

AUGUST 2004

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AUGUST 2004

No case was filed in which Review was granted during the month of August

No case was filed in which Review was denied during the month of August

A Petition for Reconsideration filed by the Secretary of Labor in Twentymile Coal Company, docket No. WEST 2000-480-R in the Commission decision issued August 12, 2004, was denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 10, 2004

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v.

SOUTHWEST CONCRETE &
PAVING, INC.

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Docket No. CENT 2004-49-M
A.C. No. 29-00473-11213

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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. (2000) ("Mine Act"). On March 9, 2004, the Commission received from Southwest Concrete & Paving, Inc. ("Southwest Concrete") a motion made by counsel to reopen a civil penalty proceeding dismissed by the Chief Administrative Law Judge because the contested penalty had been paid. The Commission construed Southwest Concrete's motion to be a timely filed petition for discretionary review. On April 5, 2004, the Commission granted the petition and stayed briefing in the case pending further order of the Commission.

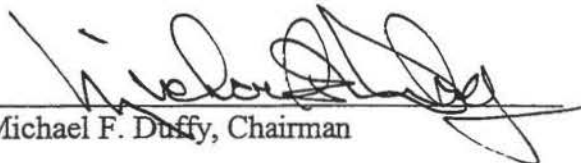
On October 17, 2003, MSHA issued a proposed penalty assessment to Southwest Concrete's Mimbres Pit in Luna, New Mexico. Southwest Concrete timely submitted a request for hearing ("green card") to contest the proposed penalty assessment for Citation No. 6222831. The Secretary of Labor filed a petition for assessment of penalty dated December 29, 2003.¹ Southwest Concrete's motion states that, as a result of "bookkeeping inadvertence," the company paid the contested penalty. Mot. at 1. Chief Administrative Law Judge Robert J. Lesnick dismissed Southwest Concrete's contest on the grounds that the penalty had been paid. Order of

¹ Southwest Concrete answered the petition, but mistakenly used the wrong docket number on its answer. It does not appear, however, that this oversight had any effect upon the disposition of this case before the judge.

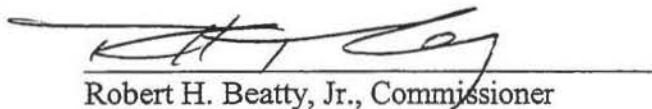
Dismissal (Feb. 26, 2004) (ALJ) (“On January 23, 2004, the Commission was informed . . . that the penalty in this case has been paid.”). In its motion, Southwest Concrete requests that the Commission vacate the judge’s dismissal order and reopen the proceeding. Mot. at 1. The Secretary does not oppose Southwest Concrete’s request to reopen the case.

Although Southwest Concrete paid the proposed penalty for Citation No. 6222831, it may have intended to continue its challenge of the penalty and underlying violation. However, the record does not contain sufficient information to permit us to determine whether the penalty payment was a “genuine mistake.” *See Dacotah Cement*, 23 FMSHRC 31, 32 (Jan. 2001).

Having reviewed Southwest Concrete's submissions, in the interests of justice, we remand this matter to the Chief Administrative Law Judge to determine whether Southwest Concrete's payment of the penalty constitutes a "genuine mistake" so as to support granting relief from the dismissal order for Citation No. 6222831. If it is determined 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.



Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

August 10, 2004

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v.

SOUTHWEST CONCRETE &
PAVING, INC.

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Docket No. CENT 2004-192-M
A.C. No. 29-00473-08804

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

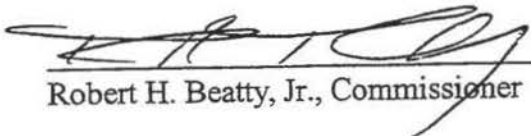
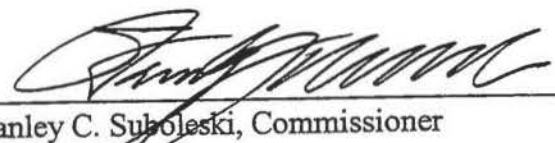
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 12, 2004, the Commission received from Southwest Concrete & Paving, Inc. ("Southwest Concrete") a motion made by counsel to reopen a penalty assessment that had become final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On September 18, 2003, MSHA issued a proposed penalty assessment to Southwest Concrete's Mimbres Pit in Luna, New Mexico (Case Number 8804) for two citations (Citation Nos. 6222829 and 6222832, issued November 13, 2002). Southwest Concrete did not contest the proposed penalty. Southwest Concrete's motion states that, as a result of "bookkeeping inadvertence," the company paid the penalty for these citations even though it had been the company's intention to contest them. Mot. at 1. In its motion, Southwest Concrete requests that the Commission reopen these penalties and consolidate this proceeding with Docket No. CENT 2004-49-M, which involves another citation issued to Southwest Concrete on November 13, 2002. *Id.* The Secretary states that she does not oppose Southwest Concrete's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787.

Having reviewed Southwest Concrete's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for the company's failure to timely contest the penalty proposals and whether relief from the final order should be granted. If it is determined 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.


Michael F. Duffy, Chairman
Robert H. Beatty, Jr., Commissioner
Mary Lu Jordan, Commissioner
Stanley C. Suboleski, Commissioner
Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

August 10, 2004

SECRETARY OF LABOR,	:	Docket Nos.	PENN 2000-181-R
MINE SAFETY AND HEALTH	:		PENN 2000-182-R
ADMINISTRATION (MSHA)	:		PENN 2000-183-R
	:		PENN 2000-207-R
v.	:		PENN 2000-208-R
	:		PENN 2000-209-R
RAG CUMBERLAND RESOURCES LP	:		PENN 2000-210-R
	:		PENN 2001-63-A
	:		

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

In these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), RAG Cumberland Resources LP ("Cumberland") has petitioned for review of Administrative Law Judge Jerold Feldman's determination that Cumberland's bleeder system was not functioning as required by 30 C.F.R. § 75.334(b)(1),¹ and that Cumberland took insufficient action with respect

¹ 30 C.F.R. § 75.334(b)(1) provides:

During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

to the bleeder condition in violation of 30 C.F.R. § 75.363(a).² 23 FMSHRC 1241, 1252-54, 1256-59 (Nov. 2001) (ALJ). As to its alleged violation of section 75.363(a), Cumberland further challenges the judge's determination that the violation resulted from its unwarrantable failure³ to comply with the standard and the judge's assessment of a civil penalty. *Id.* at 1259-61. For the reasons that follow, we affirm in part, reverse in part, and vacate and remand in part.

I.

Factual and Procedural Background

Cumberland operates the Cumberland Mine, an underground coal mine in Waynesburg, Pennsylvania. Resp. to Mot. to Stay, Ex. A. The mine liberates approximately 12 million cubic feet of methane per day and is subject to spot inspections pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 823(i). 23 FMSHRC at 1244.

A. Bleeder System

Cumberland ventilates the subject area of its Cumberland mine with a bleeder system. The bleeder system is designed to dilute methane coming from the gob,⁴ as well as from the development entries between the mined-out panels, with fresher air coursing through bleeder

² 30 C.F.R. § 75.363(a) provides in pertinent part:

Any hazardous condition found by the mine foreman or equivalent mine official . . . shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected.

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

⁴ "Gob," in the context of this case, refers to the area from which coal has been extracted from successive longwall panels. RAG Ex. 5 (detailed mine map).

entries. 23 FMSHRC at 1244; Tr. 189-91.⁵ Air containing higher levels of methane exits the gob and enters the bleeder entries through a number of regulators, several of which were designated as bleeder evaluation points, or “BEPs.” 23 FMSHRC at 1245. The horizontal bleeder entries carry the methane-air mixture to a vertical bleeder shaft, which in turn carries the methane-air mixture to the surface. Tr. 189-91, 405.

The alleged violations occurred in connection with Cumberland’s longwall mining section 42 (also referred to as the 90 butt longwall panel). 23 FMSHRC at 1245. Section 42 was located at the northern end of the gob. *Id.* at 1244. The gob was bounded on the eastern side by a set of bleeder entries and on the western side by a set of main entries, and on the southern side by a set of bleeder entries referred to as the 1B Right bleeders. *Id.*; RAG Ex. 5 (detailed mine map). The No. 1 bleeder shaft was located in the southeastern corner of the bleeder system. 23 FMSHRC at 1244. Air from the 1B Right bleeder entries met air from the eastern perimeter bleeder entries and was transported out of the mine through the No. 1 bleeder shaft. *Id.* at 1258; RAG Ex. 5. A second bleeder shaft, referred to as the No. 2 or 2A bleeder shaft, located in the northeastern portion of the bleeder system, was placed “on-line” on June 6, when longwall mining began on section 42. 23 FMSHRC at 1245; Tr. 1553.

Air entered the eastern bleeder entries from the northern end at the headgate of the 90 butt panel through regulators referred to as the No. 1 and No. 2 sweeteners. 23 FMSHRC at 1245. In addition, air entered the eastern bleeders from the tailgate (also referred to as the 82 butt entries) through a regulator referred to as “Fred’s Hole.”⁶ *Id.* Air traveling through the Nos. 1 and 2 sweeteners and Fred’s Hole moved in a southward direction until it reached a split at BEPs 18 and 18A. 23 FMSHRC at 1245. At the split, some of the air traveled north to the No. 2A bleeder shaft, while the remainder traveled south to the No. 1 bleeder shaft. *Id.*

Before July 3, 2000, section 42 was ventilated by intake air coursing down the headgate entries and across the longwall face. *Id.* Intake air also coursed through the tailgate (the No. 1 entry of 82 butt). *Id.* The air in the tailgate joined the air that had swept the face and traveled into the eastern perimeter bleeders through Fred’s Hole or outby through the No. 2 entry of the 82 butt. *Id.* Between June 6 and July 5, 2000, BEPs 6, 7, and 8 were adjusted to their most closed positions. *Id.*

On July 3, 2000, Cumberland made an air change affecting the ventilation of the longwall face. 23 FMSHRC at 1247. The velocities of the air ventilating the face had decreased due to

⁵ References to the transcript of the hearing (“Tr.”) are to the “condensed” version of the transcript because of errors in the “full-size” version.

⁶ The BEPs in the eastern bleeder entry were designated by numbers in descending order from north to south, specifically, BEPs 21, 20, 18, 18A, 8, 7, 6, and 5A. 23 FMSHRC at 1245; RAG Ex. 5. Generally, each BEP was located near a regulator which controlled the amount of methane leaving the gob. Tr. 1686-87.

increased resistance in the mine. *Id.* In order to increase the velocity of air ventilating the face, Cumberland changed the air in the tailgate (the No. 1 entry of 82 butt) from intake air to return air. *Id.* At the end of the face, the air split at a point referred to as a "T-split." *Id.* at 1247; Tr. 1802. At the T-split, some of the air from the face traveled into the eastern bleeders through Fred's Hole. 23 FMSHRC at 1246. The remaining air that had been directed across the face traveled outby through the No. 2 entry of 82 butt to the main entries on the western perimeter. *Id.*

B. Events of July 5 and 6, 2000

During the day shift on July 5, 2000, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), Ronald Hixson, inspected the mine. 23 FMSHRC at 1247. Hixson was accompanied by Mike Konosky, a Cumberland safety representative, and Tom Sedmack, a United Mine Workers of America ("UMWA") miners' representative. *Id.*; Tr. 181. In his review of the weekly mine records, Hixson noticed that the methane levels recorded at the No. 1 bleeder fan had been higher than normal during the preceding two weeks. 23 FMSHRC at 1247. For instance, while the No. 1 bleeder fan showed readings of 1.4% methane on June 6, there were readings of 1.8% to 1.9% from June 14 to July 3. *Id.* In examining the fan installations on the surface, methane readings were taken at the No. 1 bleeder fan. *Id.* Using a methane detector (an "Exotector"), Konosky obtained methane readings at the No. 1 fan of 1.8% to 2.2%.⁷ *Id.*; Tr. 207-09. Hixson took bottle samples, the results of which, when subsequently received on July 13, showed 3.6% methane. 23 FMSHRC at 1247.

In addition, on July 5, Fred Evans, the general mine foreman at the mine, convened a meeting to discuss the increase in water gauge pressure at the No. 1 bleeder fan.⁸ *Id.* at 1248; Tr. 1132-33. Sometime after June 29, the water gauge readings at the No. 1 fan began to increase. Tr. 548, 550, 1032. Evans was concerned that the increase in pressure would cause too much methane to be drawn out of the gob at too fast a rate, thus increasing the concentration of methane in the bleeder. 23 FMSHRC at 1248. Evans dispatched Jason Hustus, a Cumberland engineer, to obtain a methane reading at the No. 1 bleeder fan. *Id.* Hustus obtained a methane

⁷ Methane can be measured by using detectors that give an immediate reading, such as an Exotector, which uses a pump and hose to draw an air sample, or by using a detector such as the Explorer or CMX 270, which continuously monitors the atmosphere for three gases without drawing a sample through the use of a pump and hose. Tr. 1212-13, 1221. In addition, methane can be measured by taking a bottle sample, the results of which typically are not available until one to two weeks later. Tr. 365, 1214-15. In order to get an immediate reading of methane from the shaft, the operator used an Exotector to pump a sample from the fan housing. Tr. 207-09.

⁸ Each bleeder shaft was equipped with an exhaust fan on the surface. Tr. 500-01. The bleeder shaft fans were monitored by water gauge pressure readings, which provided a measure of the degree of resistance in the mine that had to be overcome to pull air through the mine. 23 FMSHRC at 1247; Tr. 379, 1570-71.

reading of 3.6% using an Exotector. *Id.*; Tr. 1134-36. When Evans sent Hustus back to take another reading with a recalibrated Exotector, Hustus returned with another reading of 3.6%. 23 FMSHRC at 1248.

Evans informed Gary DuBois, the manager of engineering, and Robert Bohach, the safety manager at the mine, about the elevated methane readings. *Id.* At approximately 6:00 p.m., DuBois and Bohach went to the No. 1 bleeder shaft and obtained several methane readings of 3.6%. *Id.*; Tr. 1137-38, 1777-78. They then traveled to the 32-1 surface gob vent hole near the No. 1 shaft and found that the vent hole was closed. 23 FMSHRC at 1248. As the pump connected to the bore hole was not functioning, they immediately opened the gob vent and called an electrician to repair the pump. *Id.*

During the afternoon shift of July 5, there were approximately 100 miners working underground, 12 of whom worked on the longwall section. *Id.* Beginning at approximately 7:00 p.m., the longwall experienced intermittent power shut downs when the methane sensor at the tailgate detected more than 1% methane and automatically de-energized the equipment. *Id.* The miners there could not determine the source of the problem because the methane would dissipate within minutes, allowing power to be restored. *Id.* at 1249. Timothy Hroblak, a UMW safety committeeman, went to the face and took methane and air velocity readings, which were all within normal limits and described by him as "textbook." *Id.* at 1248-49; Tr. 111-12.

DuBois and Bohach returned to the No. 1 shaft where they took more readings indicating the presence of 3.6% methane. 23 FMSHRC at 1248. They decided to evaluate the No. 1 bleeder fan periodically for the remainder of the afternoon shift and then effect some ventilation changes during the midnight shift. Tr. 1146-47. They also decided that if methane levels at the No. 1 fan reached 4%, they would withdraw miners from the mine. 23 FMSHRC at 1249. At approximately 7:30 p.m., DuBois took a reading at the No. 1 bleeder shaft that indicated the presence of 3.6% methane and then left the mine. Tr. 1784. No further readings were taken at the No. 1 bleeder shaft until DuBois returned to the mine and took a reading at approximately 10:30 p.m., which indicated the presence of 3.6% methane. Tr. 1784-85, 1827-28. At approximately 8:00 p.m. on July 5, the miners on the longwall were informed that there would be no "hot seat" changes because miners on the midnight shift were being held on the surface to effectuate a ventilation change.⁹ 23 FMSHRC at 1249.

At midnight, at the end of the July 5 afternoon shift, DuBois and Bohach had a meeting with the UMW safety committee members who were leaving the mine or arriving for work. *Id.* They informed the safety committee members that they had obtained readings of 3.6% methane at the No. 1 bleeder fan. *Id.* After the meeting, Hroblak telephoned Inspector Hixson and informed him about the conditions at the mine. *Id.*

⁹ A "hot seat" change requires a miner to remain at his position until he is relieved by a miner on the following shift. 23 FMSHRC at 1249.

The midnight shift was not permitted to enter the mine because of the ventilation changes that were to be made. *Id.* On the surface, DuBois changed the louvers on the No. 1 fan and back-up fan to reduce the amount of pressure that the fan was pulling. *Id.* at 1250. He also obtained another methane reading of 3.6%. *Id.* In addition, Robert Kimutis, Cumberland's ventilation foreman, and Roger Peelor, a senior mining engineer for Cumberland, opened the regulators at the Nos. 2 and 3 sweeteners, adjusted the regulator at Fred's Hole to a more closed position, and adjusted the regulator near the No. 2A bleeder shaft to direct more air to the No. 1 shaft. *Id.*

At approximately 1:30 a.m., Inspector Hixson arrived at the mine while the ventilation changes were being made. 23 FMSHRC at 1250. Bohach met Hixson at the surface and informed him that the last reading at the No. 1 fan was 3.6%. *Id.* Methane readings were being telephoned to Bohach every 15 to 20 minutes. *Id.* Shortly after Inspector Hixson arrived at the mine, Bohach was informed that methane at the No. 1 fan had risen to 3.8%. *Id.* Bohach subsequently received information that a reading at the fan taken at approximately 2:30 a.m. revealed that methane had increased to 4.2%. *Id.*

Inspector Hixson telephoned his supervisor, Robert Newhouse, to inform him of the conditions at the mine. *Id.* at 1251. Newhouse in turn telephoned Acting District Manager Kevin Strickland. *Id.* In accordance with Newhouse's subsequent instructions, at approximately 3:10 a.m., Hixson verbally issued an imminent danger order regarding conditions existing on the midnight shift that required Cumberland to cease the ventilation changes and withdraw all of the miners from the mine. *Id.* After the imminent danger order was issued, readings at the fan dropped from 4.2 to 3.8% methane. *Id.* The next methane reading at the No. 1 fan, which occurred at about 6:00 a.m. on July 6, revealed that methane had fallen to 2.8%. *Id.* The last miners exited the mine at approximately 6:30 a.m. *Id.*

Inspector Hixson issued the written imminent danger order at approximately 9:00 a.m. on July 6. *Id.* At approximately 4:30 p.m. that day, Inspector Hixson issued Citation No. 3657290 alleging a significant and substantial ("S&S")¹⁰ violation of section 75.323(e), which was modified on July 7 to allege a violation of section 75.334(b)(1). *Id.* In addition, at 6:00 p.m. on July 6, he issued Citation No. 3657291 alleging an S&S and unwarrantable violation of section 75.363(a). *Id.* On July 20, 2000, Inspector Hixson issued Order No. 3657297, pursuant to section 104(b) of the Mine Act, alleging that the operator failed to abate Citation No. 3657290 because the bleeder system was not yet functioning properly. Tr. 338-47.

In order to abate the section 104(b) order, the operator submitted to MSHA a ventilation plan which described a method for directing more bleeder air out of the gob directly to the No. 2A fan. Tr. 594-95. On July 29, overcasts in the gate entries of BEPs 18, 20, and 21 were

¹⁰ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

installed, which redistributed bleeder air between the Nos. 1 and 2A shafts. Tr. 1920-22, 1964. On July 30, MSHA inspected the bleeder system, determined that methane levels had been reduced, and terminated the order. Tr. 595.

C. Proceedings Before the Judge

The operator challenged in part Citation Nos. 3657290 and 3657291 and the imminent danger order, and the matter proceeded to hearing before Judge Feldman. The hearing was conducted in two sessions from April 3 through April 6, 2001, and from July 24 through July 25, 2001. 23 FMSHRC at 1242. After the hearing recess in April 2001, the parties settled various matters, including section 104(b) failure to abate Order No. 3657297. Tr. 1545-47. In addition, Cumberland stipulated that, if the judge concluded that it had violated the standards set forth in Citation Nos. 3657290 and 3657291, it would concede that those violations were S&S. 23 FMSHRC at 1254, 1259.

The judge affirmed Citation Nos. 3657290 and 3657291, as well as the associated special findings.¹¹ As to Citation No. 3657290, the judge determined that the operator had violated section 75.334(b)(1) based on his findings that the bleeder system was not adequately diluting and carrying away methane from working areas. *Id.* at 1254. The judge further concluded that the violation was S&S and had resulted from a moderate degree of negligence. *Id.* at 1255-56. Accordingly, the judge assessed a penalty of \$5,000, rather than the penalty of \$6,000 proposed by the Secretary. *Id.* at 1256. As to Citation No. 3657291, the judge determined that Cumberland violated section 75.363(a) because conditions existed in the bleeder system that required Cumberland to remove all personnel except those necessary to evaluate and correct the bleeder condition. *Id.* at 1257-59. The judge affirmed the S&S designation, and concluded that the violation was also unwarrantable because the violation was obvious, dangerous, and was allowed to exist for an extended period of time, and because the bleeder problem was not disclosed to hourly employees. *Id.* at 1260. The judge subsequently assessed a civil penalty of \$10,000, rather than the penalty of \$5,000 proposed by the Secretary. *Id.* at 1260-61.

D. Proceedings on Review

Cumberland filed a petition for discretionary review which the Commission granted. In addition, Cumberland filed a Motion for Order Taking Judicial Notice. The Secretary filed an opposition to Cumberland's motion and a motion to strike. The Commission issued an order denying Cumberland's motion to take judicial notice and granting the Secretary's motion to

¹¹ The judge vacated the imminent danger order regarding conditions existing during the midnight shift beginning on July 6. 23 FMSHRC at 1261-64. The Secretary did not challenge that determination.

strike.¹² The Commission also granted Cumberland's motion requesting oral argument, and oral argument was heard on March 11, 2004.

II.

Disposition

A. Citation No. 3657290

1. Interpretation of Section 75.334(b)(1)

Cumberland argues that the judge erred in finding a violation of section 75.334(b)(1) because he misinterpreted the standard by reading it to require an "adequate" dilution of methane in a bleeder system and erroneously relied upon an incorrect interpretation of 30 C.F.R. § 75.323(e) to set a 2% limit for methane in the bleeder shaft.¹³ RAG Br. at 11-18. Cumberland submits that the plain language of section 75.334(b)(1) does not address the adequacy of the bleeder system or dilution of methane, but simply requires that methane-air mixtures be continuously diluted and moved away from active workings. *Id.* at 12-13; RAG Reply Br. at 3-4. Cumberland argues that other standards address the functioning of bleeder systems. *Id.* The Secretary responds that the plain meaning of the standard supports the judge's interpretation. S. Br. at 13-14.

Section 75.334, entitled, "Worked-out areas and areas where pillars are being recovered," sets forth, in part, ventilation requirements for such areas, the circumstances under which such areas must be sealed, and ventilation plan requirements. 30 C.F.R. § 75.334. Section 75.334(b)(1) requires that during pillar recovery, a bleeder system shall be used "to *control* the air passing through the area and to *continuously* dilute and move methane-air mixtures . . . from the worked-out area away from active workings and into a return air course or to the surface of the mine." 30 C.F.R. § 75.334(b)(1) (emphasis added).

¹² We declined to grant judicial notice on the basis that Cumberland failed to establish good cause for the Commission to consider evidence which the judge was not afforded an opportunity to consider. Unpublished Order dated Feb. 20, 2004; *see Twentymile Coal Co.*, 15 FMSHRC 941, 946 (June 1993); *Union Oil Co.*, 11 FMSHRC 289, 301 (Mar. 1989) ("[I]t is the obligation of the parties to prove their case *before the judge*, not on review by reference to detailed material not presented to the judge and not subject to the rigors of cross-examination") (emphasis in original).

¹³ 30 C.F.R. § 75.323(e) provides in part that "[t]he concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air . . . shall not exceed 2.0 percent."

Section 75.334 is derived from section 303(z)(2) of the Mine Act, which in turn was carried over unchanged from the Federal Coal Mine Health and Safety Act of 1969 (“Coal Act”). Section 303(z)(2) of the Mine Act requires that all abandoned areas and areas from which pillars have been extracted must be ventilated by bleeder systems or be sealed off from the rest of the mine. 30 U.S.C. § 863(z)(2). It further provides that when ventilation of such areas is required, “such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane . . . within such areas and to protect the active workings of the mine from the hazards of such methane” *Id.* The legislative history of the Coal Act reveals Congress’s recognition that pillared and abandoned areas, which are not tested as frequently as working places, “represent a great potential source of explosions, which can lead to widespread underground destruction with attendant loss of life.” H.R. Rep. No. 91-563, at 21 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1051 (1975) (“*Legis. Hist.*”). The House Report explains that this problem was addressed in part by standards, including the predecessor to section 303(z), which require that “when bleeder entries or systems or equivalent means are permitted instead of sealing, they shall be effective.” *Legis. Hist.* at 1052. Thus, the purpose of section 303(z)(2) is to require bleeder systems continuously to dilute, render harmless, and carry away methane effectively within the bleeder system and to protect active workings from the hazards of methane accumulations.

The Commission has repeatedly recognized that a regulation must be interpreted so as to harmonize and not to conflict with the objective of the statute it implements. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 997-99 (June 1997). Although section 75.334(b)(1) does not literally set forth a requirement that a bleeder system shall function effectively, such a requirement is implicit in the standard’s language and underlying purpose.¹⁴ See *Western Fuels-Utah*, 19 FMSHRC at 998-99 & n.6 (interpreting regulation to require functional equipment based on standard’s plain meaning and underlying purpose); *Consolidation Coal Co.*, 20 FMSHRC 227, 238-52 (Mar. 1998) (considering whether bleeder system adequately diluted and carried away methane). Thus, consistent with its underlying statutory purpose, we read section 75.334(b)(1) to require a bleeder system to control air passing through the area and continuously to dilute and move methane-air mixtures away from active workings and into a return or to the surface in an effective manner. That is, a bleeder system must effectively ventilate the area within the bleeder system and protect active workings from the hazards of methane accumulations.

¹⁴ Cumberland did not argue that it failed to receive adequate notice that section 75.334(b)(1) applied in the subject circumstances, but merely submits that reading the standard to require adequate dilution could “potentially deprive operators of due process notice.” RAG Reply Br. at 5 n.3. Because Cumberland did not effectively raise lack of notice as a defense, we need not address the issue.

Under Cumberland's literal reading, an operator would comply with section 75.334(b)(1) if its bleeder system continuously diluted methane-air mixtures to any level of dilution, and moved such mixtures away from active workings out of the mine. RAG Br. at 12. That reading could lead to unwanted results in that a bleeder system could be in compliance with the standard if it diluted methane from a higher level to a lower level, even as the methane becomes more explosive.¹⁵ Such a result would thwart the underlying purpose of the standard and must be avoided. See *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993) (rejecting literal interpretation of regulation that led to absurd result contrary to underlying statutory purpose). Thus, we reject Cumberland's argument that the judge misinterpreted section 75.334(b)(1) by reading the standard to require adequate dilution of methane in the bleeder system.¹⁶

2. Whether Substantial Evidence Supports Section 75.334(b)(1) Violation

The standard requires that a bleeder system control air passing through the area and continuously dilute and move methane-air mixtures away from active workings and out of the mine in an effective manner. We find that substantial evidence exists in the record to support the conclusion that Cumberland's bleeder system did not do so, thereby violating section 75.334(b)(1).

First, the judge's determination that Cumberland violated section 75.334(b)(1) is supported by evidence that Cumberland's bleeder system failed to control air passing through the affected area. MSHA Assistant District Manager Stricklin testified that John Demechei, the vice president of operations for Cumberland, informed Stricklin that there were two separate ventilation systems in the area: the No. 2A fan ventilated the active 42 longwall panel, and the No. 1 fan ventilated the "mined-out" area. Tr. 730, 764. However, witnesses for both parties agreed that, in fact, the two fans actually competed for air, which affected how the methane-air mixtures moved through the bleeder system. 23 FMSHRC at 1245; Tr. 899, 971-72, 1973. For example, before the No. 2A bleeder shaft fan went online on June 6, the volume of air circulating past BEP 5A was approximately 80,000 to 90,000 cubic feet per minute ("CFM"), and methane

¹⁵ Methane is explosive in the range of 5 to 15% depending upon the concomitant level of oxygen. 23 FMSHRC at 1244.

¹⁶ We do not reach Cumberland's argument that the judge relied upon an incorrect interpretation of section 75.323(e) in concluding that the operator violated section 75.334(b)(1). RAG Br. at 14-18. Although the judge considered the effect of section 75.323(e) in relation to Cumberland's alleged violation of section 75.334(b)(1), he did so in order to respond to the argument advanced by Cumberland in its post-hearing brief that section 75.323(e) does not apply to bleeder shafts. 23 FMSHRC at 1252; RAG Post-Hr'g Br. at 23-27. The judge did not rely upon his discussion of section 75.323(e) in concluding that Cumberland violated section 75.334(b)(1). 23 FMSHRC at 1253-54. In any event, we note that, regardless of the applicability of section 75.323(e) to bleeder shafts, MSHA may impose a 2% limit on the amount of methane in bleeder shafts through the mine ventilation plan approval process.

levels at BEP 5A were approximately 1.5% or 1.6%. Tr. 551, 553. After the No. 2A bleeder shaft fan went online, the volume at BEP 5A dropped to 35,000 to 45,000 CFM, and methane levels increased to between 3% and 3.8%. Tr. 551-53. Witnesses for both parties explained that there was a failure in proper distribution of methane-air mixtures between the No. 1 and 2A bleeder fans, whereby the No. 1 bleeder shaft received a disproportionately greater share of methane than the No. 2A fan.¹⁷ Tr. 1376, 2027.

In addition, repeated readings at the No. 1 bleeder shaft showing elevated methane levels indicated that the bleeder system was not controlling air passing through the area or continuously diluting methane as required by the standard. MSHA Inspector/Ventilation Specialist Anthony Guley testified that the purpose of taking methane readings at a bleeder shaft fan is to evaluate how the bleeder system is operating. Tr. 538-39, 559-60. The Secretary's witnesses explained that a bleeder system should be designed so that air exiting the bleeder system contains 2% or less methane, and that the effectiveness of the bleeder system is questioned if more than 2% methane is exhausting at the bleeder shaft. Tr. 406, 951. It is undisputed that during the afternoon shift of July 5, Cumberland repeatedly discovered 3.6% methane at the No. 1 bleeder shaft. 23 FMSHRC at 1248-49. The methane levels at the No. 1 bleeder shaft climbed to 4.2% at 2:40 a.m. on July 6, after Cumberland had effected some ventilation changes.¹⁸ Tr. 240, 346. The Secretary's witnesses testified that such levels of methane exiting a bleeder shaft are unheard of except for after an explosion, or when a mine is reopened after being sealed. 23 FMSHRC at 1258; Tr. 713, 1009. Cumberland Safety Manager Bohach also conceded that the readings of 3.6% were atypical and that he would have expected a reading of 1.8% methane at the No. 1 bleeder shaft. Tr. 1328. Senior Mining Engineer Roger Peelor and Engineering Manager DuBois testified that having 3.6% methane exiting from the No. 1 bleeder revealed a problem in the bleeder system that needed to be addressed.¹⁹ Tr. 1665, 1726-28, 1736, 1824.

¹⁷ The belief that improper distribution of methane between the two fans was the problem with the bleeder system appears to be supported by the manner in which the operator abated the situation. The installation of overcasts or tubes at BEPs 18, 20, and 21 resulted in air moving directly from the gob toward the No. 2A fan. Tr. 594-95, 1920-22. As soon as the tubes were installed, methane levels at the No. 1 fan dropped. Tr. 1928-29, 1931. In addition, methane levels at BEP 5A dropped from between 3.5% and 3.8% to 1.2%. Tr. 1931-32.

¹⁸ We do not consider the reading of 4.2% taken on July 6 in our consideration of Citation No. 3657291, which pertains to conditions existing during the afternoon shift of July 5. Gov't Ex. 5; *see also* RAG Br. at 26 n.5.

¹⁹ By considering such evidence, we do not suggest that a 2% methane limit applied to the bleeder shaft. *See* n.16, *supra*. Rather, we view such evidence as supporting the conclusion that, regardless of whether a methane limit applies to the bleeder shaft, all parties agreed that, during the afternoon shift of July 5, the methane levels exhausting from the No. 1 bleeder shaft were elevated.

Substantial evidence supports the judge's conclusion that the bleeder's ventilation design provided a reasonable basis for concluding that there were higher levels of methane underground in the travelable bleeder entry than were exhausting from the No. 1 bleeder fan. 23 FMSHRC at 1243; Tr. 497-505, 522-23, 718-19. In the mine, air that traveled in a southern direction down the eastern bleeder entry was diluted by air in the 1B right entry before it entered the No. 1 bleeder shaft. Tr. 407, 505. The air in the 1B right entry contained less methane than air in the eastern bleeder entry. Tr. 497-98. Once air entered the bleeder shaft, there was no other air to dilute it. Tr. 407. Thus, air in the eastern bleeder entry likely had higher methane levels before it was diluted by air in the 1B right entry and exited from the mine through the No. 1 bleeder shaft. Tr. 505, 522-23.

In addition, substantial evidence supports the judge's finding that comparison readings at the No. 1 bleeder shaft and in the travelable bleeder entry indicated that there were higher levels of methane underground than were exhausting from the No. 1 bleeder shaft. 23 FMSHRC at 1243. On June 14, Cumberland obtained an Exotector reading of 1.8% methane at the No. 1 bleeder shaft while it obtained readings of 3.5 % in the travelable bleeder at BEP 5A. Tr. 558-59; Gov't Ex. 7 at 64. In addition, on June 30, Cumberland obtained an Exotector reading of 1.89% at the No. 1 bleeder fan and a reading of 3.5% at BEP 5A. Tr. 560-61, 1321-22; Gov't Ex. 7 at 68, 70. On July 3, Cumberland took an Exotector reading at the No. 1 bleeder shaft of 1.8% or 1.9%, and a reading at BEP 5A of 3.8%. Tr. 1215, 1217-18, 1221; Gov't Ex. 7, at 71. Given this history of methane level readings between the No. 1 bleeder shaft and BEP 5A, the operator had reason to believe that, while there were readings of 3.6% at the No. 1 bleeder shaft, there were likely to be higher methane levels in the travelable bleeder at BEP 5A.²⁰ Tr. 140-42, 562-64, 718-19, 721, 2005-08. Such elevated methane readings and evidence of methane-air mixture distribution problems demonstrate that the bleeder system failed to control air passing through the area and failed to continuously dilute methane-air mixtures from the worked-out area in violation of the requirements of section 75.334(b)(1).

²⁰ Cumberland claims that, during the afternoon shift of July 5, there was a 1:1 ratio in methane levels between the No. 1 bleeder fan and BEP 5A, and that, as a result, there was not an explosive mixture of methane in the travelable bleeder. RAG Reply Br. at 9. The results relied upon by Cumberland to support the purported 1:1 ratio in methane readings on July 3 were based in part on bottle samples taken at the No. 1 bleeder shaft and an Exotector reading at BEP 5A. Tr. 1213; RAG Ex. 7; Gov't Ex. 7. As noted above, a comparison of non-bottle sample readings taken on July 3 shows 3.8% methane at BEP 5A and 1.8% or 1.9% methane at the No. 1 bleeder shaft, revealing readings that were closer to a 2:1 ratio. Tr. 1215, 1217-18, 1221; Gov't Ex. 7, at 71. The results of the bottle samples taken at the No. 1 bleeder shaft were not made available to the operator until July 13, and were not relied upon by the operator on July 5. RAG Ex. 7; Tr. 1314-16. We also reject Cumberland's comparison of the readings of 3.6% methane taken at the No. 1 bleeder fan on July 5 and 6 with the reading taken at BEP 5A on July 3. RAG Reply Br. at 9. The readings of the two locations were taken on different days and are inappropriate for comparison.

Cumberland's violative conduct is compounded by evidence indicating that, although its personnel had reason to believe that the bleeder system was not functioning as it was designed to, they failed to take methane readings that would have provided information regarding the amount of methane that was present in the travelable bleeder entries and the extent to which methane was being moved away from the active workings. It is undisputed that Cumberland did not take any methane readings in the travelable bleeder entry during the afternoon shift of July 5. Tr. 530-31; Oral Arg. Tr. 17-18. Notwithstanding its knowledge that methane readings underground were likely to be higher than those at the No. 1 bleeder fan, the operator chose to monitor the methane levels at the No. 1 bleeder fan, and decided to withdraw miners only if readings at the fan reached 4%. Tr. 1146-47, 1152, 1351. Even under its plan to monitor conditions by taking readings at the No. 1 bleeder shaft, the operator chose to leave the No. 1 bleeder fan unmonitored for approximately three hours during the afternoon shift on July 5. Tr. 1784-85, 1828-29. Accordingly, we affirm the judge's determination that the operator violated section 75.334(b)(1).²¹

B. Citation No. 3657291

1. Violation of Section 75.363(a)

Section 75.363(a) sets forth posting and correction requirements for a hazardous condition, providing in part that "[a]ny hazardous condition . . . shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected." 30 C.F.R. § 75.363(a). The standard also requires withdrawal of certain miners for an imminent danger, providing in part that "[i]f the condition creates an imminent danger, everyone except those persons referred to in section 104(c) . . . shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected." *Id.*

²¹ As Cumberland asserts (RAG Br. at 14-15), the judge erroneously concluded that the air in the eastern perimeter bleeders and the air in the 1B right bleeders constituted splits of air and that the No. 1 bleeder shaft could be considered a return air course. 23 FMSHRC at 1252. The Secretary's witnesses testified that those bleeder entries were not considered separate splits of air but, rather were considered part of the same bleeder system. Tr. 374, 826-27. Moreover, "return" is a term of art applicable to specific ventilation designs described in the regulations and does not include the No. 1 bleeder shaft. *See, e.g.*, 30 C.F.R. §§ 75.323(c), 75.333. We also conclude that the judge erred in finding that here the rise in water gauge pressure indicated an increase in the water accumulation in by BEP 5A or that the bleeder system was malfunctioning. 23 FMSHRC at 1246, 1254. Consistent with Cumberland's assertions (RAG Br. at 20), there is no evidence that there was a change in the accumulation of water in by BEP 5A after June 29 when the water gauge at the No. 1 fan began to rise. Tr. 383, 638. Furthermore, a rise in water gauge pressure indicates a change in resistance, and a change in resistance may or may not indicate a problem with the bleeder system. Tr. 379-81, 1133-34. Nonetheless, we consider these errors by the judge to be harmless.

In concluding that Cumberland violated section 75.363(a), the judge reasoned that it was not feasible to use a danger-off sign because the hazardous bleeder conditions affected the entire mine. 23 FMSHRC at 1257. Accordingly, he stated that the question was whether the bleeder conditions during the afternoon shift of July 5 were a hazard that had to be corrected immediately because they constituted an imminent danger. *Id.* The judge answered that query in the affirmative. *Id.* at 1257-59.

The Secretary argues that Cumberland violated the posting, correction, and withdrawal requirements of section 75.363(a). S. Br. at 28-35. She agrees with the judge's conclusion that Cumberland violated the standard because there was an imminent danger during the afternoon shift of July 5, and miners were not withdrawn from affected areas. *Id.* at 29, 33-35. The Secretary also submits that, regardless of whether there was such an imminent danger, Cumberland violated section 75.363(a) because there was a hazardous condition that was not posted or immediately corrected. *Id.* at 29-33. The Secretary disagrees with the judge's reasoning that, because the entire mine was affected by the hazardous conditions and posting was not feasible, the Secretary was required to prove that the hazard constituted an imminent danger. *Id.* at 30 n.10. The Secretary asserts that the plain language of the standard provides that when there is a hazardous condition, the operator is required to post the affected area of the mine or immediately correct the condition, and that if posting is impractical, the operator is required to correct the condition immediately. *Id.*

Cumberland disputes the judge's conclusion that constructive knowledge of an imminent danger is sufficient to establish a violation. RAG Br. at 25-28. Cumberland further argues that the judge failed to adequately define the extent of the area affected by any alleged imminent danger. *Id.* at 28-29. Cumberland also asserts that the Secretary is impermissibly attempting to advance before the Commission the alternate theory that Cumberland violated the posting and correction requirements of section 75.363(a). RAG Reply Br. at 12-13.

Preliminarily, we disagree that the Secretary has advanced an argument outside of the Commission's scope of review. The Commission has explained that an appellee

may urge in support of the *judgment* below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or some issue resolution, so long as the appellee does not seek to attack the judgment itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review.

Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc., 12 FMSHRC 1521, 1529 (Aug. 1990) (emphasis in original). Here, the Secretary does not seek to attack the judge's conclusion that the citation should be affirmed or to enlarge her rights under that judgment. Although the Secretary disagrees with the judge's reading of the standard (S. Br. at 30 n.10), it is settled that an appellee may, without taking a cross-appeal, urge any matter appearing in the record even if the

argument advanced “involve[s] an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.” 20 James Wm. Moore et al., *Moore’s Federal Practice* § 304.11[3][b] at 304-29 (3d ed. 1997) (“*Moore’s*”) (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).²²

We agree with the Secretary that the record supports the conclusion that Cumberland violated section 75.363(a). First, it is undisputed that, during the afternoon shift of July 5, the bleeder conditions were hazardous. Senior Mining Engineer Peelor acknowledged that the operator could not allow a 3.6% methane concentration at the No. 1 bleeder shaft to continue because of the potential of methane to rise to the explosive range if unchecked. Tr. 1725-28. He agreed that the condition needed to be corrected as soon as possible. Tr. 1725-28, 1730-31. He further explained that production was stopped on the midnight shift and ventilation changes were made because “the problem was detected and it had to be addressed” immediately. Tr. 1736. Safety Manager Bohach also acknowledged that, although Cumberland officials did not believe they had an imminent danger, they believed they had “a situation that [they] had to address.” Tr. 1343. The Secretary’s witnesses uniformly testified that the level of methane exhausting from the No. 1 bleeder reflected dangerous levels of methane at the mine. Tr. 127-28, 285, 562.

Second, we agree with the Secretary that the operator failed to correct the hazardous bleeder conditions immediately, as required by section 75.363(a).²³ Cumberland recognized that, in conformance with the requirements of section 75.324, all miners except those making ventilation changes had to be withdrawn from the mine before ventilation changes could be made to address the elevated methane levels. 23 FMSHRC at 1249. At approximately 6:30 p.m. on July 5, Safety Manager Bohach and Engineering Manager DuBois confirmed the methane readings of 3.6% at the No. 1 bleeder fan. Tr. 1567. However, the operator decided that it would wait until the midnight shift to make ventilation changes, and that it would evacuate miners before then only if methane readings at the No. 1 bleeder shaft reached 4%. Tr. 1150-52. Miners were not withdrawn so that ventilation changes could be made until after the end of the afternoon

²² The Secretary’s argument that Cumberland violated the standard’s posting and correction requirements was sufficiently raised before and passed upon by the judge, so it is reviewable by the Commission. See S. Post-Hr’g Br. at 34, 37-38; Tr. 303-04 (Secretary’s arguments that the standard requires that a hazardous condition be corrected immediately, that the operator failed to correct the hazardous condition of high methane in the bleeder system immediately and that, even if the hazardous condition did not amount to an imminent danger, miners should have been withdrawn so that the operator could have taken steps to correct the condition immediately by making ventilation changes); 23 FMSHRC at 1257 (judge concluded that the standard “requires hazardous conditions to be corrected immediately or to be dangered-off,” but that posting was not feasible).

²³ The parties do not dispute that posting was impractical under the circumstances and that, in any event, the operator did not post any area. S. Br. at 32 n.11; Oral Arg. Tr. 71; RAG Reply Br. at 12.

shift, at approximately midnight. Tr. 1511-12. Thus, the operator did not “immediately correct” the bleeder conditions but, rather, delayed taking some measures required to more fully correct the violative conditions until the midnight shift.

We therefore disagree with Cumberland’s assertion that its actions during the afternoon shift were sufficient to bring it into compliance with section 75.363(a). RAG Reply Br. at 13-14. After verifying the elevated methane levels at the No. 1 bleeder shaft, the operator opened the 32-1 borehole, and arranged for a electrician to fix the pump at that borehole. Tr. 1138-41. While we credit Cumberland for finding the problem with the 32-1 borehole and solving it in a timely fashion, even Cumberland concedes that it did not expect correction of the problem would significantly affect the methane levels. Tr. 1818-20. DuBois clarified that a functioning pump at the borehole might have reduced methane from 3.6% to 3.4%. Tr. 1814-15. In fact, after opening the borehole and allowing methane to flow freely from the borehole, methane readings from the No. 1 shaft continued to measure 3.6% throughout the remainder of the shift. Tr. 1778-79. The operator also decided to evaluate the No. 1 bleeder fan periodically for the remainder of the afternoon shift and to withdraw miners if the methane level reached 4%. Tr. 1146, 1152. Nonetheless, there was a three-hour period between approximately 7:30 and 10:30 p.m. when the No. 1 fan was not monitored. Tr. 1827-28.

Furthermore, as discussed above, given the past ratio of methane levels at the No. 1 bleeder fan and at BEP 5A, the operator had information upon which to conclude that if 3.6% methane was exhausting at the No. 1 bleeder fan, higher levels would be presumed to exist in the travelable bleeder entries. Tr. 2005-08. MSHA considered 4.5% methane in a travelable bleeder to constitute an imminent danger. 23 FMSHRC at 1245. Safety Manager Bohach agreed that during active mining, MSHA’s 4.5% limit was reasonable. Tr. 1465-67. He conceded that if the operator had obtained a methane reading in the travelable bleeder at BEP 5A in the explosive range, the operator would have stopped production and evacuated the mine. Tr. 1400-02.

Given the information available to Cumberland at that time, it should have sent someone on the afternoon shift of July 5 to the bleeder entry in question to determine if the imminent danger level had been reached at BEP 5A.²⁴ Cumberland’s counsel stated during oral argument that it would have taken up to three hours for an individual from the surface to reach BEP 5A and obtain methane readings there. Oral Arg. Tr. 19-20. We do not find this argument persuasive. The record suggests that miners underground might have been able to accomplish this more rapidly. For example, Cumberland had a longwall foreman underground on the afternoon shift (Tr. 1615-16) who could have reached the travelable bleeder entries in a much more reasonable

²⁴ The operator apparently took a methane reading immediately upon reaching BEP 5A on the midnight shift, but after it had begun making ventilation changes on the midnight shift, although documentary evidence of that reading was not introduced at the hearing or at any other time in the proceedings. Tr. 1208-09, 1345-49, 1701-03, 1786-87, 1845-46. A methane reading at BEP 5A during the afternoon shift would seem necessary as baseline information to determine whether the ventilation changes made during the midnight shift were effective.

period of time to take methane readings. Cumberland's failure to utilize this person or some other person already in the general underground area to take methane readings at BEP 5A has not been satisfactorily explained and, in the absence of any justification, is not indicative of a prudent operator who was taking the *immediate* corrective action required by the regulation. Accordingly, we affirm, in result, the judge's conclusion that Cumberland violated section 75.363(a).²⁵

2. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence and encompasses conduct characterized as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consol*, 22 FMSHRC at 353.

Although the judge correctly set forth the Commission's standard for considering whether violative conduct is caused by unwarrantable failure, he erred in its application. 23 FMSHRC at 1259-60. The judge concluded that Cumberland's violation of section 75.363(a) was unwarrantable on the basis of four findings, which we conclude are not supported by substantial evidence.

First, the judge concluded that the operator's failure to withdraw miners was aggravated because general mine foreman Evans knew on the morning of July 5 that there were problems with the bleeder system based on the increase in water gauge pressure at the No. 1 bleeder shaft fan, but miners were allowed to continue production until the midnight shift. 23 FMSHRC at

²⁵ The judge erroneously concluded that "[a]bnormally high concentrations of methane at BEP 5A [were] an indication that methane from the gob [was] migrating back toward the working face rather than being diluted and carried away to the surface." 23 FMSHRC at 1258. An increase in methane in the bleeder entries is not necessarily an indication that methane is migrating back towards the face. Rather, because the volume of air exiting the mine did not significantly change (Tr. 1370), one would conclude that more methane was leaving the gob and exiting the mine. Tr. 1363-64. Nonetheless, we consider the judge's finding as it relates to the violation of section 75.363(a) to be harmless.

1259. As noted earlier, the rise in pressure at the fan was not evidence of a methane problem, but indicated a change in resistance in the mine. Tr. 203-04, 1133-34. It is undisputed that such a change in resistance could occur as a result of normal mining practices. Tr. 379-82, 1913.

Second, the record controverts the judge's finding that the aggravated nature of the operator's violation was demonstrated by evidence that the activation of the methane sensor at the tailgate indicated that the bleeder system was not moving methane from the working face. 23 FMSHRC at 1259. UMW Safety Committeeman Hroblak confirmed that on the afternoon shift of July 5, ventilation of the longwall appeared "textbook." Tr. 104-06, 112; *see also* RAG Ex. 8 at 26-28. In addition, the Secretary's ventilation expert, John Urosek, testified that the methane sensor on the longwall was located to measure methane in the airflow that crosses the longwall, rather than the methane adjacent to the shields or coming from the gob. Tr. 2009. He stated that there was sufficient air quantity at the longwall face to maintain methane levels at or below 1.5% and that there was enough volume to dilute methane coming from the bleeder system or from the gob directly behind the longwall. Tr. 2009. Urosek explained that, unless there were a massive roof fall causing methane to be propelled from the gob to the longwall, gob methane would not likely be picked up by the longwall sensors. Tr. 2015. MSHA Inspector Guley also testified that he believed that the methane monitor problem at the face was not caused by problems with the bleeder system. Tr. 630. Moreover, it appears that the methane monitor may have been activated because the monitor's cable was "shorting-out." Tr. 1238, 1469-70. There also were no findings of excessive methane at the face during the afternoon shift of July 5. Tr. 111-12, 1238; S. Br. at 8. We therefore hold that the judge's finding on this issue is unsupported by substantial evidence.

Third, we conclude that substantial evidence does not support the judge's finding that there was a significant possibility that rising methane levels in by BEP 5A could accumulate in the bleeder system and back up to the longwall face. 23 FMSHRC at 1260. The Secretary's witnesses testified that they were unsure of the extent to which the methane had backed up and characterized the problem with the bleeder system as presenting only a potential to cause a methane back up at the face. Tr. 619-23, 661-62, 714, 719, 724. The judge himself concluded that, contrary to the Secretary's assertion that the closure of BEPs 6, 7, and 8 had bottled up methane in the gob and could eventually have resulted in methane backing up to the face, the closure of BEPs 6 and 7 was not a significant cause of the bleeder malfunction.²⁶ 23 FMSHRC at 1246, 1256.

Fourth, we conclude that the judge erred in determining that other aggravating factors existed, including that the violation was obvious, was allowed to exist for an extended period of time, and was not disclosed to Cumberland's hourly employees. 23 FMSHRC at 1260. While the operator obtained repeated readings of 3.6% methane, the cause of the elevated methane readings was not obvious. Tr. 989-91, 1139-40, 1196-97, 1231, 1358-60, 1818-19. In fact, the bleeder problem was not fully abated until July 30. Tr. 594-95, 1920-22. In addition,

²⁶ The Secretary has not challenged that finding on review.

Cumberland on its own initiative took repeated methane readings at the No. 1 bleeder shaft rather than relying on MSHA's readings taken earlier that day showing methane within normal limits. 23 FMSHRC at 1247-48. As soon as it confirmed that its own readings indicated elevated levels of methane, the operator formulated a plan for correction and began gathering the necessary skilled manpower to carry out that plan. Tr. 1730-31, 1780-82. Moreover, although the operator did not inform the hourly employees of the initial elevated readings, it informed miners at 8:00 p.m. that there would be a ventilation change during the midnight shift and informed safety committee members at the end of the afternoon shift of the circumstances that had occurred. 23 FMSHRC at 1249; Tr. 110, 113-15, 122-23.

Although Cumberland's actions did not "immediately correct" the violative condition as required by section 75.363(a), we must view the company's actions and their effects in the context of the cited violation. As a preliminary matter, section 75.363(a) establishes alternative means of compliance. The operator shall *either* immediately correct the hazardous condition *or* post the area. We note that, in addition to serving as mitigating factors that should have been considered by the judge in his unwarrantable failure analysis, Cumberland's corrective actions also must be considered as attempts to comply with section 75.363(a). First, Cumberland identified the problem through proactive investigation. It then attempted to correct the problem. Although those attempts were not effective in "correcting" the methane accumulation in the bleeder shaft, the operator's belief that its course of action constituted an alternative means of compliance does not rise to the level of unwarrantable failure. *See Florence Mining Co.*, 11 FMSHRC 747, 753-54 (May 1989) (a unanimous Commission, relying on a review of the record as a whole and all of the circumstances, reversed a judge's unwarrantable failure finding where the operator relied upon an alternative means of evacuation). In this case, the Judge similarly did not analyze all of the circumstances, nor did he consider that compliance with the regulatory requirement was at least attempted through immediate, albeit ineffective, corrective action.

Moreover, the judge failed to give adequate weight to Cumberland's prior experience with elevated methane readings at the No. 1 bleeder shaft as a mitigating factor. In 1996, Cumberland had been cited for a non-significant and substantial violation of section 75.323(e) because more than 2% methane was detected exhausting from the No. 1 bleeder shaft. Tr. 1151-54; RAG Ex. 6. From December 1996 to October 1997, methane readings were taken at the No. 1 bleeder shaft that exceeded 2.7% methane and ranged as high as 3.4%, yet MSHA allowed Cumberland to operate. Tr. 232, 1157, 1490. Cumberland relied on this prior experience with MSHA in concluding that it could continue operations during the afternoon shift of July 5 and communicated that reliance to safety committee members at the end of the afternoon shift, and to Inspector Hixson when he arrived at the mine during the midnight shift of July 6. Tr. 122, 231-32; RAG Br. at 30. Thus, Cumberland relied upon MSHA's past actions as a basis for continuing operations while it formulated and implemented a plan that allowed for the orderly withdrawal of miners. Such circumstances preclude characterizing Cumberland's conduct as

unwarrantable.²⁷ See *Utah Power & Light Co.*, 12 FMSHRC 965, 972-73 (May 1990) (confusion about agency policy founded on inconsistency of previous MSHA actions militates against finding of aggravated conduct). Based on the foregoing, we reverse the judge's unwarrantable failure determination.

3. Civil Penalty

The judge assessed a civil penalty that was twice the amount proposed by the Secretary for Cumberland's violation of section 75.363(a). 23 FMSHRC at 1260-61. Cumberland argues that the judge erred in his assessment of the penalty. We agree.

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The Commission has further recognized that judges have discretion to assign differing weight to the various factors according to the circumstances of the case. *Lopke Quarries, Inc.* 23 FMSHRC 705, 713 (July 2001) (citing *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997)). The Commission has explained, however, "that a judge may not go beyond the criteria set forth in section 110(i)." *Jim Walter Res., Inc.*, 19 FMSHRC 498, 501 (Mar. 1997); *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 (Sept. 1996) (concluding that the judge erred when he considered deterrence as a separate factor warranting increase in penalty); see also *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) (concluding that the judge had considered a factor not applicable under section 110(i) when he considered mental anguish in his assessment of penalty). 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).

Although the judge purportedly considered the operator's failure to disclose conditions as part of his negligence and gravity criteria analyses, he further characterized this failure as a breach of a fundamental Mine Act purpose: that miners and operators must work together to identify and eliminate unsafe conditions. 23 FMSHRC at 1261. He concluded his discussion by stating, "Cumberland's failure to disclose the bleeder conditions during the afternoon shift on July 5, 2000, is an aggravating factor that warrants an increase in civil penalty." *Id.* Thus, the judge impermissibly increased the penalty by relying on the operator's breach of a Mine Act purpose, a factor outside of the section 110(i) penalty criteria. See *Ambrosia*, 18 FMSHRC at 1565; *Dolese*, 16 FMSHRC at 695 (concluding that judge erred by considering factors outside of

²⁷ We further note that the operator made continuing efforts to adjust and monitor the ventilation within its bleeder system by, for instance, adding the 2A bleeder shaft and fan, making the air change on July 3, and monitoring water gauge pressure and methane readings. 23 FMSHRC at 1245-48.

section 110(i) when assessing a penalty). Accordingly, we vacate the penalty and remand the matter to the judge. The judge shall reassess the penalty without considering breach of a Mine Act purpose as a separate factor bearing on the amount of the penalty. In addition, the judge shall take into account our reversal of his unwarrantable failure finding.

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Cumberland violated section 75.334(b)(1). We affirm, in result, the judge's determination that Cumberland violated section 75.363(a) and reverse the judge's determination that the violation was caused by Cumberland's unwarrantable failure. We vacate the civil penalty associated with Citation No. 3657291 and remand for reassessment consistent with the instructions in this decision.


Michael F. Duffy, Chairman
Stanley C. Szaboleski, Commissioner
Michael G. Young, Commissioner

Commissioners Beatty and Jordan, concurring and dissenting:

We concur with the conclusion of our colleagues in the majority that Cumberland violated the two regulations at issue. However, we disagree with their decision to reverse the judge's ruling that the violation of 30 C.F.R. § 75.363(a) resulted from Cumberland's unwarrantable failure to comply with that standard.

In addition to requiring operators to post and immediately correct a hazard, section 75.363(a) provides that if a hazardous condition creates an imminent danger, "everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected." 30 C.F.R. § 75.363(a). We believe the record amply supports the judge's conclusion that methane readings obtained by Cumberland on the afternoon of July 5 signaled an imminent danger, 23 FMSHRC 1241, 1259 (Nov. 2001) (ALJ), and that Cumberland's failure to withdraw the miners amounted to aggravated conduct. *Id.* at 1260.

Imminent danger is defined in section 3(j) of the Mine Act as "the existence of any condition or practice in a coal or other mine *which could reasonably be expected* to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C.

§ 802(j) (emphasis added). Although the regulations do not specify an upper limit for methane in the underground travelable bleeders, MSHA considers a 4.5% level an imminent danger. 23 FMSHRC at 1257; Tr. 820-21; RAG Ex. 3. Cumberland does not disagree with this enforcement policy. 23 FMSHRC at 1249. Indeed, Cumberland maintains that prudence requires the miners' withdrawal when methane reaches 4.0% in the bleeder shaft. RAG Br. at 30-31; Tr. 1152, 1351. Methane is explosive when it is in the 5 to 15 percent range. 23 FMSHRC at 1243.

The record indicates that during the two-week period leading up to July 5, Cumberland's methane readings at the No.1 bleeder shaft fan had been elevated. Tr. 183-85. Moreover, as the judge found, during that same period, the higher readings underground at bleeder evaluation point (BEP) 5A indicated that there was a two-to-one ratio of methane between the two locations. 23 FMSHRC at 1258. For example, on June 14, Cumberland obtained an Exotector reading of 1.8% methane at the No.1 bleeder fan, while measuring 3.5% methane at BEP 5A. Tr. 558-59, 1321-22; Gov't Ex. 7 at 64. On June 30, the Exotector detected only 1.89% methane at the No. 1 bleeder fan, but 3.5% at BEP 5A. Tr. 560-61, 1321-22; Gov't Ex. 7 at 68, 70. On July 3, Cumberland took an Exotector reading at the No. 1 bleeder shaft of 1.8% or 1.9% methane. Tr. 1215. The reading at BEP 5A was 3.8%. Tr. 1217-18; Gov't Ex. 7 at 71.

On July 5, Cumberland personnel obtained methane readings of 3.6% at the No. 1 bleeder fan. Tr. 1133-37, 1311-12, 1326-27, 1563-64, 1890-92. According to MSHA, such high readings were unheard of at a fan in an active mine. MSHA stated that levels such as those detected by Cumberland were usually detected only after an emergency such as an explosion or when a mine was reopened after having been sealed. Tr. 713. Indeed, Cumberland's general mine foreman found it difficult to believe the reading at the fan was that high, and he sent the

mine engineer back to take another measurement with a recalibrated Exotector. 23 FMSHRC at 1248, 1260. The engineer returned with another reading of 3.6%. *Id.* at 1248.

The judge determined that, given the conditions present on July 5, Cumberland was obliged to err on the side of caution. *Id.* at 1259. We agree. In light of the record evidence supporting the judge's finding of a recent 2:1 ratio between the underground methane levels at BEP 5A and the levels detected at the No. 1 bleeder fan, there was a substantial likelihood of dangerously high levels of methane in the underground bleeder entries. Tr. 562-64; 718-19. Nonetheless, as our colleagues note, it is undisputed that Cumberland failed to take any methane readings in the travelable bleeder entry during the afternoon shift of July 5. Slip op. at 11. Given the information available to it at the time, Cumberland should have sent someone to BEP 5A to determine if the imminent danger level had been reached there. *Id.* at 16. Furthermore, the judge determined that Cumberland's failure to withdraw miners on the shift was unreasonable and constituted aggravated conduct, 23 FMSHRC at 1259-60, and substantial evidence supports that conclusion.¹

Cumberland conceded that it would have withdrawn miners if methane levels had reached 4% at the No. 1 surface fan. *Id.* at 1257. The record indicates, however, that Cumberland did not continuously monitor the methane readings from that No.1 bleeder fan on July 5. In fact, the record states that there was a three-hour time period on July 5 when the No. 1 bleeder fan was not monitored at all. Tr. 1784, 1827-29. Thus, Cumberland would have no idea if readings during those three hours reached 4 or 5 or 10 percent.

The Commission has also recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). These factors include the length of time the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *Id.* All of the relevant facts and circumstances of each case must be

¹ The operator relies on tests showing that on July 3, there was a 1:1 ratio of methane between the No. 1 bleeder fan and the BEP 5A. RAG Reply Br. at 9. However, Cumberland did not have the bottle sample results which were the basis for the contention until July 13, several days after the citation in this matter was issued. RAG Ex.7. In addition, Cumberland relies upon evidence that there was 3.6% methane at the No. 1 bleeder fan on July 5 and 6 until ventilation changes were made, and that the only methane reading taken at BEP 5A revealed that there was 3.6% methane at that location also. RAG Reply Br. at 9 (citing Tr. 1582). However, the methane reading relied upon by Cumberland depicting a methane reading of 3.6% at BEP 5A was taken on July 3, not on July 5 or 6 (Tr. 1582), and it is therefore not appropriate to use it as a basis for comparison.

examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Id.*

Substantial evidence supports the judge's determination that Cumberland's violation of section 75.363(a) was of an aggravated duration. 23 FMSHRC at 1260. As previously mentioned, over the two-week period prior to July 5, the water gauge pressure at the No. 1 bleeder fan had been increasing. Tr. 548. In fact, the mine foreman stated that on June 29, the water gauge pressure had a "substantial increase." Tr. 1970. The Secretary's ventilation expert, Urosek, stated at that point, the operator should have taken any necessary steps to correct it. Tr. 1032.

However, it was not until July 5 that the mine foreman convened a meeting to discuss the rise in water gauge readings and problems with the bleeder system. Tr. 1132-33, 1891. Even then, when Cumberland became aware at approximately 4:00 p.m. that day that there was elevated methane exiting from the No. 1 bleeder shaft, it waited until the midnight shift to begin significant ventilation changes underground. 23 FMSHRC at 1249-50; Tr. 1146-47, 1569, 1780-81.²

Substantial evidence also supports the judge's finding that the violation posed a high degree of danger. 23 FMSHRC at 1260. As discussed above, there were concentrations of methane in the bleeder system that were potentially in excess of 4%, given the 2:1 ratio between the No. 1 bleeder fan and BEP 5A. As noted above, Cumberland had agreed that at 4%, the mine would need to be evacuated.

Substantial evidence also supports the judge's determination that the condition was obvious. *Id.* As the judge found, Cumberland employees took multiple readings that indicated elevated methane was exhausting from the No. 1 bleeder fan. Tr. 1137-38, 1146, 1784-85. The operator had actual knowledge of the increased water gauge readings and met to discuss their effect on the bleeder system. Tr. 1132-33, 1891.³

Our colleagues in the majority argue that the judge failed to consider mitigating circumstances in making his unwarrantable failure determination. Slip op. at 19-20. This argument is not persuasive. The majority agrees with Cumberland's assertion that its decision

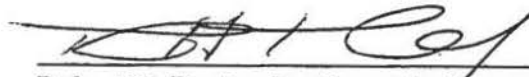
² Prior to that, Cumberland had made slight changes, such as opening the 32-1 surface gob vent hole, without affecting the levels of methane found at the No. 1 fan. 23 FMSHRC at 1248.

³ Without supporting authority, the majority cites the fact that the *cause* of the elevated readings was not obvious as a reason to reverse the judge's unwarrantable failure finding. Slip op. at 18. If anything, this argues in favor of concluding that the failure to withdraw miners was unwarrantable. Lack of knowledge as to what was causing the problem should have heightened Cumberland's caution in this instance.

not to withdraw the miners was reasonable because in the past MSHA permitted it to continue operating when methane levels at the No. 1 fan reached 3.4%. *Id.*; RAG Br. at 30. However, the circumstances surrounding the earlier event were quite different, significantly lessening its relevancy to the events in question here.

In the earlier situation at the No. 1 bleeder fan, MSHA issued a citation alleging a violation of section 75.323(e) because more than 2% methane was detected in the No. 1 bleeder shaft. Tr. 1153-54; RAG Ex. 6. From December 1996 to October 1997, methane readings were taken at the No. 1 bleeder shaft fan that exceeded 2.7% and ranged as high as 3.4%, yet Cumberland was allowed to operate. Tr. 232, 1157, 1490. At that time, however, unlike during the afternoon shift of July 5, 2000, there was no evidence indicating that methane readings at a BEP were twice the levels at the fan. In addition, in 1996 and 1997, even though MSHA had allowed the operator to continue working, state officials and MSHA knew about the situation, and MSHA had in place various guidelines and controls. Tr. 122, 232.

We agree with the judge that on July 5 an imminent danger existed, and Cumberland was obliged under the regulation to withdraw its miners before attempting to abate the hazardous condition.⁴ For the foregoing reasons, we believe that its failure to do so constituted an unwarrantable failure.⁵


Robert H. Beatty, Jr., Commissioner
Mary Lu Jordan, Commissioner

⁴ Our colleagues' argument that the judge should have considered as a mitigating factor that Cumberland "at least attempted" to comply with the regulation "through immediate, albeit ineffective, corrective action," slip op. at 19, is misplaced. The existence of an imminent danger required withdrawal of the miners before abatement efforts proceeded. Cumberland failed to comply with this section of the regulation.

⁵ In addition to vacating and remanding the judge's penalty determination in light of the majority's reversal of his unwarrantable failure finding, slip op. at 21, our colleagues vacate and remand the penalty because the judge took one of the purposes of the Mine Act into account in making his determination. *Id.* Commissioner Beatty joins the majority in vacating and remanding the judge's penalty determination on this ground. Commissioner Jordan would affirm the judge's penalty determination on this point. In his penalty discussion, 23 FMSHRC at 1261, the judge acknowledged language from section 2(e) of the Mine Act, in which Congress declared that "the operators of . . . mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] . . . conditions and practices in such mines. 30 U.S.C. § 801(e). Commissioner Jordan fails to see why a judge cannot keep this global purpose in mind while applying the more specific penalty criteria set forth in section 110(i). 30 U.S.C. § 820(i). Moreover, she believes that Cumberland's failure to disclose the bleeder conditions to the miners during the afternoon of July 5 rightly falls under the negligence criterion of section 110(i), as it relates to the operator's duty of care to avoid a violation. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). Commissioner Jordan believes that Cumberland's failure to notify its miners of potentially dangerous conditions in the bleeder system breached the duty of care inherent in section 75.363(a), providing for the posting of violations and withdrawal of miners in the event there is an imminent danger.

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August 12, 2004

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 2000-480-R
ADMINISTRATION (MSHA)	:	WEST 2002-131
	:	
v.	:	
	:	
TWENTYMILE COAL COMPANY	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Beatty, Commissioner¹

This case involves a consolidated contest and civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued an order pursuant to section 104(g) of the Act, 30 U.S.C. § 814(g), to Twentymile Coal Company ("Twentymile") as a result of an alleged violation of a mandatory training standard set forth at 30 C.F.R. § 48.7(c) (2002). Administrative Law Judge David Barbour affirmed the order, concluding that a violation had occurred and that it was significant and substantial ("S&S"). 25 FMSHRC 373, 384, 385 (July 2003) (ALJ). The judge also concluded that the proposed penalty assessment was issued within a reasonable time and dismissed the operator's challenge. *Id.* at 388. The Commission granted Twentymile's petition for review. For the reasons that follow, we affirm in part and reverse in part.

I.

Factual and Procedural Background

Twentymile operates the Foidel Creek Mine, a large underground coal mine in Routt County, Colorado. 25 FMSHRC at 375. Twentymile employs approximately 300 miners and utilizes two developing sections and one retreat longwall section to mine coal. *Id.*

¹ A majority of the Commissioners joins in each section of Commissioner Beatty's opinion, and therefore it constitutes the Commission's decision in this case. A further explanation of which Commissioners join in particular sections is provided on page 6, *infra*.

Due to geological conditions in the mine, there are times when rock is extracted along with coal. *Id.* In order to avoid combining coal from other areas of the mine with the rock-coal mixture, Twentymile separately transports the mixed material out of the mine. *Id.* Prior to the events in this proceeding, Twentymile utilized a series of four conveyor belts to move the mixed material. *Id.* In order to more efficiently transport the rock-coal mixture, Edwin Brady, conveyance manager at the mine, designed a chute to assist in this process and supervised its installation. *Id.*

The vertical chute that Brady designed is five feet square and is located in a vertical shaft, the "Glory Hole," which is approximately 12 feet in diameter. *Id.* at 376; Tr. 20. The chute, which is about 45 to 50 feet in height, connects an upper level of the mine to a lower level. 25 FMSHRC at 375-76. At the upper level, the rock-coal mixture moves to the chute on a conveyor belt that has a gate positioned over the chute. *Id.* at 376. When the gate is positioned to divert the rock-coal mixture away from a bunker where coal is stored, material is dumped from the conveyor belt into a hopper at the top of the chute and falls through the chute to the lower level. *Id.* Rocks entering the chute range in size from one inch to eight inches in diameter. *Id.* at 379. At the bottom, there is a "rock box," or slanted chute, which channels the material onto a conveyor belt that moves it out of the mine. *Id.* at 375-76.

Brady's design includes baffles to slow the fall of the material and prevent damage to the rock box or conveyor belt at the lower level. *Id.* at 376. A vertical ladder stands alongside the chute with four landings that are accessible by the ladder. *Id.* At each landing, a door opens to the interior of the chute for observation or maintenance. *Id.* The door is secured by a latch that is held in place by an eye bolt that must be loosened before the door can open. *Id.* When the door to the chute is opened, it swings outward. T. Ex. 3 and 4. In order to avoid material coming through the doorway, a miner must stand back and behind the door. 25 FMSHRC at 376. At the top and bottom of the chute are electronic signals that are triggered when the chute becomes clogged. *Id.* The conveyor is designed to stop automatically if materials can no longer move through the chute. *Id.*; Tr. 159-60.

On May 26, 2000, Twentymile placed the chute in service. 25 FMSHRC at 376. For several days, the chute operated without problems. *Id.* On June 6, the chute became clogged, and the conveyor on the upper level stopped feeding the chute. *Id.* Brady instructed electricians to check the motor on the conveyor feeding the chute. *Id.* They reported to him that the motor was fine and that the chute was clogged. *Id.*

Brady then walked to the top of the chute, climbed onto the ladder, and got off on the platform closest to the top of the chute. *Id.* He loosened the eye bolt on the latch, opened the door accessing the chute, and observed that large rocks were blocking the door. *Id.*; Tr. 167-68. He closed the door, secured the latch by tightening the eye bolt, and climbed down the ladder. 25 FMSHRC at 376. At each level, Brady opened the door and observed more rock until he reached the bottom of the chute where he met beltmen Craig Bricker and Rick Fadely. *Id.* at 377. Brady

instructed Fadely to go to the lowest landing, open the access door, and try loosening the material with a steel bar. *Id.* Fadely was unable to free the material with the bar. *Id.* Brady then ordered the miners to get the water hose and spray the material because he believed the material might become unstuck if it became "soupy." *Id.*

Kevin Olson, the acting shift supervisor, learned that the chute was clogged and assigned Matthew Winey, the production crew foreman, to go to the bottom of the chute and help in unplugging it so that mining could begin again. *Id.* Winey, in turn, directed members of his crew to go to the bottom of the rock chute. *Id.* When Winey reached the chute, Bricker and Fadely were assisting Brady in connecting the hose. *Id.* When it was connected, Fadely and Winey climbed to the lowest landing and Winey commenced spraying the stuck material in the chute while Brady began to hit the bottom of the chute with a hammer. *Id.* After about five minutes of spraying and hitting the chute, the material in the chute began to move. *Id.*

Kyle Webb was a member of Winey's crew with more than four years of mining experience. *Id.* Members of Winey's crew came to the chute at varying times, and Webb arrived at the chute with several other miners. *Id.* Either before or after Winey and Fadely began spraying the stuck material, Webb climbed the rock chute ladder above the lowest platform. *Id.* Neither Fadely nor Winey instructed Webb to go up the ladder, nor did Winey ask Webb where he was going. *Id.* at 377-78. According to Brady, there was no need for any miner to go up the ladder because there was nothing to do above the access door where Fadely and Winey were spraying the stuck material. *Id.* at 378.

As the material started to move in the chute, Webb fell and landed on the bottom platform. *Id.* At about the same time that Webb fell, the rock-coal mixture began to spill out of the top access door and down the outside of the chute.² *Id.* The material hit Webb as he lay on the platform. *Id.* Winey and Fadely took cover underneath the platform as the material fell. *Id.* An electrician who was working at the top of the chute heard shouting below and climbed down the ladder and closed the top access door. *Id.* When the material ceased falling, several miners went to assist Webb. *Id.* Webb was airlifted to a local hospital where he was diagnosed with and treated for serious, but non-fatal, head injuries. *Id.*

The mine's safety manager, R. Lincoln Derick, was notified at his home regarding the accident. *Id.* In turn, he immediately contacted MSHA Inspector Philip Gibson. *Id.* Derick and Gibson both went to the mine. *Id.* Gibson went into the mine with several representatives of Twentymile and an officer of the Routt County Sheriff's department. *Id.* at 378-79. Gibson began his investigation at the top of the chute and proceeded to the bottom. *Id.* at 379. The access door on the lowest level was open and material began to spill out of the chute, causing

² It is not clear from the record how the upper access door was opened. Winey speculated that Brady might not have adequately secured it after he opened it to examine the stuck material or that the door might have opened due to a design flaw. It is also possible that Webb himself could have opened the door prior to his fall. 25 FMSHRC at 378 & n.9.

Gibson to move quickly out of the way when he slipped and slightly injured himself. Tr. 52. Thereafter, Gibson issued an imminent danger order to Twentymile that required it to obtain MSHA's approval before resuming mining operations.³ 25 FMSHRC at 379.

From June 7 through June 14, Gibson returned to the mine where he continued his investigation by interviewing witnesses, taking photographs, and reviewing training records. *Id.* During this time, Twentymile completed the accident investigation report that it was required to file under Part 50 of MSHA's regulations. *Id.*; Gov't Ex. 11.

On June 16, 2000, Gibson issued an order, pursuant to Section 104(g)(1), 30 U.S.C. § 814(g)(1),⁴ charging Twentymile with an S&S violation of 30 C.F.R. § 48.7(c)⁵ when it allowed miners to unplug the rock chute without first receiving task training. The order stated in pertinent part:

Personnel such as mining crews, supervisors, and laborers, who had reason to work from or travel on the ladders and landings of the "Rock Chute" at the "Glory Hole" area had not received the requisite safety training . . . before they performed their work in this

³ That order is not at issue in this proceeding.

⁴ Section 104(g)(1) provides:

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

⁵ At the time the order was issued, section 48.7(c) stated, "Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such task." "Task" is further defined at section 48.2(f), 30 C.F.R. § 48.2(f): "*Task* means a work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge."

area. The "Rock Chute" had become plugged with blasted roof material on June 6, 2000. These persons entered the area to work at unplugging the chute before they had received safety training.

Order 7618153. The order was abated when Twentymile adopted procedures for working around the rock chute, including instructing miners in safe work practices. Tr. 44-45; Gov't Ex. 4.

Twentymile filed a notice of contest. The judge assigned to the case stayed the contest proceeding pending issuance of a penalty assessment. Order, dated Aug. 1, 2000. On January 4, 2001, MSHA issued its accident investigation report. Gov't Ex. 5. On November 9, 2001, MSHA issued a proposed penalty assessment, and the case proceeded to trial. 25 FMSHRC at 386.

The judge issued a decision⁶ in which he rejected Twentymile's challenge to the order on the basis that it was impermissibly vague in identifying the miners needing task training and in describing the task for which training was needed. *Id.* at 382. He concluded that the order, as initially written, used a permissible "class description" in identifying those who worked or traveled around the rock chute. *Id.* He further noted that the order was amended at trial to include the names of the miners who were not given adequate task training. *Id.* With regard to the task described, the judge concluded that there was no doubt as to the task for which training was required. *Id.*

With regard to the merits of the violation of section 48.7(c), the judge found that none of the miners who were assigned to unplug the chute received any task training regarding the assignment beforehand. *Id.* at 383. Concluding that Twentymile should have anticipated that the job of unplugging the chute would occur on a "regular" basis, he affirmed the violation. *Id.* at 384. In addressing the S&S designation of the violation, the judge found that the lack of training created conditions under which a miner could have fallen or been struck by escaping material and that the resulting injury would have been serious. *Id.* at 385-86.

The judge rejected Twentymile's challenge to the penalty that was based on a 17-month delay between the order and the issuance of the proposed penalty. *Id.* at 386-88. The judge initially noted that the Act gave the Secretary "a reasonable time" within which to notify an operator of a proposed civil penalty and that the Secretary met this requirement. *Id.* at 387. In addition, the judge analyzed the reason for the delay and whether the operator was prejudiced. *Id.* He concluded that the reasons MSHA gave for the delay – a shift in personnel in MSHA offices and the failure of a new employee to understand his duties – were "understandable" and that the

⁶ The case proceeded to trial before Judge August Cetti. However, before he issued a decision in the case, he retired and the matter was transferred to Judge Barbour. The parties agreed that Judge Barbour could decide the case on the basis of the record that he received from Judge Cetti without the need to take further evidence.

lapse in time was not prejudicial to Twentymile. *Id.* at 388. The judge, therefore, declined to dismiss the penalty petition. *Id.* In weighing the penalty criteria, the judge concluded that the Secretary's proposed penalty of \$6,000 was excessive and reduced it to \$1,500. *Id.* at 389.

II.

Disposition

Generally, Twentymile argues that the language of sections 48.7(c) and 48.2(f) is clear and unambiguous and that task training was not required because unplugging the chute was not a "task" that was performed on a regular basis. T. Br. at 9-11. Twentymile further argues that the order was not sufficiently specific (*id.* at 16-21), and that the inclusion of the six miners in the amended order is not supported by substantial evidence. *Id.* at 22-25. Twentymile contends that the judge misapplied the Commission's test for determining whether a violation is S&S. *Id.* at 25-28. Finally, it challenges the judge's conclusion that MSHA's delay in issuing a penalty proposal was not unreasonable. *Id.* at 28-33.

In support of the judge's decision, the Secretary argues that she should be given deference in interpreting the regulation at issue. S. Br. at 12-14. The Secretary further argues that the order gave Twentymile adequate notice of the allegations against it. *Id.* at 28-32. The Secretary asserts that substantial evidence supports the judge's determination that the miners named in the amended order needed task training. *Id.* at 21-24. She argues that the judge correctly found that the violation of the training regulation was S&S. *Id.* at 24-28. Finally, the Secretary challenges the assertion that the penalty assessment should be dismissed because she took too much time in proposing it. *Id.* at 32-44.

The Commission unanimously finds that Twentymile violated the training standard and that the violation was S&S, but Chairman Duffy and Commissioner Suboleski reach a finding of violation on separate grounds. Chairman Duffy and Commissioners Beatty and Young conclude that a section 104(a) citation should have issued instead of a section 104(g) order. All Commissioners agree that the citation was sufficiently specific. The Commission, with Commissioners Jordan and Young dissenting, concludes that the proposed penalty was not issued within a reasonable time and, accordingly, vacates the civil penalty.

A. Adequacy of the Order

The judge concluded that the order was not deficient in identifying those to whom it applied and that, even if the order lacked sufficient specificity, it was amended at hearing to include the names of those miners who had not been given the required task training. 25 FMSRHC at 382. He further held that the order made clear which task required training. *Id.* Before the Commission, Twentymile argues that the order did not specifically identify the miners to be trained or the task for which training was required. T. Br. at 16. The Secretary responds that the order satisfied the requirements of an administrative pleading because it gave Twentymile fair notice of the allegations against it. S. Br. at 28-29.

1. Issuance of a Section 104(g) Order

We conclude that the section 104(g) order issued to Twentymile in this case was void *ab initio* for its failure to conform to the requirements of section 104(g), 30 U.S.C. § 814(g). However, since the fact of violation survives the deficiencies of the order, we modify the order to a section 104(a) citation, an action within our authority under section 105(d) of the Act, 30 U.S.C. § 815(d).

In the course of legislating the 1977 Mine Safety and Health Act, Congress recognized with a significant degree of criticism that no mandatory safety and health standards addressing the training of miners existed under either of the predecessor statutes, the 1966 Metal and Nonmetallic Safety Act, 30 U.S.C. § 721 et seq. (1976), and the 1969 Coal Mine Health and Safety Act, 30 U.S.C. § 801 et seq. (1976) (“1969 Coal Act”): “It is unacceptable that years after enactment of these mine safety laws, miners can still go into the mines without even rudimentary training in safety.” S. Rep. No. 95-181, at 4 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 592 (1978) (“*Legis. Hist.*”).

The Committee considers the presence of miners in a dangerous mine environment who have not had even rudimentary training in self-preservation and safety practices inexcusable; and in the fact that regulations requiring said training have not yet been promulgated is a serious failure in mine safety administration.

S. Rep. No. 95-181, at 49-50, *reprinted in Legis. Hist.* at 637-38. Accordingly, in section 115 of the Act, Congress mandated new miner training for both surface and underground miners, annual refresher training for all miners, and task training for “any miner who is reassigned to a new task in which he has had no previous work experience.” 30 U.S.C. § 825(a).

To ensure compliance with the new training mandates, Congress also authorized use of the withdrawal order set forth in section 104(g). Under that provision, if an authorized representative of the Secretary

[f]ind[s] employed at any coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, [he] shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative . . . determines that such miner has received the training required by section 115 of this Act.

30 U.S.C. § 814(g)(1).

The wording of section 104(g) could not be clearer: a section 104(g) withdrawal order is an order aimed at a specific individual (one deemed a hazard to himself and to others), and it is to be issued on the spot in real time.

Given that there were no statutory or regulatory requirements for safety and health training in place prior to the passage of the Act, it is clear that the enforcement action authorized in section 104(g) was intended to ensure that miners without even “rudimentary training in self-protection and safety practices” would not be allowed to work in mines once the Act took effect. Thus, the withdrawal provision was, at the outset, intended to spur the Secretary to promulgate training regulations and operators to implement training plans during the six-month period between enactment of the new law and its effective date. In our view, Congress, in fashioning the section 104(g) order, chiefly had in mind those new miners who had not received their initial 40 or 24 hours training and those experienced miners who had not received their annual 8 hours of refresher training since it would be logical to remove those miners from the mine and place them in classrooms or in practical training environments until the requisite hours had been met.

Conversely, the inclusion of task training within the scope of a withdrawal order is somewhat problematical. It is singularly counterintuitive to remove a miner from the area where a particular task is to be performed in order to provide him with training in that task.⁷ Be that as it may, as the statute reads, a section 104(g) order is authorized in a situation where an inspector discovers that a miner has not been given necessary task training.⁸

Although the Secretary is generally authorized to issue a section 104(g) withdrawal order upon finding that a miner has not received required task training, the plain meaning and intent of section 104(g) mandates that such an order must meet at least two basic requirements. First, it must specify the miner or miners being withdrawn and prohibited from re-entering the mine or relevant area within the mine until the lack of training has been rectified. Second, the order must be issued on the spot – during or immediately following an inspection – and provide for immediate withdrawal of the miner(s) in question.

With regard to the requirement that the section 104(g) order specifically identify affected miners, the statutory language clearly contemplates that the order be directed at a particular miner

⁷ We note that 30 C.F.R. § 48.7(a)(1) provides that task training for “work tasks, equipment, and machinery . . . shall be given in an on-the-job environment.”

⁸ Withdrawal orders can be issued to encompass a part of a mine or even a particular piece of equipment on the theory that the definition of “mine” in the Act encompasses areas or equipment within the mine. Perhaps then, a section 104(g) withdrawal order, in practical terms and effect, could mean that a miner requiring task training could be removed from the immediate area within which the task is being performed, taught the appropriate procedures, and then returned to the scene of the task to demonstrate proficiency and safety consciousness in carrying out the task.

who is a hazard to “himself and to others,” not that it simply conclude that training violations exist. Moreover, the statute provides that the miner affected by a withdrawal order shall “be prohibited from entering such mine until . . . the Secretary determines that such miner has received [the necessary] training” Thus, as a practical and fundamental matter, the miner or miners subject to a section 104(g) order must be specifically identified so that the Secretary can subsequently determine whether the necessary training has been received and the order has thereby been properly abated.⁹ By contrast, a citation issued under section 104(a) need not necessarily identify the miners involved in a training violation so long as the operator is provided fair notice of the violation and the means of abatement and can adequately prepare for a hearing on the matter. *See* p. 10, *infra*. The second requirement – that the order be issued on the spot during or immediately following an inspection and provide for immediate withdrawal of the miners in question – also follows from the statutory language. Section 104(g) calls for the “immediate withdrawal” of an affected miner to address an immediate hazard created by the miner’s lack of training, not an order issued much later seeking to address a situation that has already been resolved, or is in the process of being resolved.

In this case, MSHA’s issuance of the section 104(g) order failed to satisfy the requirements above for such an order. The order did not name the miners affected, and therefore MSHA could not properly determine later whether the miners in question had received the requisite task training so that they could be allowed to re-enter the mine as provided in section 104(g). The order likewise clearly did not satisfy the on-the-spot, immediate withdrawal requirement because it was issued ten days after the inspection in question – at a time when no immediate withdrawal was necessary. The conclusion that the issuance of a withdrawal order was inappropriate in this case is further demonstrated by the fact that MSHA agreed that Twentymile’s general plan to provide training *prospectively* to miners working in the rock chute (Gov’t Ex. 4) constituted proper abatement of the withdrawal order. As discussed above, the statute makes clear that a properly issued section 104(g) order is to be abated by actually providing specific task training to the affected miner so that he may re-enter the mine.

Finally, as to the argument that a section 104(g) order must be issued in all circumstances involving training violations, that simply is not the case. The Commission recently issued a

⁹ For example, the task training received by the miner in question must be recorded and certified in accordance with 30 C.F.R. § 48.9(a), which provides in relevant part:

Upon a miner’s completion of each MSHA approved training program, the operator shall record and certify on MSHA form 5000-23 that the miner has received the specified training. A copy of the training certificate shall be given to the miner at the completion of the training. The training certificates for each miner shall be available at the minesite for inspection by MSHA and examination by the miners, the miner’s representative, and State inspection agencies.

decision in *Dacotah Cement*, 26 FMSHRC 461 (June 2004), wherein a section 104(a) citation, not a section 104(g) order, was issued when an inspector cited the operator for failing to provide task training.

For these reasons, we hereby modify the section 104(g) order to a section 104(a) citation with S&S findings.

2. Specificity of the Order¹⁰

Section 104(a) of the Mine Act requires that each “citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.” 30 U.S.C. § 814(a). The Commission has generally recognized that this requirement for specificity serves the dual purposes of allowing the operator to discern what conditions require abatement and to adequately prepare for a hearing on the matter. See *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993), and cases cited.

The citation generally referred to the miners who “entered the area to work at unplugging the chute.” 25 FMSHRC at 382. The judge concluded that this “class description” was permissible in light of the operator’s “presumed knowledge” of those working at the chute. *Id.* Contrary to Twentymile’s argument (T. Br. at 18), there is no language in section 104(a) requiring that miners be identified by name. Moreover, as Twentymile acknowledges, the miners included in the citation were identified by MSHA in two responses to interrogatories. *Id.* Significantly, the Secretary amended the citation at trial to include the names of the miners who were not task trained before working on the rock chute.¹¹ Tr. 71. In light of this identification of the miners included in the citation, Twentymile cannot seriously contest its ability to respond to the violation alleged at trial. Nor is it apparent that the lack of inclusion of named miners within the citation impeded Twentymile’s abatement of the violation. Twentymile abated the violation when it implemented work practices embodied in “Glory Hole - Rock Chute and Coal Bunker Safe Work Procedures,” which included a requirement for task training for miners working in or around the rock chute. Gov’t Ex. 4. Because the assignment of miners to the task of unplugging the chute is wholly within Twentymile’s control, for purposes of abatement, the class of miners requiring training must necessarily be broadly defined to identify potential miners who may be assigned to the same task in the future and, thus, also require task training.

¹⁰ Hereafter, we refer to the order as a “citation,” consistent with our above modification.

¹¹ Twentymile generally objects to the judge permitting the citation to be amended at trial. T. Br. at 19. However, the Commission has long held that leave to amend citations and orders should be freely granted, and a judge’s determination in this regard is reviewable under an abuse of discretion standard. See *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). Twentymile has not made any showing that the judge abused his discretion in this proceeding in granting the amendment to the citation.

Finally, Twentymile objects to the description of the task for which training was required. The citation generally described the miners' work assignment as involving the rock chute on the day of the accident. In addition, the citation was specific in referring to the task as unplugging the rock chute before safety training was given. Consistent with the description in the citation, the accident report that Twentymile prepared following the accident described the task as "cleaning plugged chute." Gov't Ex. 11, at 1. Thus, the judge's conclusion, "[t]here was no doubt as to the task for which training was required" (25 FMSHRC at 382), is well supported by the record.

In short, the citation was sufficiently specific to provide notice to Twentymile of the conditions that existed at the mine that were the basis for the alleged violation.

B. Violation of Section 48.7(c)

Although he did not explicitly say so, the judge appears to have based his reading of the regulation on a plain meaning analysis. See 25 FMSHRC at 382-84. Before the Commission, Twentymile argues that the meaning of the regulation is plain. T. Br. at 9-11. The Secretary argues that the regulation is ambiguous and that she is entitled to deference in her interpretation. S Br. at 12-13.

Section 48.7(c) provides that miners who are assigned to a "new task" "shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such task."¹² 30 C.F.R. § 48.7(c). "Task" is further defined in section 48.2(f) as a "work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge." 30 C.F.R. § 48.2(f).

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 Prod. 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. See *id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

The parties essentially do not disagree over the meaning of section 48.7(c). Nor was it disputed by the parties that the miners who were sent to unplug the chute on June 6 were not

¹² The regulation mirrors the language in section 115(a)(4) of the Mine Act, 30 U.S.C. § 825(a)(4), which states, "[A]ny miner who is reassigned to a new task in which he has no previous work experience shall receive training in accordance with a training plan approved by the Secretary . . . in the safety and health aspects specific to that task." The regulation has been revised since the violation that occurred in this proceeding. See 30 C.F.R. 48.7(c) (2003).

trained in the job prior to the assignment.¹³ 25 FMSHRC at 383. Rather, they largely disagree over whether Twentymile should have anticipated that the job of unplugging the chute would occur on a “regular basis” so as to come within the regulatory definition of “task.”

The judge concluded that the task of unclogging the chute was one that would occur on a regular basis and that Twentymile violated section 48.7(c) when it assigned miners to work on the chute without training them. 25 FMSHRC at 384. When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).¹⁴

Substantial evidence supports the judge’s findings regarding the recurring nature of unplugging the rock chute. The judge began his analysis of whether Twentymile should have foreseen that the task would occur on a regular basis by examining the conditions and work practices at the mine. 25 FMSHRC at 383. The judge noted that the rock chute was newly installed and had only been in full operation for several days before it became clogged on June 6. *Id.* at 384. He also noted that Twentymile had installed four doors on the chute. *Id.* These doors allowed access to the chute for observation and maintenance from platforms that were adjacent to the chute. *Id.* at 376. Twentymile also installed two internal monitoring devices, one at the bottom of the chute and one at the top, to signal when material in the chute stopped flowing. *Id.* at 384. In addition to the presence of the signals noted by the judge, the record also indicates that the conveyor that fed the hopper to the chute was designed to automatically cut off if material stopped flowing in the chute. *Id.* at 376.

The judge further noted that the problem of clogged or blocked chutes was not new to the mine. *Id.* at 384. Other chutes became clogged when wet, “sticky” material went into the chutes. *Id.* In conveyance manager Brady’s words, it was a “recurring problem,” happening about every four, five, or six months. Tr. 190-91. In light of the fact that the rock chute carried similar material with a known propensity to jam chutes, the judge inferred that a “reasonably prudent person” would have anticipated that the material in the rock chute would clog at least as

¹³ The operator’s training plan, which had not been updated since 1993, contained nothing about task training in chute maintenance. Gov’t Ex. 13; Tr. 127-28.

¹⁴ The Commission has further held that “the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence.” *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are “permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.” *Id.*

frequently and that Twentymile therefore violated section 48.7(c) when it assigned the miners to unplug the chute without training them. 25 FMSHRC at 384.

Twentymile argues that the judge engaged in speculation in determining that the newly-installed chute would clog, that the devices on the chute that the judge examined as evidence that the operator anticipated clogging were there for other reasons, and that, even if the chute clogged several times a year, unclogging it would not meet the dictionary definition of a “regular” task. T. Br. at 13-15. Despite Twentymile’s contentions, however, the installation of a new piece of equipment requires an operator to consider whether tasks involving the equipment will occur on a regular basis. Where a task cannot be scheduled, but is reasonably foreseeable as a recurring duty with discrete health and safety concerns, an operator is expected to provide proper planning and communication to ensure that workers performing the task receive appropriate training. To hold otherwise would be to defer training necessary to guard against the hazards associated with the job until an unfortunate experience ratifies the need for task training.

Jams, clogs, or other failures are, of course, not scheduled events. If they occurred on a literally “regular” basis, an operator presumably would take some course of action to prevent their “regular” occurrence. Imposing a literal definition of “regular,” however, creates a situation in which the health and safety aspects of events that are reasonably foreseen as recurring, but not at scheduled or fixed intervals, would escape the mine’s training program.¹⁵ This is contrary to the general intent of the Mine Act and more specifically to the training provisions. S. Rep. No. 95-181, at 49-50, *reprinted in Legis. Hist.* at 637-38 (1978) (recognizing “[t]he hazards involved with . . . mining . . . and the need to provide for the health and safety of the nation’s miners” and that “health and safety training of miners is essential to achieving” safety under the Act). *See also Cannelton Industries, Inc.*, 26 FMSHRC 146, 151 (Mar. 2004), *appeal docketed*, No. 041126 (D.C. Cir., Apr. 12, 2004) (reading the plain words of a provision literally can carry a different meaning than intended), citing *Meredith v. FMSHRC*, 177 F.3d 1042, 1053-54 (D.C. Cir. 1999). While we do not know how “regularly” the rock chute would become clogged in normal day-to-day mining operations, the record suggests it became clogged after several days of operation before it was substantially modified. 25 FMSHRC at 376; Tr. 70, 169, 276-77. That, combined with Twentymile’s experience with periodic clogging of other chutes in the mine and design features of this chute indicating that Twentymile was aware of the potential for clogging or jamming, support the judge’s conclusion that the rock chute would reasonably be anticipated to clog or jam on a recurring basis.¹⁶

¹⁵ As the Secretary states (S. Br. at 14 n.8), Twentymile’s safety manager testified that task training was given to miners prior to moving longwall mining equipment even though such moves only occur about every eight months. Tr. 294-95. Moreover, at oral argument counsel for Twentymile agreed that jobs performed at sporadic intervals would not necessarily be exempt from task training requirements. Oral Arg. Tr. 12-13.

¹⁶ The fact that some of the devices noted by the judge, such as access doors, could be used for a purpose other than unclogging the chute does not undercut his findings and inferences.

Finally, Twentymile asks the Commission to overturn the judge's decision with respect to the citation because he failed to analyze whether each of the six miners named in the amended citation needed task training. T. Br. at 22-25. The named miners included Ed Brady, Rick Fadely, Kyle Webb, Eric Hough, Matt Winey, and Craig Bricker. Tr. 71. The judge concluded that none of the miners assigned to unplug the chute had been trained in the health and safety aspects of the task, implicitly rejecting Twentymile's position. 25 FMSHRC at 383. The Secretary responds that such an individual-miner analysis was unnecessary and that substantial evidence supports the judge. S. Br. at 21.

Based on record testimony, the judge found that the shift supervisor assigned Winey as foreman of the production crew, which included Webb and Hough, to go to the chute and assist in unplugging it. 25 FMSHRC at 377. When Winey arrived at the chute, beltmen Bricker and Fadely were already working on unplugging the chute. *Id.* Winey joined in working with Bricker and Fadely in spraying the stuck material with a hose, while Brady hit the bottom of the chute with a hammer. *Id.* Hough assisted in connecting the hose and shoveled at the bottom of the chute. Tr. 220. Without being instructed to do so, Webb climbed up the ladder adjacent to the chute.¹⁷ 25 FMSHRC at 377. Given these miners' active involvement with unplugging the chute and the fact that it was undisputed that no miner had received *any* task training with regard to the rock chute, the inclusion of these miners' names in the citation is well supported by the record.¹⁸

While we certainly agree with our concurring colleagues' view that Twentymile could have met the training requirements of the Act and the regulations by incorporating the training into the duties of the beltmen, the facts of this case do not support limiting the violation to those miners. Once an operator has made a decision to assign miners to a task requiring training, it

We review the judge's findings and conclusions in light of the whole record. *See Arch of Kentucky*, 20 FMSHRC 1321, 1329 (Dec. 1998) (reviewing record as a whole to conclude that substantial evidence supports judge's finding of a violation); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (stating that an appellate tribunal must review the whole record and consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding). Taken as a whole, the evidence of the design features noted by the judge supports his conclusion.

¹⁷ Twentymile argues that neither Webb nor Hough were "assigned" the task of unplugging the chute as they received no direct orders to perform any job related to this work. T. Br. at 24. This ignores the evidence that Winey was given general instructions to unplug the chute and directed his crew to go to the chute. 25 FMSHRC at 377. Thus, while neither Webb nor Hough received specific orders when they arrived at the chute, both acted in a manner consistent with the general instruction given the crew.

¹⁸ While it is not apparent that Ed Brady, the designer of the chute, would have needed task training given his familiarity with the rock chute and the hazards that accompanied work around it, the judge's failure to explicitly exclude Brady does not require us to vacate the citation.

must ensure that those miners are provided with the appropriate training. As conceded by the Secretary at oral argument, task training need not be formal or elaborate and may be provided readily to miners assigned on an *ad hoc*, temporary, or limited basis. Oral Arg. Tr. 34. The central point, however, is that the miners were so assigned in this case and therefore fell squarely within the training requirement of section 48.7.

C. S&S

Twentymile argues that the judge misapplied the Commission's S&S analysis because of his use of the word "could," which indicated he was not applying a "reasonable likely" standard and because he did not evaluate the background and experience of the miners involved with unplugging the chute. T. Br. at 26-28. The Secretary responds that substantial evidence supports the judge's S&S determination and that Twentymile has taken out of context the judge's use of the word "could" on several occasions. S. Br. at 25-27.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Here, the parties' disagreement with the judge's analysis of the *Mathies* factors revolves around the third and fourth criteria — whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury that would be of a reasonably serious nature. The judge concluded that the violation was S&S. 25 FMSHRC at 385. Substantial evidence supports the judge. As the judge noted, Twentymile assigned a group of miners to a job without the training necessary to guard against hazards inherent to the task. *Id.* Thus, the miners were assigned to unplug the rock chute without training in the appropriate procedures and

techniques to protect themselves. *Id.* In this regard, the rock chute posed hazards involving slipping and falling around the ladder and platforms and spillage of the rock-coal mixture from the chute if the access doors to the chute were improperly handled. Injuries resulting from these accidents would be serious because the ladder posed the hazard of a 40-50 foot vertical drop should a miner slip. *Id.* at 376. Rocks falling from the chute were as large as eight inches in diameter. *Id.* at 379. In fact, on June 6, Webb received the kind of injuries that the MSHA inspector was concerned with when he designated the violation as S&S (Tr. 42). *See Dynatec Mining Corp.*, 23 FMSHRC 4, 14 (Jan. 2001).

Twentymile takes issue with the judge's analysis because he used the word "could." However, the judge's use of "could" in weighing the likelihood of an injury of a reasonably serious nature did not materially affect his analysis. *Compare Zeigler Coal Co.*, 15 FMSHRC 949, 953-54 (June 1993) ("... statements that such events could occur, *standing alone*, do not support a finding that there was a reasonable likelihood of an ignition.") (emphasis added). The judge's analysis of the *Mathies* factors relies on substantial evidence in the record to support his conclusion that a potentially serious injury would be likely to occur and is therefore is not speculative. *Compare Union Oil Co.*, 3 FMSHRC 289, 299 (Mar. 1989). The judge recited the Commission's *Mathies* test and noted that it was incumbent on the Secretary to establish a reasonable likelihood that the hazard contributed to would result in an injury, which must be evaluated assuming continued normal mining operations. 25 FMSHRC at 385. In these circumstances, the judge's several uses of the word "could" in his analysis are not sufficient grounds for reversing his S&S determination.

Finally, Twentymile cites no Commission case in support of the proposition that we must look at the background and experience of individual miners to make an S&S determination once a violation has been established. Therefore, we affirm the judge's S&S determination.

D. Timeliness of the Penalty Proposal

Twentymile challenges the civil penalty in this case on the grounds that the 17-month delay between the issuance of the underlying section 104(g) order and the ultimate issuance of the proposed penalty contravenes the mandate of section 105(a) of the Act, 30 U.S.C. § 815(a). T. Br. at 28-33. Section 105(a) requires the Secretary to issue a proposed penalty within a reasonable time once a violation has been found. The Secretary concedes that the delay was caused by MSHA's inattention to its responsibilities regarding the processing of the accident report and the eventual penalty proposal but, nevertheless, contends that the delay should be deemed reasonable and therefore in compliance with the statutory requirement for timeliness. S. Br. at 33-37; Oral Arg. Tr. 48 (Secretary's counsel concedes that he "can't make excuses for anyone involved here.").

Section 105(a) provides in pertinent part:

If, after an inspection or investigation, the Secretary issues a citation or order . . . , he shall, within a *reasonable time* after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed . . . for the violation cited [Emphasis added.]

The legislative history of the Mine Act states with regard to section 105(a) that “there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the [Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.” S. Rep. No. 95-181, at 34, *reprinted in Legis. Hist.* at 622.

While delay on the Secretary’s part may not vitiate the civil penalty proceeding and the finding of a violation, an inordinate and unjustifiable delay might well vitiate the imposition of the penalty itself. The issue ultimately turns on whether the delay is reasonable under the circumstances of each case. *See Salt Lake County Rd. Dep’t*, 3 FMSHRC 1714, 1716-17 (July 1981) (Secretary must establish “adequate cause” for failing to file penalty within 45 days of notice of contest).¹⁹ The Commission has held that the requirement in section 105(a) that the Secretary propose a penalty assessment “within a reasonable time” does not impose a jurisdictional limitations period. *See Steele Branch Mining*, 18 FMSHRC 6, 13-14 (Jan. 1996). Rather, in cases of delay in issuing proposed penalties, we have examined whether adequate cause existed for the Secretary’s delay in proposing a penalty. Apart from that consideration, we have also considered whether the delay prejudiced the operator. *See Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982). *Accord Black Butte Coal Co.*, 25 FMSHRC 457, 459-61 (Aug. 2003). Either consideration may be a ground for dismissing the penalty petition. *See Steele Branch*, 18 FMSHRC at 13-14. Consequently, we reject the Secretary’s request that the Commission “revise its analysis in late penalty cases and consider whether the operator suffered prejudice even if it finds that the Secretary has not established adequate cause.” S. Br. at 43. Our precedents do not hold that an operator should only merit relief under section 105(a) if it can show that the delay in proposing a penalty is both unreasonable *and* that it has resulted in prejudice to the operator.

The judge in this case determined that the lapse in time between the order and the penalty proposal was not prejudicial to Twentymile, 25 FMSHRC at 388, and the operator does not

¹⁹ The Commission has generally applied the same test to penalty proposals, which are to be issued within a “reasonable time” under section 105(a) of the Act (*see* Rule 25, 29 C.F.R. § 2700.25), and to petitions for assessments of penalties, which are used to provide notification to the Commission “immediately” following a notice of contest under section 105(d) of the Act, 30 U.S.C. § 815(d) (*see* Rule 28, 29 C.F.R. § 2700.28, implementing section 105(d) with a 45-day period for filing a petition for assessment of penalty with the Commission). *See Steele Branch*, 18 FMSHRC at 13-14 (proposed penalty under section 105(a)); *Salt Lake*, 3 FMSHRC at 1715-16 (penalty assessment under section 105(d)).

challenge that conclusion on review. Thus, resolution of this issue turns on whether the Secretary has established adequate cause for the delay so as to render it “reasonable.”

Here, there was nearly a 17-month delay from the date of the section 104(g) order,²⁰ June 16, 2000, until the issuance of the proposed penalty assessment for the alleged violation on November 9, 2001. MSHA used approximately the first seven months of that period to finalize the accident report (Gov’t Ex. 5) on January 4, 2001. 25 FMSHRC at 388. The Secretary argues that this period should be excluded from the time computation under section 105(a), thereby shortening the period under examination to ten months. S. Br. at 33-35. The issuance of a penalty assessment under section 105(a), however, is pegged to the completion of an investigation or inspection and issuance of a citation (or, in this case, an order), not the completion of an accident report. Accordingly, it would be inappropriate to exclude from our analysis of the delay in assessing the penalty the time dedicated to completing an accident report. *See Black Butte*, 25 FMSHRC at 461; *Steele Branch*, 18 FMSHRC at 14.

With respect to why it took seven months to finalize the accident report, Inspector Gibson, the investigating officer, completed his work on the report one month after the accident, on July 6, 2000 (Tr. 74-75), and submitted it for review to William Denning, MSHA’s district accident investigation coordinator. 25 FMSHRC at 380. Denning did not begin working on the report for three months, in October of 2000, and did not contact Twentymile for additional information until mid-November. *Id.* at 387. He testified that Twentymile promptly provided the requested information and that he forwarded the report in late November to the district manager for his signature. In the absence of the district manager, the report was signed by the acting assistant district manager and finally issued on January 4, 2001. *Id.* at 388.

However, seven additional months subsequently elapsed before the report was sent from the district office to MSHA’s Assessment Office, on July 31, 2001. *Id.* According to Denning, there was a personnel change in the office, and the new employee, who was responsible for completing the special assessment form that had to accompany the accident investigation, was not aware of his responsibility to complete the form.²¹ *Id.* After the report and form reached the Assessment Office, it took that office an additional three and one-half months to issue the proposed penalty. *Id.*

In examining the 17-month total delay, the judge separately analyzed the delay in completing the accident investigation and the delay in completing the special assessment form.

²⁰ The judge inadvertently referred to the order as the “section 103(k) order.” 25 FMSHRC at 386. However, the order upon which the violation was based is a section 104(g) order, now modified to a section 104(a) citation. Order 7618153.

²¹ The record contains no explanation regarding why MSHA apparently lacked a back-up or “tickler” system that would have alerted officials that the special assessment form was long overdue.

The judge concluded that the delay involved with each was “understandable,” noting in particular that the second delay was caused by a shift in personnel and the failure of the person who should have completed the form to understand his duties. *Id.* For the reasons that follow, we hold that, as a matter of law, the judge erred in finding that the delay here was reasonable under the circumstances.²²

Commission case law offers a basis of comparison with respect to delays in issuing section 105(a) penalty assessments. In *Black Butte*, there was a 13-month delay, but that was due in large part to ongoing revisions to an accident report requested by the operator. 25 FMSHRC at 458, 460. In *Steele Branch*, the Secretary delayed issuing the proposed penalty assessment for 11 months and offered no reason for the delay, although the Commission took judicial notice of her unusually high case load at that time. 18 FMSHRC at 13-14.

In contrast to the foregoing cases, here the bulk of the delay was due to (1) unexplained delays in the review and issuance of Inspector Gibson’s accident report, which he had completed within a month of the accident (Tr. 74-75), and (2) outright neglect in moving the report through established agency channels ostensibly designed to arrive at an appropriate proposed penalty in a timely manner. In determining whether a particular delay in proposing a penalty is “reasonable” the Commission must look at the entire set of circumstances surrounding the delay. While we could possibly excuse delay in *either* the preparation of the accident report *or* the processing of the proposed penalty, the cumulative effect of the two significant delays that took place in this case lies beyond the boundaries of what the Commission has previously allowed as reasonable under the circumstances.

Moreover, the delays greatly exceed the Secretary’s own goals for timely proposing penalty assessments. MSHA’s guidance document in effect at the time, Program Policy Letter (PPL) No. P99-III-5, at 6 (Aug. 16, 1999), stated that even cases involving “a serious accident, fatality, or other special circumstance should be assessed within 180 days [six months] of the accident.”²³ In addition, MSHA stated that, to meet that goal, “the Office of Assessments should process citations and orders within . . . 45 days for accident-related special assessments.” *Id.* In this case, we are dealing with a delay that exceeds the Secretary’s own six-month benchmark by almost three times. Even though there had been substantial delays before the special assessment

²² Contrary to the assertion of our dissenting colleagues (slip op. at 28), our opinion does not establish that a 17-month delay (or any other time period) is “per se” unreasonable. Instead, in each case the Commission must examine the particular circumstances and the justification offered by the Secretary and determine whether, as a matter of law, the overall delay should be deemed “reasonable.”

²³ The relevant portions of the August 16, 1999 PPL have been incorporated into MSHA’s Program Policy Manual. III U.S. Dep’t of Labor, MSHA, *Program Policy Manual*, at 49, Part 100.6(f) (2001), available at <http://www.msha.gov/REGS/COMPLIAN/PPM/PMVOL3D>. (last visited Aug. 4, 2004).

report was sent to the Office of Assessments, that office still took approximately 105 additional days, rather than the benchmark of 45 days, to actually propose the penalty.²⁴

While the PPL further stated that MSHA believed that “[f]or proposed assessment purposes, ‘reasonable time’ is normally within 18 months of the issuance of a citation or order or, in the case of a fatal accident, within 18 months of the issuance of the accident report” (*id.* at 5), the Commission is certainly not bound in any way by that policy statement.²⁵ As discussed below, the Commission, not the Secretary, is ultimately responsible for determining whether a proposed penalty assessment has been made “within a reasonable time.”

In short, while we are reluctant to vacate any civil penalty for a violation that has been upheld, we find the Secretary’s handling of this penalty assessment and her rationale for the excessive delay in issuing it to be wholly inadequate. Accordingly, we are compelled to invoke the extraordinary remedy of vacating the civil penalty. We stress that our action vacates the imposition of the penalty, but leaves intact the finding of a violation. Among other things, that violation will become part of the operator’s history of violations for future assessment purposes. Thus, our decision is wholly consistent with the goals and purposes of the Act in that the operator is held accountable for violating the regulation in question.²⁶

²⁴ For this reason, the parties’ stipulation that testimony would have indicated that “three months is a routine amount of time for an accident case to spend in the assessment process” (Stip. No. 25) is irrelevant. Because the case had already been subject to substantial delays, it should not have been handled in a “routine” manner.

²⁵ The Commission has held that MSHA’s policy statements such as a PPL or MSHA’s Program Policy Manual are not binding on the Secretary or the Commission. *See D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996), (quoting *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981)). While the Secretary’s policy statements may, in appropriate circumstances, be entitled to deference (*King Knob*, 3 FMSHRC at 1420), she has not asked that the Commission defer to the relevant PPL provision in this proceeding.

²⁶ In this regard, our dissenting colleagues’ reliance on certain language in *Salt Lake*, 3 FMSHRC at 1716, dealing with “dismissal” of the Secretary’s case and “nonsuiting” the Secretary (slip op. at 30-31), is not on point. The *Salt Lake* case involved the question of whether a civil penalty proceeding should be dismissed because the Secretary’s petition for penalty assessment was filed beyond the 45-day period provided in Commission Rule 27. In this case, the civil penalty proceeding has gone forward, a violation has been found, and the question is whether the penalty should be vacated for unreasonable delay. Moreover, the Commission stated in *Salt Lake* that “situations will inevitably arise where strict compliance by the Secretary does not prove possible.” 3 FMSHRC at 1716. That was not the case here where key delays resulted from inattention or neglect.

The Secretary argues that delay in issuing a proposed penalty assessment can never be a ground for vacating the penalty. S. Br. at 37-39. We reject this position as a significant departure from Commission precedent discussed previously and contrary to the language of section 105(a). In addition, adopting the position of the Secretary would contravene clear Congressional intent.

When Congress amended the 1969 Coal Act by enacting the current statute, it found that the prompt imposition of civil penalty sanctions for violation of mandatory safety and health standards was vital to the success of a federal mine safety and health program. Establishing that “the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards” (S. Rep. No. 95-181, at 41, *reprinted in Legis. Hist.* at 629), Congress expressly stated that, “[t]o promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly.” *Id.* at 622.

Moreover, under the 1969 Act, operators had been entitled to *de novo* review of all enforcement actions in U.S. District Courts, a process that led to significant delays between an allegation of wrongdoing and its ultimate vindication through the civil penalty sanction:

This right to a *de novo* hearing before a jury in the District Court has had the effect of encouraging operators to require enforcement of civil penalties in the district courts, thus delaying still further the actual payment of the penalties assessed. The resultant backlog of penalty cases has flooded the district courts in the coal mining areas of the country, and the delay engendered has seriously hampered the collection of civil penalties.

Id. at 633. “Clearly, so long a delay in assessment and collection of civil penalties does not encourage operator compliance with the Act and its standards.” *Id.* at 632.

To further remedy situations where delays between enforcement actions and the imposition of sanctions were undermining the effectiveness of the mine safety and health program, Congress severely restricted the time within which an operator could contest the imposition of a civil penalty:

The Committee believes that requiring that individuals who intend to contest a proposed penalty assessment to do so promptly furthers the objective of the Act. Penalty matters should be finally determined as quickly as possible. The Committee notes that contestants are required under this provision to notify the Commission of their intention to contest penalty proposals within fifteen days, and that the Commission would then subsequently schedule such matters for hearing before an Administrative Law

Judge. For this reason, the Committee does not believe that fifteen days is an unreasonably short period of time to expect a contestant to so notify the Commission.

Id. at 622. We do not believe that Congress would find parity in circumstances where the Secretary has 17 months to arrive at a proposed sanction of several thousand dollars while the operator, in jeopardy of forfeiting its rights under the Act, must respond to the demand for payment within 15 days.²⁷

Most significantly, under the Mine Act, this Commission is ultimately responsible for ensuring that civil penalties are assessed in a fair and expeditious manner. Under section 110(i) of the Act, "the Commission shall have authority to assess all civil penalties provided in this Act." 30 C.F.R. § 820(i). Although the Secretary issues citations and orders under the Act and proposes civil penalties, it is the Commission that is responsible for assessing civil penalties and providing other appropriate relief. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-91 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Congress adopted the bifurcated enforcement scheme under which the Secretary and the Commission now operate, wholly independent from each other, in order that both justice and, if need be, a change in an operator's compliance habits could be promptly achieved:

The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained as functions of the Secretary. This separation is important in providing administrative adjudication which preserves due process and instills confidence in the program. This separation is also important because it obviates the need for de novo review of matters in the courts, which has been a source of great delay.

Conf. Rep. on S. 717 (unnumbered), *reprinted in Legis. Hist.* at 1360.

The important role played by this Commission in the process by which hazardous conditions in the Nation's mines are identified and corrected through civil sanctions necessarily requires that we exercise our discretion to assure that the intention of Congress is carried out. Accordingly, the question of whether a particular penalty has been proposed "within a reasonable time" is one to be ultimately answered by the Commission, not the Secretary. When it can be shown that the overriding purposes of the Act are compromised by inordinate and unjustifiable delays between an allegation of wrongdoing and its accompanying sanctions, we are bound to take the steps necessary to uphold the integrity of the Mine Act and the bifurcated enforcement scheme under which we operate.

²⁷ We note that, in the enacted version of the 1977 legislation, the time operators were given in which to contest proposed penalty assessments was extended from 15 to 30 days. 30 U.S.C. § 815(a).

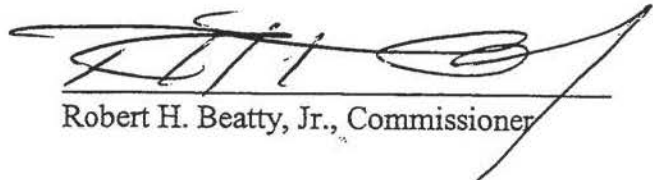
There is an additional public policy argument that weighs heavily in favor of our decision to nullify the penalty in this case: retaining the confidence of miners in the effectiveness of the Mine Act. Section 109(a) of the Act requires operators to post all "orders, citations, notices and decisions required by law or regulation" on a mine bulletin board accessible to miners. 30 U.S.C. § 819(a). The order in this case, issued on June 16, 2000, was presumably posted by the operator. As the Bard wrote, "the rest is silence" until November 9, 2001, when, presumably again, the notice of proposed penalty was posted at the mine. Surely this time lapse would leave the average miner wondering whether the matter was even being pursued, let alone resolved, during the 17 intervening months.

Accordingly, in order to vindicate the Congressional imperative that mine safety and health violations be remedied through the prompt and fair imposition of appropriate sanctions, we vacate the civil penalty proposed in this case.

III.

Conclusion

Based on the foregoing, the judge's decision is affirmed in part and reversed in part.



Robert H. Beatty, Jr., Commissioner

Commission Suboleski, concurring:

I join in part II. A.,²⁸ C., and D. of the opinion of Commissioner Beatty.

While I agree with the majority that a violation of section 48.7(c) occurred, I cannot agree with the reasoning in part II B. of the opinion and the opinion of the administrative law judge whom they affirm. I am not persuaded that the evidence shows that the plugging of the rock chute would occur on a regular basis, and I am not prepared to overlook the requirement for a task to occur on a regular basis before task training is required.

Pursuant to section 48.7(c), miners who are “assigned a new task” must receive safety and health training prior to performing that task. 30 C.F.R. § 48.7(c). “Task” is defined in the regulations as “a work assignment that includes duties of a job that *occur* on a regular basis” 30 C.F.R. § 48.2(f) (emphasis added). The definition does not specify duties that *could occur* on a regular basis. To say that task training is required for any event that foreseeably might occur more than once is to redefine the word “regular.” Further, while it may be reasonable to characterize events which occur infrequently, but predictably (such as longwall moves), as “regular” and to include events which would be expected to occur unpredictably, but frequently (such as tire repairs) as “regular,” it is another matter to similarly characterize events which are expected neither frequently nor predictably.

The record indicates that the rock chute clogged only once, and the chute was then modified to reduce the likelihood of any future clogging. Tr. 177-80; 276-77. The judge, by imposing a “reasonable prudent person” test, concluded that Twentymile should have anticipated at the time of its installation that the rock chute would clog more often, thus giving rise to the obligation to task train miners who would be assigned to unplug the chute. I cannot agree with this approach. It wrongly presumes that the operator would have tolerated a faulty design in the chute whereby it would clog regularly. Further, for purposes of establishing a violation of the task training regulation, the judge’s approach essentially assumes that any miner in the vicinity of the rock chute would have to be given task training on working on the chute. This, however, ignores the structure of the job assignment system at the mine, which would have limited the assignment of maintaining the rock chute on an everyday basis to beltmen. Gov’t Ex. 10.

There is a further problem with tying the violation to all those present at the chute when the accident occurred. The Secretary’s training expert, Robert Breland, testified that workers providing assistance during a task are not required to be trained on the entire task, only the subtask in which they are engaged:

²⁸ I find it unnecessary to reach the analysis in section II. A. of whether a section 104(a) citation should have been issued as a result of the task training violation, instead of a section 104(g) order. Accordingly, I do not join in the majority’s opinion on this issue.

Q. Now with regard to the men that were working on clearing the plug, are you saying that each of those men needed training in each of these particular items . . . ?

A. No. I wouldn't say that at all.

Q. What are you saying?

A. . . . I would expect that they had been trained in this part of that task they had been assigned to do.

* * * *

Q. So is it okay to do partial training?

A. To the extent of the exposure of the activity, the work activity the people are going to do. That is normal in the industry.

Tr. 119-20. The mine's conveyance system manager, Edwin Brady, was responsible for designing and installing the chute, and he was directing the work of unplugging the chute. Tr. 158-59. With the possible exception of Webb, whose actions are unknown and who was not given a specific task involving the chute, none of the other workers engaged in any independent action that involved the unique features of the chute before the accident occurred. Tr. 169, 172-74, 213-17. That is, the hazards they faced either were encountered under the direction of Brady or were general mining hazards, such as climbing a ladder, connecting a hose, or shoveling spilled material. Thus, I cannot conclude that there was a violation of section 48.7(c) based on the analysis set forth in the majority opinion.

Nonetheless, the rock chute does possess unique aspects of operation, particularly with regard to the door design and the manner in which the rock is redirected as it is transferred (Tr. 159-65), and, at the time that the violation of section 48.7(c) was issued, there were workers in the mine for whom working on and around the unique aspects of the chute occurred on a regular basis. Maintaining the rock chute was a regularly occurring subtask within the general assignments of a beltman that posed distinct dangers and hazards requiring task training. Tr. 85-86. Treating the rock chute as an extension of the duties of a beltman that was sufficiently different to require its own training was consistent with practice at the mine. Thus, Twentymile's safety manager, Lincoln Derick, testified that task training was required when changes in equipment would affect miner safety and health. Tr. 267, 281. He also testified that task training would be required when a miner was moved from operating a front end loader above ground to operating a scoop underground. Tr. 282. There are sufficient differences between above-ground chutes and the rock chute (Tr. 130, 222) that would have led to task training of miners if the operator were addressing the hazards posed by the rock chute in a similar manner.

Moreover, both the Secretary's and Twentymile's witnesses testified in support of a general practice of task training that occurred as the responsibilities of a job assignment or equipment changed. Tr. 120-21 (Breland), 281-82 (Derick). See 48 Fed. Reg. 47454, 47457 (Oct. 13, 1978) ("The intent is to provide task training for experienced miners who are undertaking a new task assignment."). This analysis better reflects the realities of work

assignments at the mine while adhering to the language of the regulation. Assignment to a new element of an existing assignment – maintaining the rock chute that was part of the mine's conveyance system maintenance – required task training of beltmen in that new element.




Stanley C. Suboleski, Commissioner

Chairman Duffy, concurring:

I join in part II. A., C., and D. of the opinion of Commissioner Beatty.

I concur that a violation has been shown, and I agree with Commissioner Suboleski's approach in determining whether a violation of 30 C.F.R. § 48.7(c) has been proven. I would merely add that to the extent that beltmen Bricker and Fadely and foremen Winey performed discrete tasks associated with the clogged chute and to the extent that the chute in question possessed unique aspects of operation significantly different from other smaller chutes these miners may have worked on previously, Bricker, Fadely, and Winey should have been task trained according to the requirements of section 48.7(c). Likewise, only to that extent has the Secretary proven a violation of the training regulations.



Michael F. Duffy, Chairman

Commissioner Jordan and Commissioner Young, concurring in part, and dissenting in part:

We agree with our colleagues that Twentymile violated the training standard, the violation was S&S, and the order was sufficiently specific, and join in sections II.A.2., II.B. and II.C. of Commissioner Beatty's opinion.²⁹ However, we disagree with the majority's decision to vacate the penalty assessment in this case and write separately on that subject.

When reviewing whether the Secretary assessed a proposed penalty "within a reasonable time," 30 U.S.C. § 815(a), apart from considering the length of the delay, the Commission has examined whether adequate cause existed for the Secretary's delay in proposing the penalty and whether the delay prejudiced the operator. See *Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982); *Steele Branch Mining*, 18 FMSHRC 6, 13-14 (Jan. 1996).³⁰ Below, the judge concluded that the Secretary's delay in issuing the proposed penalty did not prejudice the operator, 25 FMSHRC 373, 388 (July 2003) (ALJ), a finding which the operator does not challenge. In considering the reason for the delay, the judge examined the time it took MSHA to finish the accident report and the special assessment form, and concluded that the delays were "understandable," noting that the lapse in time in completing the form was caused by a change in personnel and the failure of the person responsible to understand his duties. *Id.*

Without citing authority, the majority holds that, "as a matter of law" the judge wrongly determined "that the delay here was reasonable under the circumstances." Slip op. at 19. Despite the majority's protestations, our colleagues appear to be stating that in effect the 17-month delay would be "per se" unreasonable, while at the same time bolstering this conclusion by relying on the specific "circumstances" of this case. *Id.* at 19 n.22. The majority cannot have it both ways. Without articulating a clear legal test by which to measure the standard of "reasonableness," our colleagues merely conclude the reasons for the delay here were inadequate, substituting their judgment for that of the judge below.

We believe that the judge's determination is more appropriately reviewed using a "substantial evidence" standard. This is consistent with long-established Commission case law utilizing a "substantial evidence" test when reviewing a trial judge's conclusion applying a legal

²⁹ Commissioner Young also agrees with the majority that the order should be modified to a citation, and joins in section II.A.1. of Commissioner Beatty's opinion. Commissioner Jordan, like Commissioner Suboleski, slip op. at 24, n.28, finds it unnecessary to reach the issue of whether the order should have been issued as a citation.

³⁰ Commissioner Young agrees with the majority that under Commission precedent, our analysis of delayed penalty proposals warrants vacating a penalty if the Secretary's delay is unreasonable or if the delay results in prejudice to the operator, and would reject the Secretary's contention that a penalty may never be vacated on timeliness grounds alone. Slip op. at 17. Commissioner Jordan sees no need to address this issue here, as she finds there was no prejudice to the operator and the judge properly found adequate cause for the delay.

principle in the Mine Act to the facts of a particular case. See, e.g., *Island Creek Coal Co.*, 15 FMSHRC 339, 348 (Mar. 1993) (finding that substantial evidence supported the judge's determination that MSHA failed to meet its burden of proving that it was reasonable for inspectors to conclude that mine conditions constituted an imminent danger); *Utah Power & Light Co.*, 12 FMSHRC 965, 971 (May 1990) (finding that substantial evidence supported the judge's finding that the violation was of a significant and substantial nature); *Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003) (holding that on the basis of substantial evidence in the record, the judge's determination that the violation was not a result of unwarrantable failure should be affirmed). In applying this test, we ask whether there is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Based on substantial evidence in the record, we would affirm the judge's conclusion that the Secretary's delay in issuing a proposed penalty assessment was reasonable, particularly in light of other Commission cases (discussed below) which offer a basis to compare delays in issuing 105(a) penalty assessments. Moreover, we believe that our colleagues have failed to recognize additional record evidence explaining the delay. For instance, the majority relies on the "unexplained delays in the review and issuance of Inspector Gibson's accident report" (slip op. at 19), ignoring testimony by William Denning, MSHA's district accident investigation coordinator, that his delay in finalizing the report was due to conflicting work responsibilities. Tr. 75. The majority also asserts that the accident report was virtually complete within a month of the accident (before it was sent to Denning), failing to take into account the additional tasks he had to perform in order to finish the report (e.g., editing, obtaining additional information from the operator, etc.). Tr. 75-76, 78.

We note that of the 17-month period at issue here, slightly more than three months consisted of the time it took the MSHA Assessment Office to propose a penalty. 25 FMSHRC at 388. According to the Office of Assessments, three months is a routine amount of time for an accident case to spend in the assessment process. Slip. No. 25. While it would have been preferable for the assessment office to treat this matter expeditiously rather than routinely, we are mindful that between July 31, 2001 (when the report was sent to the assessment office) and November 9, 2001 (when the assessment was issued), one of the four assessors in the office was on extended leave, and another was in training during much the [sic] preceding year." *Id.*

The staffing issues asserted by the Secretary as reasons for the delay here are similar to several of those asserted by the Secretary in *Black Butte Coal Co.*, 25 FMSHRC 457 (Aug. 2003), a recent case in which the Commission upheld a judge's findings that the Secretary provided adequate cause for a 13-month delay in assessing a penalty. The majority characterizes the delay in *Black Butte* as "due in large part to ongoing revisions to an accident report requested by the operator" (slip op. at 19), neglecting to discuss the other reasons we took into account in concluding that the judge did not abuse his discretion in denying the operator's motion to dismiss based on the delay. We noted in that case the Secretary's undisputed assertion that the delay was

also due to an extremely high case load and less than normal staffing levels due to training and leave absences. 25 FMSHRC at 460. In *Black Butte* we stated that, as here:

[t]he operator knew about the investigation and citation, and clearly was able to gather evidence in support of its position. To absolve [the operator] of liability due to a late issuance would undermine the purpose of the Mine Act, especially here where the operator has not demonstrated any prejudice from the delay.

Id. at 461. Vacating a penalty assessment is an extraordinary remedy, and, as in *Black Butte*, we are reluctant to vacate a penalty where it is undisputed that Twentymile has suffered no prejudice from the delay.³¹

We also find troubling the majority's selective reliance on the Secretary's Program Policy Letter ("PPL"). The majority cites to the PPL to spotlight the Secretary's delay in this case as being incongruent with her 180-day goal within which to assess penalties for a serious accident, but dismisses as non-binding authority the Secretary's assertion in the PPL that 18 months normally constitutes a "reasonable time." Slip op. at 19-20. See Program Policy Letter No. P99-III-5, Part 100.6(f) at 5 (Aug. 16, 1999) ("reasonable time" is *normally* defined as within 18 months of the issuance of a citation or order") (emphasis added). We note that the Secretary's goal of assessing penalties for serious accidents within 6 months is laudable, but is no more binding than the 18-months she has declared to be a "reasonable time in which to assess a penalty."

The Senate Report comprising a section of the legislative history of the Mine Act acknowledged that circumstances could prevent the Secretary from promptly issuing a proposed penalty, but explicitly rejected the suggestion that such delay should necessarily result in termination of penalty proceedings: "[T]he [Senate] Committee does *not* expect that the failure to propose a penalty with promptness shall vitiate *any* proposed penalty proceeding." S. Rep. No. 95-181, at 34 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978) ("*Legis. Hist.*") (emphasis added). In *Rhone-Poulenc of Wyoming Co.*, the Commission noted that the cited language in the legislative history "bespeaks the overriding concern with enforcement." 15 FMSHRC 2089, 2092-93 & n.8 (Oct. 1993), *aff'd*, 57 F.3d 982 (10th Cir. 1995) (rejecting the operator's challenge to the Secretary's late-filed penalty petition) (citations omitted). Referring to the same language, the Tenth Circuit, quoting *Salt Lake County Road Department*, 3 FMSHRC 1714, 1716 (July 1981), noted the need to "balance considerations of procedural

³¹ The other case the majority uses as a basis of comparison is *Steele Branch*, 18 FMSHRC 6 at 13-14, in which the Commission excused an 11-month delay in assessing a penalty when the Secretary offered *no* reason whatsoever for the delay, but the Commission took judicial notice of the Secretary's unusually heavy caseload. Slip op. at 19. This indicates the Commission's extraordinary reluctance to vacate a penalty.

fairness against the severe impact of dismissal” and stated that the ““drastic course of dismissing a penalty proposal would short circuit the penalty process and, hence, a major aspect of the Mine Act’s enforcement scheme.”” 57 F.3d at 984. Thus, contrary to our colleagues’ position, we do not see how vacating the penalty under the circumstances present in this case would serve the deterrent purposes intended by the enforcement provisions of the Mine Act.

We also believe that our colleagues’ reliance on other sections of the Mine Act’s legislative history inappropriately compares Congress’ views on penalty assessment delays and its views on the need for operators to promptly contest or pay penalties. For example, as the majority notes, the legislative history of the Mine Act does indicate that the right to *de novo* review of penalty proceedings was eliminated, in part, to reduce delays, and specifically noted the need to require operators to promptly contest penalty proposals. Slip op. at 21. However, these provisions relate to the delays that *operators* had used to avoid or defer payment of penalties, and not to the Secretary’s enforcement activity. S. Rep. No. 95-181, at 45, *reprinted in Legis. Hist.* at 633 (“This right to a *de novo* hearing before a jury in the District Court has had the effect of encouraging operators to require enforcement of civil penalties in the district courts, thus delaying still further the actual payment of the penalties assessed.”).

Moreover, our colleagues in the majority suggest that Congress would not have sanctioned a 17-month delay in proposing a penalty when an operator has only 30 days to contest it. Slip op. at 22. Such a comparison is misplaced, as the two involve dramatically different procedures. An operator deciding to contest a penalty simply makes a strategic choice as to whether it is better to pay the penalty or challenge it, and then notifies MSHA of its decision by checking a box on a form and mailing it to MSHA. See 30 U.S.C. § 815; 29 C.F.R. § 2700.26; Contest of Civil Penalty Proceedings, Nov. 9, 2001. On the other hand, to determine the amount of a special assessment, the Secretary must confirm the facts asserted in the citation and then weigh numerous factors. See 30 C.F.R. §§ 100.3(a), 100.4(b), and 100.5(b). In addition, in this case, as the judge found, it was prudent for the Secretary to wait to propose a penalty until the accident report and the special assessment form accompanying it were completed. 25 FMSHRC at 388. As the judge explained, “findings regarding the validity of the alleged violation, its gravity and Twentymile’s negligence could have been impacted by the report and the form.” *Id.* In short, there is simply no basis upon which to compare these two time frames, as the operator and Secretary proceed along two different tracks. As the Commission has previously stated, “[n]onsuiting the Secretary in such situations [when she has filed a late penalty proposal] presents quite a different situation from defaulting the tardy private litigant.” *Salt Lake*, 3 FMSHRC at 1716.

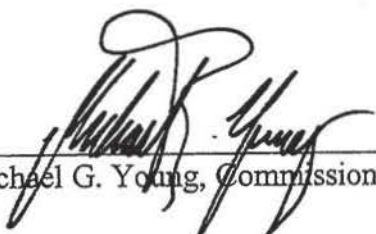
Finally, we also agree that delays in the imposition of a penalty could send a disconcerting signal to the miners who depend on the Secretary to ensure their right to a safe and healthy work environment. Slip op. at 23. To nullify that penalty entirely, however, sends an even more ominous message by ending the “silence” of a delay with a decision that can only erode a miner’s confidence in the agency’s ability to ensure that violations of mandatory health and safety standards will be subject to an appropriate sanction. Whether the old saying that

“justice delayed is justice denied” is true in a given case may be open to question; the effect of justice denied outright is beyond question.

Accordingly, we would affirm the judge’s conclusions, that, based on the facts of this case, the Secretary’s delay in issuing a proposed penalty was reasonable.



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 30, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2004-345-M
ADMINISTRATION (MSHA)	:	A.C. No. 45-03455-20609
	:	
v.	:	Docket No. WEST 2004-352-M
	:	A.C. No. 45-03224-20531
WASHINGTON ROCK QUARRIES, INC.	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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. (2000) ("Mine Act").¹ On June 2, 2004, the Commission received from Washington Rock Quarries, Inc. ("Washington Rock") a motion filed by counsel to reopen penalty assessments that became final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. 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).

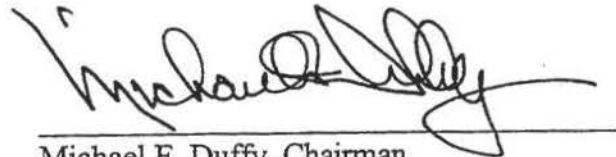
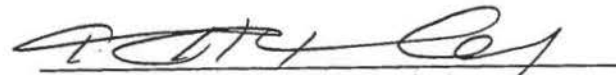
In its motion, Washington Rock states that in January 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued numerous citations for its Champion and King Creek Pits, located in Pierce, Washington. Mot. at 1-2; Affidavit of John M. Payne

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2004-345-M and WEST 2004-352-M, both captioned *Washington Rock Quarries, Inc.* and both involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

("Payne Aff.") at 2; Ex. C. Washington Rock also states that it intended to contest the citations, but that the company's owner, Harry Hart, did not understand the contest procedure. Mot. at 2; Affidavit of Harry Hart ("Hart Aff.") at 1. It further states that Hart told MSHA's inspector that he wanted to contest all citations, and was informed that there was no longer a "ten-day period" and that he should wait until he received all the citations. Mot. at 2; Hart Aff. at 2. The operator asserts that Hart then contacted MSHA's Western District Conference Litigation Supervisor ("CLS") and that in early March 2004, the CLS scheduled a conference for April 8, 2004. Mot. at 2-3; Hart Aff. at 2. Washington Rock claims that on March 12, 2004, it received the subject proposed assessments dated March 4, 2004 (A.C. Nos. 45-03455-20609 and 45-03224-20531) and that it subsequently obtained counsel to assist in the conference, which had to be rescheduled due to scheduling conflicts. Mot. at 3; Hart Aff. at 2; Payne Aff. at 2. The operator also alleges that, at that time, the CLS informed its counsel that the deadline to contest several citations had passed and agreed to confer on only those citations that had not already been assessed. Mot. at 3; Payne Aff. at 2. Subsequently, the operator received two proposed assessments for the other citations that were issued in January 2004, and submitted timely notices of contest for those assessments. Mot. at 4; Payne Aff. at 2-3. Washington Rock requests the Commission reopen the two proposed assessments (A.C. Nos. 45-03455-20609 and 45-03224-20531) so it may proceed to a hearing on the merits. Mot. at 1, 9. The Secretary states that she does not oppose Washington Rock's request for relief.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Washington Rock's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Washington Rock's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.


Michael F. Duffy, Chairman
Robert H. Beatty, Jr., Commissioner
Mary Lu Jordan, Commissioner
Stanley C. Suboleski, Commissioner
Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 30, 2004

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

HIGHLAND ENTERPRISES, INC.

:
:
:
:
:
:
:

Docket No. WEST 2004-359-M
A.C. No. 10-01911-20099

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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. (2000) ("Mine Act"). On June 10, 2004, the Commission received from Highland Enterprises, Inc. ("Highland") a motion filed by counsel to reopen a penalty assessment that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

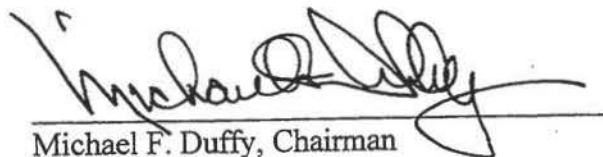
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its brief in support of its motion, Highland states that on January 15, 2004, Administrative Law Judge Jerold Feldman stayed a consolidated penalty proceeding pursuant to the Secretary's motion "so that a civil penalty case and a related 110(c) personal liability case [could] be further consolidated so that all matters could be heard at once." Br. at 2-3 (quoting Unpublished Order dated Jan. 15, 2004). Highland further states that on or about March 9 and 11, 2004, it received two proposed penalty assessments relating to the same crusher which is the subject of the stayed proceeding. *Id.* at 3; Declaration of Andy Hairston ("Hairston Declar.") at 2. The operator asserts that after it received the proposed assessments, its agent, Andy Hairston, contacted its counsel, who instructed Hairston to complete the contest form and mail it to the

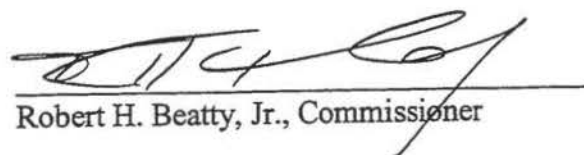
Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Br. at 3; Affidavit of Jonathan D. Hally ("Hally Aff.") at 2; Hairston Declar. at 2. Highland contends that on March 16, 2004, Hairston timely mailed the notice of contest. Br. at 3; Hairston Declar. at 2. The operator explains that on or about June 4, 2004, after contacting the Secretary's counsel, the operator's counsel subsequently determined that MSHA did not receive the notice of contest for A.C. No. 10-01911-20099, but did receive the notice of contest for the other proposed assessment, which was mailed at the same time and is now a part of Docket No. WEST 2004-238-M, also pending before Judge Feldman. Br. at 4; Hally Aff. at 2. Highland argues that the notice of contest either got lost in the mail or was misfiled or misplaced by MSHA. Br. at 4. It requests that the Commission grant its request to accept its notice of contest as timely filed. *Id.* at 2, 7; Mot. at 1. The Secretary states that she does not oppose Highland's request for relief.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Highland's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Highland's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.



Michael F. Duffy, Chairman



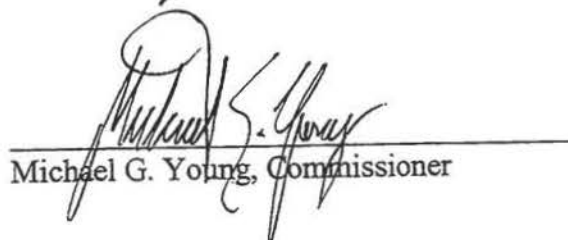
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

August 2, 2004

RAYMOND GEORGE,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. CENT 2004-98-D
v.	:	DENV CD 2003-17
	:	
24/7 SERVICE AND SUPPLY, INC.,	:	Lee Ranch Coal Mine
Respondent	:	Mine ID No. 29-01879


AMENDMENT TO DECISION

Appearances: Raymond George, Gallup, New Mexico, *pro se*;
Kenneth Chaffin, Grants, New Mexico, on behalf of the Respondent.

Before: Judge Melick

Pursuant to Commission Rule 69(c), 29 C.F.R. §2700.69(c), the decision issued in this proceeding on July 30, 2004, is hereby amended by substituting corrected paragraph three on page eight of said decision to read as follows:

Under the circumstances I give the greater weight to Mrs. Chaffin's description of the critical conversation on August 7. As best synthesized it appears that Mr. George asked Mrs. Chaffin whether there was supposed to be air in the dragline and she responded "Yes, there was." She then asked him "Well, did you feel like it was unsafe?" and he responded "No, that he did not feel it was unsafe." Mr. George then said that "he didn't want to have a violation with MSHA" and Chaffin responded "if the mine was doing something wrong, you wouldn't have been violated for it, the mine would be" (Tr. 84). Finally Chaffin explained that since George told her that he did not feel it was unsafe she did not understand what he was even talking about. In this regard she testified "You know, why bring it up if it wasn't unsafe" (Tr. 84).


Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Mr. Raymond George, 329 ½ East Jefferson, Gallup, NM 87301

Kenneth Chaffin, 24/7 Service & Supply, Inc., P.O. Box 183, Grants, NM 87020

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001-2021

August 12, 2004

SPEED MINING, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 2004-187-R
	:	Citation No. 7232788; 07/19/2004
	:	
	:	Docket No. WEVA 2004-188-R
	:	Order No. 7232789; 07/19/2004
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2004-195-R
MINE SAFETY AND HEALTH	:	Citation No. 7220274; 07/22/2004
ADMINISTRATION (MSHA),	:	
	:	
Respondent.	:	American Eagle Mine
	:	Mine ID 46-05437

DECISION

Appearances: Timothy M. Biddle, Esq., Daniel W. Wolff, Esq., Crowell & Moring,
Washington, D.C., for the Contestant;
Mark Malecki, Esq., Timothy Williams, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, VA, for the Secretary.

Before: Judge Weisberger

I. Statement of the Cases

These contest proceedings, consolidated for a hearing, are before me based on two notices of contest contesting the issuance of citations alleging violations of 30 C.F.R. § 75.1700¹, and one notice of contest challenging an order issued under Section 104(b) of the Federal Mine Safety and Health Act of 1977 (the Act). Contestant also filed, along with these contests, a motion to expedite these cases.

After the notices of contest and the motions to expedite were filed on July 21, 2004, a conference telephone call was convened with counsel for both parties. At that time, argument was presented on the motions to expedite, and the motions were granted. It was agreed at the time that the trial dates would be July 27 and July 28, 2004.

¹Initially Contestant's petition for Modification of Section 75.1700 was granted in July 2001. It was amended in a Proposed Decision and Order, Docket No. 2002-082-C, May 23, 2003, ("Modification").

III. Docket No. WEVA 2004-195-R

In essence, Citation No. 7220274, issued July 22, 2004, alleges, that relating to well No. 242, the company did not comply with the terms of paragraph 1(a)(1) of the Modification, supra, order which provides, as relevant, that “[a] diligent effort shall be made to clean the borehole to the original total depth.” The next sentence contains the following critical language. “If this depth cannot be reached, the borehold shall be cleaned to a certain depth” (Emphasis added.)

In essence, the parties agreed that in cleaning the area in question a 6 ½ inch diameter drill bit was used, and the diameter of that area had to be cleaned out, initially was 12 1/4 inches. This particular area was drilled to the center and filled with cement to a point 200 feet below the coal seam. The Secretary argues that not all material had been removed out of the 6 ½ inch cement drill hole.

In essence, it is the argument of the operator that it did comply with this section, as there is evidence that the well was cleaned out by the 6 1/4 diameter drill, furnished with a water spray, that removed the loose material from the borehole.

The evidence that the operator relies upon is the testimony of its expert witness, Joseph Pasini. He opined, based on his experience, that in order to clean a plugged well a vertical hole should be drilled with a six-inch bit, even if the hole is 12 inches in diameter. Also, it should be drilled with water; the water would clean material out of the hole.

The Secretary’s witness Eric Sherer indicated, in contrast, that cleaning by using an approximately six-inch diameter drill in a borehole 12 inches in diameter could leave material. He further indicated that the use of water is not sufficient, and it could leave material behind.

I place more weight on his opinion, because it appears to be supported by the reasons that he proffered, which in the main have not been contradicted or rebutted. In this regard, he testified that the water jets that are used along with the drill, are directed at the bit to clean and cool it, and are directed downward.

Importantly, I note that after the well had been drilled to clean it, the well shaft was inspected, by MSHA Inspector Gilbert Young on July 26, 2004, after the longwall had intersected with the vertical shaft and opened it up.

He observed that material was taken from the area of the shaft that formerly had cement in it. He stated that the material was other than cement. In general, I find that the Secretary’s position and argument in this case is consistent

with the clear language of the Modification, supra, which appears to require the shaft be cleaned before it is cemented.

As explained by Sherer, and in the main not contradicted or impeached, any unconsolidated material in the shaft should be dislodged before cement is placed in it, because any unconsolidated material compromises the integrity of the cement.

As a defense, the operator argues that Section 1(a)(1), supra, which was cited by the Secretary, is not applicable because it has not been contradicted that well no. 242 was plugged for use as a degasification borehole, and that accordingly Section 1(d) of the Modification, supra, applies.

The first sentence of Section 1(d), supra, states as follows: "Plugging oil and gas wells for use as degasification boreholes". Section 1(d), supra, in subsections one through eight, lists various procedures that should be followed and utilized when plugging oil or gas wells that are subsequently used as declassification boreholes.

The operator points out that it complied with all of these terms, and the Secretary has not challenged this claim. The Secretary has not alleged any violation of any of the terms or that the company did not follow any of the terms or that the company did not follow any of the requirements of Section 1(d), supra.

The operator further argues citing Sutherland on Statutory Construction that Section 1(d), supra, is to be read independently of the requirements of (1)(a), supra. In other words, that if Section 1(d), supra, is clear, then Section 1(a), supra, should not be applied.

The issue herein boils down to whether Section 1(a), supra, has been superseded by Section 1(d), supra, or whether the requirements of Section 1(a), supra, must be followed in the case at bar.

In this connection, I find more persuasive the arguments set forth by the Secretary, in the sense that in the main they refer to the language of the Modification itself. I note a number of factors in that regard.

First of all, at the beginning of the Modification, supra, at 2, under the heading **ORDER**, it is indicated that the petition is **GRANTED** allowing mining in conditions that would not be approved under Section 75.1700, supra, "... conditioned upon compliance with the following terms and conditions." A number of conditions follow. The first refers to "[p]rocedures to be utilized when plugging oil or gas wells." (Modification 1, supra.) A number of subparagraphs

follow including (a), supra, under which the operator was cited, and, (d), supra, which the operator alleges covers the conditions presented herein and supersedes (a), supra.

The Secretary argues that Section 1(a)(1), supra, is an antecedent to the rest of the subparagraphs that follow, including (b), supra, and (d), supra. I find the Secretary's argument persuasive. In this sense, Section 1(a), supra, whose first sentence refer to cleaning out and preparing oil and gas wells, contains the following last sentence, which I find very important. "Prior to plugging an oil or gas well, the following procedures shall be followed." (Emphasis added.) It then lists various procedures. It thus seems to set forth a sequence that has to be followed.

This interpretation is borne out by looking at Section 1(d), supra, which follows 1(a), supra, and refers to plugging, which takes place after cleaning and preparing.

The reading urged by the operator would appear to make Section 1(a), supra, somewhat superfluous, which would be contrary to legislative construction, which reasoning by analogy, I apply to modifications.

I also find it significant that the Secretary's witness Sherer, who indicated that he was the author of Section 1(d), supra, indicated that he did not intend for Section 1(d), supra, to supplant Section 1(a), supra. He indicated that Section 1(d), supra, was written to give the option to an operator to de-gas, but that the operator still needs to prepare a borehole pursuant to Section 1(a)(1), supra.

For all these reasons I find the operator did violate Section 1(a)(1), supra, of the Modification.

IV. Docket No. WEVA 2004-187-R

Citation No. 7232788, issued July 19, 2004, pertaining to well No. 384 alleges a violation predicated upon language set forth in Section 1(a)(2), supra, of the Modification. The operative language there is as follows: "If it is not possible to remove all casing" – and this is the critical language – "the casing which remains shall be perforated, or ripped, at intervals spaced close enough to permit expanding cement slurry to infiltrate the annulus"

The operator argues that this requirement has been met because the two annulae had been filled with expanding concrete. In this connection, the operator argues that the requirement to rip or perforate is a means to an end, not an end in

In a subsequent conference call at 11:00 the next morning, it was agreed by counsel that the only issue to be litigated was whether the violations have been established. Contestant made a request to start on July the 28th to allow additional time for preparation. There was not any objection, and the cases were rescheduled for trial commencing July 28 and continuing through July 29.

In addition, a conference call was scheduled for 11:00 a.m. July 26 to allow the parties to present oral argument regarding the Secretary's motion in limine. A conference call was subsequently held on July 26 at 11:00 a.m., and after listening to argument, the motion was granted².

The cases were heard in Charleston, West Virginia, on June 28, 2004. The parties waived filing written briefs, and instead presented oral argument on June 29, 2004. The following bench decision was issued, with minor corrections of non-substantial matters.

II. Introduction

Contestant owns and operates an underground coal mine located in West Virginia, known as the American Eagle Mine. The area at issue involved a longwall operation.

The Eagle Coal Seam, in which the mine operates, intersects with the Cabin Creek Oil Field. Numerous oil and gas wells are located within the mine field. Most of these wells are inactive, and they range from a depth of approximately 3,000 feet to 6,000 feet.

The coal seam is approximately 1,000 feet below the surface. The wells initially contained outer and inner pipes or casings. Some of these have been removed, and the open spaces surrounding the casings³ extend to the outer walls of the borehole.

At the hearing, the Parties filed, Stipulations of the Parties, appended to this decision as Appendix "A". The following paragraphs from the Stipulations are incorporated herein by reference: 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18.

²An oral order was issued precluding the Contestant from raising any defense that its methods of sealing, plugging, and cleaning were the equivalent of the methods set forth in the Modification at issue, and proffering testimony in support of such defense. Upon reconsideration, the initial order was revised to allow the defense of equivalency regarding those wells that were that were cleaned and plugged after the Modification was issued.

³Each open space is known as an annulus.

itself – the end here being to ensure that the expending cement goes into the annulus, and, in the case at bar, that requirement had been met.

In resolving this issue, I focus, first of all, on the language and sentence structure of Section 1(a)(2), supra. I find the Secretary's argument persuasive, just focusing on the language of the Section. The sentence that I read earlier contains a comma after the phrase "casing which remains shall be perforated, or ripped," and then goes on to state "at intervals spaced close enough to permit expanding cement slurry to infiltrate the annulus"

It is clear that the placement, in the sentence, of the comma signifies a pause at that point, and that the plain meaning is to relate the spacing of the intervals to the infiltration of the cement, i.e., that the intervals of the perforations or rippings are to be close enough to permit infiltration of the cement. The emphasis being on the closeness of the intervals as relating to the infiltration. It is clear, then, that the requirement to perforate or rip still remains. That phrase is not qualified. In the case at bar, it has been stipulated that neither perforation or rippings had been done.

The operator also argues that because well No. 384 was plugged to the surface, the requirements of Section 1(b), supra, apply rather than Section 1(a), supra. This argument is essentially the same as presented in regard to well No. 242, and my decision on this defense is the same for the reasons set forth above. (I, Infra).

Therefore, for all the above reasons, I find that the operator did violate Section 1(a)(2) of the Modification.

V. Docket No. WEVA 2004-188-R

On July 19, 2004, the Secretary issued Order No. 7232789 under Section 104(b), supra, of the Act, alleging a failure to abate Citation No. 7232788. An abatement time of 15 minutes was set starting from the time the citation was issued. The Secretary argues that the time limit and failure to extend was reasonable in order to prevent incursion by the operator's longwall operations into a restricted barrier area.

In determining whether the time set in the order was reasonable or an abuse of discretion, focus must be placed on the person who actually issued the order and his reasons for doing so. The evidence on that point is rather scanty.

Jesse Cole an MSHA district manager, who set the abatement time, indicated that he allowed only 15 minutes because there had been numerous

conferences, and MSHA had written a letter to the company setting forth what it had required.

However, I note there are a number of factors involved here. First of all, there was a history of both parties' actions that has to be taken into account. The longwall had intersected with various wells in addition to the two at issue. The situation at issue is not new, as there were many wells facing problems similar to the problems involved in the two wells at question. The Operator's allegation that

in the past it did not encounter any problems with MSHA with regard to its method of proceeding has not been contradicted

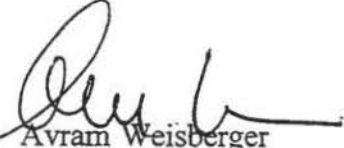
Further, the parties stipulated that, regarding well No. 384, the District Manager had asked for various documentation. The company provided that document, and a permit was issued on November 13, 2003, to mine through well no. 384. Subsequent action was taken by another manager refusing permission, and that led to the instant litigation.

In light of this history, and in light of the seemingly contradictory actions by different district managers, I conclude it was not reasonable to set only 15 minutes for abatement. More time should have been set to allow this matter to be resolved at some administrative level by a person in authority superior to a district manager.

Further, the propriety of proposed action to abate the violative conditions prepared herein, is an issue well beyond the scope of this hearing. It also is beyond the authority of a Commission judge to delve into this matter. However, because of all the above history, I cannot find that the time set and refusal to extend was reasonable. Hence, I am ordering the 104(b) order to be vacated.

ORDER

It is **Ordered** that the Notices of Contest regarding Citation Nos. 7220274 and 7232788 be **Dismissed**, and Docket Nos. WEVA 2004-187-R and 195-R be **Dismissed**. It is **further Ordered** that the Notice of Contest, regarding Order No. 7322789 be **Sustained**, and Order No. 7322789 be **Vacated**.


Avram Weisberger
Administrative Law Judge

Distribution:

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/sb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

SPEED MINING, INC.)	CONTEST PROCEEDINGS
)	
Contestant)	DOCKET NO. WEVA 2004-187-R
)	Citation No. 7232788
v.)	Issued 7/19/04
)	
SECRETARY OF LABOR,)	DOCKET NO. WEVA 2004-188-R
MINE SAFETY AND HEALTH)	Order No. 7232789
ADMINISTRATION (MSHA),)	Issued 7/19/04
)	
Respondent)	American Eagle Mine
)	Mine ID No. 46-05437

STIPULATIONS OF THE PARTIES

The parties hereto stipulate to the following:

1. Contestant Speed Mining, Inc. ("Contestant") owns and operates the American Eagle Mine in Dry Branch, West Virginia. The American Eagle Mine is an underground coal mine. Coal is mined at the mine by, *inter alia*, the longwall mining method.
2. The mine is subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*
3. The mine is subject to regulation by the Mine Safety and Health Administration, which regularly inspects the mine to assess compliance with the Act and its implementing safety and health standards.
4. The Federal Mine Safety and Health Review Commission has jurisdiction over the mine, the parties and the subject matter of this proceeding.
5. The citations and orders, and the amendments thereto, which

are at issue in this case, were properly served by a duly authorized representative of the Secretary of Labor ("Secretary") upon an agent of Contestant on the date and place stated therein and may be admitted into evidence.

6. The Proposed Decision and Order granting Contestant's petition for modification became effective in July of 2001. It was then amended. The Proposed Decision and Order dated May 23, 2003 in Docket No. 2002-082-C consisting of 12 numbered pages and an addendum labeled "Correction of Decision and Order" is now in effect. It is a binding modification of 30 C.F.R. § 75.1700 as applied to the mine. The terms and conditions in the Decision and Order constitute the standard applicable to the mine.

7. All the wells which Contestant has sought approval to mine through are inactive wells (No. 7 was deleted from the Stipulation)

Well 384

8. On November 4, 2003, Speed sent a letter to the Acting District Manager requesting a permit to mine through well #384. The letter stated that "Well #384 has been plugged to 101c Petition standards." Accompanying the letter was a plugging affidavit purporting to show that the well had been plugged on August 15, 2003.

9. Based upon the representations and documentation provided by Contestant, MSHA issued a permit on November 13, 2003 to mine through well #384.

10. By letter of July 13, 2004, the district manager instructed

Contestant not to mine within 150 feet of well #384 until Contestant provided him with proof that the well was plugged in compliance with the modified standard.

11. By letter of July 16, 2004, Contestant explained its view that it was entitled to mine within 150 feet but asked that a citation be issued so that a ruling could be obtained from the Federal Mine Safety and Health Commission.

12. On July 19, 2004, Contestant advised the district manager that Contestant had mined within 150 feet of well #384.

13. At that time, Speed did not have permission from the district manager to mine within 150 feet of well #384.

14. The two outer casings in well #384 had been neither removed nor perforated at the time at which Contestant stated that it had mined within 150 feet of the well.

Well 242

15. In 1956, the casings were removed from well #242, and cement and clay were placed in the well. In 2003, Contestant removed some but not all of that material, prior to plugging the well with cement.

16. On November 4, 2003, Contestant sent a letter to the acting district manager requesting a permit to mine through well #242. The letter stated that "Well #242 has been plugged to 101c Petition standards." Accompanying the letter was a plugging affidavit purporting to show that the well had been plugged on October 9, 2003.

17. Based upon the representations and documentation provided by Contestant, MSHA issued a permit on November 13, 2003 to mine through well #242.

18. Speed mined through well #242 on July 22, 2004.

Respectfully submitted,

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 24, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-264-M
Petitioner	:	A.C. No. 48-01605-05501
	:	
v.	:	
	:	
MELGAARD CONSTRUCTION CO.,	:	
Respondent	:	Rock Crusher #2

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, and Fred Fernandez and Ronald D. Pennington, Conference and Litigation Representatives, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
John E. Melgaard, President, Melgaard Construction Company, Gillette, Wyoming, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalties filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Melgaard Construction Company. John E. Melgaard is the company president.¹ The petition seeks to impose a total civil penalty of \$365.00 for six alleged violations of mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines.

Four of the cited violative conditions allege inadequate guarding in violation of the mandatory standard in section 56.14107(a), 30 C.F.R. § 56.14107(a). This safety standard requires moving machine parts, such as gears and pulleys, to be guarded to protect persons from injury. Only one of the guarding violations is characterized as significant and substantial (S&S) in nature. Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

¹ John E. Melgaard appeared on behalf of the company and he was its only witness. Thus, all references to "Melgaard's" contentions refer either to Melgaard's testimony or his assertions advanced on behalf of the company.

The two remaining violations, both designated as non-S&S in nature, concern the mandatory safety standard in section 56.14132(a), 30 C.F.R. § 56.14132(a), that requires manually-operated backup audible warning devices to be maintained in functional condition. This matter was heard on July 27, 2004, in Gillette, Wyoming. During the hearing, Melgaard stipulated to the fact of the non-S&S backup alarm violations in Citation Nos. 7913794 and 7913795. Melgaard agreed to pay the \$55.00 penalty proposed by the Secretary for each of these citations. (Tr. 81-83). **Accordingly, Citation Nos. 7913794 and 7913795 shall be affirmed.**

At the beginning of the hearing, the parties were advised that I would defer my ruling pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties opted to waive post-hearing briefs in favor of a bench decision. (Tr. 83-84, 137-38). This decision summarizes and supplements the bench decision with respect to the four remaining guarding violations.

I. Pertinent Penalty Criteria

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(I), to determine the appropriate civil penalty to be assessed. In determining the appropriate civil penalty to be assessed, Section 110(i) provides, in pertinent part:

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

Melgaard Construction Company is a small mine operator that is subject to the jurisdiction of the Mine Act. The company has no history of previous violations as it had recently begun operations at its No. 2 Rock Crusher site. Melgaard Construction Company abated the cited conditions in a timely manner. The cited conditions were not serious in gravity. Finally, the civil penalty proposed by the Secretary will not impair the company's ability to continue in business.

II. Background

On February 15, 2002, Donald B. Wagoner, Melgaard Construction Company's Safety Representative, notified the Mine Safety and Health Administration's (MSHA's) field office in Green River, Wyoming, of its intention to begin rock crushing operations at its No. 2 Crusher facility as of February 20, 2002. The No. 2 Crusher facility is located in Gillette, Wyoming. The Melgaard Construction Company is a small mine operator that employs approximately

15 people its No. 2 crusher facility. At the facility, rock material is removed from hilltops by dozer. The material is transported from the hilltop to a feeder by a front-end loader whereupon the material drops onto a conveyor that carries the material to be sorted by screen. The sorted material is conveyed to a rolls crusher or a jaws crusher where it is crushed into various grades of gravel. The crushed gravel is conveyed to a pay belt that serves a stacker conveyor. The gravel is sold to oil companies and ranchers who use the material for road construction.

On May 8, 2002, MSHA Inspector Joel Tankersley became aware of the Rock Crusher #2 facility after he observed the surface mine from his vehicle while driving on Interstate 90. Although Wagoner had advised MSHA of start-up operations, Tankersley was unaware of the facility's operation. Tankersley drove to the mine site where he encountered three workers. Tankersley initially met loader operator Ed Peyser. Peyser directed Tankersley to Master Mechanic Kent Lucschow, who was the supervisor and crusher operator. A third unidentified employee was operating a Caterpillar dozer. Lucschow accompanied Tankersley on his inspection. Tankersley did not have a camera because his inspection was unplanned.

Although the Caterpillar and loader were moving material at the stockpile, the conveyor system was not operating because it was being repaired. Consequently, the conveyor and crushers were de-energized as the diesel generator that powers the system was shut off. Lucschow did not provide Tankersley with any information concerning the maintenance status of the conveyor system or when startup was contemplated. Both Tankersley and Melgaard described Lucschow as a courteous, non-confrontational gentleman. (Tr. 70, 136-37).

John Melgaard testified that the rolls crusher jammed on May 3, 2002, causing the belts to spin off of the feeder. Melgaard further testified that a new belt was installed on the feeder on May 8, 2002, and that significant welding repairs were subsequently made on the rolls crusher. Melgaard stated the system was out of service for extensive repairs from May 3, 2002, until crushing operations resumed on August 1, 2002. Melgaard's testimony is consistent with Tankersley's testimony that the mine site was not staffed or operating on July 17, 2002, when Tankersley returned to the site to terminate a previously issued citation. (Tr. 40, 86-87).

III. Findings and Conclusions

A. Citation No. 7913790

Upon inspection of the feed drive motor, Tankersley observed the drive v-belt was not guarded to protect the belt from contact. The v-belt is at the side of the drive motor. The drive motor is located approximately three feet off of the ground. Tankersley was concerned that the crusher operator could contact the exposed v-belt while checking on the operating condition of the motor. In such an event, serious injuries to the fingers or the extremities would be sustained. Consequently, Tankersley issued Citation No. 7913790 citing a violation of the mandatory

guarding standard in section 56.14107(a).² (Gov. Ex. 2). However, given the location of the exposed belt drive, Tankersley believed that such an accident was unlikely. He therefore characterized the cited violation as non-S&S.

The citation was terminated shortly after it was issued after the guard, which was lying on the ground, was re-installed. Tankersley did not consider the conveyor system as “out of service” because Lucschow did not assert the system was inoperable. (Tr. 62). However, Tankersley conceded the equipment was de-energized and Lucschow was working on the rolls crusher which is in line with the feed drive motor as well as the other components of the conveyor system. (Tr. 64).

Melgaard testified that the rolls crusher “plugged-up” on May 3, 2002, causing extensive damage to the entire conveyor system. Melgaard stated the belts had to be removed to enable welding repair of the rolls crusher. On May 8, 2002, Melgaard asserts that the v-belt drive motor guard had been removed to facilitate the repairs.

The bench decision noted that the Secretary has the burden of proving the alleged violation of a mandatory safety standard by a preponderance of the evidence. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (Nov. 1989). Consistent with Tankersley’s testimony, Melgaard concedes that the v-belt guard on the drive motor had been removed and that it was lying on the ground. Thus, the Secretary has presented a *prima facie* case that the guarding standard was violated.

However, Melgaard has rebutted the Secretary’s showing by demonstrating that the conveyor system was inoperable and that the guard had been removed to facilitate repairs. In this regard, Tankersley candidly admitted that the diesel generator had been turned off, that repair work was being performed, and, that the guard was in close proximity to the drive motor and readily available to be re-installed. Melgaard stated that the lock-down handle on the generator had been “tagged-out.” Tankersley did not recall whether the generator had been locked out, however, he did not dispute Melgaard’s testimony. (Tr. 85-86). Obviously, guards may be removed to perform repairs on de-energized equipment. Under such circumstances, a violation of the guarding standard in section 56.14107(a) has not occurred. (Tr. 142-47). **Accordingly, Citation No. 7913790 shall be vacated.**

² Section 56.14107(a) provides:

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

B. Citation No. 7913791

Upon inspection of the generator drive motor, Tankersley observed the power takeoff (PTO). The PTO is approximately eight feet long and it transfers power from the generator drive motor to the rolls crusher. The eight foot length of the PTO varies in height from eight feet off the ground at the rolls crusher angling down to four feet off of the ground where it connects to the generator motor. There is a knuckle or joint assembly in the middle of the PTO. The PTO's moving parts were guarded on three sides - - the top and both sides. However, Tankersley noted that the bottom of the PTO was unguarded exposing anyone walking underneath the PTO to the hazard of a contact injury.

Tankersley believed that anyone traveling under the PTO to inspect the belts could be exposed to injury. However, Tankersley believed an injury was unlikely because of the location of the unguarded area. Consequently, Tankersley issued Citation No. 7913791 citing a non-S&S violation of the mandatory safety standard in section 56.14107(a). (Gov. Ex. 3). The citation was terminated shortly after it was issued after the guard was re-installed at the bottom of the PTO.

Melgaard conceded that a bottom guard was required. However, Melgaard asserted the guard had been removed temporarily to grease the knuckle joints. (Tr. 95). In fact, Melgaard stated the guard was removed daily to grease the universal joint in the PTO. (Tr. 96-97). Tankersley did not dispute that the guard was temporarily removed or that it was routinely removed to service the universal joint. (Tr. 95-97, 98-99).

Similar to the decision in Citation No. 7913790, the bench decision in Citation No. 7913791 noted that the evidence demonstrated that the lower PTO guard was temporarily removed during the maintenance and repair process. As discussed above, it is undisputed that the conveyor system was de-energized and repair work was being performed. As such, a violation of the guarding standard in section 56.14107(a) has not been shown. (Tr. 142-47). **Consequently, Citation No. 7913791 shall be vacated.**

C. Citation No. 7913792

Upon inspecting the return belt, Tankersley observed that the tail roller was guarded on the top and both sides. However, the bottom of the tail roller was unguarded. (Tr. 110). The tail roller was located at ground level adjacent to the PTO on the generator side of the rolls crusher. There is a walkway area next to the tail roller that is approximately six feet wide. (Tr. 118). The crusher operator traversed this area to examine the stacker belt and the rolls crusher.

Tankersley also noted that the return belt head roller did not have a guard that protected the pinch point. The head roller was located on the other side of the rolls crusher approximately seven feet above the ground. (Gov. Ex. 10, pp. 2-3). Tankersley believed that, given continued mining operations, it was reasonably likely that an individual passing by the return belt will

sustain serious injuries as a result of his hand, foot or clothing contacting exposed moving parts. Specifically, with respect to the unguarded bottom of the tail roller, Tankersley was concerned that someone could get his foot caught under the roller or catch his clothing on a pin or splice area protruding from the belt. Consequently, Tankersley issued Citation No. 7913792 citing an S&S violation of the guarding standard in section 56.14107(a). (Gov. Ex. 4). The citation was terminated on May 8, 2002, after the cited missing guards were constructed and installed on the return belt.

Melgaard did not dispute Tankersley's testimony with respect to the unguarded portion of the tail roller. Melgaard contended the head roller was seven feet above the ground. (Tr. 119). Tankersley's illustration of the return belt notes that the head pulley is "about 7 feet" above the ground. (Gov. Ex. 10, p.3). Section 56.14107(b) of the cited guarding standard provides that "[g]uards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces."

The bench decision noted that Tankersley admitted the head roller was approximately seven feet above ground. Melgaard testified the head roller is at least seven feet high. Tankersley did not take an actual measurement. In the absence of actual measurement, the Secretary has failed to demonstrate that the "seven feet high" exception to the guarding requirements specified in Section 56.14107(b) does not apply. Therefore, the bench decision vacated the portion of Citation No. 7913792 concerning the unguarded head roller. (Tr. 147-48).

With respect to the guarding standard as it applies to the tail roller, the bench decision noted that it is instructive to examine the Commission's decision in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984) that addressed the purpose of the Secretary's guarding standard. The Commission stated:

We find the most logical construction of the standard is that it imports the concepts of *reasonable possibility of contact and injury*, including contact stemming from inadvertent stumbling or falling, momentary inattention or ordinary carelessness. Applying this test requires *taking into consideration all relevant exposure and injury variables*. For example, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis.

6 FMSHRC at 2097 (emphasis added).

Thus, as a general proposition, stumbling and inadvertent contact are the concerns that the guarding standard addresses. Consequently section 57.14107(b) exempts "moving parts [that] are at least seven feet away from walking or working surfaces," although such areas may be accessible by ladder. The standard is not intended to require moving parts to be guarded in order to prevent contact by personnel who may climb up to inaccessible areas, or, intentionally crawl, or reach, under inaccessible areas near ground level to perform maintenance. Under such circumstances, section 56.14105, 30 C.F.R. § 56.14105, requires maintenance of equipment to be performed only after the power is turned off and the equipment is blocked against motion. Moreover, guarding such inaccessible areas may require removing the guard to accomplish cleaning.

Unlike the previous two cited conditions where guards were temporarily removed during maintenance and repairs, Melgaard concedes the bottom of the tail roller was unguarded. Although the conveyor system was de-energized during Tankersley's inspection, the cited condition must be viewed in the context of renewed ongoing mining operations. Putting aside the question of the likelihood of inadvertent contact, the exposed bottom of the tail roller creates a potential hazard that someone may jam his foot or catch his clothing on a splice point. **Accordingly, Citation No. 7913792 shall be affirmed.**

Turning to the issue of the likelihood of serious injury, a violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *National Gypsum*, 3 FMSHRC at 825. The Commission has explained further that to demonstrate that a violation is S&S the Secretary must 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., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984). (Emphasis in original).

In the instant case, the nature and extent of the partially unguarded tail roller, given its location in a six feet wide walkway, fails to demonstrate that it is reasonably likely that an accident resulting in serious injury from contact with the bottom of the roller will occur. In other words, although the partially unguarded tail roller can contribute to a serious accident, such an accident is unlikely. Consequently, Citation No. 7913792 shall be modified to reflect the cited violation was non-S&S in nature.

The Secretary proposes a \$90.00 civil penalty for Citation No. 7913792. Given its modification to a non-S&S citation, a civil penalty of \$55.00 shall be imposed. (Tr. 147-52).

D. Citation No. 7913793

Tankersley inspected the Caterpillar generator referred to as the Genset.³ The Genset is connected by electrical cables to the generator drive motor. (Gov. Ex. 10, p.2). The Genset creates the electricity that powers the drive motor that transfers the energy through the PTO to the crusher. The crusher operator station is located between the generator drive motor and the Genset where a box is located housing punch buttons that operate various parts of the crusher. The generator motor is at the rear of the Genset. The motor is powered by v-belts and alternator belts. There is a radiator fan that draws air into the radiator to cool the motor. The moving belts are approximately chest high. There is a cowling that guards the belts. A cowling is similar to the guard that covers the radiator fan on an automobile.

Tankersley noted that the factory installed cowling for the v-belts was not long enough or wide enough to cover all of the pinch points. Tankersley testified the cowling was approximately 12 inches too short on either side of the v-belts which protrude outside of the motor. (Tr.127-28).

Tankersley was concerned that anyone examining the crusher could sustain serious injuries by inadvertently contacting the exposed portion of the v-belt. However, Tankersley did not believe such an accident was likely because it was in a low travel area. (Tr. 128-29). Consequently, Tankersley issued Citation No. 7913793 citing a non-S&S violation of the guarding standard in section 56.14107(a). (Gov. Ex. 5).

Melgaard testified that a factory installed guard protected the v-belt from contact. Although Melgaard believed the cowling was adequate, to abate the citation Melgaard installed a spacer at the cowling's mounting site to extend the guard over the v-belt. (Tr. 130).

The citation was terminated by Tankersley on July 17, 2002, when he returned to the mine site and observed that the cowling had been extended to protect the pinch points from contact. (Gov. Ex. 5). As previously discussed, there were no mining activities occurring at the site at that time.

As previously discussed, the Secretary has the burden of proof. The bench decision noted that the Secretary is at a disadvantage in this case because Tankersley did not photograph the cited guarding violations. In this regard, the Secretary proffered drawings of the cited guarding conditions that were drawn by Tankersley approximately one month before the July 2004 trial. (Tr. 59). These drawings are based on Tankersley's recollections of conditions he observed more than two years before. As such, Tankersley's drawings are of little evidentiary value.

³ Tankersley erroneously cited the generator as a Murphy generator based on information provided to him by Lucschow. The generator was manufactured by Caterpillar. (Tr. 124).

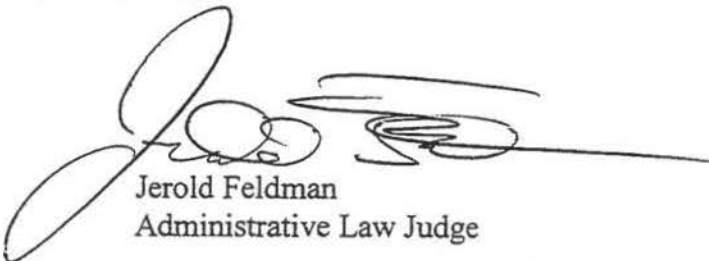
In guarding cases it is essential that the MSHA inspector photograph the cited conditions. In addition, measurements should be taken to describe the location and quantify the area that poses a contact injury hazard. In the instant case, Citation No. 7913793 alleges the cowl covering the v-belts "was not long or wide enough to cover all pinch points." (Gov. Ex. 5). In the absence of photographs or measurements quantifying the alleged inadequacy of the factory installed guard, the evidence presented by the Secretary is insufficient to demonstrate a violation of the cited guarding standard. **Accordingly, Citation No. 7913793 shall be vacated.** (Tr. 152-54).

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 7913790, 7913791 and 7913793 **ARE VACATED**.

IT IS FURTHER ORDERED that Citation Nos. 7913794 and 7913795 **ARE AFFIRMED** and Citation No. 7913792 **IS MODIFIED** to delete the significant and substantial designation.

IT IS FURTHER ORDERED that Melgaard Construction Company **shall pay a total civil penalty of \$165.00** in satisfaction of Citation Nos. 7913792, 7913794 and 7913795. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket No. WEST 2003-264-M **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 31, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2002-61
Petitioner	:	A.C. No. 33-01159-04192
	:	
v.	:	
	:	
THE OHIO VALLEY COAL COMPANY,	:	
Respondent	:	Powhatan No. 6 Mine

DECISION APPROVING SETTLEMENT ON REMAND

Before: Judge Hodgdon

This case is before me on remand from the Commission. *Ohio Valley Coal Co.*, No. LAKE 2002-61 (May 18, 2004).¹ The matter was remanded for a determination of whether the violation was "significant and substantial"² and for assessment of a civil penalty. *Id.* The parties, by counsel, have filed a motion to approve a settlement agreement. The agreement provides that the determination of "significant and substantial" will remain as issued, i.e. that the violation was "significant and substantial" and for a reduction in penalty from \$35,000.00 to \$10,000.00.

Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, the motion for approval of settlement is **GRANTED** and the Respondent is **ORDERED TO PAY** a penalty of **\$10,000.00** within 30 days of the date of this order.



T. Todd Hodgdon
Administrative Law Judge

¹ The matter was remanded to the Commission by the U.S. Court of Appeals for the D.C. Circuit. *Sec. v. Ohio Valley Coal Co.*, 359 F.3d 531 (D.C. Cir. 2004); 2004 WL 547606 (unpublished order granting Secretary's motion for clarification regarding remand to the Commission).

² The "significant and substantial" terminology is taken from section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 2004

BECON CONSTRUCTION, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2001-204-RM
v.	:	Citation No. 7994802; 01/02/2001
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH,	:	
ADMINISTRATION, MSHA	:	Lebec Cement Plant
Respondent	:	Mine ID 04-00213 AF6
	:	
MORTON ENGINEERING AND	:	CONTEST PROCEEDING
CONTRACTING, INC.,	:	
Contestant	:	Docket No. WEST 2001-226-RM
	:	Citation No. 7994802; 01/02/2001
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH,	:	
ADMINISTRATION, MSHA	:	Lebec Cement Plant
Respondent	:	Mine ID 04-00213 8FQ
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH,	:	
ADMINISTRATION, MSHA	:	Docket No. WEST 2002-147-M
Petitioner	:	A.C. No. 04-00213-05502 AF6
	:	
v.	:	
	:	
BECON CONSTRUCTION COMPANY,	:	Lebec Cement Plant
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH,	:	
ADMINISTRATION, MSHA	:	Docket No. WEST 2002-164-M
	:	A.C. No. 04-00213-05504 8FQ
v.	:	
	:	
MORTON ENGINEERING &	:	Lebec Cement Plant
CONSTRUCTION, INC.,	:	
Respondent	:	

ORDER DENYING SUPPLEMENTAL MOTION TO COMPEL

Before me is a Supplemental Motion to Compel filed on July 12, 2004, by Becon Construction Company, Inc. ("BECON") and the Secretary's July 29, 2004, Opposition. Becon's Supplemental Motion follows a May 18, 2004, Order denying Becon's Motion to Compel the Secretary's further responses to Becon's interrogatories. 26 FMSHRC 499.

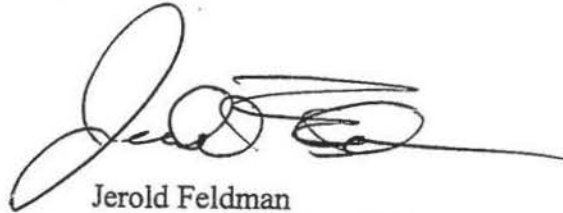
With respect to written statements, the May 18, 2004, initial Order denied Becon's motion to compel miner witness statements that are entitled to the miner informant and miner witness privileges in Commission Rules 61 and 62, respectively. 29 C.F.R. 2700.61 and 2700.62. *Id.* at 450-51. However, leave was granted for Becon to request the Secretary to provide non-miner witness statements, which, if necessary would have been viewed *in camera*. *Id.* at 452. Despite the Order denying access to miner witness statements, in its Supplemental Motion, Becon once again seeks the disclosure of all statements obtained during the course of the Secretary's accident investigation. In view of Becon's failure to limit its request to non-miner statements, I conclude there are no non-miner witness statements that Becon seeks to compel. Accordingly, Becon's supplemental motion to compel witness statements identified in the Secretary's Second Amended Privilege Log as Exs. A, E, FF, L, M, N, O, P, Q, R, S, T, U, V and Y **IS DENIED**.

With respect to the remaining documents that Becon seeks disclosure of, the initial Order noted that investigative field notes, case analysis, memorandum or summary of interviews prepared by or for a party in anticipation of litigation are protected by the work product privilege. *Id.* at 451 *citing Consolidation Coal Company*, 19 FMSHRC 1239 (July 1997). The Order also noted that intra-agency memorandum or e-mail communications that are "consultative" in nature, in that they contain advisory opinions, recommendations and deliberations, are protected by the deliberative process privilege. *Id.*

Finally, the initial Order emphasized that BECON had not articulated why it objected to the Secretary's assertion of privilege with respect to each document. Nor had Becon shown an overriding need for any document. However, Becon was granted leave to supplement its Motion to Compel if it provided specific assertions why a privilege should not apply to each document. Alternatively, Becon was invited to overcome the Secretary's privilege claims by a showing of substantial need and undue hardship with respect to each individual document.

Once again Becon failed to comply with the initial Order by generally denying the Secretary's privilege claims. Becon's request for the disclosure of the Case Closure Memorandum of District Manager Lee D. Ratcliff, identified as Ex. F in the Secretary's Privilege Log, is clearly entitled to the work product and/or deliberative process privileges. Similarly, the Special Investigation Report, identified as Ex. H, is protected by the work product privilege. *Asarco, Inc.*, 12 FMSHRC 2548, 2559 (Dec. 1990). Finally, Health and Safety Conference Notes prepared by Mine Safety and Health Administration personnel during a meeting attended by the respondents, identified as Ex. J, are protected by the work product privilege.

In each of these instances Becon has failed to demonstrate a compelling need for these documents. The facts surrounding the subject fatal trolley accident have been the focus of extensive civil litigation during which time witnesses have been deposed and discovery has been completed. Consequently, Becon has failed to demonstrate that it does not already possess the information it seeks, or that the information is not available from other sources. Thus, Becon has failed to demonstrate the requisite showing to warrant an *in camera* review. Consequently, Becon's supplemental motion to compel Exs. F, H and J **IS DENIED**. Accordingly, Becon's Supplemental Motion to Compel **IS DENIED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a large, stylized initial 'J'.

Jerold Feldman
Administrative Law Judge

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/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 17, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-160
Petitioner	:	A.C. No. 01-01322-00004
	:	
v.	:	Docket No. SE 2003-161
	:	A.C. No. 01-01322-00005
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	
	:	No. 5 Mine

ORDER DENYING MOTION FOR RECONSIDERATION **OR** **CERTIFICATION**

Jim Walter Resources, Inc. (JWR) moves for reconsideration of an order denying its Motion for Summary Decision (Order, July 2, 2004). In the alternative, it moves that the matter be certified to the Commission as a controlling question of law whose immediate review will materially advance the final disposition of the proceedings. The Secretary opposes the motions. For the following reasons, I conclude the motions should not be granted.

FACTUAL BACKGROUND

The facts are set forth in the Order (pages 1-3) and need not be repeated in toto. The controversy arises out of a double explosion that occurred at JWR's No. 5 Mine on September 23, 2001. Among the enforcement actions resulting from MSHA's subsequent investigation of the accident were orders issued pursuant to Section 104(d) of the Act (30 U.S.C. § 814(d)). One of the orders, No. 7328082, alleges a violation of 30 C.F.R. § 75.1101-23(a). The Secretary seeks a civil penalty assessment of \$55,000 for the alleged violation (Docket No. SE 2003-160). The alleged violation is one of eight that are at issue in docket. Seven are proposed to be assessed at \$55,000, and one is proposed to be assessed at \$50,000.¹

¹ In the consolidated case, Docket No. SE 2003-161, the Secretary petitions for the assessment of ten additional alleged violations. The assessments proposed for these alleged violations are significantly less than those proposed for the violations in Docket No. SE 2003-160.

At the time the order was issued section 75.1101-23(a) stated:

Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, routes of travel to the surface, and proper evacuation procedure to be followed in the event of an emergency. Such program shall be submitted for approval to the District Manager of the Coal Mine Health and Safety District in which the mine is located no later than June 30, 1974.^[2]

In pertinent part the order states:

[A] proper evacuation procedure was not followed after the first explosion on 4 Section. Miners were not evacuated from the mine after an explosion damaged critical ventilation controls. These conditions were known by and communicated to management personnel including the CO Room Supervisor. The section foreman believed there was a possibility of an explosion and did not effectively communicate this information to the other miners. Miners from other areas of the mine responded to the emergency on 4 Section believing either an ignition or a fire had occurred. These miners were unaware an explosion had occurred and a second explosion was possible. Miners underground were not alerted to the problem through the mine wide telephone paging system. Also management directed 7 additional miners to join the 13 miners already in 4 Section.

In its motion JWR argued section 75.1101-23(a) was inapplicable to the conditions that existed at the mine on September 23 and the order should be vacated. JWR raised a number of grounds for finding the standard was improperly cited. Foremost, it contended the standard expressly applied "only to emergencies involving underground fires" (Mot. at 10). Therefore, it was wrong to cite the standard for "other emergencies that could occur in an underground mine," specifically for an emergency involving an explosion. JWR also argued if section 75.1103-23(a) "could somehow be construed to apply to events that were not fire emergencies," the company was in compliance with the standard because its miners' actions were consistent with the Plan (Id. 20).

In ruling on the motion, I held that given the facts revealed by the record, it was not improper for MSHA to cite the company for a violation of section 75.1101-23(a) (Order 4-5). I stated I was not swayed by the company's argument the standard applied only to fire emergencies. Applying a "reasonably prudent person test," I concluded the September 23 emergency was of the type referenced in section 75.1101-23(a). In essence, I found a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have concluded the standard applied to both fire and explosion emergencies and that the

² On the date the violation allegedly occurred, a plan (the "Plan") approved by MSHA was in effect at the mine.

company's attempt to differentiate between a fire and an explosion for purposes of the standard was "a distinction without difference" (Order 5). Given that interpretation, I found the standard's placement in Subpart L of the regulations, a subpart headed "Fire Protection," logical, and I rejected the company's suggestion that the location "of the standard and its regulatory context restrict[ed] it to fires only and exclude[d] explosions" (Id. 6).

Having found it was not incorrect to cite section 75.1101-23(a), I held there were insufficient facts in the record to determine whether JWR complied with the standard on September 23. I noted the company and the Secretary did not agree whether the allegations set forth in Order No. 7328082 violated the company's Plan and that at trial the burden would be on the Secretary to establish that the allegations in the order actually contravened the Plan as it then existed (Order 6).

Because I found that Section 75.1101-23(a) was correctly cited and that material facts remained to be determined, I denied the motion (Order 6-7).

RECONSIDERATION

In moving for reconsideration, the company asserts, as it did in its motion, that MSHA's revision of the regulation after the accident and the agency's decision to put the standard under a different subpart indicates that MSHA itself did not consider the standard to apply to explosion-related emergencies (Mot. 1-2).³ It also argues that the conclusion that a reasonably prudent mine operator would have found the standard applicable to explosion emergencies is inconsistent with the fact that the Secretary later revised the standard (Id. 2-3).

With all due respect, I am not persuaded. If, as I believe, a reasonable, prudent mine operator would have concluded the September 23 emergency was of the type referenced in section 75.1101-23(a), the fact that the Secretary chose to revise and reposition the regulation at a later date does not make the previously worded and positioned regulation inapplicable. The Secretary has a duty to refine, revise and clarify her regulations based on her administrative experience. Revising a regulation to more clearly state what previously was reasonable to infer does not signal the inapplicability of the prior regulation. Nor is it inconsistent with concluding the prior standard applied to then existing facts. Rather, such a revision is the type of honing and

³ In December 2002, the Secretary redesignated section 75.1101-23(23(a) as section 75.1502 and moved the regulation from Subpart L to Subpart P of Part 75. Subpart P is titled "Mine Emergencies" (67 FR 76665 (December 12, 2002); 67 FR 78044 (Dec. 20, 2002)). As part of the revised regulation, the Secretary specified an evacuation program was required for "[m]ine emergencies that endanger miners due to fire, explosion, or gas or water inundation" (30 C.F.R. §75.1502(a)(1)). JWR argued in its motion, "if the Secretary intended § 75.11-01-23(a) to apply to all potential mine emergencies, she would have said so and included it in Subpart P, as she did when she revised the standard" (Mot. 11).

refining of a regulation the Secretary is obligated to undertake.

I remained convinced that when all is said and done, the matter is a simple one – would a reasonably prudent operator have concluded the standard applied only to fire emergencies and excluded other emergencies, specifically those involving an explosion? For the reasons I have stated, I continue to believe the answer is no.

Because I found the standard applicable to the events of September 23, I stated that at trial the Secretary would “have to prove the alleged violations of the [evacuation] Plan . . . either through documentary evidence or testimony, or both” and that JWR can “rebut the Secretary’s case by showing the particular events . . . the Secretary contends contravened the Plan either did not occur or were not contrary to the provisions of the Plan” (Order 6). In urging reconsideration, the company cites deposition testimony it obtained following issuance of the order. JWR maintains the testimony establishes that the order was not issued for violating the Plan but, rather, for violating the standard or the intent of the standard (Mot. For Reconsid. 4-5). However, this assertion is disputed by the Secretary. She states that at trial she will prove that JWR violated specific portions of its then existing Plan (Sec’s Opp. To Resp. Mot. For Reconsid. 3). Thus, issues remain to be tried.

For these reasons, I decline to reconsider my conclusion that the motion should be denied.

CERTIFICATION

Commission Rule 76(a)(1)(I) states that a judge may certify an interlocutory ruling when it involves and “controlling question of law and . . . immediate review will materially advance the final disposition of the proceeding.” While the issue of whether or not section 75.1101-23(a) applied to the events of September 21 is controlling regarding Order No. 7328082, its resolution will not materially advance the final disposition of the proceeding. The order sets forth but one of 18 alleged violations at issue in the consolidated proceedings. Of the 18, eight, including the alleged violation of section 75.1101-23(a), are expected to be vigorously contested by the parties. The hearing is scheduled to begin on November 4, 2004, and will extend well into December. Removal of one of the alleged violations from those that will be tried will not significantly shorten the length of the trial nor the time within which a decision will be rendered by the undersigned.

Equally important, denial of certification will not deprive JWR of review of the issue. If I ultimately conclude the standard was violated, the company may appeal to the Commission, which will have the opportunity to review the matter in the context of a complete and, I hope, enlightening record.

ORDER

JWR's Motion for Reconsideration or Certification is **DENIED**.


David F. Barbour
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
August 18, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2004-36
Petitioner	:	A.C. No. 46-08593-11714
	:	
v.	:	
	:	
BAYLOR MINING, INC.,	:	Jim's Branch No. 3a
Respondent	:	

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

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Respondent filed a request for production of documents with the Secretary. Citing the "work product" privilege, the "informant's" privilege and the "deliberative process" privilege, the Secretary declined to furnish 12 documents in response to the Respondent's request.¹ Consequently, the Respondent has filed a Motion to Compel disclosure of the documents. Relying on the privileges previously asserted, the Secretary opposes the motion. For the reasons set forth below, the motion is granted, in part, and denied, in part.

The documents at issue are: (1) The inspector's September 10, 2003, notes; (2) An August 6, 2003, Special Investigation Report; (3) A September 19, 2003 Memo from the special investigator to the Acting Director of the Office of Assessments; (4) An April 14, 2003, signed miner witness statement; (5) An April 10, 2003, unsigned miner witness statement; (6) A May 30, 2003, Memorandum of Interview of a miner witness; (7) and (8) Two June 9, 2003, Memoranda of Interview of members of management; (9) A June 6, 2003, Memorandum of Interview of a member of management; (10) A June 13, 2003, signed miner witness statement; (11) A May 30, 2003 Memorandum of Interview of a "private" individual; and (11) A June 19, 2003, Memorandum of Interview of a miner witness.

With the exception of the inspector's notes, the Secretary's Conference and Litigation Representative argues that the remaining 11 documents are covered by the "work product"

¹ It is not clear whether the Secretary withheld 11 or 12 documents since, as will be seen *infra*, the Secretary has already furnished the inspector's notes.

privilege. The work product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.² The Commission has held that:

In order to be protected . . . under Fed. R. Civ. P. 26(b)(3), the material sought in discovery must be:

1. "documents and tangible things;"
2. "prepared in anticipation of litigation or for trial;" and
3. "by or for another party or by or for that party's representative."

Asarco, Inc., 12 FMSHRC 2548, 2558 (Dec. 1990) (*Asarco I*). The documents clearly meet (1) and (3), so the question is whether they were prepared "in anticipation of litigation or for trial."

The investigation in this case was carried out in response to a section 103(g) complaint, 30 U.S.C. § 813(g).³ As evidence that the investigation was in anticipation of litigation, the Secretary has submitted the affidavits of the Supervisory Special Investigator and the investigator. The supervisor's affidavit states:

I assigned Robert W. Simmons, Special Investigator, to conduct an investigation of this complaint. Because of the allegation of possible falsification of records, one of the purposes of Mr. Simmons' investigation was to recommend whether civil penalty assessments should be proposed and whether the matter

² Commission Rule 1(b), 29 C.F.R. § 2700.1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Act, the Commission's procedural rules, or the Administrative Procedure Act.

³ Section 103(g)(1) provides, in pertinent part, that:

Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representation 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. . . . Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists. . . .

In addition, it was known that Mr. Lucas had been killed in a subsequent accident at the Jim's Branch No. 3a Mine and that there was ongoing litigation concerning his death. As such, the work performed by Investigator Simmons as part of this investigation was performed in anticipation of possible litigation.

Special Investigations conducted pursuant to Section 103(g) of the Act are not conducted in the ordinary and routine course of MSHA's business. Normally, a 103(g) complaint is assigned to a regular inspector to investigate. However, because this case involved an allegation of falsification of records, it was assigned to a Special Investigator and a special investigation was conducted. This investigation was conducted with the understanding that litigation was a possibility.

(Sec'y. Resp., Attach. B., Aff. of James G. Jones, Paras. 4 & 5.) The affidavit of Simmons contains essentially identical language. (Sec'y. Resp., Attach. C., Aff. of Robert W. Simmons, Paras. 4 & 8.)

The affidavits are relevant because the belief of the party preparing the document, that litigation will result, if objectively reasonable, is the initial focus of whether a document was prepared in anticipation of litigation. *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3rd Cir. 1993). Consequently, finding the affiants' beliefs to be objectively reasonable, I find that the Secretary has met the first step in sustaining her claim of the privilege.

Next, the Secretary correctly argues that "it is well recognized that such special investigations are conducted by MSHA in anticipation of litigation." (Sec'y. Resp. at 5.) Indeed, in *Asarco I*, the Commission held that MSHA special investigations under sections 110(c) and (d), 30 U.S.C. § 820(c) and (d), are undertaken in anticipation of litigation. *Id.* at 2559. Section 110(d) deals with criminal penalties for operators who "willfully violate[] a mandatory health or safety standard." Thus, it appears that the investigation, although initially triggered by a 103(g) complaint, falls within the protection of the privilege by the possibility of criminal charges.

Further, it does not appear that MSHA arrived at this rationale in response to the instant motion. The August 6 memorandum, written well before the citation was issued, states as its subject: "Special Investigation Report Under Section 110" This also supports the claims in the affidavits that the investigation was undertaken with litigation a possibility.

Finally, even though there is no evidence that criminal charges resulted from the investigation, the privilege would still apply in this case. As the Commission said in *Asarco I*, "documents prepared for one case have the same protection in a second case, if the two cases are closely related." *Id.* at 2558. The Commission went on to say:

It is our understanding that no charges have been brought as a result of Everett's special investigation. Nevertheless, this civil penalty case, brought under section 110(a), 30 U.S.C. § 820(a), is closely related litigation and it further appears that it could fairly be said that the document was prepared in anticipation of that litigation.

Id. at 2559 (citations omitted). In this case, the civil penalty case for inadequate task training is more than just closely related to the investigation; lack of task training was one of the allegations in the 103(g) complaint. (Sec'y. Resp. Attach. A.)

In conclusion, I find that the Secretary has met her burden of establishing that the documents in question were prepared in anticipation of litigation. Documents 2 and 3 are clearly covered by the privilege as they are documents prepared in anticipation of litigation by the Secretary's investigator. Documents 4, 5 and 10, the signed and unsigned miner witness statements, taken by the investigator during the investigation also fall within the privilege. *See Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 303 (8th Cir. 1974); *Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 159 (E.D.N.Y. 1986). Finally, Documents 6, 7, 8, 9, 11 and 12, the memoranda of interviews, are also covered by the privilege. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997). Accordingly, I hold that the work product privilege applies to all 11 documents.

Having found that all 11 of the documents are entitled to work product immunity, "they are subject to discovery 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.' Fed. R. Civ. P. 26(b)(3)." *Asarco I*, 12 FMSHRC at 2558. In this case, the Respondent argues that the documents "presumably motivated the Secretary's enforcement action and contain information needed by Baylor to prepare its defense over two and one-half years after the event." (Mot. at 9.)

This assertion may meet the substantial need part of the test, but it does not demonstrate that Baylor is unable without undue hardship to obtain the substantial equivalent of the materials by other means. This is not a case where the Secretary obtained the information back in 2001 when memories were fresh. The Secretary got the information a year ago. That is about the same length of time that proceeds most cases before the Commission.

Baylor has access to the same individuals with knowledge of the alleged inadequate task training as did the investigator and can question them in the same manner, under *subpoena*, if necessary. *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (Aug. 1992) (*Asarco II*). Other than a lapse in time, which is essentially the same for both parties, the Respondent has made no showing that it attempted to question witnesses and they could not remember what happened, that some witnesses are no longer available, that it would have to go to unusual expense to obtain the information contained in the documents or that some other *actual* reason prevents the operator

from obtaining this information. Accordingly, I conclude that the Respondent has not met the undue hardship test and that documents 2-12, with the exception of documents 7, 8 and 9 need not be disclosed.⁴

With respect to documents 7-9, which are memoranda of interviews of Baylor managerial employees, Fed. R. Civ. P. 26(b)(3) provides that: "A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party." Since Baylor, the party, is a corporation, it follows that it may obtain the statements of its agents without the required showing of substantial need and undue hardship. Inasmuch as the Secretary has not asserted any other privilege with regard to these documents, they must be furnished to the Respondent.

This disposes of all of the documents except the inspector's notes dated September 10, 2003. The Respondent requests "the inspector's notes redacted only, if applicable, of identifying information regarding informant witnesses and the mental impressions, conclusions, opinions or legal theories of any attorney or other representative party concerning the case." (Mot. at 14.) In response, the Secretary's representative states:

With respect to the inspector's notes that the respondent [sic] seeks produced, those notes were taken after the issuance of the citation at issue and relate to a follow-up inspection to determine whether the violation had been abated. The only material that was redacted from those notes was the social security and phone numbers of persons who were interviewed.


(Sec'y. Resp. at 8.) Thus, it appears that the Secretary has already produced the inspector's notes.

Order

As discussed above, the Motion to Compel is **GRANTED** to the extent that the Secretary is **ORDERED** to provide to the Respondent Documents 7, 8 and 9, the memoranda of interview

⁴ Having found that the work product privilege applies to these 11 documents, I do not reach the Secretaries assertion of the "informant's" and "deliberative process" privileges.

of management. In all other respects, the Motion to Compel is **DENIED** and the Secretary need not disclose the two memoranda from the investigator or the witness statements or other memoranda of interviews.⁵


T. Todd Hodgden
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⁵ The Respondent will be receiving the names of the Secretary's miner witnesses two days before trial. At that time, counsel for the Respondent should also receive all statements made by those miners who will be witnesses. *Asarco II*, 14 FMSHRC at 1331.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 24, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2004-19
Petitioner	:	A.C. No. 46-08829-11758
	:	
v.	:	Docket No. WEVA 2004-90
	:	A.C. No. 46-08829-17860
BAYLOR MINING INC.,	:	
Respondent	:	Beckley Crystal Mine

ORDER DENYING SECRETARY'S MOTION FOR SUMMARY DECISION

Docket No. WEVA 2004-19 was initially stayed pending the docketing and assignment of Docket No. WEVA 2004-90 that concerns a 104(d)(1) citation arising out of the same incident. The stay was continued on May 26, 2004, after WEVA 2004-90 was assigned due to scheduling conflicts that prevented an immediate hearing. The Order Continuing Stay noted that the parties agreed that discovery would continue during the pendency of the stay. The Order further noted that if settlement was not reached by August 19, 2004, the parties were to file a motion to lift the stay and to formally schedule these matters for hearing.

On July 8, 2004, Suzanne Brennan, the Secretary's counsel, wrote David Hardy, counsel for the respondent, suggesting July 23, 2004, as the written discovery completion date and the first or second week in August as the period for completing depositions. Brennan noted that this schedule would enable the parties to comply with the August 19, 2004, deadline for moving to lift the stay. On July 23, 2004, the Secretary forwarded her responses to Hardy's interrogatories and request for documents. However, Hardy failed to respond to the Secretary's discovery requests and he did not timely respond to Brennan's July 8, 2004, request to establish a deposition schedule. Brennan avers that she left subsequent telephone messages with Hardy's office that were not returned.

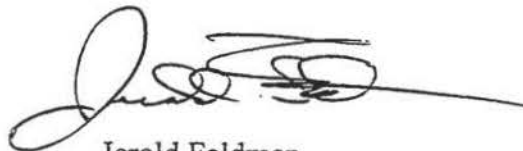
On August 17, 2004, the Secretary filed a Motion for Summary Decision. The Secretary relies on Rule 36 of the Federal Rules of Civil Procedure. Rule 36 provides that matters in requests for admissions are deemed admitted unless they are denied by the party to whom they are served within 30 days after service of the request, or, within a longer period as the court may allow or the parties may agree upon. Having failed to respond to the Secretary's request for admissions, the Secretary argues that the matters therein should be deemed admitted thus removing all genuine issues of fact.

In opposition to the Secretary's motion, Hardy relies on an August 11, 2004, letter from Brennan referencing their "conversation last week regarding scheduling of depositions." In apparent recognition of the Secretary's Motion for Summary Decision sent by Overnight Express Mail on August 17, 2004, responses to the Secretary's written discovery were served by the respondent by facsimile at 6:00 p.m. on August 19, 2004. During an August 23, 2004, telephone conference, counsel for the respondent candidly conceded that he could have been more diligent in responding to the Secretary's July 8, 2004, proposal for completion of written discovery by July 23, 2004.

Turning to the merits of the Secretary's Motion, the rub in the Secretary's reliance on Rule 36 is that the May 26, 2004, Order Continuing Stay, and the telephone conference that preceded it, extended the discovery schedule with the acquiescence of Brennan and Hardy. The Order did not explicitly establish deadlines for written and deposition discovery because the parties represented that they would cooperate with each other.

During the August 23, 2004, telephone conference Brennan indicated that the Secretary may seek additional responses to the respondent's August 19, 2004, answers to discovery. As experience demonstrated the necessity for a formal discovery schedule, the telephone conference established that any supplemental discovery requests must be served by facsimile on or before August 27, 2004. Responses to supplemental discovery must be served by facsimile on or before September 10, 2004. Finally, depositions must be completed by September 17, 2004. Failure to strictly adhere to this schedule will subject the offending party to sanctions under Commission Rule 59, 29 C.F.R. § 2700.59.

It is unfortunate that the parties did not seek to resolve this matter simply and expeditiously in a telephone conference. In view of the above, the Secretary's Motion for Summary decision **IS DENIED**.

A handwritten signature in black ink, appearing to read "Jerold Feldman", with a long horizontal flourish extending to the right.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
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August 30, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2004-129
Petitioner	:	A.C. No. 15-18068-19231
v.	:	
	:	
STERLING MATERIALS,	:	Sterling Materials
Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION

This case is before me under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. Respondent has filed a Motion for Summary Decision seeking dismissal of the case on the grounds that the Secretary failed to notify it of the proposed civil penalties within a reasonable time, as required by section 105(a) of the Act, 30 U.S.C. § 815(a). The Secretary has opposed the motion. For the reasons set forth below, the motion is denied.

The citations and order at issue in this case (two 104(a) citations and a 107(a) withdrawal order) were issued on April 9, 2003, and terminated on the same day. Respondent points out that the alleged violations were unremarkable in character, did not involve any injuries and, therefore, did not require an accident or special investigation by the Mine Safety and Health Administration ("MSHA"). Respondent was notified of MSHA's proposed penalty assessments on March 3, 2004, almost 11 months after the citations and order were issued. Respondent timely contested the citations and order on March 11, 2004. The Secretary filed her Petition for Assessment of Civil Penalty with the Commission on May 10, 2004, in excess of the 45 days permitted by Commission Rule 28(a), 29 C.F.R. § 2700.28(a). The Commission accepted the Petition, concluding that adequate cause had been shown for untimely filing. Respondent notes in the instant motion that it did not and does not object to the late filing of the proposed penalty assessment with the Commission.

Section 105(a) provides that "If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited" The Commission has provided guidance in determining whether a civil penalty has been proposed within a reasonable time:

Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. *See*

Rhone-Poulec of Wyoming Co., 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd* 57 F.3d 982 (10th Cir. 1995); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981); and *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). In commenting on the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978). Accordingly, in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator.

Steele Branch Mining, 18 FMSHRC 6, 14 (January 1996). Either circumstance, i.e., unreasonable delay or prejudice to the operator, may be a basis for dismissal. *Twentymile Coal Co.*, 26 FMSHRC 1, 17 (August 2004). The Commission has emphasized, however, that vacating a civil penalty on the basis of the Secretary's delay in notifying the operator is an extraordinary remedy. *Id.* at 20.

Resolution of the timeliness issue turns on whether the Secretary has established adequate cause for the delay so as to render it reasonable. *Id.* The Secretary contends that MSHA's notice to Respondent of its proposed assessments was not unreasonably delayed, and accounts for the processing time as follows:

[T]he Office of Assessments implemented a new MSHA Standardized Information System (MSIS) in June, 2003. The new system was a completely new type of database, case management and financial tracking system. Because of the nature of the violations cited and the implementation of this system, MSHA assessed these violations ten months after the violations occurred Given the surrounding circumstances and the high case load of the Mine Safety and Health Administration, the penalty was issued within a reasonable time from the completion of the inspection.


Sec. Resp. at 2. Respondent does not dispute the accuracy of the Secretary's explanation for the

delay, but takes the position that MSHA could have made the assessments prior to the June 23, 2003, implementation of the Standardized Information System and further, that staff vacancies in the Office of Assessments should have been filled promptly so that MSHA could meet its statutory obligations. Resp. Mot. at 3-4.

Respondent offers no support for its opinions as to when MSHA could have assessed the penalties or filled the vacancies. Therefore, these mere assertions amount to conjecture and, therefore, are unpersuasive. Moreover, in light of Congressional intent to preserve proposed penalty proceedings where penalty proposals have not been made promptly, and the Commission's reluctance to vacate civil penalties where the reasonableness of notice is challenged, I find that the Secretary has provided an adequate explanation for the delay and that, under the circumstances, MSHA's penalty proposal occurred within a reasonable time.

Respondent also argues that it has been prejudiced by the delay by asserting that former employee, Dale Estis, has critical information concerning the facts underlying the citations and order, that Estis took notes memorializing those facts, that Estis left Respondent's employ on August 20, 2003, and that Estis' current whereabouts are unknown to Respondent and his notes no longer exist. Respondent reasons that, prior to Estis' departure, it would have de-briefed Estis, preserved his notes and stayed in touch with him, had it received prompt notice of what it considers very excessive proposed penalty assessments. Resp. Mot. at 5. Respondent stands in the same position as all other operators faced with the choice of paying proposed penalties or contesting them in legal proceedings: timely preservation of evidence and preparation of the defense is often critical to that election. To the extent that Respondent claims prejudice by Estis' departure from the company and unavailability of his notes, it bears the responsibility for its own failure to act. Notwithstanding Respondent's actions, the Secretary has researched pertinent public records and provided Estis' current residential address in Lexington, Kentucky. Sec. Resp. at 4. Therefore, without more, there is no reason to conclude that Estis is unavailable for deposition or trial.

Accordingly, adequate cause having been established for the delay by the Secretary in proposing civil penalties to Respondent, and Respondent having failed to demonstrate actual prejudice, the Motion for Summary Decision is **DENIED**.


Jacqueline R. Bulluck
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