more easily have performed his regular job operating a roof bolting machine. Accordingly I do not find that Manalapan had been placed on notice that Hickson had a "reportable" injury until such time as it was so apprised by Wilson's audit. Under all the circumstances I find Manalapan chargeable with but little negligence. A civil penalty of $50 is accordingly appropriate for the violation.

ORDER

The citations at bar are affirmed and Manalapan Mining Company, Inc. is directed to pay the following civil penalties totaling $700 within 30 days of the date of this decision:

Citation No. 4252587 - $200, Citation No. 4252588 - $150,
Citation No. 4252589 - $50, Citation No. 4252590 - $50,
Citation No. 4252591 - $50, Citation No. 4252592 - $200.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

AUG 14 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 96-125
	:	A.C. No. 36-04629-03543
v.	:	
	:	Docket No. PENN 96-148
PRIMROSE COAL COMPANY, Respondent	:	A.C. No. 36-04629-03544
	:	
	:	Docket No. PENN 96-158
	:	A.C. No. 36-04629-03542
	:	
	:	Mine: Primrose Slope

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; David S. Himmelberger, Partner, Primrose Coal Company, Tremont, Pennsylvania, pro se.

Before: Judge Melick

These consolidated civil penalty proceedings are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," to challenge citations issued by the Secretary of Labor to the Primrose Coal Company (Primrose) and to contest the civil penalties proposed for the violations charged therein. The general issue before me is whether Primrose violated the cited standards and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Settlement motions were considered at hearing as to all violations except those charged in Citation Nos. 4149821 and 4152240. In connection with the settlement motion, a reduction in penalties from $460 to $443 was proposed. I have considered the representations and documentation submitted in connection with the motion, including documents submitted at trial, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed amount will accordingly be incorporated in this decision.

The two citations remaining at issue arose from an investigation by the Mine Safety and Health Administration (MSHA)

of a fatal electrical accident at the Primrose Coal Slope on March 30, 1995. The victim, Charles J. Frederick, an employee of Primrose, came in contact with an energized slope car and the frame of a 480 volt slurry pump. According to the investigation, the slope car and pump frame became energized when faults occurred in the electrical system.

Citation No. 4149821 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.518 and charges as follows:

> The 3 phase 480 volt 3.7 horsepower motor on the Flyght pump (model 3060 SS) used to wash coal from the No. 1 Breast, was not provided with an automatic circuit breaking device to protect against overload, or that would deenergize all three phases in the event any phase was overloaded. Three 30 amp fuses were improperly used to provide this protection. This condition was observed during a fatal electrical accident investigation.

The cited standard, 30 C.F.R. § 75.518, provides in relevant part that "3-phase motors on all electrical equipment shall be provided with overload protection that will de-energize all three phases in the event that any phase is overloaded."

Citation No. 4152240 charges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.701 and charges as follows:

> The metallic frames and enclosures of all 3 phase 480 volt equipment in use at the mine were not grounded by methods approved by an authorized representative of the Secretary. Failure to connect the surface equipment frames to a low resistance ground field resulted in, and increased the probability of, a difference of potential existing between the surface and underground equipment frames.

The cited standard, 30 C.F.R. § 75.701, provides that "metallic frames, casings, and other enclosures of electrical equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary." It is noted that the standard at 30 C.F.R. § 77.701-1 sets forth several of the approved methods of grounding equipment receiving power from ungrounded alternating current power systems.

There is no dispute in this case that the violations existed as charged, were "significant and substantial" and were of high gravity. It is further undisputed that these violative conditions were causative factors in the death of Charles Frederick. Under the circumstances the parties agreed at hearing that the only issues to be litigated were the operator's

negligence, if any, and the amount of civil penalty to be assessed giving particular consideration to "the effect on the operator's ability to continue in business".

It is undisputed that David Himmelberger, one of two Primrose partners, was the MSHA certified electrical examiner at the subject mine during relevant times and was responsible for the required weekly and monthly electrical examinations. According to the expert testimony of MSHA electrical inspector Bill Hughes, both of the violations should have been obvious to a certified electrician and should therefore have been known to Himmelberger. In addition, Hughes testified that neither of the violative conditions were reported in the appropriate examination books. In regard to the violation charged in Citation No. 4152240, it is particularly noted that the unconnected ground wire was hanging in plain view. (See photograph Exhibit G-12).

In his answer filed in this case and as purported grounds for reduced negligence, Primrose alleges as follows:

> The mine was inspected one month before and there was no problem. The circuit breakers that we were fined for was not inforced [sic] by MSHA for years. The mine was not inspected for years by an MSHA electrical inspector.

At hearing Himmelberger testified that he had been operating the subject mine since October 1991, and had then received an MSHA "courtesy" inspection. He has subsequently been inspected by MSHA each quarter but has never had an MSHA electrical inspection. Indeed, it is undisputed that only one month before the instant citations were issued, MSHA had inspected this mine and the violations at issue were not then cited. Himmelberger also claims, and it has not been disputed, that the conditions cited herein were the same as when he began operating this mine in 1991. He also maintains that he did not understand at the time these conditions were cited that they were violations.

I agree with the Secretary that a certified electrical inspector such as Mr. Himmelberger should have the qualifications to know that the cited conditions were violative. Under the circumstances I give but little weight to Himmelberger's claims of ignorance. I have also considered Respondent's claims that MSHA should have previously discovered and cited these apparent obvious violative conditions either at the time of its courtesy inspection when the mine began operations under Himmelberger's control in October 1991 or thereafter during what must have been 12 to 14 regular quarterly inspections. The absence of any MSHA electrical examination during this period also raises some concern. However whether or not MSHA was itself negligent in failing to conduct an electrical inspection at this mine for more than three years and in failing to detect these violations during

a courtesy inspection or during as many as 14 regular quarterly inspections, under the circumstances of this case would not in any event mitigate Respondent's own negligence herein. As the mine's certified electrical inspector, Himmelberger should clearly have known of those violative conditions. Under the circumstances and considering all of the criteria under Section 110(i) of the Act I find that civil penalties of $1,800 and $1,700, respectively, for Citation Nos. 4149821 and 4152240 are appropriate.

In reaching this conclusion I have not disregarded Respondent's claims of financial problems, however, the evidence is insufficient to warrant any further reduction. It is noted that he is no longer operating the subject mine and the operating partnership no longer exists. Furthermore, Himmelberger reported $40,000 in taxable income for 1995.

ORDER

The citations at issue are hereby affirmed and Primrose Coal Company is hereby directed to pay civil penalties of $3,943 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 2 3 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 96-20
Petitioner	:	A.C. No. 15-07201-03671
v.	:	
	:	Docket No. KENT 96-64
HARLAN CUMBERLAND COAL CO.,	:	A.C. No. 15-07201-03672
Respondent	:	
	:	Docket No. KENT 96-70
	:	A.C. No. 15-07201-03673
	:	
	:	Docket No. KENT 96-77
	:	A.C. No. 15-07201-03674
	:	
	:	C-2 Mine
	:	
	:	Docket No. KENT 96-50
	:	A.C. No. 15-08414-03634
	:	
	:	H-1 Mine

DECISION

Appearances: Marybeth Bernui, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, Charles H. Grace, Mine Safety Health Administration, Barbourville, Kentucky, and Ronnie Russell, Mine Safety and Health Administration, Gray, Kentucky for the Petitioner; William A. Rice, Esq., and H. Kent Hendrickson, Esq., (on Brief) Rice and Hendrickson, Harlan, Kentucky for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon petitions for assessment of penalty filed by the Secretary of Labor (Petitioner) alleging violations by Harland Cumberland Coal Company (Respondent) of various mandatory safety standards set forth in title 30 of the Code of Federal Regulations. Pursuant to notice, a hearing was held on May 29, 1996, in Johnson City, Tennessee.

I. Docket Nos. KENT 96-20 and KENT 96-50

Subsequent to the hearing, Petitioner filed a joint motion to approve settlement regarding these docket numbers. A reduction in penalty from $3,303 to $2,282 is proposed. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

II. Docket No. KENT 96-64

A. Citation No. 4578060.

1. Violation of 30 C.F.R. § 75.202(a)

On August 21, 1995, Larry Bush an MSHA Roof and Ventilation Specialist, inspected the No. 1 entry at Respondent's C-2 Mine. This entry was ventilated by intake air and was traveled daily by miners going to and from the working face. He observed stresses and fractures in the roof in the area between crosscuts forty-one and forty-two. In addition, he observed cutters, or breaks, in the roof that extended along both ribs parallel to the length of the entry. Looking inby, the cutters on the right rib extended approximately 116 feet from crosscut forty-one to crosscut forty-two. The cutters on the left rib extended from crosscut forty-two outby beyond crosscut forty-one. Respondent's only witness, its Superintendent, Jeremy Madon, did not rebut this testimony regarding the condition of the roof and ribs. Nor did Respondent impeach this testimony. Accordingly, I accept Bush's testimony regarding his observations of the conditions of the roof.

According to Bush, the roof was supported by a series of roof bolts that were four feet apart, and located within four feet of the ribs. According to Madon, additional support was provided by thirteen straps that were thirteen feet long, and ten inches wide. The straps were placed approximately four feet apart, perpendicular to the ribs in the area between crosscuts forty-one and forty-two. Cribs had been stacked from the floor to the ceiling, at crosscut forty-one at the corner of pillar forty in the adjacent No. 2 entry, which was separated from the entry at issue by a sixty foot wide block of coal. Seven foot long double shuck bolts had been placed in the ceiling of the No. 2 entry. Madon opined that the area in question was well supported, and that the placement of additional cribs would restrict the width of the eighteen foot wide entry by approximately three and a half feet. According to Madon, the restriction in the width of the entry might result in a vehicle coming in contact with the cribs, causing them to fall.

Bush indicated that on July 4, 1995, a rock fall occurred at Break forty-one in the No. 2 entry. He noted that the roof of the No. 2 entry, and the entry at issue contain the same strata, i.e., banded sandstone and slate, which he described as being "especially really slick" (Tr. 18). Bush indicated, in essence, that the cutters that ran "along both ribs" (Tr. 20), were four feet from the ribs. He explained that the bolts were insufficient as follows:

> The cutters along both ribs is an indication of failure of the roof, and a cutter will if not supported, continue to cut or break above that bolt, the rising anchorage of the bolt pattern. Once it breaks above that bolt length or above the four foot at that point, then the slick and sided slate with the banded sandstone layers will separate causing the roof to fail. A cutter along one rib is a bad condition, but both ribs, when it cuts along both ribs then it's -- you know, potential for failure is a lot greater. (sic) (Tr. 20-21).

Based upon the uncontested existence of stresses and fractures in the roof, as well as extensive cutters along both ribs, and the fact there was a rock fall at crosscut forty-one in the adjacent entry less than two months prior to August 21, I

find that the roof and ribs of the area in question were not supported or controlled to protect the miners who travel the area from hazards related to rock falls from the roof and ribs. Accordingly, I find that Petitioner has established that Respondent violated 30 C.F.R. § 75.202(a) as alleged by Bush in a section 104(a) citation that he had issued on August 21, 1995.[1]

2. Significant and Substantial

Bush characterized the violation he cited as significant and substantial.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable

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[1] 30 C.F.R § 75.202(a), as pertinent, provides as follows "the roof, . . . and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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

I find that because there was no specific support for the extensive cutters, that the hazard of a roof fall was contributed to by the instant violation. Further, due to the extensive cutters on both ribs, the fact that there was a recent rock fall in the area of the forty-one crosscut in the adjacent entry, I find that it was reasonably likely that the violation would have resulted in an injury producing event. Madon opined that the roof was well supported, and that there was no likelihood of injury. However, he did not provide the specific basis in any detail for these opinions. They thus are not accorded much weight. Further, since persons regularly travel in the area, I find that it was reasonably likely that any injury sustained as a result of the violation herein would have been of a reasonably serious nature. I thus find that it has been established that the violation was significant and substantial.

3. Penalty

Although the violative conditions were of a moderately high level of gravity as they could have caused a serious injury, I find that a penalty to be assessed should be mitigated by the lack of proof that Respondent was negligent to more than a slight

degree. Specifically there is no evidence as to how long the roof conditions, as observed by Bush, had existed. There is no evidence that these conditions were in existence when last examined. I find that a penalty of $700 is appropriate for this violation.

B. Citation No. 4253261.

On August 15, 1995, MSHA Inspector, William R. Johnson, instructed the operator of a scoop located at Respondent's C-2 mine, to deenergize the scoop by touching the panic bar. According to Johnson, if the panic bar is depressed, the electric system on the scoop should become deenergized, and the hydraulic break system should cause the vehicle to stop. Johnson observed that the operator touched the panic bar, but did not place his foot on the foot brake. The scoop's engine and lights were deenergized. According to Johnson, the terrain upon which the scoop was facing was on a one percent decline. According to Johnson, the scoop kept rolling for about ten feet and then "[j]ust coasted to a stop" (Tr. 61). According to Johnson if the scoop was left parked on the grade and unattended it could roll and strike someone. He also indicated that if ". . . something happens to the electrical system and contactor's stick, this scoop would be a runaway. And this has happened numerous times in mining. The panic bar would de-energize this machine but it would still keep going" (Tr. 62). Madon, who was present, testified that the scoop traveled about ten feet after the panic bar was pressed,and then "kind of abruptly stopped" (Tr. 75).

Johnson issued a citation alleging a violation of 30 C.F.R. § 75.523-3(b)(1) which provides as follows "automatic emergency-parking breaks shall-(1) be activated immediately by the emergency deenergization device required by 30 C.F.R. § 75.523-1 75.523-2:" (Emphasis added).

There is no evidence that the parking brakes were not immediately activited by the depression of the panic bar.[2] There is no evidence that there was any defect in any connection that

[2]Johnson indicated that the brake calipers had mud and water on them. Madon indicated tht to abate the citation, the calipers on the disc were tightened to make them collapse quicker. However, there is no evidence that these conditions could have caused the brakes not to activate upon depression of the panic bar.

had to be made between depression of the panic bar, and the operation of the parking brakes. At most, the evidence establishes that the parking brakes engaged after the scoop had rolled 10 feet subsequent to the depression of the panic bar. In this connection, I note that section 75.523-3(b)(2) provides that the automatic emergency parking brakes shall "engage automatically within 5.0 seconds when the equipment is deenergized;" (Emphasis added). Hence, it would appear that the regulatory scheme contemplates a two-step procedure. First the automatic parking brakes are to be "activated immediately", and then they must automatically engage within five seconds after the panic bar is depressed. The regulatory scheme is consistent with the common meaning of the term "activate". Webster's Third New International Dictionary (1979 Edition), ("Websters") defines "activate" as "to make active", whereas "engage", is defined in Webster's as "1(e) to come in contact or interlock with . . . also: to cause (parts) to engage."

For the above reasons, I find that the evidence fails to establish that the parking brakes were not immediately activated by the depression of the panic bar. I thus find that it has not been established that Respondent violated section 75.523-3(b)(1) supra, as alleged. Therefore Citation No. 4253261 is to be dismissed.

C. Citation No. 4253300

1. Violation of 30 C.F.R § 75.517

On August 15, 1995, Johnson inspected a cable on a shuttle car that was in operation. He observed that there were two cuts in the outer jacket of the cable. Each cut was approximately one and a half inches long, and one eighth of an inch wide. He indicated that one inner insulated lead was exposed. According to Johnson the cable was designed to be handled, and if there were to be a defect in one of the inner leads, stray current could escape and injure the person who was handling the cable.

Johnson issued a citation alleging a violation of 30 C.F.R. § 75.517 which provides as follows: "Power wires and cables, . . . shall be insulated adequately and fully protected."

On cross-examination, Respondent elicited from Johnson that the trailing cable at issue is normally handled only when the power is off, and that its inner cables were well insulated.

I reject Respondent's defense. I find that in order for Section 75.517, supra, to be complied with, a cable must both adequately insulated, and fully protected. Since Respondent did not impeach or contradict Johnson's testimony that there were two cuts, each one more than an inch long and an eighth of an inch wide, I find that the cable was not adequately insulated and fully protected. I thus find that Respondent violated Section 75.517, supra.

2. Significant and Substantial

According to Johnson, the floor of the mine was wet. He opined that a person handling the 480 volt cable, and standing in a wet or muddy floor, could suffer an electrical shock or burn should stray current escape from one of the inner leads. He indicated that this could occur should there be a pinhole in one of the inner cables. He said that there is no way to know if the inner cables were damaged.

There is no evidence that there were any defects in any of the inner cables. Nor is there any evidence that there was any condition in existence which would have made it reasonably likely that an inner cable defect would have occurred. For these reasons, I find that it has not been established that an injury producing event was reasonably likely to have occurred as a result of this violation. I thus find that it has not been established that the violation was significant and substantial.

3. Penalty

There is no evidence as to how long the violative condition existed. Johnson opined that since he found the condition at 8:00 a.m., it had existed for at least since the start of the shift at 6:00 a.m., and that someone should have known of the condition. Respondent did not rebut or impeach this opinion. I find that Respondent's negligence was only moderate. Considering the remaining factors as set forth in section 110(i) of the Act, I find that a penalty of $200 is appropriate.

D. Citation No. 4253297

1. Violation of 30 C.F.R. § 75.202(a)

a. Johnson's Testimony

On August 15, 1995, at approximately 6:30 a.m., Johnson observed "loose draw rock" (Tr. 105) approximately three feet by three feet by four inches thick in the center of the roof of the return entry on the 004 unit. The draw rock, which was located three crosscuts outby the face, was not attached to the roof. According to Johnson, an area at one end of the rock, approximately five inches by five inches, was supported by a strap. Johnson testified that the straps were located on four foot centers, and that there was another strap that was located near the other end of the rock, but was not supporting it.

Johnson issued a citation alleging a violation of Section 75.202(a), supra.

b. Respondent's Evidence

Respondent's witnesses, Eddie Sargent, the Safety Director, and Madon, who were present with Johnson, indicated that the draw rock was somewhat larger than testified to by Johnson, and was supported by two straps, one on either end of the rock. Both Sargent and Madon maintained, in essence, that the rock would not have fallen because it was supported by the straps. Madon indicated that in his opinion it was more of a danger to take the rock down than to have left it in position.

c. Discussion

Neither Madon nor Sargent rebutted Johnson's testimony that men were required to travel in the area below the cited draw rock. The evidence is in conflict as to whether the draw rock was resting on one or two straps. However, it is not necessary to resolve this conflict. All witnesses agree that the rock was not attached to the roof, and that there was a gap between the rock and the roof. Further there is basic agreement as to the

approximate size of the rock. None of the witnesses could establish the supporting capacity of the straps. However, it is significant that there was no evidence that the straps were designed to support draw rock. Indeed, Madon indicated that the main reason for using straps is to bond the roof together. [3]

Further, the potential instability of the draw rock might be inferred by the fact that when Madon removed the draw rock to abate the citation he indicated that he used a pry bar to "[k]ind of pushed it" (Tr. 129). There is no evidence that he had to use an inordinate amount of pressure to pry the rock loose or that it took a significant time to push it loose.

Hence, I find that even if the draw rock was resting on two straps, that it was not supported to protect miners traveling below the rock from the hazard related to a possible fall of this rock. I thus find that it has been established that Respondent did violation Section 75.202(a), supra.

2. Significant and Substantial

According to Johnson, and not contradicted or impeached by Respondent's witnesses, three or four pieces of draw rock, approximately, ten inches by ten inches by one inch, were lying on the floor in the area. Since there was no contradiction of Johnson's testimony that these items were pieces of draw rock, it might reasonably be inferred that they had fallen from the roof. Further, since the straps, upon which the draw rock in question was lying, were not designed to support loose unattached draw rock, I find that, over time, it was reasonably likely that the violation herein would have contributed to the hazard of a rock fall. Further, since miners regularly travel in the area, I find support for Johnson's testimony that it was reasonablely likely that miners would suffer reasonably serious injuries to their head or limbs, as a result of the violative condition. I thus find that it has been established that the violation was significant and substantial.

---

[3]After indicating that the main reason for the use of straps was to bond the roof together he was asked "[n]ot for loose material?" He answered as follows" [t]hat what we're trying to hold is draw rock when you use straps" (sic.) (Tr. 134).

3. Penalty

Respondent's witnesses noted the fact the draw rock was loose and not attached to the roof, and was resting on two straps. They did not contradict Johnson's testimony that this condition was obvious. Nor did they contradict or impeach his testimony that because there were a number of pieces of draw rock lying on the floor in the area, that the condition of the loose unattached draw rock "probably didn't just happen" (Tr. 113). I thus conclude that Respondent's negligence was more than moderate. I find that a penalty $500 is accordingly appropriate for this violation.

E. Citation No. 4253298.

1. Violation of 30 C.F.R § 75.516

On August 15, 1995, Johnson cited Respondent for violating 30 C.F.R. § 75.516, which provides that power wires " . . . shall be supported on well - insulated insulators . . . ." 30 C.F.R § 75.516-1 provides that "well-insulated-insulators is interpreted to mean well-installed insulators . . . ." At the hearing, Respondent admitted this violation. According to Johnson's testimony, a 480 volt cable attached to an energized charger was not hung on insulated hangers. Based on this testimony and Respondent's admission I find that Respondent violated 30 C.F.R § 75.516 supra.

2. Significant and Substantial

Madon indicated that "normally" the power center which contains the subject charger is moved every other day. He also indicated that the cable was in good condition. He opined that there was no danger to miners occasioned by the cable lying on the ground.

On the other hand, Johnson testified that although there was no draw rock in the area, the mine does have a history of draw rock being found in the roof. He also indicated that the floor was muddy, and the cable was lying in the floor. According to Johnson, miners travel in the entry at issue which serves as the travelway to the working face and also as the primary escapeway.

Within the above framework I find the violation was not significant and substantial. Specifically, it has not been established that there was a reasonably likelihood of an injury producing event (c.f., U.S. Steel, supra). In the case at bar, in order for there to be an injury producing event, there must be some defect in the insulation of the cable. There is no evidence that the cable was not well insulated. There is no evidence of any defect in the outer insulation of the cable. Also, the record does not establish that there was a reasonable likelihood of the occurrence of an event which would have had a reasonable likelihood of breaking the insulation of the cable. Although there was a history of draw rock in the roof, Johnson indicated there was no draw rock in the area. Also, there was no evidence that the roof in the area at issue was not in good condition. Also Madon's testimony that under normal mining conditions the power center containing the charger at issue would be moved every other day, hence limiting exposure of the cable, was not contradicted, or rebutted, or impeached. I thus find that it has not been established that the violation was significant and substantial.

3. Penalty

Johnson opined that the cable lying on the floor was a "pretty obvious violation" (Tr. 149). He indicated that the foreman would have made a on shift examination of the area an hour prior to the issuance of the citation at 7:30 a.m.. He also indicated that men regularly work and travel in the area.

According to Madon only about thirty feet of the 200 foot cable was not hanging. He also indicated that the cable was in good condition, and that it gets knocked down inadvertently on occasion. I find that the condition was obvious, and that Respondent's negligence was more than moderate. I find that a penalty of $200 is appropriate.

F. Citation Nos. 4253258, 4253260, 4578055, 4578057, 4578058, 4253267, and 4253270

Petitioner filed a motion to approve a settlement agreement regarding these citations. A reduction in penalty from $3,018 to $1,835 is proposed. 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.

III. KENT 96-70

A. Citation No. 4578562.

1. Violation of 30 C.F.R § 75.340(a)(1)

According to Johnson, when he inspected the 005 unit, he observed that a 480 volt scoop battery charger was located in an intake airway leading to the working face. He indicated that there was nothing in place to divert the air ventilating the charger from the face. Specifically he said that there were no curtains or brattices in place.

Johnson issued a citation alleging a violation of 30 C.F.R. § 75.340(a)(1) which provides, as pertinent, that battery charging stations shall be " . . . [v]entilated by intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places: . . ."

According to Madon, the charger at issue was located at the mouth of the No. 5 right entry. He said that he was present when the station was placed at that location, and that at the same time a brattice was built adjacent to the charger. A two by four inch hole was left at the top of the brattice between the top of the brattice and the roof of the mine, to allow air in the area of the charger to be ventilated to a return entry. Madon indicated that from the return entry the air was pulled outside the mine by way of a fan.

According to Madon, Johnson stated that the hole in the brattice should be made bigger to ventilate the charger. Madon said that in response, he enlarged the hole at the top brattice to a six inch square.

I observed the witnesses' demeanor and I find Madon to be more credible regarding the location of the charger. Further, Madon's testimony provided more detail. Johnson's contemporaneous notes indicate that the charger was in intake air, was not being ventilated into the return airway, and that air was

moving across the unit. However, the notes do not indicate the presence or absence of any ventilation controls such as a curtain or brattice. For these reasons, I accept Madon's testimony regarding the location of the charger when cited by Johnson, i.e., at the mouth of the No. 5 entry. Given this location, the Secretary must establish that, when cited, the hole in the brattice was too small to allow air coming across the charger to be ventilated to the return, and that instead it was being ventilated down the intake airway to the face. I find that the Secretary has failed to meet this burden. Johnson did not present any testimony to establish the inadequency the hole in the brattice to ventilate gases from the charger to the return. I thus find that the Secretary has failed to establish that the air that ventilated the charger was not being coursed to the return. I thus find that this citation should be dismissed, as Petitioner has not established that Respondent violated Section 75.341, supra.

B. Citation No. 4578564.

1. Violation 30 C.F.R. § 75.370(a)(1)

On September 21, 1995, while inspecting the 005 unit, Johnson observed that the miners in on the section did not have any self contained, self-rescue ("SCSR") equipment, and emergency sources of oxygen. Johnson indicated that the SCSRs were located in a storage area approximately 200 feet from these miners. He issued a citation alleging a violation of 30 C.F.R. § 75.370(a)(1) which, in essence, requires Respondent to develop and follow an approved ventilation plan. The pertinent supplement to the ventilation plan provides that "SCSRs" will be maintained at all times, within twenty-five feet of all persons working within the two entry setup" (sic) (Government Exh. 9, p. 7).

Johnson indicated that the area in question was a two entry setup. Respondent did not contradict or impeach this testimony, and accordingly it is accepted. I thus find that inasmuch as the

SCSRs were not within twenty-five feet of the persons working within the two entry setup, that Respondent was not in compliance with its ventilation plan, and accordingly violated Section 75.370(a)(1) supra.

2. Significant and Substantial

Johnson explained that the 005 unit was a two entry setup consisting of only an intake an a return entry. Hence, any smoke arising within the unit would contaminate both entries. Such a situation would contribute to the hazard of smoke inhalation. Johnson explained that should a fire or smoke be present in the unit, eight of the miners working there would not be able to escape into the smoke filled escapeway, as the SCSR equipment was not within twenty-five feet of where they were working. Based upon this analysis, Johnson concluded that the violation was significant and substantial. On the other hand, Macon opined that the violation was not significant and substantial, that there was no likelihood of injury, and that there were no hazards in the immediate area.

Within the above framework, I find that the Secretary has failed to adduce evidence of any condition which would have made an injury producing event, i.e., the creation of a smoke or a fire, reasonable likely to have occurred. I thus find the violation was not significant and substantial.

3. Penalty

Johnson indicated "that it's an obvious violation . . . because it's sitting there in plain view" (Tr. 167). Respondent has not offered any evidence to mitigate its negligence. Taking this factor into account, I find that a penalty of $700 is appropriate for this violation.

C. Citation Nos. 4253271, 4253273, 4253274, 4253275, 4253276, 4253277, 4253278, 4253279, 4253280, 4578561, 4578565, 4253296, and 4253266

Petitioner has filed a motion to approve settlement agreement regarding these citations. A reduction in penalty from $5,178 to $3,423 is proposed. 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.

IV. Docket No. KENT 96-77.

A. Citation No. 4253268

1. Violation of 30 C.F.R. § 75.325(b)

On September 5, 1995, Johnson indicated that there was no measurable air movement on the 004 unit. He issued a citation which was subsequently amended to allege a violation of 30 C.F.R. § 75.325(b) which, in essence, requires that the quantity of air reaching the last open crosscut be at least 9,000 cubit feet per minute. Respondent admitted this violation. Accordingly and based upon the testimony of Johnson, I find that respondent did violate 30 C.F.R. § 75.325(b).

2. Significant and Substantial

Madon opined that the violation was not significant and substantial. In this connection he noted that normally there are were only two people working in the "miner area" (Tr. 220). On the other hand, Johnson explained that in the absence of the movement of air in the face, coal dust and methane could accumulate creating a hazard of an explosion or a fire. Although he did not find any methane in his examination, he indicated that the mine is considered a gassy mine. Respondent did not rebut or impeach this testimony. Johnson further opined that with continued mining, it would be reasonably likely to have an accumulation of methane present as there is methane present in the coal bed. Respondent did not impeach or contradict this testimony. Johnson further explained that it was reasonably likely that an accumulation of methane or dust, as a consequence of the lack of movement of air, would be reasonably likely to have resulted in a fire or explosion due to the presence of various ignition sources. In this connection he noted that an arc might be "encountered" with the operation of the mining coal or the bolter (Tr. 213). This testimony also was not contradicted or impeached. Johnson also indicated that should a fire or explosion occur serious injuries would be expected due to the fact that miners would suffer burns or possibly fatal injuries. Respondent did not impeach or contradict this

testimony. Within the framework of this record, I find that the violation was significant and substantial.

3. Penalty

According to Johnson, the foreman had made an on shift examination prior to his (Johnson's) examination, and that foreman had been "all over this working area all" day (Tr. 217). Johnson indicated that it took an hour to abate the violation and restore the airflow to more than 9,000 cubit feet a minute. He indicated that the mine is more than four miles deep, and the ventilation fan that was present at the time was outdated. He indicated that in order to abate the violation curtains were adjusted.

On the other hand, Madon stated that he was present when a curtain was rehung in the No. 2 entry to abate the citation. He estimated it took 10 to 15 minutes to increase the airflow to more than 9,000 cubit feet a minute.

I find based upon observations of the witnesses' demeanor, that Madon's testimony was more credible. Further, I find, predicated upon Madon's testimony, which was in turn based upon his personal observation, that the violation was caused by the lack of a curtain which had to be rehung. There is no evidence as to when this curtain had to been originally installed, nor is there any evidence when and how it become lose or dislodged. Accordingly, I find that the level of Respondent's negligence to have been of a low degree. I find that a penalty of $500 is appropriate for this violation.

ORDER

It is ORDERED that, within 30 days of this decision, Respondent pay a total civil penalty of $10,340.

It is further ORDERED that Citation Nos. 4253261 and 4578562 be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 2 3 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 92-329 A.C. No. 29-00097-03540
v.	:	
BHP MINERALS INTERNATIONAL, INC., Respondent	:	Docket No. CENT 93-272 A.C. No. 29-00097-03545 Navajo Mine

DECISION AFTER REMAND

Before: Judge Amchan

Procedural History

On August 19, 1996, the Commission reversed my decision vacating citation 4060870, which alleged that Respondent had violated 30 C.F.R. § 77.506 in setting the instantaneous circuit breaker for an air compressor at an impermissibly high level. The Commission remanded the case to me to determine whether the violation was significant and substantial ("S&S") as alleged, and to assess a civil penalty. The Secretary proposed a penalty of $793 for this violation. However, the Commission and its judges assess civil penalties de novo pursuant to the criteria in section 110(i) of the Act.

Findings

I determined that the instantaneous circuit breaker in question would trip at 6000 amperes. This exceeds 1300 percent of the full-load current of the compressor's motor (approximately 438 amperes). This setting violates the requirements of section 430-52 of the National Electric Code (NEC), whose requirements are adopted by section 77.506 of MSHA's regulations.

Section 430-52 provides that an instantaneous breaker must be set at the lowest setting capable of carrying the "normal starting load" of the motor, but in no case more than 1300 percent of the motor's full-load current. I vacated the citation because I concluded that the standard did not provide Respondent with adequate notice of its requirements.

The Commission concluded, however, that "in light of the testimony of all witnesses that the breaker was required to be placed on the lowest possible setting to start the motor and unrebutted testimony that the higher settings are reserved only for rare cases involving special equipment that cannot start at lower settings,...a reasonably prudent person would have recognized that placing the instantaneous breaker on the highest setting would not provide adequate overcurrent protection as required by section 77.506." (C.D. at page 5).

As the Commission noted, the circuit breaker in question was a thermal breaker as well as an instantaneous (magnetic) breaker (Tr. 91-92, 99-100). This means that it will trip out thermally on an overheating condition, and it will trip instantaneously due to a short circuit (Id.). The thermal overload protection will also protect against short circuits when properly sized (Tr. 106-07).

While the Commission held that the existence of the thermal breaker did not negate a violation, it noted that this factor would be relevant to the "S&S" determination (C.D. at page 5 and n. 6).

The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is as follows:

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

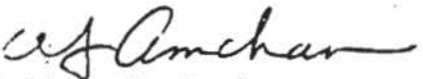
The Secretary of Labor bears the burden of proving that a violation is "S&S." The record is silent regarding the affect of the thermal breaker with regard to the likelihood of injury resulting from the improper setting of the instantaneous or magnetic feature of the breaker (See, e.g. Tr. 125). Therefore, I conclude that the Secretary has not established that the violation was "S&S." I affirm the citation as a non-"S&S" violation.

I assess a $300 civil penalty for the violation. The gravity of the violation is high in that an injury if it occurred would likely be a serious one, such as burns, electrical shock or electrocution (Tr. 66). I deem the Commission's findings regarding what a reasonably prudent person would have recognized as the equivalent of a finding that Respondent was to some extent negligent in violating this requirement. Respondent rapidly abated the violation in good faith by resetting the instantaneous breaker (Tr. 71).

As to the other section 110(i) criteria, there is nothing in the record that indicates that the penalty should be higher or lower due to Respondent's prior history of MSHA violations (Exh. P-1). BHP is a relatively large mine operator, employing 400 miners at its Navajo mine where this violation occurred (Tr. 11). The mine produced eight million tons of coal in 1993 (Tr. 6). Assessment of a $300 penalty will not affect Respondent's ability to stay in business (Tr. 6).

ORDER

Respondent is hereby ordered to pay a $300 civil penalty to the Secretary of Labor within 30 days of this decision.



Arthur J. Amchan
Administrative Law Judge

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AUG 2 3 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-402 A.C. No. 42-01435-03549
v.	:	Skyline Mine #1
UTAH FUEL COMPANY, Respondent	:	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Michael L. Larsen, Esq., Elisabeth R. Blattner, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § et seq. the "Act". The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Utah Fuel Company (Utah Fuel) with the violation of three mandatory safety standards. Utah Fuel is the operator of the underground coal mine, Skyline No. 1 located in Carbon County, Utah. MSHA issued the citations after its investigation of a fatal rib and roof fall accident. Utah Fuel timely contested each of the three alleged violations.

I

THE ACCIDENT

Tom Kubota, while working with a crew, rehabilitating a previously caved area in the underground coal mine sustained fatal injuries in a fall of rib and roof rock accident. The accident occurred in a previously caved area in the No. 3 entry of the 6 Left Tailgate Developmental section between crosscuts Nos. 71 and 72 of the Skyline Mine No. 1. At the time of the accident the decedent was kneeling on the head of a continuous

mining machine, trimming (cutting to fit with a torch) a steel crossbar in preparation to installing the crossbar as a part of the rehabilitation of the previously caved area. The size of the rock that fell was approximately 6 feet long by 5 feet wide by 2 feet thick.

II

ISSUES

After due notice, a four-day hearing on the merits was held in Salt Lake City. At the hearing the parties presented oral and documentary evidence, including a total of 131 exhibits. The parties filed post-trial briefs which I have considered in reaching this decision.

The issues at the hearing were as follows:

1. Citation No. 3850249

(a) Did Utah Fuel violate C.F.R. § 75.202(a)?

(b) If the standard was violated: (1) Was it a significant and substantial violation? (2) What is the appropriate penalty?

2. Citation No. 3412737

(a) Did Utah Fuel violate 30 C.F.R. § 75.211(b)?

(b) If this standard was violated: (1) Was the violation of a significant and substantial nature? (2) Was the violation a result of the operator's unwarrantable failure to comply with the safety standard? (3) What is the appropriate penalty?

3. Citation No. 3412738

(a) Did Utah Fuel violate 30 C.F.R. § 75.223(a)?

(b) If the standard was violated. (1) Was the violation of a significant and substantial nature? (2) What is the appropriate penalty?

III

STIPULATED FACTS AND STATEMENT OF MATTERS NOT IN DISPUTE

A. Utah Fuel is engaged in mining and selling of coal in the United States and its mining operations affect inter-state commerce.

B. Utah Fuel Company is the owner and operator of Skyline Mine No. 1, MSHA I.D. No. 4201435.

C. Utah Fuel Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

D. The Administrative Law Judge has jurisdiction in this matter.

E. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

F. The exhibits offered by Respondent and the Secretary are stipulated to be authentic.

G. The proposed penalties will not affect Respondent's ability to continue in business.

H. The operator demonstrated good faith in abating the violations.

I. At the time of the roof fall on February 11, 1992, Utah Fuel Company was operating under its Roof Control Plan approved by MSHA on November 27, 1991.

J. Utah Fuel complied with 30 C.F.R. § 50.20-5(a) in reporting the three prior roof falls and one prior lost time accident referenced in Citation No. 3412738.

K. The certified copies of the MSHA Assessed Violations History (Ex. P-10) accurately reflects the history of this mine for the two years prior to the date of the citations.

L. Utah Fuel is not contesting the Imminent Danger Order No. 3850248 issued in conjunction with Citation No. 3850249 to the extent that the imminent danger order relates to the condition which existed after the roof-fall accident. (Tr. 17-18).

IV

THE MINE - UNDISPUTED FACTUAL INFORMATION

The Skyline Mine No. 1 is an underground coal mine located at Scofield, Carbon County, Utah. The mine portals were developed in August 1982. The mine was then idled until January 1988, when full production was started. At the time of the accident,

the mine operated one retreating longwall and three continuous mining machine sections in the Upper O'Conner coal seam. Numerous faults and dikes are associated with this coal seam. The coalbed dips five degrees to the southwest and is accessed by four entries located near the main surface facilities. It also has three return air portals. The mine produced 3,594,110 tons of steam coal in 1991. The coal is taken to the surface by conveyer belts and then transported by truck and railroad to various customers.

Panel entries are developed in sets of three, off the Main West entries. These entries were driven about 18 to 20 feet wide on varying center dimensions with connecting crosscuts for an average distance of approximately 7,000 to 9,000 feet. The entries were developed with continuous mining machines for the purpose of installing retreat longwalls. At the time of the accident, four longwall panels had been successfully extracted.

A total of 119 miners are employed. They work underground on three rotating shifts per day, five days a week. The mine produces an average of 9,822 tons per day.

The approved roof control plan for Skyline Mine No. 1 at the time of the accident was a full roof-bolting plan with the minimum length of bolts being 48 inches, installed on 5-foot centers. When adverse roof was encountered, 10-foot point anchor bolts were used. Roof trusses, wood, or steel square sets could be installed or a number of supplementary support materials could be used as needed, depending on the mining conditions.

Ventilation of the mine was accomplished by a 16-blade propeller type fan properly installed on the surface. The fan is equipped with a 300 HP motor with all necessary safety devices and operates continuously. The fan induces a blowing system of ventilation with a positive pressure of 3.4 inches of water gauge at about 409,150 C.F.M. The mine does not liberate methane gas.

The day before the accident, the last regular MSHA safety and health inspection was completed.

V

After the fatal rock fall accident, MSHA's inspectors Richard Bury and Bruce Andrews went to the mine and investigated the accident. Their Accident Investigation Report received in evidence as Government Exhibit 4 concisely states many of the undisputed facts which were affirmed by testimony of witness at the hearing. Prior to the accident, work was in progress to rehabilitate the previously caved domed-out area in the No. 3 entry return of the 6 Left Tailgate Development section between crosscuts No. 71 and 72.

At approximately 8 a.m. (about 3 1/2 hours before the accident), the section foreman, Zabriskie, held a meeting with the rehabilitation crew on the surface of the mine. At this meeting the crew was instructed on how rehabilitation work of the previously caved area in the No. 3 entry between crosscut Nos. 71 and 72 was to take place.

The rehabilitation plan called for the installation of steel crossbars beginning under supported roof on both the inby and outby ends of the faulted area and work towards each other until the last span, a distance of approximately 20 feet which was unsupported, could be supported by laying galvanized metal beams, skin to skin, across the last set of steel crossbars.

After the instructions, given at the meeting at the surface, the rehabilitation crew proceeded underground to the section where they were met by Gary Long, fireboss/leadman (who had already been given this instruction), and Kurt Clawson, continuous mining machine operator. After viewing the work site and observing no hazardous conditions, the crew then began doing the necessary preparatory work prior to the installation of the steel sets. This work consisted of cleaning with the continuous mining machine from the inby end. Two and one-half ram cars of rock were removed from the area where the outby sets were to be installed. Because of the span of unsupported roof, this was done with the continuous mining machine being operated remotely. After the cleanup was completed, measurements were taken and the first sets of crossbars to be installed on the outby end were cut to length.

Zabriskie, the section foreman, and Long, the leadman, decided that the safest way to move the sets to where they were needed would be to load them on the head of the continuous mining machine and remotely tram them to the work area. After shutting off the breaker to the cutter head, the machine was trammed remotely through the unsupported top to the outby work area. With the head of the continuous mining machine positioned under supported roof, the support leg on the east side of the entry was positioned. Long and Tom Kubota, standing on the head of the machine, remeasured for the crossbar and found that an additional piece of the crossbar needed to be cut off before the bar would fit. Kubota, while standing on the ground in front of the machine, cut the first bar to the proper length. He then climbed onto the head of the continuous mining machine, and in a kneeling position with his back to the west rib, began to cut the second crossbar. With little or no warning, the west rib and associated roof rock collapsed, striking and completely covering Kubota.

Due to the very unstable ground conditions that were present immediately after the fall, Long instructed the continuous mining machine operator, to remotely tram the machine back to the inby end of the area, where the roof was supported prior to the rock

being removed from Kubota. This was done for the safety of the miners engaged in the rescue effort. Kubota was taken to the Castleview Hospital in Price, Utah, where he succumbed to his injuries.

The previously caved area that the tailgate development section crew (including Kubota) were rehabilitating was a caved domed out area, approximately 18 feet wide and 20 feet high. Whereas the coal seam mining height was only about 9 feet high. There was an area of unsupported roof and rib in the caved out domed area. Wooden cribs, constructed in a single and triple configuration, were installed on each side of the No. 3 entry, ending approximately 7 feet outby the outby brow of the cave. The outby edge of the brow was supported with 6-foot resin grouted roof bolts. One crossbar leg, an 8-inch "I" beam, had been installed on the east rib.

In an effort to reduce air slacking and the spilling of rock throughout the 18-foot wide, 20 foot-high caved area, 30 yards of shotcrete had been applied to the roof of the caved area a few days before the accident. The shotcrete was applied to the caved area roof and ribs by miners working under the roof that was supported and stable.

VI

Citation No. 3850249

This citation alleges a violation of 30 C.F.R. § 75.202(a) which requires the following:

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

Subsection (b) of the above quoted section provides:

> (b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

MSHA did not cite or charge Respondent with a violation of subsection (b) and the evidence presented at the hearing satisfactorily established that no person worked or traveled under unsupported roof.

The citation charges Respondent with a violation of subsection (a) of § 75.202 as follows:

> Hazardous roof and rib conditions were present in the #3 entry, between crosscuts No. 71 and 72, in the 6 Left Tailgate Development Section. The rock through this area consisted of unconsolidated sand and slit (sic) stones and had fallen out to a height of approximately 20 feet, resulting in very high ribs of questionable stability. In addition, an area of roof approximately 20 feet in length had been left unsupported. Shotcrete from a remote location had been applied to the roof and ribs making it very difficult to observe any hazardous condition and virtually impossible to determine where the last row of permanent supports had been installed. A fall of rib and roof rock in this area resulted in fatal injuries to one (1) employee.

There is no dispute that these hazardous roof and rib conditions were present in the #3 entry, between crosscuts Nos. 71 and 72, in the 6 Left Tailgate Development section and that rock through this area consisted of unconsolidated sand and silt stones and had fallen out to a height of approximately 20 feet and thus carving out a 20-foot high dome in the caved area.

It was this hazardous roof condition described in the citation that Respondent's rehabilitation team, including Kubota, was in the process of rehabilitating so as to make the area safe for the miners. The roof of the caved area had been supported with roof bolts and mesh wherever conditions allowed. Due to the height of the cave, the angle of the dome and the fractured and laminated conditions approximately 15 to 18 feet of roof could not be bolted. Consequently, the entire area was dangered-off from both ends (inby and outby) of the cave. Pursuant to its rehabilitation plan, shotcrete was applied over the roof and surface of the cave. Next, multiple steel sets were to be built and placed at both ends of the cave, proceeding inward into the cave to the last row of roof bolts on each side. Each steel set would be wedged to the roof as it was placed. Steel I-beams then would be placed skin-to-skin from the steel sets inby to the steel sets outby to span the unbolted area. Roof jacks would be placed on top of the I-beams to provide support from the structure to the roof, and cribs would be placed below the I-beams to provide support from the floor to the structure. The structure would then be lagged to form a tunnel, bulkheaded at both ends, and the cavern above pumped full of aqualite (a lightweight concrete).

Respondent presented evidence that the miners in the rehabilitation team were trained in the rehabilitation plan and knew where supported roof ended. Only those miners on the rehabilitation team were allowed inside the dangered-off area.

To establish a violation of 202(a), the preponderance of the evidence must be established that the area in question was (1) an area "where persons work or travel" and (2) an area that was not "supported or otherwise controlled to protect persons." The preponderance of the evidence does not establish either of these elements.

The domed-out cave area in question was not an area "where people work or travel" within the meaning of section 202(a). In Cyprus Empire Corporation, 12 FMSHRC 911 (May 1990) that Commission determined that areas where persons work or travel do not include areas which are dangered-off and in which the only work being performed is rehabilitation work. Whether a person worked or traveled or was required to enter the area was viewed in light of "normal circumstances." The fact that miners entered the dangered-off area to install needed roof support did not make the dangered-off area one "where persons worked or travel" within the meaning of subsection 212(a). The Commission in reversing the Administrative Law Judge's decision to the contrary stated:

> Cyprus argues that the judge erred in concluding that it violated Section 75.202(a) for two reasons: (1) under the cited standard the area at issue was not an area "where persons work or travel;" and (2) "dangering-off" the area is an acceptable form of "control" of the roof. Because we find the first issue dispositive, we need not reach the second.
>
> To establish a violation of 30 C.F.R. § 75.202(a), the Secretary was required by the terms of the standard to prove that the cited area was an area "where persons work or travel." As discussed above, the judge found that "under normal circumstances, the tailgate end of the long wall would allow a miner to come directly off the long wall into the return entry." 11 FMSHRC 3376 (emphasis added). What the judge did not consider, however, is whether "normal circumstances" are presented here.
>
> The record in this case establishes that as soon as Cyprus encountered the poor roof conditions, it dangered off the area to prevent miners from entering the area of adverse roof conditions. In doing so, Cyprus acted in accordance with accepted safe-mining practice. There is no evidence that at any time during the existence of the dangerous roof conditions, other than during the attempt to

> install additional roof support, any miner worked or traveled in the cited area. . . . Thus, the record established that the operator acted appropriately in dangering off the area of bad roof and that no miners worked, traveled or were required to enter the area at issue.

In the instant case, large, readily visible danger signs had been properly placed on both the inby and outby ends of the cave area prohibiting travel. No persons were allowed to work or travel in this properly dangered-off area. The only exception was the recognized permissible exception of those members of the rehabilitation crew who were doing the rehabilitation work under supported roof. Dangering-off a hazardous area, as was done here, is a recognized means to control so as to protect persons from hazards related to falls of the roof and ribs.

A preponderance of the evidence presented fails to establish a violation of the cited standard, subsection (a) of section 75.202.

VII

Citation No. 3412737

Citation 3412737 alleges a violation of 30 C.F.R. § 75.211 subsection (b) § 75.211 in pertinent part subsection (a) and (b) mandates the following:

> (a) A visual examination of the roof, face and ribs shall be made immediately before any work is started in an area and thereafter as conditions warrant.
>
> (b) Where the mining height permits and the visual examination does not disclose a hazardous condition, sound and vibration roof tests, or other equivalent tests, shall be made where supports are to be installed.

There is no dispute that Respondent fully complied with the requirement of subsection (a). A visual examination of the roof and ribs was made by experienced miners immediately before any rehabilitation work started in the area. This examination did not disclose a hazardous condition.

Respondents are charged with a violation of subsection (b) of section 75.211. That subsection requires "sound and vibration roof tests" or other equivalent tests "where mining height permits." It does not specify what tool to use, what length the tool must be, or set a height limit for testing. It is clear,

however, as discussed below in more detail, that in order to perform a sound and vibration test the height cannot exceed the ability of the tester to place the fingers of the free hand against the roof.

I credit the testimony of Gary Long and I find that Long made a proper sound and vibration test in the area in question "where mining heights permits."

A sound and vibration test requires the miner to hold the tool in one hand, place the fingers of the other hand against the roof, thump the roof with the tool, listen for the sound, and feel for vibrations. See Long, T.433:20; accord Davidson, T.338:13-20. See also Respondent Ex. 61, pg. 71. Consequently, mining heights do not permit a sound and vibration test where the roof is higher than the tester's extended arm and hand can reach the roof. Mr. Long testified that he is 6'2" tall, that he tapped "down low to begin with, and when the miner got into the area where I could get on it, I got on the head and tapped up higher, as high as I could reach."

Mr. Ralston tapped the roof with the tapping head of a 12" long tool, a Rastall. He had years of experience testing roofs and ribs with this acceptable tool. No evidence was presented that simply sounding the roof without checking it for vibration was in fact equivalent to the "sound and vibration" test.

The preponderance of the evidence presented fails to establish a violation of the cited safety standard subsection (b) of section 75.211.

VIII

Citation No. 3412738

This citation alleges a violation of C.F.R. § 75.223(a).

This safety standard provides as follows:

> (a) Revisions of the roof control plan shall be proposed by the operator-
>
> (1) When conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts; or
>
> (2) When accident and injury experience at the mine indicates the plan is inadequate. The accident and injury experience at each mine shall be reviewed at least every six months.

The citation issued by MSHA to the Operator reads as follows:

> The Skyline Mine No. 1 has had 3 unintentional roof falls in the last 4 months the dates of falls are 10/22/91, 10/28/91 and 11/12/91, this mine has also had a lost time accident on 12/30/91 due to a rib roll. The operator has not revised or requested a revision of the Roof Control Plan as required by the Code of Fedralations [sic] 30 CFR 75.223(a) which requires this operator to submit this to an authorized representive [sic] of the Secretary. This falls and accidents were prior to the fatal fall of roof which resulted in fatal injuries to one person on 2/11/92.

Thus, MSHA's citation points to the three unintentional roof falls and one lost time accident in the four months before the fall that struck Kubota and asserts that Utah Fuel "has not revised or requested a revision of the roof control plan as required by 30 C.F.R. § 75.223(a).

The evidence at the hearing established that the four prior incidents required only one revision to Utah Fuel's roof control plan before the roof fall of February 11, 1992, and that the required revision was incorporated into Utah Fuel's roof control plan approved by MSHA on November 27, 1991, approximately 2 1/2 months before the February 11, 1992, accident. The evidence establishes that three falls and one lost time accident occurred; that Utah Fuel determined the causes of the roof falls and that Utah Fuel determined the only revision needed to be made to the roof plan at that time, was incorporated in its roof control plan by MSHA's approval of the revised plan on the 27th day of November 1992, 2 1/2 months before the February 11, 1992, accident.

IX

Before the hearing, Utah Fuel submitted a prehearing memorandum of points and authorities. During the hearing, the parties presented the testimony of 14 witnesses and 139 exhibits. The parties stipulated to a number of material facts. Following the hearing, both parties submitted post-hearing memoranda. Utah Fuel submitted proposed findings of fact and conclusions of law; MSHA did not.

Having heard, considered, and evaluated the testimony of all witnesses, the exhibits, the stipulations by the parties, and the arguments of the parties at trial and in their pre- and post-hearing memoranda, I enter the following findings of fact and conclusions of law based upon the evidence presented and the reasonable inferences to be drawn from the evidence presented.

X

FINDINGS OF FACT

1. Utah Fuel is engaged in the mining and selling of coal in the United States and its mining operations affect interstate commerce.

2. Utah Fuel is the owner and operator of Skyline Mine No. 1, MSHA I.D. No. 42-01435.

3. Utah Fuel is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon Utah Fuel on the dates and places stated therein.

6. Utah Fuel demonstrated good faith in timely abating the citations.

7. On February 11, 1992, a fall of roof and rib rock occurred in Skyline Mine No. 1, 6 Left Tailgate Section, No. 3 Entry, between crosscuts 71 and 72, which rock fall caused fatal injuries to Tom Kubota, a Utah Fuel employee.

8. Mr. Kubota's death is the only fatality ever to occur at the Skyline Mines.

9. At the time of the rock fall, Utah Fuel was operating under its revised roof control plan approved by MSHA approximately 2 1/2 months before the accident.

10. Utah Fuel complied with 30 C.F.R. § 50.20-5 in reporting the three prior roof falls and one prior lost time accident referenced in Citation No. 3412738.

11. At the time in question, Utah Fuel produced more than five million but less than ten million tons of coal annually.

12. At the time of the rock fall, Mr. Kubota was involved in work to rehabilitate a caved area.

13. The cave formed in the No. 3 entry as Utah Fuel attempted to mine through a faulted section. As Utah Fuel progressed down the entry, it encountered bad roof, and significant caving.

14. Utah Fuel's previous experience with faults indicated that driving the No. 1 and No. 2 entries inby the problem area in

the No. 3 entry and then mining from the inby side out ("backmining") would have a positive effect on the mining conditions and Utah Fuel's ability to mine through the fault.

15. Utah Fuel decided to backmine and proceeded to do so, installing a variety of primary and supplemental roof supports, and placing a readily visible danger sign and restrictive ribbon across the No. 3 entry.

16. As Utah Fuel backmined and encountered the fault from the inby end of the No. 3 entry, roof conditions deteriorated. Utah Fuel shortened its cuts with the continuous miner to five feet in length but caving still occurred, which resulted in bolting problems.

17. The caving required the roof bolters to operate the bolting machine on a ramp in order to reach the roof. The resultant angle of the machine tipped the TRS (temporary supports) on the machine back, making it unsafe to proceed.

18. To avoid exposing the roof bolters to these hazards, Utah Fuel decided to cut through the coal block that remained in one pass with the continuous miner (the "punch through") and then rehabilitate the resulting cave in a way that would not expose people to hazards.

19. Utah Fuel allowed the cave to "dome out" before beginning rehabilitation work because Utah Fuel's past experience indicated that allowing a cave to "dome out" increased its stability. Utah Fuel allowed the cave to set before applying shotcrete.

20. Conflicting evidence was introduced at the evidentiary hearing concerning whether or not allowing a cave to dome out leads to a state of equilibrium, and whether the caved area at issue was in a state of equilibrium during the rehabilitation work. Dr. Ben Seegmiller, an expert on work mechanics and roof control systems with bachelor's degrees with honors in geological engineering and mining engineering, a master's degree in mining engineering with a specific emphasis on rock mechanics, and a doctorate degree in mining engineering based on the study and evaluation of acoustic energy into rock, gave his expert opinions that allowing a cave to "dome out" would result in equilibrium, and that the cave at issue reached equilibrium before rehabilitation efforts began and remained in equilibrium until the roof falls that fatally injured Mr. Kubota.

21. MSHA did not seek to have Mr. Ponceroff qualified as an expert. Mr. Hansen's opinion was offered by MSHA as an expert opinion. Dr. Seegmiller's opinions were credible and persuasive.

22. Before the rehabilitation work began, Utah Fuel applied shotcrete containing fiberglass to the roof and ribs of the cave to stop the raining of rocks caused by air slacking and spalling.

23. MSHA recognized the utility of shotcrete as a sealant and its application of shotcrete to the cave was reasonable.

24. Utah Fuel developed a rehabilitation plan for the cave which called for the placement of steel sets under supported roof on both the inby and outby sides of the cave. As each set was placed, it would be supported to the roof before the next set was placed. The sets would then be spanned with 22-foot long steel Kennedy beams. The area above the beams to the roof and the area under the beams to the floor would be supported with jacks and cribs. Lagging then would be applied to the sides of the tunnel, the cave edges above and around the tunnel would be sealed off, and the cavity around the tunnel would be filled with a lightweight concrete.

25. The rehabilitation plan did not call for anyone to work beyond the last row of roof bolts at any time and no one did so.

26. Utah Fuel developed the rehabilitation plan, reviewed it at the highest levels of mine management, and modified it before rehabilitation work was begun.

27. Utah Fuel selected David Zabriskie's crew to do the rehabilitation work because that crew had the most experience in rehabilitation.

28. At the time of the accident, Foreman Zabriskie had 14.5 years mining experience, and Gary Long, Zabriskie's fire boss, had 20 years mining experience, the last 10 of which involved rehabilitation work.

29. At the time of the accident, Karl Clawson and Tom Kubota, members of Zabriskie's crew, had prior experience rehabilitating caves with steel sets.

30. Foreman Zabriskie and Fireboss Long, who were leading the rehabilitation effort, were known to be safety-conscious individuals who emphasized safety with their crew.

31. Crew members knew they were expected to communicate any safety hazards or concerns they had to Long or Zabriskie, and that those concerns would be acted upon.

32. On the morning of the accident, readily visible danger signs prohibiting normal work or travel were present on both the inby and outby side of the cave area.

33. The danger signs complied with the requirements of 30 C.F.R. § 75.212 for rehabilitation work.

34. Only those persons designated to rectify the hazard and trained on the rehabilitation plan were allowed beyond the danger signs.

35. During rehabilitation work, Karl Clawson was placed on lookout on the inby side of the cave to prevent entry into the area by unauthorized persons and to warn the other crewmen of any change in conditions.

36. Everyone involved in the rehabilitation effort was trained on the rehabilitation plan before they arrived at the rehabilitation work site.

37. Utah Fuel employees involved in the formulation and the execution of the rehabilitation plan felt the plan was safe. No one voiced any concern about the safety of the plan.

38. No one who was not involved in the rehabilitation effort proceeded past the danger signs posted inby and outby the cave area.

39. On the outby side of the cave, in the area where the rehabilitation work was being done, there was a roof mat with four roof bolts present on the brow of the cave. See, Ex. R-45.

40. Inby of the roof mat, there was another row of roof bolts, constituting the last row of bolts proceeding inby from the outby side of the cave.

41. The last row of bolts consisted of five bolts, located in an approximate line with the hanging bolt depicted on Ex. R-45 and in photograph Ex. R-54.

42. The last row of bolts was covered with shotcrete, but the crew was able to and did discern the location of the bolts by their visible outlines under the shotcrete.

43. Gary Long made sure the crew knew where the last row of bolts was by pointing it out to them.

44. The testimony of every eyewitness to the accident was that the last row of bolts was inby the brow and inby the row of roof bolts with the mat at the brow.

45. Three used roof bolts were found in the material resulting from the fall, one of which was found on top of Kubota and the others in gob and material that fell from the roof.

46. There was no "lip" present on the floor of the cave which prevented the head of the continuous miner from moving into position under supported roof.

47. The head of the continuous miner was positioned under supported roof at the time of the rock fall.

48. Based on the uncontroverted testimony of every eyewitness to the accident, I find that at the time of the rock fall, Kubota was located under permanently supported roof. Kubota was up on the head of the continuous miner located between the row of bolts securing the last roof mat at the brow and the row of bolts further into the caved out area.

49. There was no indication that the support under which Mr. Kubota was working was failing until an instant before the roof fell when two small pieces of material dropped on Mr. Kubota's hardhat.

50. The crew recognized and immediately acted upon that warning--Mr. Clawson called out to Mr. Kubota, Mr. Kubota looked up--but there was not enough time for Mr. Kubota to make it to safety.

51. At least three roof bolts in the last row of bolts were pulled out of the roof by the rock fall that struck Kubota and one of the bolts lay on top of Kubota after the rock fall.

Sound and Vibration Test

52. Visual inspections of the work area done by Gary Long and others were properly performed as required by subsection (a) of section 202.

53. Before the work began, Gary Long did sound and vibration tests on the roof and ribs in the area where the work was to be done, with the exception of the roof inby the brow, which Long could not reach because of the height of the roof in the caved area.

54. Mr. Long conducted the sound and vibration tests using a 12" Rastall S12/H Miners Wrench, a combination tool designed as a hammer, box-end wrench and adjustable-end wrench. The handle of the wrench has a hammer end. The hammer end has a solid, flat surface area of approximately one inch by 1/2 inch. The Rastall tool is similar in size and weight to a geologist's hammer.

55. Standing on the ground and then up on the head of the continuous miner, Mr. Long held the Rastall by the handle in one hand, and used the hammer end of the Rastall to thump the roof, feeling for vibration in the free hand and listening for the sound being made.

56. Mr. Long did the tests as high as he could reach with both hands from a position on the ground and then from a position on the head of the continuous miner. He did not perform sound and vibration tests on the roof inby the brow because, even standing on the head of the continuous miner, it was too high to perform a sound and vibration test.

57. Mr. Long had tested roofs with a Rastall or similar device for at least four years before the Kubota accident, performing thousands of tests in that timeframe, and was very familiar and comfortable with the Rastall.

58. The sound and vibration tester's experience in conducting sound and vibration tests is one of the most important, if not perhaps the most important, factor when conducting a sound and vibration test.

59. When shaken, the Rastall can make a clicking or rattling sound if the jaw is loose, which sound disappears when the jaw is tightened.

60. When used to thump the roof three or four consecutive times, the Rastall omits no rattling sound. After continued thumping, the Rastall's jaw can loosen slightly and omit a slight metallic rattling sound. Minimal effort is necessary to quickly thumb-tighten the jaws before continuing with the test.

61. The metallic sound caused by the Rastall is a totally different sound than the sound the tester is listening for in the roof, and definitely distinguishable. The metallic sound did not interfere with Long's performance of the sound and vibration test.

62. The type of tool to be used for sound and vibration tests is not specified in the Mine Safety and Health Act, 30 U.S.C. § 801 et seq.; Code of Federal Regulations, 30 C.F.R. § 75.200 et seq.

63. The MSHA Roof and Rib Control Manual NMSHA-CE-003 likewise does not specify the tool to be used, stating merely that the test should be done with a "solid object."

64. MSHA District Manager William Holgate stated in a letter to Utah Fuel that a Rastall could be an appropriate tool; for conducting sound and vibration tests. See Ex. R-67.

Roof Control Plan

65. On October 21, 1991, Utah Fuel experienced a reportable roof fall in Skyline Mine No. 1, in the 6 Left Tailgate section, No. 1 Entry, at crosscut 64. See Ex. P-19. The failure was

related to high horizontal stresses in the roof. No one was injured in the fall.

66. At the time of the fall, Utah Fuel was engaged in an extensive study of different types of longer torque-tension bolts to help address horizontal movement problems, and already had forms of support in its roof control plan to adequately control the roof once it failed.

67. Utah Fuel's tensionable bolt study was scheduled to be completed in Spring 1992. MSHA was aware of Utah Fuel's bolt study and its estimated completion date and agreed with Utah Fuel that a plan amendment concerning longer torque-tension bolts was not necessary until the study was finished.

68. On October 27, 1991, Utah Fuel experienced a reportable roof fall in Skyline Mine No. 1, in the 6 Left Tailgate Section, at crosscut 4. The fall was caused by a wet roof condition. No one was injured in the fall.

69. The fall indicated that a revision to Utah Fuel's plan was needed. Utah Fuel, in conjunction with MSHA, determined that providing drain holes in intersections would alleviate some of the wet roof problems. Utah Fuel submitted a drain hole revision to the roof control plan to address the wet roof situation. That amendment was approved by MSHA as part of the November 27, 1991, MSHA approved roof control plan.

70. During MSHA's investigation of each of the October falls, MSHA's inspector Hanna may have had some discussion about the use of six-foot torque tension bolts to prevent such falls. However, following the October 1991 roof falls, Mr. Bunnell and MSHA's Denver roof-control specialist, Mike Stanton, discussed Utah Fuel's ongoing torque-tension bolt study. Mr. Stanton agreed that Utah Fuel should continue the study, and was not concerned that the study would not finish until Spring 1992. Mr. Stanton told Mr. Bunnell it was not necessary to amend the plan to a six-foot bolt at that time, and Bunnell understood that no plan amendment was required with respect to roof bolts until the bolt evaluation process was finished.

71. On November 10, 1991, Utah Fuel experienced a reportable roof fall in Skyline Mine No. 1, in the 6 Left Tailgate Section, No. 1 entry, at crosscuts 67-68. The fall occurred in a dike section of the entry, and the failure was due to an undetected fault within the dike. No one was injured in the fall.

72. Utah Fuel rehabilitated the cave resulting from the November 10, 1991, falls with steel sets, a supplemental support provided for in Utah Fuel's roof control plan.

73. The November falls did not indicate that a revision to Utah Fuel's plan was needed.

74. In December 1991, Utah Fuel experienced a lost time accident, which occurred when two miners were installing supplemental roof bolts with a Cobra hand drill. The drill vibrated and a loose slab of rock fell from the roof, striking the miner on the foot. The incident did not indicate that an amendment to the roof control plan was needed.

75. MSHA approved Utah Fuel's roof control plan on November 27, 1991, with knowledge of, and after having investigated, the three prior roof falls.

76. From December 30, 1991, through January 21, 1992, MSHA inspector Hanna, a roof-control specialist, conducted a section 75.223(d) six-month review and evaluation of the roof-control plan, which review took into account all prior roof falls and lost-time accidents.

77. As a result of his inspection, Inspector Hanna found no MSHA violations in the 6 Left Tailgate Section, the same section where the Kubota fall occurred two weeks later, and determined that no revision to the roof control plan was needed.

78. MSHA did not call as witnesses Mike Stanton, the roof specialist, nor Inspector Hanna, the only MSHA personnel in direct contact with Utah Fuel during the roof control review process. Evidence presented by Utah Fuel on the roof-control plan revision issues is credible and persuasive.

XI

CONCLUSIONS OF LAW

1. Utah Fuel "supported or otherwise controlled" the roof and ribs in the area referenced in Citation No. 3850249, Utah Fuel did not violate 30 C.F.R. § 75.202(a).

2. By dangering-off the rehabilitation area, Utah Fuel prevented miners from normal work and travel in that area, and thereby, otherwise controlled the area as required by 30 C.F.R. § 75.202(a).

3. Utah Fuel, through Fireboss Long, conducted visual inspection and performed sound and vibration tests where mining height permitted as required by 30 C.F.R. § 75.211(b)(2).

4. The Rastall used by Mr. Long is a solid object and an adequate tool for conducting sound and vibration tests.

5. The violation of 30 C.F.R. § 75.211(b)(2) as alleged in Citation No. 3412737 was not established.

6. As a result of the three prior roof falls, only one revision to Utah Fuel's roof-control plan was reasonably and foreseeably necessary before the fatal accident of February 11th. That revision was approved by MSHA and the roof-control plan as amended with this revision in accordance with 30 C.F.R. § 75.223 was approved by MSHA on November 27, 1991. The violation of 30 C.F.R. § 75.223(a) as alleged in Citation No. 3412738 was not established.

XII

Without the benefit of hindsight, the preponderance of the evidence presented failed to establish that the actions taken by Utah Fuel were not reasonable actions that a "reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have taken and provided in order to meet the protection intended by each of the three cited safety standards. Reviewed under the "reasonable prudent person standard I find Utah Fuel acted as a reasonable prudent mine operator in recognizing and addressing the potential hazards. The actions taken by Utah Fuel are what a "reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the cited standards. See Canon Coal, 9 FMSHRC 667 at 668 (1987). Each of the citations should be vacated.

ORDER

Citation Nos. 3850249, 3412737 and 3412738 and their corresponding proposed penalties are **VACATED** and this case is **DISMISSED**.

August F. Cetti

August F. Cetti
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

AUG 2 3 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 96-13
	:	A.C. No. 46-07465-03505
v.	:	
	:	Eckman-Page Strip & Auger
EXTRA ENERGY, INC., Respondent	:	

DECISION

Appearances: Alan G. Paez, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
William C. Miller, II, Esq., Jackson & Kelly, Charleston, West Virginia for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Extra Energy, Incorporated (Extra Energy) with two violations of mandatory standards and proposing civil penalties of $1,550 for those violations. The general issue before me is whether Extra Energy committed the violations 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.

Background

Extra Energy operates the subject Eckman-Page Strip and Auger Mine in McDowell County, West Virginia. It is a small surface operation employing an average of three to four employees. During the period November, 1994 through April, 1995, the mine routinely operated ten hour shifts, from 7:00 a.m. to 5:00 p.m., Monday through Friday. Independent contractor Neal and Associates, Inc. (Neal) provided security at the mine from 6:00 p.m. to 6:00 a.m. on the weekend nights of Friday, Saturday, and Sunday. Melvin Brian Day, Jr., (Brian) was a security guard employed by Neal in November, 1994 and assigned to provide night security for the mine.

On Sunday morning, April 9, 1995, around 10:00 a.m., when Brian did not return home as usual, his father,

Melvin Brian Day, Sr. (Melvin) and his brother, Jeffrey Shawn Day (Shawn) began looking for Brian. Melvin and Shawn drove to the mine site looking along the way for Brian's car. Blocked by the locked gate at the entrance to the mine, they parked and walked onto the property. They found Brian's body in his 1982 Ford Escort with the engine running, the doors locked, the windows rolled up, and his citizens band (CB) radio on. His seat was in a partially reclined position. They gained access to the car by breaking the sunroof.

They attempted to use Brian's CB to call for help but it was inoperable. The CB cable had been severed when they broke into the car. Shawn then took the gate key from Brian's key ring, unlocked the gate and drove to the accident site. Attempts to use the CB in Melvin's car were also unsuccessful so Melvin and Shawn conveyed Brian's body to a nearby town and telephoned for an ambulance. The police were also notified and West Virginia State Trooper Cochran and McDowell County Deputy Sheriff Mitchell responded.

After releasing the body to the ambulance crew, Deputy Mitchell and Trooper Cochran accompanied Melvin and Shawn to the accident site. Mitchell and Cochran examined the car and let it run a few minutes. The officers reportedly commented about smelling fumes and that there was "an exhaust leakage of carbon monoxide". Shawn was then permitted to remove the vehicle from the accident site.

James Altizer, Brian Day's supervisor at Neal, received two telephone calls on April 9, 1995, advising him of Brian's death. The first call was taken by Altizer's wife who reported to him that Brian Day had died in a car accident. A later call informed Altizer that Brian had died on the job site. Driving to the site along with another Neal employee, Timothy Stanley, they found the gate open. They were unable to find anyone on the premises or locate the precise accident site.

Altizer called Extra Energy Superintendent Steve Haynes at around 4:00 or 5:00 p.m. on the evening of the accident to inform him of Brian Day's death. Altizer told Haynes that the victim was found on the job site, that he had died from carbon monoxide poisoning, and that the accident had been investigated by the State Police and the Sheriff's Department. According to Altizer, Haynes responded that "he would take it from there".

Inspector William Uhl of the Department of Labor's Mine Safety and Health Administration (MSHA) was directed to investigate the incident on April 11, 1995. Uhl first contacted the West Virginia Department of Mines and found that two of their inspectors had already been at the mine on April 10. In the course of his investigation Uhl also received a copy of a report

of the incident from the McDowell County Sheriff's Department (Government Exhibit No. 2) and the coroner's report (Government Exhibit No. 3). In addition, Uhl inspected the automobile in which Day died. Twelve photographs of the car were admitted into evidence (Government Exhibits 4 through 15).

According to Inspector Uhl, when the motor was operated on this vehicle a separation in the exhaust pipe could be heard as a "fluttering" sound. Carbon monoxide tests were performed with a hand held monitor with the car closed and run for 15 minutes. In each of two tests, 900 parts per million of carbon monoxide was detected. Uhl testified that based on a "chart we had" such an exposure over a three hour period can be fatal. He opined, based upon hearing the exhaust system, that the system had leaks that were "obvious". Uhl also concluded that the violation was serious and "significant and substantial" because exposure to carbon monoxide can be fatal. He concluded however that Extra Energy was chargeable with but little negligence based on his finding that the vehicle was operated by the security contractor only during non-production hours and was therefore rarely seen by this production operator.

Uhl also testified that the fatality had not been reported to MSHA. Uhl spoke to Extra Energy Mine Superintendent Haynes on April 11. Haynes said that he had been called by the security company representative, Altizer, who purportedly told him he did not know whether it occurred on mine property. Haynes maintained that this was his reason for not contacting MSHA. Uhl also determined from the records at the Mt. Hope MSHA office that no report of the incident had been filed. On April 10, MSHA Supervisor Ratcliff was apparently also told by Haynes that he (Haynes) could not ascertain whether a fatality had occurred on mine property. Uhl had understood that Altizer had called Haynes on April 9 and, in fact told him at that time that there had been a fatality "on the job".

James Altizer worked for Neal Associates as a field supervisor in April 1995. He negotiated contracts for Neal and supervised 20 to 30 security guards at various job sites. Altizer recalled that Neal and Associates had contracted with Extra Energy in early 1995 for a security guard. He met with Extra Energy Mine Superintendent Steve Haynes who told Altizer that he wanted someone to guard the auger. About a week after the contract with Haynes was signed, Altizer hired the deceased and assigned him to the Eckman-Page mine site. Haynes provided Altizer with a key to the mine property and Altizer gave the key to the deceased.

Later, David Hale, another representative of Extra Energy, told Altizer that Day's duties had changed to include some

patrolling. The deceased also later told Altizer that he no longer was required to patrol the auger site because of the bad road conditions and he was permitted to locate where he had better "CB" communications, presumably on mine property between the two stockpiles. According to Altizer, the vehicles used by Neal security guards were required to meet state inspection standards and so long as the vehicle met those standards it was allowed on mine property.

Steven Haynes was superintendent for Extra Energy on April 9, 1995, and in November 1994 when they contracted with Neal and Associates for security guards. He recalled telling Altizer that they needed someone to patrol everything at the mine site, including the auger, the two gates and the load-out at the bottom of the hill. According to Haynes, Altizer checked the property and later said that the type of vehicle the guard would be using would prevent him patrolling the auger site. Haynes recalled that he then told Altizer to have the guard check only the gates and the load-out using the county roads. Subsequently Haynes met the deceased twice at the stockpile inside the gate. According to Haynes, Day told him that Altizer wanted him to be stationed there. Haynes purportedly told Day that he did not want him inside the gates. According to Haynes, the second time he found Day at the stockpile he warned him not to be on mine property.

Haynes testified that Altizer called him on April 9 around 6:00 p.m. advising him that a security guard had died but he purportedly was not sure where the guard died. He was further told that the state police were investigating the incident. Haynes maintained that he looked for glass on April 10, but found none and when MSHA Supervisor Ratliff visited around 2:00 p.m. on April 10, Haynes had no answers for him.

Haynes recalls that around 9:00 a.m. on April 10th he told an MSHA employee named "Miller" that he could not find any evidence of the incident on the mine property. Haynes further maintains that the sheriff would not give him any information regarding the incident. Haynes maintains that even as of April 11, when Inspector Uhl visited the job site he still did not know where the deceased's vehicle was found. Haynes contends that he had no reason to believe it was on mine property.

Haynes admitted that he permitted Day to retain the gate key to mine property for "emergencies" and that Day also needed the gate key presumably to enter mine property in order to chase four-wheelers off the property. Haynes also acknowledged that the gates were probably on mine property and that it was part of Day's responsibilities to ensure that the gates were locked.

Alleged Violations

Citation No. 3964767 alleges a violation of the standard at 30 C.F.R. § 50.10 and charges as follows:

> A fatal accident occurred at this mine on April 9, 1995. The victim was discovered at 10:30 a.m. MSHA was not notified by the operator.

The cited standard provides as follows:

> If an accident occurs, an operator shall immediately contact the MSHA district or subdistrict office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA district or subdistrict office, it shall immediately contact the MSHA headquarters office in Arlington, Virginia by telephone, at (800) 746-1553.

Citation No. 3964768, as amended, alleges a violation of the standard at 30 C.F.R. § 77.404(a) and charges as follows:

> The 1982 Ford Escort (vin) 2FABPU144CX249029 being operated on this surface mine property was not being maintained in a safe operating condition. The exhaust system was leaking carbon monoxide at three locations and portion of the car body was rusted and deteriated [sic] allowing high levels of carbon monoxide into the drivers [sic] compartment. High levels of (CO) was [sic] detected when funtional [sic] test were [sic] conducted. This was a contributing factor which resulted in a fatal injury.

The cited standard, 30 C.F.R. § 77.404(a) provides that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Respondent first appears to claim that the deceased, Brian Day, who was admittedly employed as a security guard by independent contractor Neal Associates, was not a "miner" as defined in the Act but was essentially only an unauthorized trespasser on its mine property and for whose actions it therefore assumes no responsibility.[1] Respondent claims the deceased was not a "miner" because "at least during the latter part of his employment by Neal, [he] was specifically directed to stay off mine property when performing his duties" as a security guard on behalf of Respondent.

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[1] A "miner" is defined in Section 3(g) of the Act as "any individual working in a coal or other mine".

Regardless of the merits, *vel non,* of Respondent's contention that the Secretary must prove in this case that the deceased was a "miner" under the Act, it is clear from the credible evidence that the deceased was in fact a "miner" as so defined and, furthermore, that he was authorized by Respondent directly and through its contractor, Neal and Associates, to perform services on Respondent's mine property as a security guard. More importantly, the evidence shows that the deceased was, during relevant times, working in the subject mine.

In reaching these conclusions I have not disregarded Haynes' testimony that he had twice directed the deceased to perform his job as a security guard on the county roads outside the mine gates and that he told the deceased that he did not want to see him on mine property. This testimony is, however, contradicted by Altizer's testimony, by the contractor's records which continued to show that the deceased was patrolling on mine property and the fact that an agent of the Respondent reviewed these records, and by Haynes own testimony that the deceased retained an access key for emergency entry onto mine property, to chase trespassers and to secure the gates which were "probably" on mine property. Under the circumstances I accord no weight to Respondent's contention that the deceased was essentially only an unauthorized trespasser.

Respondent next argues that the Secretary's decision to charge it as the production operator in this case was an abuse of discretion. It is now, of course, well established that, in cases involving multiple operators, the Secretary may generally proceed against either an owner or production operator, his contractor, or both. *W-P Coal Company,* 16 FMSHRC 1407 (July 1994); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1360 (September 1991); *Consolidation Coal Company*, 11 FMSHRC 1439, 1443 (August 1989). In addition, it is established that the Secretary has wide enforcement discretion. *W-P Coal Company* at 1411. The Commission has nevertheless recognized that review of the Secretary's action in citing an operator is appropriate in order to guard against an abuse of discretion. *Id.* at 1411. The difficulty is that there is little guidance as to what constitutes an abuse of discretion in this regard. The Secretary has here elected to charge both the independent contractor security company, Neal and Associates, and the production operator, Extra Energy, with violations related to the death of the independent contractor's employee Brian Day.

The Secretary argues that his decision to cite Extra Energy as the production operator of the Eckman-Page Mine was based in part by the fact that it was the statutory "operator" who controlled and supervised and had the right and ability to exercise control and supervise the mining operation. The Secretary also argues that the issuing inspector in this case

followed MSHA's program policy manual guidelines in determining when to cite production operators. Those guidelines provide as follows:

(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 hazards; or

(4) When the production operator has control over the condition that needs abatement. (See Government Exhibit No. 22).

The Secretary's "guidelines" one and two are, however, unworkable and essentially meaningless because it can always be said that a production operator contributed by omission to a violation committed on its premises by one of its contractors. Moreover it would be a rare case indeed where it could not be said that the production operator had some degree of control over a condition at its mine that needed abatement. The fourth "guideline" therefore is also essentially without meaning. Thus, when the Secretary claims that he has followed guidelines one, two and four it is likewise meaningless. These are not true "guidelines" at all when there are virtually no factual cases which would fall outside of such "guidelines".

The Secretary has also failed to prove that the third "guideline", the only truly workable guideline, was met. Since the deceased was the sole operator of the defective vehicle while acting as a contract security guard at the mine and since he worked at night when the Respondent's workers were ordinarily not present, Respondent's miners were not exposed nor was it likely that they would have been exposed to the carbon monoxide hazard in the cited vehicle presented by the violation charged in Citation No. 3964768. The Secretary offers no explanation as to how his third "guideline" applies to Citation No. 3964767. Under the circumstances I find that the Secretary has failed to demonstrate how his third "guideline" has been met on the facts of this case.

In spite of the noted deficiencies in the Secretary's "guidelines" I nevertheless find that the Secretary did not abuse his discretion in proceeding against both the contractor and the production operator herein. The guidelines are, in any event,

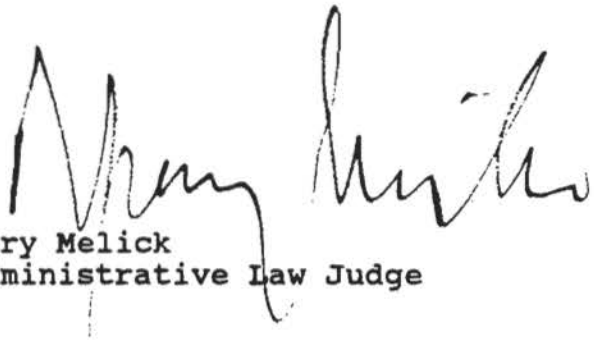
merely expressions of general policy and are not binding regulations that the Secretary is required to observe. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (1986). Moreover Respondent did in fact directly contract with Neal for security and tightly and continuously controlled access to mine property with locked gates. The undisputed evidence also clearly shows that the subject vehicle had an obviously defective exhaust system and no current inspection sticker. These factors, while minimal, are sufficient to warrant the Secretary's action in charging Respondent for its part in the violations herein. It is noted that the Secretary has recognized Respondent's lesser responsibility for the violations by his findings of decreased negligence. I further find that with respect to Respondent's failure as production operator to have reported the fatal accident at its operation to MSHA under the standard at 30 C.F.R. § 50.10, there is strict liability regardless of whether Respondent contributed to the accident or had control over the conditions giving rise to the accident.

Respondent also argues that it did not violate the standard at 30 C.F.R. § 50.10 by failing to notify MSHA of the fatal accident, as alleged in Citation No. 3964767, because of Superintendent Haynes' uncertainty that the fatal accident had occurred on its property. While it is undisputed that before Haynes even knew of the incident both the subject vehicle and deceased's body had already been removed from the mine site, leaving no direct evidence of the accident, I nevertheless find Altizer's testimony credible that on the same day as the accident, he told Haynes that Brian Day had died in his car at the subject mine of carbon monoxide poisoning. In any event since the fatal accident had occurred at the mine and Respondent failed to notify MSHA of the accident, Respondent is strictly liable for the violation. I agree however that ample mitigating circumstances exist to warrant a finding of low negligence and low gravity and that, accordingly, the proposed civil penalty of $50 is appropriate for this violation considering the criteria under Section 110(i) of the Act.

Neither the existence of the violation charged in Citation No. 3964768 nor the findings associated therewith are otherwise challenged by Respondent (See Respondent's Post Hearing Argument). Based on the record evidence and the Secretary's undisputed findings, including the Secretary's acknowledgment that Respondent's negligence was "rather low" (since the victim worked during non-production hours and was "probably seen very little by the actual controlling operator") I conclude that a civil penalty of $500 is appropriate.

ORDER

Citation Nos. 3964767 and 3964768 are affirmed and Extra Energy, Inc. is hereby directed to pay civil penalties of $50 and $500, respectively for the violations charged therein within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 2 8 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. ISLAND CREEK COAL COMPANY, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. KENT 95-214 A.C. No. 15-03178-03789 Mine: Ohio 11
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. WILLIAM THOMASON, Employed by ISLAND CREEK COAL CO., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. KENT 95-502 A.C. No. 15-03178-03800 A Mine: Ohio 11
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. JOHN CAMBRON, Employed by ISLAND CREEK COAL CO., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. KENT 95-519 A.C. No. 15-03178-03799 A Mine: Ohio 11

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
John T. Bonham, II, Esq., David J. Hardy, Esq., (on brief), Jackson & Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Island Creek Coal Company, William Thomason and John Cambron, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that the company violated five of the Secretary's mandatory health and safety standards and that Thomason and Cambron, as agents of the company, knowingly authorized, ordered or carried out one of the violations.

For the reasons set forth below, I find that the company did not violate section 50.10, 30 C.F.R. § 50.10, and vacate Citation No. 3859779. In accordance with a negotiated settlement of the remaining petitions, orders and citations, I dismiss the petitions against Thomason and Cambron, vacate and dismiss Order No. 3859663, modify Order No. 3859662 to a citation and assess a penalty against the company of $352.00.

A hearing was held on April 10, 1996, in Henderson, Kentucky. In addition, the parties filed post-hearing briefs in these matters.

Settled Matters

At the beginning of the hearing, counsel for the Secretary stated that all but one citation in these cases had been settled. With regard to Docket Nos. KENT 95-502 and KENT 95-519, the Secretary moved to dismiss the petitions because the evidence did not demonstrate the aggravation necessary to support the cases against Thomason and Cambron under section 110(c), 30 U.S.C. § 820(c). For Docket No. KENT 95-214, the parties agreed that the Respondent would pay the assessed penalty of $50.00 each for Citation Nos. 3859614 and 4067100, that Order No. 3859663 would

be vacated for lack of proof and that Order No. 3859662 would be modified from a section 104(d)(1) order, 30 U.S.C. § 814(d)(1), to a 104(a) citation, 30 U.S.C. § 814(a), by reducing the level of negligence from "high" to "moderate" and deleting the "unwarrantable failure" designation and that the penalty would be reduced from $2,500.00 to $252.00.

After considering the parties' representations, I concluded that the settlement was appropriate under the criteria set forth in section 110(i), 30 U.S.C. § 820(i), and informed the parties that I would accept the agreement. (Tr. 5-22.) The provisions of the agreement will be carried out in the order at the end of this decision.

Contested Citation

The Island Creek Ohio No. 11 mine is an underground coal mine employing 231 miners and producing 8,000 tons of coal daily from four working sections. During the second shift on April 7, 1994, a continuous mining machine cut through a "core drill hole"[1] while mining a crosscut between the numbers five and six entries on the 004 section. The core drill hole went through the No. 11 seam, where the work was being done, down into the No. 9 seam which had been sealed for some time and contained gas under pressure. As a result, gas from the No. 9 seam flowed into the No. 11 seam.

Concentrations of between three and three and one half percent methane were detected in the return adjacent to the continuous miner. Within two or three minutes, ventilation curtains were set up and the methane concentration was reduced to below one percent. The continuous miner was removed from the crosscut and attempts were made to seal the hole.

Around 7:00 a.m. on April 8, the local MSHA office was notified of the situation as a "courtesy." On receiving the

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[1] A "core drill" is " a mechanism designed to rotate and cause an annular-shaped rock cutting bit to penetrate rock formations, produce cylindrical cores of the formations penetrated, and lift such cores to the surface, where they may be collected and examined." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 266 (1968) (*DMMRT*). Thus, a "core drill hole" is the hole remaining after the core has been removed.

notification, a 103(k) order, 30 U.S.C. § 813(K), was issued to preserve the scene and MSHA inspectors traveled to the mine.

After the inspectors reviewed the situation, Citation No. 3859779 was issued, alleging a violation of section 50.10. The citation stated that "[m]ine management failed to notify MSHA immediately after the mine experienced a non-injury accident on April 7, 1994 at 1845 hrs. A core drill hole was cut through on the 004-0 MMU. MSHA was notified by phone on April 8, 1994 at 0700 hrs." (Jt. Ex. 1.)

The gas leak was finally completely solved when a hole was drilled to the surface on April 13, venting the pressurized gas to the surface. Mining operations on the other sections of the mine were not affected by the gas leak. Consequently, all other mining operations continued.

Section 50.10 requires that "[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." Section 50.2(h), 30 C.F.R. § 50.2(h), sets out 12 types of incidents when an "accident" is deemed to have occurred. Section 50.2(h)(4) states that "[a]n unplanned inundation of a mine by a liquid or gas" is an accident.

It is undisputed that this incident was not immediately reported to MSHA. Therefore, if this was an unplanned inundation of the mine by gas, Island Creek violated the regulation. I find, however, that what occurred was not an inundation of the mine. Consequently, it was not a reportable accident under section 50.10.

If there is any doubt as to whether a regulation provides "adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test." *BHP Minerals International Inc.*, No. CENT 92-329 *et al*, slip op. at 4 (August 19, 1996). That test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)." *Id.*

The regulation speaks of the inundation of a *mine*, not a part, sections, entries or crosscuts of a mine. Thus, on its face it appears that this type of accident has to be mine wide. That this is the case, is further indicated by the use of the word "inundation."

As the Commission has previously noted, the *DMMRT* at 587 defines "inundation" as an "inrush of water on a large scale which floods the entire mine or a large section of the workings." *Aluminum Company of America*, 15 FMSHRC 1821, 1825 n.8 (September 1993). Under the regulations, inundation can also be an inrush of gas. *Id.*

Clearly, what occurred here was not an inundation. The gases released did not flood the entire mine or even a large section of the workings. Three of the four working sections were unaffected. In fact, only the numbers five and six entries and the crosscut between them in the 004 section were impacted at all by the release of gas.

I find that a reasonably prudent person familiar with the mining industry would not have concluded that this incident was an accident required to be immediately reported under section 50.10. Therefore, I conclude that the company did not violate the regulation when this incident was not immediately reported.

ORDER

Docket Nos. KENT 95-502 and KENT 95-519 are **DISMISSED**. In Docket No. KENT 95-214, Order No. 3859663 and Citation No. 3859779 are **VACATED** and **DISMISSED**, Order No. 3859662 is **MODIFIED** by reducing the level of negligence from "high" to "moderate" and deleting the "unwarrantable failure" designation and is **AFFIRMED AS MODIFIED**, and Citation Nos. 3859614, and 4067100 are **AFFIRMED**. Island Creek Coal Company is **ORDERED TO PAY** a civil penalty of **$352.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 30 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-504-M
Petitioner	:	A.C. No. 42-01975-05507
v.	:	
	:	Docket No. WEST 94-614-M
LAKEVIEW ROCK PRODUCTS, INC.,	:	A.C. No. 42-01975-05508
Respondent	:	
	:	Docket No. WEST 95-49-M
	:	A.C. No. 42-01975-05511
	:	
	:	Docket No. WEST 96-88-M
	:	A.C. No. 42-01975-05519
	:	
	:	Docket No. WEST 96-89-M
	:	A.C. No. 42-01975-05520
	:	
	:	Docket No. WEST 96-209-M
	:	A.C. No. 42-01975-05523
	:	
	:	Mine: Lakeview Rock Products

DECISION

Appearances: Ann Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Gregory M. Simonsen, Esq., Kirton & McConkie, Salt Lake City, Utah, for Respondent.

Before: Judge Amchan

These cases involve three inspections conducted by MSHA at Respondent's sand and gravel pit in Salt Lake City, Utah. The first three dockets concern inspections made by Richard Nielsen

in November, 1993, and May, 1994. The last three dockets concern an inspection made by Ronald Pennington in August 1995. At the commencement of the hearing Respondent withdrew its contest to 14 penalties proposed by the Secretary. These are recounted in the transcript of this proceeding at pages 21-25. The citation/ orders and penalties that were litigated are discussed below.

Citation 4120703, November 3, 1993 (Docket No. WEST 94-504-M)

On November 3, 1993, Inspector Nielsen arrived at Respondent's mine accompanied by his supervisor William Tanner. During the inspection there was a confrontation between Inspector Tanner and Glenn Hughes, Respondent's President. Respondent also contends that there were confrontations between Mr. Tanner and Scott Hughes, the manager of the sand and gravel pit. This is denied by Mr. Tanner.

While I need not reconcile the vastly differing accounts of what transpired, the enmity that resulted has at least some relevance to what has transpired between MSHA and Respondent since that date. Several citations and penalties from that inspection were litigated in front of me in late 1994 and were decided on January 30, 1995, 17 FMSHRC 83.

On November 3, 1993, Inspector Nielsen asked Scott Hughes on several occasions to show him Respondent's quarterly employment report. Each time Hughes told him that he would have to make an appointment to see these reports at Respondent's headquarters office, which was located less than five miles from the pit (Tr. 35-48)[1]. At about 1:20 p.m. Nielsen issued Lakeview a citation alleging a violation of 30 C. F. R. § 50.40(b), which requires copies of this report to be maintained at the mine office closest to mine site for 5 years after submission (Exh. P-6, block 2).

The next evening at the closing conference Hughes produced and allowed Nielsen to inspect the quarterly reports (Tr. 35, 447). The language of the regulation suggests that the quarterly reports need not be kept at the mine site. However, I conclude

[1]I credit Nielsen's testimony in this regard over Scott Hughes' testimony at Tr. 445.

that when it is read in conjunction with section 109(a) of the Act, which requires that there be an office at every mine, the regulation requires that a mine operator maintain quarterly employment reports at the mine site.

The Secretary proposed a $100 civil penalty for this violation. Considering the penalty criteria in section 110(i) of the Act, I assess a $10 penalty[2]. I deem Respondent's negligence to be very low in that the language of the regulation suggests that the quarterly reports need not be kept at the mine site. Moreover, the gravity of the violation was low. Lakeview apparently timely filed the reports with the MSHA Health and Safety Analysis Center as required by section 50.30. Finally, Respondent rapidly abated the violation by bringing the reports to the closing conference.

Citation 4120697: Open Door on Electrical Compartment (Docket WEST 94-614-M)

On his November 1993 inspection, Nielsen observed that the door to an electrical junction box was open to an angle of 45 degrees. After Nielsen called this to the attention of Scott Hughes, Hughes closed the door almost all the way with a wire cable (Tr. 49-55, 108-112)[3].

Section 56.12032 requires that cover plates on electrical equipment and junction boxes be kept in place except during testing or repairs. The door to the compartment observed by Nielsen served as a cover plate. I read the standard as requiring that such doors be completely closed. Otherwise, electrical cables inside the compartment can be damaged by

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[2]With regard to all the violations discussed herein I have considered that Respondent is a small mine operator and that there is no indication in the record that the proposed penalties will compromise its ability to stay in business. After considering its history of past violations of the Act, I see no reason to raise or lower any of the penalties, except as specifically noted.

[3]I find Inspector Nielsen's testimony regarding the size of the opening more credible than that of Mr. Hughes at Tr. 449.

exposure to the elements or someone may inadvertently contact one of the cables (Tr. 54-55). I conclude that consideration of the penalty criteria in section 110(i) justifies assessment of a $50 civil penalty as proposed.

Citation 4332839: No Office At The Mine Site

On May 2, 1994, Inspector Nielsen issued Lakeview a citation for violation of section 109(a) of the Act. Respondent did not maintain an office at the pit as required by that provision. Afterwards, Respondent abated by designating its scale house as the mine office and erecting a bulletin board.

There is no question that Respondent was in violation of section 109(a). I assess a $25 civil penalty rather than $50 as proposed. The cited requirement is one of the more obscure provisions of the Act. The Lakeview pit had been inspected on several occasions previously without any of the inspectors making an issue of the lack of a mine office. I deem this to be evidence of extremely low negligence on the part of Respondent, who appears to have been unaware of this requirement.

Citation 4332903: Alleged Ungrounded Portable Heater

On May 2, 1994, Inspectors Nielsen and Tanner saw an unplugged portable heater sitting on a chair in the control room of the pit (Tr. 60, 168). The plug on the heater was a three-prong plug, from which one of the prongs had been removed (Tr. 60-62, 454). Nielsen issued Respondent a citation alleging a violation of section 56.12025, which requires that all metal which encloses or encases electrical circuits be grounded or provided with equivalent protection.

Respondent contends that the heater was double-insulated and thus was provided with protection equivalent to the grounding of the metal frame (Tr. 453-4, 522-24). While the inspectors insist that the heater was not double insulated, they have not persuaded me that they are correct. Nielsen conceded that he would have to look at the heater again in order to determine whether or not it was double-insulated (Tr. 121). Tanner conceded that he and Nielsen did not inspect the heater to determine whether it was marked as double-insulated (Tr. 169). I therefore conclude that the Secretary has not met his burden of proving that equivalent

protection was not provided. I therefore vacate this citation and the corresponding proposed penalty.

Citation 4332838: Unsecured Drill Hose Sections

Inspector Nielsen found a drill, above the pit, connected to an air compressor by a hose which consisted of sections. At two points where the hose sections came together they were not secured by locking devices. Also, the drill itself was not secured to the hose (Tr. 67-73).

Nielsen issued citation 4332838 alleging a violation of section 56.13021. That standard provides:

> Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or larger and between high pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

Neither Inspector Nielsen nor Inspector Tanner saw the drill in use (Tr. 69-70, 161-62). Respondent's pit manager Scott Hughes contends that the drill was not operational and had not been used in approximately 8 months prior to the inspection. He kept the hoses hooked together to prevent dirt from getting inside them and to prevent small animals from damaging the hoses (Tr. 451-52, 521-22). The drill was not tagged out to indicate that it was defective (Tr. 177).

If the drill is operated without sufficient locking devices there is a danger that the sections will separate and the loose ends will whip violently and injure someone (Tr. 69-70). Although I credit Mr. Hughes' testimony with regard to the condition of the drill, I affirm the violation and assess the $50 penalty proposed by the Secretary.

Even though the drill had not been used, it was accessible to miners and could be started by jump starting it with other equipment (Tr. 162-63). Thus, without being tagged out the condition of the drill was at least potentially hazardous to miners.

Citation 4332911: Inadequate Landing Below Ladder to Jaw Crusher

Inspector Nielsen concluded that there was insufficient room at the base of a ladder on one of Respondent's jaw crushers to provide safe access or egress (Tr. 73-75). He also concluded that if one fell getting on or off the ladder, there was a sharp drop of 8 feet below them (Tr. 73-74, Exhs. P-20 & 21). He therefore issued Respondent citation 4332911, alleging a violation of section 56.11001. The standard requires that a safe means of access be provided and maintained to all working areas.

Scott Hughes contends that there was a 3 to 4 foot ledge below the ladder and that there was a gradual slope below it (Tr. 455-57). I conclude that the testimony of inspectors Nielsen and Tanner is too imprecise to affirm this citation. They did not testify as to size of the ledge below the ladder or the degree of the slope below that ledge. All I am left with is their subjective view that access to the ladder was unsafe. That does not provide a sufficient basis on which I can determine whether section 56.11001 was violated as alleged. The citation and proposed penalty are therefore vacated.

Citation 4332912: Ungrounded Lamp Post

During his May 1994 inspection, Mr. Nielsen observed a portable lamp post which had a plug that had two prongs instead of three (Tr. 78-79). From this he concluded that the metal frame was not guarded. He therefore issued citation 4332912 alleging a violation of section 56.12025.

The record establishes that the lamp post was available for use and could have posed hazards to miners. Therefore, citation 4332912 is affirmed and a $50 civil penalty is assessed.

Citation 4332913: Maintenance Truck with Inoperative Horn and No Back-up Alarm

Inspector Nielsen observed a 2-ton Ford service truck parked in the pit area. The truck had been backed into its position. Welding equipment sat in the rear cargo area. The truck was not equipped with a reverse signal alarm and its horn did not work (Tr. 80-85, 132-35, 457-461).

Nielsen cited Respondent for a significant and substantial ("S&S") violation of section 56.14132(a). That standard requires that horns and other audible warning devices provided on such vehicles be maintained in a functional condition. It is clear that the standard was violated with regard to the horn, but there is no evidence on which I can conclude that the condition of the horn was a "S&S" violation.

There was no violation of section 14132(a) with regard to the reverse signal alarm as I have concluded that the truck was not equipped with one. I also conclude that the evidence does not establish that the truck was required to have such a device under section 56.14132(b). Scott Hughes' testimony indicates the truck did not have an obstructed view to the rear (Tr. 458-9). The Secretary's testimony is much too imprecise to credit over that of Mr. Hughes.

I affirm the citation with respect to the horn only and assess a $25 civil penalty for a non-"S&S" violation. The record does not establish the gravity of the violation and the Secretary has conceded that Respondent's management was unaware that the horn did not work (Exh. R-4). I therefore conclude that its negligence, if any, was very low.

AUGUST 1995 INSPECTION

Shortly after the May 1994 inspection, Glenn and Scott Hughes consented to a judgment, which among other things, prohibited them from participating in any MSHA inspections at Lakeview Rock Products (Exh. P-68). When Inspector Ronald Pennington arrived to conduct an inspection on August 29-30, 1995, Scott Hughes left the site (Tr. 473-75); other company officials accompanied Pennington.

Order 3908553: Missing Railings at the Edge of the Opening for the Jaw Crusher

On August 29, 1995, Pennington inspected the top deck of the primary jaw crusher. No miners were working on the top deck at this time. On the deck was a 49-inch by 45-inch opening situated above the jaw. Inspector Pennington found the cover to the opening fixed in an upright position and two of the four railings around the opening missing. These were the railings on the East and West side of the opening (Tr. 215-220).

Pennington concluded that there was a danger that miners could fall into the opening. He therefore issued section 104(d)(2) Order 3908553 alleging a violation of section 56.11002. The standard requires that elevated walkways be provided with handrails and be maintained in good condition.

The inspector characterized Respondent's negligence as "high" and therefore an "unwarrantable failure" to comply with the Act for two reasons. First, Respondent had been cited for failure to protect an opening of a jaw crusher by Inspector Nielsen in May, 1994 (Exh. P-1). Secondly, Pennington recalled being told by members of the inspection party that the crusher had operated "this way" for some time (Tr. 228).

Inspector Pennington also concluded the miners were regularly exposed to this unguarded floor opening. He found a hammer and a pry bar near it (Tr. 220). He also testified that either miner Daren Bowman or miner Darin Paris told him that the jaw is unjammed manually, if possible (Tr. 229-30, 317).

At the hearing both these miners testified to the contrary, as did pit manager Scott Hughes. All three said that the jaw is never cleared manually. Instead, Respondent always uses an air hammer attached either to a Kobelko excavator or John Deere backhoe to unjam the crusher (Tr. 386-389, 436, 462-63). I credit this testimony and find that employees were not exposed to the open-sides of the jaw opening while clearing rock jams.

Respondent, however, goes further and contends that miners almost never go to the top deck of the crusher. Scott Hughes, for example, testified that the only reason to be on the deck was to inspect the manganese liner to the jaw, which he does every six months or so (Tr. 469). Bowman (Tr. 393-94) and Paris (Tr. 435) also testified that there is no reason for a miner to go up on the top deck.

However, Respondent's witnesses were not particularly consistent with regard to use of the top deck. Bowman at one point testified that miners go up on the deck 2 to 3 times a week to do greasing and maintenance (Tr. 387). Scott Hughes explained the presence of the pry bar by testifying that he instructs his miners to store tools on the platforms to avoid the possibility that they may be scooped up by a front-end loader and fed through the plant (Tr. 466).

I therefore conclude that miners were in the vicinity of the jaw opening on a regular basis. However, it has not been established that they were ever exposed to the hazard of falling into this opening. The railings around the jaw opening were easy to remove and reinstall. On some occasions, the railings were removed to facilitate the work of the air hammer. When the air hammer operated, there was no reason for miners to be on the top deck. Respondent contends that the rails were reinstalled when miners went to the top deck to do other tasks (Tr. 467-68). There is no evidence establishing that this was not the case. Therefore, I vacate Order 3908553.

Order 3908554: Missing Top Rail on the Top Deck of Jaw Crusher; Hole in the Deck Floor

The top handrail guarding the eastern edge of the deck of the jaw crusher was not in place on August 29, 1995. For a distance of 75 inches horizontally, this edge was protected only by a midrail. The deck was 13 to 14 feet above the adjacent ground level (Tr. 248-253). Additionally, there was a hole in a corner of this edge of the deck with dimensions of approximately 24 by 18 inches (Tr. 250-52). The hole was immediately above the bullwheel that serves as a counterweight for the jaw crusher (Tr. 332-34, Exh. P-30).

Inspector Pennington issued another section 104(d)(2) order for these conditions. The characterizations of "high" negligence and "unwarrantable failure" are predicated on a notation in the body of the order that an employee told Pennington that he had reported the hole in the floor to the pit manager (Scott Hughes) on a couple of occasions (Exh. P-28, block 8). Mr. Pennington testified that he received this information from either Mr. Bowman or Mr. Parris (Tr. 253).

At hearing, however, Darin Parris testified that he did not know anything about the hole until the day of the inspection and that he thought he was on the walkaround with Pennington when he noticed it (Tr. 434). Scott Hughes testified that he was unaware of the hole until 5 minutes before he left the pit on the day of the inspection and that he ordered it be fixed immediately (Tr. 474-75). He testified that he was not aware of the missing toprail until the day after the inspection (Tr. 472-73). It

appears that the railing could have been knocked off and the hole created on the morning of the inspection by the air hammer mounted on the Kobelko excavator (Tr. 543-44).

In summary there is insufficient basis on which I can conclude that Respondent's management knew of the cited conditions for any appreciable period of time before they were noticed by Inspector Pennington. I therefore conclude that "high" negligence and "unwarrantable failure" have not been established.

I affirm this violation as a "S & S" violation of section 104(a) of the Act. The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is as follows:

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

The Commission, in United States Steel Mining Co., Inc., FMSHRC 1573, 1574 (July 1984), held that S&S determinations are not limited to conditions existing at the time of the citation, but rather should be made in the context of continued normal mining operations. I conclude that in the continued course of normal mining operations it is reasonably likely that a miner would fall into the unprotected hole in the deck or off the inadequately protected deck perimeter. It is also reasonably likely that he would be seriously injured by the fall.

I also conclude that a $500 civil penalty is warranted under section 110(i). The deck of the jaw crusher was visible from the control shed (Tr. 472) and Respondent's employees should have reported the damage to the railing and floor if they had been properly trained and supervised. I therefore conclude that Respondent was to some extent negligent in the creation and

persistence of this violation. Although Mr. Hughes testified that he ordered the hole repaired immediately, it was not repaired until Mr. Pennington required its repair (Tr. 474-75).

Order 3908602: Records of Workplace Examinations

Section 56.18002(a) requires that a competent person examine each working place at least once each shift for safety hazards. It also requires that the mine operator immediately initiate action to correct such hazards. Section 56.18002(b) requires that records of such examinations be kept for a period of one year and be made available to the Secretary of Labor.

On August 30, 1995, Inspector Pennington asked to see Lakeview's daily workplace examination records. Respondent gave him one report for each day in August 1995 signed by Daren Bowman, who operated equipment such as front-end loaders (Tr. 372-76, 383-4). No other reports for the month of August were produced at the inspection or anytime since, including at the hearing.

George Miles, the control room operator, then brought Pennington inspection reports for a few more dates in March, April and May 1995. Respondent has never produced any records for other dates in these months nor any for all of June and July (Tr. 269, Exh. R-3). There are no records for this time period other than those contained in Exhibit R-3 (Tr. 538).

Respondent's employees Bowman and Miles, and pit manager Scott Hughes testified that the daily inspections were done, recorded and maintained as required. Obviously, the records produced suggest otherwise. At a minimum the record establishes that records were not kept for a period of a year and made available to MSHA as required by section 56.18002(b).

Although the Secretary alleged a violation of section 56.18002(a), I amend the pleadings pursuant to Rule 15(b) of the Federal Rules of Civil Procedure and find an unwarrantable failure to comply with section 56.18002(b). I assess a $1,500 civil penalty.

It is obvious from the record that Respondent was very cavalier about compliance with the daily inspection report requirement. Not only should there be reports for every date, but there should also be several reports, some covering the plant and some covering vehicles, such as front-end loaders.

At the November 1993 inspection Lakeview was cited for its failure to provide workplace examination records to the Secretary. This order was litigated before me and affirmed as a section 104(d) order, 17 FMSHRC 83 at 88-89. The prior adjudication occurred prior to the time period covered by the instant order. For Respondent to be unable to produce many of the required records in August 1995 is aggravated conduct worthy of the appellation "unwarrantable failure".

The gravity of the violation is unclear. However, Respondent's negligence or intentional disregard of the record keeping requirement, in light of its prior history of violations of the same requirement, warrants a substantial civil penalty. I conclude $1,500 is an appropriate figure taking into consideration all the factors in section 110(i).

Citation 3908545: Unguarded Tail Pulley

Inspector Pennington also discovered a tail pulley on a conveyor belt that was not protected with a guard (Tr. 273-277, Exh. P-37). The fins of the tail pulley were 40 inches above ground level and several water pipes partially shielded these fins from contact by employees. Debris falling from the conveyor was normally cleaned up with a rake projecting from a front-end loader (Tr. 494).

Pennington issued a citation for a "S&S" violation of section 56.14107(a) of MSHA's regulations, which requires guarding of moving machine parts. I affirm the citation and assess a $100 civil penalty.

I credit the opinion of Inspector Pennington that the water pipes did not block access to the unguarded fins of the tail pulley to the extent that a guard was not necessary. I also find that in the continued course of mining operations it was reasonably likely that an accident would occur and that the accident would result in a serious injury. Although

Respondent's normal practice was not to clean spills from the conveyor manually, there is no reason why a miner might not approach the unguarded pulley if it was more convenient to shovel a spill rather than obtain the assistance of the front-end loader.

Citation 3908560: Miners Wearing Tennis Shoes

On August 30, the inspector observed two miners wearing tennis shoes on the site (Tr. 281-85). Pennington cited Respondent for an "S&S" violation of section 56.15003 which requires "suitable protective footwear" when working in an area in which hazards could cause injury to the feet.

Pennington considers the wearing of a hard leather shoe to constitute compliance with the standard. Respondent's safety policy requires the wearing of leather work boots (Tr. 495-96). Since the parties appear to agree that "suitable protective footwear" at the Lakeview mine excludes the wearing of tennis shoes I affirm the citation.

On the other hand there is not enough evidence in the record regarding the normal activities of the two employees to warrant finding a "S&S" violation. I therefore affirm the citation as non-"S&S" and assess a $25 civil penalty.

In assessing the penalty I place particular weight on the lack of evidence that Lakeview management was aware of the violation and that the violations appear to be contrary to company policy. Further, Scott Hughes appears to have taken appropriate steps to prevent a recurrence of this violation (Tr. 496).

Citation 3908601: Lack of Berm on Ramp Leading to the Primary Crusher

Pennington observed a front-end loader feeding the primary crusher at a time when a horizontal distance of 12 feet on the ramp leading to the crusher was unguarded by a berm (Tr. 286-296). The tires of the loader were only 12 inches from the edge of the ramp. There was a drop-off of between 10 to 12 feet from the side of the ramp.

The inspector issued a citation alleging an "S&S" violation of section 56.9300(a). This regulation requires berms or guardrails on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn. I conclude that a violation has been established and that it was "S&S" under the Mathies test. In the course of continued mining operations it is reasonably likely that a vehicle would overturn due to the lack of a berm and that the driver would be seriously injured.

Although the Secretary proposed a $69 penalty for this violation, I assess a civil penalty of $300 pursuant to the criteria in section 110(i) of the Act. Given the gravity of this violation, I believe a penalty of $100 would be appropriate if Respondent's negligence was low and this was the first berm citation received by Lakeview. However, Pennington cited Respondent for two berm violations in virtually identical circumstances in 1992. These were affirmed by Judge Cetti in August 1995, 17 FMSHRC 1413 at 1415-16. In view of this prior history of violations a much higher civil penalty is warranted. It also affects my view of Respondent's negligence with regard to the instant violation.

Once a mine operator has been cited for a violation of this nature, prudence would dictate more attention to assuring compliance with the berm regulation. There is no evidence that Lakeview took any steps to insure future compliance after the 1992 inspection. Therefore, I conclude that a $300 civil penalty is appropriate in view of the company's prior history of violations and its lack of demonstrated prudence in attempting to prevent recurrences.

Citation 3908549 (Docket WEST 96-209-M): Safe Access to El-Jay Head Cone & Screen

Upon observing the El-Jay Head Cone & Screen, Inspector Pennington determined that there was no safe way to access this equipment for maintenance (Tr. 297-303, 349-356). Pennington was primarily concerned that miners could fall while accessing this machine by climbing on an unsecured ladder and the railing above the conveyor running to the El-Jay Cone & Screen. The record establishes that miners did on some occasions access this equipment in this fashion (Tr. 426-431).

Pennington cited Lakeview for an "S&S" violation of section 56.11001 which requires that safe means of access be provided to all working places. I conclude that the fact that miners at times found it convenient to climb onto the El-Jay cone crusher via the unsecured ladder establishes a violation of the standard. However, the Secretary has not established that the violation was "S & S". Employees climbed on the crusher only when the plant was turned off (Tr. 426-428). The only hazard established is that of falling a few feet onto dirt.

I conclude that it has not been established that the likely result of an accident due to this violation would be serious injury. In view of this record, I assess a $50 civil penalty rather than the $270 proposed by the Secretary.

ORDER

Respondent is hereby ordered to pay to the Secretary the following civil penalties within 30 days of this decision:

Citation	Penalty
4120703	$ 10
4120697	$ 50
4332839	$ 25
4332838	$ 50
4332912	$ 50
4332913	$ 25
3908545	$ 100
3908560	$ 25
3908601	$ 300
3908554	$ 500
3908602	$1,500
3908549	$ 50

Respondent is also directed to pay at the same time, if it has not done so already, the penalties for the 14 violations for which it withdrew its contest at the commencement of the hearing (Tr. 21-25). The total penalty for all 27 violations is $3,553.

Arthur J. Amchan
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268
August 6, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 96-81
	:	A.C. No. 32-00491-03514
v.	:	
	:	Falkirk Mine
FALKIRK MINING COMPANY, Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION

Falkirk Mining Company ("Falkirk") filed a motion for summary decision in this case pursuant to Commission Rule 67, 29 C.F.R. § 2700.67. Rule 67(b) sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

The citation in this proceeding alleges that:

> The electrical power connections were unguarded and exposed where the welding leads connected to the generator mounted on the 369 belt maintenance truck. Adequate examinations were not made to disclose a potentially dangerous condition.

As originally written, the citation alleged a violation of 30 C.F.R. § 77.502. This safety standard requires frequent examinations of electrical equipment to assure safe operating conditions and, when a potentially dangerous condition is found, requires that such equipment be removed from service until the condition is corrected.

The citation was modified during an MSHA health and safety conference to change the safety standard allegedly violated. As modified, the citation alleges a violation of 30 C.F.R. § 77.504 on the basis that the "electrical connections were not insulated to the same degree of protection as the remainder of the wire." Section 77.504 provides, in part, that electrical connections and splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire.

In answers to interrogatories posed by Falkirk, the Secretary replied that Falkirk "did not comply with 77.502 which was cited." The Secretary also stated: "Citation was modified to 77.504 which is in error, inspector cited correct standard 77.502...." At the time these discovery responses were filed, the Secretary was represented by an MSHA Conference and Litigation Representative. Following the filing of Falkirk's motion for summary decision, Ms. Kristi L. Floyd of the Office of the Solicitor entered an appearance as the Secretary's representative in this case. Ms. Floyd filed an amended response to Falkirk's discovery stating that Falkirk violated section 77.504, as stated in the modification to the citation, and withdrew the previous answers to the discovery that stated that the Secretary was alleging a violation of section 77.502.

Falkirk argues that the citation should be vacated for three reasons. First, it contends that the Secretary expressly admitted in his discovery responses that Falkirk did not violate section 77.504. It argues that once the Secretary filed his petition for penalty and Falkirk filed its answer, the Secretary was without authority to amend the citation without Falkirk's consent or leave of the judge. It states that since the court did not authorize the amendments and Falkirk did not consent to them, the Secretary must proceed under section 77.504, as alleged in the petition for penalty. Falkirk further argues, however, that the Secretary admitted in his discovery responses that Falkirk did not violate section 77.504. Thus, it contends that this proceeding must be dismissed. Falkirk points to Commission Procedural Rule 6, 29 C.F.R. § 2700.6, which states that, in signing a document, a representative of a party certifies that the document is well grounded in fact and law. It contends that the Secretary is bound by this admission.

In response, the Secretary argues that he is not bound by the incorrect answers he filed in response to Falkirk's discovery. First, he argues that the Commission does not require signatures on discovery requests and responses and, consequently, the answers relied upon by Falkirk were not signed by the Secretary. Second, even if the answers were signed, the party's representative merely certifies that, to the best of his knowledge, information and belief, the answers were well grounded in fact.

I conclude that this proceeding should not be dismissed on the basis of the Secretary's incorrect discovery responses. Under the facts of this case, I hold that the Secretary's response that Falkirk did not violate section 77.504 should not be construed as an admission. Instead, it was an error and, although it did create some confusion, the error is not fatal to the Secretary's case. The Secretary withdrew the incorrect discovery responses. The petition for penalty filed under 29 C.F.R. § 2700.28 alleges a violation of 30 C.F.R. § 77.504 and the retracted answers to discovery do not change that fact. The hearing in this matter has yet to be scheduled, so Falkirk will have sufficient time to prepare its defense to the alleged violation of section 77.504.

Falkirk next argues that this case should be dismissed because the cited welding leads are not "electrical connections or splices in insulated wire." It argues that the Secretary's interpretation of the standard to cover welding leads or the terminals on the generator is "plainly wrong" and is not entitled to deference. It argues that the plain language of section 77.504 applies to splices or connections used to attach insulated wires, not to the ends of welding leads or terminals on electrical equipment. Falkirk also contends that the Secretary's *Program Policy Manual* supports its interpretation. Falkirk states that the area where the ends of the welding leads attach to the terminals on the generator, a piece of electrical equipment, is not an "electrical connection or splice in insulated wire."

The Secretary maintains that Respondent's argument raises an issue of material fact because the Secretary believes that the area on the generator where the welding leads attach is an electrical connection. He contends that the regulation governs both splices in insulated wire and other electrical connections. The Secretary states that he is not alleging that the ends of the welding leads are the electrical connections, but rather that the electrical connections that are a part of or are attached to the welder/generator are the "electrical connections" referred to in the cited standard.

As stated above, the standard requires, in part, that "electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire." There is no dispute that the terminals where the welding leads connected to the welder/generator were not insulated to any degree. The question is whether this type of electrical connection is covered by the safety standard. I was unable to find any reported cases on this issue so this case may present an issue of first impression for the Commission. The focus of the standard is on electrical connections and splices between insulated wires. If an insulated wire is spliced or if two insulated wires are connected, the wires must be "reinsu-

lated" at the connection so as to provide the same degree of protection as the remainder of the wire. In this case, however, two wires are not connected, rather the wires are connected to a piece of electrical equipment at a terminal. Exhibit 1 to the affidavit of Michael Wegleitner submitted by Falkirk with its motion for summary decision is a photograph of the generator at the time the citation was issued and it shows the two terminals involved. The terminals appear to be similar to the terminals on an ordinary automobile battery. The ends of the wires are equipped with devices that slip over the terminals and are tightened. The terminals are marked "+" and "-" and are color coded. The area where the wires attach to the terminals are not insulated or protected from contact in any way.

The issue in this case is not whether a greater measure of safety is provided if terminals are guarded so that individuals cannot come in contact with them. The issue is whether the safety standard requires the terminals to be "reinsulated at least to the same degree of protection as the remainder of the wire." The Secretary's *Program Policy Manual*, Volume V, does not provide any guidance. It simply states that "connections or splices in insulated conductors shall be reinsulated to at least the same degree of protection as the remainder of the conductor." *Id*. This language is concerned with the connection of two wires not the connection of a wire to a terminal on a piece of electrical equipment.

I believe that the motion for summary decision presents a close issue. The cited condition does not squarely fit within the plain language of the safety standard. It is not clear whether there was an electrical connection "in insulated wire." It is also not clear that these terminals are "electrical connections," as that term is used in the standard. In addition, it does not appear that the Secretary required Falkirk to "reinsulate" insulated wire in order to abate the condition. The termination notice states that the "power connections on the welding machine ... were guarded to prevent inadvertent contact by persons." (emphasis added). Exhibit 2 to Mr. Wegleitner's affidavit is a photograph of the welder after the condition was abated. It appears that Falkirk simply attached a piece of rubber-like material above the terminals so that the terminals were not exposed. It does not appear that the terminals and the wires were "reinsulated."

The Secretary is accorded a considerable degree of deference in the interpretation of his safety and health standards. "Since the Secretary of Labor is charged with responsibility for implementing this Act ... the Secretary's interpretations of law and regulations should be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* 1977 U.S.C.C.A.N 3401, 3448. The Secretary argues that the terminals involved are electrical connections as that

term is used in the standard. The language of the standard is ambiguous with respect to this issue. If a safety standard is "silent or ambiguous with respect to the specific issue" in the case, "the question for the court is whether the [Secretary's interpretation] is based on a permissible construction" of the standard. *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995), *quoting Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 843 (1984). Although Falkirk presents compelling arguments to support its interpretation, I am unable to hold, at this point in the litigation, that the Secretary's interpretation is incorrect as a matter of law.

Moreover, as stated above, it is not clear whether the area cited is an "electrical connection" as that term is used in the safety standard. I am unable to make that determination on the present record because there is insufficient evidence as to the meaning of that term. Accordingly, I find that there exists a genuine issue of material fact.

Finally, Falkirk contends that the Secretary failed to give it fair notice of his interpretation that welding leads and terminals are electrical connections or splices within the meaning of section 77.504. It argues that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that the cited condition was covered by the safety standard. Falkirk states that neither the standard nor the Secretary's *Program Policy Manual* even hints that the standard applies to the terminals on a welder/generator. It also contends that the Secretary's "flip-flops" concerning the appropriate safety standard supports its position that the citation does not meet the reasonably prudent person test.

The Secretary maintains that the terminals are electrical connections and "the standard gave fair and adequate notice to Falkirk that it should guard and maintain the area, so as to prevent likely injuries from a person coming in contact with it." (Sec. Response at 5). It further states that, given Falkirk's position, there is a genuine factual issue as to the meaning of the term "electrical connection."

The Commission uses the reasonably prudent person test described by Falkirk to determine whether the Secretary provided fair notice of his interpretation of a safety standard. The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess as its meaning and differ as to its application." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982)(citation omitted). The Commission has determined that adequate notice of the requirements of a broadly worded standard is provided if a reasonably prudent

person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991). In *Lanham*, the Commission vacated a judge's decision because he did not apply the reasonably prudent person test to determine whether the mine operator had notice of the specific requirements of the standard. 13 FMSHRC at 1344. In that case, the record contained evidence that the safety standard had not been previously interpreted to cover the practice cited by the inspector. 13 FMSHRC at 1343. On remand, the judge vacated the citation. 13 FMSHRC 1710 (October 1991).

I find that genuine issues of fact must be resolved before I can determine whether the Falkirk had fair notice that section 77.504 applies to the terminals on welder/generators. For example, the record does not contain evidence of MSHA's enforcement history of this safety standard. The Secretary may be able to present evidence to demonstrate that mine operators were provided with reasonable notice of its interpretation. MSHA may have issued similar citations at other mines or provided operators with notice through other means. There is no evidence as to the reasonableness of the Secretary's interpretation of the term "electrical connection." In short, the record does not contain the factual foundation I need to analyze the issues raised by Falkirk.

Accordingly, Falkirk's motion for summary decision is **DENIED** on the basis that there are genuine issues of material fact and Falkirk is not entitled to summary decision as a matter of law.

Richard W. Manning
Administrative Law Judge

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August 21, 1996

SUMMIT, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. CENT 95-108-RM
v.	:	Citation 4422929, 1/9/95
	:	
	:	Docket No. CENT 95-109-RM
SECRETARY OF LABOR,	:	Order No. 4422930, 1/9/95
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-110-RM
Respondent	:	Order No. 4422931, 1/9/95
	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 96-45-M
Petitioner	:	A.C. 39-01284-05514 X52
	:	
v.	:	
	:	Open Cut-Lead Mine
SUMMIT, INC.,	:	
Respondent	:	

ORDER DENYING MOTION TO COMPEL

Summit, Inc. ("Summit") filed a request for the production of documents in these proceedings. In response, the Secretary of Labor provided certain documents but refused to provide others on the basis of the informant's privilege and the deliberative process privilege. Subsequently, Summit filed a motion to compel production of the documents that were withheld. The Secretary opposed the motion to compel. By order dated August 9, 1996, I ordered the Secretary to provide, for my in camera inspection, a copy of each contested document. I have determined that the requested documents are relevant to these proceedings. For the reasons discussed below, Summit's motion to compel is denied.

I. Interview Memoranda of Miners

In January 1995, an employee of Summit was killed at the Open Cut-Lead Mine. The Mine Safety and Health Administration ("MSHA") conducted an investigation. During this investigation, an MSHA special investigator interviewed a number of miners. The special investigator prepared a memorandum summarizing, in detail, the statements made by each miner. These memoranda were

forwarded to me for my review. The Secretary provided Summit with copies of the interview memoranda for Summit's management. employees, Homestake Mining Company's management employees, MSHA employees, and employees of an engineering consulting firm retained by Homestake Mining Company. (Homestake Mining Company owns the Open Cut-Lead Mine.) The only memoranda that were withheld are the ones that summarize the interviews of Summit's hourly employees. After reviewing the interview memoranda, I conclude that each one is protected by the informant's privilege.

The Commission has stressed the importance of the informant's privilege under the Mine Act. Bright Coal Co., 6 FMSHRC 2520 (November 1984). The Commission held that this privilege is applicable to the furnishing of information to government officials concerning violations of the Mine Act. 6 FMSHRC at 2524. It is the name of the informant, not the contents of the statement, that is protected, unless disclosure of the contents would tend to reveal the identity of an informant. Asarco, 12 FMSHRC 2548, 2554 (December 1990) ("Asarco I"), citing Roviaro v. United States, 353 U.S. 53, 60 (1957). The Secretary bears the burden of proving facts necessary to support the existence of the privilege. Asarco I, 12 FMSHRC at 2553.

Each memorandum at issue in this case contains the name of the informant making the statement. In addition, I find that disclosure of the contents of each memorandum would tend to reveal the identity of the informant. Finally, each memorandum contains the names of other miners, many of whom are also informants. Accordingly, I conclude that each memorandum is protected by the informant's privilege. Redacting out names and identifying sentences or paragraphs is not feasible because of the detailed nature of the memoranda. It would not be possible for the Secretary to provide Summit with meaningful portions of the memoranda without revealing the identity of one or more informants.

Because the informant's privilege is a qualified privilege, I must perform a balancing test to determine if Summit's need for the memoranda is greater than the Secretary's need to maintain the privilege to protect the public interest. Bright, 6 FMSHRC at 2526. The burden is on Summit to prove facts necessary to show that disclosure of the memoranda is necessary to a fair determination of the case. Id. Factors to be considered in conducting this balancing test include whether the Secretary is in sole control of the requested material and whether Summit has other avenues available from which to obtain the substantial equivalent of the requested information. Id. In performing the balancing test, the issue is whether Summit can get substantially the same information by deposing those miners who have knowledge of the circumstances surrounding the fatal accident. Asarco, 14 FMSHRC 1323, 1331 (August 1992)("Asarco II")

I conclude that Summit could get substantially the same information by interviewing or deposing miners who worked at the mini-pit at the time of the accident. I reach this conclusion based on the simple fact that miners who work in the area of an accident are the most likely to have information concerning the events in question.

Summit states that it is entitled to any exculpatory material contained in the interview memoranda. In Bright, the Commission held that "an informer is entitled to anonymity, regardless of the substance of the information he furnishes." 6 FMSHRC at 2524. The "applicability of the informer's privilege to the Mine Act does not rise or fall based on the substance of a person's communication with government officials concerning a violation of the law." 6 FMSHRC at 2525.

Summit will be entitled to the names of any miner witnesses two days before the hearing. 29 C.F.R. § 2700.62; Asarco II, 14 FMSHRC at 1331. Summit will also be entitled to obtain the interview memorandum for any miner who is called to testify by the Secretary, in order to refresh that witness's recollection or to impeach his testimony. Asarco II, 14 FMSHRC at 1331. Summit's right to the these interview memoranda at the time of trial is a separate and procedurally distinct issue from the discovery issue presented here. Id. (citation omitted).

II. Special Investigation Reports

MSHA's special investigator prepared two reports. One is directed at Homestake Mining Company and the other Summit. Both concern whether there were "knowing and/or willful" violations at the mine. Each report consists of three parts: an introduction with a factual background, a summary of the interviews taken by the MSHA investigator, and a recommendation concerning what legal actions should be taken by the agency. The reports recommend that civil penalties be assessed against agents of Summit under section 110(c) of the Mine Act. The reports were prepared by an MSHA special investigator and were directed to Vernon R. Gomez, Administrator, through Robert M. Friend, District Manager. I find that portions of these documents are protected from disclosure by the informant's privilege and the deliberative process privilege.

The introductory parts of both reports have been provided to Summit. Most of each report is a summary of the statements made to the MSHA investigator, as described in section I, above. The Secretary has already provided Summit with the memoranda summarizing the statements made by individuals who were not hourly employees of Summit at the time of the accident. For the reasons set forth in section I above, the summaries of hourly employees are protected by the informant's privilege. In addition, for the

reasons discussed above, Summit's need for the summaries is not as great as the Secretary's need to maintain the privilege to protect the public interest.

Other portions of the reports are protected by the deliberative process privilege. This privilege protects communications between subordinates and supervisors within the government that are "antecedent to the adoption of an agency policy." Contests of Respirable Dust Sample Alternation Citations, 14 FMSHRC 987, 992 (June 1992), quoting Jordan v. Dept. of Justice, 591 F.2d 753 (D.C. Cir. 1978). The communications must be "related to the process by which policies are formulated." Id. The conclusion and recommendation section fits within the deliberative process privilege. This section in the reports contain the recommendation of the special investigator, a subordinate, to Mr. Gomez, a supervisor, that the agency bring proceedings under section 110(c). The recommendation was not a final agency decision, but was "prepared to facilitate and inform a final decision or deliberative function entrusted to the agency." Providence Journal Co. v. U.S. Dept. of Army, 981 F.2d 552, 560 (1st Cir. 1992).

I also conclude that Summit's need for the recommendation section does not outweigh the Secretary's interest in keeping it confidential. These recommendations contain the investigator's interpretation of the legal implications of the facts obtained during the interviews. He recommends that section 110(c) charges be filed. The recommendations merely reflect the opinion of the MSHA investigator and are not a final agency determination.[1]

III. Other Documents

The Secretary contends that two other sets of documents are protected from disclosure. I agree. First, a document entitled "Participants in the Investigation" lists the individuals interviewed by the special investigator and provides addresses and phone numbers. Summit already has the names of the individuals who were interviewed by the special investigator, with the exception of the names of the hourly employees that were interviewed. The names of the hourly employees who participated in the investigation are protected by the informant's privilege. I presume that Summit has the addresses and phone numbers of its own employees. Moreover, the interview memoranda that were given to

[1] The interview summaries also summarize interviews with Summit and Homestake management and MSHA officials. Summit already has copies of the memoranda of these interviews and, thus, has all of the factual information contained therein. The summaries are protected by this privilege because they reflect the deliberative process by highlighting what the investigator considered to be important information.

Summit should contain this information for the others who were interviewed. Accordingly, the Secretary need not provide this document.

The Secretary sent me three, one-page documents entitled "Possible Knowing/Willful Violation Review Form." They are signed by Gary Grimes, an MSHA inspector, and contain his opinion that there was a possible "knowing and/or willful violation" of the Secretary's safety standards. There is a separate form for the citation and two orders that Mr. Grimes issued. For the reasons discussed above with respect to the recommendation section of the special investigator's report, these documents are protected by the deliberative process privilege and need not be disclosed by the Secretary.

ORDER

Accordingly, Summit's motion to compel is **DENIED.**

Richard W. Manning
Administrative Law Judge

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August 30, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER RULING ON DELIBERATIVE PROCESS PRIVILEGE

During the week of July 22, 1996, Newmont Gold Company ("Newmont") scheduled depositions of several officials of the Department of Labor's Mine Safety and Health Administration ("MSHA"). At these depositions, the Secretary objected to deposition questions posed by counsel for Newmont on the basis of the deliberative process privilege. The parties called me and asked me to rule on these issues.[1] In my oral ruling, I construed the deliberative process privilege more narrowly than that advocated by the Secretary. As a result of these and other disputes between the parties, the depositions were terminated prematurely. The Secretary filed a motion asking that I reconsider my deliberative process privilege rulings and he briefed the issue. Newmont opposes the Secretary's motion and also briefed this issue. Because I did not have the benefit of briefs in my prior ruling, I **GRANT** the Secretary's motion to reconsider the issue and enter the following order. Accordingly, I vacate my prior oral ruling.

Background

These cases involve two citations and two orders (collectively, the "citations") alleging mercury contamination at Newmont's South Area Gold Mine. Newmont contends that the Secretary, without notice to the mining community, adopted a "zero tolerance policy" under which MSHA inspectors are instructed to issue citations if they find even trace amounts of mercury in active areas of a mine. In its discovery, Newmont

[1] Because I was on vacation in Ouray, Colorado, at the time of this call, I did not have the benefit of reference materials and the parties could not brief the issues.

sought to obtain information about this policy. The Secretary refuses to answer any discovery about this issue to the extent that such discovery questions request information that the Secretary contends is protected by the deliberative process privilege.

In an order dated July 10, 1996, I ruled that information concerning the alleged zero tolerance policy is relevant or appears likely to lead to the discovery of relevant evidence. Accordingly, I held that inquiry into this policy is an appropriate subject for discovery.

Despite the fact that the Secretary denies the existence of a zero tolerance policy, he maintains that inquiry into this issue is improper because it is protected by the deliberative process privilege. The Secretary states that Newmont "seeks to discover internal agency discussions pertaining to agency guidelines or policies upon which an MSHA inspector relied regarding the interpretation of the regulations at issue." (Motion to Reconsider at 4). He further states that "the pre-enforcement action discussions among MSHA personnel with regard to the issuance of the citations in this case are protected by the privilege...." *Id.* The Secretary argues that MSHA's "decision" to issue a citation is protected by the deliberative process privilege.

Newmont contends that only predecisional communications are protected so that the privilege does not apply to final opinions or dispositions. It contends that the information it seeks "goes directly to the agency's 'decision' to issue the citations." (Newmont's Response at 21). Newmont states that the deposition questions and document requests relate to the agency's decision to issue the citations at issue.

The Commission discussed the deliberative process privilege in some detail in *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 988-95 (June 1992)("Dust Case"). The Commission noted that "public officials are entitled to the private advice of their subordinates and to confer among themselves privately and frankly, without fear of disclosure...." 14 FMSHRC at 991 (citation omitted). The Commission emphasized that the "privilege attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy." *Id.* at 992 (citation omitted)(emphasis added). The Commission further stated that the "privilege protects only communications between subordinates and supervisors that are actually antecedent to the adoption of an agency policy...." *Id.* (emphasis in original).

Discussion

Under the Secretary's interpretation of the deliberative process privilege, a mine operator can not question an MSHA inspector about the substantive reasons why he issued the citation if he discussed the citation with his supervisor. A few examples of instances where the privilege was invoked illustrate the conflict. Inspector Michael Drussel issued the citations in these cases. Two of the citations allege that miners consumed food in an area where mercury was found. At Inspector Drussel's deposition, counsel for Newmont asked the following question:

> Were you provided with any guidelines, written or oral, on how to interpret the standard that prohibits the consumption of food or beverages when there is a potential toxic substance present?

(Depo. Tr. at 160). Counsel for the Secretary advised the inspector "not to give any specific statements that were made in the deliberative process prior to the issuance of the citation." *Id.* Counsel for Newmont next asked:

> Would you tell me what guidelines or interpretations [were] provided to you so that you could apply the regulation for the consumption of food or beverages in the areas where potential toxic [materials] were present?

Id. at 161. Counsel for the Secretary stated "[i]f you're asking about Newmont and how that decision was made, that's privileged and we'll object to that." *Id.*

Counsel for Newmont also asked Inspector Drussel "how he was told to interpret and apply the regulation that prohibits the consumption of food or beverages in area where potential toxic [materials] are present." (Depo. at 162). Counsel for the Secretary instructed Inspector Drussel not to answer any questions about MSHA policy or interpretations as they applied to the issuance of these citations at the mine. (*Id.* at 162-63).

Thus, it is clear that the Secretary takes the position that its final "decision" with respect to the citations in these cases was made when Inspector Drussel actually put pen to paper to fill out the citation form. Since the citation itself was the agency's final decision, questions about what Inspector Drussel relied upon in concluding that violations occurred is privileged. I disagree with the Secretary's approach in these cases. A mine operator is entitled to know how MSHA interpreted a standard when it determined that the operator violated that standard.

In a case involving a simpler standard, problems do not generally arise. For example, if an inspector finds an unguarded pinch point on a conveyor system, he can determine that a safety standard was violated and issue a citation on the spot. When asked why he issued the citation, the inspector can reply that the pinch point was not guarded and was in an area where someone can get seriously injured.

The standards involved in these cases are not so straightforward. For example, the standard involved in the colloquy set forth above states that "[n]o person shall be allowed to consume or store food or beverages in ... any area exposed to a toxic material." 30 C.F.R. § 56.20014. Newmont is entitled to know why MSHA believes that this standard was violated. What does MSHA consider to be an area exposed to toxic material, as far as mercury is concerned? If in issuing the citations, Inspector Drussel relied on oral instructions from his supervisors or written MSHA documents, is Newmont entitled to inquire about these statements and documents? The Secretary seems to be taking the position that its policies on mercury contamination are not final, so that any discussions or documents about these policies are protected by the deliberative process privilege. While such policies may not be final as to the mining industry in general, they are certainly final as to Newmont as evidenced by the four citations that were issued.

As discussed in the *Dust Case* and in numerous cases cited by the Secretary, the deliberative process privilege protects "[d]iscussions among agency personnel about the relative merits of various positions which might be adopted..." *Mead Data Central, Inc. v. Dep't. of the Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977). This flows from the fact that public officials should be encouraged "to confer among themselves privately and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires." *Dust Case*, 14 FMSHRC at 991 (citation omitted). Once a policy is adopted at a mine, however, MSHA is no longer deliberating because it has taken a final action. "[I]t is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

The Court of Appeals for the District of Columbia described the boundaries of the deliberative process privilege in *Coastal States Gas Corp. v Dep't of Energy*, 617 F.2d 854, 866-68 (1980). In discussing a request for documents, the court stated that this privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* at 866. Documents or discussions that are

protected by the privilege "are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Id.* The court went on to state that "even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Id.*

MSHA may decide that an operator violated a standard prior to the time that the inspector puts pen to paper and issues the citation. In complex or disputable situations, the decision is made before the inspector arrives at the mine to issue the citation. A final agency decision is made at the time MSHA determines that a violation occurred and that a citation will be issued, not when the inspector fill out the MSHA citation form. This decision may be made by the inspector, by one or more MSHA supervisors, or by both.[2]

An illustrative example is helpful. Suppose an inspector reports back to his supervisor after he inspects a mine and discusses with him a condition he observed at the mine that he feels may be a violation of a safety standard. The inspector and his supervisor "kick around" several ideas and engage in a frank discussion. The supervisor "plays devil's advocate" during these discussions. After a lengthy discussion, the supervisor and inspector agree that a citation should be issued under a particular safety standard and they outline three substantive reasons why the standard was violated. In making this decision, the supervisor relies, in part, on a memo he recently received from MSHA headquarters. The next day the inspector returns to the mine, writes a citation, and gives it to the mine manager. The citation does not list the three factors that led the inspector to issue the citation. During a deposition of the inspector, the mine operator asks why the citation was issued. The Secretary allows the inspector to repeat what is written in the citation but will not allow the inspector to discuss any of the three factors or MSHA's interpretation of the safety standard

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[2] When an inspector fills out the MSHA citation form, he is memorializing his decision that a violation occurred. The citation form does not set forth MSHA's interpretation of the safety standard or describe the reasons why the inspector believes that a violation occurred. The citation form contains only factual allegations and MSHA's conclusions as to the penalty criteria. The citation form is not the agency "decision." In contrast, when an agency issues a final written policy statement or other document, such as a formal decision, the document contains the rational for the agency's policy or decision. The document itself is the "decision" and any prior drafts or discussions leading up to the final document are generally protected.

because the inspector discussed them with his supervisor and they are protected by the deliberative process privilege.

In that example, the preliminary discussions are protected by the deliberative process privilege because they were predecisional. Neither the inspector nor the supervisor should be required to testify about their frank discussions. Once the supervisor and inspector determined that a citation should be issued, however, the discussions were no longer predecisional or deliberative. These discussions relate specifically to the decision to issue the citation and the substantive reasons why MSHA believes that the safety standard was violated. There should be no expectation that a decision to take an enforcement action will remain confidential. I recognize that there will not always be a "bright line" between those discussions that are preliminary in nature and those that follow the decision to issue a citation.

Likewise, all or part of the MSHA memo relied upon by the supervisor may not be subject to the privilege because it was made a part of the final decision to issue the citation. The fact that the memo was a preliminary expression of MSHA policy is not necessarily dispositive. If MSHA chooses to rely on a preliminary policy when making enforcement decisions, the policy may no longer be preliminary as to that mine operator. It was "used by the agency in its dealings with the public." *Coastal States*, at 866.

Application of Privilege to these Cases

I do not know when MSHA decided that conditions at the mine violated the cited safety standards. It appears, however, that the decision was made after considerable deliberation and that it was made before Inspector Drussel wrote the citations. It also appears that the inspector may have relied upon instructions from his supervisors and MSHA policies or practices in interpreting the cited safety standards. Finally, it appears that he used these instructions and policies when he interpreted the standards to find violations at the mine.

Under fundamental concepts of due process, Newmont is entitled to ask appropriate MSHA officials how the cited standards were interpreted by MSHA as applied to the South Area Gold Quarry. The Commission and the courts are required to accord the Secretary's interpretation of his standards a considerable degree of deference. Thus, it is important for the Commission and the mine operator to understand the basis for the Secretary's interpretation. The Secretary cannot take the position that MSHA's interpretation of a safety standard as expressed by its enforcement personnel is not subject to disclosure because it is privileged and then maintain that the Commission must defer to that interpretation.

In determining whether a discussion is protected by the privilege, the parties shall look to whether the discussion was predecisional, did it occur before the decision was made to issue the particular citation, and whether the discussion was deliberative, did it reflected the give-and-take of the consultative process. *See, Coastal States*, at 866. Based on this two part test, I make the determinations set forth below. These determinations are to provide general guidance and are based on the concepts set forth in this order.

1. Predecisional discussions and recommendations made to supervisors concerning MSHA policy on mercury contamination or the interpretation of the standards cited in these cases are protected by the deliberative process privilege. Predecisional documents prepared by MSHA employees that discuss these issues or contain recommendations about these issues are also protected. Factual information contained in these documents may not be protected.

2. Predecisional discussions and recommendations made to supervisors concerning whether or not the citations that are the subject of these proceedings should be issued are protected by the deliberative process privilege. Predecisional documents prepared by MSHA employees that discuss whether the citations should be issued or make recommendations concerning the citations are also protected. Factual information contained in these documents may not be protected.

3. Instructions given to Inspector Drussel by MSHA supervisors with regard to the citations at issue, including instructions as to how the cited standards should be interpreted, are not protected by the privilege. Reasons given to Inspector Drussel by his supervisors to justify the citations are not protected by the privilege. If Inspector Drussel relied upon MSHA policies or practices orally communicated to him in interpreting the standards when issuing the citations, these communications would generally not be protected by the privilege.

4. Documents relied upon by Inspector Drussel in issuing the citations and documents relied upon by his supervisors in instructing or advising him to issue the citations may not be protected by the privilege. Factual information is generally not protected and the specific portions of a document relied upon in issuing the citations may not be protected. General discussions and recommendations concerning mercury contamination that are predecisional in nature may be protected.

Conclusion and Order

The parties, particularly Newmont, must understand that the issue in these cases is whether Newmont violated the cited standards as set forth in the citations. My function is not to

review the wisdom of MSHA policies, practices, and decisions, but rather is to determine *de novo* whether the citations and the allegations contained therein should be upheld based on the evidence presented at the hearing. The Secretary bears the burden of proof. It must also be understood that "parties may obtain discovery of any relevant, nonprivileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). At the hearing, on the other hand, only relevant evidence that is not unduly repetitious or cumulative is admissible. 29 C.F.R. § 2700.63(a). Much of the information obtained by Newmont about MSHA policies, practices or decisions may not be relevant and, therefore, may not be admissible at the hearing.

Accordingly, **IT IS ORDERED** that the parties comply with the principles set forth in this order in posing discovery requests and in providing answers to these discovery requests. The deliberative process privilege shall be applied as described in this order. If counsel for the Secretary contends that a document or a portion of a document is protected by the privilege, counsel shall send a copy to me for my *in camera* review.[3]

Richard W. Manning
Administrative Law Judge

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RWM

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[3] The parties have filed numerous pretrial motions in these cases, including motions to compel, motions for protective orders, a motion to dismiss, and a motion alleging that the Secretary has waived his right to assert evidentiary privileges. I will enter my ruling on these motions in one or more orders, as soon as possible.

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