AUGUST 2005

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

AUGUST 2005

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

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

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 9, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2005-184-M
v.	:	A.C. No. 34-01285-45400
MERIDIAN AGGREGATES COMPANY, LLP	:	

BEFORE: Duffy, Chairman; 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 6, 2005, the Commission received from Meridian Aggregates Company, LLP ("Meridian") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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, Meridian states that on approximately December 10, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to the company the proposed penalty assessment at issue. Mot. at 1. Meridian further states that, at the time MSHA sent the proposed penalty assessment to its Southwest Division Office, the individual who was responsible for ensuring that the proposed assessment would be forwarded to Meridian's district office for processing was on extended leave. As a result, the proposed assessment "was overlooked" and not received at the district office until January 21, 2005, six days after the date on which the proposed penalty had become a final order of the Commission. *Id.* at 1-2. The Secretary states that she does not oppose Meridian'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 Meridian'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 Meridian'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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Karen L. Johnston, Esq.
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 9, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2005-185-M A.C. No. 34-00282-47934
v.	:	
O/N MINERALS (ST. CLAIR) CO.	:	Docket No. CENT 2005-186-M A.C. No. 34-00282-52828

BEFORE: Duffy, Chairman; 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 8, 2005, the Commission received from O/N Minerals (St. Clair) Company ("O/N Minerals") motions made by counsel to reopen two penalty assessments that had become 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).

On January 13 and March 17, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two proposed assessments to O/N Minerals. Mot. at Ex. A-B. In its motions, O/N Minerals states that the employee responsible for processing proposed penalty assessments for the company was "unaware of the proper contest procedures." Mot. at

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2005-185-M and CENT 2005-186-M, both captioned *O/N Minerals (St. Clair) Company* and both involving similar issues. 29 C.F.R. § 2700.12.

Aff. The employee believed that the proposed assessments at issue did not reflect modifications agreed to in a conference with MSHA on the citations and orders listed, and assumed MSHA would reissue or revise the proposed assessments based on the modifications. *Id.* The employee thus did not file requests for hearing for either of the proposed assessments. *Id.*

O/N Minerals further states that "it was always our intent to contest these proposed penalties." *Id.* The company requests to be excused from its failure to timely request a hearing, which it claims was due to its mistake and inadvertence. Mot. at 1. The Secretary states that she does not oppose O/N Minerals' requests 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 O/N Minerals' motions, in the interests of justice, we remand these matters to the Chief Administrative Law Judge for a determination of whether good cause exists for O/N Minerals' failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 9, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2005-222-M
v.	:	A.C. No. 39-00014-40619 (A129)
BORTON LC	:	

BEFORE: Duffy, Chairman; 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 May 13, 2005, the Commission received from Borton LC ("Borton") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

On October 15, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Borton the proposed penalty assessment that is at issue. Supp. Mot. Ex. In its motion, Borton states that it never received the proposed assessment, and learned of it inadvertently when, during April 2005, the company's safety director discovered it listed on MSHA's web site. Mot. at 1-2. Although Borton subsequently attempted to contest the proposed assessment, Supp. Mot., the Commission has determined that MSHA considers the contest untimely. The Secretary states that she does not oppose Borton'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 Borton'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 Borton'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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Marcus P. McGraw, Esq.
Greenebaum, Doll & McDonald, PLLC
300 West Vine Street, Suite 1100
Lexington, KY 40507

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 9, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2005-247-M
v.	:	A.C. No. 40-02981-44539
SEQUATCHIE CONCRETE SERVICE	:	

BEFORE: Duffy, Chairman; 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 1, 2005, the Commission received from Sequatchie Concrete Service ("Sequatchie") a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

On December 2, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Sequatchie the proposed penalty assessment at issue. In its letter, Sequatchie states that although it attempted to contest the proposed penalty assessment, the contest "was received too late" by MSHA. According to Sequatchie, the contest was late because of "a communication breakdown in that the information was sent directly to the mine instead of our corporate office." The Secretary states that she does not oppose Sequatchie'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 Sequatchie's letter, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Sequatchie'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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Jamie Steinmeyer, Safety Director
Sequatchie Concrete Service
P.O. Box 129
South Pittsburgh, TN 37380

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 9, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2005-376-M
	:	A.C. No. 05-00037-54124
v.	:	
HOLCIM (US) INC.	:	

BEFORE: Duffy, Chairman; 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 20, 2005, the Commission received from Holcim (US) Inc. ("Holcim") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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, Holcim states that on approximately April 15, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Holcim for three orders issued to the company by MSHA between September 2004 and January 2005. Mot. at 1-3. Holcim had already timely contested all three orders, which are the subject of Docket Nos. WEST 2005-182-RM, WEST 2005-183-RM, and WEST 2005-49-RM. *Id.* These proceedings are currently stayed before Commission Administrative Law Judge Richard Manning. *Id.* Holcim states that the proposed penalty assessment for the three orders was not delivered to its current safety director but was instead sent to and received by a former safety director, who did not act upon it in a timely fashion. *Id.* at 3. The Secretary states that she does not oppose Holcim'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 Holcim'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 Holcim'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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

William K. Doran, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2400 N Street NW, 5th Floor
Washington, DC 20037

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 9, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2005-157
ADMINISTRATION (MSHA)	:	A.C. No. 46-08913-46657
	:	
v.	:	Docket No. WEVA 2005-158
	:	A.C. No. 46-08913-50525
MOUNTAIN EDGE MINING, INC.	:	

BEFORE: Duffy, Chairman; 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 22, 2005, the Commission received from Mountain Edge Mining, Inc. ("Mountain Edge") a letter requesting that the Commission reopen two penalty assessments that had become 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).

On December 28, 2004 and February 17, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Mountain Edge the two proposed penalty assessments at issue. In its letter, Mountain Edge states that along with partial payments for the proposed penalties, the company thought it had included forms indicating it wished to contest several citations and orders included in the proposed assessments. The company has been

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2005-157 and WEST 2005-158, both captioned *Mountain Edge Mining, Inc.* and both involving similar issues. 29 C.F.R. § 2700.12.

informed by MSHA however, that the agency never received the contest forms. The Secretary states that she does not oppose Mountain Edge'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 Mountain Edge's letter, in the interests of justice, we remand these matters to the Chief Administrative Law Judge for a determination of whether good cause exists for Mountain Edge's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Douglas M. Epling, President
Mountain Edge Mining, Inc.
P.O. Box 2226
Beckley, WV 25802

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 11, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2005-223-M
ADMINISTRATION (MSHA)	:	A.C. No. 13-00733-46541
	:	
v.	:	Docket No. CENT 2005-224-M
	:	A.C. No. 13-00733-41258
NORTHERN GRAVEL COMPANY, INC.	:	

BEFORE: Duffy, Chairman; 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 July 19, 2005, the Commission received from Northern Gravel Company, Inc. ("Northern Gravel") motions made by counsel to reopen two penalty assessments that had become 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 motions, Northern Gravel states that during August 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to the company several citations and orders. Mot. at 2. Northern Gravel further states that when penalties were proposed for the citations and orders, the company was not represented by counsel and it failed to contest the penalties because it was not familiar with the procedures for contesting penalties under the

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2005-223-M and CENT 2005-224-M, both captioned *Northern Gravel Company, Inc.* and both involving similar issues. 29 C.F.R. § 2700.12.

Mine Act and the Commission's Procedural Rules. *Id.* The Secretary states that she does not oppose Northern Gravel's requests 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 Northern Gravel's motions, in the interests of justice, we remand these matters to the Chief Administrative Law Judge for a determination of whether good cause exists for Northern Gravel's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

John A. Kyhl, Esq.
Stanley, Lande & Hunter
900 U.S. Bank Center
201 West Second
Davenport, IA 52801

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 11, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2005-17
v.	:	A.C. No. 44-07048-48293
HUBBLE MINING COMPANY, LLC	:	

BEFORE: Duffy, Chairman; 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 April 28, 2005, Chief Administrative Law Judge Robert J. Lesnick issued a show cause order to Hubble Mining Company, LLC ("Hubble") stating that it had failed to file an answer to a petition for penalty assessment sent to it by the Secretary of Labor on March 17, 2005, and that Hubble would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. On June 20, 2005, Chief Judge Lesnick issued an order finding that Hubble had failed to respond to the show cause order and entering a judgment by default for the Secretary of Labor.

On July 21, 2005, the Commission received from Hubble a motion made by counsel seeking review of Chief Judge Lesnick's default order. In its motion, Hubble states that before Chief Judge Lesnick entered the default judgment, the company was not represented by counsel. Mot. at 2. The company official handling the matter mistakenly believed that a conference held with MSHA on the citation underlying the proposed penalty at issue was "a hearing on the merits," and that he was "not required to further participate in the penalty proceedings." *Id.* The Secretary states that she does not oppose Hubble's motion.

The judge's jurisdiction in this matter terminated when his decision was issued on June 20, 2005. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the

Commission. 30 U.S.C. § 823(d)(1). The judge's order became a final decision of the Commission on August 1, 2005.

In evaluating requests to reopen final 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"); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 787 (May 1993). 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 Hubble's motion, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse Hubble's failure to respond to the show cause order, and for further proceedings as appropriate.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Mickey T. Webster, Esq.
Wyatt, Tarrant & Combs, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 11, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2005-195
	:	A.C. No. 46-06045-000059820
v.	:	
BROOKS RUN MINING CO., LLC	:	

BEFORE: Duffy, Chairman; 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 25, 2005, the Commission received from Brooks Run Mining Company, LLC ("Brooks Run") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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, Brooks Run states that on June 17, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Brooks Run for three citations issued to the company by MSHA on January 27, 2005. Mot. at 1-2. Brooks Run had already timely contested all three citations, which are the subject of Docket Nos. WEVA 2005-77-R, WEVA 2005-78-R, and WEVA 2005-79-R. *Id.* at 2. These proceedings are currently before Commission Administrative Law Judge David Barbour and are scheduled for hearing on September 7, 2005. *Id.*

Brooks Run states that it mailed a contest of the proposed penalty assessment at issue on

July 21, 2005,[1] but was informed by MSHA's Assessment Office that a timely contest had to be filed "within 30 days of the date of the proposed assessment, June 17, 2005." *Id.* To the contrary, section 105(a) of the Mine Act states that an operator may file a contest "within 30 days from the *receipt* of the notification" of a proposed penalty. 30 U.S.C. § 815(a). Here, however, Brooks Run provides no information on when it received MSHA's proposed penalty assessment, and we are thus unable to determine whether Brooks Run is, in fact, in default. The Secretary states that she does not oppose Brooks Run'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).

[1] Brooks Run states it did not file a contest earlier because of "the occurrence of a vacation period." Mot. at 2.

Having reviewed Brooks Run's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Brooks Run is, in fact, in default, and if so, whether good cause exists for Brooks Run'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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 24, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2005-228
v.	:	A.C. No. 36-07230-41768
CONSOL PENNSYLVANIA COAL CO.	:	

BEFORE: Duffy, Chairman; 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 August 2, 2005, the Commission received from Consol Pennsylvania Coal Co. ("Consol") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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, Consol states that on November 4, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") "apparently" issued to the company the proposed penalty assessment at issue. Mot. at 1. The company states, however, that it has no record of receiving the proposed assessment until it obtained a copy on July 15, 2005, though it also states that it "intended to contest the penalties and underlying citations." *Id.* at 1-2. Although the Secretary states that she does not oppose Consol's request for relief, she notes that MSHA's records include a signed return receipt for the proposed assessment dated November 13, 2004.

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 (Sep. 1995).

Having reviewed Consol'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 Consol'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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Gateway Center, Suite 1340
401 Liberty Ave.
Pittsburgh, PA 15222

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety and Health Review Commission
601 New Jersey Avenue, Suite 9500
Washington, D.C. 20001

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 26, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) and	:	
	:	Docket Nos. PENN 2002-116
UNITED MINE WORKERS OF AMERICA, LOCAL 1248, DISTRICT 2, SUBDISTRICT 5	:	PENN 2003-54
	:	PENN 2003-55
	:	PENN 2003-56
v.	:	
MAPLE CREEK MINING, INC.,	:	
STEVE BROWN, employed by MAPLE CREEK MINING, INC.,	:	
ALVY WALKER, employed by MAPLE CREEK MINING, INC., and	:	
GREG MILLER, employed by MAPLE CREEK MINING, INC.	:	

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

DECISION

BY: Duffy, Chairman, and Young, Commissioner

In these consolidated 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"), Administrative Law Judge Jacqueline Bulluck affirmed an order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Maple Creek Mining, Inc. ("Maple Creek"), alleging a significant and substantial ("S&S") violation of 30 C.F.R. § 75.380(d)(1), which requires that each designated escapeway in an underground coal mine "be maintained to always assure passage

of anyone, including disabled persons." 26 FMSHRC 539, 543-48 (June 2004) (ALJ). The judge further found that the violation was due to the operator's unwarrantable failure and that Maple Creek employees Steve Brown, Alvy Walker, and Greg Miller were also liable for the violation under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). 26 FMSHRC at 548-53. Maple Creek and the three employees jointly filed a petition for discretionary review of the judge's decision, which the Commission granted. For the reasons that follow, we affirm in part and reverse in part.

I.

Factual and Procedural Background

Maple Creek owns and operates the Maple Creek Mine, an underground bituminous coal mine in Washington County, Pennsylvania. 26 FMSHRC at 541. Undulations in the coal seam and the steady infiltration of water by percolation through the mine floor and seepage from the coal seam and the mine roof cause accumulations of water at low points in the mine's entries. These conditions are such that between 1.2 and 2 million gallons of water are pumped from the mine daily. *Id.*

In the 4 West section of the mine, the track entry, ventilated with intake air, was the primary escapeway. *Id.*; MCM Exs. 1 & 2. The adjacent travelway, ventilated with return air, was designated as a secondary escapeway. 26 FMSHRC at 541; Tr. 385. In late July and early August 2001, the track in the primary escapeway ended at crosscut 15 or 16. 26 FMSHRC at 541. Scoops delivered supplies from there to the working face, which was at or near crosscut 30. *Id.*

On July 30, 2001, Mine Inspector Dennis Walker of the Pennsylvania Department of Environmental Protection's Bureau of Deep Mine Safety conducted a regular state quarterly inspection of the mine. *Id.* at 542; Tr. 32-33. He issued a state compliance order for water accumulation in the 4 West section to midnight shift section foreman Greg Miller. 26 FMSHRC at 542, 546. The compliance order stated that between crosscuts 24 and 25, in an area 40 to 50 feet in length, there was water 12 inches deep from rib to rib that created slippery walking conditions. *Id.* at 542; Gov't Ex. 1 at 1. The order required that Maple Creek remove the water or pump it to a reasonable depth by 8:00 a.m. the next day, July 31. 26 FMSHRC at 542; Gov't Ex. 1 at 1. Dennis Walker did not return to the mine in the following days, but was told a few days later by Steve Brown, the 4 West section coordinator who had accompanied him on at least part of the inspection, that the water had been removed by pumping. 26 FMSHRC at 542; Tr. 58; Gov't Ex. 2.

On August 9, 2001, MSHA Inspector James Dickey was at the mine to conduct a regular Triple-A inspection. 26 FMSHRC at 542. He was still above ground when he came upon MSHA Inspector George Rantovich in a discussion with miners Thomas Sutton and Jim Constable, UMWA safety committeemen at Maple Creek. *Id.*; Gov't Ex. 3. They were

discussing water in the mine. 26 FMSHRC at 542. Sutton told the inspectors that the water problem had existed for some time, that it was not being recorded consistently in the preshift examination book, and that nothing was being done about it. *Id.*; Gov't Ex. 3. Dickey thereafter reviewed the preshift (Gov't Ex. 8) and onshift record books for the 4 West section back to at least July 31, 2001. 26 FMSHRC at 542.

While traveling through the section, Dickey encountered an accumulation of water that he considered extensive, deep, "mucky," and very difficult to walk in. *Id.* Dickey informed the two men accompanying him, day shift assistant general mine foreman Paul Henry and miner Robert Maust, that he would be issuing a withdrawal order pursuant to section 104(d) of the Mine Act, 30 U.S.C. § 814(d). 26 FMSHRC at 542. Dickey later issued such a withdrawal order,[1] charging a violation of 30 C.F.R. § 75.380(d)(1). 26 FMSHRC at 542. To abate the violation, Maple Creek built a 6-foot-wide bridge over the entire length of the accumulation, and the order was terminated early the following morning. 26 FMSHRC at 543; Gov't Ex. 9 at 3.

A hearing was held on the order, at which the United Mine Workers of America, Local 1248, District 2, Subdistrict 5 ("UMWA"), participated as an intervenor. 26 FMSHRC at 540. In her decision following the hearing, the judge concluded that the primary escapeway on the 4 West section was not maintained in a safe condition that would permit passage of all persons, and therefore that Maple Creek had violated section 75.380(d)(1). *Id.* at 547. The judge also found the violation was S&S, because a hazardous condition resulted from the violation and because there was a reasonable likelihood that it would result in injuries of a reasonably serious nature. *Id.* at 548. Based on her finding that Maple Creek's actions with respect to the hazardous escapeway conditions reflected indifference and a serious lack of reasonable care, the judge also concluded that the violation was attributable to Maple Creek's unwarrantable failure. *Id.* at 548-51. The judge also found that Brown, Alvy Walker, and Miller were each liable under section 110(c) for the section 75.380(d)(1) violation. *Id.* at 551-53.

II.

Disposition

Maple Creek contends that the evidence establishes that the area of the escapeway at issue was passable, both with respect to the miners who would walk it and those who might need to carry a disabled miner on a stretcher. MCM Br. at 10. The operator asserts that the conditions in the escapeway, when viewed properly in context, were not as poor as the judge's decision makes them appear, so that the judge's finding of violation is unsupported by substantial evidence in the

---

[1] Maple Creek was already on the "D chain" as a result of an unchallenged citation and order from 6 weeks prior. 26 FMSHRC at 543 n.3. The "D chain" refers to the increasingly severe sanctions provided by section 104(d) of the Mine Act, 30 U.S.C. § 814(d), which are intended to serve as an incentive for operator compliance. *See Nacco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sep. 1987); *Cyprus Cumberland Res. Corp.*, 21 FMSHRC 722, 725 (July 1999).

record. *Id.* at 11. Maple Creek also argues that, because the condition of the escapeway did not rise to the level of a hazard and it was unlikely that it would contribute to a serious injury, the judge's S&S determination should be reversed. *Id.* at 12. Maple Creek further maintains that the judge's unwarrantable failure finding is not supported by substantial evidence, and that the evidence shows that Maple Creek was actively maintaining its escapeways by, among other things, diligently working on pumping water from the area in question. *Id.* at 13. Maple Creek also contends that the section 110(c) charges filed against its three employees are arbitrary and an abuse of agency discretion in light of the agency's decision not to file a section 110(c) case against the mine foreman. *Id.* at 16. Maple Creek concludes that, in any event, substantial evidence does not support the judge's finding of liability for any of the three men because all of them had been actively involved in the operator's extensive efforts to address the water accumulation in the escapeway. *Id.* at 15.

In response, the Secretary urges affirmance of the finding of violation, citing evidence she maintains supports the judge's determination that the escapeway was not safe for persons during an emergency evacuation of the mine. S. Br. at 15-20. The Secretary also submits that the judge's finding that the violation was S&S is supported by substantial evidence. *Id.* at 21-23. The Secretary argues that Maple Creek does not dispute many of the findings the judge made in support of the unwarrantable failure conclusion, that those findings support the unwarrantable failure determination, and that the Commission should affirm the judge's finding that Maple Creek's efforts to abate the condition of the escapeway were "woefully ineffective." *Id.* at 23-30. Intervenor UMWA agrees with the Secretary, asserting that it is not enough for an operator to engage in some action related to a mine hazard, but rather an operator's actions must be effective. UMWA Br. at 5-6. The Secretary maintains that her decision not to file section 110(c) charges against the mine foreman is unreviewable, and that the judge's section 110(c) findings are all supported by substantial evidence. S. Br. at 31-35.

All four Commissioners affirm the judge's findings that Maple Creek violated section 75.380(d)(1) and that the violation was S&S. Chairman Duffy and Commissioner Young, joined by Commissioner Jordan, also affirm the judge's findings that the violation was unwarrantable and that Steve Brown is individually liable for the violation under section 110(c). Chairman Duffy and Commissioner Young, joined by Commissioner Suboleski, reverse the judge's findings that Alvy Walker and Greg Miller are individually liable for the violation under section 110(c).

A. Violation

Section 75.380 requires that underground coal mine operators designate "at least two separate and distinct travelable passageways" as escapeways, that "[e]scapeways shall be provided from each working section," and that "[e]ach escapeway shall be . . . [m]aintained in a safe condition to always assure passage of anyone, including disabled persons." 30 C.F.R.

§ 75.380(a), (b)(1) & (d)(1).[2] The judge determined that the escapeway here failed to meet the standard because from the time the state compliance order was issued until the issuance of the withdrawal order by Inspector Dickey, work crews were routinely forced to use the narrow walkway or "cow path" along the right rib in order to avoid the 6 to 17-inch-deep muck that had accumulated in the escapeway between crosscuts 24 and 27. 26 FMSHRC at 547. The judge found that the conditions created a slip and fall hazard that precluded swift passage through that portion of the escapeway. *Id.* She further found that a team of miners carrying a stretcher would have to negotiate the slippery rutted bottom of the center of the escapeway, thus endangering the safety of those carrying the stretcher and delaying medical attention to the injured miner. *Id.*

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). Under the substantial evidence test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

The judge's finding of violation here is supported by substantial evidence. Prior to trial, the parties by stipulation established the conditions of the escapeway to a significant extent. They agreed that, on the day the withdrawal order issued, water was present in the intake escapeway of the 4 West section in varied depths and extended for approximately 420 feet. 26 FMSHRC at 541. Moreover, Maple Creek's assistant mine foreman Henry conceded that, as a result of equipment tramming through the fire clay bottom, the water/clay mixture soon became dark, thick, soupy "mud and slop" that at some points extended from rib to rib. Tr. 747, 770-71, 776.

Maple Creek takes issue with the measurements taken by Inspector Dickey that persuaded the judge to find that the water was as much as 17 inches deep. *See* 26 FMSHRC at 547. Stating that the deeper measurements were taken in ruts created by the passage of scoops delivering supplies to the face, the operator argues that the depth of the water should be considered in the context of the mine area, where the roof was over 9 feet high. MCM Br. at 11. While Maple Creek is correct regarding the method of measurement, that does not necessarily detract from the judge's finding that there was a hazard. In the words of section foreman Alvy Walker, the water

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[2] Section 75.380 was originally derived from section 317(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), which was carried over without change to the Mine Act, 30 U.S.C. § 877(f)(1).

had "slurried up" (Tr. 659-60), and the mine floor and the drop-offs could not be seen by the miners, who could suddenly step off from an area of 6-inch water into 12 to 17 inches of water. Tr. 126. Moreover, there was testimony that the floor beneath the mud was littered with coal that had sloughed off the ribs. Tr. 158-59. The ample headroom provided by the high roof thus did little to mitigate the hazards on the floor which unnecessarily impaired the utility and safety of the escapeway.

Maple Creek also cites the ability of its miners to make it through the area to and from their work places each day as evidence that the escapeway was passable and, thus, in compliance with the regulation. MCM Br. at 10. In so doing, Maple Creek ignores the fact that at those times the miners were not using the route as an escapeway to evacuate the mine. During an emergency evacuation, miners would likely need to move expeditiously through the area in order to seek safe passage away from what could be a dangerous underground environment. *See* 61 Fed. Reg. 9764, 9810 (Mar. 11, 1996) (preamble to section 75.380).[3] Assistant mine foreman Henry admitted that the condition of the escapeway would slow the evacuation of miners, as they would have to be more cautious in the area. Tr. 788.

Of particular importance in determining whether an escapeway is adequate under section 75.380 is the ability of miners to transport an injured miner on a stretcher through it. Maple Creek does not take issue with the judge's finding that the cow path was too narrow to accommodate a team with a stretcher (26 FMSHRC at 547), but instead argues that it presented sufficient evidence to establish that a stretcher carrying an injured miner could have passed through the area off of the cow path, and that there was an alternate escapeway available in any event. MCM Br. at 10. The evidence to which Maple Creek refers is the testimony of Brown and Alvy Walker. *Id.* Brown testified that he could have carried a stretcher through the area, but went on to state that he would have used the alternate escapeway. Tr. 497. Alvy Walker testified that two miners could have walked ahead of the stretcher team to show them where the holes in the floor were located. Tr. 661.

That testimony does not support the notion that the requirements of section 75.380(d)(1) were being met with respect to safe passage by a stretcher team. Alvy Walker would have required two additional miners to remain behind with the stretcher team, thus delaying their exit from the mine. The judge properly rejected this idea when she stated that "miners [should] not be confronted with risking life and limb to come to the aid of each other." *See* 26 FMSHRC at 547.

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[3] Moreover, Maple Creek's reference to the daily passage of miners through the escapeway is not to their use of the escapeway through the water, but rather to the narrow cow path walkway along its right rib, which at points was as narrow as 12 inches. 26 FMSHRC at 541; MCM Br. at 10; Tr. 620-21. Reliance on such a narrow route to serve as an escapeway clearly runs counter to the requirement of section 75.380(d)(4) that escapeways be maintained at a width of 6 feet, except in circumstances not applicable here.

We also reject Maple Creek's suggestion that the judge erred in ignoring the existence of an alternate escapeway. The regulation is clear that the maintenance requirement of section 75.380(d)(1) applies to "each" escapeway. More than one escapeway is required, not in recognition that conditions routine to the mine might prevent use of one of the escapeways, but rather because the emergency condition that causes the need to evacuate the mine may prevent use of one of the escapeways. The Senate Committee which was responsible for drafting the Coal Act explained the two-escapeway requirement in the following manner:

> Mine fires, extensive collapse of roof, or similar occurrences may completely block the regular travelway between the working section and the surface, thus cutting off escape in an emergency unless an alternate route is provided to the surface. As recently as March 1968, 21 men at a salt mine lost their lives because a travelable second escapeway was not provided.

S. Rep. No. 91-411, at 83 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 209 (1975).

Lastly, Maple Creek contends that the judge improperly rejected its contention that a scoop could have been used to transport an injured miner through the water. MCM Br. at 10. Maple Creek's evidence consisted of the testimony of Brown, Alvy Walker, Miller, and Maust. The judge credited the testimony of Inspector Dickey over those witnesses on the issue of whether using a scoop would be a safe method of transportation. 26 FMSHRC at 547. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

We see no basis to overturn the judge's credibility determination. The witnesses cited by Maple Creek testified that a scoop was an available means of transport through the escapeway, but they did not address how safely an injured person can be carried in one. Tr. 127, 507, 630, 671. In contrast, both Dickey and miner John Baluh testified about the further harm that traveling in a scoop could cause to an injured miner. Tr. 216, 302-04.

In summary, substantial evidence supports the judge's determination that Maple Creek violated section 75.380(d)(1).

B. S&S

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. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2012-13 (December 1987). 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).

Maple Creek contends that the conditions at issue here did not rise to the level of a hazard, and thus takes issue with the judge's finding that the section 75.380(d)(1) violation satisfied the second *Mathies* element. MCM Br. at 12. The judge based her hazard findings in part on the testimony of the miners who walked through the area each day. 26 FMSHRC at 548. There was extensive testimony that if they chose to pass through the water, miners were subject to slippery walking conditions, given the uneven bottom obscured by the muddy water. *Id.* at 545; Tr. 202. Inspector Dickey stepped into several holes while walking through the center of the escapeway and, when he did so, the water level was over the top of his 15-inch boots. 26 FMSHRC at 544. The coal that had sloughed off the ribs and was concealed on the floor posed an added tripping risk. *Id.* at 545; Tr. 158-59.[4]

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[4] While the cow path may have provided an arguably safer route than the remainder of the escapeway, it was not without its own hazards. Miner Maust testified that caution was necessary because a person walking on the cow path could slip from it into the water and the holes in the bottom. 26 FMSHRC at 544; Tr. 103.

In arguing that the condition was not hazardous, Maple Creek essentially ignores the judge's finding attributing the injuries suffered by roof bolter John Gargala to the condition of the escapeway. *See* 26 FMSHRC at 548. On the shift immediately preceding the shift during which Dickey issued the withdrawal order, Gargala had slipped and fallen while walking on the cow path, spraining his wrist and straining his back. *Id.*; Tr. 138-42; Gov't Ex. 16. Thus, there is evidence that the hazard observed created not only the potential for injury but had actually contributed to a miner's injury.

Maple Creek also believes that the judge erred in finding that the fourth *Mathies* element — the reasonable likelihood that an injury resulting from the hazard contributed to by the violation will be of a reasonably serious nature — was satisfied. Maple Creek would have the Commission reject the judge's finding that it was likely that the condition of the escapeway would contribute to a serious injury on the basis of miners having passed through the area daily without sustaining serious injury. MCM Br. at 12. However, the Secretary is not required to show that a violation has resulted in an accident or injury in order to establish S&S. *See Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987).[5]

At the hearing, evidence of the seriousness of the injuries that could result from the condition of the escapeway was provided by Inspector Dickey,[6] who testified that it was reasonably likely that slips and falls in the muck would result in leg and back injuries. Tr. 257-58. *Cf. Southern Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (recognizing that miners could suffer serious injuries from stepping into unseen openings in surface they were traversing). MSHA assistant district manager Thomas Light further noted that any delay in miners evacuating the mine in an emergency increased the danger posed by the emergency, as the delay could prevent miners from getting out alive. Tr. 338-39, 373.

While Maple Creek relies heavily on the existence of alternative escapeways as a means by which miners could avoid the conditions of the primary escapeway, the judge found, and Maple Creek does not dispute, that the mine had been experiencing methane and ventilation problems when the withdrawal order issued. *See* 26 FMSHRC at 548; Gov't Ex. 17 at 2. The

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[5] In so arguing, Maple Creek again ignores that the miners making their way through the area were not using the route as an escapeway, but rather merely as a travelway to their jobs. As discussed above, use of the route as an escapeway is an entirely different matter; in those circumstances miners would be seeking quick exit from the mine in an emergency. The potential for slips and falls would therefore be even greater during a mine evacuation. Consequently, the miners' everyday travel over the escapeway route is of little relevance to the fourth *Mathies* element.

[6] In *Mathies*, the Commission specifically noted that an inspector's judgment is an important consideration in the Commission's determination of whether a violation is S&S. 6 FMSHRC at 5.

judge specifically noted the danger posed if miners were deprived of their fastest means of evacuation, the primary escapeway ventilated with intake air. 26 FMSHRC at 548.

In light of the foregoing, substantial evidence supports the judge's conclusion that Maple Creek's violation of section 75.380 was S&S.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 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. 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 were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material*, 19 FMSHRC at 34; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The judge addressed the relevant aggravating factors, and many of her findings are undisputed by Maple Creek or have been already addressed herein. Maple Creek clearly knew that it had a problem with water in that area of the 4 West section intake escapeway and that greater efforts were necessary for compliance. That area usually had only 2 or 3 inches of water (Tr. 665), but on July 30 Maple Creek was issued the compliance order by the state inspector that

described a 12-inch accumulation of water in the numbers 24 and 25 crosscuts that was causing slippery walking conditions. Gov't Ex. 1 at 1.[7]

Maple Creek also does not take issue with the judge's finding that the condition of the escapeway was obvious. *See* 26 FMSHRC at 551. The judge noted that "muck" 12 to 17 inches deep in places is, "of course," obvious. *Id.* That miners used the cow path to avoid walking through the muck further demonstrates that the condition in question was obvious.

As for the danger posed by the condition of the escapeway, much of the judge's reasoning rests on the same grounds which support her S&S finding. In addition to the slip and fall hazard posed by the condition, the judge specifically examined the consequences of a stretcher team having to navigate through the escapeway. *Id.* She found that not only would a stretcher team be subject to the same slip and fall hazard to which the other miners using the escapeway would be exposed, but the condition of the escapeway could delay the team's evacuation of the mine. *Id.* This could delay the provision of critical medical treatment to the injured miner. *Id.* The judge also noted that in the event of a fire or explosion, impeded evacuation of the mine could result in the death of miners. *Id.* As we have found with respect to her S&S finding, substantial evidence amply supports the judge's conclusion regarding the danger posed by the condition of the escapeway.

The parties dispute the duration of the violation and the import of the actions Maple Creek was taking to combat the water accumulation. At trial, Brown testified that the intermittent notations in the preshift examination records about the water problem in the area at issue provided an indication that Maple Creek successfully pumped much of the excess water out, only to have it soon accumulate again. 26 FMSHRC at 550; Tr. 486-87. On appeal, Maple Creek contends that the judge ignored this evidence that it was attempting to correct the condition, which it believes mitigates the violation's unwarrantability. MCM Br. at 14.

As her decision shows, the judge did consider Maple Creek's evidence. *See* 26 FMSHRC at 549-50. She rejected it, however, and concluded that, from the time the state compliance order was issued until the MSHA withdrawal order was issued, the water accumulation remained at a

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[7] Even if Commissioner Suboleski's dissenting position on the preshift records is accepted (*see* slip op. at 22-23), any error by the judge is harmless. The records themselves indicate that the escapeway was occluded by significant water for five consecutive shifts, from July 31 to August 1 and again from August 7 to August 9. Gov't Ex. 8. This evidence, combined with the record's indication that Maple Creek has been cited 18 times in the previous 2 years for violations of the escapeway standard in section 75.380(d)(1), provides substantial support for the judge's conclusion and indicates a repeated, if not chronic, failure to *always* ensure the escapeways are travelable. 26 FMSHRC at 553; Stip. 13 (Tr. 17); Gov't Ex. 13. Taking the evidence as a whole, it is reasonable for the judge to have inferred from those circumstances indifference to the seriousness and persistence of the problem, given the ineffectiveness of the operator's efforts to control it.

level that continuously prevented safe travel by all persons through the primary escapeway. *Id.* at 549. The judge based her conclusion on the testimony of miners that the water was present at a high level for at least a week, as well as on her finding, drawn from the testimony of Maple Creek management officials, that the company did not approach the water problem with the seriousness it deserved. While the judge's conclusion is contradicted to a degree by the preshift records, which show that high water levels were only noted during the July 31-August 1 and August 7-August 9 time frames (Gov't Ex. 8), that is not a sufficient basis to vacate her unwarrantable failure finding.

We agree with the judge that the testimony of the Maple Creek management officials indicates a lack of seriousness on the part of Maple Creek with respect to water accumulation in the escapeway. Brown testified that before he would consider the conditions hazardous, as opposed to a "condition" to be managed, the water would have to be waist high in the escapeway, and that even then if a secondary escapeway were open, he would not be worried because the second escapeway would provide another way out of the mine. Tr. 550. Brown's standard for the water's depth becoming a hazard was similar to that of Alvy Walker, who testified that so long as the water in the escapeway in question did not exceed 20 inches and prevent a miner from moving his legs through it, he would not consider the conditions hazardous. Tr. 635-36. Miller was also of the opinion that the water would have to be higher than that measured in this case for him to consider the conditions hazardous, as in this instance miners could get through it if necessary. Tr. 692-94. Similarly, section foreman Richard Cline believed the water would have to be over the top of his 16-inch boots before it would be hazardous. Tr. 598.

We believe that this testimony of the Maple Creek supervisors provided ample grounds for the judge to infer that Maple Creek management did not approach the water problem in the section with the seriousness it deserved. "[T]he substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). 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.* In our view, it was eminently reasonable for the judge to infer from the foregoing testimony that Maple Creek simply did not view the condition of the escapeway as hazardous and therefore was not putting a high priority on bringing the escapeway into compliance with section 75.380(d)(1).

In light of the evidence, we agree with the judge that Maple Creek's actions reflect a threshold level of indifference and serious lack of reasonable care sufficient to establish an unwarrantable failure to comply with section 75.380(d)(1).

D. Section 110(c) Liability

Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil

penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy*, 14 FMSHRC at 1245.

Maple Creek requests that the Commission consider the Secretary's failure to charge the mine foreman as a ground to overturn the judge's findings of liability on the part of the three supervisory personnel who were charged under section 110(c). MCM Br. at 16. Maple Creek cites no law in support of this extraordinary request, and we are aware of none. We are thus left to review the judge's findings regarding their individual liability under the substantial evidence standard.

1. Steve Brown

In concluding that Steve Brown was individually liable for the section 75.380(d)(1) violation, the judge relied on Brown's familiarity with the conditions of the escapeway during the 10 days preceding the issuance of the withdrawal order. 26 FMSHRC at 551-52. The judge found that Brown was well aware of the conditions, yet failed to take expeditious, effective remedial action to protect the safety of miners who traveled through the primary escapeway daily, as well as those miners who would have to evacuate the mine in an emergency. *Id.* There is substantial record evidence to support the judge's conclusion. As 4 West section coordinator, Brown oversaw operations on the section, including the pumping operations and maintenance of the pumps. Tr. 378, 391-93, 538-39. Brown traveled with the state inspector who issued the compliance order on July 30, and was responsible for abating that order. Tr. 535-36. Brown walked the section at least once a day, including the cow path, conducted some of the preshift examinations of the section, and reviewed the preshift and construction logs. Tr. 482-84, 553-54.

Most importantly, and as the judge found, Brown was aware that the pumping he was responsible for overseeing was ineffective in removing the muck. 26 FMSHRC at 552. Inspector Dickey explained that the pumps Maple Creek was using, because they were air pumps, were incapable of removing muck and mud, so that the use of the pumps would not have changed his designation of the violation as unwarrantable. Tr. 325-26. Brown conceded that while the air pumps were sufficient to remove water, they could not remove muck. Tr. 402, 408, 480-81. Moreover, Brown explained that scoops running by the pumps would create the muck which

would clog the pumps, and in some instances, as happened during the time in question, run into a pump and put it out of service. Tr. 393, 407, 414, 415, 481-82, 493. This was a serious problem, since the pumping system Maple Creek was using for the escapeway was interconnected, so that when one pump shut down the other pumps in the system would also shut down. Tr. 389-90, 411-12, 513, 555.

Brown nevertheless did not think additional steps were necessary to deal with the expanding accumulation of water in the area in question. Tr. 507-08, 537-38, 553-54, 561-62, 564-65. Because the evidence is overwhelmingly to the contrary, and because Brown was in a position to protect employee safety yet failed to act on the basis of information that gave him reason to know that the escapeway's condition violated the standard, we affirm the judge's finding that Brown should be held liable under section 110(c) for the section 75.380(d)(1) violation.

2. Alvy Walker and Greg Miller

Alvy Walker was a day shift section foreman, and Greg Miller was a midnight shift section foreman. 26 FMSHRC at 552. Their crews passed through the area in question on the way to the face. *Id.* at 552-53. Each was also occasionally responsible for conducting a preshift examination that included the area in question. *Id*; Gov't Ex. 8. The judge held each liable for the section 75.380(d)(1) violation because each knew of the violative conditions and failed to take effective remedial action to address the water accumulation problem. 26 FMSHRC at 552-53.

A review of the record indicates a lack of evidence regarding the judge's findings that Alvy Walker and Miller engaged in aggravated conduct that is more than ordinary negligence. *Compare Austin Powder Co.*, 21 FMSHRC 18, 26-27 (Jan. 1999) (affirming section 110(c) finding where foreman was standing near miners who lacked the fall protection they should have been wearing). As Brown explained, the primary responsibilities of Alvy Walker and Miller were at the face, so that is where they spent as much of their time as possible. Tr. 474. If they were having any problems in their section or in getting to their section, they would report it to Brown. Tr. 539. There is no allegation that they withheld information from Brown or that they otherwise kept Maple Creek management in the dark regarding the conditions of the escapeway during the time in question. In fact, the preshift reports show that both reported the water accumulations. Gov't Ex. 8 at 17, 40.

As was established by more than one witness at the hearing, different outby foremen were responsible for dealing with areas outby the face, including the water problem. One foreman, along with his two-man crew, did nothing but work on the lines and pumps designed to remove the water. Tr. 392-93, 413-17, 474, 640, 680, 725. However, Miller explained:

> I was not assigned specifically on the outby area. I was strictly assigned to the face boss. At that particular time due to the length of travel, the nature of the

> water we had in that area, we had outby foremen and people assigned to maintain the pumps. That wouldn't have been my specific job to know anything about it or to do anything about it as far as being assigned by the company to direct out a work order to get this taken care of.

Tr. 724-25.[8]

We agree with the judge that Brown is liable under section 110(c) for the section 75.380(d)(1) violation, because the water accumulation was expanding while the same ineffective pumping system was being used under Brown's direction. The same rationale does not apply to Alvy Walker and Miller, however. While the two face foremen may have had views similar to Brown regarding the point at which the water accumulation would become a hazard, that does not establish that either possessed the power to take remedial action to eliminate the potential escapeway hazard involved here, i.e., neither was authorized to redesign the pumping system or to construct an alternative walkway. The two foremen had taken certain actions to address the problem of excess water in the escapeway such as consistently reporting the water accumulations and (in the case of Walker) sending two miners to repair a malfunctioning pump. Tr. 623-24, 650-51; Gov't Ex. 8 at 17, 40. On balance, we conclude that the two foremen's lack of authority to take necessary remedial action is a significant factor in this case and that their failure to take further action under these circumstances did not constitute aggravated conduct that amounts to more than ordinary negligence under section 110(c).[9]

Moreover, the Secretary made no attempt at the hearing to establish the actions of Alvy Walker and Miller that were lacking, and her trial brief is entirely silent on this point. *See* Sec'y's Proposed Findings of Fact, Conclusions of Law, and Supporting Memorandum at 25-27.

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[8] Brown did state that all foremen, when they passed by pumps during their travels through the section, were expected to check whether the pumps were working. Tr. 393, 417-18. However, there was no evidence presented that either Alvy Walker or Miller failed to do so. Indeed, when Alvy Walker learned of a pump down on his way to the face on August 9, he sent two men from his crew to try to repair it once they had retrieved their tools from the face area. Tr. 623-24, 650-51.

[9] We disagree with Commissioner Jordan, who in her dissent suggests that we have changed the standard that guides imposition of liability under section 110(c). Slip op. at 17-18. Contrary to her statement, in determining whether a corporate agent has engaged in aggravated conduct under section 110(c), the Commission has examined the agent's authority to take remedial action in the face of unsafe conditions. *E.g.*, *Kenny Richardson*, 3 FMSHRC at 17 ("Richardson, in view of his position as day shift master mechanic with general supervisory authority over the dragline, . . . should have removed it from service."). Nothing in *Kenny Richardson* nor any other Commission decision requires that, to avoid section 110(c) liability, Alvy Walker and Miller had to do more to eliminate the hazard where they lacked authority to do so.

This is a fatal flaw, given that the Secretary has the burden of proof, including proof that the conduct at issue was aggravated. *See Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) (in an enforcement action before Commission, Secretary bears burden of proving any alleged violation); *Peabody Coal Co.*, 18 FMSHRC 494, 498 (Apr. 1996) (Secretary bears burden of proving conduct is unwarrantable). Given the lack of any evidence on this prerequisite to a finding of individual liability, we reverse the judge's section 110(c) determinations with respect to foremen Alvy Walker and Greg Miller.

III.

Conclusion

For the foregoing reasons we affirm the judge's determinations that Maple Creek violated section 75.380(d)(1), that the violation was S&S, that the violation was due to Maple Creek's unwarrantable failure, and that Steve Brown was liable for the violation under section 110(c). We reverse the judge's determinations that Alvy Walker and Greg Miller were liable for the violations under section 110(c).

Michael F. Duffy, Chairman

Michael G. Young, Commissioner

Commissioner Jordan, concurring and dissenting:

I agree with my colleagues in the majority that Maple Creek violated section 30 C.F.R. § 75.380(d)(1), that the violation was significant and substantial and constituted an unwarrantable failure, and that Steve Brown is liable for the violation under 110(c) of the Mine Act, 30 U.S.C. § 820(c). However, I disagree with their conclusion that Alvy Walker and Greg Miller are not individually liable.

The judge held that Walker and Miller were liable under section 110(c) of the Mine Act, finding that they knew of the violative condition and that their failure to take effective remedial action constituted aggravated conduct. 26 FMSHRC 539, 552-53 (June 2004) (ALJ). We review her findings by applying 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)). My review of the record evidence leads me to conclude that the judge's finding that Walker and Miller engaged in aggravated misconduct was eminently reasonable.

Neither my colleagues nor the operator dispute that Walker and Miller were "corporate agents" of Maple Creek, an initial prerequisite for section 110(c) liability. 30 U.S.C. § 820(c). Furthermore, the majority does not challenge the judge's finding that Walker and Miller had knowledge of the violative condition, yet refused to consider the high water level to be hazardous. 26 FMSHRC at 552-53. There is ample record evidence, including his own admission, that Walker had received complaints from miners about the water problem. Tr. 104, 134-35, 157, 645-46. Nonetheless, he testified repeatedly that the water was not a hazard, Tr. 631, 639, and although the water conditions were characterized by the inspector as having the consistency of "pig slop," Tr. 243, Walker contended that muck was only a hazard if a miner could not move his or her legs through it. Tr. 635. Miller, who traveled through the primary escapeway daily, Tr. 696, also asserted that the water was not a hazard, Tr. 670-71, and that it would have to have been at "roof depth" before he would not have been able to get through it "for survival." Tr. 690-91.

In spite of the unassailable evidence demonstrating Walker's and Miller's knowledge of the water accumulation and their cavalier attitude regarding it, the majority reverses the judge's finding of liability, concluding that there was insufficient record evidence showing that Walker and Miller "possessed the power to take remedial action." Slip op. at 15. I find it significant that this claim was never raised by Walker or Miller as a defense to the section 110(c) charges, and that the majority cites not one Commission case declining to find 110(c) liability on this basis. *Cf. BethEnergy Mines, Inc.*, 14 FMSHRC 1232 (Aug. 1992) (finding shift foreman liable under section 110(c) because he was aware of hazardous conditions even though the shift foreman was carrying out instructions of his superiors). This is a subtle, yet meaningful, sleight-of-hand transformation of the longstanding section 110(c) case precedent that to establish the liability of an individual who fails to act, he or she must simply be "in a position to protect employee safety

and health," *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), which does not necessarily require the authority to make extensive structural changes, contrary to the majority's suggestion. Slip op. at 15.

In fact, Walker testified that he could have protected his miners from the danger of the high water level and mucky mine floor — had he acknowledged that these conditions posed a hazard:

> Q. Now, Mr. Walker, if you came across an area that your crew would have to go through and you considered it perhaps to be somewhat hazardous for them to go through, as the shift foreman, would you have the right to say, I'm not going to take my crew through here, I'm going to take them somewhere else.
>
> . . . .
>
> A. Certainly. That's my discretion.

Tr. 646. Nonetheless, the record indicates that he took his crew through the rising water of the primary escapeway every day.

Contrary to the majority's conclusion that Walker did not possess "the power to take remedial action," slip op. at 15, the record reflects (and the operator's arguments emphasize) that he did. As the majority acknowledges, slip op. at 15 n.8, Walker testified that he sent two men from his crew to try to repair a broken pump:

> There were three pumps in that area. I physically saw water seeping through from the return area into this track area. I did not want that to compound the problem in this hole so I sent them [the men] back immediately to take care of this situation and let me know immediately what they needed, if they needed additional parts. . . . I wanted to get someone on this situation right away, so I sent my people back at that point.

Tr. 650-52. This is not the testimony of a foreman incapable of taking steps to protect his crew from the water accumulation problem at this mine, as my colleagues' opinion would suggest.

There is also record evidence that under the Commission's traditional section 110(c) standard requiring that the individual be "in a position to protect employee safety and health," Miller is liable under section 110(c). When asked at trial what he would have done if he thought the conditions in the escapeway constituted a hazard, he testified that "I wouldn't stick my crew through there and I would have notified my immediate foreman which would have been the shift

boss on that particular shift." Tr. 673-74. Nothing in the record indicates that he took either action.

Furthermore, the judge found Miller liable based in part on the fact that "[i]n terminating the Compliance Order, Inspector Walker lists Brown and Miller as having reported that the water had been pumped off the section, although Miller did not recall making such report." 26 FMSHRC at 552 (citing Gov't Ex. 1 & Tr. 722-23). And indeed, Miller indicated at trial that he could have taken steps to remedy the water situation if he believed the mine was not obeying the state compliance order:

> Q. Did you feel you had — you were out of compliance with this compliance order?
>
> A. If I had I would have took immediate action. What I'm saying is I don't know the depth, I didn't measure it, that's number one.

Tr. 713.

Perhaps most persuasive is Miller's own admission that he was in part responsible for the elevated water level:

> [Q. Judge Bulluck:] In terms of your being responsible for this condition, do I understand from your testimony that you're saying if there was some violation that it wasn't your responsibility?
>
> A. No ma'am. I'm just one of many. . . . I in no way imagine take away any obligation on my part. I'm in it with everybody else. That's the way it has to be. . . . .

Tr. 729-30.

Notably, Maple Creek, in its brief, argues vigorously that Walker and Miller were significantly engaged in the efforts to ameliorate the water level. Indeed, the operator states that they "had been actively involved in the substantial efforts taken by Maple Creek to address the water condition in the cited area. These facts are uncontroverted." MCM Br. at 15. The operator also contends that "the undisputed evidence presented was that all three of these men [Brown, Walker, and Miller] were addressing the water condition, as each had been actively involved in the substantial efforts taken by Maple Creek to address the water." MCM Reply Br. at 7 (emphasis in original). These assertions make it difficult for me to adopt the majority's view that it was questionable whether Walker and Miller "possessed the power to take remedial action." Slip op. at 15.

For the foregoing reasons, I would affirm the section 110(c) violations of Walker and Miller, and therefore respectfully dissent from the majority's ruling reversing the judge's finding of liability against them.

Mary Lu Jordan, Commissioner

Commissioner Suboleski, concurring and dissenting:

I agree with the majority regarding the merits of the violation and that the violation was significant and substantial. I also agree with the majority's disposition of the section 110(c) liability of Alvy Walker and Gregg Miller. However, I disagree with the majority and the administrative law judge that Maple Creek's violation of the regulation was a result of its unwarrantable failure. I believe that the judge failed to fully consider the facts leading up to the August 9 citation and order,[1] as well as mitigating circumstances surrounding the violation. For this reason, I would remand the unwarrantability determination to the judge for further consideration.

It is undisputed that Maple Creek is a wet mine with depressions frequently filling up with water. 26 FMSHRC 539, 541 (June 2004) (ALJ). As the judge found, Maple Creek had an extensive pumping system in place at the mine, pumping out between 1.2 to 2 million gallons of water daily.[2] *Id.* Clearly, this was an operator that could not ignore the problem of water in its mine if it intended to produce coal. The parties stipulated that water was in the intake escapeway of the 4 West section in varied depths on August 9, 2001, and had been there for approximately 2 weeks previously. *Id.* And the Commission has concluded that the water was of sufficient depth that it affirmed the citation for violating 30 C.F.R. § 75.380(d)(1), which requires that escapeways be maintained in safe condition, that was issued on August 9. I fully concur in that determination and that the violation was S&S.

The judge's unwarrantability determination is premised on Maple Creek's actions in response to the state compliance order that issued on July 30. I believe that the judge ignored or did not sufficiently consider largely undisputed testimony concerning Maple Creek's efforts to combat the wet conditions in the 4 West section following the July 30 order. In this regard, foreman Steve Brown testified that he brought in four pumps to the 4 West section to address the water accumulation that had been cited by the state inspector. Tr. 390-91. Maple Creek's actions appear to have been productive as evidenced by inspections of the area between August

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[1] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[2] The fact that Maple Creek's pumping system removed this amount of water from a wet mine belies the judge's description of Maple Creek's pumping system between July 30 and August 9 as "woefully ineffective." 26 FMSHRC at 550.

1and 7. Tr. 578-81; Gov't Ex. 8. A foreman and a crew of two miners were responsible for maintaining pumps in the 4 West section and worked in this area on the shift preceding the August 9 order. Tr. 415-17.

While miner testimony established that they generally used the "cow path" adjacent to the ribs to avoid the deepest water, this alone does not establish that the water level in the escapeway was consistently high throughout the period after July 30. Unlike the judge, I do find an inherent inconsistency between the preshift log and the miner testimony regarding conditions in the escapeway.[3] While miner complaints about the condition of the escapeway continued after the July 30 order, this is not inconsistent with the presence of residual water and muck that could not be pumped out, despite Maple Creek's good faith efforts.[4] Moreover, it is not apparent that miner grumbling about conditions in the escapeway resulted in either formalized complaints to MSHA or to Maple Creek under the collective bargaining agreement.

In discrediting evidence from Maple Creek regarding water in the escapeway, the judge relied heavily on the operator's witnesses' referring to it as a "condition," rather than as a problem or hazard. It appears to me that the reference to the water as a "condition" by all of Maple Creek's witnesses was a product of over zealous preparation for trial. Nevertheless, for whatever the reason the term was used, I cannot conclude that it is a reasonable or logical factual basis upon which to premise a credibility resolution. *See Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989) (the Commission will not affirm credibility determinations if there is dubious evidence to support them). Whether the water in the escapeway was viewed as a

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[3] The judge's characterization of the log as reflecting "scattered notations of water accumulation" indicates a fundamental misunderstanding of the log. The log shows a consistent pattern of reporting the presence or absence of water, and a pattern that shows improved conditions in the escapeway following July 30, including 15 consecutive shifts with no reports of water accumulations in the escapeway. *See* Gov't Ex. 8. The breakdown of two pumps just prior to the August 9 mine inspection coincided with the reappearance of water in sufficient depths to again appear in the preshift log. *Id.* For this reason alone, I would remand this case to the judge to reexamine the evidence regarding unwarrantability.

[4] The testimony of the hourly workers can be reconciled with the preshift records. The water level could be pumped down without the mud drying up – i.e., without changing appearance much. In the darkness, walking along the "cow path," the miners would not be looking over the entire entry; they would be concentrating only on their next step. The testimony is that the water extended rib-to-rib for about half the distance at the time of the violation. Whether they would be walking one-fourth of the distance or one-half of the distance in water, and what the depth of that water was, would not be readily memorable months or years later to those who traveled every day – they recall only walking in and out of water and alongside muck. Indeed, the miners' (and foreman Walker's) testimony that it was much the same everyday contradicts the record that it was twice as long on August 9 as it was on July 30 – evidence of the unreliability of years-old memory.

"condition" or a "problem," it is apparent from the record that Maple Creek had dedicated pumps and personnel to removing the water from the area, and I conclude that the judge inadequately weighed that evidence in making her unwarrantability determination.[5] *Compare Eagle Energy, Inc.*, 23 FMSHRC 829, 836 (Aug. 2001) ("Despite the chronic water accumulation problems in the escapeway, the operator made no attempt to abate accumulations in the escapeway.").

In addition to the foregoing, it is not apparent that the judge sufficiently considered mitigating circumstances, as well as aggravating factors, that indicated Maple Creek was making a good faith effort to minimize the water accumulation in the escapeway. *See id.* at 834-40. The events that aggravated the water accumulation in the escapeway and preceded the citation and order on August 9 were the collision of a scoop with one pump and the breakdown of a second pump, which needed a new diaphragm. Tr. 407-14, 500. The nearest replacement pump was some 15 miles away. Tr. 412. Thus, at the time the inspector observed the escapeway, no pumps were running and water was seeping into the area. Tr. 499-500, 650. Maple Creek took immediate steps to repair the broken pump. Tr. 648-50.

In addition to the efforts of Maple Creek to address the extraordinary events in the escapeway on August 9, uncontradicted testimony in the record also shows that Maple Creek foremen were aware of the presence of a nearby, alternate escapeway as a means of avoiding the water in the primary escapeway. Tr. 454, 506-07, 631, 735. While this mitigating factor does not affect the violation itself, it weighs on the determination of indifference and serious lack of reasonable care and whether this violation involves ordinary negligence or aggravated misconduct. *See Florence Mining Co.*, 11 FMSHRC 747, 753-54 (May 1989).

In sum, I would remand this proceeding to the judge for further consideration of whether the violation was due to Maple Creek's unwarrantable failure.

While I agree with the majority of my colleagues regarding the dismissal of section 110(c) charges against Alvy Walker and Greg Miller, I disagree with the affirmation of the judge's determination of section 110(c) liability against section coordinator Steve Brown. For

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[5] The majority asserts that it is harmless error for the judge to have misconstrued the preshift reports that, when properly read, indicate that the water in the entry was pumped down during the period between the state citation and the citation at issue. However, the failure to abate the state order and the truthfulness of the report to the state inspector are at the heart of the lengthy MSHA investigation into what would otherwise have been a routine, low-risk-of-injury violation. The preshift reports, as the only contemporaneous, official, written record, go to the heart of the issues at hand here – and essentially refute them. The judge's error in misconstruing them is not harmless, given her conclusion that "Maple Creek's actions to [fail to] abate" the earlier state order constitute an unwarrantable failure to comply. 26 FMSHRC at 551. I believe that a clear understanding of these reports would allow the judge to properly decide whether this is a case of aggravated misconduct and callous disregard, or simply a case of two malfunctioning pumps and scoop problems foiling a good-faith effort by Maple Creek to comply.

reasons similar to my conclusion regarding the need to remand the judge's unwarrantable failure determination, I am compelled to conclude that the judge must reconsider her conclusion regarding Brown's liability.

The judge's determination with regard to Brown was premised on her finding that, after the state compliance order, he failed "to take expeditious, effective remedial action to protect the safety of miners who traveled daily through the primary escapeway, as well [as] those miners who would have to evacuate the mine in an emergency." 26 FMSHRC at 552. The judge concluded that Brown's conduct "amounted to an aggravated lack of care that was more than ordinary negligence." *Id.*

As I have noted above, slip op. at 21, the judge ignored undisputed testimony regarding Maple Creek's actions directly in response to the July 30 order. Brown was instrumental in setting up the four pumps in the 4 West section that led to the apparent improvement in conditions in the section up until August 9. *Id.* This response to the water accumulation problem in the section stands in marked contrast to the inaction of officers or agents that has characterized Commission decisions finding section 110(c) liability. *Compare Sunny Ridge Mining Co.*, 19 FMSHRC 254, 274 (Feb. 1997) (company president was aware of violations but failed to take any measure to correct them); *Prabhu Deshetty*, 16 FMSHRC 1046, 1051 (May 1994) (mine foreman was aware of ongoing accumulation problem but failed to take measures to remedy the problem). The events that led to the water accumulation on August 9 were not due to Brown's inaction, let alone an aggravated lack of care. Rather, the immediate cause of the water accumulation problem on August 9 was due to the breakdown of two of the four pumps, which caused all pumping to cease. In light of these extenuating factual circumstances, I would ask the judge to further consider whether Brown knowingly violated section 75.380(d)(1).

Stanley C. Suboleski, Commissioner

Distribution

Marco M. Rajkovich, Jr., Esq.
Noelle M. Holladay, Esq.
Watt, Tarrant & Combs, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507-1746

Jack Powasnik, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209

Judith Rivlin, Esq.
United Mine Workers of America
8315 Lee Highway
Fairfax, VA 22031

Administrative Law Judge Jacqueline R. Bulluck
Federal Mine Safety and Health Review Commission
601 New Jersey Avenue, Suite 9500
Washington, D. C. 20001

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268
August 11, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2004-453 A.C. No. 42-01715-31669
v.	:	
GENWAL RESOURCES, INC., Respondent	:	Crandall Canyon Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2004-454 A.C. No. 42-01715-31882A
v.	:	
GARTH J. NIELSON, employed by GENWAL RESOURCES, INC., Respondent	:	Crandall Canyon Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Ned Zamarripa, Conference & Litigation Representative, Mine Safety and Health Administration, Denver, Colorado for Petitioner; Noelle M. Holladay, Esq., and Marco M. Rajkovich, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, for Respondents.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Genwal Resources, Inc. ("Genwal") and Garth J. Nielson, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 ("Mine Act"). The petitions allege that the respondents violated 30 C.F.R. § 72.630(a), which governs the control of dust created by drilling. An evidentiary hearing was held in Salt Lake City, Utah, and the parties filed post-hearing briefs.

I. BACKGROUND AND SUMMARY OF THE EVIDENCE

Genwal operates the Crandall Canyon Mine, an underground coal mine in Emery County, Utah. On May 29, 2003, MSHA Inspector Randy E. Gunderson issued Order No. 7616128 under section 104(d)(1) alleging a violation of 30 C.F.R. § 72.630(a). The body of the order provides as follows:

> On the 3½ east longwall recovery face (MMU 010), during the full bolting process conducted by the crew, drilling of the rock roof is being conducted without the means of controlling the dust generated by the drilling. Dust shall be controlled by the use of permissible dust collectors, or by water, or by ventilation. None of these preventative measures were in effect. The mine operator engaged in aggravated conduct by acknowledging a safety hazard and not taking corrective action.

The inspector determined that an illness or injury was reasonably likely, that the violation was of a significant and substantial nature, and that the violation was the result of the operator's unwarrantable failure to comply with the standard. The cited standard provides that "[d]ust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method approved by the Secretary that is as effective in controlling the dust." The Secretary proposes a penalty of $6,600.00 against Genwal and a penalty of $600.00 against Mr. Nielson.[1]

Inspector Gunderson testified that during his inspection on May 29, 2003, he parked his vehicle about 500 feet from the face and walked up the headgate side onto the longwall. As he walked along the face, he noticed that miners were drilling into the roof in order to install roof bolts. (Tr. 16). The inspector walked past Joe Fielder, the longwall coordinator, as he inspected the longwall. Gunderson could hear a drill operating as he walked between the shields and the pan line. When he arrived at the first drill, he could see dust coming off the drill. (Tr. 19; Ex. G-5). Gunderson believes that this drill was at or near shield 86. (Ex. G-4). Garth Nielson, the mine superintendent, was sitting near the drill. The air movement was from the headgate to the tailgate. (Tr. 21).

Inspector Gunderson determined that the drilling at shield 86 should cease because the miners were "drilling dry" and he could hear at least one other drill being operated downwind from the drill. *Id.* The inspector testified that the dust was airborne and that the only ventilation in the area was face ventilation which was moving toward the miners at the second drill further along the longwall.

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[1] On February 8, 2004, MSHA Inspector Donald Durrant issued Citation No. 7613354 at the mine. A penalty of $6,300.00 was proposed by the Secretary in Docket No. WEST 2004-453. At the hearing, the Secretary agreed to vacate this citation. (Tr. 8).

Gunderson testified that he asked Nielson if he knew that he had to use water while drilling and that Nielson replied, "I know." (Tr. 22). After the drill was shut down, Gunderson and Nielson walked down the face to the second drill, which was about 100 feet away. The inspector ordered that drill shut down. After that, Inspector Gunderson walked further down the longwall toward the tailgate to where miners were getting ready to operate a third drill and he ordered them not to drill. (Tr. 24, 116). Inspector Gunderson asked Section Foreman Mike Allred, who was at the third drill, why water was not being used with the drill. Gunderson testified testified that Allred replied that he wanted to stay dry. (Tr. 25).

Miners were drilling into the roof using stoper drills to install roof bolts. These drills are relatively small and are supported by a pneumatic cylinder which provides thrust while drilling. (Ex. G-5). A water hose can be attached to each stoper drill to suppress dust. Roof bolts and matting are installed along the longwall in preparation of a longwall move in which the shields and all the other longwall components are removed from the section. The longwall was about 680 feet long (Tr. 20). There have been about 19 longwall moves at this mine. (Tr. 82, 164).

Inspector Gunderson determined that the violation was a result of Genwal's unwarrantable failure to comply with the standard because the violation was "obvious" and a "hazard," and because management knew of "this problem" and were not "taking care of it." (Tr. 26, 42-43). Because the miners were "drilling dry," Inspector Gunderson believed that Genwal was not controlling the dust generated by the drills. He concluded that the miners were drilling into quartz-bearing rock because the dust produced was a white powder. It is Inspector Gunderson's understanding that the roof was sandstone. He could see this white dust in the air, on the pan line, and on the miners working with the drills.

The inspector determined that the violation was of a significant and substantial nature ("S&S") because, if the practice of drilling without controlling the dust were to continue, it is reasonably likely that miners would develop silicosis, which is a serious illness. (Tr. 35). He believes that everyone along the longwall face was exposed to the hazard because they were either around a drill or were in the airstream containing dust particles. (Tr. 36). Two miners were operating the first drill and the other two drills were operated by three miners each. (Tr. 47). The shift started at 7:00 a.m. and Inspector Gunderson observed the condition at 8:00 a.m. Although he is not certain, the inspector believes that drills were used on the previous shift without controlling dust because a few roof bolts had already been installed along the longwall face and there was quite a bit of dust that had settled along the pan line. (Tr. 37). Inspector Gunderson terminated the order when the drills were shut down. The drills were connected to the waterline along the longwall before drilling resumed. (Tr. 46).

Danny Vetter, an MSHA special investigator, conducted an investigation into the circumstances surrounding the citation that was issued. (Tr. 247). He determined that "there was an obvious and blatant violation" of the standard at the time Inspector Gunderson entered the longwall section and Garth Nielson was present. He stated that dust samples are not required to be taken under the cited standard. Vetter believes that if dust is visible, then respirable silica dust

is also present. (Tr. 253). He also stated that relying on face ventilation does not meet the requirements of the standard and may, in fact, put more dust into suspension. (Tr. 255). As a consequence, he recommended that a civil penalty be proposed against Nielson.

David Jensen, who was an assistant to the mine's safety director, was working at the third drill on the day of the inspection. (Tr. 77). He testified that the drills were not connected to the water line that morning. (Tr. 78). He said that the miners in the longwall face typically do not use water when drilling. *Id.* He further testified that when he provides annual safety and health training at the mine, he discusses the need to use water as a method of dust suppression on drills. (Tr. 80-81). He also stated that he had discussed this issue with Garth Nielson in the past when miners complained to him about the lack of dust suppression. (Tr. 81-82). Jensen testified that he felt uncomfortable operating the drill without water on May 29 because, as a safety trainer, he instructed miners to use water and he believed he would lose the respect of the miners by drilling dry. (Tr. 83). He did not wear a respirator on May 29.

Jensen believes that the ventilation along the face of the longwall was insufficient to direct dust away from miners. He could see the dust and there were no ventilation curtains present to direct air away from miners. (Tr. 84). Jensen stated he could see dust everywhere around the first drill where Nielson was sitting. (Tr. 87). Jensen also testified that whenever a longwall move was scheduled, miners would start complaining to him about the method of drilling without dust control. (Tr. 89). Jensen overheard Nielson telling Inspector Gunderson that he has tried to get the miners to hook up water lines to the drills but he could not get them to use water. (Tr. 91-92). Jensen disagrees with this assessment because, from his perspective, miners often complained to him about the lack of water when installing roof bolts in preparation for a longwall move. (Tr. 81, 89, 92).

Jensen testified that he had been on the longwall during several longwall moves. (Tr. 99). He could only remember one occasion when water was used to control dust on the stoper drills. Jensen admitted that he did not take any steps on the morning of May 29 to get water to the drills. (Tr. 101-103). Jensen testified that several years earlier, he told Joe Fielder, the longwall coordinator, that water lines should be connected to the stoper drills when roof bolting along the longwall. (Tr. 103-05). According to Jensen, Fielder told Jensen that "we're not going to do it so just get out of here." (Tr. 103).

David Turner, a longwall mechanic, testified that he helped operate the second drill along the face from the headgate. (Tr. 126). He was drilling dry. He said that usually four stoper drills are used. He could see a drill operating on each side of him. (Tr. 128). Turner testified that he could "most definitely" see dust in the area coming from the drills. *Id.* He does not think it would be feasible to use ventilation to control the dust because an "enormous amount of curtains" would be required to direct the contaminated air away from the miners working along the face. (Tr. 130). Water was available along the face so it took about 30 to 45 minutes to supply water to each drill after the withdrawal order was issued. *Id.* Some of the fittings

necessary to connect water to the drills had to be located elsewhere on the section. (Tr. 131, 139).

Turner could not recall ever being told to use water when operating the stoper drills, but it was common knowledge that water was necessary to "handle" the dust. *Id.* Turner was wearing a respirator because it was his normal practice to do so whenever he was working on a longwall section. (Tr. 132). He does not recall anyone else wearing a respirator that day. Turner has participated in about seven longwall moves and, if he is asked to operate a drill, he tries to operate the drill at the headgate end so that he can stay out of the dust generated by drilling. (Tr. 133-34). He has never been told that he had to drill without water. (Tr. 138).

Rodney Cox, a fireboss at the mine, testified that because the mine was shorthanded on May 29, he worked on the longwall face that day. (Tr. 143). He operated the second drill and Dave Turner assisted him. Cox said that he did not use water on the drill because he "chose not to." (Tr. 146). It would not have been hard to hook up water to the drill. (Tr. 152). He knew that some method of dust control was necessary when operating a drill in order to control the silica. (Tr. 146). He did not wear a respirator that day. Cox testified that he had previously operated a drill with water as well as dry. (Tr. 147). He is not aware of any methods to control dust with stoper drills other than water. He does not believe that ventilation would protect miners further down the air course. (Tr. 148-49).

Garth Nielson, the mine superintendent, testified that he does not have direct responsibility for planning, organizing, or scheduling longwall moves. (Tr. 162). He also does not schedule daily work assignments. The longwall coordinator and general mine foreman are responsible for longwall moves.

Nielson testified that Genwal always complies with section 72.630(a) by using water or ventilation. (Tr. 164). Ventilation is used if there is sufficient air in the longwall. The mine has never been cited by MSHA for using ventilation on the longwall section to control dust from stoper drills. (Tr. 164-65). The approved ventilation plan requires 45,000 cubic feet per minute ("cfm") on the intake of the longwall when coal is being mined. (Tr. 166, Ex. R-1 p. 21-22). During a longwall move, the mine is required to have 20,000 cfm on the intake end. There is nothing in the ventilation plan that addresses any special requirements when miners are drilling into rock on the longwall face. (Tr. 166). Nielson understood that when bolts were being installed on the longwall section prior to a longwall move, Genwal was required to move enough air through the longwall to stay in compliance with all dust standards. Mine records show that prior to the start of the shift, the quantity of air entering the longwall was 53,504 cfm. (Tr. 169; Ex. R-2).

Nielson is the superintendent for several mines. He traveled to the Crandall Canyon Mine on May 29 because he knew that there was a longwall move scheduled. (Tr. 170). He arrived at the mine at about 5:30 a.m. and, after checking the books, traveled underground. He parked near the tailgate entry of the longwall panel and proceeded to walk up the return air course on the

tailgate side. He checked the roof for abutment pressures and, when he arrived at the tailgate end of the face, he looked into the gob to see if there was a good tight cave. (Tr. 180). Because the cave was tight, ventilation along the face was excellent. He walked along the face toward the headgate and checked to see if the roof was well meshed. When he reached the midpoint of the longwall face he could see two people and a stoper drill. (Tr. 183). It was still the graveyard shift at the time. The miners were installing matting to the roof with roof bolts. (Tr. 184). There was no water supplied to the drill. There was a large amount of air moving through the area, but Nielson did not take any air measurements. As he approached the miners drilling into the roof, he could see dust coming from the drill from a distance of about 40 to 50 feet from the drill. (Tr. 185-86). He did not believe that there was enough dust present to be concerned about. Nielson helped the miners until the end of their shift.

At the end of the graveyard shift, Nielson walked further along the longwall and sat down to wait for the day shift crew. (Tr. 187). Mike Allred was the first to arrive on the day shift. He told Nielson that he was shorthanded so he would help run a drill. There was no discussion of putting water on the drills. Nielson testified that he has never ordered anyone to drill without water and if a miner wanted to drill with water he could have done so. (Tr. 190). He stated that no miner has ever complained that he could not get water to his drill. Dave Jensen was on the crew that day, but Nielson did not recall seeing him and he does not recall discussing anything with him. (Tr. 191).

Insepctor Gunderson arrived on the section early that morning and walked past Nielson and walked toward the tailgate. When the inspector returned he said to Nielson, "Garth, we got a problem." (Tr. 192). Inspector Gunderson told Nielson that because Genwal was not running water on the stoper drills he was going to issue a (d)(1) order. In response, Nielson said, "I see then we have a problem." (Tr. 193). Nielson testified that, by making that statement, he meant that the withdrawal order was a problem, not that he agreed that the stoper drills created a problem. Nielson told the Gunderson that he would shut down the drills, but the inspector told him that he had already done so.

Nielson does not believe that the mine was in violation of section 72.630(a) on May 29. The amount of silica dust being emitted was not enough to be out of compliance with the "milligram standard that we have to meet." (Tr. 195). MSHA has never taken dust samples when miners were drilling along the longwall. Nielson testified that a miner complained to MSHA about excessive silica dust along the longwall in January 2005 when the shearer was cutting more than two feet of rock for the length of the longwall. MSHA placed five dust pumps on longwall employees to test for respirable dust. (Tr. 197). Nielson testified that the test results revealed that the miners were not overexposed to silica dust. Nielson admitted that in the January 2005 situation, the miners wearing the pumps were about 2,000 feet downwind from the shearer cutting into the rock. (Tr. 211). Nielson further testified that any employee can request that he be fitted for a respirator to wear when working around drills. (Tr. 199).

Nielson testified that Genwal makes sure that water is available for the stoper drills along the longwall. (Tr. 199). He stated that connections and fittings to connect water to the drills were readily available. *Id.* He further stated that water is used on the drills about half of the time during longwall moves. (Tr. 203). Miners tend to use water when the roof is damp and some miners prefer to use water not only to control the dust but because it is faster to drill with water. Face ventilation is used to control the dust at all other times.

Robert Oviatt, shift foreman, testified that the face ventilation on May 29 was twice the volume required by the ventilation plan. (Tr. 232). He believes that this ventilation was controlling the dust. He admitted, however, that any miner downwind from one of the stoper drills would have been exposed to dust. (Tr. 237-38). He did not tell any miners that they could not use water with the stoper drills. (Tr. 233).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Violation of Section 72.630(a)

I find that the Secretary established a violation of the standard. Section 72.630 was drafted to address a specific problem: dust that enters the mine environment when drilling into rock in underground mines. This requirement is separate and distinct from any standards regulating the amount of respirable dust that is permitted in underground mines. The standard is violated if an operator is not using one of the specified methods to control dust resulting from drilling regardless of the actual level of exposure. Nothing in section 72.630 requires that the Secretary must establish there was an actual overexposure to drill dust at the time the citation is issued.[2] Section 72.630 is not vague or confusing on this issue. It clearly provides that any dust resulting from miners drilling into rock must be controlled. There is no dispute that miners were using stoper drills to install roof bolts in the longwall section, that these miners were drilling into rock to perform this task, and that visible dust was being created. It can be inferred that invisible respirable silica dust was also being produced. As a consequence, the issue is whether the dust being produced as a result of the drilling was being controlled in a manner required by the standard.

One method to control drill dust is by using water, as set forth in section 72.630(c). There is no dispute that water was not being used. Respondents argue that the mine was using ventilation to control the dust. Section 72.630(c) provides, under the heading "Ventilation Control," that to "adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator and any other miners in the area." Respondents contend that the ventilation provided at the longwall face met the requirements of subsection (c). Respondents point to the fact that the mine was providing at least

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[2] Indeed, the preamble to the standard provides that the "final rule is a work practice standard that does not require sampling." 59 Fed. Reg. 8317, 8323 (Feb. 18, 1994).

53,500 cfm of air to the area while the ventilation plan only requires 20,000 cfm. Genwal also relies on the mine's history of compliance with MSHA standards with respect to respirable silica dust. Genwal argues that because the citation is not supported by any sampling for respirable silica dust, I should assume that the mine was in compliance with all respirable dust standards.

Inspector Gunderson took a rather practical approach to his interpretation of the standard. He stated that he probably would not have issued the order if Genwal had only one stoper drill operating so long as there were not any miners working downwind from the drill. In this instance, however, at least three drills were going to be operating during the day shift and these drills were operating about 100 feet apart. Gunderson believed that miners working downwind from the first drill would be exposed to the dust.

I agree with Inspector Gunderson's assessment of the conditions at the mine. The drill dust was not "dispersed and carried away from the . . . miners in the area" by the longwall ventilation. There was no dispute that drill dust was being produced because it was readily visible in the air and it had settled on longwall components. This dust that had not settled was blowing directly toward the miners at the downwind drills. The Secretary is not required to establish that Genwal violated threshold limit values for silica. I do not agree with Genwal's argument that, if it is complying with its approved ventilation plan, it is in compliance with the requirements of section 72.630(c). The requirements of section 72.630 are separate and distinct from the ventilation plan requirements and an operator can violate this health standard without violating the ventilation plan.

Genwal argues that the language of section 72.630 clearly provides that ventilation may be used to control dust. Genwal contends that because the language of the standard is clear, I should "give effect to the unambiguously expressed intent of the regulation" that ventilation is a permissible control method. (G. Br. 4, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Councit, Inc.*, 476 U.S. 837, 843 (1984). If ventilation is used to control dust, however, it must be effective. *Consolidation Coal Co.*, 23 FMSHRC 392, 397-98 (April 2001). I find that the face ventilation along the longwall did not effectively control the drill dust as required by the standard.

Genwal also argues that, even if I find that the language of the standard is ambiguous, the Secretary's interpretation of the standard is not entitled to deference because it is contrary to the plain meaning of the words. It maintains that Genwal was not provided with fair notice of the requirements of section 72.630. The Commission has held that the language of section 72.360 is clear and unambiguous. *Id.* at 397. If ventilation is used to control drill dust, it must carry the dust away from drill operators and other miners in the area. The evidence clearly establishes that the longwall ventilation used by Genwal did not carry the dust away from miners in the area but rather blew the dust toward them. This "carry away" requirement is clearly set forth in the standard. It is Genwal, not the Secretary, who is interpreting the standard beyond its plain meaning. The Secretary provided fair notice of the requirements of this standard as applied to the facts of this case. The Secretary clearly set forth her intended requirement that, if ventilation

is used to disperse drill dust, the air current must carry the dust away from miners working in the area.[3] Respirable dust samples are not required to establish a violation. *Accord Jim Walter Resources, Inc.*, 17 FMSHRC 1423, 1444-45 (Aug. 1995) (ALJ); *aff'd Jim Walter Resources, Inc. v. Sec'y of Labor*, 103 F. 3d 1020, 1024 (D.C. Cir. 1997). I find that the ventilation used by Genwal on the longwall face did not effectively carry the dust away.

B. Significant and Substantial

I also find that the violation was S&S. A violation is classified as S&S "if based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). As applied to a health standard, such as section 72.630, the Secretary must establish: (1) the underlying violation of the health standard; (2) a discrete health hazard, a measure of danger to health, contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature. *Consolidation Coal Co.*, 8 FMSHRC 890, 897 (June 1986). The Secretary is not required to show that it is more probable than not that an illness will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that there was a violation of the health standard and that a discrete safety hazard was contributed to. I also find that there is a reasonable likelihood that the health hazard contributed to will result in an illness. It is important to recognize that the violation need only "contribute to" a health hazard. The violation is not required to create a health hazard to be considered S&S.

I rely on the phrase "hazard contributed to" in this element of the *Mathies* test in reaching this conclusion. 6 FMSHRC at 3. A single exposure to respirable silica dust may not result in an illness, but an exposure to respirable silica dust is a hazard that contributes to the development of an illness. *See Consolidation Coal Co.*, 8 FMSHRC at 894-99. When promulgating the standard, the Secretary noted that during drilling "there is the potential for extremely high exposures in short periods of time to both miners doing the . . . drilling and to other miners in the immediate area." (S. Br. 4 *quoting* 59 Fed. Reg. 8318 (Feb. 18, 1994)). The inhalation of freshly fractured silica particles from rock drilling may contribute to the development of acute silicosis.

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[3] In addition, the preamble to the standard provides that "[g]eneral ventilation is not usually effective in underground coal mines for drill dust control, unless it can rapidly disperse and carry away the drill dust as well as direct the dust away from workers in the area." 59 Fed. Reg. at 8324.

(S. Br. 3; Tr. 38-41; Ex. G-6 p. 8-9; 59 Fed. Reg. at 8319). "Silicosis has been recognized . . . as a disease associated with coal miners, and the inhalation of silica-bearing dust has been causally linked to the disease." *U.S. Steel Mining Co., Inc.* 8 FMSHRC 1274, 1279 (Sept. 1989). The Secretary was unable to establish whether any miner was overexposed to silica dust because Inspector Gunderson ordered drilling to stop immediately so he did not take respirable dust samples. When taking into consideration continued normal mining operations, I believe that it is reasonable to presume under the facts of this case that miners would have been exposed to silica dust for at least a short period of time. I find that the Secretary was not required to sample for dust in order to establish the S&S nature of the violation in this case. *Contra Jim Walter Resources*, 17 FMSHRC at 1446-48 (ALJ). Any illness contributed to by the violation would be of a reasonably serious nature. "The fibrosis associated with silica-bearing dust is irreversible and may continue to develop after the exposure has ended." *Id.* at 1281.

C. Unwarrantable Failure

I find that the Secretary established that the violation was the result of Genwal's unwarrantable failure to comply with the safety standard. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. I find that Genwal's conduct does not reach that level of negligence. A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

The Secretary argues that Genwal had knowledge of the violation because it knew that it was not using dust collectors or water to control the drill dust and it knew that ventilation would not carry the dust away from downwind miners. She contends that Nielson knew that stopers were being used and that miners downwind from other stopers would be breathing dust generated by the stopers. The Secretary states that Nielson acknowledged that he knew that water should have been used to control dust when Inspector Gunderson issued the order of withdrawal. In addition, Nielson was present at the time drilling started and could see and hear the drills operating. Foremen and other mine managers are held to a high degree of care regarding safety matters.

Genwal argues that it reasonably believed that it was complying with the standard by providing more than sufficient ventilation along the longwall. It was providing more than twice the volume of air required by the ventilation plan during longwall moves. In addition, Genwal

maintains that because it has moved the longwall equipment about 19 times over an 8 year period without being cited by MSHA, an aggravated conduct finding is not appropriate. It contends that any of the miners could have used water to control dust as the company has no policy against using water on stoper drills and the equipment to do so was present on the section. Finally, it contends that the Secretary misconstrued Nielson's statement to Inspector Gunderson that "I see then we have a problem" when he was told about the unwarrantable failure order. Genwal argues that Nielson simply meant that if an order was being issued, then there was a problem, not that he admitted that he knew that was a violation.

Jensen, who worked for the safety department, and Oviatt, who was a shift foreman, testified that they knew that any miners in the area who were downwind from a stoper would be exposed to drill dust. (Tr. 83-87, 236-38). Nielson observed drill dust being produced when he walked in the longwall on the graveyard shift. In addition, the testimony of miners demonstrates that it was "common knowledge" that the only way to control dust on the stoper drills when used on the longwall was to drill with water. (Tr. 131). The drills were close enough to each other that they could be seen and heard by the miners. Nielson was at a location where he could have seen and heard the first drill operating. Turner, a mechanic, and Cox, a fireboss, testified that miners on the section were well aware of the hazard created by the drill dust and knew that face ventilation would not control the dust. (Tr. 128-30; 146-49). Jensen testified that miners complained to him about the lack of water on the drills. (Tr. 81). Although these miners may not have been well versed on the requirements of section 72.630, they knew that the drill dust was not being dispersed and carried away. This violation should have been obvious to mine management.

It appears that the violation had only existed for a short time and Genwal had never been placed on notice by MSHA that greater efforts were necessary to comply with the standard. Nevertheless, miners and an employee in the safety department had complained about the lack of dust control for the drills. Mine management was put on notice by its own employees that greater efforts were necessary to control dust when installing roof bolts prior to a longwall move. I find that the violation demonstrates a serious lack of reasonable care. Genwal management did not recklessly disregard the standard and their conduct does not rise to the level of intentional misconduct, but I find that the violation was caused by Genwal's aggravated conduct constituting more than ordinary negligence.

D. <u>Penalty Against Garth Nielson</u>

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, any agent of such corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to a civil penalty. 30 U.S.C. § 820(c). The Commission held that "knowingly" means "knowing or having reason to know." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan 1981); *aff'd* 689 F.2d 623 (6th Cir. 1982). "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Richardson*, 3

FMSHRC at 16. "If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." *Id.* "In order to establish section 110(c) liability, the Secretary must prove only that the individual knowingly acted not that [he] knowingly violated the law." *BethEnergy Mines*, Inc., 14 FMSHRC 1232, 1245 (August 1992).

Genwal is a corporate operator and Mr. Nielson was an agent of the corporation. In addition, as discussed above, the corporate operator violated section 72.630. I find that Nielson knowingly authorized the violation of section 72.630. He knew that drill dust was or would shortly be blowing through the longwall where miners were working. He had walked through drill dust being created by a stoper drill on the graveyard shift. He testified that the dust was readily apparent and that he could see dust for 40 to 50 feet from the drill. From where he was positioned when Inspector Gunderson arrived on the day shift, he should have been able to see and hear the first drill operating. A person exercising reasonable care would have realized that the drill dust was not being controlled by the face ventilation because the dust was not carried away from miners in the area. Although he apparently believed that the 53,500 cfm of air provided to the longwall section was sufficient to dilute the dust to meet MSHA's threshold limit value for respirable dust, he had reason to know that the dust was not being carried away from miners as required by the standard. Hazardous short term exposures to silica-bearing dust were highly likely. I credit the testimony of Jensen that miners had complained to him about dust control from stoper drills on the longwall and that he discussed this issue with management while Nielson was present. (Tr. 81-82). Nielson also attended a training class when Jensen instructed miners to use water on stoper drills. (Tr. 80-81). Thus, Nielson knew or had reason to know that face ventilation was not sufficient to carry drill dust away from miners and that using water was the most practical method to control dust. In reaching this conclusion, I did not give weight to the Secretary's evidence concerning the conversation between Nielson and Inspector Gunderson at the time the order was issued. I believe that when Nielson acknowledged that there was a problem, he was most likely confirming that, if Inspector Gunderson was issuing an order of withdrawal, then there was a problem that must be corrected.

The Secretary cites *U.S. v. Gibson*, 409 F.3d 325, 336 (6th Cir. 2005), for the proposition that "mine superintendents or foremen can be said to have knowingly authorized, ordered, or carried out violations of the [Mine Act] when they enter mines and observe violations but do nothing to stop or correct them." (S. Br. 17). In that criminal case, a mine superintendent and foreman were charged with "authorizing, ordering, and carrying out the violation of the mining regulation that requires the mine operator to adopt and follow a ventilation plan." *Id.* Apparently, ventilation curtains were down at the face and throughout the mine so that there was insufficient ventilation at the face. *Id.* at 335. Such a violation would be obvious to anyone with even a casual understanding of underground coal mining. I believe that the language quoted by the Secretary is a little too broad to fit all circumstances. I am not basing my conclusion on the mere fact that Nielson was at the mine and observed the conditions. I find that the Secretary established that Nielson failed to act on the basis of specific relevant facts within his knowledge

that should have given him reason to know that the mine was in violation of section 72.630. Nielson's conduct demonstrated aggravated conduct constituting more than ordinary negligence" on the part of a mine superintendent. *BethEnergy Mines*, Inc., 14 FMSHRC at 1245.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the Crandall Canyon Mine had a history of about 205 paid violations in the two years prior to May 29, 2003. (Ex. G-1). The parties stipulated that Genwal is a large mine operator. The order was abated in good faith. The violation was serious and Genwal was negligent. The penalty assessed in this decision will not have an adverse effect on Genwal's ability to continue in business. Based on the penalty criteria, I find that a penalty of $6,000.00 is appropriate for this violation.

The Secretary did not present evidence with respect to the penalty criteria for Mr. Nielson. *See Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997). There is no evidence that Mr. Nielson has a history of previous violations of the Mine Act. There is no evidence concerning his income and family obligations. The parties stipulated that the proposed penalty will not affect his "ability to continue in business." (Ex. J-1 ¶ G). The violation was serious, Nielson's negligence was high, and he was the mine superintendent. He rapidly abated the violation in good faith. Based on the penalty criteria, I find that a penalty of $200.00 is appropriate and that Nielson has the ability to pay the penalty.

IV. ORDER

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

WEST 2004-453 (Genwal)

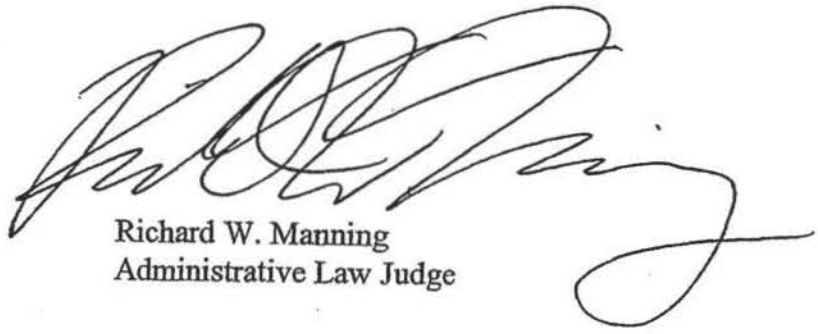
7616128	72.630(a)	$6,000.00
7613354	75.380(f)(3)(iii)	Vacated

WEST 2004-454 (Garth Nielson)

7616128	72.630(a)	$200.00

For the reasons set forth above, Order No. 7616128 is **AFFIRMED** as written and Citation No. 7613354 is **VACATED**. Genwal Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $6,000.00 within 30 days of the date of this decision.

For the reasons set forth above, Garth Nielson violated section 110(c) of the Mine Act and he is **ORDERED TO PAY** the Secretary of Labor the sum of $200.00 within 30 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Certified Mail)

Noelle Holladay, Esq.,Wyatt Tarrant & Combs, 250 West Main St., Suite 1600, Lexington, KY 40507 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington DC, 20001-2021
Telephone: (202) 434-9958
Fax: (202) 434-9949

August 15, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-51-M
Petitioner	:	A. C. No. 24-02196-39845
v.	:	
	:	J C Crusher
JAMES CARNEY CONSTRUCTION,	:	
Respondent	:	

ORDER DENYING REQUEST TO REOPEN
ORDER TO PAY

This case is before me pursuant to an order of the Commission dated April 18, 2005, remanding this matter for further consideration and determination as to whether the operator, James Carney Construction("Carney") is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.[1] In particular, Rule 60(b)(1) provides relief from a final judgment in cases where there has been a "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

This matter arose because Carney failed to answer the Secretary of Labor's ("Secretary") petition for assessment of penalty, and then failed to answer my subsequent show cause order for the failure answer the Secretary's penalty petition. Carney claims he never received the February 2, 2005 show cause order, stating he was out of town on that date. The Secretary indicates that she does not oppose the request to reopen.

The Commission has stated that default is a harsh remedy, and if the defaulting party makes a showing of adequate or good cause for failing to timely respond, the case may be reopened. *Coal Prep. Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept.1995). In addition, the Commission has held pleadings drafted by *pro se* litigants to a less stringent standard than that applied to documents drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992)(*citing Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

Despite Carney's claim of having never received the show cause order, his signature is on the receipt for the show cause order. From Carney's letter, it appears he disagreed with the imposition of the fine, felt that he did not have to pay it, and, thus, ignored court documents

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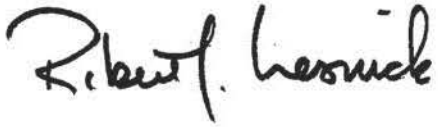
[1]While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied "so far as practicable" Rule 60(b). 29 C.F.R. § 2700.1(b).

sent to him. The Commission makes great efforts to afford due process to all parties even when pleadings are not crafted as artfully or clearly as they could or should be. However, a party's blatant disregard for Commission procedure does not warrant Rule 60(b) relief.

Accordingly, this case is dismissed and the Respondent is **ORDERED** to pay the proposed penalty assessment of $475.00.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified Mail)

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Boulevard, 22nd Floor, Arlington, VA 22209-2296

James Carney, Owner, James Carney Construction, P.O. Box 928, Glasgow, MT 59230

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington DC, 20001-2021
Telephone: (202) 434-9958
Fax: (202) 434-9949

August 17, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-311-M
Petitioner	:	A. C. No. 48-01497-06604 A
v.	:	
	:	General Chemical Mill
DEWAYNE HERREN,	:	
Respondent.	:	

ORDER DENYING REQUEST TO REOPEN
ORDER TO PAY

This case is before me pursuant to an order of the Commission dated October 6, 2004, remanding this matter for further consideration and determination as to whether the miner, DeWayne Herren, is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.[1] In particular, Rule 60(b)(1) provides relief from a final judgment in cases where there has been a "mistake, inadvertence, surprise, or excusable neglect." Fed.R.Civ.P. 60(b)(1).

This matter arose because Herren failed to notify the Secretary of Labor ("Secretary") that he wished to contest the proposed penalty assessed to him for an alleged violation of Section 110(c) of the Mine Act within 30 days of receipt of the proposed penalty assessment. In his request for relief, Herren claims he did not defend against the proposed penalty because of inadvertence or mistake. He contends he was informed by an MSHA investigator that he would need to be interviewed prior to any hearing taking place. However, Herren did not give an interview, believing "the whole thing would then go away." Resp. Affidavit at 2. The Secretary filed a response to Herren's request to reopen, arguing that Herren seems to have deliberately avoided an interview with MSHA, which, if true, undermines Rule 60(b). Sec. Mot. at 2. The Secretary also requested "that the Commission remand the case to an administrative law judge with instructions to provide both parties with an opportunity to present relevant evidence and legal arguments." Sec. Mot. at 2-3.

Upon review of the record and the Secretary's request, on March 24, 2005, I issued an order to the Secretary to submit a statement indicating the type of additional information she was seeking from Herren and the type information she intended to submit. Accordingly, the Secretary filed a response, requesting that Herren's request be denied, claiming MSHA employees made

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[1]While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied "so far as practicable" Rule 60(b). 29 C.F.R. § 2700.1(b).

several attempts to contact Herren, either by telephone, in person, or by letter, to no avail. Sec. Reply Apr. 18 Brief at 3-4. Moreover, in a sworn affidavit, the investigator claims he never told Herren that a civil penalty hearing could be avoided by Herren's refusal to be interviewed by an MSHA official. Thomas Marvke Affidavit at 2. The Secretary argues that Herren's deliberate refusal to respond to the proposed penalty assessment is not grounds for Rule 60(b) relief. Sec. Reply Apr. 18 Brief at 2-3.

In response, Herren, through counsel, contends he "did not understand the consequences of his actions, but rather this was his way of defending himself when he knew that he was not at fault in the subject accident." Resp. Apr. 29 Brief at 2. Herren argues that "defaults are not favored," and that "when . . . the defending party, *for whatever reason*, and in particular through inadvertence or mistake, fails to defend himself and yet maintains that he has a good defense to the allegations, then justice requires that the defendant be allowed to present his defense." *Id.* (emphasis added).

Based upon the arguments presented, I deny Herren's request to reopen the penalty assessment. While Herren accurately argues that defaults are not favored, he is wholly inaccurate in stating that if "*for whatever reason*" he "fails to defend himself and yet maintains that he has a good defense . . . then justice requires that [he] be allowed to present his defense." Justice does not require an adjudicative body to ignore or excuse a litigant's conscious decision to circumvent the judicial process.

Herren admits avoiding MSHA officials for the purpose of making his case "go away." I do not believe the MSHA investigator suggested to Herren in any way that dodging the interview would be a strategy for averting payment or a hearing. Further, I am not convinced that Herren did not understand the consequences of his actions. But even if he did not, a party's blatant disregard for Commission procedure does not warrant Rule 60(b) relief. Herren was provided an opportunity to question the evidence presented against him, to present his own defense, and to have the matter heard before an impartial adjudicator. Mr. Herren chose at his peril to forego this process.

For the foregoing reasons, Herren's request to reopen the penalty assessment is **DENIED**. Herren is **ORDERED TO PAY** the proposed penalty assessment.

Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified Mail)

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Boulevard, 22nd Floor, Arlington, VA 22209-2296

Frank D. Neville, Esq., Williams, Porter, Day & Neville, P.C., 159 North Wolcott, Suite 400, P.O. Box 10700, Casper, WY 82602

/mvc

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 19, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2004-330-M A. C. No. 04-01299-24394
v.	:	Docket No. WEST 2004-472-M A. C. No. 04-01299-32142
ORIGINAL SIXTEEN TO ONE MINE, INC. Respondent	:	Sixteen to One Mine

DECISION

Appearances: Isabella M. Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of the Petitioner;
Michael M. Miller, President, Original Sixteen to One Mine, Inc., Alleghany, California, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994) the "Act," charging Original Sixteen to One Mine, Inc. (Sixteen to One) with violations of mandatory standards and proposing civil penalties for the violations. The general issue before me is whether Sixteen to One violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

Docket No. 2004-472-M

Citation No. 6353514

Citation No. 6353514, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 57.4560(a) and charges as follows:[1]

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

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also

The mines portal timber-set entrance at the 800' foot level did not have a fire suppression system capable of controlling fire in the early stages. Two holes of the four sprinkler heads have been plugged off, the drain plug on the end was missing, and the valve to the system was turned off. The portal consists dry timber sets and is considered main fresh air intake. Conditions near the mine entrance contribute to discrete hazards of fire conditions in that diesel fuel was stored and a combustible building was set up within the 100' limitations, creating fire and smoke hazards. This condition has been cited twice in the last three years along with several verbal warnings to the principal officer in charge. The principal officer was fully aware of the standard and the warnings which engages him in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard provides that "[f]or at least 200 feet inside the mine portal or collar timber used for ground support in intake openings and in exhaust openings that are designated as escapeways shall be-

(a) Provided with a fire suppression system, other than fire extinguishers and water hoses, capable of controlling a fire in its early stages; or

(b) Covered with shotcrete, gunite, or other material with equivalent fire protection characteristics; or

(c) Coated with fire-retardant paint or other material to reduce its flame spread rating to 25 or less and maintained in that condition."

The 800 Portal is lined with timber on the ceiling and sides and has a fire suppression sprinkler system running along the roof of the portal. The sprinkler system is designed to have four sprinkler heads that are activated when the ambient air reaches a certain temperature. According to the credible testimony of Inspector James Weisbeck of the Department of Labor's Mine Safety and Health Administration (MSHA), during his inspection of the Sixteen to One Mine on March 10, 2004, he found that the mine's portal timber-set entrance at the 800 foot level (the 800 Portal) did not have a fire suppression system capable of controlling fire in its early stages. His testimony is

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

undisputed that two holes of the four sprinkler heads had been plugged off thereby preventing their use; that the drain plug at the end of the system was missing thereby denying pressure to the system and thereby permitting all of the water in the system to drain out; and that the valve to the system was turned off thereby preventing any water from entering the system (See photographic Exhibits P-20, P-22 and P-19, respectively).

At hearing, Respondent's President, Michael Miller, appeared to suggest that, while the sprinkler system was admittedly not functioning, there was nevertheless a vinyl pipe running through the cited area and that heat from a fire would melt the vinyl causing it to burst and dump its water on nearby flames. Even assuming, *arguendo,* that Mr. Miller is an expert in fire suppression systems, his bald assertion that a melted vinyl pipe would provide adequate fire protection, is without factual support. Without such factual support, I can give his opinion but little weight. It is also patently obvious that if the vinyl pipe would melt and burst near the entrance to the mine portal then all the water would drain out at that point leaving no water to quench any flames further inby. In any event, the undisputed evidence shows that the main valve depicted in the photographic evidence (Exhibit P-19) was closed, thereby depriving even the vinyl pipe of water. Accordingly, even the purported alternative fire suppression system, based upon the melting of vinyl pipe, would have been inoperable. Under the circumstances, I find that Respondent failed to comply with the option provided in the cited standard to provide a fire suppression system.

The cited standard also gives a mine operator the option of coating mine portal timbers with fire-retardant paint, but the timbers in the 800 Portal were only partially coated with fire-retardant paint. Respondent had been cited on at least three prior occasions (August 1999, May 2001, and March 2003) because the fire sprinkler heads were taken off during the winter "freeze and thaw" season. It is undisputed that each time these prior citations were issued, Respondent was informed that he could comply with this standard if he painted the portal timbers with fire-retardant paint. In fact, one year prior to the subject citation, Weisbeck issued a citation at the 800 Portal for a violation of the same standard and terminated it when Respondent fixed the sprinkler system. It is undisputed that at the time the prior citation was issued, Respondent started painting the timbers in the 800 Portal but when half the timbers were painted, Respondent ran out of paint and did not complete the job.

Finally, it may reasonably be inferred from the credible record, including the photographic evidence, (Exhibits P-20 through P-22), that the operator also failed to comply with the third option provided in the cited standard i.e. that it covered the area with shotcrete, gunite or other material with equivalent fire protection characteristics.

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

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

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

The gravity was also greatly heightened by the inadequacy of the fire warning system. It is undisputed that the stench warning system was not functioning and that the mine telephone system was not always capable of providing communication to the underground miners. According to the undisputed testimony of Inspector Weisbeck, the timber-sets in the cited area were also treated with creosote and would cause any fire to be even more gassy. In addition, Weisbeck observed that many of the timbers remained without fire-retardant paint. His conclusions that the air was intaking at the time he issued the citation and that such smokey conditions could cause serious injuries to the miners underground were also reasonable, supported by his credible testimony, and sufficient to find that the violation was "significant and substantial" and of high gravity.

I also find the violation was a result of high operator negligence and "unwarrantable failure". In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence", "thoughtlessness", and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991).

The Commission has also considered other factors in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's effort in abating the violative condition. *Lexicon, Inc.*, 24 FMSHRC 1014, 1024 (November 2002). Moreover,

evidence of a prior history of violations may be an aggravating factor for purpose of determining whether a violation is the result of an unwarrantable failure because prior citations place operators on notice that greater compliance is required.

In this regard, the operator's agent, Ian Haley, acknowledged to Inspector Weisbeck that he was aware that the endcap for the sprinkler system had been missing and he opined that the fire suppression system was not functioning because of this defect, i.e. because the water had drained out of the open pipe. [2] Since the operator's agent thereby admittedly had actual knowledge of the violative condition and took no corrective action, the violation was clearly the result of high negligence and "unwarrantable failure."

Weisbeck also determined from his inspection of MSHA's file on Respondent's mine that Respondent had been cited for the same hazard-sprinkler heads missing and the water valve turned off for the fire sprinkler system at the 800 Portal – on three prior occasions. Weisbeck issued the latest of these three citations in March 2003, and asked Haley why the painting of the timbers in the 800 Portal was not completed. It is not disputed that Haley told Weisbeck that they had run out of fire-retardant paint and that Miller was not going to buy any more.

After the March 2003 inspection, Weisbeck inspected Respondent's mine three more times and, although there was no violation to cite because the sprinkler system was functional, he noticed that Respondent had not completed painting the 800 Portal's timbers with fire-retardant paint. During the last of those three visits and in anticipation of another winter "freeze and thaw" season, it is undisputed that Weisbeck again brought the incomplete paint job to Respondent's attention and Respondent assured him that they would complete the painting of the 800 Portal.

The evidence thereby establishes that as a result of the prior citations and verbal warnings given by Weisbeck and other MSHA inspectors, Respondent knew that in order to comply with the cited standard he needed to maintain the fire sprinkler system in a functional condition or to completely paint the timbers in the 800 Portal with fire-retardant paint. These factors therefore provide an independent basis for finding high negligence and "unwarrantable failure."

Citation No. 6353511

Citation No. 6353511 alleges a violation of the standard at 30 C.F.R. § 57.11051(a) and charges as follows:

> The alternate secondary escape route was not inspected for a safe and travelable condition along with not being clearly marked to indicate the way of escape. The original secondary escape route had a gob wall failure on the 1700 making the route impassible. The alternate

[2] Haley acknowledged at hearings that he was "for MSHA purposes" the operator's mine manager.

route was decided to be on and across the 1300 to the 49 winze in which all the miners have not traveled for at least a month or more. Creating hazards of confusion, disorientation, entrapment and mine rescue not knowing the designated route. Five miners work in the underground mine daily.

The cited standard, 30 C.F.R. § 57.11051(a), provides, in relevant part, that "[e]scape routes shall be-(a) [i]nspected at regular intervals and maintained in a safe, travelable condition...". It is undisputed that mine manager Haley was aware, at least several days before this citation was issued, that the prior designated secondary escapeway (on the 1700 level) had a gob wall failure making the route impassable. It is also undisputed that the alternate route, on the 1300 level to the 49 winze, contained a hole five to six feet deep and six to eight feet in diameter with only a plank to cross it. Weisbeck's testimony is also undisputed that while traveling the 1300-level route the inspection party had to "belly crawl" over certain areas. Within this framework of evidence, I have no difficulty in finding that the violation is proven as charged.

The violation was clearly also of a serious nature. Weisbeck interviewed the underground miners and found that two were unaware of the newly purported designated secondary escapeway at the 1300 level. In addition, there was no marking or signage to indicate that it had been designated as the secondary escapeway. Under these circumstances, some miners would not, in certain emergencies, find a safe escape route. In addition, as noted by Inspector Weisbeck, rescue teams would not know where to look for miners injured or overcome by smoke who might have become lost in trying to escape without knowledge of the purported new secondary escapeway.

I also find that the violation was a result of high operator negligence. Mine manager Haley admittedly knew for some time that the previously designated secondary escapeway had become blocked by a gob failure and, should have known from having traveled the purported newly designated secondary espcapeway, that it was not a safe and suitable route. His negligence, and therefore the operator's negligence, it is further enhanced by the fact that not all miners were told of the newly designated secondary escapeway on the 1300 level and that no signage or markings were in place to identify that route as the secondary escapeway.

Docket No. WEST 2004-330-M

Citation No. 6353507

Citation No. 6353507, as amended, alleges a violation of the standard at 30 C.F.R. § 57.4101 and charges as follows:

> No readily visible signs prohibiting smoking and or open flames were posted at the two fifty five gallon fuel barrels used for storage of the air compressors fuel supply. The containers were not sealed tight and had a 12-volt pump in the opening of the barrel, creating fire or explosion hazards in an area near the lower shop and the mine portals air intake area where miners work daily.

The cited standard provides that "[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists". There is no dispute that there were no signs prohibiting smoking and or open flames posted at the two 55 gallon fuel barrels used to supply diesel fuel to the air compressors as cited. There is also no dispute that the containers were not sealed tight and one had a twelve-volt pump in the opening of the barrel. According to the undisputed testimony of Inspector Weisbeck, each had a two-inch opening with a three-quarters to one-inch hole in the opening. One had an electric cord near the top of the barrel providing power to a twelve-volt pump. The credible evidence also establishes that the barrels and the surrounding ground were wet with fuel.

While the operator's witnesses acknowledged that diesel fuel was contained in the barrels for at least several days at a time, Mr. Miller, on behalf of the operator, maintained that the barrels were not used for storage. However, Miller misconstrues the nature of the violation charged under the cited standard. The issue is whether "readily visible signs prohibiting smoking and open flames [were] posted where a fire or explosion hazard exists". It is therefore irrelevant whether or not the fuel barrels were "used for storage" since it is admitted that they contained combustible fuel with potential ignition sources thereby presenting a fire or explosion hazard.

I accept Inspector Weisbeck's assessment that the violation was unlikely to cause injury or illness. Weisbeck testified that conditions were damp and that there was no torch work or grinding nearby. Weisbeck also observed that a fire extinguisher was located nearby. He found only "moderate" negligence based on an admission by Mr. Haley that the condition was an "oversight". I find no reason to modify Weisbeck's findings.

Citation No. 6353508

Citation No 6353508 alleges a violation of the standard at 30 C.F.R. § 57.4102 and charges as follows:

> Under the air compressor unit located at the lower shop and portal area there was combustible liquid spillage and leakage with little fuel puddles up under the unit along with fuel oil soaked dirt. There was [sic] several little puddles estimated 3" by 5" that appeared reddish in color from the red fuel oil used which appeared to have existed for weeks from the saturation levels in the dirt under the unit, creating potential fire and smoke hazards in an area close to the air intake of the mine portal. Four to five miners work on the surface area and in the underground mine daily.

The cited standard, 30 C.F.R. § 57.4102, provides that "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard."

The testimony of Inspector Weisbeck regarding this violation is essentially undisputed. According to his credible testimony there were puddles of fuel beneath the compressor unit approximately one-quarter inch deep. The area was saturated suggesting to Inspector Weisbeck that the condition had existed for some time. According to Weisbeck, the hazard, of low gravity, would be from fire or smoke created by ignition of the fuel oil, possibly from a cigarette. He found

operator negligence to be "moderate" apparently based on the fact that the area had been saturated thereby indicating that the condition had existed for some time. While Mr. Miller thought the spills were "fresh" because he saw only a few drops of fuel actually fall, I accept the inspector's credible testimony and find that the violation is proven as charged but with low gravity and moderate negligence.

Citation No. 6353509

Citation No. 6353509 alleges a violation of the standard at 30 C.F.R. § 57.4533(a) and charges as follows:

> An estimated 8' by 24' foot long trailer building has been set up within 56' feet of the mine openings portal and air intake. The building is not of a non-combustible material nor does it meet a fire resistance rating of no less than one hour. Creating fire and smoke hazards near the mine portal air intake in the event of a fire and wind conditions [sic]. Five miners work in the underground mine daily.

The cited standard, 30 C.F.R. § 57.4533(a), provides that "[s]urface buildings or other similar structures within 100 feet of mine openings used for intake air or within 100 feet of mine openings that are designated escapeways in exhaust air shall be-
(a) Constructed of noncombustible materials..."
(b) Constructed to meet a fire resistance rating of no less than one hour; or
(c) Provided with an automatic fire suppression system; or
(d) Covered on all combustible interior and exterior structural surfaces with noncombustible material or limited combustible material, such as five-eighth inch, type "X" gypsum wallboard.

Inspector Weisbeck's testimony is undisputed that the cited trailer was within 56 feet of the mine's opening portal and was not made of non-combustible material meeting a fire resistant rating of no less than one hour. It is also apparent that no automatic fire suppression system was provided on the outside of the trailer (Exhibits. P-7 and P-8). It is also clear from Weisbeck's credible testimony that this portal was an air intake for at least part of the time. Mr. Miller agrees. The violation is accordingly proven as charged. Inspector Weisbeck found that the hazard of an ignition and fire causing smoke and moving into the air intake of the mine thereby exposing the underground miners to the related dangers, was "unlikely".

Mine Manager Haley acknowledged that he told Sixteen to One President, Michael Miller, that it would be a violation to place the trailer where it was subsequently found by the inspector. Haley therefore wanted to place the trailer more than 100 feet away from the mine portal but Miller overruled him and had the trailer placed where it was subsequently found by the inspector, only 56 feet from the portal. Under the circumstances, the violation was intentional and in flagrant disregard of the mandatory standard. It was therefore the result of the highest form of "negligence."

Citation No. 6353510

Citation No. 6353510 alleges a violation of the standard at 30 C.F.R. § 57.4431(a)(1) and charges as follows:

Unburied combustible liquids are being stored within 75' feet of the mine openings portal and air intake. Two 55 gallon barrels of diesel fuel oil were stored for the air compressors weekly use at the lower shop area. The barrels had a 12-volt pump inserted into the barrel for fueling the compressor along with some spillage or leakage around the compressor and barrels. Creating fire and smoke hazards in the event a fire was to break out in the area. Five miners work in the underground mine daily.

The cited standard, 30 C.F.R. § 57.4431, provides, in relevant part, as follows:

(a) On the surface, no unburied flammable or combustible liquids or flammable gases shall be stored within 100 feet of the following:
(1) Mine openings or structures attached to mine openings.

There is no dispute that the two 55 gallon barrels of diesel fuel were positioned within 75 feet of the mine portal opening as alleged. While acknowledging that diesel fuel was indeed contained in the barrels as cited and that such fuel would remain in the barrels for up to two days at a time, Respondent argues that the fuel was nevertheless not "stored" in those barrels and that therefore there was no violation of the cited standard. Since the term "store" is authoritatively defined as "a source from which things may be drawn as needed" and is synonymous with the term "hold", I find Respondent's argument to be without merit. See Webster's Third New International Dictionary (Unabridged) 2252 (2002).

Inspector Weisbeck found no nearby ignition sources and concluded that injuries were "unlikely". He cautioned however that should there be fire and smoke, there was a danger of smoke inhalation to the miners underground. Weisbeck found only moderate negligence, relying upon the statement by Mr. Haley that he was not aware that he could not store fuel within 100 feet of the mine portal.

Citation No. 6353512

Citation No. 6353512 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.4360(a) and charges as follows:

The fire alarm system was not functional nor capable of promptly warning every person working underground in the event of a fire. The Mercaptan Stench Cartridge located at the upper shop and old compressor area was totally missing from its location along with the likelihood of it being in a [sic] air lock in this configuration. The inlet tube from the cartridge to the mine air system was in place and it appeared the cartridge had been missing for a while. Conditions at the portal present discrete hazards at this time and contribute to the likelihood based on continuous mining operations. Five miners work in the underground mine daily.

The cited standard, 30 C.F.R. § 57.4360(a), provides that "[f]ire alarm systems capable of promptly warning every person underground, except as provided in paragraph (b), shall be provided and maintained in operating condition." The operator does not claim that the exception provided in

paragraph (b) of the cited standard is applicable herein.

The stench system was attached to the compressed air flow system to the mine. The system can be manually activated by puncturing the stench cartridge, sending a "rotten cabbage" smell throughout the mine and thereby signaling the miners to evacuate. There is no dispute that the cited stench fire alarm system at the Sixteen to One mine was indeed not functional. It is further undisputed that the Mercaptan Stench Cartridge was absent thereby preventing the system from operating. According to Inspector Weisbeck, miners and the miners representative told him that they had removed an expired cartridge and had no others to replace it. According to them, the cartridge had been missing for weeks. According to Weisbeck, even if the cartridge had been replaced there would not have been enough pressure to operate the stench system since the compressor was not working.

Respondent argues that it was not necessary to have the stench warning system in a working condition because it could provide warning by way of the mine telephone system. Mine Manager Haley testified that either the stench system or the telephone system could be used to warn miners of a fire. It is undisputed, however, that the miners were trained in a fire alarm system based on the stench system. As noted, the stench system depends upon the transmission by mine ventilation of the strong and distinctive odor of rotten cabbage. Since the miners were trained in the use of the stench warning in the event of fire and would therefore, in the event of a fire, expect to receive such a warning, I find that it was the duty of the mine operator to maintain it in a functioning condition. The telephone system would not, in any event, be a reliable means of communicating to all miners. Inspector Weisbeck testified credibly that, on three or four occasions during his six prior inspections, underground miners could not be reached by the mine telephone.

I also find that the violation was of high gravity and "significant and substantial". I agree with the inspector that it was reasonably likely for fatalities to occur since there was no other reliable means to alert miners in the event of fire. I further find that the violation was the result of high operator negligence. Sixteen to One President Miller acknowledged that he had ordered the removal of the stench cartridge in the summer of 2003, at least five months before the citation at bar was issued. Miller further testified that he then thought there were only outdated cartridges available at the mine. When later told that a working cartridge was found at the mine, Miller refused to allow it to be installed.

Civil Penalty Analysis

In assessing a civil penalty under Section 110(i) of the Act, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the 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 the violation. Sixteen to One has a modest history of violations. It is a small size business and achieved appropriate compliance after notice of the violations herein. Gravity and negligence have been previously discussed. Any claim regarding the effect of penalties on Respondent's ability to continue in business was barred by order of the undersigned judge because of its failure to have

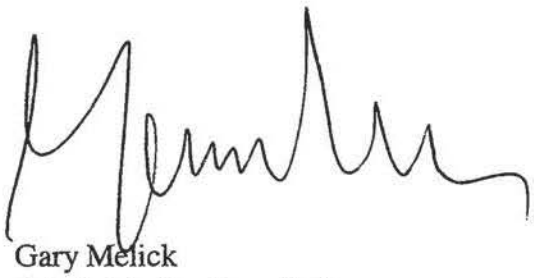
responded to the Secretary's discovery requests in this regard.

ORDER

Citations No. 6353507, 6353508, 6353509, 6353510, 6353511, 6353512 and 6353514 are affirmed and the Respondent is directed to pay the following civil penalties, totaling $4,180.00, within 40 days of the date of this decision:

Docket No. WEST 2004-472-M
Citation No. 6353511-$500.00, Citation No. 6353514-$2,000.00.

Docket No. WEST 2004-330-M
Citation No. 6353507-$60.00, Citation No. 6353508-$60.00, Citation No. 6353509-$500.00, Citation No. 6353510-$60.00, Citation No. 6353512-$1,000.00.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (First Class Mail)

Isabella M. Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105

Michael M. Miller, President, Original Sixteen to One Mine, Inc., P.O. Box 909, 527 Miners Street, Alleghany, CA 95910

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