AUGUST 1998

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

Secretary of Labor, MSHA v. Black Mesa Pipeline, Inc., Docket No. WEST 97-49, etc.
(Judge Bulluck, June 29, 1998)

Secretary of Labor, MSHA v. Eastern Ridge Lime, L.P., Docket No. VA 96-21-M.
(Judge Weisberger, July 15, 1998)

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

Secretary of Labor, MSHA v. REB Enterprises, Inc., Docket No. CENT 95-29-M, etc.
(Judge Weisberger, April 24, 1998)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 4, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. CENT 95-29-M
	:	CENT 95-30-M
REB ENTERPRISES, INC.,	:	CENT 95-239-M
HAROLD MILLER, and	:	CENT 95-240-M
RICHARD BERRY	:	

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

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 5, 1996, Administrative Law Judge Avram Weisberger issued a decision in which he, in part, determined that four violations by REB Enterprises, Inc. ("REB") were not the result of its unwarrantable failure to comply with various standards,[2] that REB did not violate section 30 C.F.R. § 56.14130(a)(3) as alleged in Order No. 4327626, and that Order No. 4327628 must be dismissed because it alleged a violation of the wrong standard. 18 FMSHRC 1603, 1622-24 (Sept. 1996) (ALJ). On October 7, 1996,

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[1] Commissioner Beatty elected not to participate in the Commission's March 30, 1998, decision because he assumed office after the case had been considered at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty continues to elect not to participate in this matter.

[2] The four violations are as follows: Citation No. 4327776 alleging a violation of 30 C.F.R. § 57.14131(a) for failure of a haul truck driver to wear a seat belt; Order Nos. 4327622 and 4327625 alleging violations of 30 C.F.R. § 56.14130(g) for failure of bulldozer drivers to wear seat belts; and Order No. 4327631 alleging a violation of 30 C.F.R. § 56.14107(a) for failure to guard the tail pulley of a radial stacker conveyor belt. 18 FMSHRC 1603, 1607, 1610-12, 1614-16, 1619-21, 1624-25 (Sept. 1996) (ALJ).

REB paid $2,400 in civil penalties that were assessed by the judge for the violations. *Id.* at 1627. On October 15, 1996, the Commission granted a petition for discretionary review filed by the Secretary of Labor challenging the judge's determinations.

On March 30, 1998, the Commission issued a decision in which it, in part, vacated the judge's determination that the four violations were not the result of REB's unwarrantable failure, reversed the judge's determination that REB did not violate section 56.14130(a)(3) as alleged in Order No. 4327626, and vacated the judge's dismissal of Order No. 4327628. 20 FMSHRC 203, 218-19 (Mar. 1998). The Commission remanded the matter to the judge for further consideration and assessment of civil penalties. *Id.*

In an April 24, 1998, remand decision, the judge affirmed his findings that the four violations were not unwarrantable. 20 FMSHRC 455, 456-59 (Apr. 1998) (ALJ). In addition, he found that the violations alleged in Order Nos. 4327626 and 4327628 were not unwarrantable and assessed $1,400 in civil penalties for the two violations. *Id.* at 458-59.

On April 30, 1998, the Commission received REB's Motion to Dismiss Consideration of Further Penalties.[3] Relying on section 100.7(b) of the Secretary's civil penalty assessment procedures, 30 C.F.R. § 100.7(b),[4] REB argues that since it had already paid the civil penalties assessed by the judge in his initial decision, and since MSHA had accepted the payment prior to the Commission's decision, the Secretary is "estopped from seeking to augment penalties based on the same violations." Mot. at 1.

On May 12, 1998, the Commission received the Secretary's opposition to the motion. Therein, the Secretary asserts that the "acceptance" provision of section 100.7(b) "applies only if, within 30 days of receipt of the proposed penalty, the charged party pays the proposed penalty instead of contesting the proposed penalty." Opp'n at 1-2. She argues that, since REB contested the proposed penalties instead of paying them within 30 days of receipt, REB cannot now invoke the "acceptance" provision of section 100.7(b). *Id.* at 2. In addition, the Secretary argues that, even if the "acceptance" provision could be invoked to prevent her from seeking increased penalties, it could not prevent the Commission from assessing increased penalties because the Commission has authority to assess penalties *de novo*. *Id.* at 2-3 (citing 30 U.S.C. § 820(i);

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[3] The certificate of service attached to the motion indicates that it was mailed on April 27, 1998.

[4] Section 100.7(b) states, in part:

> Upon receipt of the notice of proposed penalty, the party charged shall have 30 days to: (1) Pay the proposed assessment (acceptance by MSHA of payment tendered by the party charged will close the case); or, (2) notify MSHA in writing of the intention to contest the proposed penalty.

Wallace Bros., Inc., 18 FMSHRC 481, 483-84 (Apr. 1996); *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-93 (Mar. 1983)). Further, in light of the judge's remand decision affirming his unwarrantable failure findings with respect to the four violations and, thus, affirming the penalty amounts, the Secretary notes that if she does not petition for discretionary review, REB's motion will be moot. *Id.* at 4 n.2. Subsequently, the Secretary did not seek review of the judge's remand decision.

On June 15, 1998, REB submitted a letter to the Commission in which it states that it "wants to hold . . . in abeyance [the paying of the $1,400 civil penalties for the violations alleged in Order Nos. 4327626 and 4327628] until the Commission makes a decision on . . . [the m]otion." REB asserts that, if the motion is granted, then it would not owe the penalties.

The judge's jurisdiction over this case terminated when his remand decision was issued on April 24. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). REB's motion was received by the Commission on April 30, within 30 days of the judge's decision. The Commission did not act on the motion and the judge's decision became a final decision of the Commission 40 days after its issuance.

A final Commission judgment or order may be reopened under Fed. R. Civ. P. 60(b)(1) & (6) in circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen this proceeding and deem REB's motion to be a petition for discretionary review, which we deny. *See Remp Sand & Gravel*, 16 FMSHRC 501, 502 (Mar. 1994) (reopening proceeding after decision became final due to Commission's inaction on letter deemed to be timely filed petition).

In its motion, REB asserts that the Secretary is estopped from "augmenting" the penalties that it had previously paid and that the Secretary had accepted. Mot. at 1 ¶¶ 2, 3. However, in his remand decision, the judge did not augment the four penalties that REB had previously paid. By affirming his initial decision that the four violations were not unwarrantable, the judge, in effect, merely affirmed the penalties that he had previously assessed. 20 FMSHRC at 456-59. Accordingly, REB's argument has no basis.

In addition, it appears that REB is arguing that, because it paid penalties for *all* violations and the Secretary accepted those payments, it cannot be assessed further penalties. Mot. at 1; Letter dated June 15, 1998. However, Order Nos. 4327626 and 4327628 were initially dismissed by the judge. 18 FMSHRC at 1622-24. Accordingly, REB never paid penalties for those orders and the Secretary never accepted payment for them. The assessment of penalties for those orders in the sum of $1,400 by the judge in his remand decision was not an augmentation, but an initial

assessment. In any event, we agree with the Secretary that REB cannot invoke the "acceptance" provision of section 100.7(b) because it contested all six of the proposed penalties instead of paying them within 30 days upon receipt of the Secretary's notice of proposed penalties. *See* 30 C.F.R. § 100.7(b)(2).

Based on the foregoing, we reopen this proceeding, deem the motion to be a petition for discretionary review, and deny the petition. Accordingly, REB's motion is denied. REB is directed to pay $1,400 in civil penalties for the violations contained in Order Nos. 4327626 and 4327628.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 7, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEST 98-338-M A.C. No. 04-05271-05509
ESSAYONS, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On July 17, 1998, the Commission received from Essayons, Inc. ("Essayons") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Essayons.

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

In its request, Essayons contends that its failure to timely file a hearing request to contest a proposed penalty was due to its misplacement of the proposed assessment notification. Essayons asserts that before it mailed the hearing request, however, the thirty-day deadline for submission of the request had already passed.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g.*, *Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final

order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

On the basis of the present record, we are unable to evaluate the merits of Essayons' position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Essayons has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 24, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 94-23 PENN 94-166
CYPRUS EMERALD RESOURCES CORPORATION	:	

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

DECISION

BY: Jordan, Chairman; and Beatty, Commissioner[1]

These civil penalty cases, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), present the issues of whether the placement of coal refuse by Cyprus Emerald Resources Corporation ("Emerald") was a "refuse pile" under 30 C.F.R. § 77.215(f) and (h); whether the accident-reporting and investigating standards in 30 C.F.R. §§ 50.10 and 50.11 were triggered by a collapse of that coal refuse pile; whether Emerald violated 30 C.F.R. § 77.1608, requiring trucks to dump a safe distance from the edge of the bank when on unstable ground; and whether certain of the violations were significant and substantial ("S&S") and due to Emerald's unwarrantable failure to comply with the standards. Emerald petitioned the Commission to review Administrative Law Judge William Fauver's determinations that Emerald violated the standards, and challenged his S&S and unwarrantable failure findings. *See* 17 FMSHRC 2086 (Nov. 1995) (ALJ). The Commission granted review. For the reasons that follow, we affirm in part, vacate and remand in part, and reverse in part the judge's decision.

[1] Chairman Jordan and Commissioner Beatty are in the majority on all issues presented. Commissioner Marks joins in all parts of the decision, except for section II. E., from which he dissents. Commissioners Riley and Verheggen join in all parts of the decision, except for sections II. B.2.a. and II. B. 2.b., from which they dissent.

I.

Factual and Procedural Background

Emerald owns and operates the Emerald No. 1 Mine, a coal mine located in Greene County, Pennsylvania. 17 FMSHRC at 2087. Emerald had an MSHA-approved impoundment plan for disposing of refuse from its coal preparation plant. *Id.* The impoundment plan entailed four stages of construction of an impoundment embankment built from refuse material. *Id.* at 2087; R. Ex. 7. Under the plan, the impoundment embankment served to initially impound a slurry pond,[2] which in its final stages would be completely filled in with refuse. Tr. 466. The plan provided that each layer of the impounding embankment should be compacted, and provided for specific "lift" limitations in Stages II and III.[3] 17 FMSHRC at 2088. Stage IV development was expected to be completed in the year 2002. *Id.* In May and June 1993, the time of the subject citations and orders, the impoundment was in Stage III. Tr. 400.

At that time, refuse material, along with raw coal, was brought by conveyor belts from the Emerald mine to the preparation plant located on the surface. 17 FMSHRC at 2088. There, the coal and rock were separated by washing. *Id.* The refuse material was loaded on the refuse belt, which carried it to a 500-ton refuse storage bin. *Id.* At the bin, 35-ton dump trucks picked up the refuse and disposed of it. Tr. 45. Constant disposal of the refuse in the bin was essential for the preparation plant's production; the plant could operate no more than one hour without a functioning bin. Tr. 184-85. The dump trucks picked up and disposed of approximately 70 loads of refuse material per shift. Tr. 229. The mine worked three shifts per day. Tr. 250.

Under the impoundment plan, refuse was hauled to the impoundment embankment for use in its construction. 17 FMSHRC at 2088.[4] There it was to be placed in lifts and compacted pursuant to the impoundment plan. 17 FMSHRC at 2088-89.

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[2] "Slurry" is the fine carbonaceous discharge from a mine washery. American Geological Institute, *Dictionary of Mining, Minerals and Related Terms* at 516 (2d ed. 1997) ("*DMMRT*"). A "slurry pond" is any natural or artificial pond or lagoon for settling and draining the solids from washery slurry. *Id.* at 517.

[3] A "lift" is the distance between any two levels. *DMMRT* at 311. The impoundment plan provided that, at Stage II, "[a]fter placing the initial five-foot layer embankment, construction should consist of lifts of coarse coal refuse which are a maximum of two feet thick and compacted . . . ." R. Ex. 7, at 5-7. Stage III also required placement of refuse in two-foot maximum lifts and compaction. *Id.* at 5-8.

[4] The impoundment area, commonly referred to as the "regular lay down" area, was located down a slope about a mile from the preparation plant, a five or six-minute drive from the bin. 17 FMSHRC at 2088; Tr. 183-84, 228-29, 573, 695.

In inclement weather or when the road to the embankment impoundment was too icy, snowy, muddy, or dusty to travel, refuse was hauled to a location southwest of the bin known as the "short haul" area. *Id.* at 2089; Tr. 210-11, 228-29, 560, 674-76. It was situated on top of a naturally occurring embankment which abutted the shoreline of the slurry pond. 17 FMSHRC at 2089. At Stage IV, a portion of the short haul area was projected to become part of the impoundment structure. Tr. 365, 417-19.

After the dump trucks dumped their loads at the short haul area, bulldozers spread the resulting piles, pushing refuse over the edge of the embankment towards the slurry pond. 17 FMSHRC at 2089. This practice continued for 18 years and, by April 1993, the accumulation of refuse material in the short haul area extended 1,000 feet in length, 60 to 80 feet in height, and 300 feet in width. *Id.*

On April 2, 1993, MSHA received a complaint under section 103(g)(1)[5] of the Act concerning a partial collapse of the short haul area. *Id.* at 2087. MSHA inspector Walter Daniel, responding to the complaint, went to the mine and observed that a section of the refuse pile measuring about 350 feet long, 60 feet high, and 40 feet wide had broken off, caved in, and slid into the slurry pond. *Id.* at 2087, 2090. Because the pile was unstable with large cracks in it, he issued an imminent danger order under Mine Act section 107(a)[6] closing off the refuse pile. *Id.*

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

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this [Act] or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

30 U.S.C. § 813(g)(1) .

[6] Section 107(a) provides in part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such

at 2087, 2093-94; Tr. 35-37.

On April 5, 1993, Inspector Daniel, accompanied by MSHA engineering specialists, resumed inspection of the mine and issued three S&S citations under section 104(a) alleging violations of section 77.215(f), for failure to construct the refuse pile in such a manner as to prevent accidental sliding and shifting of material (Citation No. 3658639); section 77.215(h), for failure to construct the refuse pile in compacted layers not exceeding 2 feet in thickness and with a slope not exceeding 27 degrees (Citation No. 3658640); and section 77.1608(b), for operating mobile equipment in the area that collapsed (Citation No. 3658700). 17 FMSHRC at 2087, 2101, 2103, 2106-07; Tr. 38-39. MSHA later issued special assessments in conjunction with all three citations. Gov't Ex. 2, 5, 6.

During the investigation on April 5, Inspector Daniel received another section 103(g) complaint alleging an earlier failure of the same refuse pile on December 27, 1992, when a 35-foot wide section of the refuse pile broke off and slid toward the slurry pond. 17 FMSHRC at 2090. Miner Ike Bihun was operating a bulldozer on the part of the refuse pile that failed. *Id.*; Tr. 75-76. The bulldozer slid about 30 feet down the refuse pile toward the slurry pond and was partially buried in refuse material. 17 FMSHRC at 2090; Tr. 553-54. Ropes were thrown down to the trapped miner to help him climb up the slope of the refuse pile. 17 FMSHRC at 2090.

As a result of investigating the December complaint, Inspector Daniel issued Citations Nos. 3658682 and 3658696, alleging violations of sections 50.10 and 50.11(b) for failure to notify MSHA of the December incident and for failure to investigate it. *Id.* at 2094, 2096. He indicated that the section 50.11(b) violation was S&S and attached a special assessment to the citation. Gov't Ex. 10. Inspector Daniel also issued Order No. 3768690 and Citation No. 3658683, under section 104(d)(1), alleging S&S and unwarrantable violations of sections 77.215(f) and 77.215(h) as a result of the December incident. 17 FMSHRC at 2100, 2104; Gov't Ex. 8, 11. The inspector also issued Order No. 3658698 pursuant to section 104(d)(1) alleging an S&S and unwarrantable failure violation of section 77.1608(b) based on the December accident. 17 FMSHRC at 2105-06; Gov't Ex. 7.

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imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

II.

Disposition

A. Whether the Material at Issue Was a Refuse Pile

The judge found that the refuse material was a refuse pile that had built up over many years. 17 FMSHRC at 2095. Emerald argues that the judge erred in characterizing the refuse material at issue as a "refuse pile." E. Br. at 12-18. It asserts that the short haul area does not meet the requirement set forth in 30 C.F.R. § 77.217(e). *Id.* at 13. Emerald argues that the material was only temporarily stockpiled and was part of the impoundment area, which did not fail. *Id.* at 12-17; PDR at 9-10, 13 n.4. The Secretary responds that substantial evidence supports the judge's finding that the material at issue was a refuse pile, not a temporary stockpile nor part of the impoundment structure. S. Br. at 13-19. Moreover, the Secretary asserts that because MSHA, in the past, did not treat the refuse material as a violative refuse pile does not estop the agency from citing a violation on this occasion. *Id.* at 18 n.4.

"Refuse pile" is defined in section 77.217(e) as

> [A] deposit of coal mine waste . . . excavated during mining operations or separated from mined coal and disposed of on the surface as waste byproducts of either coal mining or preparation operations. Refuse pile does not mean temporary spoil piles of removed overburden material associated with surface mining operations.

The "language of a regulation . . . is the starting point for its interpretation." *Dyer* v. *United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Under the plain terms of section 77.217(e), the short haul area qualified as a refuse pile. The pile was an extremely large deposit of coal mine waste that had been "disposed of on the surface as waste byproducts" of Emerald's preparation plant, as set forth in the regulation. We reject Emerald's argument that, because the refuse was only temporarily stockpiled, it was not "finally" disposed as contemplated in section 77.217(e). E. Br. at 13-14. That section does not

require that the material be *finally* disposed. In addition, substantial evidence[7] supports the judge's finding that the material at the short haul area was not in a temporary stockpile, as Emerald asserts. 17 FMSHRC at 2089. The refuse pile accumulated over eighteen years. Tr. 676. The enormous size of the refuse pile also belies its characterization as "temporary." MSHA engineer Mazzei estimated that the volume of the refuse pile was between 750,000 to 1 million tons. Tr. 332. *Compare RNS Services, Inc.*, 18 FMSHRC 523, 524 (April 1996) (refuse pile 1,200 feet long, 500 feet wide, 90 feet high), *aff'd*, 115 F.2d 182 (3rd Cir. 1997). The heavy equipment operators testified that, although some of the refuse was moved from the short haul area to the impoundment structure, this occurred only on Sundays or on off days and that a great portion of the refuse was never moved from the pile. Tr. 208-12, 219, 230. Emerald's long-term practice of bulldozing the refuse over the edge of the embankment also indicates that Emerald did not treat the refuse pile as a temporary stockpile. Accordingly, we conclude that substantial evidence supports the judge's finding that, "[a]lthough a small part of the refuse on the refuse pile was used at times to build up the impoundment embankment, the great majority of the refuse deposited on the refuse pile was pushed over the edge toward the slurry pond to make room for more refuse material." *See* 17 FMSHRC at 2089-90.

We are not persuaded by Emerald's argument that, because the area was eventually to become part of the impoundment and was covered by an impoundment permit number, it should have been considered as an impoundment structure, not a refuse pile. E. Br. at 14-15. "Impounding structure" is defined in 30 C.F.R. § 77.217(c) as "a structure which is used to impound water, sediment, slurry, or any combination of such materials." Substantial evidence supports the judge's finding that the refuse pile was not intended to be and did not serve as an impounding structure. 17 FMSHRC at 2090. Although at Stage IV, a portion of the area where the refuse pile stood would become part of the impoundment, at that point the material would have to be re-graded and compacted to conform to the impoundment plan. Tr. 419, 672, 683. MSHA's engineer testified that in April 1993, there was no indication of the operator's intention to comply with the impoundment plan because the pile was well beyond the area where the impoundment slope was to be located and the conditions of the pile were very different from those outlined in the plan. Tr. 409-10, 449. Emerald senior engineer Terry Dayton testified that the refuse material in April 1993 was not intended to impound the slurry pond. Tr. 637, 672-73. Emerald preparation plant manager Alan White testified that there was "no doubt" that the refuse was piled beyond what was intended in the impoundment plan. Tr. 520, 542. Likewise, MSHA engineers Daniel Mazzei and George Gardner testified that the pile of refuse at the short haul

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[7] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(1). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 304 U.S. 197, 229 (1938)).

area did not serve to impound, but instead, "fulfilled all the definitions of a refuse pile." Tr. 314, 382, 409-10, 431-32, 445.

The record also does not support Emerald's contentions that, because MSHA only required a small portion of the refuse pile to be reworked to abate the violative condition, the refuse pile met the Secretary's requirements. E. Br. at 17. Substantial evidence establishes that the slope that failed was cut down and regraded to an appropriate slope and the entire area was compacted with waste material placed in two-foot lifts. Tr. 360, 429-30. MSHA engineer Gardner, who reviewed the plans for regrading the area, testified that Emerald was also required to provide continued engineering oversight of the area and to install equipment to constantly measure the core pressures in the pile. Tr. 430. Finally, Emerald's assertion that MSHA previously had not treated the short haul area as a refuse pile is not persuasive. It is well established that estoppel does not operate against the government's enforcement powers. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981); *accord Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416-17 (10th Cir. 1984).

In sum, we affirm the judge's conclusion that the material at issue constituted a refuse pile.

B. Part 50 Violations

The judge found that the failure of the refuse pile on December 27, 1992, qualified as a reportable accident under section 50.2(h)(10). 17 FMSHRC at 2095. He then determined that Emerald violated section 50.10 when it did not contact MSHA after learning that part of the refuse pile failed on December 27. *Id.* at 2095-96. Finding that the violation was "due to high negligence," the judge assessed a penalty of $400. *Id.* at 2096. The judge also found that Emerald violated section 50.11(b) by not investigating and developing a report of the December failure, including measures needed to prevent a recurrence. *Id.* at 2098. In addition, the judge determined that the section 50.11(b) violation was S&S, reasoning that "[c]ontinued operations without investigating the causes of a failure of a refuse pile and the measures needed to prevent a recurrence could contribute significantly and substantially to another failure of the refuse pile with a risk of serious injury." *Id.* at 2099. Concluding that the violation was due to high negligence, the judge assessed a penalty of $3,000. *Id.* at 2099-2100.

According to Emerald, because no refuse pile existed, the judge erred in finding violations of sections 50.10 and 50.11(b). PDR at 9. Further, Emerald maintains that the judge's finding of a violation of section 50.11(b) is not supported by substantial evidence because it prepared and submitted a report to MSHA in April 1993, nearly two months before the issuance of the citation. *Id.* at 11; E. Br at 25 n.9. Emerald also argues that, if the Commission accepts MSHA's interpretation of the incident as an accident, then sections 50.10 and 50.11(b) are impermissibly vague because no other operator was aware of the reporting requirement for such events. E. Br. at 24 n.8. Emerald also submits that the judge erred in holding that the violation of section 50.11(b) was S&S because Part 50 is not a mandatory safety or health standard and

section 104(d)(1) only provides for S&S findings with respect to such standards. PDR at 12; E. Br. at 25.

The Secretary responds that the judge correctly determined the December failure to be a reportable accident under section 50.10. S. Br. at 19-25. According to the Secretary, under the plain meaning of the section and its regulatory purpose, the failure of the refuse pile constituted an accident. *Id.* at 19-24. Alternatively, the Secretary asks for deference to her reasonable interpretation of section 50.10. *Id.* at 20. Thus, the Secretary asserts, Emerald's failure to immediately report and investigate the accident constituted violations of sections 50.10 and 50.11(b). *Id.* at 25-28. The Secretary contends that a violation of section 50.11(b) may properly be designated S&S under section 104(d) of the Mine Act and argues that her interpretation is reasonable and entitled to deference. *Id.* at 28-35.

1. Whether the December Incident Was an "Accident" Under Part 50

"Accident" is defined in Part 50 as "[a]n unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or *failure of* an impoundment, *refuse pile* or culm bank." 30 C.F.R. § 50.2(h)(10) (emphasis added). Under the plain terms of this definition, failure of a refuse pile qualifies as an accident. Thus, the failure of the pile on December 27, 1992, when a 35-foot portion of the pile collapsed, causing a bulldozer to slide down 30 feet and become partially buried, qualified as an accident.

We reject Emerald's argument that, for a refuse pile failure to constitute an accident, it must require emergency action and involve a failure of a significant portion of the pile. PDR at 10; E. Br. at 21-25. Emerald reads into section 50.2(h)(10) requirements that are not in the provision. Similarly, we find unconvincing Emerald's argument that MSHA's revision of section 50.2(h) to exclude various events from the accident definition somehow indicates that the December collapse of the refuse pile does not qualify as a reportable accident. E. Br. at 21-23. Emerald overlooks the simple fact that, in the present section 50.2(h), MSHA specifically added the failure of a refuse pile to the definition of "accident." Further, Emerald incorrectly asserts that the term "accident" in section 50.2(h) should be narrowly construed because its companion section 50.12 requires preservation of an accident site, often compelling an operator to shut down production. E. Br. at 23-24. Emerald's proposed construction directly contravenes the Commission's long-held principle that the Mine Act and its regulations must be broadly construed to further the Act's remedial goals. *See, e.g., Hanna Mining Co.*, 3 FMSHRC 2045, 2048 (Sept. 1981); *accord Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) ("Congress intended the [Mine] Act to be liberally construed").

Further, we are not persuaded by Emerald's second estoppel argument based on the fact that MSHA has not previously cited operators for neglecting to report similar refuse pile failures. *See King Knob*, 3 FMSHRC at 1421-22. In addition, we reject Emerald's argument that, because

no other operators have reported such accidents, the regulation is impermissibly vague. From our conclusion that the definition of accident in section 50.2 is plain, it follows that section 50.10 provided the operator with adequate notice of its requirements.[8] *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (adequate notice provided by unambiguous regulation).

Accordingly, we affirm the judge's conclusion that the December failure was an accident. It was undisputed that Emerald failed to immediately report the accident to MSHA. 17 FMSHRC at 2095; Tr. 491-92. We therefore affirm that Emerald violated section 50.10, requiring immediate notification of accidents.

2. Violation of Section 50.11(b)

Section 50.11(b) requires that an operator investigate all accidents and prepare a report that includes, inter alia, the steps the operator will take to prevent a recurrence.[9] Substantial evidence supports the judge's finding that Emerald did not investigate the December incident until after MSHA began its investigation in April 1993. 17 FMSHRC at 2098; Tr. 564-65, 610-12, 618-20. We reject Emerald's argument that, because section 50.11(b) establishes no time frame for preparation and submission of the report and because it submitted a report to MSHA in April 1993, no violation occurred. E. Br. at 25 n. 9. In *Steele Branch Mining*, 15 FMSHRC 597, 602 (Apr. 1993), the Commission construed section 50.11(b) to require operators to investigate all accidents and to develop a report of each investigation within a reasonable period of time. The Commission reasoned that the purpose of the regulation "'is to 'ensure that operators are in fact investigating accidents and injuries and are engaged in the constant upgrading of health and safety practices.'" *Id.* (quoting introduction to final rule at 42 Fed. Reg. 65,534 (1977)). In *Steele Branch*, the Commission addressed the question of how much time an operator has to submit an investigation report after MSHA's request. The Commission held that "[w]here a

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[8] Section 50.10 provides in pertinent part that "[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine."

[9] Section 50.11(b) provides in pertinent part:

> Each operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator shall develop a report of such investigation. . . . An operator shall submit a copy of an investigation report to MSHA at its request. Each report prepared by the operator shall include,
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> . . . .
>
> (8) A description of steps taken to prevent a similar occurrence in the future; . . .

standard is silent as to the period of time required for compliance, the Commission has imputed a reasonable time." 15 FMSHRC at 601. The Commission determined that a report submitted less than a month after an accident satisfied the reasonableness requirement, especially in view of the operator's oral notification to MSHA less than a week after the accident of the "critical portion of the report, i.e., the preventive steps [the operator] would take to avoid a similar accident." *Id.* at 602. Emerald's preparation and submission of its report, initiated only after a second accident four months after the incident, does not fall within the bounds of reasonableness. We also find somewhat disingenuous Emerald's assertion that, because it submitted a report for the December accident on April 8, more than a month before the citation was issued, it did not violate the regulation.

Nor are we persuaded by Emerald's argument that the judge erred by construing section 50.11(b) to require immediate submission of the report. E. Br. at 25 n.9. We do not read the judge's decision as requiring immediate submission of the report. The judge determined that Emerald violated the regulation because it did not investigate the December failure until prompted by MSHA four months after the accident. 17 FMSHRC at 2099. Accordingly, we affirm the judge's conclusion that Emerald violated section 50.11(b).

a. Whether This Violation May Be Designated S&S

Emerald contends that, because this violation involves a regulation which is not a mandatory health or safety standard, it may not be designated S&S.[10] E. Br. at 25. Emerald relies on section 104(d) of the Mine Act, which states in relevant part:

> If . . . the Secretary finds that there has been a violation of *any mandatory health or safety standard* . . . and such violation is of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health

[10] Mandatory health and safety standards are defined as "the interim standards established by [titles] II and III of this [Act] and the standards promulgated pursuant to [title] I of this [Act]." 30 U.S.C. § 802(*l*). The standard at issue was promulgated under section 508, which is located in Title V of the Mine Act and provides that "[t]he Secretary, the Secretary of Health and Human Services, the Commissioner of Social Security, and the [Interim Compliance] Panel are authorized to issue such regulations as each deems appropriate to carry out any provision of this [Act]." 30 U.S.C. § 957.

> hazard, . . . he shall include such finding in any citation given to the operator under this [Act].

30 U.S.C. § 814(d)(1) (emphasis added).[11]

In addition, Emerald points out that the Commission has held that to find a violation S&S, the Secretary must prove: (1) *the underlying violation of a mandatory health or 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 injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. E. Br. at 25 (citing *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (emphasis added)).

In response, the Secretary argues that, in issuing the particular citation under review, she relied on the broad authority granted by section 104(a), which provides:

> If . . . the Secretary believes that an operator of [a] . . . mine . . . has *violated this [Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this [Act]*, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and *shall describe* with particularity *the nature of the violation* . . . .

30 U.S.C. § 814(a) (emphasis added). *See* S. Br. at 28-35.

The Secretary notes further that the Commission has previously held that a section 104(a) citation may be designated S&S as a way of describing the nature of the violation. *Id.* (citing *Consolidation Coal Co.*, 6 FMSHRC 189, 192 (Feb. 1984)). The Secretary contends that the reference to "mandatory health or safety standard" in sections 104(d) and (e) was not intended to

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[11] The other relevant provision of the Mine Act referring to an S&S designation is section 104(e), which provides in part:

> If an operator has a pattern of violations of *mandatory health or safety standards* in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists.

30 U.S.C. § 814(e) (emphasis added).

shield other serious violations from the enforcement mechanisms that Congress provided in those statutory provisions. S. Br. at 29-35.

The judge below found that an allegation of a significant and substantial violation in a 104(a) citation is simply an "allegation of gravity, not an assertion of jurisdiction to apply the sanctions of [section] 104(d)." 17 FMSHRC at 2099. The judge therefore declined to reach the issue of "whether the sanctions of [section] 104(d) apply to a violation of Part 50."[12] *Id.*

On appeal, the parties have urged us to decide whether the Secretary is precluded from attaching the S&S designation to a violation if the underlying regulation does not meet the statutory definition of a mandatory health or safety standard. Emerald argues that the designation of S&S is more than an allegation of gravity affecting the amount of the penalty proposed, since it allows the violation to be included in a determination of whether the operator has engaged in a pattern of violations under section 104(e). E. Br. at 26. Moreover, although the enforcement sanctions available in section 104(d) were not sought in the instant case, the Secretary disputes Emerald's assertion that she cannot apply that provision to a violation that does not involve a mandatory health or safety standard. S. Br. at 31-34. We will therefore address the issue squarely raised by the parties and consider whether the reference to mandatory health or safety standard in sections 104(d) and 104(e) precludes the Secretary from attaching the S&S designation to a violation of another regulatory requirement, regardless of the risk of harm that the violation may pose.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal* Co., 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir 1989); *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). In conducting our analysis, we utilize traditional tools of construction, including an examination of the particular statutory language at issue, and the language and design of the statute as a whole. *Thunder Basin,* 18 FMSHRC at 584 (quoting *K Mart Corp. v. Cartier, Inc.*, 496 U.S. 281, 291 (1988)). If the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron,*

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[12] Regulations contained in Part 50 of 30 C.F.R. pertain to "Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment, and Coal Production in Mines[.]"

467 U.S. at 843-44; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin Coal* Co., 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.

Although section 104(d) refers explicitly to "a violation of any mandatory health or safety standard," that same provision authorizes the Secretary to include her S&S designation "in *any citation* given to the operator under" the Mine Act. 30 U.S.C. § 814(d)(1) (emphasis added). The particular citation under review refers to section 104(a), which instructs the Secretary to cite violations of the Act, as well as violations of "any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to" the Mine Act. 30 U.S.C. § 814(a). This provision treats a violation of a mandatory health or safety standard identically to a violation of the Act and to violations of other rules, orders or regulations promulgated pursuant to the Act. Moreover, section 104(a) provides that each citation "shall describe with particularity the nature of the violation." *Id.* As the Commission has held, "[t]he 'nature' of a violation refers to its characteristics and properties. . . . [and] [t]hat one of those characteristics may be whether the violation is significant and substantial is made clear by section 104(d)(1)." *Consolidation*, 6 FMSHRC at 192.[13] Thus pursuant to section 104(a), a citation alleging a violation of a regulatory requirement could be designated S&S if the violation posed a reasonable likelihood of injury.

The Commission has made clear that any citation issued under the Act is issued pursuant to the broad authority granted to the Secretary by section 104(a). Although citations and orders issued under section 104(d) contain special findings, they are nevertheless derived from and are a part of the Secretary's general authority to issue citations under section 104(a). This view was articulated in *Utah Power and Light Co.*, 11 FMSHRC 953, 956 (June 1989) ("*UP&L*"), where the Commission held that section 104(d) is not a separate basis for the issuance of a citation independent from section 104(a). The Commission explained that "[s]ection 104(a) is the source of the Secretary's power to issue citations" and that "the statutory language makes clear that 'significant and substantial' and 'unwarrantable failure' determinations by MSHA inspectors constitute special findings that are '*includ[ed]*' in any citation" issued under the authority of section 104(a). *Id.* (emphasis and alteration in original). *UP&L* expressly approved *Nacco Mining Co.*, 9 FMSHRC 1541, 1545 & n. 6 (Sept. 1987), and clarified that a "section 104(d)(1) citation" is only a term of convenience, and that it refers to a section 104(a) citation with the special findings described in section 104(d). 11 FMSHRC at 957. Likewise, a pattern notice under section 104(e) is based on the number of prior S&S citations the operator has received under section 104(a). *See Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1078 (D.C. Cir 1987).

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[13] The partial dissent of Commissioners Riley and Verheggen erroneously contends that the holding of *Consolidation*, 6 FMSHRC at 192, must be linked to violations of mandatory health or safety standards. Slip op. at 39. The case simply never presented the question of whether violations of other regulations cited under section 104(a) could be S&S.

Thus, we cannot consider sections 104(d) and 104(e) in isolation from section 104(a) when deciding whether Congress intended to restrict the application of sections 104(d) and 104(e) to certain kinds of standards.[14] Reading sections 104(d) and 104(e) together with section 104(a) gives rise to an ambiguity as to whether Congress intended the Secretary's enforcement ability to depend on the fact that the violation concerned a standard promulgated under section 101 of the Act, as opposed to one contained in the Act itself or one promulgated pursuant to section 508 of the Act.[15]

Because the statute is ambiguous on this point, we must determine whether the Secretary's interpretation is reasonable, and thus entitled to deference. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997); *see also Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

The Secretary argues that the Mine Act must be read as one harmonious whole. S. Br. at 35. She contends that, consistent with the statute's graduated enforcement scheme, violations posing a likelihood of harm can be designated S&S, regardless of whether they involve a mandatory health or safety standard or some other mandatory requirement under the Act. *Id.*

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[14] In *Emerald Mines Corp.*, 9 FMSHRC 1590 (Sept. 1987), *aff'd*, 863 F.2d 51 (D.C. Cir. 1988), the Commission similarly declined to construe section 104(d) apart from the enforcement authority granted by section 104(a). The operator in that case unsuccessfully contended that, since section 104(d) referred to unwarrantable failure violations found "upon any inspection," a section 104(d) citation could not be based upon a violation discovered through an "investigation." *Id.* at 1594. In affirming the Commission, the Court of Appeals considered the fact that sections 104(a) and 107(a) authorize citations and withdrawal orders for violations found "upon inspection or investigation" and concluded that the Secretary was not limited to issuing a section 104(d) citation for only a violation discovered during the course of an inspection. 863 F.2d at 55.

[15] The partial dissent of Commissioners Riley and Verheggen characterizes section 104(d) as a separate prosecutorial tool, apart from section 104(a), and analogous to those contained in sections 110(c) or 110(d). Slip op. at 37. This characterization, however, overlooks a fundamental fact — sections 104(a) and 104(d) are subsections of the same section of the Mine Act. This provides even more support for interpreting the two subsections harmoniously.

The citation under review charges a violation of 30 C.F.R. § 50.11(b), which states in pertinent part that "[e]ach operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator shall develop a report of each investigation."

We note at the outset that the cited conduct in this case involves a failure to comply with a requirement specified in the statute itself. The Part 50 standard at issue here implements the language of section 103(d) of the Act, which states that "[a]ll accidents . . . shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents and investigations shall be kept and the information shall be made available to the Secretary . . . ." 30 U.S.C. § 813(d). In explaining this statutory requirement, the report of the Senate Committee on Human Resources, the committee responsible for drafting the Mine Act ("Senate Committee"), emphasized that:

> This provision reasserts the Committee's view that the primary responsibility for mine safety and health is the operator's and requires the operator to maintain a continuing program for mine safety and health. Such accidents may forwarn mine operators of potential hazards, and they should thus be investigated, and remedial action should be taken regardless of whether actual injuries occurred. The operator is required to keep a record of his actions to prevent recurrence of similar accidents. . . .
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> . . . [T]he Committee recognizes that adequate investigation of accidents by operators assists operators to develop responsive and responsible in-house safety and health programs.

S. Rep. No. 95-181, at 28 (1977) ("Senate Report"), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616 (1978) ("*Legis. Hist.*").

If we determine, therefore, that the Secretary can never apply the sanctions contained in sections 104(d) and 104(e) to violations involving a failure to investigate the cause of an accident, we must of necessity conclude that Congress intended the Secretary to have less enforcement tools at her disposal when the violation involves a safety requirement that Congress saw fit to include in Title I of the Act than when the violation involves a requirement

promulgated by the Secretary under that title, that is, a mandatory health or safety standard. We are reluctant to ascribe such an illogical approach to the statute's drafters.[16]

There is nothing in the legislative history of the Mine Act that indicates Congress was more concerned about the origin of the standard violated as opposed to the potential danger created by the violation, or the kind of conduct that caused the violation. And there is certainly no indication that the drafters of the statute intended a regulation promulgated by the Secretary under Title I of the Act to be subject to more stringent enforcement than a requirement specified in that title by the drafters themselves. In fact, the terms "violations of the law" and "mandatory health and safety standards" are used interchangeably throughout the legislative history of the Mine Act. For example, when discussing the newly enacted training requirements contained in Title I, 30 U.S.C. § 825, the Senate Committee continually refers to this provision of the Act as a "mandatory safety and health training standard." S. Rep. No. 95-181, at 49, *Legis. Hist.* at 637. In discussing unwarrantable failure closure orders, the Senate Committee explained: "[t]he unwarrantable failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards resulting from conditions *violative of the Act.*" S. Rep. No. 95-181, at 31, *Legis. Hist.* at 619 (emphasis added). A withdrawal order under section 104(d)(1), 30 U.S.C. § 814(d)(1), is triggered by a violation that is both S&S and unwarrantable. Therefore, if a violation of the Act can trigger a withdrawal order under this section, MSHA must have the authority to cite it as S&S as well as unwarrantable.

The Senate Committee expressly disapproved the "unnecessarily and improperly strict view" of S&S taken by the Commission's predecessor under the 1969 Coal Act, the Interior Board of Mine Operations Appeals, in *Eastern Associated Coal Corp.*, 3 IBMA 331 (1974). S. Rep. No. 95-181, at 31, *Legis. Hist.* at 619. In *Eastern Associated*, the Board based its narrow reading of S&S in part on the "explicit restriction to infractions of the mandatory standard." 3 IBMA at 349. The Senate Report indicated, moreover, that even violations of a technical provision (many of which are contained in Part 50) could trigger sanctions under section 104(d),

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[16] As Chairman Jordan and Commissioner Marks noted in *Topper Coal Co.*, 20 FMSHRC 344 (Apr. 1998):

> It is plainly illogical for a standard promulgated pursuant to title I of the Mine Act to be subject to more stringent enforcement than a prohibition inserted in that title by the drafters themselves. . . . If the Secretary can apply the full panoply of the Mine Act's enforcement scheme to any regulation she promulgates pursuant to title I of the Act, surely she should be able to do the same regarding behavior that the lawmakers themselves took the trouble to prohibit.

Id. at 359.

when the "violations do pose a health or safety danger to miners, and are the result of an 'unwarranted failure.'" S. Rep. No. 95-181, at 31, *Legis Hist.* at 619.[17]

Preventing the Secretary from designating violations of Part 50 regulations as S&S also defeats the objectives of the Mine Act because a failure to investigate and report an accident may often lead to significant safety consequences. No better example exists than the facts of the instant case. As we explain below, if Emerald had complied with section 50.11(b) by investigating the failure of the refuse pile in December 1992, it could have likely prevented the failure of the refuse pile in April 1993, an incident that needlessly exposed miners to a serious risk of harm. Moreover, the cases that Emerald relies on to attempt to demonstrate that violations of these regulations are not hazardous are inconclusive and do not address this point directly. In fact, in one of those cases, *LJ's Coal Corp.*, 14 FMSHRC 1225 (Aug. 1992), the Commission implicitly accepted that Part 50 violations may be S&S; that case was remanded for determination of whether a violation of section 50.10 was S&S. *See* 14 FMSHRC at 1230.

The Secretary's position is consistent with numerous court and Commission cases that have declined to embrace a literal application of the term "mandatory health or safety standard." For example, in *Consolidation Coal Co.*, 14 FMSHRC 956 (June 1992), the Commission rejected an argument, similar to the one Emerald makes here, that the Secretary was without authority to propose a civil penalty for a violation of a Part 50 regulation because it was not a mandatory health or safety standard. *Id.* at 963-65. The operator relied on Section 110(a), which requires the Secretary to assess a civil penalty against "[t]he operator of a . . . mine in which a violation occurs of a *mandatory health or safety standard* or who violates any other provision of this [Act] . . . ." 30 U.S.C. § 820(a) (emphasis added). Observing that "[s]ection 110(a), if read in isolation, appears to authorize civil penalties only for violations of the Act and of mandatory safety and health standards," the Commission adopted instead an approach that harmonized sections 104(a), 105(a) and 110(a), and concluded that civil penalties should be assessed for violations of any regulation, not just mandatory safety and health standards. 14 FMSHRC at 964-65. The Commission held that "[e]ach part of a statute should be construed in connection with the other parts 'so as to produce a harmonious whole,'" and concluded that the Secretary's interpretation, allowing civil penalties for violations of Part 50 regulations, "advance[d] the goals of the Act and maintain[ed] the importance of civil penalties as a deterrence." *Id.* at 965 (quoting 2A *Sutherland Statutory Construction* § 46.05, at 103 (Singer 5th ed. 1992 rev.)).

Similarly, in *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 405 (D.C. Cir.), *cert. denied*, 429 U.S. 858 (1976), the D.C. Circuit rejected a literal reading of the Federal Coal Mine Health and Safety Act ("Coal Act") that would have permitted the Secretary to issue citations only for violations of mandatory health or safety standards. In *Zeigler*, the operator argued that, because

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[17] The Senate Report also indicated simply that "violations" should be designated S&S, without referring to any specific type of violation. S. Rep. No. 95-181, at 31, *Legis Hist.* at 619.

a ventilation plan provision was not a mandatory health and safety standard, the provision was unenforceable. *Id.* at 401. The court acknowledged that, under the plain meaning of the Coal Act, the operator was correct, but rejected such a "deceptively simple resolution of the problem." *Id.* at 405.[18] The court foresaw that "[a] strict literal reading of the statute's definition provision" would render unenforceable many other protective provisions of the Coal Act that did not conform to the definition of a mandatory health or safety standard. This was a "result" that "Congress could hardly have intended" since it "would greatly impair the statute's effectiveness as a tool for bringing about improvements in mine health and safety conditions." 536 F.2d at 405.[19] Congress expressly approved the reasoning in *Zeigler* when it enacted the Mine Act. S. Rep. No. 95-181, at 25, *Legis. Hist.* at 613. The partial dissent of Commissioners Riley and Verheggen fails to acknowledge the precedential value of the long line of Commission and court cases that decline to narrowly interpret the Mine Act, including the D.C. Circuit's refusal in *Zeigler* to narrowly confine the term mandatory health or safety standard.

Having determined that the reference in sections 104(d) and 104(e) to "mandatory health or safety standard" does not reflect a Congressional intent to prevent the Secretary from applying those provisions to violations of other requirements, we also reject Emerald's contention that our *Mathies* decision requires us to vacate the S&S designation from this violation.[20] In *Mathies*, the Commission held that the Secretary must prove the following to establish that a violation is S&S: (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

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[18] The language of section 104(b) and other enforcement provisions of the Coal Act limited their application to violations of "any mandatory health or safety standard." 30 U.S.C. § 814(b) (1976).

[19] *See also Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974) ("[s]ince the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a narrow or limited construction is to be eschewed.").

[20] Commissioner Marks agrees that this violation is S&S. However, for the reasons set forth in his concurring opinions in *United States Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he continues to urge that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent. On February 5, 1998, MSHA issued a lengthy Interpretative Bulletin, setting forth a new agency interpretation of S&S and announcing that MSHA would challenge the Commission's narrow interpretation of S&S. 63 Fed. Reg. 6012 (1998). However, on April 23, 1998, MSHA suspended that Interpretive Bulletin with little explanation. *Id.* at 20,217. Commissioner Marks is curious as to MSHA's change in position on the S&S question and requests that the Secretary promptly advise this Commission as well as the mining community on this important issue.

the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4. In *Mathies*, however, only the second and third elements were at issue. *Id.* at 4. Since the violation was conceded by the operator, there was no need for the Commission to elaborate on its reference to "mandatory safety standard," which was presumably derived from the language of section 104(d).

Ironically, the regulation that was violated in *Mathies* was not a "mandatory health or safety standard," as that term is defined in section 3(*l*) of the Act. The *Mathies* citation involved a failure to comply with a safeguard notice. *Id.* at 1-2.[21] Those requirements are issued under the authority granted by section 314(b) of the Act, a provision located in Title III that states that "[o]ther safeguards adequate, in the judgement of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 U.S.C. § 874(b). Safeguards allow the Secretary to impose a requirement at a particular mine "when the inspector observes a transportation hazard that is not addressed by an existing mandatory standard." *Southern Ohio Coal Co.*,14 FMSHRC 1, 10 (Jan. 1992) ("*SOCCO II*"). We have held that a safeguard "may be enforced at a mine only after the operator is advised in writing that a specific safeguard will be required as of a specified date." *Id.* at 7.

Although we have recognized that section 314(b) allows the Secretary to create "what are, *in effect*, mandatory safety standards . . .[,]" we have also recognized a "crucial difference in the rules of interpretation applicable to mandatory standards promulgated by the Secretary [under Title I] and those applicable to 'safeguard notices' issued by his inspector." *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) ("*SOCCO I*") (emphasis added). In *SOCCO I*, we held that while mandatory standards "should be construed in a manner that effectuates, rather than frustrates their intended goal[,]" safeguards are issued without resort to the normally required rulemaking process, and therefore "a narrow construction of the terms of the safeguard and its intended reach is required." *Id.*[22] Furthermore, in *SOCCO II*, the Commission cited with

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[21] The particular provisions at issue included 30 C.F.R. § 75.1403 (identical to the statutory provision at section 314(b), 30 U.S.C. § 874(b)), 30 C.F.R. § 75.1403-1 (permitting inspector to require safeguards on mine-by-mine basis, in addition to those required in sections 75.1403-2 through 75.1403-11), and 30 C.F.R. § 75.1403-6(b)(3) (listing criteria designed to guide inspector in requiring other safeguards and including provision that track mounted personnel carriers should be equipped with sanding devices). *Id.* at 1 n.1. The safeguard at issue in *Mathies* required that "all mantrips at this mine will be provided with properly maintained sanding devices sufficient to sand all wheels in both directions of travel." *Id.* at 2 n.2.

[22] Commissioners Riley and Verheggen's partial dissent wrongly asserts that the majority "concede[s]" that safeguards are treated as mandatory safety standards (slip op. at 39-40), failing to apprehend the crucial distinction that exists between mandatory health or safety standards and safeguards. A safeguard, because it is not issued pursuant to the procedures set forth in section

approval MSHA's *Program Policy Manual*, which emphasized that "the criteria of sections 75.1403-2 through -11 are *not* mandatory standards." 14 FMSHRC at 7 (emphasis added). Accordingly, the *Mathies* decision, involving precisely these criteria, does not restrict the Secretary to applying an S&S designation only to a citation involving a mandatory safety or health standard.

Finally, the assertion of our dissenting colleagues Riley and Verheggen that the S&S designation in this case has no legal impact is based upon a literal reading of the Mine Act that ignores the historical role the S&S designation has played, as a practical matter, in Mine Act enforcement. *See* slip op. at 40. The designation of S&S has served as MSHA's dividing line between violations that are treated in a perfunctory fashion, and those that are subjected to more individualized scrutiny. The D.C. Circuit recognized the significance of an S&S designation in *Consolidation*, 824 F.2d at 1077-79. In discussing the impact of a section 104(a) violation that was designated S&S, the court found that MSHA routinely applied a flat $20 penalty to non-S&S violations and excluded them from the operator's history of violations.[23] *Id.* at 1078. The court noted that the "[d]esignation of [section 104(a)] violations as significant and substantial . . . is necessary if the more severe sanctions available under [section] 104(e) are ever to be applied." *Id.* This differential treatment for 104(a) violations designated S&S led the court to conclude that the operator had suffered a "cognizable injury under the Act." *Id.* at 1079. In addition, Congress provided for the issuance of a withdrawal order for repeated S&S violations under Mine Act section 104(e). Thus, the S&S designation is much more than a "term of art" for gravity as our dissenting colleagues incorrectly suggest. *See* slip op. at 40.

For the foregoing reasons, we hold that the Secretary is not precluded from designating this violation of section 50.11(b) as S&S.

101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard.

[23] The Secretary's current practice is to apply a flat penalty of $55 to non-S&S violations (63 Fed. Reg. 20,035 (1998) (amending 30 C.F.R. § 100.4)), but the violations are now included in an operator's history as a result of the ruling in *Coal Employment Project*, 889 F.2d at 1138, that the policy of excluding such violations from an operator's history itself violates section 110(i).

b. Whether the Violation of Section 50.11(b) Was S&S

Emerald argues in a footnote in its brief that, even if the Secretary has the authority to make S&S findings for Part 50 violations, application of the Commission's S&S test, as articulated in *Mathies*, does not support such a conclusion here. E. Br. at 29-30 n.13. Emerald essentially argues that the failure to prepare a report of the investigation was not reasonably likely to result in injury. *Id.* It also asserts that, because the Secretary alleged that the violation of section 50.10 for the failure to report the accident was of low gravity and not likely to cause injury or illness, the Secretary was inconsistent in alleging that the violation of section 50.11(b) was reasonably likely to cause injury. *Id.*

The judge found that Emerald's violation of section 50.11(b) was S&S because "[c]ontinued operations without investigating the causes of a failure of a refuse pile and the measures needed to prevent a recurrence could contribute significantly and substantially to another failure of the refuse pile with a risk of serious injury" a little more than three months after the December failure. 17 FMSHRC at 2099. We agree with the judge that Emerald's failure to investigate and prepare a report on the December accident prior to the April collapse was reasonably likely to, and did in fact, result in a similar event that posed a high risk of danger. Indeed, a larger collapse of the refuse pile occurred in April for which an imminent danger order was issued. Gov't Ex. 1. If Emerald had properly investigated and reported the December accident it would have been required under section 50.11(b)(8) to include a "description of steps taken to prevent a similar occurrence in the future." No such steps were taken and as a consequence the condition of the refuse pile worsened in the intervening months between December and April during which the dangerous practice of operating trucks and bulldozers on an unstable refuse pile continued. 17 FMSHRC at 2098; Tr. 214-19, 230-31, 663-64. Thus, we view the failure to investigate as closely linked to the subsequent accident.

Moreover, we are not persuaded by Emerald's argument that the fact that MSHA determined that one violation of a Part 50 regulation was not reasonably likely to result in injury is somehow inconsistent with determining that another violation of a different Part 50 regulation was reasonably likely to result in injury. MSHA was citing Emerald for different omissions under different sections, and the nature of one violation is not determinative of the nature of the other. We therefore affirm the judge's finding that the section 50.11(b) violation was S&S.

C. Section 77.215(f) and (h)[24]

The judge determined that, based on the December 1992 incident, Emerald committed an S&S and unwarrantable violation of section 77.215(f) for constructing the refuse pile "without an engineering plan and without adherence to accepted engineering practices to prevent accidental sliding and shifting of materials." *Id.* at 2100-01. Finding that the violation was due to high negligence, he assessed a penalty of $8,000. *Id.* at 2101. The judge further found an S&S and unwarrantable violation of section 77.215(h) because the refuse pile was not constructed, compacted, or graded according to the requirements in that section. *Id.* at 2104. He assessed a $7,000 penalty for the violation. *Id.*

Concerning the April 2, 1993, incident, the judge found an S&S violation of section 77.215(f) because a portion of the refuse pile, measuring 350 feet long, 60 feet high, and 40 feet wide, shifted and slid into the slurry pond. *Id.* at 2101-02. He reasoned that the "refuse pile had been constructed over the years without an engineering plan to prevent the refuse material from shifting and sliding." *Id.* at 2102. He found that although the violation was due to high negligence, Emerald's conduct did not amount to "reckless disregard" for the safety of the employees as alleged in the citation and he modified the citation accordingly. *Id.* He assessed a penalty of $8,500. *Id.* The judge also found a violation of section 77.215(h) because the refuse pile was not compacted and constructed in lifts so as not to exceed a 27 degree slope, as required by that standard. *Id.* at 2103. He found the violation to be S&S and a result of Emerald's high negligence and unwarrantable failure and assessed a penalty of $8,500. *Id.* at 2103-04. The judge also affirmed an imminent danger order under section 107(a) issued as a result of the April incident. *Id.* at 2108.

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[24] Section 77.215 provides in pertinent part:

> (f) Refuse piles shall be constructed in such a manner as to prevent accidental sliding and shifting of materials.
>
> . . . .
>
> (h) . . .[N]ew refuse piles and additions to existing refuse piles[ ]shall be constructed in compacted layers not exceeding 2 feet in thickness and shall not have any slope exceeding 2 horizontal to 1 vertical (approximately 27 [degrees]) except that the District Manager may approve construction of a refuse pile in compacted layers exceeding 2 feet in thickness and with slopes exceeding 27 [degrees] where engineering data substantiates that a minimum safety factor of 1.5 for the refuse pile will be attained.

Emerald contends that, because the entire area at issue was part of the impoundment and not a refuse pile, the judge erred in finding four violations of section 77.215. PDR at 13; E. Br. at 12-18. Additionally, Emerald argues that the unwarrantable failure determinations for three of the section 77.215 violations should be reversed because the judge disregarded important evidence showing the necessity of stockpiling the refuse material. PDR at 14-17; E. Br. at 31-34. Emerald notes that it had never been cited before for this practice and MSHA had inspected just a month prior to the April incident. E. Br. 33 n.15. In a footnote, Emerald argues that the S&S determinations for the section 77.215 violations were improper because the record does not establish a likelihood of injury. PDR at 17 n.5; E. Br. at 34 n.16.

The Secretary responds that the judge's findings of four violations of section 77.215 are supported by substantial evidence. S. Br. at 39-41. She asserts that substantial evidence also backs the judge's determinations that the section 77.215(f) and (h) violations on December 27 and the section 77.215(h) violation on April 2 were unwarrantable. *Id.* at 42-46. The Secretary contends that, contrary to Emerald's assertion, the judge did not find that the April 2 violation of section 77.215(f) resulted from unwarrantable failure, but rather determined that it was due to high negligence, a finding that the Secretary asserts is supported by substantial evidence. *Id.* at 43 n.12, 46.

1. Violations of Section 77.215(f) and (h)

Substantial evidence supports the judge's determinations that the two failures of the refuse pile in December and April constituted violations of section 77.215(f) and (h). On December 27, 1992, a 35-foot wide portion of the refuse pile broke away and slid down the slope causing a bulldozer to slide down the slope 30 feet toward the slurry pond. 17 FMSHRC at 2090. On April 2, 1993, an area of the refuse pile measuring 350 feet long, 60 to 80 feet high, and 40 feet wide shifted, caved in and slid into the slurry pond. *Id.* MSHA experts testified that the failure of the refuse pile was caused by its improper construction. Tr. 334-35, 338-43, 346-49, 416-18, 421, 423, 426-28. MSHA's engineering experts testified that the material had built up over several years without adequate compaction and foundation. Tr. 337, 341-42, 345, 349, 358, 399, 427-28. The miners testified that they had never used a compactor on the refuse pile. Tr. 229-30, 254. As observed by a number of witnesses, Emerald's practice of pushing the refuse over the edge of the embarkment did not compact the material and caused a steep incline. Tr. 182, 450, 472-73. MSHA's engineering experts testified that the pile's slope, 35 to 37 degrees, was steeper than permitted by the standard. Tr. 337, 341-42, 345, 358, 427-28. In addition, there was no evidence that Emerald sought permission from the district manager pursuant to section 77.215(h) to deviate from the requirements of that section.

In light of this evidence, we conclude that substantial evidence supports the judge's finding that the refuse pile failed in December 1992 and April 1993, as a result of the "unsafe manner in which the pile was constructed," i.e., by pushing refuse over the edge toward the slurry pond, without compaction, proper grading of the slope or adherence to an engineering plan

or accepted engineering practices. 17 FMSHRC at 2100-04. Accordingly, we affirm the judge's determinations that Emerald violated section 77.215(f) and (h).

2. Unwarrantable Failure (December Section 77.215 Violations)

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. *E.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

The Secretary alleged, and the judge found, that the two December section 77.215 violations were a result of unwarrantable failure. The judge's unwarrantable findings with respect to the December violations rest on Emerald's "[knowledge] that the refuse pile was developed without an engineering plan to prevent accidental sliding and shifting of refuse materials" and on the high risk posed to miners working on the refuse pile. 17 FMSHRC at 2101, 2104.

Substantial evidence supports the judge's findings concerning Emerald's knowledge that it was not following the proper construction procedure. Emerald's Senior Environmental Engineer Terry Dayton, who was responsible for inspecting the impoundment area and assisting the foremen in the development of the refuse disposal site at the time of the citations, testified that the material placed on the refuse pile was not compacted or placed in horizontal lifts in December 1992. Tr. 637-40, 674-79, 682-83. Dayton testified that there was a significant amount of refuse in the short haul area in December 1992. Tr. 676. In addition, as the judge found, before the failure in December 1992, Emerald submitted a report for the Pennsylvania

Department of Environmental Resources noting that refuse material was being deposited on the refuse pile. 17 FMSHRC at 2092; R. Ex. 11. Foreman John Meyers, who was responsible for the refuse impoundment on the afternoon and evening shifts, testified that, in December 1992, conditions in the short haul area were "really bad" and the area was full of refuse piles. Tr. 548-50, 560-61, 569. Likewise, equipment operator Leonard Hamilton testified that management officials were out at the site and observed conditions there. Tr. 208, 215. Accordingly, we conclude that substantial evidence establishes Emerald's awareness of the condition of the refuse pile.

Substantial evidence also supports the judge's conclusion that, despite its knowledge that a significant pile had accumulated by December 1992, Emerald put the miners at risk by taking no steps to either construct the pile in a safe manner or to restrict miners from dumping on the pile. 17 FMSHRC at 2101, 2103-04; Tr. 562. Foreman Meyers testified that in December 1992, when the bulldozer went over the edge, something had to be done with the accumulating refuse and management provided no guidance or alternatives for placing refuse. Tr. 561-62. The record establishes that Emerald neglected the short haul area and implicitly permitted the practice of bulldozing the refuse piles over the edge of the embankment to accommodate more refuse. Tr. 179-81, 553-55, 560-61, 709-10. The miners testified that the refuse disposal operation suffered because of a shortage of manpower and a lack of supervision. Tr. 228, 231-32, 264, 469-71, 481-83. In addition, Emerald had permitted this very large refuse pile — estimated by MSHA to be as much as 1 million tons — to develop over 18 years without attention to commonly accepted engineering principles. 17 FMSHRC at 2089; Tr. 676. With respect to the level of danger, MSHA engineer Mazzei testified that the refuse pile created a hazard to anyone working on it, because it lacked a solid foundation, and Emerald engineer Dayton acknowledged it presented a danger to trucks going out on the pile. Tr. 340, 349, 679. The duration, extensiveness and obviousness of the violative condition — as well as the danger it posed — all support the judge's unwarrantable determination.

Emerald's defenses to the unwarrantable charge are not persuasive. Emerald argues that it had a valid safety reason for placing the refuse material in the short haul area, i.e., that the refuse was wet and could not be safely compacted and included on the impoundment. E. Br. at 31-32. Emerald's contention is based on its position that the short haul area was merely a temporary stockpile to dry out materials, and not a refuse pile. We have already rejected this contention (*see* slip op. at 5-7). Additionally, for the same reasons that uncompacted refuse could not be safely added to the impoundment, it could not be safely added to the unstable refuse pile in the short haul area. Thus, we reject Emerald's argument, based on its asserted good faith belief that a hazard would exist if it did not place the material in the refuse pile, because its belief was unreasonable under the circumstances. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (Aug. 1994) (operator's good faith belief that cited conduct is safest method of

compliance must be reasonable).[25] Emerald's argument that the bulldozer operator was operating in an unauthorized fashion at the time of the December failure (E. Br. at 33) overlooks the fact that Emerald was required under section 77.215 to construct its refuse pile so as to prevent it from sliding. The bulldozer operator's actions are not a defense to the allegation of unwarrantably failing to construct the pile correctly.

In sum, we agree with the judge that Emerald's awareness of, and indifference to, the ever-increasing danger of the unstable, improperly constructed refuse pile over a long period of time amounted to aggravated conduct. Accordingly, we affirm, on substantial evidence grounds. the judge's determinations that Emerald's violations of section 77.215(f) and (h) relating to the December incident were a result of its unwarrantable failure to comply with those standards.

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[25] Commissioner Riley observes that, while estoppel is no defense to a violation of the Mine Act, it may, depending on the surrounding circumstances, offer a limited defense to unwarrantability.

> [T]he Secretary and the Commission interpret the words "unwarrantable failure" to require a culpability determination similar to gross negligence or recklessness. . . . Citing the Restatement (2d) of Torts §283 (1965), the Secretary argues that this negligence-based definition of "unwarrantable failure" requires consideration of the *surrounding circumstances*. ("[T]he standard of conduct to which [the actor] must conform to avoid being negligent is that of a reasonable man *under the circumstances*.") (emphasis added).

Secretary of Labor v. *FMSHRC*, 111 F.3d. 913, 919-20 (D.C. Cir. 1997) (citations omitted) (alteration in original). Such mitigating surrounding circumstances could include the fact that "the duration, extensiveness and obviousness of the violative condition" (*see* slip op. at 25), were overlooked by MSHA for 18 years, including within a month of the accident that spawned the instant case.

The benefit of the doubt in such situations, however, flows only to the "reasonable man under the circumstances[,]" not to those who remain clueless despite repeated instances of ground failure nor to those who appear volitionally ignorant, refusing to acknowledge and remediate widespread instability in the auxiliary refuse pile, including bulldozers subsiding into the slurry pond. Such events need not be of seismic proportions to inform a "reasonable" actor that greater efforts are necessary for compliance.

3. S&S (December and April Section 77.215 Violations)

Emerald argues that the judge erred in finding that the four violations of section 77.215 were S&S. E. PDR at 17, n.5; E. Br. at 34 n.16. The Secretary asks the Commission to treat Emerald's argument as abandoned because it is contained in a two-sentence footnote. S. Br. at 41 n.11.[26] Alternatively, the Secretary argues that the judge's S&S findings are supported by substantial evidence. *Id.* at n.11.

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 (Apr. 1981); *Mathies*, 6 FMSHRC at 3-4. We agree with the Secretary that substantial evidence supports the judge's determination that a failure of a refuse pile with its resultant collapse of ground is reasonably likely to result in serious injury to miners working on the pile. *See* 17 FMSHRC at 2101-04. Inspector Daniel testified that improper construction of the refuse pile created a danger of shifting, sliding, or cracking of the refuse pile having the likelihood to result in a fatal injury. Tr. 53-55, 70-71, 90. Indeed, what happened in this case — a large portion of the refuse pile collapsed causing a bulldozer to slide approximately 30 feet down the pile and become partially buried — illustrates that these violations were reasonably likely to result in injuries of a very serious nature. We therefore affirm the judge's findings that the four violations of section 77.215 were S&S.

D. Section 77.1608(b) Violations

The judge determined that Emerald violated section 77.1608(b) in December 1992 "by having dump trucks drive on a refuse pile that might fail to support the weight of a loaded dump truck." 17 FMSHRC at 2105-06. The judge also concluded that Emerald violated section 77.1608(b) in April 1993 because loaded dump trucks were operated in an unstable area that might fail to support them and the "[d]ump trucks were dumping loads of coarse coal refuse along the edge of the refuse pile." *Id.* at 2107. He determined that both violations were S&S and unwarrantable and assessed penalties of $9,500 for each of them. *Id.* at 2106, 2107-08.

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[26] Commissioner Marks would grant the Secretary's request and determine that Emerald has abandoned its challenge to the S&S designations by the skeletal nature of its argument, in line with well-established appellate law. *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (declining to entertain appellant's asserted but unanalyzed claim); *Jackson v. Univ. of Pittsburgh*, 826 F.2d 230, 237 (3rd. Cir. 1987) (unsupported issue is deemed waived); *Dungaree Realty, Inc. v. United States*, 30 F.3d 122, 124 (Fed. Cir. 1994) (characterizing as frivolous argument supported by one sentence in brief); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) (issues raised in brief not supported by argument deemed abandoned unless manifestly unjust to do so); *see also Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993) (Commission did not address issue listed in PDR but not discussed in brief).

Emerald argues that substantial evidence fails to support the judge's findings that violations of section 77.1608(b) occurred and that the violations resulted from unwarrantable failure. PDR at 17-20. Emerald also challenges the S&S findings associated with the truck violations. PDR at 8, 19 n.6. The Secretary responds that substantial evidence supports the judge's findings of violations of section 77.1608(b). S. Br. at 47, 48-49. Further, the Secretary asserts that substantial evidence supports the judge's finding that Emerald's December violation of section 77.1608(b) was a result of unwarrantable failure. *Id.* at 47-48. With respect to the S&S findings, the Secretary argues that Emerald has effectively abandoned its challenges to the S&S findings because its entire argument is contained in a two-sentence footnote in its PDR, and, alternatively, that the judge's findings are supported by substantial record evidence. *Id.* at 48 n.13; *see also id.* at 41-42 n.11.

1. December Violation

Section 77.1608(b) provides that "[w]here the ground at a dumping place may fail to support the weight of a loaded dump truck, trucks shall be dumped a safe distance from the edge of the bank."

The miners testified that they drove onto the refuse pile and dumped material there. Tr. 162, 166, 185, 310-11. Foreman Meyers testified that trucks were dumping in the short haul area in December 1992. Tr. 560-62. Thus, substantial evidence supports the judge's finding that Emerald had "dump trucks drive on a refuse pile that might fail to support the weight of a loaded dump truck." 17 FMSHRC at 2106. However, the judge did not address how close to the edge the trucks were dumping in December. Under the plain terms of section 77.1608(b), the judge was required to determine not only that the trucks drove on ground that might fail to support them, as he did, but also that the trucks were not dumping a safe distance from the edge of the bank. The judge stated: Dump trucks traveled on unstable parts of the refuse pile, including the area that failed, in order to deposit coarse refuse." *Id.* The judge did not explain his reference to "the area that failed," and it is unclear whether this is a finding that the trucks were dumping too close to the edge. For this reason, we believe that a remand on this issue is warranted.

In addition, a remand is necessary because the record supports various conclusions as to how close to the edge the trucks were dumping in December 1992. The witnesses were not specific as to how close the trucks came to the edge at that time. The Secretary does not point us to evidence that the trucks were dumping on the edge in December 1992. *See* S. Br. at 47. However, there is evidence in the record suggesting that trucks were dumping on the edge as a general practice that was ongoing in December. Inspector Daniel testified that, when investigating the incidents, he received statements from the miners that "[f]or months" they were "dumping the material on the edge and shoving it over the edge with the dozer." Tr. 52-53, 64. He relied on these statements when issuing the citation. Tr. 123. Dozer operator Donald Moore observed truck tracks "[s]omewhat close [t]o . . . the edge." Tr. 261. Substitute safety

committeeman and haul truck driver Timothy Brown testified that he observed piles that had been dumped "right on the edge." Tr. 160, 311.

A remand is necessary for the judge to sift through this evidence and make the requisite finding. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (judge must analyze and weigh relevant testimony of record, make appropriate findings, and explain reasons for his decision). Accordingly, we vacate the judge's finding of violation, as well as the related S&S and unwarrantable failure determinations. If the judge finds a violation on remand, he should reexamine the S&S and the unwarrantable determinations and make specific findings explaining the rationale for his decision.[27]

2. April Violation

The judge found that "[d]ump trucks were dumping loads of coarse coal refuse along the edge of the refuse pile" prior to the April violation. 17 FMSHRC at 2107. Substantial record evidence supports this finding. Photographs taken when the inspector investigated the April failure show truck tire tracks going to the edge of the portion of the refuse pile that broke away. Tr. 62-63, 258-59, 335; Gov't Ex. 21. Inspector Daniel testified that he observed truck tracks going into the failed area. Tr. 63-64. Equipment operator Hamilton, who had worked with Emerald for 18 years, testified to dumping on the refuse pile in the area that collapsed just before the April failure. Tr. 208, 214.

We do not find persuasive Emerald's requests that the Commission credit other witnesses who were uncertain how close to the edge the trucks were dumping, and draw a different conclusion from the photographs. PDR at 19. A judge's credibility determinations are entitled to great weight and cannot be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). We see no basis for overturning the judge's credibility determinations here. Based on the credited evidence, including the photographs, we find that substantial evidence supports the judge's findings.

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[27] The judge determined that Emerald's violation of section 77.1608(b) was unwarrantable because the operator "knew of the longstanding practice of dump trucks dumping coarse refuse on the refuse pile" as well as the danger of the practice as shown by instructions of supervisors to dump the material closer to the bin. 17 FMSHRC at 2106. Although substantial record evidence establishes Emerald's knowledge of dumping on the pile in December 1992 (Tr. 560-62), the judge made no finding as to when management began instructing drivers to dump close to the bin. Equipment operator Hamilton testified that his foreman "encourage[d]" dumping close to the bin. Tr. 215-16. However, it appears that this testimony may relate to events following the December accident. Tr. 215-16. We therefore instruct the judge to address this evidence, as well as any other relevant factors, when he reexamines the unwarrantability question. *Mid-Continent*, 16 FMSHRC at 1222.

Because substantial evidence supports the judge's determination, we affirm the judge's conclusion that Emerald violated section 77.1608(b) in April 1993.

3. Whether the April Section 77.1608(b) Violation Was S&S

Emerald asserts, without providing any additional argument, that the ALJ erred in finding that the April violation of section 77.1608(b) was properly designated S&S. PDR at 8. The judge found that the violation was S&S, reasoning that "[b]ecause of the instability of the refuse pile, it was reasonably likely that a failure of the refuse pile would occur and cause a dump truck to roll over or fall with collapsed refuse material, resulting in serious injury." 17 FMSHRC at 2107. We affirm that conclusion. It is beyond doubt that dump trucks driving on ground that fails to support them near the edge of a bank may be reasonably likely to result in serious injury. The December accident, which involved a refuse pile collapse causing a bulldozer to fall 30 feet down the pile, illustrates the serious hazard contributed to by the violation. In addition, Emerald has presented us with no reason to overturn the judge's decision. We accordingly affirm the judge's finding that the April violation of section 77.1608(b) was S&S.[28]

E. The Judge's Modification of Two Citations

The two S&S citations issued by MSHA charging violations of sections 77.215(h) and 77.1608(b) as a result of the April failure did not include unwarrantable failure allegations. Nonetheless. the judge determined that the April violations were a result of Emerald's unwarrantable failure. 17 FMSHRC at 2103-04, 2107.[29]

The operator (E. Br. at 34) and the Secretary (S. Br. at 49-51) agree that the judge erred in unilaterally modifying the citations. In *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996), the Commission determined that its judges may not on their own initiative modify a citation to add an S&S allegation. In *Mettiki Coal Corp.*, 13 FMSHRC 760, 764-65 (May 1991), the Commission held that its judges are not authorized representatives of the Secretary and do not have authority to charge an operator with violations of section 104(b) of the Mine Act. Under this reasoning, the judge erred in modifying the above citations to allege unwarrantable failure violations. Accordingly, we reverse the judge's modification of the two April citations.

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[28] Commissioner Marks would affirm the judge's S&S determination on the grounds that Emerald has abandoned its argument to the Commission. *Carducci*, 714 F.2d at 177; *Jackson*, 826 F.2d at 237; *Dungaree Realty*, 30 F.3d at 124.

[29] The judge found that MSHA modified the section 77.215(h) citation to a section 104(d)(1) citation (*id.* at 2103); however, the citation does not show such a modification. *See* Gov't Ex. 2.

Nonetheless, our holding does not cause us to disturb the judge's penalty assessments for these two citations. *See, e.g., Mechanicsville,* 18 FMSHRC at 881-82 (penalty affirmed even though Commission held judge lacked authority to sua sponte find violation was S&S). In reviewing a judge's penalty assessment, the Commission must determine whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria. "While a judge's assessment of a penalty is an exercise of discretion, 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). We conclude that the judge's findings that the two violations were the result of Emerald's high negligence are supported by substantial evidence.

The evidence discussed in sections C and D that Emerald was aware of the unsafe condition of the refuse pile in April, continued to use unsafe practices in the construction of that pile, permitted trucks to dump close to the edge of the unsafe pile, and that the conditions on the refuse pile posed a high danger, provides substantial support for the judge's determination that Emerald's violations of sections 77.215(h) and 77.1608(b) were characterized by high negligence. The high negligence findings are further supported because Emerald did not take steps to bring the refuse pile in compliance with section 77.215, nor did it stop the unsafe practice of trucks dumping on the pile, even after the December failure. The high negligence of the April violation of section 77.1608(b) is also buttressed by the fact that, in March 1993, Emerald engineer Dayton specifically warned the foreman in charge to keep the truck drivers close to the bin and to keep the trucks off the refuse pile because of the danger. Tr. 230-31, 556-57, 663. Accordingly, we affirm the penalty assessments as supported by substantial evidence.

III.

Conclusion

For Citation Nos. 3658682 and 3658696, we affirm the judge's conclusions that the refuse material in the short haul area constituted a "refuse pile," and that Emerald violated sections 50.10 and 50.11(b). We affirm the judge's determination that the section 50.11(b) violation was S&S.

With respect to Order No. 3768690 and Citation Nos. 3658639, 3658640, 3658683, we affirm all section 77.215 violations and that they were S&S. We affirm the determination that the December section 77.215 violations were a result of unwarrantable failure. We reverse the judge's unwarrantable determination as to the April section 77.215(h) violation contained in Citation No. 3658640, and affirm the judge's assessment of penalties for all section 77.215 violations.

As to Order No. 3658698, we vacate the judge's conclusion that Emerald violated section 77.1608(b) in December 1992, and remand for reanalysis and, if necessary, S&S and unwarrantable determinations. We also remand for reassessment of penalty, if any.

As to Citation No. 3658700, we affirm the judge's determinations that Emerald violated section 77.1608(b) in April 1993, and that the violation was S&S. We reverse the judge's unwarrantable determination, and affirm the penalty assessed by the judge.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur in all parts of the majority's decision with the exception of section E. In that section, the majority has determined that the judge did not have the authority to conclude that a violation is a result of unwarrantable failure when the Secretary has failed to formally make such a charge. I disagree and dissent on this issue.

As I reasoned in my partial dissent in *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 883 (June 1996), the Commission has recognized that Mine Act section 105(d), 30 U.S.C. § 815(d), authorizes the judge to modify citations "so long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order." *Id.* at 880 (citing *Consolidation Coal Co.*, 4 FMSHRC 1791, 1793-94 (Oct. 1982)). For reasons explained below, I conclude that is precisely what occurred in this case, i.e., the judge's rulings are based on allegations contained in the citations. Therefore, I find that the judge acted within his authority and in accordance with his duty as an administrative law judge when he concluded that the subject violations were a result of unwarrantable failure.

The two violations at issue stem from the April collapse of the refuse pile, which also resulted in the issuance of an imminent danger order under Mine Act section 107. Gov't Ex. 1. In both citations, the inspector marked that Emerald's negligence was "reckless disregard," which is the highest level of negligence on a MSHA citation or order. Gov't Ex. 2, 5.[1] Both citations indicate that "fatal" injuries were "highly likely" to result from the violations. *Id.* Both citations include special assessments which allege in detail that Emerald was alerted to the dangers of the unsafe refuse pile and of allowing the trucks on the pile and, despite the awareness of these dangers, the operator continued the practice of operating trucks on the unstable pile. *Id.*

Both citations were issued under section 104(a) and specifically indicate that they were issued in conjunction with an imminent danger order. *Id.* The inspector's testimony suggests that he issued the two citations under section 104(a), rather than as unwarrantable under section 104(d), not because they were not a result of unwarrantable failure, but because the citations were issued in conjunction with an imminent danger order. Tr. 92.[2] The inspector's apparent view that the

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[1] The citation alleging a section 77.215(h) violation was modified twice to raise the level of operator negligence — from "moderate" to "high" to "reckless disregard." Gov't Ex. 2. MSHA Inspector Daniel testified that he raised the level of operator negligence because his investigation revealed that, prior to the April collapse, Emerald Engineer Terry Dayton warned the Emerald foreman in charge of the refuse pile, Jim Graznik, about the danger of how "his people were piling the mine refuse, the way they were bulldozing over the edge." Tr. 55-56.

[2] The inspector was apparently relying on the language of Mine Act Section 104(d), which provides:

> (1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been

imminent danger order precluded issuance of a citation alleging unwarrantable failure was erroneous. *See Eastern Associated Coal Corp.*, 13 FMSHRC 902, 907-911 (June 1991) (section 104(d)(2) unwarrantable failure order can be issued in conjunction with imminent danger order). In *Eastern*, the Commission construed the language of section 104(d) so as not to limit the Secretary's enforcement authority, especially in cases involving imminent danger. There, the Commission stated: "To read out of the Act the protections and incentives of a section 104(d)(2) order on the basis that the hazard created by the violation is so great that it creates an imminent danger would seem peculiar on its face and would blunt the effectiveness of this sanction." 13 FMSHRC at 910. Although the holding of *Eastern* was limited to section 104(d)(2) orders, its reasoning is instructive and applicable here. Inspector Daniel's choice to not issue a citation

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> 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.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d) (emphasis added).

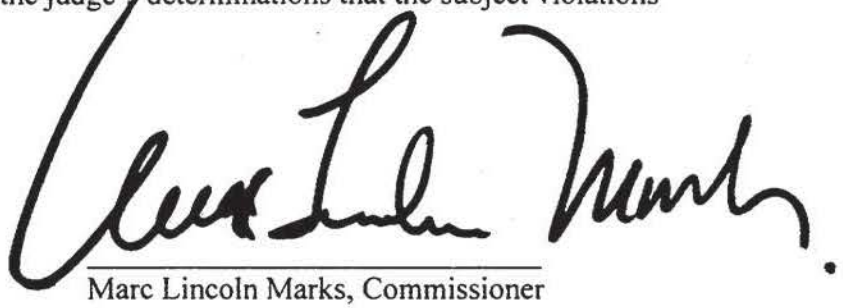
alleging unwarrantable failure does seem peculiar, if not absurd, under the facts of this case. He failed to issue a citation, which would trigger the more serious enforcement sanctions under the Mine Act, because the violative condition was of such a high level of gravity that it qualified as an imminent danger. The majority now blindly affirms this absurdity by refusing to look at the contents of the citations, especially in the context of a record that reveals conduct that could not be anything but an unwarrantable failure.

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than 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. The contents of both citations charge Emerald for violative conduct constituting more than ordinary negligence. Both citations charge Emerald with "reckless disregard" and provide, in the accompanying special assessments, the details to back that up. Gov't Ex. 2, 5. Accordingly, the judge was well within his authority under section 105(d) to modify the citations to charge unwarrantable failure. *See Consolidation*, 4 FMSHRC at 1793-97. Further, Emerald could in no way be prejudiced by such a modification because it was on notice from the face of the citations that it was being charged with the highest level of culpability for these very serious violations.

In addition, the record overwhelmingly supports the judge's determinations of unwarrantable failure. Indeed, the majority affirms the judge's determinations of high negligence for the very reasons that support the unwarrantable failure charges. Slip op. at 31. The record in this case supports the judge's conclusion that the conditions of the refuse pile posed a high danger. 17 FMSHRC at 2101-02, 2103; Tr. 340, 349. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (unwarrantable failure finding supported by high danger posed by violation). Emerald was aware of the unsafe condition of the refuse pile in April, but continued to use unsafe practices in the construction of that pile and permitted trucks to dump close to the edge of the unsafe pile. Tr. 62-63, 214, 335-36, 556-57, 663-64. The judge's conclusion that Emerald engaged in aggravated conduct is further supported because Emerald did not take steps to bring the refuse pile in compliance with section 77.215, nor did it stop the unsafe practice of trucks dumping on the pile, even after the December failure of the refuse pile. 17 FMSHRC at 2103, 2107. Emerald's own engineer warned the foreman about the dangers of this growing and unstable refuse pile. Tr. 663-64; *see Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992) (unwarrantable failure finding supported by circumstances that show that operator was aware of violative conditions but failed to take effective measures to remedy them).

Substantial evidence in the record in this case supports the judge's determinations that Emerald's violations of section 77.215(h) and 77.1608(b) were a result of its aggravated conduct.

Accordingly, I dissent and would affirm the judge's determinations that the subject violations resulted from unwarrantable failure.



Marc Lincoln Marks, Commissioner

Commissioners Riley and Verheggen, in favor of reversing the judge's finding that Emerald's violation of 30 C.F.R. § 50.11(b) was S&S:

We join in the decision of Chairman Jordan and Commissioner Beatty with the exception of sections II.B.2.a and II.B.2.b, from which we dissent. We agree with Emerald's contention that its violation of section 50.11(b) may not be designated S&S because the regulation cited is not a mandatory health or safety standard.

The first element of the *Mathies* test requires the Secretary to prove an "underlying violation of a *mandatory safety standard*." 6 FMSHRC at 3-4 (emphasis added). But here, the Secretary has proven a violation of a regulation that is not a mandatory safety standard. Her allegation of S&S thus fails to meet the first element of the *Mathies* test. Although we agree with the judge's statement that the S&S allegation at issue here was merely an "allegation of gravity, not an assertion of jurisdiction to apply the sanctions of [section] 104(d)" (17 FMSHRC at 2099), for the following reasons, we find that the judge erred in finding the violation S&S.

Section 104(a) of the Mine Act grants the Secretary the authority to cite violations of the "[Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to [the Act.]" 30 U.S.C. § 814(a). The S&S terminology, on the other hand, appears only in sections 104(d)(1) and 104(e) of the Mine Act, both of which are limited in scope to violations of "mandatory health or safety standards." 30 U.S.C. § 814(d)(1), (e). Here, by their plain terms, sections 104(d)(1) and 104(e) are limited in application to violations of mandatory health or safety standards. *Chevron*, 467 U.S. at 842-43 (if a statute is clear and unambiguous, effect must be given to its language).

The Secretary's power to cite mine operators originates in section 104(a). In various sections of the Act, Congress then set forth additional prosecutorial tools for the Secretary to use in connection with specific actors and offenses, such as sections 110(c) and 110(d) addressing individual civil and criminal liability, section 110(e) addressing advance notice of inspections, section 110(f) addressing false statements made to the Secretary, and section 110(g) addressing smoking in mines. *See* 30 U.S. C. § 820(c), (d), (e), (f), (g). In section 104(d), Congress provided the Secretary with the power to make *special findings* when issuing a citation under section 104(a) as to one broad category of offenses, violations of mandatory health or safety standards. These findings are made when violations are "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" or "caused by an unwarrantable failure of [an] operator to comply with such mandatory health or safety standards." 30 U.S.C. § 814(d)(1). The authority to make special findings under section 104(d) applies, by the plain terms of the section, to only one category of the types of violations enumerated in section 104(a): violations of mandatory health or safety standards.[1]

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[1] Our colleagues state that section 104(d) "authorizes the Secretary to include her S&S designation 'in *any citation* given to the operator under' the Mine Act." Slip op. at 13 (majority's emphasis). But the *findings* which section 104(d) authorizes the Secretary to make

Read together, sections 104(a) and 104(d) create a hierarchy of enforcement under which the Secretary can bring additional enforcement sanctions to bear on operators who violate mandatory health or safety standards. *See Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) ("The Mine Act's use of different terms within the same statute demonstrates that Congress intended the different terms to censure different types of operator conduct within a *graduated enforcement scheme*") (emphasis added).

In *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071 (D.C. Cir. 1987), the D.C. Circuit very clearly sketched out the graduated enforcement scheme set forth in section 104 of the Mine Act. The court stated:

> In [section] 104 . . . Congress established a detailed scheme for enforcement of mine health and safety standards promulgated by the Secretary of Labor. That statutory scheme specifically provided for findings by the Secretary that certain violations of *health and safety standards* were [S&S]. 30 U.S.C. § 814(d), (e). Pursuant to *that statutory authorization* [i.e., section 104(d)], the Secretary designates violations as [S&S] in citations issued under [section] 104(a).

824 F.2d at 1077-78 (emphasis added). Section 104 thus includes what the D.C. Circuit called "the initial [section] 104(a) citation stage" (*id.*) for any violation, then a special finding stage for violations of mandatory health or safety standards when the Secretary determines, among other things, whether the violations are S&S.

Congress may have created these additional separate enforcement sanctions beyond section 104(a) because it considered violations of mandatory health or safety standards as particularly serious. But whatever Congress's intent — and the legislative history is silent on this issue[2] — we find the Act to be plain on its face, unambiguous, and setting forth an eminently sensible scheme of ratcheting up the consequences of wrongdoing for particular classes of violations.

— findings of S&S and unwarrantable failure — are clearly and unequivocally predicated upon the Secretary first finding "that there has been a violation of any mandatory health or safety standard." The language of the Act is inescapable on this point. *See* 30 U.S.C. § 814(d)(1).

[2] Congressional "silence" on this specific issue cannot be construed one way or the other beyond the plain and unambiguous terms of the Act itself. As the Supreme Court has noted, "congressional silence 'lacks persuasive significance,' particularly where administrative regulations [or practices, as in this case] are inconsistent with the controlling statute." *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (citations omitted).

The majority argues that it is illogical for section 103(d) of the Act, which requires operators to report mine accidents, to receive less enforcement significance than mandatory health and safety standards. Slip op. at 15-16. Although 30 C.F.R. § 50.11(b) is at issue in this case and not section 103(d) of the Act, insofar as section 103(d) may be indirectly implicated, Congress placed many standards in Titles II and III of the Act, clearly designating them as *mandatory health or safety standards*. Congress then singled out such "mandatory health or safety standards" in sections 104(d) and 104(e) as meriting different, more severe sanctions when an operator has violated them repeatedly. Section 103(d), in contrast, appears in Title I of the Act, and violations of the section are thus not subject to the sanctions of sections 104(d) and 104(e). Nor, for that matter, does Part 50 contain any mandatory health or safety standards — it too is outside the scope of sections 104(d) and 104(e). The Act and its implementing regulations speak for themselves, and have their own internal logic — a graduated enforcement scheme that imposes more severe sanctions on violations of mandatory health or safety standards than on violations of reporting requirements.

The majority cites a case in which the Commission concluded that "the required description of the nature of the violation of a mandatory safety or health standard cited under section 104(a) may include a finding . . . that the violation is significant and substantial." *Consolidation Coal Co.*, 6 FMSHRC at 192 (cited by majority, slip op. at 13). This holding, however, is limited to violations of mandatory health or safety standards cited as S&S under section 104(a) — whereas here, a violation of a Part 50 regulation that is not a mandatory health or safety standard has been cited as S&S under section 104(a). Similarly, at issue in the D.C. Circuit case cited by the majority to illustrate "the historical role the S&S designation has played . . . in Mine Act enforcement" was a violation of a mandatory health standard. Slip op. at 20 (citing *Consolidation Coal Co. v FMSHRC*, 824 F.2d 1071).

We believe that *LJ's Coal Corp.*, remanding a Part 50 violation for an S&S analysis and cited by the majority for the proposition that "the Commission implicitly accepted that Part 50 violations may be S&S" (slip op. at 17), was wrongly decided on this particular point. As for the *Consol* case cited by the majority in which the Commission addressed the scope of penalties assessed under the Act (slip op. at 17, citing 14 FMSHRC at 963-65), section 110(a) provides that penalties be assessed against "[t]he operator of a . . . mine in which a violation occurs of a mandatory health or safety standard or [an operator] *who violates any other provision of this [Act]*." 30 U.S.C. § 820(a) (emphasis added). The expansive language of section 110(a) is a far cry indeed from the much more limited language of section 104(d)(1), which makes no mention of any provision of the Act other than mandatory health or safety standards.

Finally, the majority comments at some length on the irony of the *Mathies* test having been formulated in a case involving a safeguard notice, which they appear to view as something other than a mandatory health or safety standard. Slip op. at 19-20. But as they concede, the

Commission views safeguard notices as being "'*in effect*, mandatory safety standards.'" *Id.* at 19 (citing 7 FMSHRC at 512) (majority's emphasis).[3]

As we stated in *Topper Coal Co.*, 20 FMSHRC 344, 376-77 (Apr. 1998), we are also troubled by the policy implications of the Secretary's insistence on citing violations of provisions other than mandatory safety or health standards as S&S. As the judge correctly noted here, "[a]n allegation of a 'significant and substantial' violation in a § 104(a) citation is an allegation of gravity, not an assertion of jurisdiction to apply the sanctions of § 104(d)." 17 FMSHRC at 2099. A section 104(a) S&S designation is nothing more than an allegation that a particular violation is serious. No legal consequences flow from such a designation that the Secretary could not more efficiently accomplish under her Part 100 civil penalty regulations,[4] including her broad discretion to impose special assessments (*see* 30 C.F.R. § 100.5). We believe that the Secretary has wasted her resources and those of the Commission by resorting to a term of art[5] under sections 104(d) and 104(e) to measure the gravity of a violation of a Part 50 regulation charged under section 104(a).

Our colleagues state that our "assertion . . . that the S&S designation in this case has no legal impact is based upon a literal reading of the Mine Act that ignores the historical role the S&S designation has played, as a practical matter, in Mine Act enforcement." Slip op. at 20. Our colleagues, however, can point to not one legal impact flowing from the S&S designation at issue here. They fail to demonstrate how the judge erred (as they would presumably hold) when he stated that this S&S allegation is merely an "allegation of gravity." 17 FMSHRC at 2099; *cf. Consolidation Coal Co. v. FMSHRC*, 824 F.2d at 1084 ("the fact that a particular violation has been designated as [S&S], without more, does not result in the imposition of any additional sanction under the Mine Act").

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[3] Indeed, safeguard notices are issued pursuant to section 314(b) of the Act, which appears in Title III, captioned "Interim Mandatory Safety Standards for Underground Coal Mines," and various implementing provisions of Part 75 of 30 C.F.R., captioned "Mandatory Safety Standards — Underground Coal Mines."

[4] Although the majority notes that MSHA's "current practice is to apply a flat penalty of $55 to non-S&S violations (slip op. at 20 n.23, citing amended 30 C.F.R. § 100.4), they neglect to mention that this practice is purely discretionary and that under the single penalty assessment regulation they cite, the Secretary has broad discretion to assess a penalty based upon the unique circumstances of each case, notwithstanding whether a citation has been designated S&S. *See* 30 C.F.R. § 100.5.

[5] Our colleagues incorrectly state that we "suggest" that an S&S designation is "a 'term of art' for gravity." Slip op. at 20. Instead, we are saying that S&S is a term of art used in sections 104(d) and 104(e) to describe violations which the Secretary finds are serious enough to trigger the additional sanctions of these sections.

As for the "historical role" of S&S in Mine Act enforcement, section 104 clearly sets forth where S&S fits in — as violations of mandatory health or safety standards impinge more significantly and substantially on the safety of miners, the legal consequences become more severe. Thus, the sanctions of sections 104(d), triggered by an S&S finding, were designed by Congress to be more severe than sanctions available to address a violation of, for example, a reporting requirement which is not set forth in a mandatory health or safety standard. That the Secretary has historically ignored this scheme by blurring the lines so clearly drawn by Congress — a mistake she made in this case when she designated a Part 50 violation as S&S — is no excuse for this Commission to ignore the plain language of the Act. As the Supreme Court has held, the age of an agency interpretation of its enabling statute "is no antidote to clear inconsistency with [the] statute." *Brown v. Gardner*, 513 U.S. at 122 (striking down Department of Veterans Affairs regulation that had been on books for 60 years). If an agency interpretation "flies against the plain language of the statutory text, [this] exempts courts from any obligation to defer to it." *Id.*

We hasten to add that we do not consider this violation of section 50.11(b) anything other than serious. We agree with our colleagues that had Emerald complied with the cited standard when its refuse pile failed in December 1992, a similar accident might not have occurred in April 1993. *See* 30 C.F.R. § 50.11(b)(8) (requiring accident reports to include "description of steps taken to prevent a similar occurrence in the future"). But it does not follow that the violation must be designated S&S. Such a designation is simply at odds with the Act's plainly articulated graduated enforcement scheme. Instead, the Secretary ought to have relied upon her broad discretion under Part 100 to address the seriousness of this violation. Furthermore, also at issue here are underlying violations, all of which we find to be S&S, and which we believe are the proper vehicle for the Secretary to have brought down upon Emerald the sanctions of section 104(d).

Accordingly, we would reverse the judge's finding that Emerald's violation of section 50.11(b) was S&S, and dissent from our colleagues' holding to the contrary.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 28, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of CLEMMIE CALLAHAN	:	
v.	:	Docket No. KENT 97-13-D
HUBB CORPORATION	:	

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

DECISION

BY: Marks and Beatty, Commissioners

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is Administrative Law Judge Avram Weisberger's order dismissing the proceeding in its entirety upon complaining miner Clemmie Callahan's motion, which was prompted by Callahan's settlement of his discrimination claim against operator Hubb Corporation ("Hubb"). Unpublished Order dated June 10, 1997. The Commission granted the Secretary of Labor's petition for discretionary review challenging the order of dismissal. The judge's order is reversed and the matter is remanded for resumption of proceedings.[1]

I.

Factual and Procedural Background

Callahan had worked for approximately 9 months as a roof bolter at Hubb's No. 5 mine, an underground coal mine in Perry County, Kentucky, when he was laid off in early March of 1996. Tr. 45-46, 56-57, 67-68. On April 5, 1996, Callahan filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), pursuant to

[1] Commissioners Marks and Beatty vote to reverse the judge's order and remand for further proceedings. Chairman Jordan concurs in a separate opinion. Commissioners Riley and Verheggen vote to affirm the judge, and dissent in a separate opinion.

section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).[2] H. Ex. 1. After conducting an investigation of the complaint, the Secretary filed a complaint on October 21, 1996, alleging that Callahan's layoff was due to his complaints to the company about being forced to work in unsafe conditions. S. Compl. at 2.[3] The complaint requested relief for Callahan, as well as an order assessing a civil penalty against Hubb. *Id.* at 2-4. On November 18, 1996, the Secretary amended her complaint to set the requested penalty amount at $10,000. S. Am. Compl. at 1-2, 5.

At the hearing, the Secretary called two witnesses prior to the lunch recess. Carl Ingram testified that he had worked at the Hubb No. 5 mine as a repairman while Callahan was working there and had discussions with him regarding shocks Callahan had received from the trailing cable to a bolter Callahan was using. Tr. 8, 13, 15, 16-18. Callahan, who was represented by his own counsel at the hearing, then testified and was cross-examined about the allegations that formed the basis for the Secretary's discrimination complaint. Tr. 43-126.

The Secretary planned to continue to present her case after the lunch recess. Tr. 129.[4] However, during that recess the three parties resumed settlement discussions that they had begun

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[2] Section 105(c)(2) provides:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of . . . subsection [105(c)] may . . . file a complaint with the Secretary alleging such discrimination. . . . [, who] 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. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order . . . affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. . . . The complaining miner . . . may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

[3] The Secretary alleged that Callahan had complained to Hubb about being shocked by a trailing cable to his bolter that had bad splices, being required to work on a section without sufficient ventilation, and being required to work underground while other employees were smoking. S. Compl. at 2.

[4] According to the Secretary on appeal, she was going to offer the testimony of two more witnesses. S. Br. at 2. At the hearing, an MSHA electrical supervisor who was present was identified as one potential witness. *See* Tr. 9.

prior to the hearing. S. Br. at 2; H. Br. at 3.[5] Consequently, prior to the resumption of testimony after the recess, Callahan's trial counsel moved that "this claim be dismissed pursuant to an agreement reached between myself and counsel for [Hubb]." Tr. 128. He further stated that "[w]e would admit at this time there has been no violation of the [A]ct and would ask the court to dismiss the case in its entirety." Tr. 128.

The Secretary's counsel objected to the motion, citing Callahan's testimony in support of his allegations, and went on to state:

> [T]he Secretary's position is that [she] filed the case on behalf of [Callahan] . . . .
>
> . . . [T]here has been a 105(c) case established, and at this point I would like to ask that you allow me to continue to put the rest of my case on so that a civil money penalty can be assessed against [Hubb].

Tr. 128-29. At that point Hubb joined in the motion to dismiss, its counsel stating that "[i]f the complainant has admitted that there is no violation, then . . . there is no case and we therefore move that this matter be dismissed." Tr. 130.

The judge granted Callahan's motion orally at trial, ruling that Callahan, having conceded the lack of a violation, was entitled to seek dismissal. Tr. 130. The judge went on to state:

> If there is not any individual complainant who is alleging an act of discrimination, I don't see how the Secretary has a[ny] standing at that point to seek any penalty against the company.
>
> I don't see where I have any jurisdiction to consider assessing the penalty against the company for an alleged violation of Section 105(c).
>
> . . . [T]he person allegedly discriminated against has conceded that an act of discrimination did not occur; hence, the motion [is] well founded, and the motion is granted. The case is dismissed.

Tr. 130-31. The judge subsequently issued a one-page order reiterating his grant of Callahan's motion and dismissal of the case. Unpublished Order dated June 10, 1997.

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[5] At the outset of the hearing, the judge stated that the parties had apprised him that they had not been able to reach a settlement, and he encouraged them to continue discussions. Tr. 3.

The judge did not review the terms of the settlement between Callahan and Hubb either before or after granting the motion. Responding to the Secretary's statement that Hubb and Callahan agreed on the amount of backpay Hubb would pay Callahan (S. Br. at 2), Hubb states that it accepted a proposal for settlement made by Callahan, and "[t]he terms of the settlement were not made a part of the record nor revealed to the ALJ or counsel for the Secretary . . . ." H. Br. at 3. Hubb and the Secretary agree that the Secretary rejected any offer of settlement with respect to the $10,000 civil penalty she had proposed. S. Br. at 2 & n.1; H. Br. at 3.

II.

Disposition

The Secretary has not objected to Callahan's settlement with Hubb. However, the Secretary contends that she should have been permitted to present her case to its conclusion, as section 105(c)(2) requires judges to decide discrimination cases brought by the Secretary. S. Br. at 5-7. According to the Secretary, the Mine Act and its legislative history provide that, because the Secretary seeks to vindicate broader interests, the Secretary's case is separate and distinct from a complainant's. *Id.* at 7-8. The Secretary submits that, regardless of whether the settlement made Callahan whole, the Mine Act requires the imposition of civil penalties for violations. *Id.* at 8-11. Lastly, the Secretary relies on other federal labor statutes for the proposition that a judgment or settlement in a private action does not bar the government from continuing its action against the same defendant on the same statutory claim. *Id.* at 11-13.

Hubb claims that the judge properly found, based on Callahan's testimony and his later admission of no violation, that there was no violation. H. Br. at 4-5. Hubb argues that because substantial evidence supports that determination, the judge's dismissal of the case should not be overturned. *Id.* at 5-6. Callahan has new counsel who entered an appearance for him on this appeal, but did not submit any other pleading at this stage of the proceeding.

A. The Basis for the Judge's Dismissal of the Entire Proceeding

Reviewing the judge's ruling at trial, it is clear that he dismissed the entire proceeding for what he perceived to be a lack of jurisdiction. Once he permitted Callahan to withdraw from the case, the judge was faced with a decision regarding the status of the Secretary. From his references to a lack of "jurisdiction" and "standing" (Tr. 130-31), we interpret the judge's involuntary dismissal of the Secretary's discrimination claim as based on his understanding that, because the party that had initiated the discrimination complaint had withdrawn from the proceeding, there no longer was a basis upon which the Secretary could proceed with a discrimination claim against Hubb.[6]

[6] Callahan's trial counsel initially moved to dismiss only Callahan's "claim" (Tr. 128), a motion that did not reach the Secretary's complaint against Hubb. It is only when that motion was expanded to include a request for "dismiss[al of] the case in its entirety" (Tr. 128) that

While the judge also made a passing reference to the statement made by Callahan's attorney in moving to dismiss that there had been no violation of the Act (*see* Tr. 131), we do not consider the judge's remark as a determination of the merits of the Secretary's complaint.[7] This is particularly true because the Secretary, who has the burden of proof, had not finished presenting her evidence. Consequently, we reject Hubb's unsupported argument that we should affirm dismissal of the entire proceeding on the ground that substantial evidence supports a finding of no discrimination.[8] Because there was no decision on the merits of the discrimination complaint, the substantial evidence standard is inapplicable to this case. *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994) (before Commission can review judge's decision under substantial evidence standard, judge must weigh and analyze all relevant testimony, make appropriate findings, and present reasons for his decision).

B. Whether a Discrimination Complaint Brought by the Secretary Survives Settlement of the Initiating Complaint

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute

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dismissal of the Secretary's complaint was made an issue.

[7] The dissent's characterization of the judge's decision as one on the merits is, like Hubb's, based on the judge's reference to the admission by Hubb's counsel that "there has been no violation of the [Act]." *See* slip op. at 11; Tr. 128. We do not interpret the judge's decision in that fashion. The judge could not make a substantive determination of whether Hubb violated the Mine Act based solely on the post-settlement, unsupported opinion of Callahan's trial counsel. To render a decision on the merits, the judge must first consider and analyze the record *evidence*, including that supplied under oath by Callahan. *See Anaconda Co.*, 3 FMSHRC 299, 300 (Feb. 1981). Because there was no such analysis and consideration of the record here, there could be no decision on the merits of the discrimination violation.

Our dissenting colleagues also parse the words of the Secretary's counsel to conclude that she had rested her case in chief, and that therefore a motion to dismiss was timely. *See* slip op. at 13 (quoting Tr. 129). However, the language on which they focus is from counsel's extemporaneous response to Callahan's motion to dismiss. Consequently, we do not interpret counsel as making an after-the-fact acknowledgment that the Secretary had no more evidence on the issue of discrimination, and that her remaining two witnesses would speak solely to the appropriate penalty assessment. Our approach is especially appropriate here because nothing in the record reveals the matters about which the remaining witnesses were going to testify.

[8] In arguing that substantial evidence supports a finding of no discrimination, Hubb does not cite to the record below. *See* H. Br. at 4-6.

is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).

Section 105(c)(2) both authorizes the Secretary to bring discrimination complaints under the Mine Act and governs that complaint process. According to the language of section 105(c)(2), the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on *the Secretary's investigation* of the initiating complaint to her, and not merely on the initiating complaint itself. *See also Secretary of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997) (scope of complaint Secretary may pursue before Commission not circumscribed by matters addressed in original complaint filed with her, but by subject matter of investigation conducted by Secretary in response to that complaint). Section 105(c)(2) also clearly states that the hearing held and the order subsequently issued by the Commission are on *the Secretary's complaint and proposed order for relief.* The provision in section 105(c)(2) that a complainant miner "may present additional evidence on his own behalf" is a further indication that *the Secretary's* case may be separate and independent from the complainant's.

Section 105(c)(3) of the Mine Act states that "[v]iolations by any person of paragraph (1) [of section 105(c)] shall be subject to the provisions of section[110(a)] . . . ." 30 U.S.C. § 815(c)(3). Section 110(a) provides that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this [Act], shall be assessed a civil penalty by the Secretary . . . ." 30 U.S.C. § 820(a). Thus, sections 105(c) and 110(a) of the Mine Act plainly *require* that a penalty be assessed for discrimination violations of the Act.

Moreover, the legislative history is clear that relief for the individual miner provided by section 105(c) is to be "in addition" to the Secretary's authority to assess a penalty against an operator for violating the Act by discriminating. *See* S. Rep. No. 95-181, at 35 (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 623 (1978) ("*Legis. Hist.*"). Such penalties are imposed on operators to induce them to comply with the Act. S. Rep. No. 95-181, at 41, *Legis. Hist.* at 629. The Commission's procedural rules also require the Secretary to propose a civil penalty for a violation of section 105(c). *See* 29 C.F.R. § 2700.44. Additionally, in *Meek v. Essroc Corp.*, 15 FMSHRC 606, 617-18 (Apr. 1993), *overruled on other grounds, Secretary of Labor v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996), the Commission held that the Mine Act authorizes the assessment of a separate civil penalty against an operator who unlawfully discriminates against a miner, apart from the relief owed to the miner to remedy the discrimination.

The Mine Act plainly confers Commission jurisdiction over a discrimination complaint and request for relief brought by the Secretary apart from the discrimination proceeding initiated by the complainant. Any settlement between Hubb and Callahan could not affect the Secretary's

right, as a party who had not entered into the settlement,[9] to pursue the relief she sought, which in this case included a penalty assessment against Hubb. Accordingly, we conclude that the judge erred in granting the motion to dismiss to the extent that it resulted in dismissal of any of the Secretary's claims. To rule otherwise would bestow upon initiating complainants veto authority over the Secretary's enforcement of the Mine Act's discrimination provisions, a result plainly at odds with the language of the Act.

Despite the plain meaning of the terms of the Mine Act, our dissenting colleagues come to the conclusion that, under section 105(c)(2), a complaining miner's interest in settling his or her case trumps any interest the Secretary may have in continuing the case she has brought on behalf of that miner. *See* slip op. at 12-13. However, there is no support in the Mine Act or Commission precedent for the proposition that the goal of making complainants whole is more important than the interest the Secretary may have in pursuing a discrimination case.[10] While acknowledging the Secretary's "separate and distinct" interest in discrimination proceedings (slip op. at 12), the dissent seems to subordinate that interest to those of the complainant, characterizing the Secretary's interests as no more than "abstract" (*id.* at 13 n.2) and part of her "institutional agenda." *Id.* at 12. Given the language and history of the Mine Act, we fail to see why the Secretary's "interests" — which here are to continue the case in order that a penalty may be assessed upon a finding of violation — merit such a description. Indeed, by seeking to assess penalties for discrimination, the Secretary thus serves the broader public purpose of deterring future discrimination, which is also unquestionably an important purpose of section 105(c).

The dissent states that remanding the case for further proceedings means that Callahan will be brought back into the case, and that his settlement thus will be impeded. Slip op. at 12, 13. However, the record does not support this proposition.[11] The Secretary has voiced no

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[9] To the extent that our dissenting colleagues find fault with the Secretary's failure to also reach a settlement with Hubb, they err. We are aware of no authority *requiring* the Secretary to compromise the assessed penalty. Nor is it proper to speculate why a settlement was not reached between the Secretary and Hubb.

[10] The dissent relies on section 105(c)'s legislative history for this proposition (*see* slip op. at 12), but that history is silent regarding the importance of the miner's interests *relative to those of the Secretary* in a discrimination proceeding. Similarly, *Meek* says nothing regarding the *relative* importance of the interests of the miner and the Secretary, who was not even a party in that case. In fact, *Meek* plainly states that a miner's discrimination complaint is separate and apart from the Secretary's civil penalty action stemming from a discrimination violation of the Act. *See* 15 FMSHRC at 618.

[11] These concerns are apparently based on the dissent's fear that "[w]ithout Callahan's cooperation, it would be impossible for the Secretary to meet her burden of proving by a preponderance of the evidence that Hubb discriminated against Callahan, especially since he now admits that no such discrimination occurred." Slip op. at 11. However, the Commission should

opposition to Callahan settling with Hubb, and there is nothing in the record to suggest that Callahan's settlement with Hubb will be voided should the Secretary's case survive the dismissal motion. Consequently, we disagree with the dissent's unsupported characterizations of the basis for the Secretary's decision to continue to pursue this case.

III.

Conclusion

The judge's dismissal order as it applies to the Secretary is reversed, and this proceeding remanded for further proceedings.

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

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not give dispositive weight to the post-settlement opinion of Callahan's trial counsel when his client supplied testimony indicative of discrimination under oath.

Chairman Jordan, in favor of reversing the decision of the administrative law judge:

I agree with Commissioners Marks and Beatty that the judge erred in ruling that he lacked jurisdiction over this case once Callahan sought a dismissal pursuant to a confidential settlement agreement between himself and Hubb. The judge's jurisdiction was invoked by the filing of the Secretary's complaint. She was a party to the case. Jurisdiction is not automatically extinguished simply because another party to this litigation has entered into a settlement agreement and asks that the action be dismissed. Therefore, I would reverse the judge's decision and remand the case.

I write separately, however, because I am unwilling to join my colleagues' statement that "*[a]ny* settlement between Hubb and Callahan could not affect the Secretary's right, as a party who had not entered into the settlement, to pursue the relief she sought . . . ." Slip op. at 6-7 (emphasis added and footnote omitted). This blanket assertion grants the Secretary the automatic right to proceed with her case despite the existence of any settlement between Callahan and Hubb, no matter what the terms.

The question of whether and on what grounds a judge may dismiss a discrimination proceeding over the objection of the Secretary, on the basis of a settlement reached between the complainant and the operator, has not previously been addressed by the Commission.[1] Answering that question requires a discussion of the interests at stake, as well as the Commission's role in awarding relief under section 105(c)(2) of the Mine Act and overseeing settlements.[2] Because of the present posture of the case, the Commission has not had the benefit of hearing the views of all of the parties, or even the judge on these issues. Moreover, it is clear that such a discussion can only take place when the terms of the settlement forming the basis of the motion have been made available to the judge and the litigants and are not, as here, a

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[1] Although the complainant's trial counsel moved to dismiss, that motion was clearly a *quid pro quo* for the settlement agreement.

[2] Although this appears to be a case of first impression for the Commission, other agencies have been confronted with somewhat analogous situations. *See, e.g., Central Cartage Co.*, 206 NLRB 337, 84 LRRM 1273 (1973) (NLRB dismisses case over objections of its General Counsel, when charging party, union, and employer settled); *Al-Hilal Corp.*, 325 NLRB No. 43, 157 LRRM 1113, 1114 (1998) (NLRB revokes ALJ's approval of settlement agreement because "most of the alleged violations are unremedied," and because "the public interest . . . [was] not addressed by the settlement."). The Commission has previously exercised its discretion to oversee settlements in both section 105(c)(2) and section 105(c)(3) discrimination cases. *See Asarco, Inc.*, 18 FMSHRC 2081, 2082 (Dec. 1996); *Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (Mar. 1993); *Secretary of Labor on behalf of Gabossi v. Western Fuels-Utah, Inc.*, 11 FMSHRC 134 (Feb. 1989).

confidential matter between the parties to the agreement. Accordingly, on remand I would order the judge to review the settlement agreement and address these issues.

Mary Lu Jordan

Mary Lu Jordan, Chairman

Commissioners Riley and Verheggen, dissenting:

Section 105(c)(2) of the Mine Act requires the Secretary to file a discrimination complaint with the Commission if, during the investigation of a complaint made to her, she determines the provisions of section 105(c) have been violated. 30 U.S.C. § 815(c)(2). At issue here is whether a subsequent complaint made by the Secretary can proceed without the complainant miner's consent after the miner has withdrawn his or her original complaint. Our colleagues hold that under such circumstances, the Secretary's complaint must be fully adjudicated. Slip op. at 6-7 (opinion of Commissioners Marks and Beatty, joined by Chairman Jordan).[1] We disagree and would affirm the judge's ruling dismissing the Secretary's complaint. We therefore dissent.

Very early in the hearing, the judge encouraged the parties, including the Secretary, to continue settlement negotiations. Tr. 3. Hubb and Callahan heeded the judge's admonition, and during a lunch hour recess, agreed to settle. Slip op. at 3. However, the Secretary rejected any settlement of the $10,000 proposed civil penalty. *Id.* at 4. When the hearing reconvened, Callahan moved to dismiss the case pursuant to the agreement he and his attorney worked out with Hubb during the recess. *Id.* at 3. The judge granted this motion, stating in his written order memorializing his ruling at the hearing that Callahan "admit[ted] that he was not discriminated against by Hubb . . . ." *Id.*; Unpublished Order dated June 10, 1997. The Secretary appealed to the Commission because she apparently believes, notwithstanding the judge's finding that there was no violation of the Act, the judge should have assessed a penalty against Hubb. S. Br. at 8-11.

Further legal action on behalf of Callahan may have some theoretical basis, but under the particular facts and circumstances of this case, any such action would be impossible since it would have to be achieved over the former complainant's (i.e., Callahan's) objections and protestations to the contrary. Without Callahan's cooperation, it would be impossible for the Secretary to meet her burden of proving by a preponderance of the evidence that Hubb discriminated against Callahan, especially since he now admits that no such discrimination occurred. We view a remand of this case as an exercise in futility and a waste of the judicial

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[1] We disagree with the majority's reliance on *Secretary of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009 (June 1997), for the proposition that the Secretary's authority to proceed under section 105(c)(2) is not bound by the initiating complaint. Slip op. at 6. In *Pontiki*, the Commission held that a section 105(c) complaint made by a representative of miners — Dixon — could properly be construed by the Secretary to include as complainants those miners who designated Dixon as their representative. 19 FMSHRC at 1014-16. The Commission did not address in *Pontiki* whether the Secretary's complaint could be expanded into a litigation dragnet that included any alleged victim of discrimination who did not complain. This latter point is closer to the issue here: whether Callahan should be forced to participate in further litigation without his consent.

resources of the Commission. *See American Mine Svcs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand unnecessary where judge's reconsideration of issue would serve no purpose).

We hasten to add that we do not question the Secretary's assertion that although her case and Callahan's case come before the Commission as parts of a single proceeding, they are legally separate and distinct involving separate and distinct interests. S. Br. at 7. At issue here, however, is what happens to *Callahan's* interests when, encouraged by the judge to negotiate a settlement, he reaches an accord with his former employer, but where the Secretary refuses to acknowledge Callahan's interest in resolving his case in a manner most favorable to himself.

It is this latter interest that we find most important in this case. Callahan, having settled with Hubb, has been made whole to his satisfaction, thus effectuating the *primary* goal of section 105 — which is unequivocally to make miners whole. S. Rep. No. 95-181, at 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) ("*Legis. Hist.*") ("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"); *see also Meek v. Essroc Corp.*, 15 FMSHRC 606, 617 (Apr. 1993) ("The Commission endeavors to make miners whole and to return them to their status before illegal discrimination occurred."). It is simply unfair to Callahan to resurrect his case and drag him unwillingly back into the fray with a remand order. We are also troubled by the broader implications of the majority's decision. We believe that the majority's decision could encourage miners to avoid bringing discrimination complaints to the Secretary knowing full well that once the Secretary files a formal complaint on their behalf, it will be all but impossible to achieve a favorable settlement unless the *Secretary's* institutional agenda is satisfactorily served.

Our colleagues argue that a complaining miner's interest to be made whole is not the primary goal of section 105(c). Slip op. at 7. We disagree. The purpose of section 105(c) is unequivocally to protect *miners* against any possible discrimination by ensuring that they will be made whole if they suffer any adverse, retaliatory action. The legislative history makes clear that Congress intended this section to provide "all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct." S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625. *Miners* — not the Secretary — are given first priority under the Mine Act. In section 2 of the Act, Congress declared that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource — the miner." 30 U.S.C. § 801(a).

In fact, section 105(c) does set forth a hierarchy of interests. Sections 105(c)(2) and 105(c)(3) clearly state, and Commission precedent holds, that a discrimination complaint can only be initiated by a miner "who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection." 30 U.S.C. § 815(c)(2), (c)(3). In other words, a discrimination case under the Act proceeds only if a *miner*

initiates it, then is willing to participate in and cooperate with the proceedings. We fail to see how the Secretary's position in a discrimination proceeding could not be subordinate to that of the complainant when section 105(c)(3) permits the complainant — and ultimately the Commission — to "second guess" the results of the Secretary's initial 105(c)(2) investigation by proceeding to a hearing on the merits of the original complaint, in effect reducing the Secretary's role to little more than that of a discredited fact finder. As between the original complainant and the Secretary, the Act makes it abundantly clear who is in the driver's seat.

We also find the Secretary's litigation conduct at odds with her position on appeal. At the hearing, when Callahan announced through counsel his settlement with Hubb, the Secretary's counsel objected, but only by stating that Callahan had testified as to his prima facie case (Tr. 128), and as follows: "It has been established and we feel like there has been a [section 105(c)] case established, and at this point I would like to ask that you allow me to continue to put the rest of my case on *so that a civil money penalty can be assessed against the operator*." Tr. 129 (emphasis added). The solicitor's response was odd for two reasons. First, she made no effort to rebut Callahan's new admission that he was not discriminated against, other than by relying on his prior testimony. She could at least have made an offer of proof when the judge indicated he was granting the motion. Second, and more puzzling, is the solicitor's apparent lack of any concern for whether the settlement was in Callahan's best interests.[2]

The Secretary's objections to Callahan's settlement could be interpreted as predicated upon a fundamental lack of faith in the ability of miners to make informed decisions regarding their own best interests. Indeed, we are troubled by the Secretary's apparent reluctance to trust Callahan's judgment, in the forming of which Callahan had input not only from the Secretary in her role as statutory counsel, but from private counsel as well — private counsel with no separate agenda retained by Callahan at his own expense. *See Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 644 (4th Cir. 1987). We do not believe that it is appropriate for the Secretary to impede Callahan negotiating a settlement that is presumably most favorable to him.

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[2] In this proceeding, we believe a conflict may have arisen between the Secretary's abstract interests and Callahan's much more concrete interests. Although Callahan settled his differences with Hubb, when he moved to have his case dismissed, the Secretary objected strenuously. Yet the Secretary was Callahan's statutory counsel. The question arises whether the Secretary has the authority to pursue her separate agenda when it might be in conflict with her client's interests. *See* Model Rules of Professional Conduct Rules 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.") and 1.3 cmt. 1 ("A lawyer should act . . . with zeal in advocacy upon the client's behalf.") (1998).

Accordingly, we would affirm the judge's decision dismissing this docket, and thus dissent from the majority's remand order.

James C. Riley, Commissioner

Theodore F. Verheggen. Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 5, 1998

BRYCE DOLAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 97-24-DM
	:	MSHA Case No. SC MD 96-05
F & E ERECTION COMPANY,	:	
Respondent	:	Mine ID No. 41-00320-B96
	:	Bayer Alumina Plant

SUPPLEMENTAL DECISION ON RELIEF
AND
FINAL ORDER

Appearances: Errol John Dietze, Esq., Dietze & Reese, Cuero, Texas, for the Complainant; James S. Cheslock, Esq., Cheslock, Deely & Rapp, San Antonio, Texas, for the Respondent.

Before: Judge Feldman

This discrimination proceeding is before me as a result of a discrimination complaint filed on December 27, 1996, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(3), by the complainant, Bryce Dolan, against the respondent, F&E Erection Company (F&E). On June 12, 1998, I issued a Decision on Liability determining that Bryce Dolan's April 16, 1996, work refusal was protected by the provisions of section 105(c) of the Mine Act. 20 FMSHRC 591. The Decision on Liability provided the parties with an opportunity to file proposed orders for relief with respect to the appropriate back pay, reasonable attorney's fees and incidental litigation expenses to be awarded to Dolan.

Dolan filed a Proposed Order for Relief on July 13, 1998. F&E replied to Dolan's proposed order on July 23, 1998. Although F&E proposed alternative measures of relief, F&E reserved its right to appeal the June 12, 1998, Decision on Liability as well as this decision on relief.

As a general proposition, this Commission has been delegated the broad remedial power to fashion relief for victims of discrimination. In this regard, section 105(c)(2) of the Mine Act states in pertinent part: "The Commission shall have authority . . . to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to . . . [awarding] back pay and interest." 30 U.S.C. § 815(c)(2). Remedies may be tailored to varied and diverse circumstances

provided that the remedial relief effectuates the purpose of section 105(c) that seeks to encourage miners to work with operators to prevent the existence of hazardous conditions and practices. *Secretary of Labor on behalf of Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 142 (February 1982); 30 U.S.C. § 801(e). Thus, back pay awards may be reduced in appropriate circumstances where there is a failure to mitigate damages. 4 FMSHRC at 144.
A discussion of the appropriate relief to be awarded in this matter follows.

I. Back Pay

a. Calculation of Back Pay

At the time of Dolan's termination of employment, Dolan was scheduled to work a 50 hour week, that included ten hours overtime. His regular hourly wage paid for a 40 hour work week was $13.00 per hour, or $520.00 per week. Dolan was paid $19.50 per hour overtime for the ten hours of overtime he was scheduled to work each week. Thus, Dolan's weekly compensation totaled $715.00 per five day 50 hour week ($520.00 regular pay + $195.00 overtime). The $715.00 weekly wages is equivalent to daily wages of $143.00. In addition to Dolan's $715.00 weekly wages, Dolan was entitled to a monthly "safety bonus" of $100.00.

Although F&E does not dispute Dolan's regular and overtime hourly wage, F&E asserts Dolan's back pay should be calculated on the basis of a 41.7 hourly work week because Dolan had a pattern of absenteeism on many Fridays during the fifteen week period preceding his April 16, 1996, termination.

In resolving disputes concerning the appropriate weekly calculation of back pay, the benefit of the doubt must be afforded to the complainant, rather than the mine operator that is responsible for violation of the anti-discrimination provisions of section 105(c) of the Mine Act. F&E's assumption that Dolan would not have reported to work on Fridays is speculative and does not provide an adequate basis for reducing Dolan's normal weekly wage. Accordingly, the amount for calculation of back pay shall be $715.00 per week ($143.00 per day) plus a safety bonus of $100.00 per month.

b. Period of Back Pay

Dolan contends he is entitled to back pay and bonuses of $49,576.50 for the period April 17, 1996, through July 25, 1997, when he started receiving Temporary Income Benefits under the Texas Workers Compensation Law, Labor Code § 401.001 *et seq.*

F&E argues Dolan is entitled to back pay during the period April 17, 1996, through June 5, 1996, when Dolan's physician certified that Dolan was under his care for a "significant illness" and that Dolan was "unable to engage in employment in his usual trade, or in any other form of employment." (Ex. C-8).

Dolan received a total of $4,221.00 in unemployment benefits for the period from April 21, 1996 through August 11, 1996.[1] The Commission has determined that unemployment benefits shall not be deducted from back pay awarded to a complainant in a discrimination proceeding. *See Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1323-25 (August 1996) (citations omitted).

Dolan was hired by the United Kensington Group as a construction worker on August 11, 1996. Dolan quit the following day on August 12, 1996, because of reported physical problems. Dolan testified that he believes he is totally disabled and that he has been unable to work since quitting his job with the United Kensington Group on August 12, 1996. In this regard, Dolan testified that he has not looked for work since August 12, 1996. Dolan currently does household chores and his wife is employed.

Dolan applied for state workers compensation benefits alleging disability as of August 12, 1996. Dolan has received Texas Workers Compensation Temporary Income Benefits for the period July 25, 1997, to the present. Temporary Income Benefits represent lost wages that are paid until a determination is made regarding eligibility to Impairment Income Benefits, which represent payment for disability. Labor Code, §§ 408.103, 408.121. Temporary Income Benefits continue until it is determined that the employee has reached maximum medical improvement at which time entitlement to Impairment Income Benefits is determined. Id. at § 408.102.

There is no record evidence of any state agency determination that Dolan has been determined to be disabled, or the effective date of such disability. Dolan's eligibility for workers compensation benefits for the period April 17, 1996, through July 24, 1997, has not been resolved.

As a threshold matter, whether Dolan is disabled is beyond the scope of this proceeding. Although I have concluded that Dolan expressed good faith, reasonable concerns about his exposure to the hazards of lead contamination, this is not the appropriate forum for determining whether Dolan's health was, in fact, adversely affected by his F&E employment. *See* 20 FMSHRC at 605. In any event, Dolan is not claiming back pay as of July 25, 1997, the date Dolan began Temporary Income Benefits under the Texas State Worker Compensation program.

While I am sensitive to the Commission's obligation to endeavor to make a complaining miner whole, Dolan's claim for back wages from August 12, 1996, until July 25, 1997, a period during which he alleges to be totally disabled, and a period during which he admits that he has not looked for work, must be rejected. Back pay cannot be awarded for a period during which

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[1] This information is taken from Dolan's answer to the respondent's first set of interrogatories filed on March 21, 1997.

Dolan alleges that he has been unable to work. In this regard, the Commission has determined that "back pay may be reduced in appropriate circumstances where an employee incurs a **willful** loss of earnings (fails to mitigate damages)." *Dunmire & Estle,* 4 FMSHRC at 144 (emphasis added).

In the absence of a medical determination that Dolan was disabled during the period for which back wages have been claimed, Dolan's loss of earnings due to his decision not to look for work must be characterized as voluntary. If his complaints of disability ultimately are substantiated by adequate objective medical findings, his loss of earnings will no longer be considered voluntary. At such time Dolan will be entitled to workers compensation disability benefits from August 12, 1996, through July 24, 1997, the period of back pay claimed.

My determination that Dolan is not entitled to back pay as of August 12, 1996, is based on his admission that he has removed himself from the labor market as of that date. 20 FMSHRC at 598. While it is true, as F&E contends, that Dolan's physician opined that he has been disabled since June 5, 1996, Dolan looked for work and obtained employment until August 12, 1996. Giving Dolan the benefit of the doubt that he was looking for work prior to August 12, 1996, the period for calculating back pay shall be from April 17, 1996, the day after he severed his F&E employment, until August 11, 1996, the day prior to the date that Dolan alleges he became totally disabled.

There are 83 work days during the period April 17, 1996, through August 11, 1996. Consequently Dolan shall be awarded total back pay of $12,269.00, plus interest, constituting $11,869.00 (wages of $143.00 per day × 83 days) plus $400.00 in bonuses ($100.00 per month × four months), less earnings of $174.40 paid United Kensington Group, Inc., for work performed on August 11 to August 12, 1996.[2] Thus, **F&E shall pay net back pay in the amount of $12,094.60, less applicable federal, state and local taxes.**

II. Reasonable Attorney's Fees

Section 105(c)(3) of the Act provides, in pertinent part:

> 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 . . . in connection with [ ] the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

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[2] Dolan reported that he earned $174.40 at United Kensington Group, Inc., in his answer to the respondent's first set of interrogatories filed on March 21, 1997.

Dolan has claimed attorney's fees of $23,745.00 as reflected in a detailed itemized statement of services rendered. This total constitutes attorney services of 121 hours @ $125.00 per hour, and paralegal services of 215½ hours @ $40.00 per hour.

F&E does not allege that the attorney and paralegal hours claimed in this matter are unreasonable. Nor does F&E assert that the claimed hourly rates of $125 and $40 per hour for attorney and paralegal fees, respectively, are unreasonable. Rather, F&E argues that attorney fees for services rendered prior to November 30, 1997, should be limited to $5,000.00 based on Dolan's answer to Interrogatory No. 8 in response to F&E's second set of interrogatories that reflects that Dolan had agreed to pay counsel a flat fee of $5,000.00, win or loose, for services rendered in this litigation.

Thus, F&E contends the appropriate attorney fee to be awarded should be $9,766.25 calculated by adding $5,000.00 for services rendered prior to the November 30, 1997, interrogatory response, and $4,766.25 for the services rendered by Dolan's counsel and his paralegal after November 30, 1997, based on the 89¾ attorney hours and 31¼ paralegal hours of work that reportedly occurred after November 30, 1997, as detailed in Dolan's itemized bill for services.

As noted above, F&E does not assert that the hourly fees and total hours claimed by Dolan's counsel in this proceeding are exorbitant. In fact, additional discovery and a second hearing in this proceeding were necessitated by F&E's adherence to its assertion that burning was an accepted industry alternative to chipping and grinding as a safe method of lead abatement. While F&E is entitled to advance its defense as it chooses, given the provisions of section 105(c)(3) of the Act that provide for reimbursement of litigation expenses, F&E must bear the burden of reimbursing Dolan for the additional legal services and expert witness fees necessary to rebut F&E's defense. Consequently, the hourly rates and hourly totals claimed by Dolan's counsel are entirely reasonable.

F&E's assertion that it is entitled to rely on Dolan's initial legal fee arrangement of $5,000.00 is unconvincing. Significantly, F&E is not a party in privity to that fee agreement. Dolan and counsel were free to renegotiate their agreement at any time as circumstances dictated. While it is not uncommon for attorneys to reduce fees based on a client's inability to pay, the fact that attorney fees are recoverable in this proceeding is a legitimate basis for Dolan to disavow his initial reduced fee agreement.

In the final analysis, an operator that violates the anti-discrimination provisions of section 105(c) of the Mine Act cannot rely on a miner's inability to pay reasonable attorney fees to mitigate its statutory obligation to reimburse the miner for reasonable litigation expenses. Having prevailed in this matter, Dolan's counsel, like F&E's counsel, is entitled to reasonable fees for services rendered.

Having concluded that it has neither been contended nor shown that the attorney fees claimed are unreasonable, **F&E shall pay Dolan's legal fees in the total amount of the $23,745.00** as claimed. While I am aware that the attorney fees awarded are approximately double the back pay awarded to Dolan, it is the reasonableness of the attorney fee request in a given case, rather than the proportionality of the request, that governs the appropriate fee to be awarded. Moreover, the potential deterrent value of this case, that hopefully will heighten industry awareness to the dangers associated with the lead abatement process, must also be considered. *See Copeland v. Marshall*, 641 F.2d 880, 906-08 (D.C. Cir. 1980); *see also Munsey v. Smitty Baker Coal Company, Inc.*, 3 FMSHRC 2056 (1981); *Simpson v. Kenta Energy, Inc.*, 7 FMSHRC 272 (1985).

III. Miscellaneous Litigation Expenses

Dolan has also claimed total miscellaneous litigation expenses of $7,790.0.21 for such items including, *inter alia*, expert witness fees, court reporter and transcript fees incidental to trial and depositions, postage, telephone bills and service of subpoenas. With the exception of the $662.00 claimed for telephone bills, and the $161.00 claimed for "fax" expenses that are not documented expenses, F&E does not specifically contest any of the other litigation expenses claimed.

Having been a participant in several telephone conferences initiated by counsel, and having been the recipient of telephone inquiries and facsimiles, I am aware that long-distance telephone and facsimile expenses have been incurred. However, it is true that the exact amount of these expenses has not been documented. Thus, on balance, I am awarding reasonable reimbursement of $250.00 for telephone and facsimile expenses rather than the $823.00 claimed. Accordingly, **F&E shall pay total miscellaneous litigation expenses of $7,217.21.**

ORDER

In view of the above, **IT IS ORDERED THAT**:

1. The Decision on Liability issued on June 12, 1998, and this Supplemental Decision on Relief constitute the final decision in this proceeding.

2. F&E Erection Company **SHALL PAY** the complainant, Bryce Dolan, back pay plus bonuses of **$12,094.60, less applicable federal, state and local taxes, plus accrued interest until payment of back pay is made**, for the period April 17, 1996 through August 11, 1996. The interest accrued with respect to back pay shall be computed according to the Commission's decision in *Local Union 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1483 (1988), *aff'd sub nom. Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773 (D.C. Cir. 1990), and calculated in accordance with the formula in *Secretary o/b/o Bailey v. Arkansas Carbona*,

5 FMSHRC 2042 (1984). Using this formula, the applicable interest rate for April 17, 1996, through June 30, 1996, is 8% (.0002222 daily interest factor); the applicable interest rate for July 1, 1996, through March 31, 1998, is 9% (.0002500 daily interest factor); and the applicable interest rate for April 1, 1998, through September 30, 1998, is 8% (.0002222 daily interest factor).

3. F&E Erection Company **SHALL PAY** Bryce Dolan's **attorney's fees of $23,745.00**.

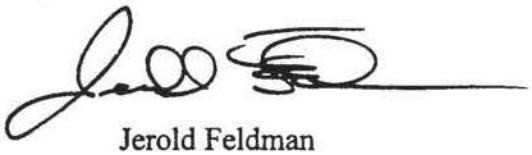
4. F&E Erection Company **SHALL PAY** Bryce Dolan's **miscellaneous litigation expenses of $7,217.21**.

5. F&E Erection Company **SHALL EXPUNGE** from Bryce Dolan's personnel records, and/or company personnel records, all references to Dolan's complaints that ultimately resulted in his April 12, 1996, termination of employment and all references to the fact that Dolan has filed the subject discrimination complaint in this matter.

6. F&E Erection Company **SHALL POST** a copy of the June 12, 1998, Decision on Liability and this Supplemental Decision on Relief at ALCOA's Point Comfort Plant in a conspicuous, unobstructed location where notices to employees are customarily posted for a period of 60 consecutive days from the date of this Supplemental Decision and Final Order.

7. F&E Erection Company **SHALL COMPLY** with the above enumerated orders within 30 days of the date of this decision.

8. Upon timely compliance with the orders enumerated above, this discrimination complaint **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

August 6, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 98-6-M A. C. No. 44-00061-05533
v.	:	
LESUEUR-RICHMOND SLATE CORP., Respondent	:	Richmond-Arvonia Quarry & Mill

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, United States Department of Labor, Arlington, Virginia, on behalf of the Petitioner; Harlan L. Horton, Esq., Farmville, Virginia, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor against the Le Sueur-Richmond Slate Corporation (Le Sueur), pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et. seq.*, the "Act," alleging two violations of mandatory standards and seeking a civil penalty of $1,299.00, for those violations. The general issue before me is whether Le Sueur 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.

Citation No. 4433235 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14107(a) and charges as follows:

> The 10-inch Sears electric bench saw being used at the roofing plant to cut wedges, was not provided with a guard to protect employees from blade. The saw was used on a weekly basis. Employee has to get hand within 4-inches of blade.

The cited standard, 30 C.F.R. § 56.14107(a), provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Respondent first claims that saw blades are not sufficiently like other "similar moving parts that can cause injury" to come within the meaning of the cited standard. Under the rule of

statutory construction, ejusdem generis, where general words are followed by specific examples in a statutory or regulatory provision, the general words are construed to embrace only objects similar in nature to the specific examples. 2A Sutherland Stat. Constr. 47.17 (5th Ed.) Garden Creek Pocahontas Company, 11 FMSHRC 2148 (November 1989). Therefore, the question is whether the general words of this regulation ("similar moving parts that can cause injury") can fairly be read to include the saw blade at issue in this case given the nature of the specific examples cited in the regulation. I conclude that saw blades come within the scope of the items such as "fan blades" specifically enumerated in the regulation. Saw blades are similar moving parts that clearly can cause injury. Respondent's argument in this regard is accordingly rejected.

The Secretary's evidence in support of the violation comes primarily through the testimony of Inspector Joseph Bosley. Bosley has been an inspector with the Mine Safety and Health Administration for 14 years. He also has 15 years underground mining experience. Bosley testified that he, accompanied by another MSHA employee, Sam Bond, conducted an inspection of the subject surface slate mine on October 7, 1997. In its roofing plant he observed a 10-inch Sears electric table saw without a blade guard. The saw was used on a weekly basis to cut wedges for packing roof shingles. The saw blade was 10-inches in diameter, protruded about 2-inches above the surface of the bench and had no guard affixed to it. Bosley opined that the saw had been used recently because of the presence of fresh sawdust and statements by its operator that he used the saw on a weekly basis.

A guide had been provided for more safely moving wood through the channels on the bench, but the guide was found underneath the saw covered with sawdust. Bosley therefore concluded that the guide had not been recently used. The saw operator also admitted to Bosley that he used the saw without any guard over the blade. Significantly, plant foreman Burley Hudgin acknowledged to Bosley that the saw never did have a guard over the blade. This essentially undisputed evidence is clearly sufficient to sustain the violation.

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

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In this regard, Bosley testified that it was reasonably likely for the saw operator to place his hand in the rotating saw blade resulting in the loss of fingers or a hand. The situation was aggravated, according to Bosley, by the fact that the guide itself was not used and that, during ordinary operation, the saw operator's hand would be within 4-inches of the blade.

Within the above framework of credible and essentially undisputed evidence, I conclude that the violation was indeed "significant and substantial." In reaching this conclusion I have not disregarded the testimony of Respondent's maintenance supervisor, Keith Cheadham. However, his testimony does not contradict that of Inspector Bosley's in regard to the above issues. Rather, Cheadham's testimony goes to the issue of negligence. According to Cheadham, the saw had previously been inspected by MSHA and he was unaware of any citations having previously been issued for the lack of a guard. Cheadham maintains that after a guard was ordered from Sears he had to further modify the saw by obtaining longer mounting bolts. As an aggravating factor however, I note that Cheadham acknowledged that he was aware the saw was being used without a guard. The admission of the maintenance supervisor, an agent of the operator, that he was aware that the saw was being used without a guard also clearly supports a finding of high negligence. The absence of a guard under the circumstances was also obvious and admittedly, the saw never had a guard. Under the circumstances I conclude that the violation was the result of high negligence.

Citation No. 4433236, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14132(b)(2), and charges as follows:

> The backup alarm of the Cat 966 front end loader was not audible above surrounding noise, could not hear within 2-feet of rear of loader. Observed to [*sic*] people out of there [*sic*] trucks in area. Hazard backing over one of or both of these truck drivers.

The cited standard, 30 C.F.R. § 56.14132(b)(2), provides that "alarms shall be audible above the surrounding noise level."

Inspector Bosley testified that during the same inspection on October 7, 1997, when approaching the stockpile area, he observed a Caterpillar Model 966 front end loader loading a truck. According to Bosley, the backup alarm on the loader was not audible above the surrounding noise. He asked the operator to reverse the loader and he was unable to hear the alarm from a distance of five feet due to the surrounding noise. At a measured distance of two feet he was able to hear the alarm. The surrounding noise came from the diesel motors on the loader and two nearby trucks.

Bosley observed that the loader also had an obstructed view to the rear. The eight-foot-high engine compartment and exhaust system created a blind spot behind the loader and pedestrians could not be seen from the operator compartment less than 15 feet behind the loader. Bosley observed that as the loader was operating two truck drivers were walking between the loader and the trucks. Based on this evidence Bosley concluded that the violation was "significant and substantial." He opined that it was reasonably likely that persons walking between the loader and trucks would be run over by the loader and this would be reasonably likely to result in fatal injuries. Within the above framework of undisputed evidence the Secretary has clearly met her burden of proving the violation and that the violation was "significant and substantial" and of high gravity.

In reaching these conclusions I have not disregarded Respondent's argument that, in essence, the standard is so vague that it leaves mine operators little notice as to their responsibilities. If Respondent is claiming that the cited standard is unconstitutionally vague, the test is whether a reasonable prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition would recognize a hazard warranting corrective action within the purview of the regulation at issue. Alabama By-Products Corporation, 4 FMSHRC 2128, 2129-2130 (December 1982). In this case there is little to contradict the testimony of Inspector Bosley who, it may be inferred, is a reasonably prudent person within the purview of the Alabama By-Products decision. Respondent's argument in this regard is accordingly rejected.

The Secretary further argues that operator negligence was high, in particular because of three prior violations relating to backup alarms. She refers to Citation Nos. 4440485, 4441557 and 7703296 (See Exh. P-9). These prior violations do not however concern the same factual circumstances as the instant citation. This case involves a unique situation where the alarm was actually functioning but was not, in the inspector's opinion, sufficiently loud. Because the ascertainment of loudness in this case was subjective and not based on a measured standard I am hesitant to find high operator negligence. The point at which alarms are not sufficiently loud is largely a judgment call and depends on the ambient noise such as the number of diesel vehicles present at any one time.

In assessing civil penalties in this case I have also considered the record evidence concerning the remaining criteria under section 110(i) of the Act.

ORDER

Citation Nos. 4433235 and 4433236, are AFFIRMED and Le Sueur-Richmond Slate Corporation is directed to pay civil penalties of $800.00 and $100.00, 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
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON D.C. 20006-3868

August 11, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-24-M
Petitioner	:	A. C. No. 27-00083-05526
	:	
v.	:	
	:	Swenson Gray Quarry
SWENSON GRANITE COMPANY, LLC,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor under section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(a) .

The operator seeks to have the petition dismissed on the ground that the Secretary failed to timely file the petition for the assessment of a civil penalty.

This case involves an order that was issued on August 7, 1997, under sections 107(a) and 104(a) of the Act, 30 U.S.C. §§ 817(a) and 814(a), for an alleged violation of the Act and mandatory standards.

On March 2, 1998, the Secretary issued a notice of proposed civil penalty assessment. The operator timely contested this assessment by filing a request for hearing within 30 days. The request was received on March 23, 1998. 29 C.F.R. § 2700.26. The Secretary had 45 days after receipt of the contest to file the penalty petition. 29 C.F.R. § 2700.28. Therefore, the petition was due on May 7, 1998.

The Solicitor failed to file the penalty petition within 45 days. Indeed, the Solicitor did nothing until June 18, 1998, when the Commission's Docket Office contacted him to inquire about the penalty petition. The Solicitor mailed the petition on the same day and the petition was received by the Commission on June 22, 1998. The Solicitor did not file a motion seeking leave to file the petition out of time.

On July 14, 1998, the operator filed a motion to dismiss because the Solicitor failed to file the penalty petition within 45 days. The operator asserts that the Secretary has failed to demonstrate adequate cause and that it has been prejudiced by the delay.

On July 23, 1998, the Solicitor filed an opposition to the motion to dismiss. The Solicitor represents the following: on April 8, 1998, the case was received in the Boston Regional Office and was assigned to him while he was on vacation; on April 13 he returned from vacation, but worked on other matters for the next two weeks; on April 27 he reviewed the file in this case and determined that it should be referred to MSHA under MSHA's ACRI (Alternate Case Resolution Initiative) Program; on April 28 he forwarded the case to MSHA's Northeast District Office; sometime in May 1998, the District Office notified him that it would not handle the case.

The Commission permits late filing of penalty petitions where the Secretary demonstrates adequate cause for the delay and where the respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). The Secretary must establish good cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

Late filings have been permitted where there has been a rise in the mine safety caseload together with a lack of support personnel. Salt Lake, supra; Medicine Bow Coal Co., 4 FMSHRC 882 (May 1982). See also Wharf Resources USA Incorporated, 14 FMSHRC 1964 (November 1992); Fisher Sand and Gravel Company, 14 FMSHRC 1968 (November 1992). Out of time filing of the penalty petition was allowed when the delay was due to the adoption by MSHA of a new system for handling mine safety cases. Roberts Brothers Coal Company, 17 FMSHRC 1103 (June 1995). So too, late filing was permitted when it was due to a mistake in the computation of the 45 days by a Conference and Litigation Representative (CLR) when the CLR program was new. Lone Mountain Processing Incorporated, 17 FMSHRC 839 (May 1995); Austin Powder Company, 17 FMSHRC 841 (May 1995); Ibold Incorporated, 17 FMSHRC 843 (May 1995). An extraordinary circumstance like a government shutdown also has been recognized as adequate reason for late filing. Secretary of Labor v. Roger Chistensen, 18 FMSHRC 1693 (August 1996).

In this case the only heavy caseload the Solicitor relies upon is his own. He sets forth in detail what he was doing in the two weeks after he received the case. This type of excuse is far different from those set forth above. Here the case was at all times in the hands of an experienced Solicitor who must be held responsible to handle his assignments properly. If such an excuse were accepted here, every Solicitor could justify tardiness by explaining he was busy with something else. Since all Solicitors are almost always, if not always, busy, the time requirements of the Act and regulations would be rendered meaningless. More importantly, despite the two week period when he was busy elsewhere, there was still time for the Solicitor to file a timely petition. Late filing occurred because the Solicitor closed the case when he sent the file to MSHA for handling under ACRI. The Solicitor knew, or should have known, that sending the case to MSHA did not excuse him from filing required pleadings. I reject the Solicitor's

assertion it was inevitable that under ACRI a situation would arise where MSHA and the Solicitor would slip up because each thought the other was handling a case. The fault here lies with the Solicitor who should not have closed the case. Had the Commission's Docket Office not telephoned the Solicitor, one can only speculate when the petition would have been forthcoming and when he did file, the Solicitor did not seek permission to file out of time. These circumstances do not constitute adequate cause to justify the late filing.

Because there has been no showing of adequate cause, it is not necessary to reach the issue of prejudice.

In light of the foregoing, the operator's motion to dismiss is **GRANTED**.

It is **ORDERED** that this case is **DISMISSED**.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 13, 1998

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of ROSCOE RAY YOUNG,	:	Docket No. KENT 98-254-D
Complainant	:	BARB CD 98-13
v.	:	
	:	
LONE MOUNTAIN PROCESSING, INC.,	:	Huff Creek No. 1 Mine
Respondent	:	Mine ID No. 15-17234

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Complainant;
Marco M. Rajkovich, Jr., Esq. and Melanie J. Kilpatrick, Esq., Wyatt, Tarrant & Combs, Lexington, KY, on behalf of the Respondent.

Before: Judge Melick

DECISION

This case is before me upon the application for temporary reinstatement filed by the Secretary of Labor, pursuant to Section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., the "Act", and Commission Rule 45, 29 C.F.R. §2700.45. The Secretary seeks an order "temporarily reinstating" Roscoe Ray Young, an applicant for employment with Lone Mountain Processing, Inc., (Lone Mountain) pending a final hearing and disposition on the merits of the related discrimination proceeding (Docket No. KENT 98-255-D). At hearings held on July 31, 1998, the parties waived their rights under Commission Rule 45(e), 29 C.F.R. §2700.45(e) to a decision within seven days of the hearings in order to file posthearing briefs.

It is undisputed that on September 3, 1997, and until September 4, 1997, Young was employed by Arch of Kentucky (Arch) as a roof bolter. Arch is a separate and distinct mine operator and not a party to this case. In anticipation of a layoff at Arch, Young had applied for employment as a roof bolter at Respondent Lone Mountain's Huff Creek No. 1 Mine. As a condition of employment with Lone Mountain, Young was required to take a roof bolting test. He took this test on September 3, 1997, but claims that during the test, he encountered unsafe roof conditions which prevented him from completing the test in the time prescribed by Lone Mountain. It is further alleged that Lone Mountain's agent, Gary Sisk, was present during the test and that he was made aware by Young of the purportedly unsafe roof conditions. The

Secretary maintains that Lone Mountain thereafter refused to employ Young, in retaliation for working slowly but safely, in violation of the Act.

Within this framework of allegations, the Secretary requests an order of temporary reinstatement directing Lone Mountain to immediately and on an expedited basis "give Young a new roof bolting test under safe conditions and in the presence of an authorized representative of the Secretary, applying the same criteria for employment as was applicable on September 3, 1997, and, if successful, to immediately employ him as a roof bolter at the same rate of pay and with the same or equivalent duties assigned to him as from September 3, 1997."

In its answer and in a motion to dismiss filed at expedited hearings, Respondent, Lone Mountain, maintains, *inter alia*, that the Commission does not have the authority or jurisdiction under the Act to temporarily reinstate an "applicant for employment" such as Mr. Young. In particular it argues that Section 105(c)(2), by its plain language, specifically limits the Commission's authority and jurisdiction in temporary reinstatement proceedings to "miners" and thereby excludes applicants for employment.[1] In particular, it cites the language of Section

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[1] Section 105(c)(2) of the Act provides as follows:

"Any miner or applicant for employment or representative of miners 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. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. 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, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph."

105(c)(2) which limits Commission authority and jurisdiction in temporary reinstatement proceedings as follows: "the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint" (emphasis added).

The term "miner" is defined in Section 3(g) of the Act as " any individual working in a coal or other mine". Since Congress has clearly defined the term "miner" and that definition does not include an "applicant for employment" there is no need to resort to secondary rules of construction applicable where the statutory language is ambiguous. Where the language of a statutory provision is clear, the terms of that provision must be enforced as they are written unless the Legislature clearly intended the words to have a different meaning. See *Chevron, USA v. NRDC*, 467 U.S. 837, 842-43 (1984); *United States v. Baldridge*, 677 F2d 940, 944 (D.C. Cir. 1982); *Phelps Dodge Corp. v. FMSHRC*, 681 F2d 1189, 1192-93 (9th Cir. 1982); *Utah Power and Light Company*, 11 FMSHRC 1926, 1930 (October 1989).

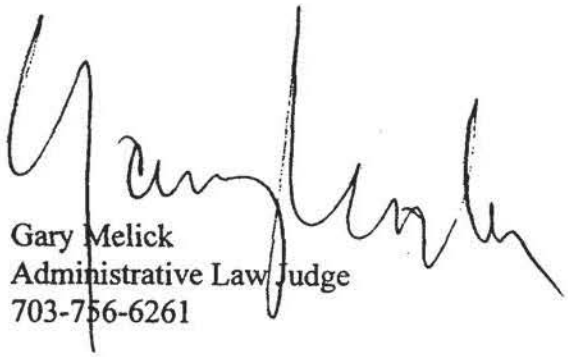
Moreover, under the maxim expressio unius est exclusio alterius, the expression or mention in a statute of one thing ("miner") implies an intention to exclude all other things from its operation. For this additional reason it is clear that Congress did not intend to include "applicants for employment" in the temporary reinstatement provisions of Section 105(c)(2) of the Act. It becomes even more apparent that Congress limited the remedy of temporary reinstatement to only "miners" (and not to applicants for employment) when a comparison is made in the statutory language between the term "miner" and the phrase "miner, applicant for employment or representative of miners" as referenced in sections 105(c)(1) an 105(c)(2) of the Act. The phrase "miner, applicant for employment or representative of miners" is cited eight times in these subsections and the term "miner" alone, is cited twice--and both of the references to the term "miner" alone are cited in the context of reinstatement. There can, therefore, be no mistake of Congressional intent that the remedy of temporary reinstatement is to be limited only to miners who have suffered unlawful discrimination.

The Secretary argues, alternatively, that Mr. Young was in any event, at the time of his protected activity a "miner" as defined in the Act, although he was admittedly a "miner" only because of his employment with another mine operator not involved in the alleged discrimination and who is not a party to this case. Even assuming, arguendo, that Young was still an employee of the non-party operator (Arch) on the date of the allegedly discriminatory act, he would not be entitled to temporary reinstatement to that employer because it is neither a party to these proceedings nor is it alleged to have discriminated against Young. Moreover Young would not be entitled to temporary reinstatement to Lone Mountain by virtue of his status as a "miner" at Arch. Reinstatement means to restore to a position from which the person has been removed. Likewise, since Young was not employed by Lone Mountain as a "miner" he could not be reinstated to Lone Mountain as a "miner". The Secretary in any event is not seeking to reinstate Young as a "miner" with Lone Mountain but as an "applicant for employment".

While it is not necessary for the disposition of this issue, I nevertheless note that it has not by any means been established that Young was, in any event, employed as a "miner" at the time of the alleged discrimination (the decision not to hire him) even with that other non-discriminating operator, Arch. It is undisputed that Young's last day of employment with Arch was September 4, 1997. The only evidence as to when the decision not to hire Young was made comes from Lone Mountain Division Training Coordinator Gary Sisk. Sisk testified that within three days after giving Young the roof bolting test on September 3, 1997, he fed the raw timing data into his computer and obtained the final tabulated results on which he based his decision not to hire Young. Sisk testified that after obtaining those results he contacted his boss who agreed that Young had operated too slowly and that Young should therefore be informed that he would not be hired. The letter Young received on September 18 (Government Exhibit 1) advising Young that he would not be hired was the result, according to Sisk, of the computer calculations performed within three days of the roof bolting test. Under the circumstances it is unclear whether Young was even a "miner" for Arch on the date he allegedly suffered discrimination.

ORDER

This Commission is without statutory authority and jurisdiction to reinstate applicant, Roscoe Ray Young, for employment. The Secretary's application for temporary reinstatement herein is accordingly dismissed.



Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

August 13, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEFFERY S. SILL, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 98-6-DM
v.	:	
LAKEVIEW ROCK PRODUCTS, Respondent	:	Lakeview Rock Products Mine ID 42-01975

DECISION

Appearance: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Gregory M. Simonsen, Esq., Kirton & McConkie, Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor against the Respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the "Act"). The complaint was filed on behalf of Jeffery S. Sill, a former employee of the Respondent who claimed that his employment was illegally terminated on March 26, 1997. The Respondent denied any discrimination and it contended that Mr. Sill quit his employment with Respondent.

Mr. Sill was employed by Respondent as a loader operator. Three weeks after his alleged unlawful termination on March 26, 1997, Mr. Sill returned to work as a loader operator with another employer. Thus, at the time the original complaint was filed on October 6, 1997, Mr. Sill was still fully employed as loader operator and claimed only for the three weeks of back-pay that it took him to find the new job in April 1997.

In early December 1997, however, Mr. Sill was laid off from his new employment due to the slack winter season. He remained unemployed for a period of time and then returned to work

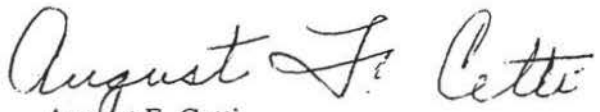
for yet another employer as a loader operator. He is still continuing with that employment at the present time.

When the parties were unable to resolve their differences, the case was set for hearing. The hearing included the direct and cross-examination of the Complainant. At the end of the hearing, the parties in open court agreed to settle the case. Under the terms of the agreement that the parties entered into the record, Respondent without admitting a violation of section 105(c) of the Act agreed to pay $1,000.00 to Complainant to cover any losses he may have and pay a civil penalty of $1,500.00 to MSHA. The parties also agreed as a part of the settlement that there will be no 110(c) action against any agent of the Respondent based upon any allegation of unlawful discrimination against Jeffery S. Sill under section 105(c) of the Act.

Based upon the exhibits and the testimony given at the hearing, I approve the settlement entered into the record at the hearing. I find it is consistent with the statutory criteria set forth in § 110(i) of the Act.

ORDER

Respondent, if it has not previously done so, is **ORDERED TO PAY** within the next 30 days, $1,000.00 to Jeffery S. Sill and a civil penalty of $1,500.00 to the Secretary of Labor. Upon receipt of timely payment, this case is dismissed.



August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 19, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-14-M
Petitioner	:	A. C. No. 20-02980-05501
v.	:	
	:	Rohloff Sand & Gravel Company
ROHLOFF SAND & GRAVEL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
Luke Rohloff, President, Ms. Jody McPeak, Rohloff Sand & Gravel Company, Midland, Michigan, for Respondent.

Before: Judge Barbour

In this civil penalty proceeding, brought under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d) (the Act)), the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) seeks the assessment of civil penalties against Rohloff Sand & Gravel Company (the company) for five alleged violations of mandatory safety and health standards for surface metal and nonmetal mines. The Secretary charges the violations occurred at the company's sand and gravel pit, located in Tuscola County, Michigan. The company raises various defenses and argues the amount of the penalties will affect adversely its ability to continue in business. The case was heard in Midland, Michigan. At the close of the hearing, the parties waived the filing of briefs and submitted the case for decision.

STIPULATIONS

The parties stipulated the Commission has jurisdiction over the proceeding; the mine is subject to the provisions of the Act; the company owns and operates the mine; the mine affects interstate commerce; the company's employees worked a total of 1,998 man hours during 1996, and the company was not cited for any violations at its facility from September 1994 to July 1997 (Tr. 10-11; Joint Exh. 1). They also agreed that in order to abate the alleged violation of a noise standard, the company expended $237.80 for sound deadening materials and $300 for labor (Tr. 11; Joint Exh. 1).

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
4563927	9/4/96	56.5050	$50

The citation states:

> On September 4, 1996, the operator of the Northwest 95 dragline was exposed to a mixed noise level of 222.60% as measured with a noise dosimeter for a full shift. This amount exceeded the permissible exposure limit of 100% times the instrument sampling factor (1.32) for dosimeter noise sampling. This is equivalent to an 8-hour exposure at 95.7 dBA. There was no barrier between the cab and the motor nor was there an[y] sound dampening material in the cab. The [dragline] operator was wearing hearing protection (Gov. Exh. 1).

At the mine, sand and gravel is extracted by a dragline from a pond and a bank and is processed through a wash plant (Tr. 23). On September 4, 1996, MSHA Inspector James Hautamaki went to the mine to conduct a noise survey. The purpose of the survey was to determine the level of noise to which the dragline operator was exposed (Tr. 24). Terry Timmons was operating the dragline (Tr. 25, 27). (In addition to operating the dragline, Timmons served as the mine foreman.) Timmons was seated in the dragline's cab, approximately 6 feet from the its engine (Tr. 29). He was digging sand from the pond, and he was wearing hearing protection.

The night before the inspection Hautamaki calibrated his dosimeter and sound meter (Tr. 29). Hautamaki attached the dosimeter to Timmons' clothing, as near as possible to Timmons' ear. Timmons wore the dosimeter for the full shift (Tr. 28-29). Throughout the shift, Hautamaki spot-checked the sound level with the sound meter (Tr. 28).

The dosimeter, which measured the average ambient noise to which Timmons was exposed during the course of the shift, recorded an exposure level of 222.60 percent. This meant that Timmons was exposed to an average of approximately 95.7 dBA (Tr. 32, see also Tr. 76, 77). Under section 56.5050, the sound level limit for an 8 hour shift is 90 dBA. Therefore, Hautamaki cited the company (Gov. Exh. 1).

In Hautamaki's opinion most of the noise came from the dragline's engine compartment. Because Timmons was wearing hearing protection, Hautamaki did not think the sound was likely to injure Timmons (Tr. 32). However, if Timmons had not been wearing protection, or if he had improperly worn it, he would have been in danger of suffering a hearing loss (Tr. 32-33).

Hautamaki maintained the company's failure to comply with the standard was the result of its "low" negligence (Tr. 33). He did not think the company knew Timmons was over-exposed, and he noted the company had taken the precaution of providing Timmons with hearing protection (Tr. 38).

MSHA Inspector Clyde Brown testified concerning the steps taken by the company to abate the condition. Brown, who had conducted approximately 100 noise surveys, went to the mine on July 1, 1997. He inspected the dragline and found the company had added a barrier between the operator's compartment and the engine. The company also had installed acoustical insulation (Tr. 48).

Brown conducted a noise survey. He found the dragline operator was exposed to noise at 90.8 percent of the permissible limit, an exposure level equivalent to approximately 89 or 88 dBA (Tr. 49, 82). Therefore, Brown terminated the citation.

The company expended $537.80 on materials and labor to meet the noise level requirements (Joint Exh. 1, ¶9; Tr. 11). In Brown's view, the barrier and insulation totally eliminated the possibility the dragline operator would suffer a hearing loss (Tr. 53).

MSHA's Industrial hygienist George Schorr testified concerning the dangers of high noise levels and the ways in which the levels can be controlled. He explained that while he does not conduct noise inspections, he reviews the results of the inspections and offers suggestions on how to reduce noise levels (Tr. 59). In Schorr's opinion, noise above the standard can cause both temporary and permanent hearing loss. For a permanent loss to occur the excessive notice must continue over a period of time (Tr. 66). The loss is usually at specific frequencies, which means the victim loses the ability to hear certain vowel sounds and can no longer perceive some speech patterns (Tr. 85).

On a dragline, compliance can be obtained by either reducing the time the dragline operator is exposed to the noise (Tr. 69), or by installing a barrier between the operator and the engine compartment and acoustically insulating the dragline operator's cab, or by a combinating of both approaches (Tr. 67-69, see also Tr. 70-71). The latter measures block the noise that goes directly to the operator as well as the noise that reverberates off the interior of the cab (Tr. 67-69).

Schorr testified that all Northwest 95 draglines in MSHA's North Central District (the Duluth district) have been brought into compliance with the noise standard (Tr. 78). He stated, "In all cases when it comes to draglines we know . . . there are achievable controls that can reduce the noise below the permissible exposure limit" (Id.). Schorr estimated the cost of materials necessary to achieve compliance is "under $1,000" (Tr. 81). He did not believe the

cost to be out of proportion to the benefit achieved because compliance protects a miner from lifelong hearing loss (Tr. 81, 83). He described installation of a barrier and insulation as "a fairly simple fix and fairly easy to do," and the reduction in the noise level that the installation achieves as "fairly significant" (Tr. 82).

Rohloff testified that it was obvious to the company the dragline was too noisy, but the company did not know its exact noise level until Hautakai conducted the survey. Nevertheless, because the company was concerned about the noise, the company purchased hearing protection, and Rohloff instructed those operating the machine to wear the protection at all times (Tr. 92-93).

THE VIOLATION, GRAVITY AND NEGLIGENCE

Section 5050(a) establishes permissible noise exposure levels based on a time-weighted average. Section 56.5050(b) requires feasible administrative or engineering controls to be used when noise exposure exceeds the permissible levels. If these measures fail to reduce noise exposure levels sufficiently, personal protection equipment must be used.

In *Callanan Industries, Inc.*, 5 FMSHRC 1900 (November 1983), the Commission held the Secretary establishes a violation of section 56.5050 by proving:

> (1) a miner's exposure to noise levels in excess of the limits specified in the standard; (2) a technologically achievable engineering control that could be applied to the noise source; (3) the reduction in the noise level that would be obtained through implementation of the engineering control; (4) a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a demonstration that the costs of the control are not wholly out of proportion to the expected benefits (5 FMSHRC 1909).

The Secretary proved all of these elements. Rohloff did not dispute the results of the noise survey conducted by Hautamaki, and the results established Timmons was exposed to an ambient noise level above that permitted by the standard (Tr. 32, 76, 77). As both the testimony and the abatement of the violation show, engineering controls to reduce the noise level were available to the company (Tr. 48). There is no suggestion the company had difficulty finding the barrier material or the acoustical insulation, and given Schorr's testimony that no similar draglines in the district were out of compliance (Tr. 78), I conclude the materials readily were available. Further, it is clear that the barrier and the acoustical insulation produced a decrease in sound sufficient to bring the ambient noise level into compliance (Tr. 74, 78-79). Schorr testified the cost of obtaining such compliance would be under $1,000 (Tr.81), as indeed it was (Joint Exh. 1 ¶ 9). The actual cost — $537.80 — resulted in a reduction of approximately 6.7 dBA (Tr. 81), well within costs the Commission has found previously to be not unreasonable (*Explosives Technologies International, Inc.*, 14 FMSHRC 59, 63-64 (January 1992); *A.H. Smith*, 6 FMSHRC 199, 203 (February 1984); *Callanan Industries, Inc.*, 5 FMSHRC 1900, 1911-12 (November 1983)).

The fact Timmons was wearing hearing protection, does not excuse the violation, but does mitigate its gravity. Hautamaki noted that without the properly worn protection Timmons would have been in danger of suffering a loss of hearing (Tr. 32). I infer from this the converse is true and that Timmons was not in danger of suffering a loss of hearing. Therefore, I conclude the violation was not serious.

I also conclude the company was negligent in allowing the violation to exist. Rohloff was candid in stating it was obvious the dragline was too noisy (Tr. 9). While purchase of the hearing protection was commendable, it was the company's duty to have the ambient noise tested so the company could ensure compliance with section 56.5050. Instead, it waited for MSHA to test and thus failed to meet the standard of care required.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
4564290	7/1/97	56.11027	$81

The citation states:

> The work platform around the plant water pump was not provided with handrails. An employee working on the platform could slip and fall into the water. An employee goes on the work platform once a day (Gov. Exh. 5).

Hautamaki testified that in June or July 1996, before the mine began operating, he went to the facility to assign it an MSHA I.D. number. While there, Timmons requested he "just kind of give . . . [the mine] a quick look over" (Tr. 96). During the "look over" Hautamaki saw a floating pump platform on the pond. He also saw a gangplank on the bank. Hautamaki told Timmons if the platform and gang plank were going to be used by miners on a regular basis, the company needed to have handrails installed on them in order to prevent the miners from falling into the water and possibly drowning (Tr. 34, 96-97, 98-99).

When Brown inspected the mine on July 1, 1997, he observed the same platform and gangplank. Neither had handrails (Tr. 100). Irving Gilley, who was then the foreman, told Brown that due to a problem with a valve on the pump, he had to go on the platform once a shift to prime the pump (Tr. 101-102). The platform was made of steel, and measured approximately 10 feet by 12 feet. Brown estimated the water under it was 15 to 20 feet deep (Tr. 102).

Brown feared when the deck of the platform became wet from dew, rain, ice, or snow a person was likely to slip and fall into the water. Brown also believed such a slip or fall was likely to result in permanently disabling injuries (Tr. 103). Therefore, he found the lack of handrails constituted a significant and substantial contribution to a mine safety hazard (S&S) (Id.). He testified "quite a few deaths and serious accidents [occur] on dredges and work platforms, and pump stations" and he identified a MSHA news release, dated November 5, 1997, that noted there had been 13 drowning deaths at surface metal and nonmetal facilities since April 1996 (Id.; Gov. Exh. 6).

He regarded the company as moderately negligent in failing to install the handrails (Tr. 105). He testified Gilley told him the company had started to construct the handrails but had not finished (Tr. 107).

THE VIOLATION, S&S, GRAVITY AND NEGLIGENCE

Section 56.11027 requires "working platforms" to be "provided with handrails."

The floating platform was a working platform. I credit Brown's testimony that Gilley told him the pump needed to be primed once a shift (Tr. 101-102). I therefore conclude that, at least at the time of the inspection, daily work was done on the platform. I realize Rohloff argued it was not typical for someone to go on the platform every day, that "[i]t would be more monthly" (Tr. 171), but there is no reason why Gilley would have misstated the facts to Brown, and even if the visits were monthly, rather than daily, I still would conclude the platform was a working platform within the meaning of the standard. In my view, the visits must be much more infrequent to make the standard inapplicable (see e.g. *Empire Iron Mining Partnership* 19 FMSRHC 1912, 1920-21 (ALJ Hodgdon)).

A violation is properly designated S&S if "based upon the particular facts surrounding the violation there exists a reasonable likelihood the hazard contributed to will result in an injury or illness of a reasonably serious nature" (*Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981)). To establish the S&S nature of a violation, the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature (*Mathies Coal Co.*, 6 FMSRHC 1, 3-4 (January 1984)).

Evaluation of the reasonable likelihood of injury, is made in the context of "continued mining operations" (*U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

I have concluded there was a violation. I also conclude there was a discrete safety hazard contributed to by the violation, in that without a handrail around the platform, the likelihood was increased that a miner who slipped or fell would tumble from the platform into the pond. The miner, who would be wearing work shoes and work clothing, would be weighed down. The water around the platform was too deep to stand. The miner could drown — a reasonably serious result, to say the least. I further conclude the Secretary proved there was a reasonably likelihood a miner would fall and drown. As mining operations continued through inclement and increasingly cold weather, it became more and more likely a miner would slip and fall into the pond and there were few other miners present who could help the victim.

In addition to being of an S&S nature, the violation was serious. The gravity of a violation is judged by the injury that can result from it and the possibility of the injury occurring. Here, the injury — death by drowning — was of the upmost gravity and was more than a possibility.

I accept Hautamaki's testimony that approximately one year before the citation issued, he told Timmons handrails would be needed (Tr. 34, 96-97, 98-99). Timmons was the agent of the company. Thus, the company knew what was required well in advance of Brown's inspection. The fact the handrails were not installed on July 1, 1997, can only be attributed to the company's negligence.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
4564287	6/30/97	56.18010	$50

The citation states:

> There was no one on the property currently trained in first aid. If an injury were to occur, the severity could be compounded by an untrained person (Gov. Exh. 7).

Brown testified he asked Gilley whether anyone at the mine was trained to provide first aid. Gilley responded Timmons had been trained, but after Timmons left, no one with current training worked at the mine (Tr. 109). Brown believed failing to have an employee at the mine who was currently trained in first aid was a violation of section 56.18010 (Tr. 109-110; Gov. Exh. 7). Brown considered it unlikely the lack of training would lead to an injury. He also believed the company, through Rohloff or Gilley, should have known no person was trained and should have corrected the problem (Tr. 110-111, 113).

Rohloff testified he was unaware of the requirement to have a trained person present at the mine during all working shifts (Tr. 116). Rohloff speculated the requirements of section 56.18010 "probably were discussed with . . . Timmons" (Tr. 116), but that Timmons left the company in December 1996, more than 6 months before the citation was issued (Id.).

Upon becoming aware of the requirement, Rohloff made it company policy to train all employees at the mine (Tr. 116). Rohloff stated the closest ambulance service was 10 miles from the mine, and the closest major city, Saginaw, had a helicopter "medivac" service (Tr. 118).

THE VIOLATION. GRAVITY AND NEGLIGENCE

The standard requires an individual capable of providing first aid to be present at the facility on all working shifts. In addition, the individual's training must be current. There is no doubt the violation existed. Brown was told by Gilley that no person at the mine had up-to-date training (Tr. 109), and Rohloff stated he was unaware of the requirement. (Tr. 116).

Brown did not think the violation was serious, and neither do I. There is no indication the mine had a history of accidents requiring the administration of first aid to miners. Nor is there any indication the mine contained hazards more dangerous than those faced by miners at similar facilities. According to Rohloff, Gilley once had been certified as trained in first aid, but his certification had lapsed (Tr. 151). I take Rohloff at his word, and I believe Gilley's prior training diminished whatever hazard resulted from the violation. Moreover, any gravity was mitigated further by the facility being within 10 miles of ambulance service and within range of a "medivac" service.

The company obviously was negligent. Rohloff admitted he was unaware of the requirement (Tr. 116). Rohloff was responsible for knowing what was needed to comply. In failing to make certain a miner with current training was present at the mine when it was in operation, he exhibited a lack of the care required of him.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
4564289	6/30/97	12028	$50

The citation states:

> The continuity and resistance of the grounding system was not tested annually. Testing the grounding system would ensure a low resistance path for fault current (Gov. Exh. 8).

In 1996, before the plant went into production, Hautamaki discussed the need for continuity and resistance testing with Timmons. Huatamaki told Timmons testing needed to be done before the plant began operating and yearly thereafter (Tr. 134-135)).

On June 30, 1997, the plant was operating (Tr. 130-131). During an inspection on that date, Brown discussed continuity and resistance testing with Gilley. Gilley told Brown he did not know how to test the continuity and resistance of the ground system, and therefore it had not been done (Tr. 123, 125-126).

Were this all of the testimony regarding the alleged violation, I would find the Secretary met her burden of proof. However, there is more. The record is clear that at some point after installation of the grounding system and prior to June 30, 1997, continuity and resistance testing was performed.

Judge: Do you know if continuity and resistance testing had been conducted previously at this facility?

Inspector Brown: [B]efore we go to a property we go over the previous inspection. And that box [on the form an inspector reviews prior to conducting an inspection]. . . said continuity and resistance yes or no, it said yes, ... It was prior to my inspection. Somebody had done a continuity and resistance test (Tr. 131).

THE VIOLATION

The standard requires testing of the continuity and resistance of grounding systems immediately after installation "and annually thereafter" (30 C.F.R. §56.12028). The Secretary established through Brown's testimony that Gilley did not know of any tests that had been conducted and that Gilley did not know how to conduct the required tests (Tr. 123, 125-126). However, the Secretary's allegation is, "The continuity and resistance of the grounding system was not tested annually" (Gov. Exh. 8). To meet her burden of proof, the Secretary had to establish no tests were conducted within a year of the previous tests. She did not establish when the prior tests were conducted. Therefore, I cannot find the tests were not conducted annually.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
4564291	7/1/97	15001	$50

The citation states:

A stretcher and blanket [were] not provided as part of the first aid supply (Gov. Exh. 9)

Section 56.15001 specifies the first aid materials an operator must provide. The materials include stretchers and blankets. Brown testified on July 1, 1997, Gilley looked for, and could not find, a stretcher or a blanket at the mine (Tr. 138). Brown too did not see the items (Tr. 139). Brown thought the missing equipment was not likely to cause an injury. Brown found the company negligently failed to provide them (Tr. 139).

Rohloff maintained the company had designated two sheets of plywood as stretchers (Tr. 143-147). They were located in the tool trailer (Tr. 148). In addition, there was a piece of cloth, "a curtain of some sort," that was intended to serve as a blanket (Tr. 143). However, Rohloff also testified Gilley may not have known the location of the plywood pieces and may not have known the cloth could be used a blanket because Gilley was not "up to speed" at the time of the inspection (Tr. 147).

THE VIOLATION, GRAVITY AND NEGLIGENCE

Section 56.15001 states in pertinent part, "Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas." Brown did not see a stretcher and blanket, and his testimony that Gilley looked for and could not find them was not disputed (Tr. 138-139). I need not reach the question of whether the plywood boards and the cloth actually were on-site and if so were "adequate," because the fact Gilley could not locate them establishes the violation. To "provide" something, is to make it available ("Provide" WWWebster Dictionary, http://www.m-w.com/cgi-bindictionary). Gilley represented the company at the work site. He could not make available items he could not find.

The violation was not serious. There is no indication in the record the company had a history of accidents. Moreover, as Rohloff pointed out, much of the time there were only two people at the site. If one were injured, the utility of a stretcher would have been negligible. Nevertheless, reasonable care, which the company failed to exercise, required the first aid items be provided.

OTHER CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The company has no applicable history of previous violations (Joint Exh. 1 ¶7).

SIZE OF BUSINESS

Counsel for the Secretary agreed the company is small in size (Joint Exh. 1 ¶5; Tr. 15).

ABILITY TO CONTINUE IN BUSINESS

The burden is on the operator to come forward with proof the size of any penalty assessed will affect its ability to continue in business. The company offered a financial statement prepared by the company's CPA (Resp. Exh. 2). The statement, which is dated February 9, 1998, is the latest available (Tr. 158). The statement was complied from information presented by the company. Accordingly, the CPA does not express assurance as to fiscal conclusions drawn from the information (Resp. Exh. 2 at 1). Nevertheless, Rohloff, a generally reliable witness, was asked under oath if he attested to the veracity of the report, and he stated he did (Tr. 159). Further, Jody McPeak, who acts as bookkeeper for the company, also stated the report was accurate to the best of her knowledge (Tr. 168-169). There is no reason why the company would falsify the report which was not prepared for the hearing, and I credit its accuracy.

The report indicates that as of December 31, 1997, the company had a gross profit on sales of $37,816, and general and administrative expenses of $42,798 (Resp. Exh. 2 at 3). Thus, the company lost $4,982 for the 9 months ending December 31(Id.; Tr. 159). More to the point,

the report shows the company is carrying a long term debt of $321,594 (Id. at 2), $212,691 of which is owed to Michigan National Bank. Rohloff testified that instead of calling the note and sending the company into bankruptcy, the bank agreed to a one year extension on the note (Tr. 164). Rohloff also testified the company has a current contract from which it expects a small profit of $2,500 (Tr. 165-166). Rohloff, who does not take a salary from the company (Tr. 164, 166), described the company as "financially strapped" (Tr. 163). McPeak characterized it as "running on empty" (Tr. 167).

I conclude from the report and the testimony of Rohloff and McPeak that the company is indeed struggling to survive, and I find the amount of the penalties assessed will adversely affect the company's ability to continue in business. Accordingly, I will reduce by half what I would assess otherwise.

GOOD FAITH IN ATTEMPTING TO ACHIEVE RAPID COMPLIANCE

All of the violations were abated within a time that was acceptable to MSHA, and I find the company exhibited good faith in attempting to achieve rapid compliance.

CIVIL PENALTY ASSESSMENTS

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
4563927	9/4/96	56.5050	$50	$25

The violation was not serious and the company was negligent. These criteria and the company's history of previous violations, its size, and its good faith abatement normally would warrant a penalty of $50. However, because an assessment of such size would adversely affect the company's ability to continue in business, I find a $25 penalty is appropriate.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
4564290	7/1/97	56.11027	$81	$62

The violation was serious and the company was negligent. These criteria and those referenced above normally would warrant a penalty of $125. However, I find a $62 penalty is appropriate.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
4564287	6/30/97	56.18010	$50	$25

The violation was not serious and the company was negligent. These criteria and those referenced above normally would warrant a penalty of $50. However, I find a penalty of $25 is appropriate.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
4564289	6/30/97	12028	$50	$0

The Secretary did not prove the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
4564291	7/1/97	15001	$50	$25

The violation was not serious and the company was negligent. These criteria and those referenced above normally would warrant a penalty of $50. However, I find a penalty of $25 is appropriate.

ORDER

Citation No. 4564289 is **VACATED.** Within 30 days, the company **WILL PAY** civil penalties of $136. Upon payment of the assessed penalties, this proceed is **DISMISSED.**

David Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 27, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-381 A.C. No. 46-06051-03689
v.	:	
	:	Stockton Mine
CANNELTON INDUSTRIES, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-100 A.C. No. 46-06051-03698-A
v.	:	
	:	Stockton Mine
CHARLES PATTERSON, Employed by CANNELTON INDUSTRIES, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-101 A.C. No. 46-06051-03697-A
v.	:	
	:	Stockton Mine
GEORGE RICHARDSON, Employed by CANNELTON INDUSTRIES, INC., Respondent	:	

DECISION ON REMAND

Before: Judge Hodgdon

On July 27, 1998, the Commission vacated my determinations that Cannelton's violation of section 75.400, 30 C.F.R. § 75.400, was the result of an unwarrantable failure to comply with the regulation and that Patterson and Richardson, Cannelton foremen, were liable under section 110(c) of the Act, 30 U.S.C. § 820(c), for the violation, and remanded the case for further consideration consistent with its opinion. *Cannelton Industries, Inc. et al*, 20 FMSHRC 726

(July 1998). For the reasons set forth below, I conclude that the violation did result from the operator's unwarrantable failure and that Patterson and Richardson are liable under section 110(c).

Factual Setting

The situation, which is set out more fully in my original decision, *Cannelton Industries, Inc. et al*, 18 FMSHRC 651 (April 1996), and the Commission's decision, can briefly be summarized. MSHA Inspector Michael Hess discovered an accumulation of dry, loose coal and coal dust that was approximately 10 feet square and 4 feet deep under the V-scraper on the No. 3 belt. The Secretary's witnesses, two fire bosses who examined the belt every day for the 2-weeks preceding the violation and a laborer who observed the belt a few days prior to the violation, testified that the accumulation began on February 14, 1994, and grew steadily until it had reached the height of the belt where it was discovered by the inspector on March 1. One of the examiners, who accompanied the inspector during the inspection, specifically testified that the accumulation found by the inspector was the one he had observed growing steadily.

On the other hand, Patterson, Richardson and a third foreman, Elkins, postulated that "the accumulation discovered by Hess was the result of a shuttle car hitting the spill board at the belt feeder which in turn knocked the belt out of alignment and caused most of the coal to fall directly onto the bottom belt" on which it traveled until it reached the V-scraper where it was knocked off onto the floor. *Id.* at 655. They stated that if an accident such as they described occurred, an accumulation like the one found by the inspector could occur in "two to three minutes." (Tr. 255, 331, 385.)

Discussion

Obviously, the two versions of events are mutually inconsistent. They cannot be reconciled. In my original decision, I stated that I believed the three witnesses presented by the Secretary because nothing was offered at the hearing to show "that any of them had any reasons not to tell the truth. Nor was there any indication at the hearing that they were not credible." *Cannelton* at 655. In addition, I would add that their testimony is mutually corroborative and is further supported by their entries in preshift-onshift reports. It follows that I did not believe the three foremen. On reconsideration, I adhere to that determination.

The Third Foreman

In its remand, the Commission directed that I "consider Elkins' testimony and make a credibility determination with respect to Elkins." 20 FMSHRC at 732. They specifically directed that I address his "testimony that, 3½ hours prior to the inspection, the accumulation was smaller than when the inspector cited it." *Id.* For the reasons that follow, I do not find Elkins' testimony credible.

Elkins testified that at about 7:00 a.m. on the morning that the inspector made his inspection he observed an accumulation under the belt which he deemed to be "normal." He described it as follows: "Now these are all approximates, okay? An accumulation of possibly four foot by four foot - although it was not a square. It would not fall that way - and I would say a depth of, just using judgment, 18 to 24 inches deep." (Tr. 322.) He said that he made this observation at a distance of "[m]aybe two, two-and-a-half breaks which would be probably less than 200 feet . . . with my cap light." (Tr. 324.)

There are three possible explanations for this testimony. First, the testimony could be absolutely correct. Second, what he saw was the accumulation described by the Secretary's witnesses, but he misjudged its size as a result of the distance from which he observed it and the fact that the only available light was his cap light. Or third, the testimony is a complete fabrication.

If the testimony is true, it means that, despite Elkins' characterization of it as "normal," a sizable accumulation was already under the V-scraper, which he did nothing to alleviate. The testimony also undercuts the foremen's theory that the accumulation occurred during a 2 to 3 minute time period shortly before the inspector discovered it.

On the other hand, the testimony could well be a complete falsehood. Curiously, this was the only thing that Elkins specifically remembered in his entire testimony. He could not remember when the No. 3 belt line, with its movable feeder, was set up; he could not remember when the feeder had previously been jarred by a shuttle car dumping coal onto the belt resulting in a large spill; he could not recall which miners he had shovel the belt line, when he had them shovel it, or on how many occasions he assigned miners to shovel it.

However, giving Elkins the benefit of the doubt, I find that the most reasonable explanation for this testimony is that he saw the accumulation discovered by the inspector, and misjudged its size. He certainly did not bother to make a close investigation of the accumulation. Viewing it from 200 feet by cap light is not conducive to accurate observations and estimates.

Corroboration

Besides the testimony of the three foremen, no evidence supports their hypothesis that the accumulation resulted from a shuttle car dumping coal on the belt, hitting the spill board at the feeder, knocking the belt out of alignment, and causing most of the coal to fall directly onto the bottom belt until it was knocked off of the belt by the V-scraper in a 2 to 3 minute time period shortly before the inspector discovered it. The section boss, Steve Dean, the man Richardson allegedly called and told to shut down the belt and reset the feeder after the accumulation was discovered presumably could have presented such evidence. Unfortunately, he was not called as a witness.

In my original decision, I did not intend to imply that the accumulation was not caused by spillage from the feeder or the belt onto the bottom belt. Some spillage is normal and is the reason the bottom belt has a V-scraper. What I found was that the accumulation did not occur over a short period of time as suggested by the foremen. While Inspector Hess testified that there was some spillage coming down on the bottom belt and hitting the V-scraper when he discovered the accumulation, he indicated that it was not a significant amount, a "five-gallon bucket" out of the 15 tons of coal which would be dumped by a shuttle car. (Tr. 47.)

In this connection, Inspector Hess also testified that "I walked by that area which is inby where the V-scraper is. There was no noticeable accumulation or spillage in this area where the third right feeder is and the backboard or the spill board where the third right feeder dumps on the 3 right belt." (Tr. 87.) He also stated that if most of the coal were being deposited on the bottom belt: "There would be coal scattered out from the feeder back to the scraper board. To get approximately 10 tons of coal piled up in one area, there would be several tons of coal scattered out from area A, let's call it the feeder, back to where area B would be at the [scraper] board." (Tr. 88.) He declared that he did not see any such accumulations in the area between the feeder and the V-scraper.

In conclusion, none of the three foremen actually saw a shuttle car knock the feeder and belt out of alignment, saw coal being dumped directly onto the bottom belt or saw the accumulation until the inspector directed Richardson's attention to it. No one else testified that such an incident occurred and there is no other evidence to suggest that the accumulation occurred as insinuated by the foremen. On the other hand, the evidence of the two fire bosses, the laborer and Inspector Hess directly contradicts such an occurrence. Accordingly, I find that the accumulation was caused by normal spillage being scrapped off the bottom belt by the V-scraper over a 2-week period of time.

Unwarrantable Failure

The Commission vacated my finding "that Cannelton did not make efforts to eliminate the violative condition, and remand[ed] the matter for further consideration of the evidence adduced during the hearing on this issue." 20 FMSHRC at 734. After further considering the evidence, I conclude that Cannelton in general, and the three foremen specifically, made no efforts to clean up the accumulation in this case.

Consistent with their theory in this case, the foremen denied that an accumulation, beginning on February 14 and steadily growing until March 1, ever existed. Thus, Richardson declared: "I never seen a condition at that scraper and I was by there. If there was a mound of coal there, it presented no problem." (Tr. 307.) Patterson testified: "Q. Okay. Now, during the two weeks in question, did you ever observe a buildup in the rollers of the No. 3 belt? A. No, sir." (Tr. 388.) And Elkins answered: "Q. Do you think there was a problem with accumulations at the No. 3 belt V-scraper during the period from February 14th to March the 1st? A. No more so than normal." (Tr. 337.) Consequently, their testimony about cleaning up

accumulations did not go to the specific accumulation in question, but to cleaning up accumulations in general.

Furthermore, it is apparent that their general practice was not very rigorous. Richardson testified: "Q. Do you recall during that two-week period going to check the V-scraper and the No. 3 belt to see if it had been cleaned up? A. As far as going to specifically check that, no." (Tr. 284-85.) He stated further:

> Q. And you're sure that men worked on the No. 3 belt near the V-scraper during the two week period before the citation?
>
> A. Yes, ma'am. I'm sure *if it's in that book.* I give them a piece of paper to clean that area because they would clean from the feeder to the V-scraper, because when you got the V-scraper full you've got -- you had trails of coal down each side of the belt where part of the coal fell off.
>
> Q. Can you tell me when these men were working on it?
>
> A. No, ma'am.
>
> Q. Can you tell me how often during that two-week period they worked on it?
>
> A. No, ma'am.

(Tr. 298-99.) (emphasis added.) Since there was nothing in the preshift book indicating that the V-scraper had been cleaned during the two week period in question, Richardson was *not* sure that the area had been cleaned. In fact, Richardson's testimony indicated that he never checked to make sure that it had been cleaned.

In the same vein, Elkins testified:

> A. At various times I had people go down there and shovel some.
>
> Q. Is this in the two-week period preceding the citation being issued?
>
> A. *I cannot give you an exact time frame. I would say yes, it is. But, then again, I am not certain of that.*
>
> Q. Do you recall who you sent down to shovel?
>
> A. No, ma'am. I do not.

Q. Do you recall when you sent them to shovel?

A. No.

Q. Do you recall on how many occasions you sent them to shovel?

A. It would depend, I guess, on the depth of the what they call "hay stacks," which is the way the material forms when it drops off the belt.

Once it got to a height that concerned me, then I would have someone go down and -- they might not -- they wouldn't clean maybe the whole thing up.

(Tr. 338) (emphasis added.)

Patterson testified similarly: "Well, like I said previously, the men were assigned that area every day somewhere on the list. So I felt that it would be cleaned up." (Tr. 390.) The foremen *assumed* that any accumulations were being cleaned up; not one of them ever bothered to check or even to ask one of the fire bosses or the men assigned to clean up whether anything had been done.

If any efforts were made to clean up the accumulation, it was in spite of, not because of, anything the foremen did. Furthermore, it defies credulity to think that work could be done on the accumulation and yet nobody, not the foremen, not the fire bosses, not anyone who testified ever saw it being done, or saw the results of the work. If anything had been done, surely the fire bosses would have noticed that the accumulation had stopped steadily growing.

I find that the accumulation was extensive, that the operator, through its foremen, was put on notice that greater efforts were necessary to take care of accumulations in the area of the V-scraper, that the violation existed for 2 weeks and that little or no efforts were made to eliminate the accumulation. Accordingly, I conclude that the violation resulted from Cannelton's unwarrantable failure to comply with the regulation.

Section 110(c) Liability

The Commission vacated my determination that Patterson and Richardson were liable under section 110(c) and remanded "for findings of fact related to the foremen's cleanup efforts." 20 FMSHRC at 737. Since the Commission has already concluded that "the record supports the judge's finding that Patterson and Richardson, agents of Cannelton, possessed actual knowledge of the accumulation problem by way of the preshift-onshift reports," *Id.* at 736 (footnote omitted), and I have already found that the foremen made little or no effort to cleanup the accumulation, I conclude that they are liable under section 110(c).

Conclusion

Resolution of this case depends on who is believed. The Secretary's case is that an accumulation began developing on February 14, 1994, when it was first reported, and gradually increased in size until it was 10 feet square, 4 feet high and was touching the belt and rollers when discovered by Inspector Hess on March 1. Cannelton's case, based on the testimony of its three foremen, is that nothing other than "normal" accumulations existed until March 1 when the jarring of the feeder and the belt by shuttle cars dumping coal must have resulted in the accumulation developing over a very short period of time shortly before it was discovered. The two versions cannot be reconciled. It is not possible to find that all of the witnesses are credible.

I believe the Secretary's witnesses for the reasons I have previously given. It follows that I do not believe the foremen. Their version is not what someone actually saw happen, but what they believe happened. No other evidence corroborates this theory. In fact, the direct evidence of Inspector Hess contradicts it. There are inconsistencies in their testimony. For instance, Patterson believed that a spill similar to the one in this case had occurred right around February 14. The other two said that such a spill had happened some time prior to the 2-week period in this case. All three had reasons to testify as they did, since to admit that the accumulation occurred the way I have found that it occurred would be to admit that they were not doing their jobs. In addition, Richardson and Patterson had the further reason that they faced 110(c) liability.

Accordingly, I conclude that the accumulation resulted from the operator's unwarrantable failure to comply with section 75.400. I further conclude that Richardson and Patterson are liable under section 110(c) of the Act for this violation since they knowingly allowed the accumulation to exist and grow for 2 weeks without taking any significant action to clean it up.

Civil Penalty Assessment

Since I have found that this violation resulted from the company's unwarrantable failure, I adopt my evaluation of the penalty criteria set out in my original decision and assess a penalty of $3,600.00. 18 FMSHRC at 661-62.

In its decision, the Commission directed that in the event I find the foremen liable under section 110(c), I should "reassess the civil penalty or penalties based on the section 110(i) criteria as they apply to individuals. *Ambrosia Coal and Constr. Co.*, 19 FMSHRC 819, 823 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997)." 20 FMSHRC at 737. *Sunny Ridge* counsels that in making findings concerning the penalty criteria as they apply to individuals, the judge should

> consider such facts as an individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay.

> Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence that is used in assessing an operator's penalty for the violation underlying the section 110(c) liability.

Id. at 272.

In this case, neither Richardson nor Patterson presented any evidence concerning his income, family support obligations or ability to pay. Similarly, the Secretary did not present any evidence on the foremen's history of violations and negligence. In *Sunny Ridge*, because there was no evidence in the record on these criteria, the Commission remanded the case to the judge "to institute further proceedings as necessary to obtain evidence that will enable him to make findings pertinent to . . . individual liability." *Id.* Since *Sunny Ridge* was issued after the original decision in this case, I conclude that the parties should be given an opportunity to present evidence on these criteria.

Accordingly, this decision will not be final with regard to any civil penalty to be assessed against Richardson and Patterson. Instead, Richardson and Patterson have until September 11, 1998, to submit evidence on their income and family support obligations, the appropriateness of a penalty in light of their job responsibilities and their ability to pay. Likewise, the Secretary will have until September 11, 1998, to submit evidence on each individual's history of violations and negligence. Any evidence submitted must be sent to the opposing party. Comments or objections to a party's submission must be filed by September 18, 1998. After reviewing the submissions, I will issue a final decision on civil penalties for Richardson and Patterson.

ORDER

Citation No. 4195028 issued to Cannelton Industries, Inc., and the civil penalty petitions alleging that George Richardson and Charles Patterson knowingly authorized the violation in the citation are **AFFIRMED**.

T. Todd Hodgdon
Administrative Law Judge

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WEVA 96-170). The Secretary agreed to modify the citations and reduce the total penalty to $720.00. The proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act and an order directing payment will be incorporated in this decision. The remaining five citations allege violations of the standard at 30 C.F.R. § 72.620. Hearings in these proceedings were bifurcated. The initial hearings were limited to fact witnesses. The experts for each party, utilizing transcripts of the testimony of these fact witnesses, then prepared written direct testimony, and the second portion of the bifurcated hearings followed with examination of those expert witnesses.

The mandatory standard at issue in these cases, 30 C.F.R. § 72.620, provides as follows:

> Holes shall be collared and drilled wet, or other effective dust control measures shall be used, when drilling non-water-soluble material. Effective dust control measures shall be used when drilling water-soluble material.

Docket No. WEVA 96-170

Citation No. 7152439

This citation alleges a "significant and substantial" violation of 30 C.F.R. § 72.620 and, in relevant part, charges as follows:

> The Marion rock drill co. no. 109622 located at the drill bench near the Wabco parking area is observed during drilling operations, with excessive amounts of visible suspended drill dust present around the operators cab, drill mast and entire front of the machine.

John Workman is an experienced MSHA surface coal mine inspector with 20 years additional experience in the coal mining industry ranging from general laborer to mine foreman. His testimony is largely undisputed. On May 21, 1996, Workman inspected Hobet's No. 21 Surface Mine. As he approached the drill bench near the Wabco parking area he observed a drill releasing "very noticeable" visible clouds of dust. The drill, Marion rock drill company number 109622, was operating on a level bench near the access road. Workman drove toward the drill, exited his jeep, and approached the drill on foot. He walked around the drill taking photographs of the conditions he observed. The drill cab was approximately 10 to 12 feet high and the dust rose above the cab and enveloped the machine. The wind was changing directions at the time of the inspection. Several holes had been drilled on the bench prior to Workman's arrival. He concluded that the dust collection system was not operating properly.

While the machine was drilling, Inspector Workman observed the driller helper exit the greasing room at the rear of the drill, walk through the dust cloud along the walkway, and enter the operator's compartment. He also saw the drill operator briefly leave his cab after drilling had ceased but while dust remained suspended in the air around the machine.

Workman opined, based on the amount of material around the drill hole, that the hole he observed being drilled had been collared before his arrival. Upon closer examination he found that the skirt rubber on the drill had not been properly maintained in that it was pushed-out and bent-up, leaving an opening to impede the collection of dust. In particular, he observed that the rear corner was rolled up so that it could not seal the area under the drill deck. Workman believed that this condition existed before the current shift because rubber would not assume this shape and maintain that shape without having taken this position over an extended period of time.

Workman also examined the inside of the operator's cab. Drill dust, light to dark grey in color, coated the controls, window sills, and flat surfaces throughout the inside of the cab. He opined that the drill dust had entered the cab because the pressurization unit was not working properly. The air conditioning filters, air conditioning outlets, and the circulating system where the air conditioner was located, were full of dust. Workman testified that when he removed the vent covers to the air conditioning system, he could "dig" the dust out of the vents. The dust was "real thick and real heavy up in the compartment of the circulating part of the air conditioner," and the vents blew the air down from the ceiling into the cab where the driller operator and helper worked. The inspector opined that the large quantity of dust inside the cab and air conditioning system had accumulated over a long period of time and was not the result of the cab door having been left open or the brief process of collaring. In addition, based on the fact that there were holes in the dust hose (which had previously been taped and which needed re-taping) indicated to Workman that the system had not been maintained over a long period of time.

On May 28, 1996, when Inspector Workman returned to the mine to terminate the citation, repairs had not yet been made because the mine had been idle since May 22, 1996. Accordingly, he extended the abatement period to May 30, 1996. On May 30, he returned to the mine and again observed the drill while operating. There was no visible airborne dust present and he terminated the citation. Hobet foreman Jerry Simmons told Workman that in order to eliminate the dust clouds, Hobet installed new filters on the machine, installed belts on the drive motor to increase suction, repaired the damaged skirt rubber, and repaired a damaged suction line (dust hose). Workman observed that these components were essential to the drill's dust collection system, and that a problem with the filters alone would render the dust collection system inoperative.

According to Workman, as of May 30, 1996, however, the company had still not corrected the dust conditions inside the operator's cab. The Chief Maintenance Foreman, Lonnie Stanley, told the inspector that the drill was 15 years old, and that "possibly the technology had been outdated." He acknowledged that they were aware of the problem. Jerry Simmons also acknowledged that they knew that they had a problem with the drill.

On June 3, 1996, Inspector Workman again returned to examine the operator's cab. Jerry Simmons explained that the cab had been cleaned out, the circulating compartment of the cab had been eliminated, and another circulation area, that would allow the air to blow on the operator, had been formed. The cab now had neutral pressure and no outside air was entering.

Perry Bias was the drill helper working on the Marion drill on May 21, 1996. He had been working as a helper on the Marion drill for about 4 years. On May 21, they began drilling around 8:15 a.m. According to Bias, conditions outside the cab were very dusty and he was exposed to drill dust. He was not wearing a respirator, and he had never been fit-tested for one. His duties as a driller helper required him to leave the cab during drilling to check fluid levels and to investigate any problems that arose. On these occasions, it was necessary for him to go to the rear of the machine by way of the outdoor catwalk. He also left the cab several times each shift to use the bathroom and to mark the holes for the drill operator. Drilling sometimes was in progress when he left the cab to mark holes. Bias estimated that on an average shift, he left the cab eight to twelve times while drilling was in progress and was not always able to avoid the dust.

Bias further testified that conditions inside the cab were always dusty, and that included May 21, 1996. He maintains that he reported the dusty conditions inside the cab on the Marion drill to management nearly every day for four years. The cab was not pressurized and the air conditioning system was pulling outside air into the cab through cracks. Part of Bias' job was to clean the cab. According to Bias, within an hour after he had cleaned the cab, the dust would return to the extant that he could write his name in the drill dust on the window sills.

Sanford Johnston was the drill operator working with Bias on the Marion drill that day. He had been operating that drill since February 1995, and worked six days a week, 8:00 a.m. to 4:00 p.m. He estimated that, when the inspector arrived, he had drilled the extant hole 25 to 35 feet deep. According to Johnston, conditions outside the cab that day were "very dusty," and were typical of conditions at that mine. Johnston was not wearing a respirator and had never been fit-tested for one. He acknowledged that, in any event, a respirator would not seal around his beard. After the citation was issued that day, holes were found in a large dust hose. Johnston maintains that he had previously reported that condition, but rather than replace the hose, duct tape had been used on several occasions in an effort to plug the holes.

Johnston confirmed that the cab was always dusty. The cab was not pressurized and outside air was being pulled inside through cracks and holes in the doors and windows. He and Bias had repeatedly plugged the larger holes in the windows and doors, but he noted that it was not possible to plug all the holes. He noted that when they took apart the vents to the air conditioning system that day, they found a "wheelbarrow load of dust" in the system. He claims that he and his helper always reported dust in the cab on their pre-operational checklists.

Citation No. 7159321

Inspector Workman issued this citation on May 30, 1996. It alleges a "significant and substantial" violation of 30 C.F.R. § 72.620 and charges as follows:

> The Robbins highwall drill co. no. 116181, operating in the no. 18 pit drill bench area is observed during drilling operations with excessive amounts of visible airborne drill dust present, around the cab, front and surrounding areas.

Workman left the Marion drill around 10 a.m. on that day. He then observed another drill generating dust over 100 yards away in the No. 18 pit drill bench area. Workman pulled up to the drill, parked his jeep and began to document the drill on his video camera as he approached. It was a Robbins highwall drill company number 116181. There was drill dust around the cab and the drill. The hole was collared at the time of the inspection and the drill operator told Workman that the hole had been drilled to 28 feet.

Hole loaders and an endloader operator were working about 50 feet from the drill. Others were walking within 15 to 20 feet of the drill during the inspection. Workman acknowledged that he did not see any miners directly in the visible dust but noted that wind conditions were changing, and it was expected that several more hours would be required to finish loading the holes.

Jerry Simmons told the inspector that the filters were dirty and, in order to abate the conditions, they were changed. Hobet also installed a new piece of skirt rubber on the drill to replace skirting that had been torn away. On June 3, 1996, after the repairs, Inspector Workman observed the Robbins drill in operation with no visible drill dust, and terminated the citation.

Docket No. WEVA 96-178

Citation No. 7159340

This citation, issued July 17, 1996, alleges a "significant and substantial" violation of 30 C.F.R. § 72.620 and charges as follows:

> The Ingersoll Rand Rock Drill Co. No. 61170, operating in the 295 shovel pit area is observed during drilling operations with excessive amounts of visible airborne dust present around the operators compartment and surrounding areas.

On July 17, 1996, Workman inspected the Hobet Peats Branch No. 3 Mine. As he drove along the 295 shovel pit area, he observed a drill more than 100 yards away releasing a "lot of dust." It was Ingersoll Rand rock drill company number 61170. Workman photographed the drill and the surrounding conditions as he conducted his inspection. The visible dust extended above the top of the cab and in to the surrounding area. The rubber skirting was raised off the ground approximately three to four inches, and dust was emanating from under it. Dust was also being generated from the top of the drill deck through the donut. The filters were also dirty and needed to be changed. The drill bit was more than halfway down when the inspector approached, indicating that the hole had already been collared.

Charles Wiseman, a driller operator, was the miner's representative traveling with Inspector Workman that day. Wiseman observed an "excessive amount of dust" coming from under the drill curtain. It was so thick he could not see through it. Workman did not observe any miners working directly in the dust and Wiseman estimated that the powder crew of five or six men was working 50 to 100 feet away. Both Workman and Wiseman opined that the crew could

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 31, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 96-170
	:	A. C. No. 46-04670-03629
v.	:	
	:	Hobet No. 21 Surface Mine
HOBET MINING, INC., Respondent	:	
	:	Docket No. WEVA 96-185
	:	A. C. No. 46-02249-03607
	:	
	:	Hobet No. 7 Surface Mine
	:	
	:	Docket No. WEVA 96-178
	:	A. C. No. 46-06750-03576
	:	
	:	Docket No. WEVA 97-33
	:	A. C. No. 46-06750-03581
	:	
	:	Peats Branch No. 3 Mine

DECISION

Appearances: Caryl Casden, Esq., and Gretchen McMullen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Petitioner; David J. Hardy, Esq., and John T. Bonham, II, Esq., Jackson & Kelly, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine and Safety Health of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," charging Hobet Mining, Inc. (Hobet) with eight violations of mandatory standards and seeking civil penalties for those violations. The general issue before me is whether Hobet 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.

At hearing, the Secretary vacated Citation No. 7152240 (Docket No. WEVA 96-170) and moved to settle Citation Nos. 4629642 (Docket No. WEVA 96-185) and 7152318 (Docket No.

have been exposed to dust if the wind should change direction. The drill holes were positioned about ten feet apart, and it is not disputed that blasters can work within 10 to 20 feet of the drill. An unidentified blaster purportedly told the inspector that they had been working in similar conditions for two weeks.

Edgar Chambers was operating the cited Ingersoll Rand rock drill on July 17. He had been a driller operator at the Peats Branch Mine for eight years. Chambers confirmed that the dust conditions outside of the cab that day were "bad" and stated that the curtain was too short. Chambers claimed that he had problems having maintenance performed on his drill sometimes taking as long as a week before they would be fixed. He had recently waited three weeks for a dust curtain to be repaired and he continued to operate the drill under dusty conditions.

Frank Stover was working as a surface blaster near the Ingersoll Rand rock drill that day. Stover has worked in surface mining for 11 years and around drills for six to seven years. He loads the drill hole stems with drill cuttings, wires the shots, and blasts them. On July 17, he arrived at the worksite around 7:00 a.m. Dust was emanating from the drill "pretty bad" and, at times, Stover was working in the drill dust. He estimated that he was 100 feet from the drill when it was shut down and that one member of the crew was 50 feet closer. He testified that on a typical day, he would work as close as ten feet to the drill while drilling is in progress and although he tries to maneuver out of the dust, because of the wind, he is not always able to avoid it.

Rick Phillips was also working as a surface blaster near the Ingersoll Rand rock drill on July 17. According to Phillips the dust conditions were "bad" around the drill that day. There was a large cloud of dust around the cab and drill and the dust was so thick near the drill that it was difficult to see through it. The dust was present from the time the blasters arrived around 7:00 a.m. While he was working between 50 and 100 feet from the drill when the inspector arrived, he usually works within 20 feet of the drill. The other blasters generally worked within 20 to 30 feet of him. According to Phillips, because of the changing wind conditions, dust from the drill reached the blasters. Phillips estimated that if the drill had not been shut down that day, the blasters would have worked approximately five hours near the Ingersoll Rand rock drill. Phillips did not recall whether he wore a respirator that day. On July 18, 1996, after repairs, the inspector observed the drill operating without generating dust.

Docket No. WEVA 96-185

Citation No. 4629641

Jerry Robertson, an MSHA surface mine inspector issued this citation on July 8, 1996, at the Hobet No. 7 Mine. The citation alleges a "significant and substantial" violation of 30 C.F.R. § 72.620 and charges as follows:

> Management and/or the operator failed to effectively control the dust being produced by the Ingersoll Rand Drill DMSOE C/O 23161 at the 10 pit area. The writer observed the following: (1) dust in the air, over under and around the

operator's cab (white in color), (2) defective door seals; defective air conditioning (temperature 80°); (3) dust coming up around drill stem, (4) defective cyclone discharge, (8) missing discharge flex tube, (6) cyclone system appears to [be] inadequate at the time of inspection, due to the amount of dust being discharged.

Robertson has five years experience with MSHA and 23 years experience in the coal mining industry, including work as an instructor and mine foreman. On July 8, 1996, Michael Hudak was a mining engineer with MSHA District 4. He is a 1961 graduate of West Virginia University with honors in mining engineering. On November 17, 1997, Hudak became a coal mine health and safety specialist in MSHA's safety department in Arlington, Virginia. He has 36 years experience in the mining industry including work as a project engineer and mine manager and has been with MSHA for about four years.

On July 8, 1996, Robertson and Hudak inspected the No. 7 Surface Mine. They were driving along the access road to pit 10, about one-quarter mile away, when they saw dust emanating from a drill operating at the pit on a reclaim bench. They approached the drill, an Ingersoll Rand DM 50, observed drilling operations for several minutes, and then shut it down. The dust cloud generated from drilling was approximately 15 to 20 feet wide by 15 to 20 feet high. Drill dust was seen over, under and around the operator's cab. The interior of the cab, where the drill operator worked, was also heavily dusted. Robertson placed his hand on a flat surface inside the cab, pulled it away, and saw that the imprint of his hand remained. Dust covered the ceiling, sides, doors and controls. Robertson concluded, based on the amount of dust, that it could not have accumulated as a result of collaring alone.

The rubber seals on the door to the operator's cab were "very, very ragged." Robertson stated that when he looked at the seals from inside of the cab, he could see light from the outside. Hudak noted that there were places where the seal itself was torn completely off and there were few places where the door was actually sealed. Robertson concluded that it would have taken several days for the seals to have deteriorated to the condition in which they were found. Curtis Lester, the driller operator, confirmed that the seals had been in poor condition for several days.

The air conditioner was also inoperative although its blower was functioning. However, given the defective door seals, dust from the outside was being brought in. The outside temperature in Charleston, West Virginia on July 8, 1996, was 80 degrees. Inspector Robertson speculated that it was only a matter of time before the heat inside the cab would become unbearable, and the operator would open the windows for relief, thereby exposing himself to even more of the drill dust. The driller operator told Inspector Robertson that there had been problems with the air conditioner for several days.

The inspectors opined that dust observed inside the cab was drill dust that had entered the cab through the deteriorated rubber door seals. With the door seals failing to seal, and the air conditioner failing to completely pressurize the cab, there was nothing to preclude drill dust from entering the cab.

The inspectors also found that the cyclone discharge was defective. It was not sealed against the side of the dust collector system. Therefore, when the system discharged the dust was blown sideways into the atmosphere at eye level instead of dropping down to the ground. In addition, the discharge flex tube was missing. This component of the drill dust control system consists of a long tube which is attached to the end of the discharge chute. It is designed to force the discharged dust to the ground in a concentrated form. Without the discharge flex tube, dust was being propelled into the air in an uncontrolled manner. The drill stem collar was also defective and was allowing dust to be blown back into the drill deck and cab areas. Finally, the inspectors concluded that the cyclone, which is the vacuum for the drill dust control system, was inadequate.

The hole was well past the collaring stage. The drill was on its second steel, about 25 feet into the hole. Inspector Robertson noted that almost half of the drill steel was in the ground when he arrived.

Curtis Lester, the driller operator who ran the Ingersoll Rand DM 50 drill on July 8, 1996, had worked in surface mining for over 20 years and had worked for Hobet for over 17 years. He had been a driller operator at the No. 7 Surface Mine for 15 years, and had operated the Ingersoll Rand DM 50 drill for the three to four months it had been on the job site. On July 8, he arrived at the bench around 8:30 a.m. The dust that day was "pretty heavy" and conditions inside the cab were dusty. Inside the cab, he used rags to wipe the controls and windows, but a "little bit later on, it would be dusted again." He typically worked inside the cab, unless he was laying out holes.

On several occasions before July 8, Lester had reported the dusty conditions inside the cab to management. The dust collector often broke down (about every other day) and the drill dust was entering the cab through cracks in the doors. Before July 8, the company tried to put a seal around the cracks but that was ineffective and the dust continued to enter. Lester also remembered that July 8 was a sunny, dry day, and it was possibly 80 degrees in the cab. The blowers were working but the air conditioning was not functioning, and therefore, hot air was merely being circulated.

Lester confirmed that there was drill dust coming up around the drill stem. He had reported that condition to management before. The dust around the drill stem was caused by a bent piece of steel. He also confirmed that there was a problem with the exhaust chute coming off the dust collector and that the cyclone system was inadequate. Lester stated that when he called mechanics to fix the dust collector, "a lot of times they would be busy working on other equipment at the shop and the equipment foreman couldn't release their mechanics to send them out at that time." Lester was not wearing any respiratory protection that day.

On July 9, 1996, Inspector Robertson returned to the mine to re-inspect the drill. He found that the door seals had been repaired, the air conditioning was working, and the operator's cab had been cleaned. However, the drill was continuing to release dust into the work environment around the drill stem and around the discharge chute in the same quantity as the day before. Accordingly, he issued Section 104(b) "failure to abate" Order No. 4629643. That order

is now final and will be considered in assessing a civil penalty for the violation at issue. On July 10, 1996, Robertson again returned to the mine to examine the drill. He found that the filters had been replaced, the discharge chute had been sealed against the dust collector and a flex tube and dust collars had been installed. As a result, the drill dust was under control, and no dust was released even during collaring.

Docket No. WEVA 97-33

Citation No. 7152206

This citation, issued on September 23, 1996, alleges a "significant and substantial" violation of 30 C.F.R. § 72.620, and charges as follows:

> The Ingersoll Rand DM 50 Drill, Co. No. 22875, does not have effective dust control measures being used during operation. The dust collection system is not working properly, causing a visible cloud of dust to be discharged from the exhaust blower. Two members of the blasting crew are exposed to the excessive discharge of dust.

Donald Winston has been an MSHA inspector for approximately three-and-a-half years. He has a master's degree in mining engineering, a bachelor's degree in civil engineering and is a registered professional engineer. Winston has also worked as chief engineer for two mining companies for a total of 17 years. At the time of the hearing, he was working as a Compliance Analysis Program (CAP) Specialist with MSHA. In that capacity, he visited surface mines and discussed the hazards of silicosis with employees.

On September 23, 1996, Inspectors Winston and Workman visited the Peats Branch No. 3 Surface Mine. Around 10:25 a.m., they drove up an inclined road towards a box cut, and parked their truck near the entrance. They observed a drill (Ingersoll Rand DM 50 company number 22875) operating in the box cut discharging dust from the exhaust blower. A stream of dust was shooting out the exhaust port of the dust collector at high velocity and blowing across the drill bench. The dimensions of the exhaust port were approximately eight by ten inches, and the visible dust stream was being pushed approximately 30 to 40 feet from the drill.

Two blasters, who were not wearing respiratory protection, were working within 70 to 80 feet of the drill. While these men were not engulfed in the visible dust at the time of the inspection, they were working directly across from the stream of drill dust. Winston speculated that if the wind should change direction, these miners would have been exposed to the drill dust. It was also Winston's opinion that high winds were likely to occur in the area in which the drill was operating. Peat's Branch No. 3 is a mountaintop surface mine from which the trees have been removed. Box cuts are more likely than other areas to have turbulent winds because of the turbulence produced when the wind hits the highwalls. This box cut had three highwalls and one open side. The highwalls on the sides were approximately 80 to 100 feet high. In the confined area of the box cut, it was opined that winds could carry drill dust to anyone working therein.

The drill was shut down, and new filters were installed on the dust collector. The inspectors then observed the drill operating without visible dust being discharged from the exhaust blower.

Evaluation of the Evidence

The mandatory standard at issue, 30 C.F.R. § 72.620, provides as follows:

> Holes shall be collared and drilled wet, or other effective dust control measures shall be used, when drilling non-water-soluble material. Effective dust control measures shall be used when drilling water-soluble material.

In the cases at bar it is undisputed that the subject holes were not drilled wet. I find that the Secretary has also clearly met her burden of proving in each of these cases by a preponderance of the evidence that other effective dust control measures were not being used. In each of these cases the Secretary has established by a preponderance of the evidence that dust controls were missing, defective, or ineffective. Under the plain meaning of the cited standard and the facts of these cases, that is sufficient to establish the violations. I note that this interpretation is also consistent with the preamble to the cited standard in which it is clearly stated that MSHA intends to cite mine operators for violations of this standard "when a dust control is missing, defective, or obviously ineffective by visual inspection" (Gov. Exh. 54 at 8324). The preamble also specifically rejects the proposition that a total mechanical failure of a drill dust control system would necessarily have to exist before a citation for a violation of this standard may be issued. In this regard, the preamble states:

> Most failures of drill dust controls are readily identified and easily corrected. Rather than mechanical breakdown of the controls, malfunctions are generally the result of oversights or poor maintenance, such as failure to turn on water, to fill water-holding tanks, or to empty filters. (Gov. Exh. 54 at 8323).

It is therefore not necessary in these cases to determine whether the presence of visible dust alone can establish a violation of the cited standard. Moreover, contrary to Hobet's arguments, the language of the cited standard does in fact provide reasonable notice of what is forbidden and, therefore, the standard comports with due process. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). The Commission in *Secretary v. U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1546 (August 1993), also held that an operator cannot legitimately contend that it did not have notice of the conduct required by a regulatory standard if it has been cited previously by an authorized representative of the Secretary for a similar violation of the same standard. The record herein clearly establishes that Hobet has previously been so cited. (See Gov. Exh. 14).

Citation No. 7152439

The Secretary argues that dust control on the Marion drill here cited was ineffective because the dust collection system had not been maintained in proper working condition. The

drill table shroud (skirt rubber) had not been maintained properly so as to provide an enclosed area for the dust collector to maintain the necessary capture of the dust being generated by the drilling process. In addition, the filters used in the dust collector had not been maintained to ensure that sufficient air could be moved by the collector to capture the dust laden air being expelled from the drill hole by the bailing air. The dust collector blower unit had also not been maintained as designed with the drive belts to maintain sufficient air movement through the dust collector to pick up the dust-laden air being generated by the drilling process. Finally, there were holes in the dust hose which allowed rill dust to escape into the work environment . Robert Thaxton, MSHA's Supervisory Industrial Hygienist and expert witness in dust control opined that, indeed, these conditions constituted defects to the drill's dust collection system.

While not disputing the factual allegations, Hobet appears to argue that the evidence shows the dust control measures were inefficient but not ineffective within the meaning of the cited standard. I find however that the Secretary has met her burden of proving that effective dust control measures were not being used.

Citation No. 7159321

The Secretary maintains that dust control on the Robbins drill here cited was likewise ineffective because the dust collection system had not been maintained in proper working condition. A section on one side of the shroud had been torn away and the shroud was elevated so that there was a gap of about four inches between the bottom of the shroud and the ground. The dust collection filters also were dirty and reduced the quantity of air which could be moved through the dry dust collector. Thaxton opined that these conditions prevented the dust collector from maintaining a sufficient capture velocity to pick up the drill dust as it exited the drill hole. He further opined that these conditions constitute defects to the drill's dust collection system.

Hobet here argues that because both filters and skirt rubbers are routinely replaced "every 250 hours or as needed," there was no violation. This argument is no defense to the violation however, but goes only to the issues of abatement and negligence. The violation is accordingly proven as charged.

Citation No. 7159340

The Secretary argues that dust control on the Ingersoll Rand rock drill here cited was ineffective because the dust collection system had not been maintained in proper working condition. The drill was operating on an incline with the dust shroud elevated off the ground but the violation was also the result of dirty dust collection filters. Thaxton opined that the combination of the improper work practice and defective conditions on the drill decreased the capture velocity and rendered the system ineffective.

Hobet again does not dispute the factual allegations but argues that it is common industry practice to maintain skirt rubbers three to four inches off the ground and, under some circumstances, as high as six inches off the ground. This argument is no defense however and the undisputed facts alone are sufficient to sustain the violation as charged.

Citation No. 4629641

The Secretary maintains that dust control on this Ingersoll Rand drill was ineffective because the dust collection system had not been maintained in proper working condition. The facts are undisputed. Dust was being released into the work environment around the drill stem due to a bent piece of steel. The system also had a defective cyclone discharge and missing discharge flex tubes. Thaxton opined that these conditions were defects that rendered the system ineffective. According to Thaxton, the drill stem collar and improperly operating cyclone allowed the dust from drilling to escape into the atmosphere. Moreover he concluded that the unsealed cyclone discharge and missing flex tube allowed drill dust that should have been pulled into the dust collection system to be released into the atmosphere surrounding the operator's cab.

Hobet does not dispute the facts but claims that the cited defects would be corrected by routine maintenance. These claims do not of course, afford a defense to the violation but is a factor that may mitigate negligence. Hobet also appears to argue that the Secretary has the burden of proving that the cited defects can be avoided by current technology. Since Hobet corrected the defects with current technology the argument is obviously without merit.

Citation No. 7152206

The Secretary notes that large quantities of visible airborne dust were being blown out of the exhaust blower of the cited Ingersoll Rand DM drill at high velocity. Hobet concedes that the filters were wet and clogged. Thaxton opined that the fact that the drill dust was exiting the dust collector exhaust established that the system was not filtering the small dust particles from the air, but was simply moving the drill dust from the confines of the deck shroud to the atmosphere around the drill. New filters were installed on dust collectors and visible dust was no longer observed exiting the exhaust blower. It may therefore reasonably be inferred that the filters had been defective or ineffective.

The facts are not disputed by Hobet but it argues that the citation should nevertheless be vacated because clogged filters cannot be avoided. This argument affords no defense. While clogged filters may not be avoided they can nevertheless be replaced.

In affirming the violations in these cases, I have not disregarded Hobet's repeated claims that dust control measures are "plagued with numerous problems brought about by hard use," that it utilized the "best dust control technology available," acted "promptly" to repair problems with the dust control systems, and "instructed miners to withdraw if dust conditions get too bad before maintenance could make repairs" (Resp.'s Brief Pg. 48). However, these claims do not provide a defense to the violations and are accordingly rejected. Such issues may be considered in regard to abatement and possible mitigation of negligence.

Significant and Substantial

Under present law, the elements for determining whether a violation of a mandatory health standard is significant and substantial are: (1) an underlying violation of the mandatory

health standard; (2) a discrete health hazard - - a measure of danger to health - - contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature. *Secretary of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); *Secretary of Labor v. Consolidation Coal Company*, 8 FMSHRC 890, 897 (June 1986), *aff'd*, 824 F.2d 1071 (DC Cir. 1987); *See also Secretary of Labor v. FMC Wyoming Corp.*, 11 FMSHRC 1622, 1626 (September 1989).

The determination of "significant and substantial" must be based on the facts existing at the time the citation is issued but also in the context of continued normal mining operations without any assumptions as to abatement, *Secretary of Labor v. U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984). Thus, it cannot be inferred that the violative condition will cease. *Secretary of Labor v. Gatliff Coal Company*, 14 FMSHRC 1982, 1986 (December 1992).

In the *Consolidation Coal Company* case (*Consol*) the Commission adapted the *Mathies* test to a violation of a mandatory health standard. In that case, Consol received a citation for a violation of 30 C.F.R. Section 70.100(a), which requires that the average concentration of respirable dust in the mine atmosphere during each shift to which a miner is exposed be maintained at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device. Sampling results showed that miners had been exposed to an average respirable dust concentration of 4.1 mg/m^3.

The Commission in *Consol* held that the violation was significant and substantial. The Commission concluded that any exposure above 2.0 mg/m^3 based on designated occupation sampling would satisfy the second element of the test, and therefore, the violation posed a measure of danger to health. *Id.* at 898. The Commission also found that there was a reasonable likelihood that the health hazard contributed to would result in an illness. *Id.* at 899. The Commission recognized that the development and progress of respiratory diseases are due to the cumulative dosage of dust a miner inhales, and that proof of a single incident of overexposure does not, by itself, conclusively establish a reasonably likelihood that respirable disease will result. *Id.* at 898. The Commission recognized that although overexposure to respirable dust clearly can result in chronic bronchitis and pneumoconiosis, the effects of the health hazards associated with overexposure to respirable dust usually do not cause immediate symptoms, and that assessing the precise contribution that a particular overexposure will make to the development of respiratory disease is not possible.

Because of these considerations, the Commission concluded:

> . . . given 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, we hold that if the Secretary proves an overexposure to respirable dust in violation of section 70.100(a), based upon designated occupation samples, has occurred, 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. *Id.* at 899.

The fourth element of the significant and substantial test, whether a reasonable likelihood that the illness in question will be of a reasonably serious nature, was not seriously disputed, and the Commission held that there is a reasonable likelihood that illness resulting from overexposure to respirable dust will be of a reasonably serious nature.

The Commission in *Consol* held that when the Secretary proves that an overexposure in violation of 30 C.F.R. Section 70.100(a), based upon designated occupation samples, had occurred, a presumption arises that the violation is significant and substantial. *Id.* The operator may rebut this presumption only by establishing that miners in the designated occupation were not exposed to the hazard posed by the excessive concentration of respirable dust. *Id.*

On appeal, the DC Circuit affirmed the Commission's decision and rejected Consol's argument that the presumption adopted by the Commission lacks a rational basis because short-term exposure to respirable dust can never result in a significant and substantial violation. *See Consol*, 824 F.2d at 1085.

The Court reasoned as follows:

> Consol's argument fails to consider the inherent difficulties in enforcing a health standard designed to prevent diseases caused by the cumulative effects of repeated overexposure to a harmful substance. The harmful effect of any one incident of exposure to excessive concentrations of respirable dust is negligible - - as the ALJ phrased it, a "drop in the bucket." Thus, acceptance of Consol's argument would mean that *no* violation of the respirable dust could ever be designated as significant and substantial.

Id. at 1086.

In *Secretary v. U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274 (September 1986), the Commission applied the analysis used in *Consol* to a case involving the respirable dust standard when quartz is present. After considering the legislative history which discussed the Congressional intent to prevent respirable diseases induced by silica-bearing dust, the Commission held that any overexposure to respirable dust based upon designated occupation sampling results giving rise to a violation of 30 C.F.R. Section 70.101 presents a discrete health hazard. *See Id.* at 1279-1280. Thus the second element of the *Mathies* test had been met.

The Commission then concluded that there was a reasonable likelihood that the health hazard contributed to will result in illness:

> . . . The nature of the health hazard posed by excessive concentration of respirable dust containing quartz is in some respects greater than that posed by respirable dust without quartz. The fibrosis associated with silica-bearing dust is irreversible

> and may continue to develop after exposure has ended. Although the present state of scientific and medical knowledge does not make it possible to determine the precise point at which respirable diseases induced by silica-bearing dust above the applicable exposure limit are an important risk factor. Accordingly, given the nature of the heath hazards at issue, the potentially devastating consequences to affected miners, and the strong concern expressed by Congress for the elimination of occupation-related respiratory illnesses in miners, we hold that where the Secretary proves an overexposure to respirable dust in violation of section 70.101 based upon designated occupation samples, a presumption arises that the third element of the significant and substantial test - - a reasonable likelihood that the hazard contributed to will result in an illness - - is established.

Id. at 1281.

The fourth element of the significant and substantial test, a reasonable likelihood that the illness in question will be of a reasonably serious nature, was not disputed. *Id.* The Commission concluded by holding that proof of an overexposure to respirable dust containing silica gives rise to a presumption that the violation is significant and substantial. *Id.*

In the cases at bar, the first element of the *Mathies* test as modified in the *Consol* cases, has been met, i.e., the Secretary has proven a violation in each case of the mandatory health standard at 30 C.F.R. § 72.620. It is the second element, i.e., the existence of a discreet health hazard - - that is, a measure of danger to health - - contributed to by the violation, for which the Secretary has failed to sustain her burden of proof. In contrast to the *U.S. Steel* case wherein the second *Mathies* element was met by proof of overexposure to respirable dust by designated occupational sampling, the Secretary here seeks to establish that element by first creating an evidentiary presumption that visible dust clouds emanating from surface coal mine drills such as those described in these cases by photographic and/or testimonial evidence contain hazardous levels of respirable coal mine dust and silica (Gov. Exh. No. 26 p. 12). In effect, the Secretary thereby seeks to shift the burden of proof to the operator to disprove that his miners were overexposed to respirable dust and silica -- and thereby to require the operator, rather than the Secretary, to create a program for, and to conduct respirable dust monitoring of, its miners.

However, as the Circuit Court for the District of Columbia recently stated, in reviewing a similar presumption sought by the Secretary, in *Secretary v. Keystone Coal Mining Corporation et al.*, No. 95-1619 (D.C. Cir. August 21, 1998):

> Such a presumption is only permissible if there is "a sound and rational connection between the proved and inferred facts," and when "proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact...until the adversary disproves it." *Chemical Mfrs. Ass'n v. Department of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997) (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-89 (1990)) (internal citation and quotation marks removed).

Even assuming, arguendo, that the Secretary is not seeking to establish a presumption but rather is seeking on a case by case basis to utilize indirect or circumstantial evidence to prove that the miners at issue were overexposed to respirable silica-bearing dust there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. *Garden Creek Pocahontas*, 11 FMSHRC 2148 (November 1989). Moreover, contrary to the Secretary's suggestion, her burden of proof, by a preponderance of the evidence, is not reduced for the purpose of establishing the second element of the *Mathies* test because it may be difficult in a particular case to prove that element or because she has not yet developed a monitor that will obtain accurate real time readouts of exposures by miners to respirable dust.

In attempting to prove the second element of the *Mathies* test the Secretary relies upon the testimony of her expert, Robert Thaxton. Thaxton, an MSHA Supervisory Industrial Hygienist, has a bachelor's degree in chemistry and a master of science degree in occupational health and safety engineering. He has been employed by the Petitioner and MSHA as an industrial hygienist since 1976. Thaxton was accepted at hearing as an expert witness in drill dust control systems and respirable dust sampling.

Thaxton was not present and did not observe first hand the conditions surrounding the issuance of any of the citations at issue. His conclusions were based on photographs (Citation No. 7152439 and 7159340), a videotape (Citation No. 7159321) and oral testimony of eyewitnesses regarding the existence of "excessive amounts of visible dust". With respect to Citations No. 4629641 and 7152206, there were no photographs or videotapes of the conditions and Thaxton relied solely upon testimony that "visible dust" was present. Thaxton asserts that visible dust clouds similar to those described in these cases result in respirable dust concentrations of 10 to 100 mg/m^3, and that, therefore, there is no need to perform respirable dust sampling to establish individual overexposures to respirable dust.

Thaxton's analysis proceeds as follows:

> There is no reason to sample in situations where visible dust is being emitted from a drill. NIOSH, The Bureau of Mines and MSHA have determined that highwall drills are the single greatest source of respirable coal mine dust at surface coal mines and that the dust generated from drilling operations contains large quantities of crystalline silica or quartz. This makes sense when one considers that the drilling process is a mechanical grinding, the purpose of which is to pulverize the rock into small particles. This grinding process inherently produces respirable dust along with larger particles and cuttings. The method used to remove this particulate matter from the drill hole is high pressure compressed air which forces this harmful material into the work environment. If the dust collector is working improperly, this harmful respirable dust is released into the work atmosphere.
>
> We know that a large portion of the dust produced from surface drilling contains crystalline silica because the coal deposits are laid down with sedimentary rocks and clay, with much of the rock being sandstone and/or shale and clays. All three

materials, as well as some coals, contain crystalline silica. The Bureau of Mines publication entitled "Sources and Characteristics of Quartz Dust in Coal Mines" found that at 9 different surface coal mines, the quartz content of drill cuttings ranged from 20.0% to 69.0%.

The presence of respirable dust as a component of visible dust is an elementary principle of industrial hygiene. The very existence of a visible dust cloud in suspension long enough to be seen 20-30 feet away from the drill hole established the existence of significant amounts of respirable dust. This is so because respirable particles, that is, those particles that are 10μm or smaller in size, remain suspended in the air much longer than non-respirable particles. For example, a 10μm particle will only fall approximately 0.03 cm/sec in still air. This principle is discussed in the book titled "Pulmonary Deposition and Retention of Inhaled Aerosols." There it is stated that an aerosol includes a system of suspended particles in air that are fine enough to possess considerable stability as an aerial suspension. Particles in the 10-20μm size range are in suspension only briefly; however, if one observes a dust suspension or cloud, the majority of particles making up that cloud are in the respirable range — that is, smaller than 10μm. Similarly, the Occupational Safety and Health article titled "Dust Control in the Working Environment (Silicosis)" states that particles smaller than 10μm can remain airborne for a very long period and that these particles travel with the air currents. The Bureau of Mines article entitled "Transport of Respirable Dust from Overburden" concluded that 42% of the dust from drilling traveled a distance of 28.96 maters (95 feet). In addition, in the primer industrial hygiene text "Fundamentals of Industrial Hygiene" published by the National Safety Council (4th Ed.), it is stated that respirable dust particles are visible in strong light and that high concentrations of respirable dust particles may be perceived as a haze or have the appearance of smoke.

Studies by the former Bureau of Mines indicate that visible dust clouds similar to those photographed, videotaped and described in the current case have respirable coal mine dust concentrations of 10 to 100 mg/m^3. For example, the Bureau of Mines study entitled "Quartz Dust Sources During Overburden Drilling at Surface Coal Mines" found dust concentrations as high as 98.0 mg/m^3 at the drill shroud. My own fieldwork confirms the fact that visible clouds of dust contain high levels of respirable coal mine dust. Without exception, every time that I have sampled an occupation exposed to visible dust from drilling, I have found high levels of respirable dust.

(Gov. Exh. No. 26 pp. 7-8).

The weight to be given Thaxton's opinions in support of the Secretary's claims that the violations herein constituted a discrete health hazard depends on the relevance and reliability of the underlying scientific evidence, i.e., the above publications and studies and Thaxton's own "field work." In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the

U.S. Supreme Court provided guidelines for determining when scientific evidence is reliable:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation - - i.e., "good grounds," based on what is known. . .
>
> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry"...
>
> Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability . . . But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. . . The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Id. at 590, 593-594 (citations omitted).

The U.S. Supreme Court has also stated that the reliability of scientific evidence, or an expert opinion based thereon, can be called into doubt if the studies upon which an expert bases an opinion bear little factual similarity to the facts presented in a particular lawsuit. *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997). The Supreme Court also held in that case that the District Court did not abuse its discretion when it excluded an expert's opinion that was connected to existing data only by *ipse dixit* i.e. a bare assertion resting solely on the authority of the individual expert. *Id.* at 519.

Within this legal framework and for the reasons set forth below I find that the sources underlying Thaxton's opinions are unreliable and/or irrelevant (bearing insufficient factual similarity to the instant cases) and, accordingly, those opinions cannot be accorded any weight. Those opinions, at bottom, are indeed based only upon *ipse dixit*. There is simply too great an analytical gap between the cited studies and Thaxton's opinions. *See Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (6th Cir.), *cert. den.*, 506 U.S. 826 (1992). Without Thaxton's testimony the Secretary cannot sustain her burden of proving the second element of the *Mathies* test in these cases and has thus failed to prove that the violations at bar were significant and substantial. Neither the Secretary's proposed presumption nor the ultimate facts she seeks to have inferred can be established by the evidence.

Thaxton's conclusions correlating visible dust emanating from highwall drills and the exposure of the miners at issue to respirable dust concentrations of 10 - 100 mg/m^3, are based

upon seven sources: (1) a Bureau of Mines Publication entitled "Sources and Characteristics of Quartz Dust in Coal Mines," in which the quartz content of drill cuttings at nine different surface mines (not including any of the Hobet mines at issue in these cases) ranged from 20.0% to 69.0%, (2) selections from a book entitled"Pulmonary Deposition and Retention of Inhaled Aerosols," (3) an Occupational Safety and Health article entitled "Dust Control in the Working Environment (Silicosis), (4) a Bureau of Mines article entitled "Transport of Respirable Dust from Overburden," (5) an industrial hygiene text "Fundamentals of Industrial Hygiene" published by the National Safety Council (4th Edition), (6) a Bureau of Mines study entitled "Quartz Dust Sources During Overburden Drilling at Surface Coal Mines" and (7) Thaxton's own field work in which "without exception, every time that (Thaxton) sampled an occupation exposed to visible dust from drilling, (Thaxton) found high levels of respirable dust." These publications and studies have been examined and are rejected as irrelevant and/or unreliable for the reasons set forth below.

"Sources and Characteristics of Quartz Dust in Coal Mines" (Gov. Exh. No. 37)

This publication by the Bureau of Mines is cited by Thaxton for the proposition that the quartz content of drill cuttings at nine different surface coal mines ranged from 20.0% to 69.0%. However, since the location and the composition of the geological strata at the nine surface mines tested are not identified it cannot be known whether there is any correlation between the quartz content of drill cuttings at the tested mines and those of the Hobet mines at issue in these cases. The relevance of the cited study to the instant cases is therefore not established. There is no rational connection between the evidentiary fact alleged (that the quartz content of drill cuttings at nine unidentified mines ranged from 20% to 69%) and the ultimate fact to be inferred (that the miners at issue in the cases at bar were overexposed to hazardous levels of quartz bearing respirable dust at the times alleged). *Garden Creek Pocahontas,* 11 FMSHRC 2148 (November 1989).

"Pulmonary Deposition and Retention of Inhaled Aerosols" (Gov. Exh. No. 32)

This publication is cited by Thaxton in his direct examination for the following conclusions:

> The very existence of a visible dust cloud in suspension long enough to be seen 20-30 feet away from the drill hole establishes the existence of significant amounts of respirable dust. This is so because respirable particles, that is, those particles that are ten microns or smaller in size, remain suspended in the air much longer than non-respirable particles. For example, a ten micron particle will only fall approximately 0.03 centimeters/second in still air. This principle is discussed in the book entitled, "Pulmonary Deposition and Retention of Inhaled Aerosols." There it is stated that an aerosol includes a system of suspended particles in air that are fine enough to possess considerable stability as an aerial suspension. Particles in the 10-20 micron size range are in suspension only briefly; however, if one observes a dust suspension or cloud, the majority of particles making that cloud are in respirable range--that is, smaller than 10 microns. (Gov. Exh. No. 26 p. 7).

The cited text is inapposite to the cases at bar since it is based upon an "approximate range of air movement in the so-called 'still air' of an ordinary closed room." These cases on the other hand involve open-air benches exposed to winds of varying velocities and directions. One case (Citation No. 7152206) also involved the propulsion of dust from a blower at high velocity. The effect of such velocities on the settlement rate of respirable and non-respirable dust particles is not discussed. The relevance of the cited study to the facts at bar has not therefore been established and the study is accordingly rejected.

In his testimony Thaxton also cited the above text for the proposition that a visible dust cloud is an aerosol, that aerosols are composed of particles less than 10 microns in size, and thus a dust cloud is composed primarily of respirable dust. According to Thaxton, a dust cloud could not be 99 percent non-respirable dust, because "(i)f that cloud was 99 percent non-respirable, the dust would be falling out and it wouldn't be a cloud traveling 30 or 40 feet away from the drill." The Secretary in her posthearing brief also reasserts that "particles in the 10 to 20 micron range...are in suspension only briefly and cannot float 30 to 40 feet away from a drill." Thaxton's opinion and the Secretary's position are not based however on the factual record at bar. In particular, with the exception of testimony regarding Citation No. 7152206, neither the miners nor the MSHA inspectors described the dust clouds 30 to 40 feet from the drills. Nor did they state, contrary to Thaxton, that the dust clouds were 20 to 30 feet from the drills. MSHA Inspector John Workman indicated that the dust cloud he observed at the Hobet No. 21 Mine on May 21, 1996, was confined to the area around the operator's cab, drill mast, and front of the machine. (Citation No. 7152439). Similarly, Workman indicated that the dust he saw at the Hobet No. 21 Mine on May 30, 1996, was also confined to the front and cab areas of the drill. (Citation No. 7159321). MSHA Inspector Jerry Robertson described the dust cloud he saw at the Hobet No. 7 Mine on July 8, 1996, at 15 to 20 feet high and wide. (Citation No. 4629641). MSHA mining engineer Michael Hudak described that same dust cloud as being 15 feet, 18 feet, or 20 feet wide and high. Even Thaxton testified that the cloud depicted in Government Exhibit No. 12-1E was no more than 20 feet wide. (Citation No. 7159340). In addition the inspectors uniformly testified that they never saw non-driller operators or helpers who were located 50 feet to 300 feet from the drills, in the dust.

Since Thaxton erroneously assumed that the dust clouds at issue dispersed 20 to 40 feet from the drills, his conclusions based upon the size of the dust clouds are likewise erroneous. Accordingly for this additional reason Thaxton's conclusion that the visible dust in these cases must have been comprised principally of respirable particles can be given no weight.

As noted, Citation No. 7152206 issued September 23, 1996, at Peats Branch No. 3 Mine, by MSHA Inspector Donald E. Winston, can be further distinguished from the other citations. Winston stated that the dust he saw streaming from the blower "a substantial distance, 30, 40 feet" was not like the dust clouds at issue in the other citations. The dust Winston here observed was being propelled at a high velocity and was "not as dense" as the dust clouds. As noted, the studies relied upon by Thaxton do not discuss such high-velocity projections or address how a velocity of the type witnessed by Winston could affect the particle size or settling rates.

It is also noted that while Thaxton cites this article to support his statement that "if one observes a dust suspension or cloud, the majority of particles making up that cloud are in the respirable range --that is, smaller than 10 microns" nothing in the two-page portion of the text submitted as evidence in this hearing actually supports this statement.

"Dust Control in the Working Environment (Silicosis)" (Gov. Exh. No. 34)

This article is cited by Thaxton for the proposition that "particles smaller than 10 microns can remain airborne for a very long period and that these particles travel with the air currents." The generalization stated in this article does not however prove the issue central to these cases i.e. whether the miners at issue were overexposed to respirable dust, nor does it support Thaxton's conclusion that the visible dust in these cases contained high levels of respirable dust.

Indeed the article further detracts from Thaxton's conclusions and the previous study relied upon by Thaxton (Gov. Exh. No. 32) in that it corroborates that the rate of fall of the dust particles studied was established in still air. The article cautions that the studies are also based on an analysis of a spherical quartz particle and that the velocity of the fall of a particle also varies according to its density and shape. Since the density and shape of any dust particles in these cases as well as the velocity and direction in which the particles were being projected, are unknown, the relevance to these cases of studies relied upon by Thaxton involving spherical quartz particles in still air has not been established.

"Transport of Respirable Dust from Overburden Drilling at Surface Coal Mines" (Gov. Exh. No. 36)

This article is cited by Thaxton for the proposition that "42% of the dust from drilling traveled a distance 28.96 meters (95 feet)". The relevance of the study to the instant cases has not been established. Indeed it is stated therein that "owing to the extremely complicated nature of gas and dust transport via ambient wind currents, the calculated values of R are presented with the intention of merely describing the maximum values obtained and the general trends of how R varies with distance". It is also noted that during sampling in this study "a recording wind anemometer was used to measure wind direction and velocity in order to establish and maintain proper sampling locations during the testing." In the cases at bar there were no such controls. Finally, the calculation of respirable dust exposure at varying distances still depends upon the amount of respirable dust emanating at its source--something that has been the subject of speculation but has not been established in the cases at bar.

"Fundamentals of Industrial Hygiene" (Gov. Exh. No. 33)

This text is cited by Thaxton for the proposition that "respirable dust particles are visible in strong light and that high concentrations of respirable dust particles may be perceived as a haze or have the appearance of smoke". (Gov. Exh. No 26 p. 7). The cited text states as follows:

> Most industrial particulates consist of particles that vary widely in size; the small particles greatly outnumber the larger ones. Consequently, when dust is

noticeable in the air around an operation, more invisible dust particles than visible ones are probably present.

Thaxton opined that more respirable particles than non-respirable particles are present in a drill dust cloud because respirable particles i.e. those less than 10 microns in diameter, are invisible. He was presumably relying upon the summary conclusion in the above text that more invisible particles than visible are "probably present" in noticeable dust. The mere probability of a presence does not however meet the standard of reliability needed to accord credibility and weight to scientific evidence.

Even more problematic however is the evidence that not all invisible particles are small enough to fall within the "respirable" range. Thaxton appears to have ignored this critical fact. The various charts and discussion contained in the studies establishes that non-respirable particles ranging in size from 10 to 50 microns are not, and particles between 50 and 100 microns might not be, visible to the human eye. Government Exhibit No. 32 Figure 1.1 indicates by a dashed line that it is "doubtful" whether particles between 10 and 100 microns are visible to the human eye. It is also indicated in the instant text, Government Exhibit No. 33 at page 179, that a person with normal eyesight can detect individual dust particles as small as 50 microns in diameter.

It is further stated as follows:

> (s)maller airborne particles can be detected individually by the naked eye only when strong light is reflected from them. Particulates of respirable size (usually considered to be below 5 microns) cannot be seen as individual particles without the aid of a microscope. However, high concentrations of suspended small particles may be perceived as a haze or have the appearance of smoke. (Gov. Exh. 33 and Fig. 8-2).

While Thaxton concluded from this language that the dust clouds at issue consisted primarily of respirable dust particles, the charts and discussion in Government Exhibits 32 and 33 establish that non-respirable particles ranging in size from 10 to 50 microns come within the classification of "small particles" that also may be perceived as haze or smoke.

The other studies also establish that non-respirable particles ranging in size from 10 to 50 microns fall within the classification of "aerosols" that Thaxton opined may be seen by the naked eye, if present in sufficient concentrations. According to Thaxton, the following language from the article "Pulmonary Deposition and Retention of Inhaled Aerosols" (Gov. Exh. No. 32), supports his conclusion that only aerosol particles of respirable size would remain in dust clouds 20 to 40 feet away from the highwall drills:

> The term aerosol, comparable to hydrosol, refers to any system of liquid droplets or solid particles dispersed in air, of fine enough particle size, and consequent low settling velocity, to possess considerable stability as an aerial suspension. A 50 (micron) spherical particle of unit density settles through still air at a velocity of

about 8 cm/sec or 16 ft/min. This is within the approximate range of air movement in the so-called "still air" of an ordinary closed room. Coarser particles, therefore, have relatively little aerial stability, and , indeed, the duration of an atmospheric suspension of considerably smaller particles ([less than] 10-20 [microns]) is so brief that the upper size limit of aerosols of practical interest is well below this size.

(Gov. Exh. No. 32 p. 7).

Thaxton's assertion that only particles less than 10 microns in size could have been in aerial suspension at a distance of 20 to 40 feet from the drills is therefore clearly erroneous. The above study demonstrates that aerosol particles of non-respirable size (i.e., between 10 and 50 microns in diameter could be in aerial suspension 16 feet to 20 feet from a drill and the evidence does not establish that the dust clouds at issue extended more than 15 feet to 20 feet from the drills.

As previously noted, Thaxton also failed to consider the caveat in the studies that the settling rates were obtained in "still air". Considering the windy conditions existing at the subject surface mines, the relevance of these studies to the cases herein has not been established. It is also noted that there are contradictory conclusions in Government Exhibit 34 that moving air keeps particles in suspension longer and in Government Exhibit 33 that moving air causes particles to settle out faster.

"Quartz Dust Sources During Overburden Drilling at Surface Coal Mines" (Gov. Exh. No. 35)

This study is cited by Thaxton for the statement that "dust concentrations as high as 98.0 milligrams per cubic meter [were found] at the drill shroud" studied (Government Exhibit No. 35). Thaxton was unable however to establish the relevance of the cited study to the facts at bar. Thaxton lacked specific factual information regarding the studied conditions. For example, although he believed that the drills in this study and those at Hobet used the same drilling process, he did not know that only one mine was associated with the study, the name or location of the mine, the manufacturer of the drill, or the specifics of the type of dust control system utilized by the drill. In addition, he testified that, while the basic dust control technology for highwall drills has remained unchanged, filter, filter media, and motors had improved greatly since the study was done in 1983 and 1984.

However, even assuming, arguendo, that the conditions in this study and those cited were comparable, the study does not support Thaxton's conclusion that the dust clouds at issue had respirable coal mine dust concentrations of 10 to 100 mg/m^3. Thaxton concluded that dust clouds can contain up to 100 mg/m^3 of respirable dust based upon a RAM (Realtime Air Monitor) reading of 98 mg/m^3 obtained at location where the highwall drill shroud meets the ground. This reading however constitutes only one reading out of approximately 178 contained in that exhibit and is the only reading of 98 mg/m^3 included in the report. Thaxton's focus on the 98 mg/m^3 reading not only ignores other ground shroud readings that were significantly lower than 98 mg/m^3, but minimizes the researchers' findings that the time-weighted averages for the

ground shroud readings were well below 10 mg/m^3, and completely ignores the more relevant readings, for purposes of these cases, obtained at the cab.

In the study, seven RAM readings for respirable dust were taken on the ground next to the drill shroud. These RAM results are listed in Table V. Five of the readings obtained were greater than 25.5 mg/m^3 over a test duration of 18 to 32 minutes, with cumulative test values ranging from 3.2 to 6.8 mg/m^3 . One reading of 24.4 mg/m^3, over a test duration of 40 minutes with a cumulative test value of 3.2 mg/m^3, was reported; while one reading of 98.0 over a test duration of 27 minutes, with a cumulative test value of 7.0 mg/m^3 was reported. According to Thaxton, the readings listed as "greater than 25.5" probably did not exceed 98 mg/m^3. Although Thaxton initially disagreed that the "cumulative test" values constituted time weighted averages ("TWAs"), in the following exchange he admitted that the values constituted TWA's comparable to those utilized to determine compliance with MSHA's respirable dust standard:

Q. The MSHA standard is 2 milligrams over an 8-hour shift exposure?
A. Or less.
Q. Or less?
A. It is full shift, whichever is less. Surface mines typically, in the past, ran seven and a quarter hours. Seven and a quarter hours would be plugged into the calculation.
Q. You are measuring the miner's exposure over the entire working shift, correct?
A. Yes.
Q. That recognizes the fact, Mr. Thaxton, you are going to have ups and downs, highs and lows, in that 8-hour shift; does it not?
A. Yes, it does.
Q. When I say ups and downs, I mean varying readings of respirable dust over the shift; is that correct?
A. That's correct.
Q. In this case, even when you went to the shroud and measured a 98, isn't it true that for that 27-minute period the average was 7.0?
A. That's correct.

Thaxton admitted that the one reading of 98 mg/m^3 on Table V was the basis for his conclusion that respirable dust concentrations in a dust cloud can be as high as 100 mg/m^3, even though the single entry on Table V was the only reading in the entire report that approached the 100 mg/m^3 figure. Thaxton also admitted in the following colloquy that no study produced by the Secretary supports his contention that sampling results obtained on the ground at the shroud are representative of exposures for miners whose noses are not at ground level:

Q. Can you show me any study in all this literature that would prove that a miner who is standing within five feet of a drill is going to be breathing the exact same respirable dust content as a pump or a measuring device that's on the ground by the shroud?
A. I cannot point you to a study or a result, no.

The study also included the results of sampling conducted inside the drill cab, and outside the cab near the cab door. (Gov. Exh. No. 35, Table III). The time-weighted averages for the samples inside the cab was 1.65 mg/m^3, while the TWA for the readings outside the cab near the door was 1.43 mg/m^3. The researchers also noted that since the cab door "was normally open during the sampling period, almost the same amount of respirable dust and quartz dust was measured inside and outside the cab." (Gov. Exh. No. 35 at 366). Despite these findings, which indicated that significantly lower respirable dust readings exist at locations above ground level away from the shroud, Thaxton assumed that all personnel working in the vicinity of a highwall drill are exposed to respirable dust levels exceeding 10 mg/m^3.

Thaxton testified that he disregarded the lower sampling results obtained by the researchers and reported throughout Government Exhibit 35, because his own undocumented fieldwork substantiated the readings of 10 to 100 mg/m^3 reported in Government Exhibit 35, but did not substantiate the lower readings. No determination can be made as to whether Thaxton's fieldwork, collected between 1976 and 1992, supports his use of the 10 to 100 mg/m^3 figure, since he was unable to produce any of the field data. Neither the reliability nor relevancy of his field data can therefore be established. Thaxton's treatment of the lower readings obtained by the researchers, and the reliability of his conclusion that all dust clouds contain respirable dust levels of 10 to 100 mg/m^3, is also further suspect because Thaxton had no field data on any of the drills at issue, and thus had no written field data of his own to contradict that gathered on April 21, 1997, by MSHA Inspector John Workman regarding two Hobet drills. Workman's samples found no unhealthy levels of silica in samples taken at a Hobet highwall drill that was generating visible airborne dust; however, samples taken at a Hobet drill that was not generating visible airborne dust indicated the existence of high levels of silica.

Under all the circumstances it is clear that Thaxton misconstrued the findings of Government Exhibit No. 35 to conclude that all dust clouds contain 10 to 100 mg/m^3 of respirable dust/silica. Thaxton's testimony established that his opinion rests upon at least two erroneous assumptions; namely that respirable dust/silica readings obtained on the ground at the shroud are comparable to those that would be found in areas where driller operators, driller helpers, and blasters work and that he could ignore the majority of sampling results contained in Government Exhibit No. 35 that fell well below the 98 mg/m^3 figure he relied upon in formulating his opinion.

Thaxton's Field Work

Thaxton also relied upon certain field work apparently performed between 1976 and 1992 to conclude that visible clouds of dust contain high levels of respirable dust. He concluded in his direct examination that "without exception, every time that I have sampled an occupation exposed to visible dust from drilling, I have found high levels of respirable dust." (Government Exhibit 26 page 8). In addition, he testified that he disregarded the lower sampling results obtained by the research and reported throughout Government Exhibit 35 because his own fieldwork substantiated the readings of 10 to 100 milligrams per cubic meter reported in Government Exhibit 35 and that such fieldwork did not substantiate the lower readings. Since there is no documentation of Thaxton's fieldwork however there is no basis to test the

methodology and, therefore, the reliability of his results. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Indeed there is no way to determine whether this fieldwork was conducted with any scientific rigor and there was no opportunity to subject this work to effective cross examination. Accordingly Thaxton's "fieldwork" cannot be given any weight. *See Secretary v. Keystone Mining Corp. et al.*, 17 FMSHRC 1819 at 1845 (November 1995), *aff'd, Secretary v. Keystone Mining Corp. et al.*, No. 95-1619 (D.C. Cir. August 21, 1998).

Civil Penalty Assessments

In assessing a civil penalty under Section 110(i) of the Act, consideration is to be given to the operator's history of previous violations, the appropriateness of the penalty to the size of its business, the effect on the operator's ability to continue in business, good faith abatement, negligence, and gravity. Hobet is a large company (Gov. Exh. 22-25) and it is undisputed that its ability to continue in business would not be affected by a penalty as high as that proposed by the Secretary. Hobet has a history of drill dust related violations under the Act. (See Gov. Exh. 18, 19, 20, 21). With the exception of Citation No. 4629641, which was not abated until a Section 104(b) order was issued, the Secretary acknowledges that all citations were abated in a good faith and timely manner. As previously noted, the Secretary has failed in sustaining her burden of proving any discrete health hazard. Without such proof, the gravity of these violations cannot be deemed serious.

In each of the citations at bar the Secretary has alleged moderate negligence. Although she has not sought to modify or amend those citations, she now claims in her post-hearing brief that the violations resulted from "higher" negligence. Upon my *de novo* review I find that, indeed, the violations were the result of significant negligence. It is indeed apparent from the photographs, videotape, and testimony that the obvious visible dust should have triggered closer examination of the drills. The inspectors were able to observe the dusty conditions from distances of more than 100 feet. It may reasonably be inferred, therefore, that these conditions were also obvious to agents of the operator and warranted closer examination of the dust control devices on the cited drills.

More particularly, with respect to Citation No. 7152439, Thaxton opined that the faulty conditions of the drill shroud had occurred before the shift in which the citation was issued. He further testified that holes in the dust hose which had been taped-over indicated that the system had not been maintained over a long period of time. He also concluded, from the undisputed testimony of the drill operators that dust in the cab was a constant problem, that there were recurring problems with the drill dust collection system.

Driller helper Bias also testified that conditions inside the cab of his drill were always dusty and that he reported these conditions to management nearly every day for four years. Driller operator Sanford Johnston testified that the dusty conditions captured in the photographs of the drill were typical of conditions at the mine. Johnston testified that the cab was always dusty and that he reported this condition on his pre-operational checklist.

This evidence supports a finding of significant negligence. In reaching this conclusion I have not disregarded the testimony of drill operator Johnston that the cited defects could have occurred within the ten minutes time that the drill had been operating that day. However I can give such speculative testimony but little weight.

Thaxton concluded, with respect to Citation No. 7159321, that the shroud had been torn at some point before the drill had been moved to the hole it was drilling when cited. He further concluded that the gap on the "sneezer" side of the shroud had been present since the shroud was installed. Thaxton's testimony in this regard is not disputed. In addition, Hobet had previously been cited for a violation of Section 72.620 on the same drill and one of the same defects to the dust collection system noted in that prior citation, i.e., the filter needing replacement, was again cited in this case. Within this framework of evidence I find that there was significant operator negligence.

The Secretary had also previously issued a citation for a violation of Section 72.620 on the same drill as cited in Citation No. 7159340. Drill operator Edgar Chambers testified that it might take up to a week before maintenance corrected problems with the dust collection system on his drill. He recalled that on one occasion before the inspector's visit, when one of the blasters had asked him when he was going to get the dust problem fixed, he answered, " I don't know. I said, I wrote it and wrote it and wrote it. I get tired writing it to write it up, they don't do nothing about it." In addition, the men working on the benchline informed the inspector that they had been working in dusty conditions for two weeks.

Thaxton testified that the number of defects to the drill noted in Citation No. 4629641 led him to conclude that the drill had been out of compliance for some time. He found it highly unlikely that all of the defects occurred recently or immediately before the inspectors arrived. Drill operator Curtis Lester testified that when he called for a mechanic to fix the dust collector, "a lot of time they would be busy working on other equipment at the ship and the equipment foreman couldn't release their mechanics to send them out at that time." "Sometimes it would be a while before they'd respond, get there to fix the machine." In addition, only one month before the issuance of the instant citation, the Secretary had issued a citation for a violation of the same regulation on the same drill. Finally, it is noted that the drill charged in Citation No. 7152206, had been operating for at least two hours at the time it was charged.

Within the above framework of evidence and in consideration of the settlement presented at hearing I assess the civil penalties set forth in the Order below.

ORDER

Citation No. 7152240 has been **VACATED** by unilateral action of the Secretary. Citation Nos. 4629642 and 7152318 are **MODIFIED** and Hobet Mining Incorporated is directed to pay civil penalties of $720.00 for the above violations within 30 days of the date of this decision.

The "significant and substantial" findings as to all remaining citations are **VACATED**, the citations are **AFFIRMED** and Hobet Mining Incorporated is hereby directed to pay the following civil penalties within 30 days of the date of this decision: Citation No. 7152439 - $600; Citation No. 7159321 - $600; Citation No. 7159340 - $600; Citation No. 4629641 - $1,000; Citation No. 7152206 - $600.

Gary Melick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON D.C. 20006-3868

August 20, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-34-M
Petitioner	:	A. C. No. 27-00315-05501
	:	
v.	:	
AMBROSE BROTHERS	:	Portable Crushing Plant 128 X 108
INCORPORATED,	:	
Respondent	:	

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement for the one violation in this case. A reduction in the penalty from $3,000 to $2,000 is proposed. A fatality is involved.

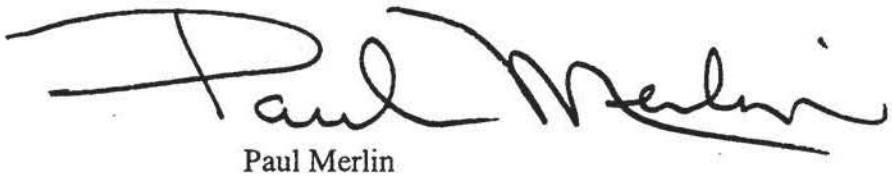
Citation No. 7702165 was issued for a violation of 30 C.F.R. § 56.9201 because a concrete and steel barrier for the portable crushing plant was not secured or removed while the crusher was relocated. The former president of the company was fatally injured when he was struck by the unsecured barrier while directing the relocation of the crusher. The violation was designated significant and substantial and negligence was assessed as high. The Solicitor states that the basis for the reduction is that the violation was the result of employee misconduct and the employee's misconduct was against the stated policy of the operator.

I cannot approve the settlement motion. The Solicitor is reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, 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 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). These considerations are especially pertinent in the case of a fatality.

The violation in this case is the ultimate in gravity. However, the Solicitor fails to discuss any of the facts surrounding the fatality nor does he offer any analysis to support his statements regarding the employee's conduct. There is no discussion of the operator's policies and of how the employee, the former president, violated them. Nor does the Solicitor explain the position and duties of the decedent at the time of the accident. Finally, the Solicitor does not explain how negligence can remain unchanged at high where there is employee misconduct and a failure to follow established procedures of the operator. Therefore, I have no information that would permit assessment of an appropriate penalty or a reduction from the original amount.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED**.

It is further **ORDERED** that within 30 days of the date of this order the Solicitor submit appropriate information to support his settlement motion. Otherwise, this case will be set for hearing.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON D.C. 20006-3868

August 26, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-189
Petitioner	:	A. C. No. 15-10306-03539
	:	
v.	:	Big Sandy River Dock
PEN COAL CORPORATION,	:	
Respondent	:	

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT IN PART
DECISION DISAPPROVING SETTLEMENT IN PART
ORDER TO MODIFY
ORDER TO PAY
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. Cyprus Emerald Resources Corporation, 16 FMSHRC 2359 (November 1994).

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. The parties have filed a joint motion to approve settlements for the six violations in this case. A reduction in the penalties from $612 to $448 is proposed.

Citation No. 4586911 was issued for a violation of 30 C.F.R. § 77.202 because loose coal and float coal dust accumulated on an electric motor for the hydraulic truck dump and inside the breaker box. The originally assessed penalty was $102 and the proposed settlement is $50. The parties request that the citation be modified to delete the significant and substantial designation. The parties advise that the breaker box is located outside and that no miners were assigned to the area which made exposure to the hazard very limited. In addition, the parties state that all other protective circuits were operating properly, therefore there were no ignition sources. This recommended settlement is approved.

Citation No. 4586917 was issued for a violation of 30 C.F.R. § 77.1606(c) because the dump truck had defects which were not corrected prior to being put into service. The originally assessed penalty was $102 and the proposed settlement is $50. The parties also request that the citation be modified to delete the significant and substantial designation. According to the parties, the truck was operated only at this site and at very low rates of speed not exceeding 10 miles per hour. In addition, the truck operated in an area where miners were not regularly assigned to work. This recommended settlement is approved.

Citation No. 4586918 was issued for a violation of 30 C.F.R. § 77.1606(c) because the coal truck had defects which were not corrected prior to being put into service. The originally assessed penalty was $102. The parties state that the operator has agreed to pay this penalty in full. This recommended settlement is approved.

The three remaining violations, Citation Nos. 4586912, 4586913, and 4586916, were issued for violations of 30 C.F.R. § 77.1104 because coal dust and oil soaked coal dust accumulated on the engine and engine frame of three end loaders. Each violation was assessed a penalty of $102 and the parties propose a settlement of $81. The parties also request that the citations be modified to reduce the likelihood of injury from reasonably likely to unlikely thereby making the violations non-significant and substantial. The parties state that the reasons for the reductions and modifications are that had a fire occurred the operator could have exited the end loader and that a fire extinguisher was provided for each piece of equipment.

I cannot approve the settlements for these last three violations. The rationale advanced in the settlement motion is unacceptable because it is contrary to governing case law. In Buck Creek Coal, Incorporated v. Federal Mine Safety and Health Administration, 52 F.3rd 133 (7th Cir. 1995), the operator challenged the significant and substantial finding regarding coal dust accumulations on the basis that the operator had fire suppression systems in place. The court rejected the challenge stating as follows:

> The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are in place (as MSHA regulations require them to be) precisely because of the significant dangers associated with coal mine fires.

52 F.3rd at 136; See also Enlow Fork Mining Co., 19 FMSHRC 5, 9 (January 1997); Mid-Continent, 17 FMSHRC 1234, 1242 (July 1995). In addition, the parties offer no support for their assertion that the loader operator could exit the loader should a fire occur.

The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, 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 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

In light of the forgoing, it is **ORDERED** the motion for approval of settlement for Citation Nos. 4586911, 4586917, and 4586918 is **GRANTED.**

It is further **ORDERED** that the motion for approval of settlement for Citation Nos. 4586912, 4586913, and 4586916 be **DENIED**.

It is further **ORDERED** that Citation Nos. 4586911 and 4586917 be **MODIFIED** to delete the significant and substantial designations.

It is further **ORDERED** that the operator **PAY** penalties totaling of $202 for Citation Nos. 4586911, 4586917, and 4586918 within 30 days of the date of this decision.

It is further **ORDERED** that within 30 days of the date of this order the parties submit appropriate information to support their settlement motion for Citation Nos. 4586912, 4586913, and 4586916. Otherwise, these violations will be set for hearing.

Paul Merlin
Chief Administrative Law Judge

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