

## SEPTEMBER AND OCTOBER 2009

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**COMMISSION DECISIONS AND ORDERS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 9, 20009

PETER J. PHILLIPS

v.

A&S CONSTRUCTION COMPANY

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Docket No. WEST 2008-1057-DM

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

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). The case raises the question of whether an order of temporary reinstatement remains in effect after the Secretary of Labor has made a determination that facts revealed from an investigation by the Mine Safety and Health Administration (“MSHA”) regarding a miner’s discrimination complaint do not constitute a violation of section 105(c) of the Act.<sup>1</sup> Administrative Law Judge David Barbour concluded that

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<sup>1</sup> Section 105(c) provides in part:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act . . . .

(2) Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary’s receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate

such an order does not remain in effect after MSHA's determination that no discrimination occurred. Accordingly, he dissolved his earlier order temporarily reinstating Peter J. Phillips, an employee of A&S Construction Company ("A&S"), and dismissed the temporary reinstatement proceeding. 30 FMSHRC 1119, 1123 (Nov. 2008) (ALJ). Mr. Phillips filed a petition for discretionary review, challenging the judge's determination, which the Commission granted. For the reasons that follow, the judge's determination stands as if affirmed.

## I.

### Factual and Procedural Background

No factual record has been developed in this case. The procedural background of the case is set forth in the judge's decision and is briefly summarized here. Mr. Phillips was discharged by A&S on September 13, 2007. *Id.* at 1119. On February 11, 2008, Mr. Phillips filed a

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reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner . . . alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. . . .

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. . . .

30 U.S.C. § 815(c).

complaint with MSHA alleging that his discharge was motivated by protected safety complaints in violation of section 105(c)(1) of the Mine Act. *Id.* MSHA conducted a preliminary special investigation of the complaint and determined that it was not frivolous. *Id.* The Secretary filed an application with the Commission seeking the temporary reinstatement of Mr. Phillips. *Id.* The parties agreed that a hearing on the Secretary's application was unnecessary and that Mr. Phillips should be economically reinstated.<sup>2</sup> *Id.* On June 6, 2008, the judge ordered Mr. Phillips' economic reinstatement. *Id.*

As part of the economic reinstatement, the judge ordered the Secretary to report on July 2, and August 1, 2008, regarding the status of her determination as to whether to bring a discrimination complaint on Mr. Phillips' behalf. Unpublished Order dated June 6, 2008. On each of those dates, counsel for the Secretary stated that the determination had not yet been made. 30 FMSHRC at 1120.

Approximately three months later, on November 10, 2008, the Commission received a notice that the Secretary did not intend to proceed under section 105(c)(2) of the Mine Act on Mr. Phillips' behalf. *Id.* Counsel for the Secretary stated that it was the Secretary's position that the order of temporary economic reinstatement must remain in effect until there is a final order of the Commission disposing of Mr. Phillips' case, including if Mr. Phillips decided to proceed on his own behalf under section 105(c)(3). *Id.* Attached to the Secretary's notice was a November 3, 2008, letter to Mr. Phillips from MSHA stating that MSHA had "determined that facts disclosed during the investigation do not constitute a violation of Section 105(c)" and that "[t]herefore, discrimination, within the confines of the Mine Act, did not occur." *Id.* (citations omitted).

On November 10, the Commission also received from A&S a motion to schedule a hearing to determine whether the order of temporary reinstatement should be rescinded in light of the Secretary's determination. *Id.* The judge scheduled the matter for oral argument.

Following oral argument, the judge determined that an order of temporary reinstatement is no longer viable after the Secretary has determined that the facts underlying a miner's complaint do not constitute a violation of section 105(c). *Id.* at 1121-23. The judge noted that the authority to issue an order of reinstatement arises under section 105(c)(2), which provides that such an order remains in effect "pending final order on the complaint." *Id.* at 1121. He explained that the complaint referred to is the miner's complaint that is investigated by the Secretary, and that a final order on the complaint is made when the Secretary determines that the facts alleged in the miner's complaint do not constitute a violation of section 105(c). *Id.* The judge reasoned that if a miner wishes to proceed under section 105(c)(3), the miner must file a new complaint, which is separate from the Secretary's application for temporary reinstatement.

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<sup>2</sup> The parties agreed that Mr. Phillips should receive the same pay and benefits he would have received prior to his discharge, as if he were still working. Unpublished Order dated June 6, 2008.

*Id.* at 1121-22. Accordingly, the judge dissolved the order of temporary reinstatement and dismissed the temporary reinstatement proceeding. *Id.* at 1123.

On December 15, 2008, Mr. Phillips filed a petition for discretionary review challenging the judge's order with the Commission. In addition, on that same date, Mr. Phillips filed an action on his own behalf under section 105(c)(3), which has been docketed as WEST 2009-286-DM, and assigned to Administrative Law Judge Richard Manning. On December 23, 2008, the Commission granted Mr. Phillips' petition and stayed the judge's order dissolving the order of temporary economic reinstatement, pending the Commission's decision. The Commission granted the Secretary leave to participate as *amicus curiae*.

A&S argues that the Commission should affirm the judge's order dissolving the temporary reinstatement order. A&S Br. at 5. It contends that the plain language of the Mine Act supports the judge's determination that "pending final order on the complaint" refers to the miner's complaint investigated by the Secretary, and that a final order on the complaint is made when the Secretary makes a determination of no discrimination. *Id.* at 9-10. Drawing an analogy to sections 105(a) and 105(b) of the Mine Act, A&S notes that a "final order" can arise from a notice issued by the Secretary under section 105 and need not be a final Commission order. A&S Resp. Br. at 3-5.

In her *amicus* brief, the Secretary contends that the judge erred in dissolving the temporary reinstatement order. S. Br. at 8-24. She contends that the plain meaning of section 105(c)(2) requires a temporary reinstatement order to remain in effect until there has been a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under section 105(c)(2) or by the miner under section 105(c)(3). *Id.* at 10-15, 24. The Secretary asserts that such a reading is also supported by the structure of the Mine Act, the legislative history, and the purpose of section 105(c)(2). *Id.* at 15-24. Finally, she states that even if section 105(c)(2) does not have a plain meaning, the Commission should accept the Secretary's interpretation because it is reasonable and furthers the protection to miners contemplated by section 105(c)(2). *Id.* at 1, 23.

## II.

### Disposition

#### A. Analytical Framework

The question presented in this case is whether, under the provisions of section 105(c) of the Mine Act, a temporary reinstatement order remains in effect after the Secretary has determined that the allegations made by the miner in his or her discrimination complaint filed with MSHA do not constitute a violation of section 105(c)(1) of the Mine Act.

In considering this question of statutory construction, we are mindful that our first inquiry is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. See *Chevron*, 467 U.S. at 842-43; accord *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency’s interpretation of the statute may not be applied “to alter the clearly expressed intent of Congress.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). In ascertaining the meaning of the statute, courts utilize traditional tools of construction, including an examination of the “particular statutory language at issue, as well as the language and design of the statute as a whole,” to determine whether Congress had an intention on the specific question at issue. *Id.*; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a “*Chevron I*” analysis. See *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

If a statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a “*Chevron II*” analysis, is required to determine whether an agency’s interpretation of a statute is a reasonable one. See *Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Deference is accorded to “an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). Where the statute is silent or ambiguous, the agency’s interpretation is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. See *Joy Techs., Inc. v. Sec’y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996) (citing *Chevron*, 467 U.S. at 843), *cert. denied*, 520 U.S. 1209 (1997); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

The Commissioners are evenly divided regarding whether the judge correctly determined that a temporary reinstatement order no longer remains in effect after the Secretary has made a determination of no discrimination. Commissioners Duffy and Young would affirm in result the judge’s dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. Chairman Jordan and Commissioner Cohen would reverse the judge’s order. The effect of a split decision is to allow the judge’s order dissolving the temporary reinstatement order and dismissing the temporary reinstatement proceeding to stand, as if affirmed.<sup>3</sup> See *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff’d on other grounds*, 969 F.2d 1501 (3d Cir. 1992). The separate opinions of the Commissioners follow.

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<sup>3</sup> Because the judge’s order stands as if affirmed, we hereby lift the stay we issued on December 23, 2008. Accordingly, the order of temporary economic reinstatement is hereby dissolved and this temporary reinstatement proceeding is hereby dismissed.

B. Separate Opinions of the Commissioners

Commissioners Duffy and Young, in favor of affirming in result the judge's order:

1. Statutory Language

The authority to order temporary reinstatement is found in section 105(c)(2) of the Mine Act. Under the terms of section 105(c)(2), after the Secretary has filed an application stating that a miner's complaint of discrimination filed with MSHA was not frivolously brought, the Commission must order the "immediate reinstatement of the miner *pending final order on the complaint.*" 30 U.S.C. § 815(c)(2) (emphasis added). In order to determine how long a temporary reinstatement order may permissibly remain in effect, we must consider what Congress meant by "final order" and "complaint." We first consider what is meant by "complaint."

Reading section 105(c)(2) in context, we conclude that the provision that a temporary reinstatement order remains in effect "pending final order on the complaint" clearly refers to the "complaints" filed under section 105(c)(2) and does not extend to the miner's "action" filed under section 105(c)(3). We base this conclusion on the usage of the term "complaint" in sections 105(c)(2) and 105(c)(3).

More specifically, section 105(c) refers to two complaints: the miner's complaint made to, and investigated by, the Secretary under section 105(c)(2); and the complaint filed by the Secretary with the Commission under section 105(c)(2) if, upon investigation, the Secretary determines that section 105(c)(1) has been violated.

The legitimacy of the miner's complaint is determined by the Secretary in a two-phased process. First, the Secretary determines whether the miner's complaint has been "frivolously brought" through an initial investigation. 30 U.S.C. § 815(c)(2). If the complaint is not frivolous, the Secretary files an application with the Commission to temporarily reinstate the miner. *Id.* The standard of the initial determination, which requires only that a miner's complaint must appear to have merit, is set low so that a miner may be reinstated while the Secretary conducts a more thorough investigation. *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000) ("The Mine Act's legislative history defines the 'not frivolously brought' standard as indicating that a miner's 'complaint appears to have merit.'" (citation omitted). Second, if, after further investigation, the Secretary determines that a violation of section 105(c) has occurred, the Secretary files a complaint with the Commission on the miner's behalf, which validates the initial finding of non-frivolousness and the miner's initial complaint of discrimination. In such circumstances, the Secretary is acting on the miner's complaint, which has merged with the Secretary's complaint. Temporary reinstatement continues until there is a final order on the miner's complaint as advanced by the Secretary in the section 105(c)(2) proceeding.

This contrasts with the terms of section 105(c)(3). Under that section, if the Secretary, upon investigation, determines that section 105(c)(1) has not been violated, the miner has the right to file a new, separate “action” charging discrimination with the Commission. Section 105(c)(3) also describes the time within which the Secretary must notify the miner of that negative determination as being within 90 days after the receipt “of a complaint filed under paragraph (2).” 30 U.S.C. § 815(c)(3). We conclude that Congress’s reference to the documents filed under section 105(c)(2) as “complaints” and to the filing of an “action” under section 105(c)(3) was intentional.<sup>1</sup> See *Russello v. United States*, 464 U.S. 16, 23 (1983) (providing that where Congress uses a particular phrase in one section but omits it in another, the difference in language is presumed to be intentional). Therefore, based on the plain language of sections 105(c)(2) and (c)(3), a temporary reinstatement order remains in effect pending final order on the miner’s complaint as advanced by the Secretary under section 105(c)(2), but does not extend to the pendency of an action under section 105(c)(3).

We next consider what is meant by the term “final order” in section 105(c)(2). The term “order” is used in section 105(c) to refer to action by the Commission in terms of issuing an order of temporary reinstatement; issuing an order affirming, modifying, or vacating the proposed order set forth in the Secretary’s complaint; or issuing an order dismissing or sustaining a miner’s charges under section 105(c)(3). In contrast, sections 105(c)(2) and 105(c)(3) consistently refer to the Secretary’s conclusion regarding whether a violation of section 105(c)(1) had occurred as a “determination.” Thus, the Secretary’s conclusion regarding whether her investigation revealed discrimination is a “determination,” not an order. In addition, although the Secretary may include a proposed order for the Commission’s consideration in her complaint filed under section 105(c)(2), only the Commission may issue an “order” under section 105(c).<sup>2</sup>

Furthermore, we find it instructive that section 105(c) describes when a Commission order becomes “final.” Sections 105(c)(2) and 105(c)(3) explicitly provide that the “order” issued by the Commission becomes “*final* 30 days after its issuance.” 30 U.S.C. §§ 815(c)(2) & (c)(3) (emphasis added). Thus, it is clear from the language of the Act that “final order” in section 105(c)(2) refers to a final Commission order.

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<sup>1</sup> We note that section 105(c)(3) refers to a “complainant.” We conclude that the term is used in section 105(c)(3) as a matter of convenience, in order to avoid repetition of the lengthy description of the filing party – that is, any “miner, representative of miners or applicant for employment” whose complaint to the Secretary may have resulted in an investigation under section 105(c)(2). 30 U.S.C. §§ 815(c)(1) & (c)(2).

<sup>2</sup> We reject the operator’s analogy to sections 105(a) and 105(b) to support its argument that a “final order” may arise from a notice issued by the Secretary under section 105 and need not be a final Commission order. A&S Resp. Br. at 3-5. Sections 105(a) and 105(b) are not analogous because they explicitly provide that a notice “shall be deemed a final order of the Commission.” 30 U.S.C. § 815(a) and (b). No such language is set forth in section 105(c).

Considering the language discussed above regarding what is meant by “complaint,” with the language regarding what is meant by “final order,” we conclude that a temporary reinstatement order remains effective pending the final order of the Commission on a complaint filed under section 105(c)(2). Therefore, if the Secretary determines that there has been no discrimination, the temporary reinstatement order would cease to be effective, and the judge should issue an order dissolving the temporary reinstatement and dismissing the temporary reinstatement proceeding.<sup>3</sup> If the Secretary determines that there has been discrimination and files a complaint on the miner’s behalf, the temporary reinstatement order would remain in effect until the judge’s decision disposing of the merits of the complaint, or the Commission’s decision or court’s decision, in the event of appeal, becomes final by the passage of 30 days.

Chairman Jordan argues that the terms of section 105(c)(2) mandate that temporary reinstatement remains in effect until there has been a final Commission order on the complaint the miner filed with the Secretary, and that such an order cannot issue in the temporary reinstatement proceeding. Slip op. at 17-18. We cannot agree with such reasoning as it proves too much. While the miner is, as Chairman Jordan states, “entitled” to file an action pursuant to section 105(c)(3) when the Secretary refuses to file a 105(c)(2) discrimination claim on his behalf, the miner is by no means required to do so, and may choose not to file such an action. Nevertheless, under Chairman Jordan’s reading of the statute, if temporary reinstatement had been previously ordered, it could not be dissolved when a miner chooses not to proceed under section 105(c)(3) because there was and never will be a Commission “final order” on the miner’s discrimination complaint filed with MSHA. We cannot agree that Congress intended such a result, and thus we reject that interpretation in favor of an one much more in keeping with how temporary reinstatement under section 105(c)(2) has worked in practice – it remains in place only as long as the Secretary is investigating and pursuing the miner’s claim of discrimination.<sup>4</sup>

We are not troubled by concluding that a final order issued by the judge dissolving temporary reinstatement rests on a determination by the Secretary that there has been no violation of section 105(c), rather than on the judge’s findings of fact developed from a record during a hearing. The Secretary was given authority by Congress to determine as an initial matter whether a violation of section 105(c)(1) has occurred, as is evident by statutory language that (1) requires the miner to file his or her complaint with the Secretary, and not with the Commission,

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<sup>3</sup> This was, in fact, Commission procedure for more than 27 years. See n.8, *infra*.

<sup>4</sup> We cannot ignore the significance under section 105(c)(2) of the Secretary’s refusal to file her complaint with the Commission, as such a complaint is an absolute prerequisite to further Commission action, including of course the issuance of any “final order” in the proceeding, under that standard. Because the Secretary’s refusal to go forward and file such a complaint prevents the Commission from acting on a discrimination complaint under section 105(c)(2), it only makes sense to view an order dissolving temporary reinstatement under section 105(c)(2) as the “final order” referenced in that provision.

(2) requires the Secretary to investigate that complaint “as [she] deems appropriate,”<sup>5</sup> and (3) requires the Secretary to file with the Commission a complaint on behalf of the complaining miner, applicant for employment or representative of miners alleging discrimination and proposing an order “[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated.” 30 U.S.C. § 815(c)(2). If, however, the Secretary determines that no violation has occurred after administrative investigation and evaluation, the miner is still entitled to seek a hearing in a section 105(c)(3) proceeding.

In fact, the language of section 105(c)(2) makes clear that the Commission is required to afford the opportunity for a hearing and issue an order based on findings of fact regarding the allegations of discrimination only in circumstances in which the Secretary has determined, upon further investigation, that a violation of section 105(c) has occurred. Under section 105(c)(2), the Commission must “afford an opportunity for a hearing . . . and thereafter . . . issue an order, based upon findings of fact, affirming, modifying, or vacating *the Secretary’s proposed order*, or directing other appropriate relief.” 30 U.S.C. § 815(c)(2) (emphasis added). The Secretary’s proposed order is only before the Commission in circumstances in which the Secretary has filed a complaint after determining that her investigation reveals a violation of section 105(c).

Thus, it is apparent from the language of the statute that Congress intended a two-track system for discrimination complaints under the Mine Act. Under Section 105(c)(2), the complaint to the Secretary is merged into, and subsumed by, the Secretary’s own complaint for redress of the alleged discrimination. A complainant is required to bring the issue to the Secretary and may not initiate an action with the Commission. In the event the Secretary finds that the Act may have been violated, it is her obligation to file a complaint with the Commission. There is clear continuity of action, and the “complaint” upon which the order for temporary reinstatement is based is the same “complaint” submitted by the Secretary.<sup>6</sup> The Secretary in that instance is the advocate for both the miner’s private rights and the public interest.

Conversely, if the Secretary finds that the Act was not violated, she has made a determination with legal effect and consequences. As the Act makes clear, a person whose

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<sup>5</sup> The investigation by the Secretary is critical to vindicating public interest in whether the Mine Act has been violated. See *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 545 (April 1991) (“[T]he statutory scheme provides to miners a full administrative investigation and evaluation of an allegation of discrimination.”).

<sup>6</sup> We note that while the Commission is required to issue an order “affirming, modifying, or vacating the Secretary’s proposed order” under section 105(c)(2), the Commission is required under section 105(c)(3) to issue “an order, based upon findings of fact, dismissing or sustaining the complainant’s charges.” 30 U.S.C. §§ 815(c)(2) & (c)(3). The separate grounds that must serve as the basis for the Commission’s orders under sections 105(c)(2) and 105(c)(3) do not support the Secretary’s contention that the miner’s discrimination complaint filed with MSHA is the basis for the Commission’s order under both sections. S. Br. at 12, 24.

complaint is investigated and found to be unsupported may proceed, but by “fil[ing] an action *in his own behalf* before the Commission.” 30 U.S.C. § 815(c)(3) (emphasis added). This is necessary because once the Secretary has determined that a violation has not occurred, the original complaint – which was made to the Secretary, and not to the Commission – has no continuing legal status. A person wishing to bring the issues contained therein before the Commission must therefore initiate a new action.

In that context, it is notable that section 105(c)(2) expressly provides for temporary reinstatement, while section 105(c)(3) does not. We agree with the judge’s determination that the inclusion of this remedy in one subsection and omission in the other is presumptively intentional. *See Russello v. United States*, 464 U.S. at 23. While temporary reinstatement may have been imposed on a finding that the complaint was not frivolously made, it is important to remember that this early determination is made before the Secretary has conducted the investigation commanded by the Mine Act. At the conclusion of the investigation, the Secretary must decide whether or not the Act has been violated. We rightly presume that the Secretary has faithfully performed her duty and, while that does not preclude the possibility that a violation of the Act may yet be found, it certainly stands in sharp contrast to the circumstances present when the initial complaint is filed, before there has been any exposition of the issue.

## 2. Legislative History and Statutory Structure.

The rationale for temporary reinstatement is evident from changes made to the anti-discrimination provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) (“Coal Act”). Under the Coal Act, a miner was responsible for pursuing his own discrimination case and filed the case at his own expense with his own counsel. *See* 30 U.S.C. § 820(b)(2) (1976) (amended 1977). Temporary reinstatement was not provided for under the Coal Act. Under section 105(c)(2) of the Mine Act, however, the Secretary has the exclusive duty to conduct the initial investigation, and retains effective legal control over the issues when she brings an action on a miner’s behalf. Notwithstanding that the Secretary is directed in the Mine Act to complete her investigation within 90 days, Congress feared that a prolonged investigation under section 105(c)(2) of the Mine Act would impose an economic hardship on the miner since, unlike under the Coal Act, the miner was not in charge of his or her own case. To rectify the problem, Congress developed the remedy of temporary reinstatement in order to protect the miner from bureaucratic delay.

Such reasons justifying temporary reinstatement do not apply in a section 105(c)(3) proceeding under the Mine Act. In a section 105(c)(3) proceeding, the miner brings his own action at his own expense and is in charge of his case. Miners proceeding under section 105(c)(3) of the Mine Act are in much the same position they were in under the Coal Act. Under those circumstances, the need to account for harm caused by any bureaucratic delay does not exist.

This reading of the statutory language is supported by the Conference Report pertaining to section 105(c) of the Mine Act. The Conference Report provides in part:

To protect miners from the adverse and chilling effect of loss of employment while such matters are being investigated, the Senate bill provided that if the Secretary determined that any such complaint was not frivolously brought, the Secretary seek temporary reinstatement of the complaining miner pending final outcome of the investigation and the Commission order such reinstatement, after expedited proceedings. The House amendment contained no such provision.

The Senate bill provided that upon completion of the investigation, if the Secretary found that there had been such discrimination, he immediately file a complaint with the Commission, with copies to the complaining party and the violator. The Commission, after affording the parties an opportunity for a hearing, could order appropriate relief . . . .

....

Under the Senate bill, a complaining party could, within 30 days of an adverse determination by the Secretary, file an action with the Commission on his own behalf. . . .

....

The conference substitute conforms to the Senate bill . . . .

S. Conf. Rep. No. 95-461, at 52-53 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977* (“*Legis. Hist.*”), at 1330-31 (emphases added). Thus, the Conference Report reveals that temporary reinstatement was a remedy fashioned to protect miners from the adverse effect of loss of employment during the Secretary’s investigation. In addition, the Conference Report distinguishes between the initiating documents in section 105(c)(2) as “complaints,” and the initiating document under section 105(c)(3) as an “action.”

As the judge reasoned, the remedial provisions of sections 105(c)(2) and 105(c)(3) represent a balancing of interests by Congress. 30 FMSHRC at 1122. By providing temporary reinstatement under section 105(c)(2), Congress determined that operators should bear the greater economic burden during her investigation, and continuing once the Secretary has concluded that a miner’s discrimination complaint has merit. However, if the Secretary determines that the miner’s discrimination complaint does not have merit, i.e., that a violation of the Act has not

occurred, the balance would tip in favor of the operator's interest in controlling its workforce.<sup>7</sup> As noted by the judge, the Eleventh Circuit stated that deprivation of an employer's right to control the makeup of its workforce is only a "temporary one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor." *Jim Walter Res. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990) (emphasis in original).

Our reading of the Mine Act is also consistent with the Commission's historic reading of the statute, as embodied in its former procedural rule pertaining to temporary reinstatement. Rule 45(g) formerly provided that, "If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement." 29 C.F.R. § 2700.45(g) (2005). The sentence requiring the judge to dissolve the order of reinstatement was in place from the inception of the Commission's rule implementing the temporary reinstatement provisions of the Mine Act in 1979 and remained unchanged until the Commission's rulemaking in 2006.<sup>8</sup> In the absence of any compelling contrary argument, we are reluctant to overturn an interpretation which existed without challenge for almost 30 years.

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<sup>7</sup> We note that section 105(c)(3) proceedings can be lengthy in duration. *See, e.g., Price v. Monterey Coal Co.*, 12 FMSHRC 1505 (Aug. 1990) (passage of approximately four-and-a-half years between the filing of an action by miner under section 105(c)(3) and issuance of the Commission decision). The duration can be increased by procedural delays if the miner is proceeding without benefit of counsel. *See, e.g., Jaxun v. Asarco, LLC*, 29 FMSHRC 616, 617-21 (Aug. 2007); 31 FMSHRC 631 (May 2009) (ALJ) (passage of approximately three years between the filing of a 105(c)(3) action by an unrepresented miner and the issuance of the Commission decision disposing of merits). As a practical matter, if a miner remains temporarily reinstated during a section 105(c)(3) proceeding, there is little incentive for the miner to advance the proceeding expeditiously.

<sup>8</sup> On June 29, 1979, the Commission adopted final procedural rules that included Rule 44(b), entitled, "Dissolution of order," which provided in part, "If, following an order of reinstatement, the Secretary determines that the provisions of section 105(c)(1) have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement." 44 Fed. Reg. 38226, 38231 (June 29, 1979). The provisions of Rule 44(b) were later set forth in Rule 45(g), 29 C.F.R. § 2700.45(g). In August 2006, the Commission revised Rule 45(g) to delete the requirement that the judge dissolve the order of temporary reinstatement after the Secretary has made a determination of no discrimination. 71 Fed. Reg. 44190, 44198-99 (Aug. 4, 2006). In the preamble, the Commission explained that the deletion "leaves open for litigation the issue of whether an order for temporary reinstatement remains in effect pending a miner's discrimination complaint under section 105(c)(3)." *Id.* at 44199.

### 3. Conclusion

In sum, we conclude that the language of sections 105(c)(2) and 105(c)(3) and relevant legislative history demonstrate that Congress directly spoke to the issue in this case: a temporary reinstatement order may not remain in effect after the Secretary has made a determination that no discrimination has occurred, and a temporary reinstatement order may not remain in effect during a section 105(c)(3) proceeding.

Even if the Act were silent or ambiguous on the question at issue, however, we would reach the same conclusion. The Secretary (S. Br. at 23), along with Commissioner Cohen, would have us defer to the Secretary's interpretation of the Mine Act, but we fail to see how the Secretary is owed deference on the question of whether temporary reinstatement should continue after the Secretary has made a determination of no discrimination. Deference under *Chevron II* is owed to an agency's interpretation when the statutory provision being interpreted is one the agency is "charged with administering." *Energy West*, 40 F.3d at 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The Secretary, by declining to pursue a miner's claim of discrimination, essentially removes herself from the case.

Once that occurs in future cases,<sup>9</sup> it will certainly not be the Secretary that is "administering" the Mine Act. The question of whether the miner was discriminated against can then only take place in a section 105(c)(3) proceeding, a proceeding that is essentially a private right of action. If any agency will be said to be "administering" the Mine Act at that point, it would be this Commission, which, among other things, will be charged with interpreting the discrimination provisions of section 105(c) to determine whether discrimination occurred, the Secretary's determination notwithstanding. Consequently, we look not to the Secretary's interpretation of section 105(c) to see whether the temporary reinstatement protections in section 105(c)(2) carry forward into section 105(c)(3) proceedings, but rather our own.<sup>10</sup>

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<sup>9</sup> In this case the Secretary has chosen to appear as an amicus to give her views on the legal question this case presents. Once the issue is resolved, we highly doubt the Secretary will be making appearances as an amicus in other section 105(c)(3) proceedings, given that such proceedings take place only after the Secretary has determined that there was no discrimination.

<sup>10</sup> Commissioner Cohen would nevertheless have the Commission defer to the Secretary's interpretation of section 105(c), because the Secretary administers the overall Mine Act statutory scheme. Slip op. at 28. We cannot agree, because according such deference would run counter to the plain meaning of section 105(c). First, under the terms of that section, the Secretary discharges her responsibility when she determines that no discrimination occurred. Second, while the Secretary is free to interpret section 105(c)(1) to conclude under section 105(c)(2) that an operator's action did not constitute discrimination, the very fact that Congress provided in section 105(c)(3) that the Commission could come to the opposite conclusion, and that the operator would be then subject to penalties for engaging in discrimination, suggests that,

Commissioner Cohen asserts that we have mischaracterized the Secretary's role in this case. However, his description of the procedure under section 105(c), slip op. at 29-30, misstates the process by which the Secretary relinquishes her involvement in the case and simplifies the problem before us by assuming away the issue. Commissioner Cohen says that "[t]he fact that the Secretary has determined that *a miner has not demonstrated discrimination* in a particular case does not change the Secretary's interest in ensuring that miners who file section 105(c)(3) actions are entitled, as a class, to continue temporary reinstatement until a final order of the Commission." *Id.* at 29 (emphasis added). First of all, it is not the miner's responsibility to "demonstrate discrimination." Rather, it is the *Secretary's* duty to initiate an appropriate investigation to determine whether discrimination has occurred. 30 U.S.C. § 815(c)(2). Second, when the Secretary has made a determination that there has been no discrimination, there is no basis for her interest in continuing temporary reinstatement. The presumption of discrimination that underlies temporary reinstatement cannot exist in a section 105(c)(3) proceeding because the fact of violation is the ultimate issue we are called upon to decide. Third, Commissioner Cohen's assumption runs counter to the procedural posture of every section 105(c)(3) case brought before us. In that regard, we note that the end result of the investigation required by section 105(c)(2) is a finding by the Secretary either that (1) a violation of the law has occurred, in which case the procedure and her duty are outlined in the subsection, or (2) a violation has not occurred, in which case the Secretary, through her own actions and determination, is no longer a party in the case. Thus, the Secretary *must* initiate an investigation and *must* pursue the miner's complaint if she believes the anti-discrimination provisions of the Act have been violated and may only elect, in her sole discretion as the "enforcer of the Act," not to pursue the Miner's complaint when she has determined that the provisions of the Act have not been violated.

In sum, the mere fact that the Secretary appears before us as an amicus does not determine the weight we afford her view; rather, it is the fact that she attained that status through what we must presume to be a scrupulous and diligent exercise of her authority, leading to a finding that the operator did not discriminate against the complainant and that it would therefore be inappropriate to continue with a public prosecution of the complaint. The cases cited by Commissioner Cohen, slip op. at 30 n.4, conferring deference or weight to an agency's interpretation, even as a nonparty, do not involve the agency's deliberate, negative determination on the question at issue and are therefore distinguishable.

Finally, even if we were to consider deferring to the Secretary's interpretation of sections 105(c)(2) and 105(c)(3), we would conclude that her interpretation is unreasonable because it is inconsistent with the statutory language, relevant legislative history, and the Commission's own experience with section 105(c)(3) cases, as discussed above. *See Lancashire Coal Co. v. Sec'y of Labor*, 968 F.2d 388, 393 (3d Cir. 1992) ("[W]e cannot conclude that the Secretary's interpretation is reasonable in this case insofar as it conflicts with the language of the statute."); *cf. Sec'y of Labor v. FMSHRC*, 111 F.3d 913, 920 (D.C. Cir. 1997) (finding Secretary's

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in the area of discrimination proceedings, the Commission is not obligated to defer to the Secretary.

interpretation reasonable where it was consistent with the statutory language, legislative history and legislative purpose).

For the reasons discussed above, we would affirm in result the judge's dissolution of the order of temporary economic reinstatement and his dismissal of the temporary reinstatement proceeding.



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner

Chairman Jordan, in favor of reversing the Judge's order:

Under the Mine Act, a miner's temporary reinstatement remains in effect "pending final order on the complaint." 30 U.S.C. § 815(c)(2). Because the plain language of the statute mandates that temporary reinstatement continue until the Commission issues a final order regarding the merits of the miner's allegations of discriminatory conduct, I would reverse the judge's order dissolving the miner's temporary reinstatement in this case.

A miner who alleges an illegal discharge may obtain temporary reinstatement in accordance with section 105(c), which provides in relevant part:

[a]ny miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may . . . file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall . . . cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, *the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.*

30 U.S.C. § 815(c)(2) (emphasis added).

Upon completion of her investigation, the Secretary makes a determination as to whether discrimination occurred. If the Secretary determines that the Act was violated, she must "immediately file a complaint with the Commission." *Id.* If the Secretary concludes that no violation occurred, she must notify the miner of that fact and the miner, pursuant to section 105(c)(3), has the right to "file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1)." 30 U.S.C. § 815(c)(3). The issue in this case is whether the temporary reinstatement remains in effect while the miner proceeds on his own behalf to litigate his or her discrimination claim before the Commission.

As in other cases involving statutory interpretation, we must determine "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The Supreme Court emphasized in *Chevron* that, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. As demonstrated below, Congress intended the temporary reinstatement of a miner to continue until there is a final Commission order on the merits of the miner's claim that he or she was discriminated against because of safety activity.

Section 105(c)(2) provides for temporary reinstatement “pending final order on the complaint.” The Secretary’s decision not to go forward on the miner’s discrimination case is not a final order on the complaint. On this point I agree with my affirming colleagues, who state that “only the Commission may issue an ‘order’ under section 105(c).” Slip op. at 7. Pursuant to the split enforcement scheme envisioned by Congress, it is the Secretary who investigates miners’ complaints of discrimination and issues proposed orders, but it is only the adjudicatory body – the Commission – that issues final orders pertaining to the litigation. *See* 30 U.S.C. § 815(c)(2) and (c)(3). The word “order” appears in section 105(c) nine times, always referring to a Commission order (either an order granting temporary reinstatement, an order disposing of a complaint filed by the Secretary on behalf of a miner under section 105(c)(2), or an order disposing of an action filed by a miner under section 105(c)(3)). As my colleagues correctly point out, “the Secretary’s conclusion regarding whether her investigation revealed discrimination is a ‘determination,’ not an order.” Slip op. at 7.

The Mine Act sets forth the method by which the Commission issues a final order in a discrimination proceeding. If, after conducting her investigation, the Secretary decides that the Act has been violated, pursuant to section 105(c)(2) she is required to file a complaint with the Commission and to “propose an order granting appropriate relief.” 30 U.S.C. § 815(c)(2). The Commission, after affording an opportunity for a hearing, is required to “issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary’s proposed order, or directing other appropriate relief.” *Id.* The Commission’s order “become[s] final 30 days after its issuance.” *Id.*

If the Secretary notifies the miner of her determination that no violation of section 105(c)(1) occurred, “the complainant,” pursuant to section 105(c)(3), is entitled to “file an action in his own behalf before the Commission.” 30 U.S.C. § 815(c)(3). The Commission is required to afford an opportunity for a hearing and to “issue an order based upon findings of fact, dismissing or sustaining the complainant’s charges and, if the charges are sustained, granting such relief as it deems appropriate. . . .” *Id.* This Commission order “become[s] final 30 days after its issuance.” *Id.*

Thus, in accordance with the plain meaning of the statute, there is no “final order on the complaint” until the Commission issues an order which either affirms, modifies, or vacates the Secretary’s proposed order in accordance with section 105(c)(2), or dismisses or sustains the complainant’s charges in accordance with section 105(c)(3). It is clear that a final order in either case must be based on the Commission’s findings of fact and the Commission’s determination of whether discriminatory conduct in violation of section 105(c)(1) occurred.<sup>1</sup>

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<sup>1</sup> My affirming colleagues contend that if the miner does not choose to go forward under section 105(c)(3), under my view of the statutory language there would never be a Commission final order on the discrimination complaint. Slip op. at 8. Since temporary reinstatement remains in effect “pending a final order on the complaint,” the temporary reinstatement could never be dissolved. My colleagues claim this is not what Congress intended. I agree. A

A miner who has been granted temporary reinstatement is entitled to remain in that status “pending final order on the complaint.” 30 U.S.C. § 815(c)(2). There has been no final Commission order on Mr. Phillips’ complaint, and, therefore, the statutory prerequisite that would justify dissolution of Mr. Phillips’ temporary reinstatement order is lacking. Although my affirming colleagues appear to treat it as such, the judge’s November 26, 2008 order dissolving Mr. Phillips’ temporary reinstatement cannot constitute the prerequisite “final order on the complaint.” To consider it in this manner would amount to a ruling that the final order on the complaint, necessary to dissolve the temporary reinstatement, is the order dissolving the temporary reinstatement.

The judge did not dissolve Mr. Phillips’ temporary reinstatement because of a final Commission order. The judge never considered the merits of Mr. Phillips’ claim. The sole basis of the judge’s decision was the Secretary’s determination that a violation of section 105(c) had not occurred, and her notification that she would not be filing a complaint on Mr. Phillips’ behalf. According to the judge: “A final order on the miner’s complaint is reached when the Secretary advises the miner, as she has done in this proceeding, that ‘[y]our complaint of discrimination under Section 105(c) has been investigated . . . [and] MSHA has determined that facts disclosed during the investigation . . . do not constitute a violation of section 105(c).’” 30 FMSHRC 1119, 1121 (Nov. 2008) (ALJ).

Having agreed that the Secretary’s determination regarding the results of her investigation does not constitute a final order under section 105(c), (“the Secretary’s conclusion . . . is a ‘determination’ not an order,” slip op. at 7), my affirming colleagues nevertheless proceed to make the duration of the temporary reinstatement contingent on just this determination. Ignoring the statute’s plain language, they conclude: “[I]f the Secretary determines that there has been no discrimination, the temporary reinstatement order would cease to be effective, and the judge should issue an order dissolving the temporary reinstatement and dismissing the temporary reinstatement proceeding.” Slip op. at 8. The statute requires a final order from the Commission, not a determination from the Secretary, in order to dissolve a grant of temporary reinstatement. My colleagues fail to realize that the judge lacked the necessary statutory prerequisite for dissolving the temporary reinstatement because no final order had been issued on Mr. Phillips’ complaint.

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reinstatement that can never be dissolved can hardly be considered temporary. The requirement that temporary reinstatement remain in effect “pending final order on the complaint” necessarily implies that there is a possibility of obtaining a Commission final order on the discrimination complaint under section 105(c)(2) or 105(c)(3). In the event the miner foregoes that possibility, obviously the temporary reinstatement provision would no longer be applicable.

My colleagues have been led astray by their narrow focus on section 105(c)(3)'s reference to the complainant's right to file an "action" in his own behalf before the Commission.<sup>2</sup> They consider the reference to filing an "action" under section 105(c)(3) as an indication that there no longer exists a complaint that can be the subject of a Commission order. Since temporary reinstatement stays in effect pending the Commission's "final order on the complaint," initiating an "action" under section 105(c)(3) must, in their view, extinguish the miner's temporary reinstatement. My colleagues' position is untenable in light of the pertinent statutory language and the Commission case law.

Much as my colleagues would like to erect an impenetrable analytical barrier between the miner's initial filing of a discrimination complaint to the Secretary and the miner's subsequent action before the Commission, neither the statutory language nor the Commission case law permit them to do so. Although section 105(c)(3) refers to an "action" before the Commission, the person who files this action is referred to as the "*complainant*." 30 U.S.C. § 815(c)(3) (emphasis added). Thereafter, the Commission is instructed to afford an opportunity for a hearing and to "issue an order based upon findings of fact, dismissing or sustaining "*the complainant's*" charges." *Id.* (emphasis added). The reference to "complainant" is an acknowledgment that the proceeding under section 105(c)(3) involves the same alleged discriminatory conduct that prompted the miner's complaint to the Secretary under section 105(c)(2). The statute does not direct the miner to file a complaint under section 105(c)(3) because the miner has already filed a complaint. That is why the miner is referred to in section 105(c)(3) as the "complainant."

Commission rulings have made that fact clear. In *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), the operator argued that the complainant's amended filing pursuant to section 105(c)(3) differed too substantially from his complaint filed with the Secretary. The Commission agreed that the proceeding under section 105(c)(3) must be based on the matter initially investigated by the Secretary under section 105(c)(2) or else "the statutory prerequisites for a *complaint* pursuant to § 105(c)(3) have not been met." *Id.* at 546 (emphasis added). *Accord Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009 (June 1997). The Commission's reference to the section 105(c)(3) proceeding as a "complaint" in *Hatfield* was not an isolated occurrence. In *Roland v. Sec'y of Labor*, 7 FMSHRC 630 (May 1985), the Commission pointed out that "[s]hould the Secretary determine that no discrimination has occurred, the miner, pursuant to section 105(c)(3) . . . may file a discrimination *complaint* on his own behalf before the Commission." 7 FMSHRC at 635 (emphasis added).

Resort to the legislative history of the Mine Act merely underscores the strained nature of my colleagues' reading of the statute. Citing the Conference Report language that "[u]nder the Senate bill, a complaining party could, within 30 days of an adverse determination by the

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<sup>2</sup> Section 105(c)(3) states that "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission." 30 U.S.C. § 815(c)(3).

Secretary file *an action* with the Commission on his own behalf,” slip op. at 11 (emphasis added), my colleagues omit the sentence that follows, which states that:

The Commission must afford an opportunity for a hearing, and thereafter, issue an order, based upon findings of fact, dismissing or sustaining *the complaint*, and granting such relief as may be appropriate. If the *complainant* prevailed in an action which he brought himself after the Secretary’s determination, the Commission order would require that the violator pay all expenses reasonably incurred by the *complainant* in bringing the action.

S. Conf. Rep. No. 95-461, at 52-53 (1977); *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1330 (1978) (“*Legis. Hist.*”) (emphases added).

The Commission’s Procedural Rules also demonstrate that the significance my colleagues place on the use of the word “action” in section 105(c)(3) (as opposed to the word “complaint” in section 105(c)(2)) is misplaced. Our rule clearly contemplates that a miner filing a claim under section 105(c)(3) does so by filing a “complaint.” Procedural Rule 40(b), 29 C.F.R. § 2700.40(b), states:

A discrimination complaint under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), have not been violated.

Additional language in the Mine Act refutes the contention that Congress considered claims brought under section 105(c)(2) and (c)(3) to be such entirely separate proceedings, that they deemed it appropriate to provide temporary reinstatement pursuant to only one of them. Section 105(c)(3) states that “[p]roceedings under this section shall be expedited by the Secretary and the Commission.” 30 U.S.C. § 815(c)(3). This mandate, however, undeniably applies to section 105(c)(2) actions as well (otherwise the reference to the Secretary makes no sense). Indeed, the Commission has interpreted it in this manner. *See Sec’y of Labor on behalf of Noe v. J & C Mining, LLC*, 22 FMSHRC 705, 706 (June 2000) (stating, in a section 105(c)(2) case, that “the Commission will be expediting these proceedings as it is statutorily required to do”). Likewise, section 105(c)(3) refers to Commission orders issued “under this paragraph” being “subject to judicial review in accordance with section 106.” 30 U.S.C. § 815(c)(3). Clearly, however, a Commission order issued under section 105(c)(2) is also subject to judicial review.

My affirming colleagues contend that temporary reinstatement is designed to protect miners “from the adverse effect of loss of employment during the Secretary’s investigation.”

Slip op. at 11. Not only is this position contrary to the statutory language (which provides for temporary reinstatement pending final order on the complaint, not pending the resolution of the Secretary's investigation), the literal application of this principle would result in the dissolution of the temporary reinstatement order upon conclusion of the Secretary's investigation, even if the Secretary determines that section 105(c)(1) was violated. That the temporary reinstatement provision was hardly viewed in the cramped fashion suggested by my colleagues is evidenced by the Senate Report, wherein the drafters explained that:

The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.

S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625.

Because, under section 105(c)(3), a miner "brings his own action at his own expense and is in charge of his case," slip op. at 10, my affirming colleagues have concluded that the need to account for harm due to "bureaucratic delay" does not exist. *Id.* Underlying this statement is the unsubstantiated notion that somehow a miner in a section 105(c)(3) proceeding will be able to control how quickly his or her case is resolved. Their own reference to a section 105(c)(3) case that took four-and-a-half years to decide belies this contention. Slip op. at 11-12 n.7 (citing *Price v. Monterey Coal Co.*, 12 FMSHRC 1505 (Aug. 1990)). My affirming colleagues are concerned that, "if a miner remains temporarily reinstated during a section 105(c)(3) proceeding there is little incentive for the miner to advance the proceeding expeditiously." Slip op. at 12 n.7. Of course, the corollary to this concern is that when the complainant miner is not temporarily reinstated, there is every incentive for the respondent mine operator to delay the section 105(c)(3) proceeding. While both scenarios are problematic, the appropriate question for us to consider is, which one caused Congress greater concern?

By making temporary reinstatement dependent on a determination that the miner's discrimination claim is "not frivolously brought," 30 U.S.C. § 815(c)(2), Congress "clearly intended that employers should bear a disproportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990).<sup>3</sup> While the employer's loss of its ability to control its

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<sup>3</sup> My colleagues invoke the Court's observation that "deprivation of an employer's right to control the makeup of its workforce is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or by a decision on the merits in the employer's favor." Slip op. at 12 (citing *Jim Walter*, 920 F.2d at 748 n.11 (emphasis in original)). However, it appears the Court's comment was prompted by prior Commission Rule 44(f), 29 C.F.R. § 2700.44(f) (subsequently re-numbered as Commission Rule 45(g), 29 C.F.R. § 2700.45(g)), *id.* at 741, rather than by an independent interpretation of the statute.

workforce is not to be taken lightly, the legislative history of the Mine Act indicates that section 105(c)'s prohibition against discrimination is to be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36, *Legis. Hist.* at 624. Recognizing the important role that individual miners play in ensuring a safe and healthy working environment, Congress was also acutely aware that "mining often takes place in remote sections of the country where work in the mines offers the only real employment opportunity." S. Rep. No. 95-181, at 35, *Legis. Hist.* at 623. The temporary reinstatement provision was viewed as "an essential protection" for miners who might not be able "to suffer even a short period of unemployment." S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625. This Congressional balancing of equities applies equally to a section 105(c)(2) case brought by the Secretary, and to a section 105(c)(3) claim, brought by the miner on his own behalf after the Secretary declines to go forward.

Temporary reinstatement is imposed pursuant to a Commission order that the miner's discrimination claim was not frivolously made. The Secretary's decision not to proceed with the discrimination complaint does not transform that complaint into a frivolous action. To hold otherwise would require us to conclude that Congress implemented a statutory provision (section 105(c)(3) of the Mine Act) devoted to the litigation of frivolous claims. To the contrary, not only does the Secretary's negative determination not reduce the complaint to a frivolous claim, the Commission has explicitly acknowledged that it "may find discrimination where the Secretary has not" and that "the Secretary's determination not to prosecute [a] discrimination case is not probative of whether [the operator] discriminated against the miners." *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1117 (July 1995). Indeed, there have been numerous cases in which the Secretary declined to file a complaint and the miner successfully proceeded on his own behalf. See, e.g., *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 974-76 (June 1993); *Meek v. Essroc Corp.*, 15 FMSHRC 606, 612-13 (Apr. 1993); *Womack v. Graymont Western US, Inc.*, 25 FMSHRC 235, 261-63 (May 2003) (ALJ); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171, 176-77 (Feb. 1999) (ALJ); *Paul v. Newmont Gold Co.*, 18 FMSHRC 181, 191 (Feb. 1996) (ALJ).

Consequently, since the Secretary's decision not to go forward on Mr. Phillips' behalf does not vitiate the previous non-frivolous finding regarding his complaint, the temporary reinstatement, which is based on that nonfrivolous finding, must remain in effect "pending final order on the complaint."<sup>4</sup> Balancing the equities does not require the opposite conclusion. Requiring the temporary reinstatement to remain in effect pending the miner's litigation under section 105(c)(3) is no more inequitable than the Commission's determination that a temporary reinstatement order remains in effect pending appeal to the Commission, notwithstanding the fact that a Commission judge concluded, subsequent to a hearing on the merits, that no discrimination

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<sup>4</sup> In *Jim Walter*, the Eleventh Circuit explained that the basis for a temporary reinstatement order and the underlying merits of a miner's claim are "conceptually different," and it ruled that the temporary reinstatement order was a collateral order completely separate from the merits of the action. 920 F.2d at 744.

occurred. See *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947, 949 (Sept. 1999). In *Bernardyn*, the Commission recognized that the statutory language, providing for temporary reinstatement "pending final determination on the merits of the complaint," required this result. 21 FMSHRC at 950.<sup>5</sup>

In conclusion, in passing the Mine Act, Congress created two different mechanisms for bringing discrimination complaints, under which either the Secretary or the claimant may prosecute the case. Under either procedure, the same underlying complaint (filed initially with MSHA) is at issue. The statute clearly states that a temporary reinstatement order remains in effect pending a final Commission order on this complaint. Here, there has been no such final order on the miner's complaint. Accordingly, I would reverse the judge's decision.

  
Mary Lynn Jordan, Chairman

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<sup>5</sup> I recognize that in *Bernardyn*, the Commission refers to prior Procedural Rule 45(g), 29 C.F.R. § 2700.45(g) (1999), which provided for dissolution of a temporary reinstatement order if the Secretary determined that discrimination did not occur, as a "gap filling provision designed to deal with a situation not addressed by the statute – the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c)." 21 FMSHRC at 950. I believe this comment, which is dictum, to be incorrect since I have concluded that the referenced situation is addressed by the statutory language "pending final order on the complaint" and requires the maintenance of temporary reinstatement until there is a final determination by the Commission on the merits of the miner's claim of discrimination.

Commissioner Cohen, in favor of reversing the Judge's order:

This case presents the question of whether a temporary reinstatement order remains in effect after the Secretary determines that the anti-discrimination provisions of the Mine Act, 30 U.S.C. § 815(c), have not been violated. The relevant Mine Act language states that, after a determination that a discrimination complaint was not "frivolously brought," the Commission "shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The resolution of this issue involves identifying the proper interpretation of "final order" and "complaint" in this section of the statute. Although I agree with my colleague, Chairman Jordan, that a temporary reinstatement order stays in effect pending resolution of a discrimination complaint filed with the Mine Safety and Health Administration ("MSHA"), I reach this conclusion by way of a different analysis, and therefore write separately, as I find that the statutory language at issue is ambiguous.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union No. 1261, UMW v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).<sup>1</sup> If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "Chevron II" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Under *Chevron II*, deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

The operator contends that the plain meaning of the Mine Act requires that the temporary reinstatement order be dissolved if the Secretary does not file a complaint on behalf of the miner. A & S Br. at 7. My colleagues Commissioners Duffy and Young agree with the operator. On the other hand, the Secretary asserts that the plain meaning of the statute mandates that a temporary reinstatement order remain in effect until the Commission issues a final order on the merits of the miner's underlying discrimination complaint. S. Br. at 10. My colleague Chairman Jordan agrees with the Secretary. The parties' insistence that the statutory language is clear, coupled

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<sup>1</sup> The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "Chevron I" analysis. *See Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

with their equally emphatic contentions proposing contradictory interpretations of that language, suggests that the Mine Act is actually ambiguous on this question.<sup>2</sup>

In order to determine whether Congress' intention as to the question at issue can be gleaned from the "plain meaning" of the statutory language, we employ the "traditional tools of statutory construction." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9). These include examination of the statute's text, legislative history, and structure, as well as its purpose. See *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). As the D.C. Circuit recognized in *Bell Atlantic*, a court utilizes the text, history, and purpose of a statute to determine whether they convey a plain meaning that *requires* a certain interpretation. *Id.* at 1049 (emphasis in original).

Statutory language is considered ambiguous if reasonable minds may differ as to its meaning, and when, as in this case, it is open to two or more constructions. 73 Am. Jur. 2d Statutes § 114. Consequently, we must determine "whether the language of [the] statute is susceptible to more than one natural meaning." *Taing v. Napolitano*, 567 F.3d 19, 23 (1st Cir.

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<sup>2</sup> As one federal court judge declared, when wrestling with the meaning of a term in environmental law:

Despite the fact that both parties argue that the meaning of "toxicity" is clear, they come to different conclusions as to whether [a particular chemical] meets the definition. . . . What emerges clearly from this dialogue between the parties is not the meaning of "toxicity," but that its meaning is both ambiguous and ill-defined.

*The Fertilizer Institute v. Browner*, No. CIV. A. 98-1067 (GK) 1999 WL 33521297, at \*3 (D.D.C. Apr. 15, 1999); see also *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 (11th Cir. 2008) (ruling that although both parties agreed that statutory language was plain and unambiguous, and argued that plain meaning supported their different interpretations, this indicated ambiguity); *Toomer v. City Cab*, 443 F.3d 1191, 1194-95 (10th Cir. 2006) (holding that when both parties argued that a statutory term was unambiguous and urge different meanings that are clear from the statute's plain language, the statute was ambiguous with respect to that term); *Harris v. Sims Registry*, No. 00 C 3028, 2001 WL 78448, at \*3 (N.D. Ill. Jan. 29, 2001) (finding that when both parties asserted that a statutory text was not ambiguous but their interpretations differed, the term created ambiguity). But see Symposium, "Pernicious Ambiguity in Contracts and Statutes," 79 Chicago-Kent L. Rev. 859, 867 (2004) (citing Justice Thomas' view that "[a] mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong" (citation omitted)); *John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001) (stating that "statutory ambiguity cannot be determined by referring to the parties' interpretations of the statute. Of course their interpretations differ. That is why they are in court.").

2009) (citation omitted). Here, the parties differ strenuously as to the “plain meaning” of the statute’s text, its structure, its legislative history, and its purpose.

As to the text, the parties disagree about the plain meaning of the words “final order” and “complaint” in the phrase “immediate reinstatement of the miner pending final order on the complaint” in section 105(c)(2), and offer several competing interpretations. The Secretary argues that the words refer to the Commission’s final order on the miner’s underlying complaint of discrimination. S. Br. at 10-15. A&S, echoing the judge, 30 FMSHRC at 1121, contends that the “final order” occurs when the Secretary’s involvement ends, after the investigatory findings do not show a violation of section 105(c)(1). In its reply brief, A&S argues that a “final order” of the Commission can arise out of the Secretary’s investigatory determination, just as a final order can arise out of an operator’s failure to timely contest a proposed assessment by the Secretary under sections 105(a) and (b). A&S R. Br. at 3-5. A&S also states that the judge’s order dismissing the case when the Secretary chose not to proceed constitutes a final order of the Commission. *Id.* at 4.

Likewise, my colleagues disagree as to the “plain meaning” of the text. Commissioners Duffy and Young assert that the textual language means that the temporary reinstatement order remains effective pending the Commission’s final order on the miner’s discrimination complaint to the Secretary under section 105(c)(2), and that this final order occurs when the judge, upon notification by the Secretary of a determination of no discrimination under section 105(c)(1), issues an order dissolving temporary reinstatement and dismissing the temporary reinstatement proceeding. Slip. op. at 8. On the other hand, Chairman Jordan agrees with the Secretary that the textual language refers to the Commission’s final order disposing of the miner’s complaint of discrimination to MSHA. Chairman Jordan disputes Commissioners Duffy and Young, arguing that the final order on which the dissolution of temporary reinstatement is predicated cannot be the order which itself dissolves temporary reinstatement. Slip op. at 18.

This brief summary of the different “plain meanings” which have been advanced in this case for the statutory text “reinstatement of the miner pending final order on the complaint” – most of which have at least some justification – illustrates that the text actually does not have a plain meaning.

Differences also emerge when the parties and my colleagues examine the structure of the statute. The Secretary argues that a finding that the complaint was not frivolously brought, which triggers temporary reinstatement under section 105(c)(2), is different from a determination that the substantive discrimination provisions of section 105(c)(1) were not violated. The determination that a substantive violation has not occurred must be made by the Commission, not the Secretary, and case law establishes that a violation may have occurred even though the Secretary declined to file a complaint. The Secretary further asserts that 105(c)(2) and 105(c)(3) actions before the Commission have the same relationship to the miner’s underlying discrimination complaint. S. Br. at 15-21. However, following the reasoning of the judge, 30 FMSHRC at 1121-22, A&S argues that section 105(c)(2) and section 105(c)(3) embody different

kinds of complaints and procedures. Temporary reinstatement only occurs in the context of section 105(c)(2). Moreover, a miner does not face lengthy delays in a complaint under section 105(c)(3), which the statute requires to be “expedited.” A&S Br. at 7-11. Similarly, Commissioners Duffy and Young describe a two-track system where the miner’s “complaint” in section 105(c)(2) is distinctly different from the miner’s “action” in section 105(c)(3). Temporary reinstatement applies in section 105(c)(2) but not in section 105(c)(3). Their opinion concludes that if the Secretary makes a determination of no discrimination, the miner’s original complaint has no legal status, and the miner must initiate a new “action,” distinct from his original “complaint.” Slip op. at 6-7. However, Chairman Jordan contends that the section 105(c)(3) “action” is not inherently different from the section 105(c)(2) “complaint,” because the statute describes the party bringing the section 105(c)(3) “action” as the “complainant,” which refers back to the miner’s complaint under section 105(c)(2). She points out that the Commission’s Procedural Rule 40(b), 29 C.F.R. § 2700.40(b), refers to the “action” filed by a miner under section 105(c)(3) as a “discrimination complaint.” Chairman Jordan also cites case law in which the Commission has held that the requirement in section 105(c)(3) that the proceedings be “expedited” also applies to cases before the Commission under section 105(c)(2). Slip op. at 20.

The parties and my colleagues also have different interpretations of the legislative history of the temporary reinstatement provision. The Secretary cites the Senate Report, which states that Congress intended that section 105(c) “be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (“*Legis. Hist.*”). The Secretary quotes the same report to the effect that upon determining that the complaint was not frivolously brought, she shall seek “an order of the Commission temporarily reinstating the complaining miner pending *final outcome* of the investigation *and complaint* . . . [as] an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.” S. Br. at 21-23 (citing S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625 (emphasis in Secretary’s brief)). In contrast, Commissioners Duffy and Young cite the Conference Report, which states that the Conference Committee adopts the Senate version of the provision, which, according to the Conference Committee, provides that if the complaint was not frivolously brought, the Secretary shall “seek temporary reinstatement of the complaining miner pending the *final outcome of the investigation.*” Slip op. at 11 (citing S. Conf. Rep. No. 95-461, at 52-53 (1977), *reprinted in Legis. Hist.* at 1330-31 (emphasis added)). Thus, the Conference Report referred to temporary reinstatement until completion of the investigation (if the Secretary did not find discrimination), while the Senate Report spoke of temporary reinstatement until the resolution of the entire complaint. The legislative history can be interpreted quite differently depending on which report is quoted.

The parties and my colleagues also interpret the purpose of the temporary reinstatement provision differently. The Secretary, S. Br. at 21-23, and Chairman Jordan, slip op. at 21-22,

emphasize the need to fully protect the miner who is unemployed because of alleged discrimination, and conclude that a viable allegation of discrimination continues past an adverse finding by the Secretary and until the conclusion of proceedings by the Commission. However, A&S, Br. at 8-9, and Commissioners Duffy and Young, slip op. at 11-12, echoing the decision of the judge, 30 FMSHRC at 1122-23, emphasize a balancing of the interests of the miner and the operator, which is best accomplished by limiting temporary reinstatement to the period of the Secretary's investigation if the investigation does not result in a finding of discrimination.

In view of these different and contrary interpretations of the statute's text, its structure, its legislative history, and its purpose, all set forth as having a "plain meaning" and all containing at least some plausibility, I have to conclude that in terms of the *Chevron I* analysis, the statute is ambiguous.

I also note that former Commission Procedural Rule 45(g), 29 C.F.R. § 2700.45(g) (1999), permitted the dissolution of a temporary reinstatement order upon the Secretary's decision not to proceed on the complaint. The Commission has described this as "a 'gap filling' provision designed to deal with a situation *not addressed by the statute* – the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c)." *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947, 949-50 (Sept. 1999) (emphasis added). I fail to see how the statutory language can be considered plain when we have acknowledged that it pertained to a situation that Congress did not address.

Since the relevant statutory language is ambiguous, it is necessary under *Chevron II* to determine whether the Secretary's interpretation is reasonable and should be accorded deference. As demonstrated by the analysis of Chairman Jordan, I find that the Secretary's interpretation – that a temporary reinstatement order must remain in effect until there is a final Commission order on the miner's underlying discrimination complaint (whether it is litigated by the Secretary pursuant to section 105(c)(2) or by the miner under section 105(c)(3)) – is reasonable, and therefore it is entitled to deference. *See Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

My other colleagues claim that deference to the Secretary's policy position is not appropriate in this case. They base this assertion on their view that the Secretary is not "charged with administering" section 105(c) after she makes a determination of no discrimination. Slip op. at 13. According to them, once the Secretary has made such a determination, "there is no basis for her interest in continuing temporary reinstatement." *Id.* at 14. This is due to the "presumption of discrimination that underlies temporary reinstatement [that] cannot exist in a section 105(c)(3) proceeding." *Id.* This position misapprehends the role of temporary reinstatement under the Mine Act, and the Secretary's interest in implementing it.

Commissioners Duffy and Young state that *Chevron* deference is owed to an agency interpretation "when the statutory *provision* being interpreted is one the agency is charged with

administering,” slip op. at 13 (citing *Energy West*, 40 F.3d at 460) (emphasis added), which in turn cited to *Chevron*, 467 U.S. at 844. However, both the D.C. Circuit in *Energy West* and the Supreme Court in *Chevron*, did not parse an agency’s statutory authority provision by provision when articulating the general principles underlying the deference doctrine, but instead spoke of “an agency’s interpretation of the *statute* it is charged with administering,” *Energy West*, 40 F.3d at 460 (emphasis added), and “an agency’s construction of the *statute* which it administers,” and the weight to be accorded to “an executive department’s construction of a *statutory scheme*, *Chevron*, 467 U.S. 842, 844 (emphases added).

Moreover, my colleagues’ are incorrect in stating that temporary reinstatement is predicated on a “presumption of discrimination.” The statutory language does not, in any way, describe a “presumption of discrimination” as the basis for temporary reinstatement. Rather, temporary reinstatement is based on a finding by the Secretary that the discrimination claim was not “frivolously brought.” The fact that the Secretary may later find that discrimination did not occur does not alter or diminish her finding that the complaint was not “frivolously brought.” Since the Secretary was the entity who made the determination that the complaint was not frivolously brought, which triggers temporary reinstatement in the first place, it makes no sense to say that the Secretary is not “charged with administering” the temporary reinstatement provision of the Act.

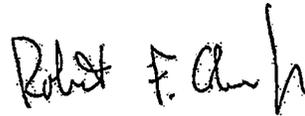
Additionally, my colleagues’ basis for refusing to accord deference to the Secretary is an unnecessarily restrictive view of the Secretary’s role under the Mine Act. The fact that the Secretary has determined that a miner has not demonstrated discrimination in a particular case does not change the Secretary’s interest in ensuring that miners who file section 105(c)(3) actions are entitled, as a class, to continued temporary reinstatement until a final order of the Commission. Because “enforcement of the [Mine] Act is the sole responsibility of the Secretary,” *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006), she has an interest in ensuring that section 105(c) is interpreted in an expansive manner, as vigorous protection for miners who make safety complaints (such as the complaint in this case, regarding miners operating equipment while under the influence of alcohol, S. Br. at 3). As the Secretary noted herein, “Congress . . . recognized the important role that individual miners play under the Mine Act in ensuring a safe and healthy working environment.” S. Br. at 21 (quoting S. Rep. No. 95-181, at 35, *Legis. Hist.* at 623). The unfettered right of miners to complain about safety issues without fear of economic penalty strengthens the Secretary’s ability to effectively enforce the Act.

The Secretary has recognized Congress’ concern that “temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment. . . .” S. Br. at 22 (quoting S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625). Anything that could potentially diminish some miners’ willingness to do

so – including the prospect of being fired in retaliation and not having the right to temporary reinstatement – thwarts the Secretary’s overarching mission to make our nation’s mines safer.<sup>3</sup> Thus, the fact that the Secretary has determined that there has been no violation of section 105(c)(1) in a particular case does not decrease her interest in guaranteeing that miners may make health or safety complaints free of economic coercion. Consequently, the Secretary has real interest in ensuring that her view of the Mine Act’s temporary reinstatement provision prevails.<sup>4</sup>

Finally, by invoking the Secretary’s “negative determination on the question at issue” to deny her deference, my colleagues confuse the issue at hand. Although the Secretary indeed declined to continue to represent Phillips in his discrimination claim, the “question at issue” here is whether temporary reinstatement should be continued notwithstanding that determination – a question to which the Secretary has responded with a resounding “yes.”

Accordingly, I would reverse the order of the judge.



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Robert F. Cohen, Jr., Commissioner

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<sup>3</sup> As the Eleventh Circuit pointed out in *Smith v. Bellsouth Telecommunications, Inc.*, 273 F.3d 1303 (11th Cir. 2001), a case involving the private right of action created for employees under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. (“FMLA”), “[i]f former employees like Smith knew they would have no remedy if their former employers retaliated against them for their past use of FMLA leave, it would tend to chill employees’ willingness to exercise their protected leave rights and would work against the purpose of the FMLA.” 273 F.3d at 1313.

<sup>4</sup> My colleagues also err in their assertion that Secretary should not be accorded deference because she is not a party to the section 105(c)(3) case and has chosen to participate as amicus. Slip op. at 13. See *Community Bank of Arizona v. G.V.M. Trust*, 366 F.3d 982, 987 (9th Cir. 2004) (recognizing that interpretations of the Office of the Comptroller of Currency (“OCC”) of the National Bank Consolidation and Merger Act contained in amicus briefs were entitled to “great weight” if those interpretations were reasonable); see also *Bank of America v. City & County of San Francisco*, 309 F.3d 551, 563 (9th Cir. 2002) (stating that “that the OCC’s construction of the National Bank Act comes to us in the form of an *amicus* brief does not make it ‘unworthy of deference.’” (citation omitted)).

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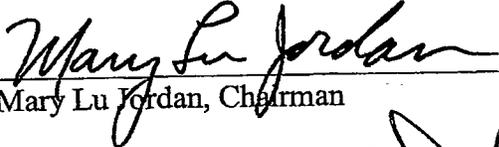
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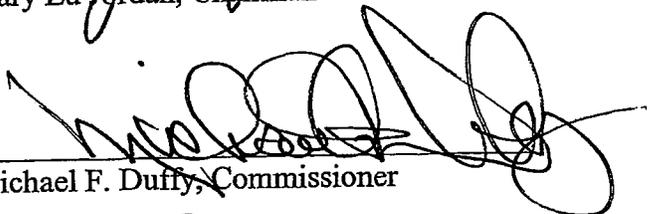
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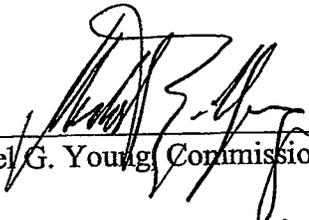


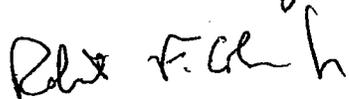
The record revealed that the operator misplaced the proposed penalty assessment and promptly sought re-opening when it discovered the assessment. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Hanson's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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September 14, 2009

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

v.

HERITAGE COAL & NATURAL  
RESOURCES, LLC

:  
:  
:  
:  
Docket No. YORK 2009-143  
A.C. No. 18-00781-178016

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On June 15, 2009, the Commission received a request to reopen a penalty assessment issued to Heritage Coal & Natural Resources, LLC (“Heritage”) 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).

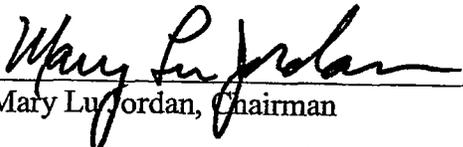
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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

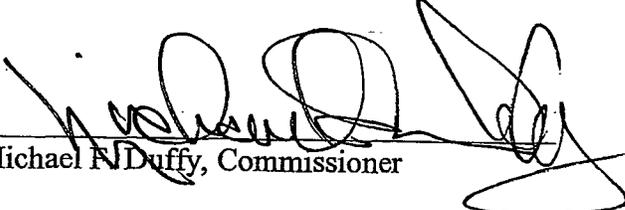
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

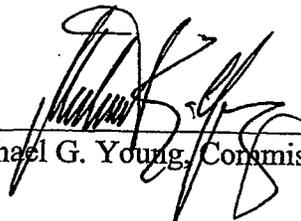
On March 3, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Assessment No. 000178016 to Heritage, proposing penalties for two citations and two orders MSHA had previously issued to the operator. Heritage, which neither paid nor contested the penalties, states that it would like to reopen the assessment because it had requested but never received a conference with MSHA on the citations and orders and the operator's alleged negligence.

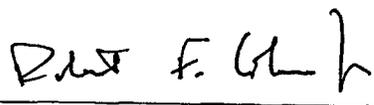
The Secretary opposes Heritage's request to reopen. She states that MSHA has no record of a request for a conference by Heritage, and that in any event a request for a conference does not toll the 30 days an operator has in which to contest proposed penalties.

Having reviewed Heritage's request and the Secretary's response, we conclude that Heritage has failed to provide an adequate explanation for its failure to timely contest Proposed Assessment No. 000178016. Accordingly, we deny without prejudice Heritage's request to reopen. The words "without prejudice" mean Heritage may submit another request to reopen so that it can contest the citations, orders, and penalty assessments.<sup>1</sup>

  
Mary Lu Jordan, Chairman

  
Michael N. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> If Heritage submits another request to reopen, it must establish good cause for not contesting the citations, orders, and proposed penalties within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief. Heritage should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem involving a conference request prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. In addition, Heritage should submit copies of supporting documents with its request to reopen the case.

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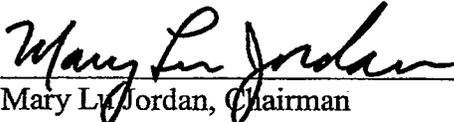
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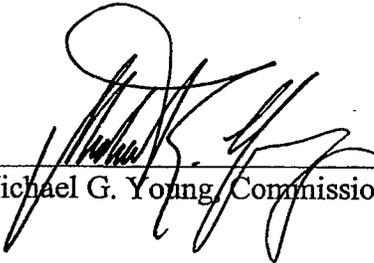


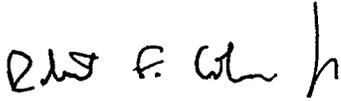
On September 17, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000162985 for nine citations issued to Barrick in July 2008. In its motion, Barrick states that the nine citations arose from an inspection that resulted in the issuance of 29 citations. The operator states that 20 of the 29 citations were assigned to a different case. Barrick explains that it faxed the forms for both cases, along with the forms for seven other cases, to its counsel for the filing of contests. It further states that, although it received notification that the facsimile transmissions had been successful, the form for Proposed Assessment No. 000162985 had not been successfully transmitted. The operator asserts that it did not learn of the error until it received a notice of collection action from the Department of Treasury. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Barrick's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary L. Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 20, 2009

|                        |   |                            |
|------------------------|---|----------------------------|
| SECRETARY OF LABOR,    | : | Docket No. LAKE 2008-345-M |
| MINE SAFETY AND HEALTH | : | A.C. No. 47-02043-140232   |
| ADMINISTRATION (MSHA)  | : |                            |
|                        | : | Docket No. LAKE 2008-346-M |
|                        | : | A.C. No. 47-02940-140235   |
|                        | : |                            |
| v.                     | : | Docket No. LAKE 2008-347-M |
|                        | : | A.C. No. 47-03245-140241   |
|                        | : |                            |
| PITLICK & WICK, INC.   | : | Docket No. LAKE 2008-348-M |
|                        | : | A.C. No. 47-03367-140245   |

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On April 14, 2008, and November 21, 2008, the Commission received from Pitlick & Wick, Inc. (“Pitlick”) motions from counsel seeking to reopen four 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).

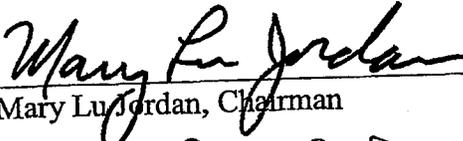
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

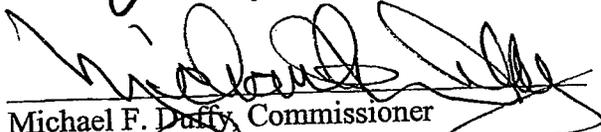
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable

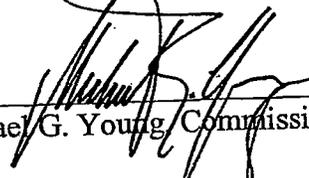
by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

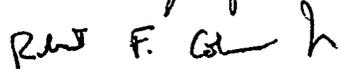
On November 7, 2008, the Commission denied without prejudice Pitlick’s request on the basis that the operator had failed to provide “a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments.” *Pitlick & Wick, Inc.*, 30 FMSHRC 1006, 1008 (Nov. 2008). On November 21, Pitlick promptly filed a second motion to reopen the penalty assessments with an affidavit that more fully explained the reason for its delay in contesting the assessments. The Secretary has not opposed the requests to reopen.

Having reviewed Pitlick’s request and the Secretary’s response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 22, 2009

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

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v.

Docket No. SE 2009-171  
A.C. No. 01-00851-161298 A

WAYNE RAY, employed by  
OAK GROVE RESOURCES

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

ORDER

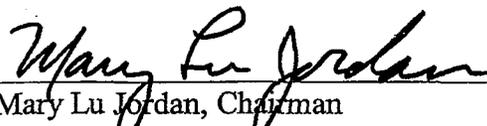
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 12, 2008, the Commission received from Wayne Ray a motion by counsel in which Mr. Ray seeks to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had allegedly become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

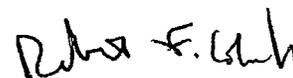
On August 27, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 00161298A. Mr. Ray states that he did not learn of the proposed assessment until his counsel received a delinquency notice dated November 28, 2008, indicating that the assessment had become a final order of the Commission. The Secretary confirms that the proposed assessment was never received by Mr. Ray and was returned to MSHA because delivery was refused by the law firm representing him. The Secretary submits that the assessment was addressed solely to Mr. Ray at the street address of the law firm and that delivery was refused “because the address did not indicate that the assessment was meant to be delivered to the law firm or to Mr. Ray’s attorney.”

Having reviewed Mr. Ray's request and the Secretary's response, we find the request to reopen to be moot because Mr. Ray never properly received the assessment and the proposed assessment has not become a final order of the Commission.<sup>1</sup> Since Mr. Ray is now aware of the proposed penalty assessment, he has 30 days from the date of this order to either contest or pay the proposed penalty. If the proposed penalty is timely contested by Mr. Ray, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> The Commission has previously stated that, in a section 110(c) proceeding, MSHA should send the proposed assessment to the individual at his home address or "in care of" counsel at counsel's address. *E.g., Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892, n.1 (Dec. 2005).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

September 23, 2009

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

v.

DARBY SANDERS, Formerly Employed by  
NATURAL MATERIALS, LLC

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Docket No. CENT 2008-420-M

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

ORDER

BY THE COMMISSION:

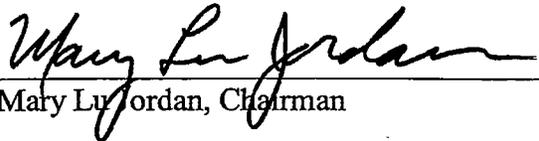
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 4, 2008, Chief Administrative Law Judge Robert J. Lesnick issued to Darby Sanders, formerly employed by Natural Materials, LLC (“Natural Materials”), an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of civil penalty against him. The case was subsequently assigned to Administrative Law Judge Gary Melick and, on February 6, 2009, Judge Melick entered an Order of Default against Mr. Sanders.

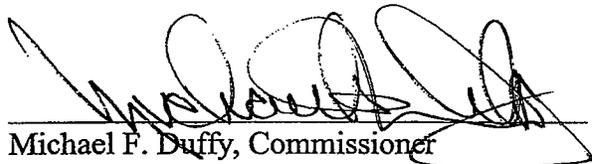
On May 14, 2009, the Commission received a motion from Mr. Sanders requesting that the Commission reopen the penalty assessment proceeding and relieve him from the order of default. Mr. Sanders states that he was employed by Natural Materials from May 2005 until December 2007, when the company filed for bankruptcy, and that he remained in contact with the company throughout the first half of 2008. Mr. Sanders submits that he told Natural Materials that he had requested a hearing, and that the operator assured him that it would handle everything including setting a hearing date. Mr. Sanders explains that he moved from the area for work and had difficulty communicating with the operator because his letters were returned and the operator’s phones were disconnected. Mr. Sanders later contacted former Natural Materials management officials and discovered that the operator was not, in fact, acting on his behalf. The Secretary did not respond to the request to reopen.

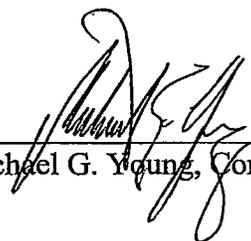
The judge's jurisdiction in this matter terminated when his decision was issued on February 6, 2009. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 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 March 18, 2009.

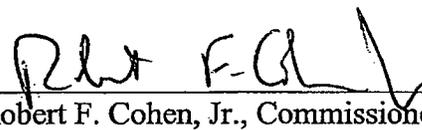
In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 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 Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Upon review of the record, it appears that Mr. Sanders may not have received the show cause order in a manner that permitted his timely response. Accordingly, in the interest of justice, we hereby vacate the Order of Default and remand this matter to Administrative Law Judge Gary Melick for further appropriate proceedings. *See generally Oak Grove Res., LLC, 29 FMSHRC 766, 767 (Sept. 2007) (vacating default when show cause order provided inadequate notice).*

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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Nick Kinser  
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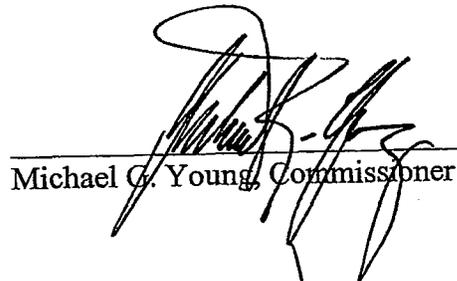
Luminant's safety coordinator states that he discussed the proposed assessment with his supervisor, the safety director, and that he believed the proposed assessment would be forwarded to Luminant's counsel for filing a contest. However, it was apparently not forwarded to counsel. Luminant states that, because of this "internal miscommunication," it failed to timely request a hearing on the penalty.

The Secretary opposes reopening the proposed penalty assessment because, among other things, she believes that Luminant's excuse for failing to timely file a contest to the proposed penalty is "conclusory."

Having reviewed Luminant's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Luminant's failure to timely contest the penalty and whether relief from the final order should be granted. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. § 2700.

  
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Mary Lu Jordan, Chairman

  
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Michael F. Duffy, Commissioner

  
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Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW  
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September 23, 2009

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

v.

BUCYRUS FIELD SERVICES, INC.

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Docket No. CENT 2009-433  
A.C. No. 41-04586-180077 Z8T

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

ORDER

BY THE COMMISSION:

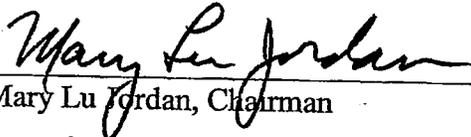
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 18, 2009, the Commission received from Bucyrus Field Services, Inc. (“Bucyrus”) a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

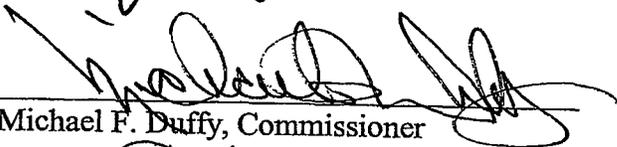
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

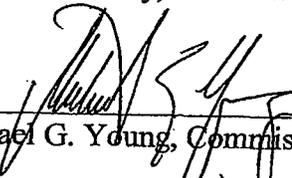
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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).

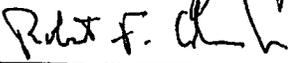
The record indicates that the operator submitted its contest of the proposed penalty for Citation No. 8455328 two days late due to confusion about the due date.<sup>1</sup> The Secretary states that she does not oppose reopening the proposed penalty assessment.

Having reviewed Bucyrus' request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty with respect to Citation No. 8455328 within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> The operator submits that its contest of the proposed penalty assessment was timely because the time for response was extended by five days under Commission Procedural Rule 8(b). 29 C.F.R. § 2700.8(b) (providing in part that “[w]hen a party serves a pleading by a method of delivery other than same-day service, the due date for party action in response is extended 5 additional calendar days”). We reject the argument. Section 105(a) of the Mine Act requires that an operator notify the Secretary of a penalty contest “within 30 days from the receipt of the notification issued by the Secretary.” 30 U.S.C. § 815(a). Similarly, the Secretary’s regulations, 30 C.F.R. § 100.7(c), and the Commission’s regulations, 29 C.F.R. § 2700.27, both plainly provide that to be timely, an operator’s notice of contest must be submitted within 30 days of receipt of the proposed penalty assessment. The extension allowed under Rule 8(b) applies to responsive pleadings and, as the Secretary asserts, a proposed penalty assessment is not a pleading. Moreover, since the 30-day time period for responding to a proposed assessment begins to run upon *receipt* by the operator, the method of service chosen by MSHA for delivering the proposed assessment does not reduce the operator’s 30-day period.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 24, 2009

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

v.

AUGUST WINTER & SONS, INC.

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Docket No. LAKE 2009-447-M  
A.C. No. 47-02918-175141 W178

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

ORDER

BY THE COMMISSION:

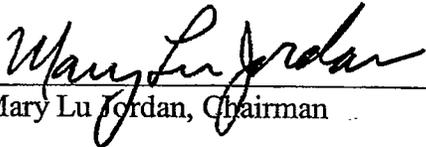
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 1, 2009, the Commission received from August Winter & Sons, Inc. (“Winter”) a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant 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).

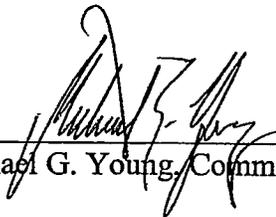
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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).

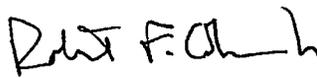
On January 21, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000175141 to Winter, proposing a civil penalty for one citation. The operator's safety director states that he was not notified of the citation until April 24, 2009, "[d]ue to clerical issues" and, as a result of the delay, the operator was unable to timely contest the citation and proposed penalty. The Secretary opposes the request to reopen on the ground that the operator's statement that it failed to timely contest the proposed assessment due to "clerical issues" does not demonstrate circumstances that warrant reopening.

Having reviewed Winter's request to reopen and the Secretary's response, we agree with the Secretary that Winter has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Winter's conclusory statement that it failed to timely contest because of clerical issues does not provide the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Winter's request. *See, e.g., BRS Inc.*, 30 FMSHRC 626, 628 (July 2008); *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008). The words "without prejudice" mean Winter may submit another request to reopen the case so that it can contest the citation and penalty assessment.<sup>1</sup>

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> If Winter submits another request to reopen the case, it must establish good cause for not contesting the citation and proposed assessment within 30 days from the date it received the proposed penalty assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Winter should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Winter from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. Winter should submit copies of supporting documents with its request to reopen the case.

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On November 13, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000169050 to Old Dominion, which proposed civil penalties for 24 citations. Old Dominion states that it intended to contest the penalties for Citation Nos. 6641802, 6641805, 6641806, 6641807, 6641808, 6641816, 6641817, and 6638021 and to pay the remaining penalties.<sup>1</sup> It further states that on November 25, 2008, it submitted its contest of the eight penalties to MSHA's Civil Penalty Compliance Office, and on December 10, 2008, sent a check to MSHA for the remaining penalties. The operator submits that it became aware that the penalties had not been contested when it received a notice of delinquency from MSHA. It explains that funds from the payment it made were misapplied to some of the citations which it intended to contest, and other penalties which it intended to pay are shown as delinquent.

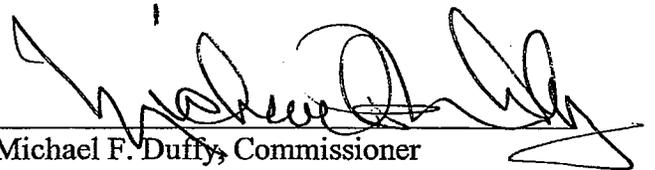
The Secretary states that she does not oppose the reopening of the proposed penalty assessment. She notes, however, that while the payment was received at MSHA's payment processing center, there is no record that the penalty contest form was received by MSHA's Civil Penalty Compliance Office.

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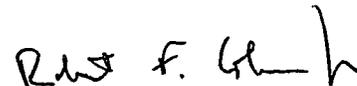
<sup>1</sup> The operator's counsel has confirmed that the operator intended to contest the penalties associated with these citations, as the citation numbers are listed in the proposed assessment attached to Old Dominion's motion to reopen. Some of the citation numbers set forth in the motion were transposed.

Having reviewed Old Dominion's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
Michael F. Duffy, Commissioner

  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

September 29, 2009

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

v.

A MINING GROUP, LLC

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Docket No. SE 2009-505-M  
A.C. No. 08-01340-159339

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

ORDER

BY THE COMMISSION:

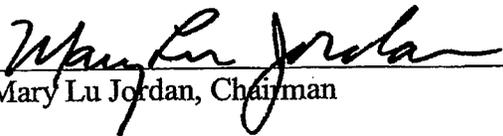
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 11, 2009, the Commission received from A Mining Group, LLC (“AMG”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant 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).

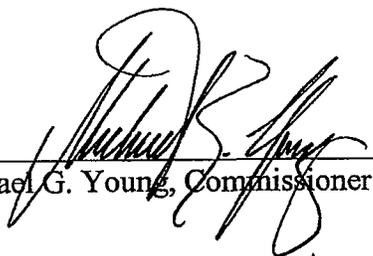
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

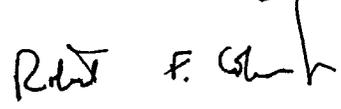
In an affidavit, the operator states that on May 21, 2008, it received Citation No. 7751269 and that it timely contested the citation. In November 2008, it received a delinquency notice from the Department of Labor's Mine Safety and Health Administration ("MSHA"). AMG states that it attempted on numerous occasions to contact MSHA about the matter but was unsuccessful. The operator's counsel investigated the matter and determined that the operator had failed to contest Proposed Assessment No. 000159339, which proposed a civil penalty for Citation No. 7751269. AMG contends that it has no record of having received the proposed assessment. The Secretary does not oppose reopening the proposed assessment but notes that FedEx records indicate that the proposed assessment was received on August 13, 2008.

Having reviewed AMG's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 30, 2009

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|-------------------------------|---|----------------------------|
| SECRETARY OF LABOR,           | : | Docket No. LAKE 2008-349-M |
| MINE SAFETY AND HEALTH        | : | A.C. No. 47-03165-140238   |
| ADMINISTRATION (MSHA)         | : |                            |
|                               | : |                            |
| v.                            | : | Docket No. LAKE 2008-350-M |
|                               | : | A.C. No. 47-03191-140239   |
|                               | : |                            |
| NORTHERN LAKES CONCRETE, INC. | : | Docket No. LAKE 2008-351-M |
|                               | : | A.C. No. 47-03330-140242   |

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

ORDER

BY THE COMMISSION:

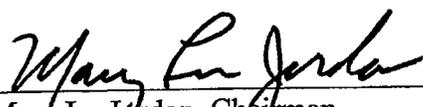
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 14, 2008, and November 21, 2008, the Commission received from Northern Lakes Concrete, Inc. (“Northern Lakes”) motions by counsel seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

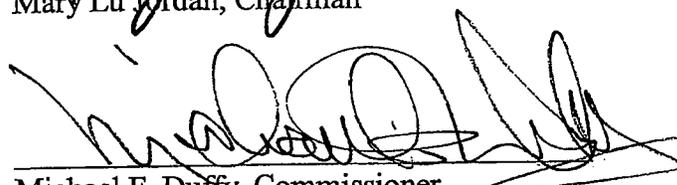
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

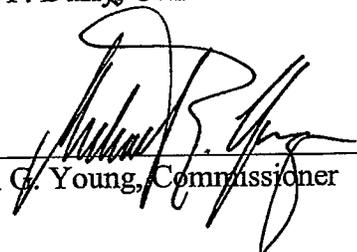
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

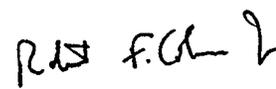
On November 7, 2008, the Commission denied without prejudice Northern Lake's request on the basis that the operator had failed to provide "a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments." *Northern Lakes Concrete, Inc.*, 30 FMSHRC 1010, 1011 (Nov. 2008). On November 21, 2008, Northern Lakes promptly filed a second motion to reopen the penalty assessments with an affidavit that more fully explained the reason for its delay in contesting the assessments. The Secretary has not opposed the requests to reopen.

Having reviewed Northern Lake's requests and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
Michael F. Duffy, Commissioner

  
\_\_\_\_\_  
Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

September 30, 2009

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

v.

THE BANNER COMPANY, LLC

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Docket No. VA 2009-90  
A.C. No. 44-07181-159712

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On December 5, 2008, the Commission received from The Banner Company, LLC (“Banner”) a motion 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).

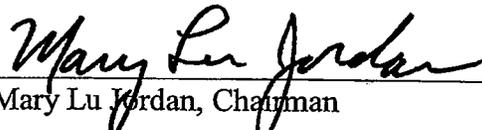
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

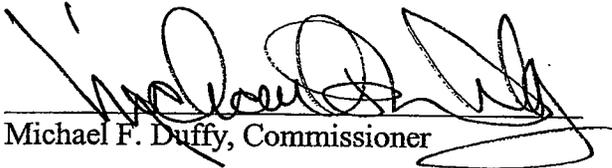
The record indicates that the operator submitted its contest to the proposed penalty assessment one day late due to confusion about the due date.<sup>1</sup> The Secretary states that she does not oppose reopening the proposed penalty assessment.

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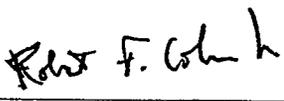
<sup>1</sup> The operator submits that its contest of the proposed penalty assessment was timely because the time for response was extended by five days under Commission Procedural Rule 8(b). 29 C.F.R. § 2700.8(b) (providing in part that “[w]hen a party serves a pleading by a method of delivery other than same-day service, the due date for party action in response is extended 5 additional calendar days”). We reject the argument. Section 105(a) of the Mine Act requires that an operator notify the Secretary of a penalty contest “within 30 days from the receipt of the notification issued by the Secretary.” 30 U.S.C. § 815(a). Similarly, the Secretary’s regulations, 30 C.F.R. § 100.7(c), and the Commission’s regulations, 29 C.F.R. § 2700.27, both plainly provide that to be timely, an operator’s notice of contest must be submitted within 30 days of receipt of the proposed penalty assessment. The extension allowed under Rule 8(b) applies to responsive pleadings and, as the Secretary asserts, a proposed penalty assessment is not a pleading. Moreover, since the 30-day time period for responding to a proposed assessment begins to run upon *receipt* by the operator, the method of service chosen by MSHA for delivering the proposed assessment does not reduce the operator’s 30-day period.

Having reviewed Banner's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
Michael F. Duffy, Commissioner

  
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Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
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

October 8, 2009

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
on behalf of ROBERT GATLIN :  
 :  
 : Docket No. KENT 2009-1418-D  
v. :  
 :  
KENAMERICAN RESOURCES, INC. :

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

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 31, 2009, Administrative Law Judge Margaret Miller issued an order temporarily reinstating Robert Gatlin to employment with KenAmerican Resources, Inc. (“KenAmerican”) pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). On September 18, 2009, the Judge issued an order clarifying and adding to the temporary reinstatement order. KenAmerican filed a petition with the Commission seeking review of the Judge’s September 18 order. In the petition, KenAmerican also moves the Commission to stay the effect of the September 18 order pending the Commission’s review and decision. For the reasons that follow, we grant the petition, deny the motion for stay, vacate the September 18 order, and remand the matter to the Judge for further proceedings.

I.

Factual and Procedural Background

The facts of this case are set forth in detail in the Judge’s August 31 order. Mr. Gatlin was employed with KenAmerican from February 2009 until he was discharged on June 7, 2009. Mr. Gatlin was discharged on June 7 after he refused to work in a section of KenAmerican’s Paradise No. 9 Mine, which he believed to be unsafe. Mr. Gatlin filed a complaint with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) alleging that the

discharge amounted to discrimination in violation of section 105(c) of the Mine Act. The Secretary filed an Application for Temporary Reinstatement on August 3, 2009, and the Judge held a hearing on the application on August 20, 2009.

The Judge concluded that the Secretary had made a sufficient showing of the elements of a prima facie discrimination case and that she met her burden of establishing that Mr. Gatlin's discrimination complaint had not been frivolously brought.<sup>1</sup> Aug. 31 Order at 8. More specifically, the Judge determined that the Secretary had presented evidence that Mr. Gatlin refused to work on June 7 because he had a good faith belief that the section he was assigned to was unsafe, and that Mr. Gatlin had expressed his concern to KenAmerican management. *Id.* at 6. The Judge further found that there was sufficient evidence that KenAmerican did not address Mr. Gatlin's concerns and terminated Mr. Gatlin for his work refusal. *Id.* at 7-8. Accordingly, the Judge ordered KenAmerican to temporarily reinstate Mr. Gatlin to his former position effective as of the date of the order, noting that the operator could economically reinstate Mr. Gatlin if it chose to do so. *Id.* at 8.

On September 11, 2009, the Secretary filed a Motion to Enforce Order of Temporary Reinstatement with the Judge. The Secretary stated in the motion that although KenAmerican had been ordered on August 31, 2009 to temporarily reinstate Mr. Gatlin, the operator had failed to do so, and was contending that Mr. Gatlin's position had been eliminated in a layoff. Mot. at 1. The Secretary asserted that KenAmerican had an obligation to reinstate Mr. Gatlin regardless of whether it was economically beneficial for it to do so. *Id.* at 2. The Secretary requested that the Judge immediately reinstate Mr. Gatlin to his former position pending the final hearing and disposition of the case. *Id.*

On September 15, KenAmerican filed an opposition to the Secretary's motion with the Judge. The operator asserted that it had not failed to reinstate Mr. Gatlin, and that it considers Mr. Gatlin reinstated as of August 31. KA Resp. to Mot. to Enforce ("KA Resp.") at 1, 2. It explained that, as it had indicated in a teleconference with the Judge and the Secretary on September 3, KenAmerican intended to offer economic reinstatement to Mr. Gatlin. *Id.* at 1. The operator stated that while it was in the process of finalizing a Joint Motion to Approve Economic Reinstatement Agreement with the Secretary, an independent management decision was made to idle KenAmerican operations with a massive workforce reduction, and that counsel learned of the decision on September 10, 2009. *Id.* at 1-2. As of September 14, 2009, 290 of 370 employees were laid off because the Paradise mine was idled due to adverse mining conditions. *Id.* at 2. The operator states that Mr. Gatlin was among the employees subject to the layoff, and that his selection was made solely on the basis of skill level, performance, and years of service as related to operational needs. *Id.* KenAmerican contended that a bona fide economic retrenchment bars reinstatement, and that the reinstatement order should not be enforced because

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<sup>1</sup> The scope of a hearing on an application for temporary reinstatement is limited to a determination of whether the miner's complaint was frivolously brought. 29 C.F.R. § 2700.45(d).

there is no job to which Mr. Gatlin could be reinstated, and it would be inequitable for Mr. Gatlin to be paid while other, more senior, miners are out of work. *Id.* at 3-4. KenAmerican states that it made an offer to the Secretary to pay Mr. Gatlin from August 31 to September 18, the last pay date for laid-off employees.<sup>2</sup> *Id.* at 2. KenAmerican attached to its opposition an affidavit supporting its factual allegations.

On September 18, the Judge issued an order clarifying and adding to the August 31 temporary reinstatement order ("Sept. 18 Order").<sup>3</sup> The Judge concluded that Mr. Gatlin must be reinstated to his former position, at least temporarily, until the layoff can be reviewed with other aspects of the case. Sept. 18 Order at 2. She explained that "A temporary reinstatement order, such as the one issued here, requires the complaining miner to be re-employed, under any circumstance, including changing circumstances at the mine." *Id.* The Judge reasoned that to determine otherwise would be to undermine the purpose of the temporary reinstatement and to grant the mine operator a defense that was not raised during the temporary reinstatement hearing. *Id.* Accordingly, the Judge ordered that the operator begin the economic reinstatement of Mr. Gatlin immediately without the need for further agreement or order. *Id.*

In its petition, KenAmerican states that the Judge's Sept. 18 Order is contrary to law and is not supported by substantial evidence. Pet. at 3. KenAmerican maintains that the Secretary has not disputed its submission that due to economic reasons precipitated by adverse mining conditions, the Paradise Mine was idled, which necessitated a massive workforce reduction, including Mr. Gatlin, whose selection was based solely on skill level, performance and years of service as related to operational needs. *Id.* at 4. It submits, therefore, that the "undeniable facts before the Judge are that [Mr.] Gatlin was laid off after his reinstatement as part of a massive workforce reduction and would have been in the same situation had there never been a prior termination or reinstatement." *Id.* at 5 (emphasis omitted). KenAmerican states that a change in circumstances does, in fact, make a difference in terms of whether a reinstatement is enforceable. *Id.* at 6. It explains that a miner cannot be reinstated to a position that no longer exists, and that it could not have raised such a defense at the temporary reinstatement hearing because the

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<sup>2</sup> KenAmerican's counsel states that after learning of the layoff decision, he contacted counsel for the Secretary to verbally relay information about the layoff and to inform the Secretary that KenAmerican would pay Mr. Gatlin until the day of the workforce reduction. Rather than determining unilaterally that the workforce reduction justified terminating Mr. Gatlin's reinstatement, KenAmerican should have moved the Judge to modify the August 31 Order. *See Consolidation Coal Co.*, 14 FMSHRC 956, 970 (June 1992) ("[N]o operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.").

<sup>3</sup> The Judge stated that she lacks authority to enforce her own orders, and that if the Secretary believes that the temporary reinstatement order is not being fully enforced, the Secretary's remedy is to seek injunctive or other appropriate relief from a United States District Court. Sept. 18 Order at 1. She interpreted the Secretary's motion to be one for clarification. *Id.*

circumstances surrounding the layoff occurred one month after the hearing. *Id.* Accordingly, KenAmerican requests that the Judge's order be reversed and moves the Commission to stay the effect of the order pending its review and decision. *Id.* at 1, 8.

The Secretary responds that KenAmerican has not established that changed circumstances warrant relief from the Judge's temporary reinstatement order. S. Resp. at 9-11. First, she argues that KenAmerican is estopped from arguing that changed circumstances warrant relief. *Id.* at 11-12. The Secretary explains that parties may be estopped from taking inconsistent positions in the same litigation. *Id.* at 11. She asserts that because KenAmerican chose to pay Mr. Gatlin money without receiving job services from him, it cannot now take the inconsistent position that it should be relieved from paying him because a layoff eliminated his job. *Id.* Next, the Secretary argues in the alternative that if KenAmerican is not estopped, the Commission should remand the case to the Judge in order to give KenAmerican an opportunity to prove that changed circumstances warrant relief from the temporary reinstatement order. *Id.* at 12-16. The Secretary acknowledges that under Commission precedent, an operator may be able to convince a Judge that changed circumstances make compliance with a temporary reinstatement order impossible. *Id.* at 12. She states that the affidavit submitted by the operator is inadequate but that it should be provided an opportunity to make such a showing. *Id.* at 12-14. Finally, she asserts that the Commission should deny KenAmerican's motion to stay because the operator failed to adequately brief the issue and because it failed to establish the extraordinary circumstances warranting a stay. *Id.* at 16-19.

## II.

### Disposition

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has repeatedly recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

Here, KenAmerican has not challenged the Judge's determination that Mr. Gatlin's discrimination complaint was not frivolously brought. Rather, KenAmerican challenges the period of time for which it must economically reinstate Mr. Gatlin. In such circumstances, the Commission reviews a "judge's remedial order for abuse of discretion and to ensure that it effectuates the purposes of the Mine Act." *Sec'y of Labor on behalf of Rieke v. Akzo Nobel Salt*,

*Inc.*, 19 FMSHRC 1254, 1258 (July 1997). Abuse of discretion may be found when “there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” *Id.* at 1258 n.3 (citations omitted).

We conclude that the Judge’s decision is based on an improper understanding of the law.<sup>4</sup> The Judge abused her discretion when she determined that a temporary reinstatement order requires a miner to be employed under any circumstance, regardless of changes that occur at the mine after issuance of the temporary reinstatement order. Sept. 18 Order at 2.

The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator’s reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee. *See Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638, 1639 (Sept. 1989) (holding that back pay is due to a discriminatee from the date of the unlawful discharge until the time of reinstatement or “the occurrence of an event tolling the reinstatement obligation”); *Wiggins v. E. Assoc. Coal Corp.*, 7 FMSHRC 1766, 1772-73 (Nov. 1985) (concluding that back pay award ended upon date of layoff). As a Commission Judge reasoned, “if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.” *Casebolt v. Falcon Coal Co., Inc.*, 6 FMSHRC 485, 499 (Feb. 1984) (ALJ) (citations omitted); *see also NLRB v. Federal Bearings Co.*, 109 F.2d 945 (2d Cir. 1940) (concluding that an employer should not be held in contempt for failing to reinstate a wrongfully discharged employee when depressed business conditions required a reduction in force).

Thus, as noted by both parties (Pet. at 5; S. Resp. at 12), Commission precedent recognizes that a change in circumstances may be relevant to tolling economic reinstatement in a temporary reinstatement proceeding. *See generally Sec’y of Labor on behalf of Shepherd v. Sovereign Mining Co.*, 15 FMSHRC 2450 (Dec. 1993) (remanding to Judge to determine effect of operator’s layoff on Judge’s temporary reinstatement order). We therefore hold that the Judge erred in concluding that a miner must remain temporarily reinstated notwithstanding changing circumstances at the mine.

The Commission has also recognized in remedial contexts that an operator has the burden of establishing “facts which would negative the existence of [back pay] liability to a given employee or which would mitigate that liability.” *See Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 779 (May 1989) (citations omitted). The Commission has stated that, “[s]pecifically, the burden of showing that work was not available for a discriminatee, whether through layoff, business contractions, or similar conditions, lies with the employer as an

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<sup>4</sup> We reject the Secretary’s estoppel argument. We see no significant inconsistency between KenAmerican’s agreement to economically reinstate Mr. Gatlin and its position that the operator’s reinstatement obligation was subsequently tolled when Mr. Gatlin’s job was eliminated.

affirmative defense to reinstatement and backpay.” *Id.* In such circumstances, the operator must make such a showing by a preponderance of the evidence. *Id.*

Given this precedent, we vacate the Judge’s Sept. 18 Order and remand for further proceedings. On remand, the Judge, upon request, shall expeditiously take further evidence and provide an opportunity for discovery, if appropriate, to determine whether the duration of temporary reinstatement set forth in the August 31 Order should be modified. More specifically, the Judge should determine whether KenAmerican has proven by a preponderance of the evidence that the occurrence of the layoff is a legitimate reason for tolling Mr. Gatlin’s economic reinstatement. Factors to be considered by the Judge include whether the layoff was unrelated to the August 31 Order and whether the layoff properly included Mr. Gatlin.<sup>5</sup> In sum, in order to justify termination of economic reinstatement, KenAmerican must prove by a preponderance of the evidence that Mr. Gatlin’s inclusion in the layoff was entirely unrelated to his protected activities.

Furthermore, we deny KenAmerican’s motion to stay the effect of the Sept. 18 Order. The motion is moot given our vacating of that order. Because the terms of the August 31 Order remain in effect until such time, if any, that the period of reinstatement is modified by the Judge, Mr. Gatlin shall continue to receive economic reinstatement until such modification, if any. Thus, KenAmerican must continue to comply with the terms of the August 31 Order and pay Mr. Gatlin until the matter is resolved by the Judge.

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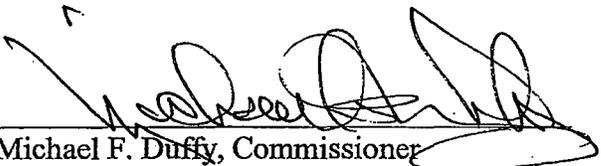
<sup>5</sup> We note that although KenAmerican stated that it considered four factors (mining experience, skill level, performance, and years of service) in making the workforce reductions, it only asserted that three of these factors (excluding mining experience) were relevant to Mr. Gatlin’s inclusion in the layoff. Pet. at 4; KA Resp. at 2. Moreover, in its submissions to the Judge and in the Petition to the Commission, KenAmerican has described only the fact that Mr. Gatlin had been its employee “shortly over six months.” Pet. at 4; KA Resp. at 2. On remand, KenAmerican should explain how all of the factors it considered were applied to Mr. Gatlin or why any factor not applied was deemed irrelevant.

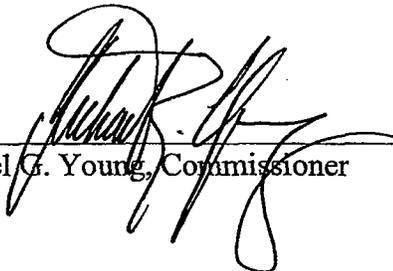
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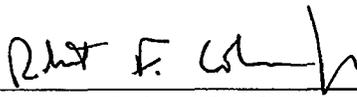
Conclusion

For these reasons, we grant KenAmerican's petition, vacate the Judge's September 18 order, deny the motion for stay, and remand for further proceedings consistent with this decision.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

October 8, 2009

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

v.

CLEAN ENERGY MINING COMPANY

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Docket No. KENT 2009-925  
A.C. No. 15-10753-170921

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

ORDER

BY THE COMMISSION:

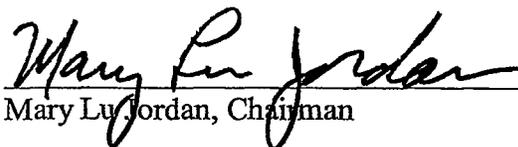
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 16, 2009, the Commission received from Clean Energy Mining Company ("Clean Energy") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

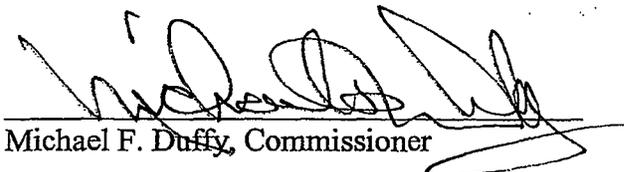
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

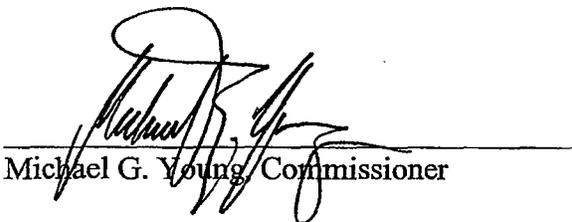
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

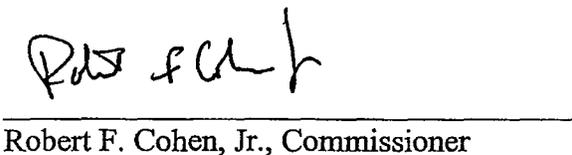
On December 10, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000170921. However, both the operator and the Secretary now agree that the proposed assessment was not received by Clean Energy and was returned to MSHA undelivered. The Secretary states that she "will mail the proposed assessment to . . . the operator" again and that "Clean Energy will then have 30 days after receipt of the proposed assessment to either pay or contest the penalty."

Having reviewed Clean Energy's request and the Secretary's response, we find the request to reopen to be moot because Clean Energy never properly received the proposed assessment and therefore it did not become a final order of the Commission. As stated above, once the Secretary mails the proposed assessment, Clean Energy will have 30 days from the date of its receipt to either contest or pay the proposed penalty. If the proposed penalty is timely contested by Clean Energy, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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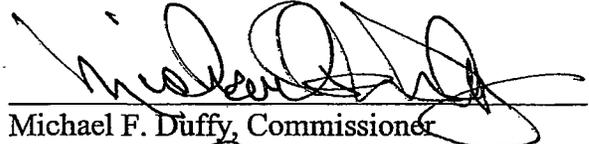
Proposed Assessment No. 000161991 was issued by MSHA on September 9, 2008. Taft asserts that it has no record of having receiving the proposed assessment, and paid the proposed penalties in error when it received a notice of "outstanding balance" on another proposed assessment after Assessment No. 000161991 had become a final order.

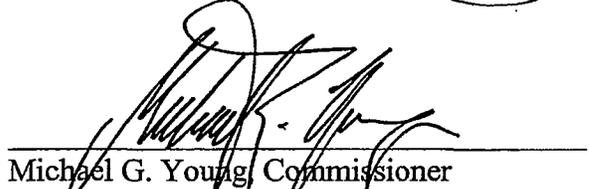
The Secretary states that she does not oppose the reopening of the proposed penalty assessment. However, she produced a FedEx Tracking Report indicating that the penalty assessment was received by the operator on September 15, 2008, and signed for by S. Brandon.

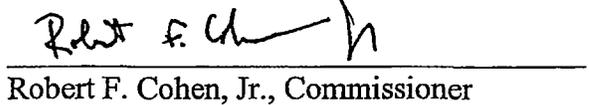
Having reviewed Taft's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Taft's failure to timely contest the penalties and whether relief from the final order should be granted. The Chief Administrative Law Judge should determine whether the operator actually received the proposed assessment on September 15, 2008 and, if so, whether the operator's failure to contest the assessment resulted from mistake, inadvertence, or excusable neglect.

If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
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Chief Administrative Law Judge Robert J. Lesnick  
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601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021



Knife River states that it misunderstood the instructions on the assessment form and mailed the contest of the proposed penalties to the Commission, rather than to the Department of Labor's Mine Safety and Health Administration ("MSHA"). Knife River further states that it was unaware of its error until it received a delinquency notice from MSHA and then immediately called MSHA and learned that it had sent the contest to the wrong address.

The Secretary does not oppose Knife River's motion to reopen.

Having reviewed Knife River's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 13, 2009

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

v.

RIVERTON INVESTMENT CORP.

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Docket No. WEVA 2008-1449-M  
A.C. No. 46-00007-122557

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) ("Mine Act"). On July 9, 2008, the Commission received from Riverton Investment Corp. ("Riverton")<sup>1</sup> a motion by counsel seeking 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).

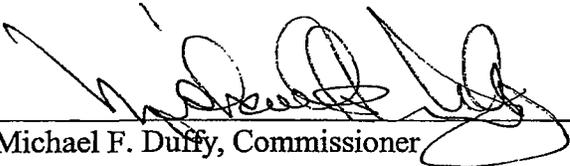
On September 8, 2009, the Commission received a letter from counsel for the Secretary stating that Riverton had paid the penalty assessment at issue in full and requesting that Riverton's pending request to reopen the assessment be denied as moot.

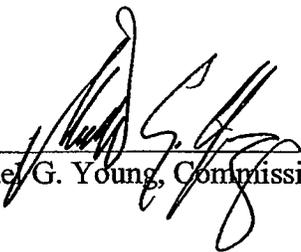
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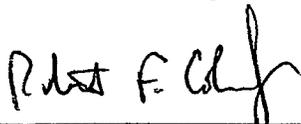
<sup>1</sup> Riverton is identified on the legal identity report as the name of the operator of Essroc Cement, the mine involved with this proceeding.

Having reviewed Riverton's request and the Secretary's responses, we hereby deny Riverton's request to reopen as moot.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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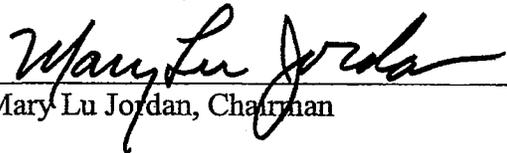
Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
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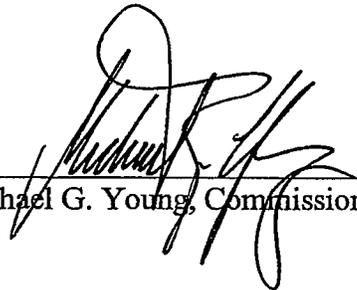
Big River states that, when it received the proposed penalty assessment, its safety director, who is responsible for reviewing proposed penalties, was absent from the office for training and personal reasons. Big River further states that, after the safety director returned to the office, for some unknown reason, he never received the proposed penalty assessment. Big River states that the safety director learned of the penalties only when he received another assessment and saw the penalties listed.

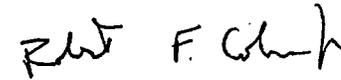
The Secretary opposes reopening the proposed penalty assessment. The Secretary argues that Big River has made no showing of exceptional circumstances warranting reopening and that an operator's inadequate or unreliable internal processing procedures should not constitute an adequate justification. The Secretary also notes that Big River failed to timely contest assessments in two other dockets in which it sought to reopen final orders because proposed assessments were not in its files.

Having reviewed Big River's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Big River's failure to timely contest the penalty and whether relief from the final order should be granted.<sup>1</sup> If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. § 2700.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> On remand, the judge should consider whether Big River has met the standard for relief in light of its prior failures to adequately track assessments after delivery to its office and warnings from the Secretary that she would oppose future motions to reopen if Big River did not establish adequate procedures to ensure that assessments were timely contested.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

October 13, 2009

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

v.

KENAMERICAN RESOURCES, INC.

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:  
:  
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:  
:

Docket No. KENT 2009-1060  
A.C. No. 15-17741-170925

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On May 15, 2009, the Commission received from KenAmerican Resources, Inc. (“KenAmerican”) a motion 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).

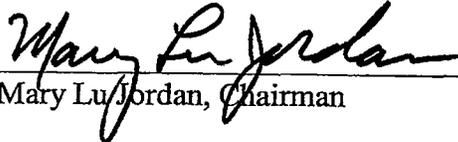
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

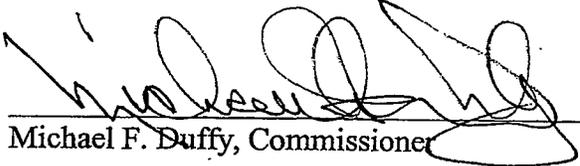
However, we have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

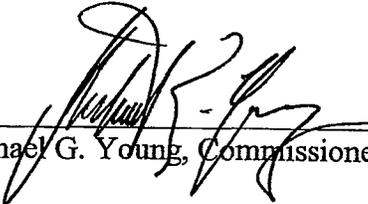
KenAmerican states that, according to information obtained from the Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Proposed Assessment No. 0001790925 was delivered to KenAmerican on December 18, 2008. The operator states that the employee who apparently received the delivery never forwarded the proposed assessment to any of her supervisors and then resigned on February 26, 2009. A mine foreman (and former Manager of Health and Safety) for KenAmerican explains in an affidavit that he became aware of the proposed assessment only after he received a delinquency notice from MSHA on March 12, 2009, and investigated the matter.

The Secretary opposes KenAmerican's request to reopen. She asserts that the operator has made no showing of the exceptional circumstances that warrant reopening but rather an instance of inadequate or unreliable internal distribution procedures, and that the operator has failed to identify facts that, if proven on reopening, would establish a meritorious defense.

Having reviewed KenAmerican's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. This appears to be an isolated instance of an inadvertent error involving an employee who is no longer employed by KenAmerican rather than an indication of inadequate or unreliable internal distribution procedures. Upon discovering the delinquency, KenAmerican investigated the matter, filed its request to reopen within a reasonable time, and provided the Commission with a sufficiently detailed explanation for its failure to timely contest the proposed assessment which was supported by reliable documentation. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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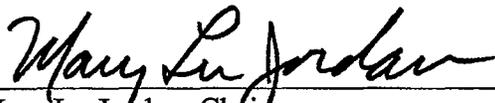
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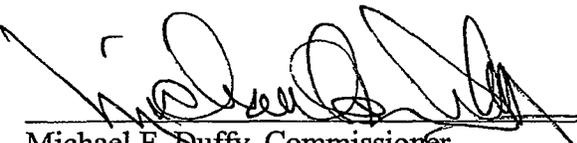


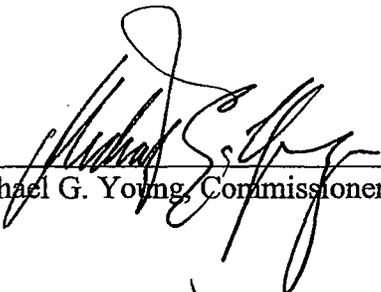
Knox Creek states that it returned the assessment form to MSHA with the citations that it desired to contest noted on the form. Shortly after Knox Creek received a delinquency letter from MSHA, it submitted its request to reopen to the Commission.

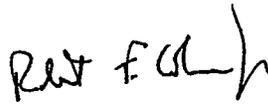
The Secretary does not oppose reopening the proposed penalty assessment but states that there is no record of the penalty contest form having been received by MSHA's Civil Penalty Compliance Office. The Secretary acknowledges receiving payment in this penalty assessment in an amount which, when subtracted from the total proposed assessment, leaves a balance which is the amount of money that Knox Creek claims to have contested.

Having reviewed Knox Creek's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Knox Creek's failure to timely contest the penalty and whether relief from the final order should be granted. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. § 2700.

  
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Mary Lu Jordan, Chairman

  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 13, 2009

|                           |   |                           |
|---------------------------|---|---------------------------|
| SECRETARY OF LABOR,       | : | Docket No. WEVA 2009-1348 |
| MINE SAFETY AND HEALTH    | : | A.C. No. 46-05978-176931  |
| ADMINISTRATION (MSHA)     | : |                           |
|                           | : | Docket No. WEVA 2009-1349 |
|                           | : | A.C. No. 46-05978-177402  |
|                           | : |                           |
|                           | : | Docket No. WEVA 2009-1350 |
|                           | : | A.C. No. 46-05978-171680  |
|                           | : |                           |
|                           | : | Docket No. WEVA 2009-1351 |
| v.                        | : | A.C. No. 46-05978-168598  |
|                           | : |                           |
|                           | : | Docket No. WEVA 2009-1352 |
| JACOB MINING COMPANY, LLC | : | A.C. No. 46-05978-165760  |

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On May 1, 2009, the Commission received from Jacob Mining Company, LLC (“Jacob”) a letter seeking to reopen 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).<sup>1</sup>

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

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-1348, WEVA 2009-1349, WEVA 2009-1350, WEVA 2009-1351, and WEVA 2009-1352, all captioned *Jacob Mining Company, LLC*, and involving the same procedural issues. 29 C.F.R. § 2700.12. Although Jacob also sought reopening of Assessment No. 000182191, the Secretary indicated in her response that she will treat that proposed assessment as being timely contested and proceed accordingly.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

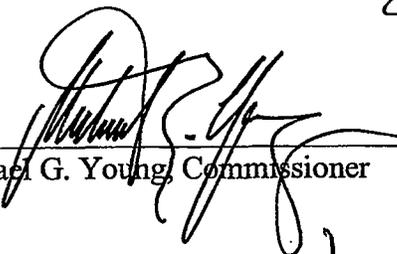
The operator asserts that it failed to contest the proposed assessments in a timely manner because it “was unaware that [it] could contest the fine amounts.” It also states that it is unable to pay the proposed penalties and requests reopening so that the penalty amounts may be lowered.

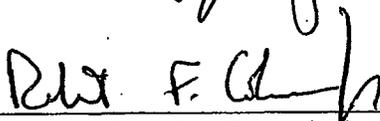
In response, the Secretary states that the operator has failed to make a showing of exceptional circumstances that warrant reopening. She asserts that Jacob has been in business since 2005, and that the proposed assessment forms set forth the procedure for contesting proposed penalties. The Secretary contends that, in any event, ignorance of the rules and law and inability to pay a penalty are not grounds for reopening a proposed penalty that has become final. She also notes that, if the operator wishes to set up a payment plan, it should contact MSHA’s Civil Penalty Compliance Office.

Having reviewed Jacob's request to reopen and the Secretary's response, we conclude that Jacob has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Jacob's conclusory statement that it was "unaware that [it] could contest the fine amounts" (even though the assessment forms set forth contest procedures) does not provide the Commission with an adequate basis to reopen. In addition, Jacob's statement that it is unable to pay the full penalty amounts does not address the question of why it failed to timely contest the proposed assessments. Accordingly, we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Jacob may submit another request to reopen Assessment Nos. 000176931, 000174402, 000171680, 000168598, and 000165760 so that it can contest the proposed penalties.<sup>2</sup>

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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<sup>2</sup> If Jacob submits another request to reopen, it must establish good cause for not contesting the citations and proposed penalties within 30 days from the date it received the proposed assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Jacob should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Jacob from responding within the time limits provided in the Mine Act, as part of its request to reopen. Jacob should also submit copies of supporting documents with its request to reopen.

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2009. Slip op. at 2, 3; Tr. 25, 39. Williamson began working on the 001 Section around the middle of April 2009 under the supervision of McArthur Swiney, section foreman. Slip op. at 3. The 001 Section was a “walking supersection,” which meant that two continuous miners ran alternatively among the different entries on the face with a single split of air. Slip op. at 3; Tr. 26-27. Previously, Williamson worked on the 002 Section, a “supersection,” which had two continuous miners operating simultaneously with double splits of air. Slip op. at 3; Tr. 26.

On or about April 20 or 21, Williamson noticed that both left-side and right-side shuttle cars were returning from the face with loads of coal at the same time. Slip op. at 3. He believed that both continuous miners were cutting coal at the same time, which was not permissible with the section’s current ventilation. *Id.* He spoke with Swiney about the simultaneous operation of the miners, but Swiney did not respond. *Id.* Swiney later denied that Williamson made this complaint. *Id.* at 4. After this incident, Williamson alleges that Swiney began “dogging” him and assigning him more onerous tasks. *Id.* at 3-4. Williamson, who has a history of heart trouble, testified that he began suffering chest pain that he attributed to the stress caused by Swiney’s “dogging.” *Id.* at 3. Williamson also testified that he visited a doctor for his chest pain on April 23 and was off work until he returned on April 27, as per his doctor’s instructions. *Id.* When Williamson returned to work, he was transferred to operate the right-side shuttle car. *Id.* Williamson claims that Swiney began calling him “asshole” and gave him job assignments that were different from, and more difficult than, the assignments given to other shuttle car operators. *Id.* at 3-4; Tr. 39-40, 63-64, 67, 158, 160. Swiney testified that he never called Williamson “asshole” and denied dogging Williamson. Slip op. at 4.

On May 5, 2009, MSHA issued Citation No. 8227386 to CAM Mining for a violation of section 75.370(a)(1), 30 C.F.R. § 75.3701(a)(1), which requires a mine operator to follow an approved ventilation plan. *Id.* The citation was issued because the 001 Section was operating on a single, rather than two distinct splits of air, as provided in the existing approved ventilation plan. *Id.* The citation was terminated on May 7, 2009, after CAM Mining submitted an updated ventilation plan conforming with its single split of air operation. *Id.*

On May 13, 2009, Williamson was driving his shuttle car around a corner when he struck a dip in the floor and skidded across the intersection, hitting and cutting the water line and pinching the continuous miner power cable. *Id.* Williamson said that as he was attempting to reposition the shuttle car, Swiney approached him and began chastising him. *Id.* at 4-5. Williamson testified that Swiney had his finger in his face, swearing and calling me a “[g]oddamn dumbass.” *Id.* at 5. Williamson rose from his seat in the shuttle car, approached Swiney, and began swearing and yelling at him. *Id.* Swiney claimed that Williamson pushed him against the rib. *Id.* Williamson denied touching Swiney. *Id.* Swiney called Danny Conn, mine foreman, to “come get” Williamson. *Id.*; Tr. 279. Swiney drove Williamson on the mantrip to the end of the track and waited for Conn. Slip op. at 5; Tr. 97-99, 102. When Conn arrived, Swiney told him he wanted Williamson off his section, that he didn’t care what Conn did with him, and that Williamson had pushed him against the rib. Tr. 103, 279-80; CM Ex. 1.

Conn drove Williamson outside and told him to come back to the mine the next day to speak with Frank Smith, mine superintendent. Slip op. at 5.

On May 14, Williamson met with Smith, who told him that he was being suspended for three days “with intent.” *Id.* at 6. Williamson next heard from the company in the form of a termination letter dated May 15, 2009, and delivered to his home via certified mail on May 16. *Id.* The letter stated that Williamson was discharged for insubordination. *Id.*

Williamson filed a section 105(c) complaint with MSHA on May 29, 2009. The Secretary filed an application for temporary reinstatement on August 12, 2009. A hearing was held on September 2, 2009.

In his decision, the judge found that Williamson’s complaint was frivolously brought. *Id.* at 2, 9. The judge assumed that Williamson engaged in protected activity when he complained to Swiney about the improper simultaneous operation of the continuous miners, and that Williamson was the subject of adverse action when he was discharged on May 15. *Id.* at 2, 7. However, the judge determined that there was “no reasonable cause to believe there is a nexus” between the two events. *Id.* at 2. The judge based his determination on his finding that the Secretary failed to present any evidence that the operator was discriminatorily motivated when it terminated Williamson. *Id.* at 7. The judge relied on Williamson’s admissions that he “cussed” Swiney on May 13 and believed that he would lose his job for doing so, to support the conclusion that there was no nexus between the protected activity and the adverse action. *Id.* at 8. Accordingly, the judge denied the Secretary’s application for temporary reinstatement. *Id.* at 2, 9.

In her petition, the Secretary argues that the judge committed a series of legal errors that misconstrue the nature of temporary reinstatement proceedings. Pet. at 1. The Secretary asserts that the judge erred in finding that there was no evidence of retaliatory action by CAM Mining in response to Williamson’s protected activity. *Id.* at 17-18. The Secretary explains that the judge’s analysis is erroneous for several reasons: (1) the judge ignored his own factual findings pertaining to the operator’s hostility or animus toward the protected activity; (2) the judge failed to find close proximity in time between the protected activity and the adverse action; (3) the judge placed improper weight on his finding that upper management had no knowledge of Williamson’s safety complaint; and (4) the judge improperly analyzed the May 13 incident as part of the Secretary’s prima facie case. *Id.* at 18, 20-29. The Secretary states that, under a correct application of the legal standard for temporary reinstatement, the record compels the conclusion that the miner’s complaint was not frivolous, and she requests that the Commission vacate the judge’s denial of temporary reinstatement and grant her application. *Id.* at 29-30.

CAM Mining responds that the judge correctly determined that the Secretary’s case was frivolously brought and that substantial evidence in the record supports the judge’s decision. Resp. at 1. CAM Mining agrees with the judge that Williamson’s complaint was too remote in time from his discharge. *Id.* at 26-29. CAM Mining asserts that the evidence supports the

judge's finding that Williamson's discharge was a justified business decision. *Id.* at 29. CAM Mining argues that the final decision makers had no knowledge of Williamson's alleged protected activity. *Id.* at 29-30. CAM Mining rejects the Secretary's reliance on circumstantial evidence to establish an unlawful motive in the face of direct substantial evidence establishing that Williamson was discharged for non-discriminatory reasons. *Id.* at 30-32. In sum, CAM Mining states that the judge correctly denied the Secretary's application for temporary reinstatement and asserts that the Commission should deny the Secretary's petition. *Id.* at 35.

## II.

### Disposition

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has repeatedly recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). In reviewing a judge's temporary reinstatement order, the Commission has applied the substantial evidence standard.<sup>1</sup> *See id.* at 719; *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

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<sup>1</sup> 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)).

We conclude that the judge made a number of errors in determining that Williamson's complaint was frivolously brought. Although the judge correctly stated the legal standard to be applied in a temporary reinstatement proceeding, he applied an unduly restrictive standard in reviewing evidence pertaining to the Secretary's application. Instead of limiting the scope of the proceeding to a determination of whether the miner's complaint was frivolously brought, the judge ignored relevant evidence, resolved conflicts in the testimony, and made credibility determinations in evaluating the Secretary's prima facie case, which he clearly should not have done at this stage in the proceeding. *Chicopee Coal Co.*, 21 FMSHRC at 719. Rather, the judge should have evaluated the evidence of the Secretary's prima facie case and determined whether the miner's complaint of discrimination "appear[ed] to have merit." *Jim Walter Res.*, 920 F.2d at 747.

We first address the issues of Williamson's alleged protected activity and adverse action. We conclude that substantial evidence supports the judge's findings that Williamson engaged in protected activity and suffered adverse action. Slip op. at 3, 6-7. As to protected activity, Williamson testified that he informed his supervisor, Swiney, of his concern about the simultaneous operation of the two continuous miners on the section. Tr. 35-36, 153. Swiney testified that Williamson never made a safety complaint to him. Tr. 285. Although there is a conflict in the testimony, it need not be resolved at this stage of the proceedings. *Chicopee Coal Co.*, 21 FMSHRC at 719. Rather, Williamson's testimony is sufficient evidence to support the judge's finding.<sup>2</sup> Substantial evidence also supports the finding that Williamson suffered adverse action when he was discharged on May 15, 2009.

The heart of the issue is the judge's finding that the Secretary failed to carry her burden in demonstrating a nexus between the protected activity and the adverse action. In so concluding, the judge erred.

The Commission has recognized that direct evidence of motivation is rarely encountered; more often, the only available evidence is indirect. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has identified several circumstantial indicia of discriminatory intent: (i) hostility or animus toward the protected activity; (ii) knowledge of the protected activity, and (iii) coincidence in time between the protected activity and adverse action. *Id.*

The judge ignored circumstantial evidence of motivation which the Secretary presented. The record contains evidence of Swiney's alleged hostility or animus towards Williamson and

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<sup>2</sup> In its response to the Secretary's petition, CAM Mining makes much of Williamson's inconsistent testimony about the details of his safety complaint and the fact that Williamson never raised his complaint to other management officials prior to his discharge. Resp. at 3-21. We find these arguments to be of no avail as to whether Williamson engaged in protected activity. Whether Williamson was correct in his belief that the continuous miners were operating simultaneously is irrelevant to whether he made the safety complaint to his supervisor.

disparate treatment of Williamson as compared to the other shuttle car operators. Williamson testified that Swiney “dogged” him, swore at him, and assigned him more difficult and onerous tasks as compared to other shuttle car operators, and that all this occurred after Williamson made the alleged complaint regarding the two continuous miners to Swiney. Tr. 35, 39, 40-43, 63-64, 67-68, 158, 160. Although Swiney denied these allegations (Tr. 306, 310, 314-16),<sup>3</sup> and despite Williamson’s admission that the tasks in question were within his job description (Tr. 40), the judge need not resolve these disputes at this stage nor make credibility determinations. *Chicopee Coal Co.*, 21 FMSHRC at 719.

The judge also erroneously relied on upper management’s lack of knowledge regarding Williamson’s protected activity. First, Commission case law states that the Secretary need not prove that the operator has knowledge of the complainant’s protected activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge. *Chicopee Coal Co.*, 21 FMSHRC at 718. Second, the operator’s alleged basis for Williamson’s discharge was Williamson’s altercation with Swiney, the individual who allegedly showed Williamson hostility, animus, and disparate treatment. Swiney allegedly had knowledge of Williamson’s protected activity because Williamson testified that he made the safety complaint to Swiney. Moreover, the decision to terminate Williamson was based on Swiney’s allegations of Williamson’s misconduct. Swiney’s incident report and notes stated that Williamson struck him and that Swiney did not want Williamson on his section. Slip op. at 5; CM Ex. 1, 2. Thus, there may be a meritorious basis for imputing Swiney’s knowledge to the operator. See *Wiggins v. Eastern Associated Coal Corp.*, 7 FMSHRC 1766, 1771 (Nov. 1985) (“[A]n operator cannot escape liability by pleading ignorance due to the division of company personnel functions.”) (quoting *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984)).

The judge also erred in failing to find proximity in time between the protected activity and adverse action, despite the span being a mere three weeks. Commission case law supports the position that the timing between the protected activity (Williamson’s complaint to Swiney about the continuous miners on April 20 or 21) and the adverse action (Williamson’s discharge on May 15) was sufficiently close. A three-week span can be sufficiently close in time given the evidence of intervening acts of hostility, animus, and disparate treatment. *Sec’y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 37-38, 43-44 (Jan. 1999) (finding temporal proximity despite 16-month gap between miners’ contact with MSHA and the failure to recall miners from layoff where only a month had passed from MSHA’s issuance of penalty as a result of the miners’ notification of the violations). Moreover, the judge ignored the proximity in time between the alleged protected activity and the alleged disparate treatment and hostility by Swiney, which Williamson said began soon after he complained to Swiney about the ventilation plan issue. Slip op. at 3.

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<sup>3</sup> Even so, Swiney testified that during the May 13 incident, Williamson stated to him that Swiney had been on his “case for 2 or 3 days.” Tr. 277.

Finally, the judge erred in his consideration of the evidence regarding the May 13 incident. The judge based his conclusion that there was no nexus between Williamson's protected activity and the adverse action on his finding that Williamson was discharged for insubordination for the events of May 13. In doing so, the judge found no evidence of intervening retaliation, which, as previously stated, was erroneous, and relied in part on Williamson's statement that he believed he could lose his job for "cussing" out his foreman. Slip op. at 8. Contrary to the judge's characterization, Williamson's statement of his own belief does not establish the operator's motivation. Moreover, as the Secretary argues, Williamson's testimony is consistent with a theory that Swiney would use the May 13 exchange as a pretext for Williamson's discharge. Pet. at 28 n.22.

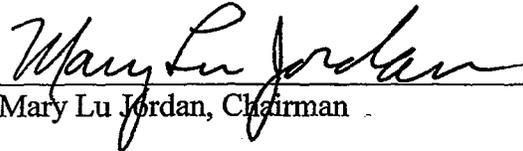
Furthermore, we note that evidence that Williamson was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense. In essence, the judge weighed the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case. In doing so, the judge erred by assigning a greater burden of proof than is required. In a temporary reinstatement proceeding, the Secretary need not establish a prima facie case of discrimination by a preponderance of the evidence. Rather, the Secretary was required to prove only that a non-frivolous issue exists as to whether Williamson's discharge was motivated in part by his protected activity. *Chicopee Coal Co.*, 21 FMSHRC at 719. Given Williamson's testimony of the hostility and animus he was shown by Swiney, we conclude that there is clearly a non-frivolous issue as to motivation.

In sum, we thus conclude that substantial evidence supports that the Secretary's discrimination complaint is not frivolous. We intimate no view as to the ultimate merits of this case.

III.

Conclusion

For the foregoing reasons, we grant the Secretary's petition, reverse the judge's decision, and order the retroactive reinstatement of Lige Williamson effective as of September 30, the date of the judge's decision.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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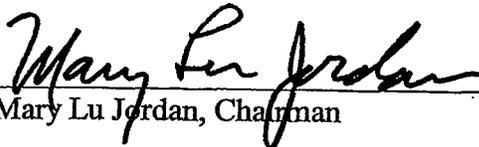
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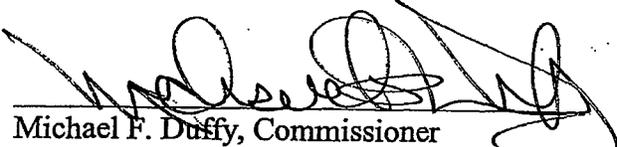


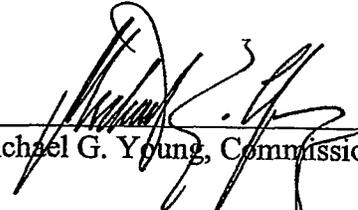
merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

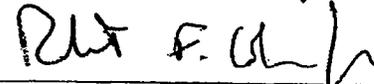
The operator states that it intended to contest the proposed penalties for 24 citations in two assessments – 23 in one assessment and one penalty in the other assessment. It further states, however, that because of a misunderstanding between it and its counsel the single penalty in the second assessment was not contested on a timely basis. When the operator realized the mistake, it promptly sought reopening. The Secretary does not oppose the reopening of the proposed penalty.

Having reviewed Holcim's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
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Chief Administrative Law Judge Robert J. Lesnick  
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Westside's owner states, among other things, that the employee who was responsible for handling all the company's paperwork suddenly left the company, leaving him unaware of the citations. He also states that the company is in dire financial circumstances. The Secretary states that Westside's assertions are "conclusory," but that Westside should be given an opportunity to respond further and show whether it is entitled to a reopening of the penalty assessment.

Having reviewed Westside's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Westside's failure to timely contest the proposed assessment and whether relief from the final order should be granted. Specifically, the Judge should ascertain why Westside failed to return the proposed assessment form within 30 days of receiving it and which citations it wanted to contest. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



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Mary Lu Jordan, Chairman



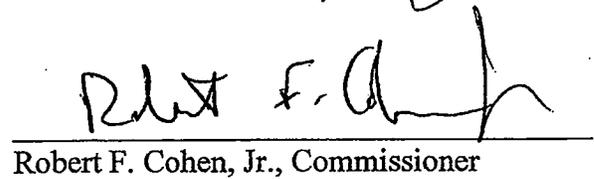
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Michael F. Duffy, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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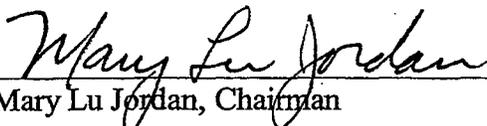
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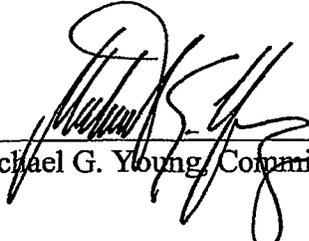
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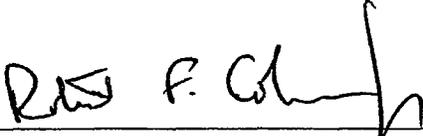


The court vacated the Commission's decision and remanded the case to the Commission for further proceedings in accordance with the court's opinion. 573 F.3d at 797. Accordingly, this proceeding is remanded to Administrative Law Judge Jerold Feldman for proceedings on the merits of the citation.

  
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On October 2, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment for 29 violations totaling \$32,026 to Oldcastle. Oldcastle states that the violations at issue in the proposed penalty assessment it seeks to reopen were issued between August 5 and August 14, 2008, and that it provided its counsel with a copy of the violations on September 3, 2008. Counsel filed a Notice of Contest of Citation No. 6105371, which has been docketed as SE 2008-992-RM and stayed before the Commission. Oldcastle claims that it received the proposed assessment on October 10, 2008, but that it did not realize that it needed to forward the assessment form to its counsel for a contest. It further explains that counsel became aware of the proposed assessment on December 11, 2008, when a state inspection revealed that the penalties were overdue.

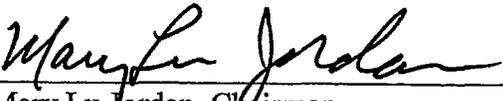
The Secretary opposes reopening the proposed penalty assessment, maintaining that Oldcastle has failed to establish the existence of "exceptional circumstances." Specifically, the Secretary contends that ignorance of the law and MSHA's and the Commission's procedural rules is not a permissible ground for reopening.

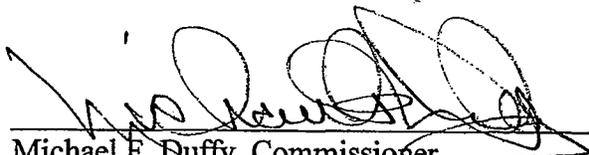
Oldcastle timely contested Citation No. 6105371, and the case has been docketed and stayed before a Commission administrative law judge pending issuance of the proposed penalty assessment by MSHA. Given these circumstances, it seems clear that Oldcastle intended to contest the proposed penalty for that citation. As to the remaining violations contained in the proposed assessment, the operator has neither demonstrated an intent to challenge those penalties nor provided an explanation for its failure to timely contest the proposed assessment, other than its general assertion of ignorance of the procedure.<sup>1</sup> Oldcastle's failure to explain the delay in contesting the proposed penalties does not provide the Commission with an adequate basis to reopen the remaining penalties in the proposed assessment. *See, e.g., Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009).

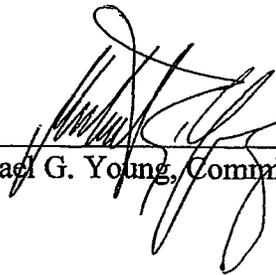
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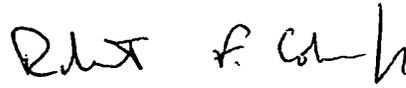
<sup>1</sup> Oldcastle's motion to reopen states at one point that "[a]ll underlying citations/orders captioned above have been contested." Mot. at 2. However, in her opposition, the Secretary questions this statement and claims that "[t]he operator has furnished a copy of, and the Secretary is aware of, only one contest – the contest pertaining to Citation No. 6105371." Opp'n at 3, n.1.

Having reviewed Oldcastle's request and the Secretary's response, in the interests of justice, we hereby reopen the penalty assessed for Citation No. 6105371 and remand the matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28. As to the remaining 28 penalties in Assessment No. 000164541, we deny without prejudice Oldcastle's request to reopen.

  
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Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 28, 2009

|                        |   |                              |
|------------------------|---|------------------------------|
| SECRETARY OF LABOR,    | : |                              |
| MINE SAFETY AND HEALTH | : | Docket No. SE 2009-802-M     |
| ADMINISTRATION (MSHA)  | : | A.C. No. 09-00472-183080 PEU |
|                        | : |                              |
| v.                     | : | Docket No. SE 2009-803-M     |
|                        | : | A.C. No. 09-00959-183082 PEU |
| B & H TRANSFER COMPANY | : |                              |

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On August 10, 2009, the Commission received from B & H Transfer Company (“B & H”) a letter seeking to reopen penalty assessments that may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2009-802-M and SE 2009-803-M, both captioned *B & H Transfer Co.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

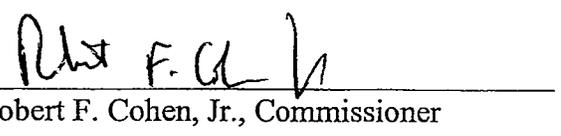
With respect to Proposed Assessment No. 000183080 PEU, both the operator and the Secretary now agree that the proposed assessment was timely contested. The Secretary asserts that MSHA misfiled the contest form and, as a result, the case was not processed properly. The Secretary submits that the error has been corrected and the contest is being considered timely and will follow the normal course of proceeding. As to Proposed Assessment No. 000183082 PEU, the Secretary states that the penalty contained therein was assessed against B & H in error and will be removed from its account.

Having reviewed B & H’s requests and the Secretary’s response, we find the requests to reopen to be moot. B & H has properly contested Proposed Assessment No. 000183080 PEU, and therefore it did not become a final order of the Commission. This case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. With respect to Proposed Assessment No. 000183082 PEU, we also find the request to reopen to be moot because the penalty contained therein was assessed in error and has been or will be removed from the operator’s account.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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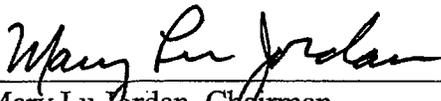
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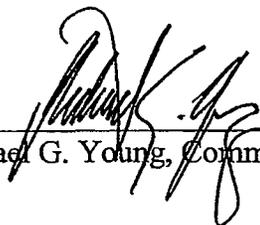
Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
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Washington, D.C. 20001-2021



Having reviewed Cessford's request and the Secretary's response, we find the request to reopen to be moot. Cessford has properly contested the proposed penalty assessment and therefore it did not become a final order of the Commission. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
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Michael F. Duffy, Commissioner

  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 30, 2009

|                        |   |                          |
|------------------------|---|--------------------------|
|                        | : | Docket No. KENT 2010-1   |
|                        | : | A.C. No. 15-18687-188524 |
| SECRETARY OF LABOR,    | : |                          |
| MINE SAFETY AND HEALTH | : | Docket No. KENT 2010-2   |
| ADMINISTRATION (MSHA)  | : | A.C. No. 15-18854-188526 |
|                        | : |                          |
| v.                     | : | Docket No. KENT 2010-3   |
|                        | : | A.C. No. 15-19080-188530 |
| LIGGETT MINING, LLC    | : |                          |
|                        | : | Docket No. KENT 2010-4   |
|                        | : | A.C. No. 15-19234-188533 |

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On October 2, 2009, the Commission received from Liggett Mining, LLC (“Liggett”) motions to reopen four penalty assessments that may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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).

We have held, however, 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

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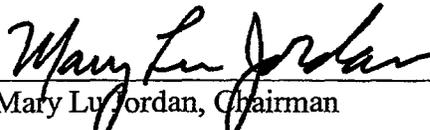
<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2010-1, KENT 2010-2, KENT 2010-3, and KENT 2010-4, all captioned *Liggett Mining, LLC*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

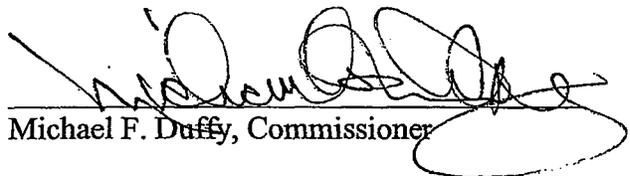
reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 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).

Each of the four assessments was dated June 18, 2009, and received by Liggett. According to the motions, Liggett’s representative marked each of the assessments indicating which penalties the operator was contesting and mailed the four notices separately, on June 27, 2009, using certified mail. According to copies of the on-line records of delivery submitted by Liggett with its motions, the four envelopes were received by the Department of Labor’s Mine Safety and Health Administration two days later. Nevertheless, Liggett received delinquency notices for the assessments dated September 10, 2009, which caused it to promptly file its motions to reopen.

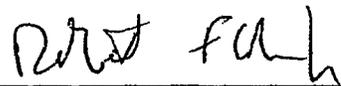
The Secretary of Labor states that, while she has no record of receiving the notices of contest, given the information provided by Liggett, she will accept the copies of the notices of contest included with Liggett’s motions. The Secretary states in her letters dated October 9, 2009, that she will file penalty petitions within 45 days of that date.

Having reviewed Liggett's motions and the Secretary's responses, we find the requests to reopen to be moot. These cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700, and, per her statements, the Secretary's penalty petitions shall be filed no later than November 23, 2009.

  
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Mary Lu Jordan, Chairman

  
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Michael F. Duffy, Commissioner

  
\_\_\_\_\_  
Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

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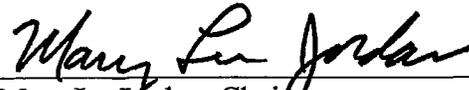
Chief Administrative Law Judge Robert J. Lesnick  
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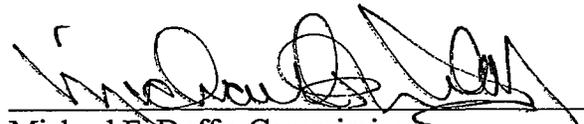


On December 21, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000171882 to Hoover, proposing penalties for six citations that had been issued to Hoover in October and November 2008. After receiving no response, MSHA sent Hoover a delinquency notice on or around March 19, 2009. Hoover promptly notified MSHA that it had no record of receiving the assessment and that the individual MSHA identified from the Federal Express records as having signed for the delivery, Jerry Rogers, had been on long-term medical leave since early December 2008. Hoover explains in its motion, which is supported by an affidavit, that it investigated the matter but never located the FedEx package or determined who signed for the delivery. Hoover had previously indicated to MSHA its intent to contest all six of the proposed penalties.

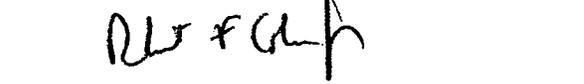
The Secretary does not oppose Hoover's request to reopen the assessment, and includes with her response a signature page for the delivery which does not match the Federal Express record stating that the delivery was signed for by Rogers.

Having reviewed Hoover's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
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Mary Lu Jordan, Chairman

  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 30, 2009

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

v.

MOLTAN COMPANY

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Docket No. SE 2009-601-M  
A.C. No. 40-02968-179454

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

ORDER

BY THE COMMISSION:

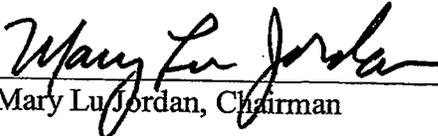
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 12, 2009, the Commission received from Moltan Company (“Moltan”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

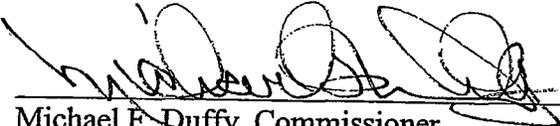
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

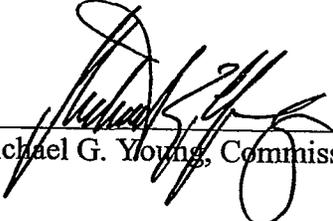
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the 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 mistake, inadvertence, or excusable neglect. 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).

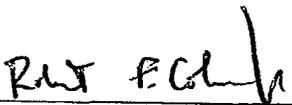
On March 17, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000179454 to Moltan, proposing penalties for 38 citations and orders that had been issued to Moltan the previous month. Moltan explains that it did not respond to the assessment until May 27, 2009, because shortly after the assessment was received, the company's founder died, and new management assumed leadership. The employee who had received the assessment immediately left the company without informing anyone of the time sensitive nature of the assessment. Moltan states that, after company officials found the assessment in a pile of papers in the employee's former office, it promptly mailed the contest to MSHA, indicating its intent to contest 12 of the proposed penalties. MSHA rejected the filing as untimely, and Moltan promptly filed this request to reopen. The Secretary states that she does not oppose Moltan's request to reopen the assessment.

Having reviewed Moltan's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
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The Secretary opposes Consol's request to reopen the proposed assessment. She argues that Consol's inadequate or unreliable internal distribution procedures do not constitute the exceptional circumstances required for reopening. The Secretary also states that the penalty assessment became a final Commission order on October 17, 2008, and that on December 10, 2008, MSHA sent a delinquency notice to Consol informing the operator that it had failed to timely contest the proposed penalties. The Secretary asserts that Consol has failed to explain why it did not file its motion for reopening until nearly an additional six months had passed.

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 mistake, inadvertence, or excusable neglect. *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).

We do not agree with the Secretary that this one instance necessarily establishes that Consol's internal distribution procedures are inadequate or unreliable. However, in considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Although the Secretary's response raised the issue that Consol failed to explain why, after it was informed of the delinquency, it took as long as it did to request reopening, the operator did not file a reply providing an explanation.<sup>1</sup>

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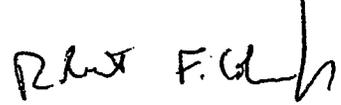
<sup>1</sup> We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008). Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency letter and the filing of the request to reopen, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril.

Having reviewed Consol's request and the Secretary's response, we conclude that Consol has failed to explain the delay in responding to the delinquency notice and therefore has not provided the Commission with an adequate basis to reopen. *See, e.g., Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). Accordingly, we deny without prejudice Consol's request to reopen.

  
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Mary Lu Jordan, Chairman

  
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Michael F. Duffy, Commissioner

  
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Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick  
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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).

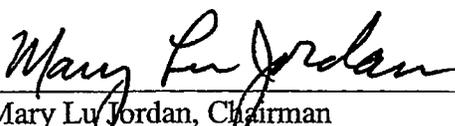
U.S. Silver states that it sent its contest form to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) approximately one week after the 30-day deadline. The affidavit of U.S. Silver’s safety superintendent indicates that, although the company has an established procedure for processing proposed assessments, he neglected to send the contest form to a company administrative assistant for mailing to MSHA until the deadline had passed. The affidavit also notes that the company has now revised its procedure to more accurately calendar assessments in an effort to avoid the same circumstance in the future.<sup>2</sup> When MSHA informed it of the mistake, U.S. Silver promptly filed a motion to reopen. Contests had already been filed for two of the citations at issue.

The Secretary does not oppose the reopening of the proposed penalties.

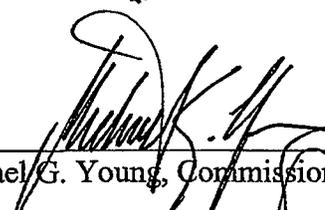
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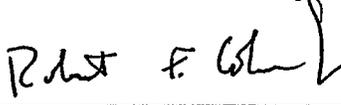
<sup>2</sup> The revised procedure places deadlines to contest all MSHA assessments, detailed by mine name and case number, on both the paper and electronic calendars of both the safety superintendent and the administrative assistant.

Having reviewed U.S. Silver's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
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Mary Lu Jordan, Chairman

  
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Michael F. Duffy, Commissioner

  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 30, 2009

|                              |   |                           |
|------------------------------|---|---------------------------|
| SECRETARY OF LABOR,          | : |                           |
| MINE SAFETY AND HEALTH       | : |                           |
| ADMINISTRATION (MSHA)        | : |                           |
|                              | : | Docket No. WEVA 2009-1592 |
| v.                           | : | A.C. No. 46-07908-179891  |
|                              | : |                           |
| PINE RIDGE COAL COMPANY, LLC | : |                           |

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On September 9, 2009, the Commission received from Pine Ridge Coal Company, LLC (“Pine Ridge”) a renewed motion 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On March 19, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000179891 to Pine Ridge for 22 citations MSHA had issued to the operator over the previous two months. However, the operator did not file a timely notice of contest. In its first motion to reopen, filed on June 22, 2009, Pine Ridge stated that it had intended to contest 12 of the proposed penalties, but because of a "clerical error" it failed to return the contest form to MSHA. The Secretary of Labor opposed reopening on the ground that the proffered ground for reopening did not rise to the level of exceptional circumstances. The Commission subsequently denied the request to reopen without prejudice because of Pine Ridge's failure to provide a sufficiently detailed explanation for its failure to file a timely contest. *See Pine Ridge Coal Co.*, 31 FMSHRC \_\_\_, slip op. at 2, Docket No. WEVA 2009-1592 (Aug. 26, 2009).

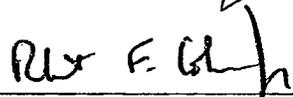
The renewed request to reopen from Pine Ridge includes an affidavit from its safety manager, who explains that the assessment was not processed as it normally would have been because it was misfiled in a stack of documents on his desk after he had marked it to indicate which penalties he wished to contest. The Secretary has not responded to Pine Ridge's renewed motion.

Having reviewed Pine Ridge's requests, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
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Mary Lu Jordan, Chairman

  
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Michael F. Duffy, Commissioner

  
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Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

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601 New Jersey Avenue, N.W., Suite 9500  
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**ADMINISTRATIVE LAW JUDGE DECISIONS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001  
September 4, 2009

|   |   |  |
|---|---|--|
| SECRETARY OF LABOR, MINE SAFETY<br>AND HEALTH ADMINISTRATION,<br>on behalf of CHARLES SCOTT HOWARD<br>Complainant | : | TEMPORARY REINSTATEMENT<br>PROCEEDING          |
| v.  | : | Docket No. KENT 2009-1427-D<br>BARB CD 2009-11 |
| CUMBERLAND RIVER COAL COMPANY, INC.,<br>Respondent  | : | Mine ID 15-18705<br>Band Mill No. 2            |

## DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant, Secretary of Labor, Tony Opegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Charles Scott Howard, Willa B. Permuter, Esq., and Thomas P. Gies, Esq., Crowell & Moring, LLP, Washington, D.C., for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Charles Scott Howard pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). Howard filed a complaint with the Secretary's Mine Safety and Health Administration (MSHA) alleging that his May 14, 2009, layoff was motivated by his protected activity. The Secretary contends that Howard's complaint is not frivolous, and seeks an order requiring Respondent, Cumberland River Coal Company, Inc., to reinstate Howard as an employee, pending completion of a formal investigation and final decision on the merits of the discrimination complaint. A hearing on the application was held in Whitesburg, Kentucky, on August 26 and 27, 2009.<sup>1</sup> For the reasons set forth below, I grant the application and order Howard's temporary reinstatement.

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<sup>1</sup> A malfunction in the court reporter's tape recorder during the first day of the hearing resulted in the loss of approximately 15 pages of transcript. Tr. 59. The malfunction occurred during the testimony of Valarie Lee, Cumberland's manager of human resources. As noted in the body of this Decision, Lee's testimony was informative, but not particularly critical to the central issues in the case. The missing portion of the transcript has not compromised the fair and impartial disposition of this proceeding, and no party has so contended.

## Summary of the Evidence

Howard was hired by Cumberland on March 21, 2005, and worked as an underground miner in a position classified as "Face." That job classification encompasses a variety of duties, including, continuous miner operator, ram car operator, scoop operator, roof bolter, and general laborer. Beginning in 2007, Howard engaged in a number of safety-related activities, and exercised other rights under the Mine Act. A listing of his claimed protected activities was submitted into evidence. Exhibit G-10. While Cumberland challenges the characterization of several of the claimed activities, it acknowledges that Howard engaged in numerous activities protected under the Act, including the filing of two discrimination actions with MSHA and the Commission, making safety complaints and testifying on safety issues before the United States Congress and MSHA. Tr. 322-23. Moreover, key management decision makers were well aware of Howard's protected activities at all times pertinent to this proceeding. Tr. 311-14, 322-47, 465-67.

The general downturn in the economy that began in 2008 resulted in reduced coal sales which, in turn, prompted Arch Coal, Inc., to reduce coal production at its subsidiary, Cumberland. Contract operations were curtailed and hours were reduced. However, Cumberland's coal inventory continued to grow, swelling in early 2009 to 224,000 tons, as compared to a normal inventory of 80,000 tons. Tr. 236-38. Gaither Frazier, Cumberland's general manager, was instructed to reduce production to bring it into line with projected sales. He instructed Cumberland's production manager Ricky Johnson, to develop plans to reduce Cumberland's production by 50,000 to 60,000 tons per month. Tr. 239.

Johnson considered several options for restructuring Cumberland's operations to meet the production goal. He eventually proposed, and Frazier approved, a plan that called for closing one mine and reducing operations at several other facilities, which necessitated laying off both hourly and salaried personnel. Frazier's overriding concern was to achieve the production targets. While he was interested in keeping as many employees as possible, he was not concerned with keeping or eliminating a particular number of jobs or laying off a specific number of employees, and he did not give Johnson any instructions in that regard. Tr. 251, 433-34, 450. The final restructuring plan prepared by Johnson specified the various facilities that would continue to operate, and the numbers and types of positions that would be filled for each shift. Tr. 251, 450. Frazier approved the restructuring plan and the specific staffing levels proposed by Johnson. Tr. 298, 450. Many positions were eliminated. However, some vacant positions at operations that were to continue were filled. As Johnson described it, there was a lot of fine tuning and a few extra positions were factored in. Tr. 450, 456.

The next step in the process was to identify the specific employees who would fill the positions that were to remain, and those who were to be laid off. The collective bargaining agreement ("CBA") between Cumberland and the Scotia Employees Association ("union") specified that three factors were to be considered in any reduction of the working force. They were, in order; a) ability and individual skill to perform the essential functions of the job; b) company seniority; and c) experience and efficient service related to the qualifications of the job.

Ex. G-4 at 8-9. An employee's qualifications for the first factor were determined by his job classification and/or whether he had performed a job under company supervision within the past seven years. *Id.* The CBA specified only two non-trainee job classifications for underground miners, "Maintenance," which required electrical certification, and "Face," which included virtually all other jobs associated with the production of coal. Ex. G-4, App. C. Other classifications are specified for different operations. Cumberland maintained a list of employees, by seniority, on which each employee was assigned a seniority number. Ex. G-3. Johnson and Valarie Lee, Cumberland's manager of human resources, examined the job classifications and qualifications of Cumberland's hourly employees, and their length of seniority, and wrote the names of employees who would fill the post-restructuring staffing plan into blank spaces on the plan. Ex. G-2. It was not necessary to consider the third factor, because no two persons in a given job classification had the same length of seniority. Tr. 147-49, 452.

Frazier had done rough estimates early in the process that reflected that 63 hourly employees might be laid off. Tr. 240-47; ex. G-11, G-12. When Johnson and Lee finished inserting employee names into the restructured operations staffing plan, there were 66 hourly and 19 salaried employees for whom no positions existed, and who had to be laid-off. Employees were notified of the restructuring on Thursday, May 14, 2009. Friday was an idle day, and production resumed on Monday, May 18, 2009. Howard, whose seniority number was 125, was the most senior employee in the underground "Face" job classification to be laid off, and would be the first to be recalled in the event an underground face position was filled. Eddie Bently, the president of the union, was given a copy of the layoff notices. The following week, he brought several errors to Cumberland's attention. Essentially, they consisted of individuals who qualified for a different job and had more seniority than a person who had been retained in that classification.<sup>2</sup> Those "errors" were corrected, and the previously retained employees were "bumped," i.e., laid off.

Two or three underground face employees left Cumberland's employment subsequent to the layoffs. However, Cumberland has determined not to fill those positions. The most recent vacancy occurred during the week of the hearing, and Cumberland advised, through counsel, that the position would not be filled on a permanent basis.<sup>3</sup> Howard has not been recalled.

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<sup>2</sup> One such employee, James Cress, Jr., testified at the hearing. He was carried on Cumberland's records as an underground face employee, and his seniority number was 179. He received a layoff notice on May 14, 2009. However, he was a certified electrician in the State of Kentucky, and had been working in a higher-paid "Maintenance" position for months prior to the layoff. Because he had more seniority than another maintenance employee who had been retained, he was placed into that maintenance position.

<sup>3</sup> Cumberland's witnesses offered several reasons why a particular position may not be filled. Positions vacated temporarily because a worker is injured are not typically filled. Cumberland also had built in some "extra" positions in the post-restructuring staffing plan, and expected one or two people who had been out on worker's compensation to return shortly.

On July 11, 2009, Howard filed a complaint of discrimination with MSHA, claiming that he had been laid off in retaliation for having engaged in protected activity. On August 4, 2009, the Secretary filed the instant Application for Temporary Reinstatement on his behalf.

### Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint “and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” The Commission has established a procedure for making this determination. Commission Rule 45(d), 29 C.F.R. § 2700.45(d), states:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner’s complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of [her] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

“The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Sec’y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11<sup>th</sup> Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it “appears to have merit.” S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 36-37 (1977), *reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong. 2<sup>nd</sup> Sess., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The “not frivolously brought” standard has been equated to the “reasonable cause to believe” standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec’y of Labor on behalf of Bussanich v. Centralia Mining Company*, 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3<sup>rd</sup> Cir. 1981); *Sec’y of*

*Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (Aug. 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

Howard has engaged in numerous activities protected under the Act, including making safety complaints and filing discrimination actions with MSHA and the Commission, two of which are currently pending. Howard's protected activity was well-known to virtually all management officials at Cumberland. In fact, when Lee realized that Howard's name appeared on the list of hourly employees to be laid-off, she expressed surprise. Tr. 179. She, Johnson and Frazier recognized that Howard, who had several "court cases" pending against Cumberland, would likely initiate proceedings to challenge his layoff. Frazier called Bob Shanks, Arch Coal's president of eastern operations, and advised him of the situation. Shanks recommended that Frazier let things fall where they were going to, i.e., that no "special consideration" should be given to Howard, and Frazier decided to allow the reduction in force to proceed as planned. Tr. 311-14, 349-50, 400, 413. It is not disputed that Howard suffered adverse action, having lost his job on May 14, 2009, pursuant to the reduction in force. Whether the Secretary has proven, by a preponderance of the evidence, that Howard's claim of discrimination is not frivolous turns on whether there is evidence that the adverse action was motivated, at least in part, by Howard's protected activity.

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent.<sup>4</sup> *Id.*

Cumberland argues that there was a nine-month gap between Howard's last protected activity and the layoff, which is "surely insufficient coincidence in time to support a reasonable inference of impermissible motivation." Resp. Br. At 21-22. However, Howard engaged in protected activity much closer in time to the layoff. On January 21, 2009, Howard exercised his right under section 105(c)(3) of the Act, to file a discrimination complaint with the Commission. 30 U.S.C. § 815(c)(3). The filing of "any proceeding under or related to this Act" is specifically

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<sup>4</sup> Cumberland argues that there is no evidence of hostility toward Howard's protected activities. The Secretary contends that statements made by Frazier that he didn't like seeing a video that Howard had taken in Cumberland's mine and shown during an MSHA hearing, and a purported refusal of Howard's request for a copy of the seniority list evidence such hostility. I place little weight on that factor, because there are reasonable explanations for both of the actions. The Secretary also contends that Cumberland's failure to recall Howard to fill positions vacated subsequent to his layoff further evidences improper motive. Little weight has been placed on that evidence, for the same reason.

identified as protected activity. 30 U.S.C. § 815(c)(1). Cumberland's attempt to dismiss that protected action as simply a continuation of his original complaint of discrimination to MSHA is unavailing. Howard also claims protected activities in January and March of 2009, including the communication of a safety complaint by his attorney, the initiation of a grievance regarding that complaint, and the initiation of grievances regarding changes to Cumberland's safety policy. Cumberland challenges the characterization of those activities, and disputes that the attorney's communication constitutes protected activity by Howard. I find that the fact that the safety complaint was communicated through counsel does not alter its status as protected activity by Howard. Howard's filing of grievances regarding the incident and changes to the safety policy also appear to constitute activities protected by the Act.

More importantly, Howard's protected activities were numerous and have extended over a considerable period of time. Two discrimination actions that he filed are currently pending before the Commission. Cumberland's managers were well aware of the bulk of his activities, and anticipated that he would freely raise safety issues, and institute discrimination complaints as to any suspected retaliatory conduct. His status as a miner who engaged in protected activity was, in essence, continuing in nature, such that it could be said that the layoff was almost contemporaneous with his protected activities.

Cumberland further argues that no reasonable inference of improper motivation could be drawn because the undisputed evidence establishes that the number of hourly miners laid off was arrived at without reference to their identities, and that personnel were placed into the available slots by "mechanically applying" the terms of the CBA. Resp. Br. at 16. I have little problem with the assertion that, once the post-restructuring positions were established, proper application of the CBA resulted in Howard's layoff. Nor, apparently, does Howard.<sup>5</sup> However, it is not at all clear that the process by which those positions were established was as squeaky clean as Cumberland asserts.

While there is no direct evidence to counter testimony that identities of miners were not considered in determining the positions that would be kept following the restructuring, there is circumstantial evidence that could give rise to a contrary inference and that Howard's layoff was motivated, in part, by his protected activity. Johnson developed the post-restructuring staffing plan, i.e., determined the numbers and classifications of positions that would be used to conduct each of the remaining operations. He had considerable discretion in performing that task. As

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<sup>5</sup> There was a good deal of evidence introduced as to the interpretation and application of the CBA. While counsel for the Secretary and Howard repeatedly questioned the explanations offered by Lee, Howard's counsel eventually stated that Howard was not contending that there had been a mistake in application of the contract. Tr. 423. Lee had explained that because a previous reduction in force had resulted in the retention of union members with less seniority than those laid off, the contract had been modified to base retention largely on seniority in broad job classifications, relegating more subjective criteria to essentially tie-breaker status. Tr. 182-89; ex. G-4, R-1. There is no evidence that the union has taken issue with Cumberland's interpretation of the agreement.

previously noted, he testified that there was a lot of fine tuning of the staffing plan and some extra positions were factored in. Frazier explained that there was no specified number of personnel required to be kept, or let go, and Cumberland could have terminated fewer hourly miners, preserving Howard's job. Tr. 412.

Johnson testified that identities of miners were not considered in establishing the post-restructuring staffing plan. However, information as to miners' identities and their rank on the seniority list was readily available to him. While the process of determining exactly where the cut-off line for a given number of layoffs would fall on the seniority list can be complicated, it would have been feasible to arrive at a staffing plan that would dictate that Howard would not be retained.<sup>6</sup> Frazier had made preliminary estimates that 63 hourly miners might be laid off. Johnson's staffing charts dictated that 66 miners be let go. There is no detailed explanation of how the preliminary estimates of 63 were arrived at, or exactly how they differed from the eventual number of 66.<sup>7</sup> Johnson did not preserve drafts, notes, or other paperwork he generated in arriving at the staffing plan. Tr. 454.

Cumberland appears to overstate the Secretary's burden. It argues that "[t]o justify an order of temporary reinstatement . . . the Secretary and Howard must . . . show that the adverse action complained of was motivated in any part by [the protected] activity," citing *Sec'y of Labor on behalf of Pendley v Highland Mining Company, LLC*. Resp. Br. at 15. *Highland Mining* involved a claim of discrimination, and the quoted language addressed the complainant's burden to establish a *prima facie* case. In this temporary reinstatement proceeding, however, the Secretary need not establish a *prima facie* case of discrimination in order to prove that the complaint was not frivolously brought. It is sufficient that the evidence establish that a nonfrivolous issue exists as to whether Howard's layoff was motivated in part by his protected activity. *Sec'y on behalf of Albu v. Chicopee Coal Company*, 21 FMSHRC 717, 719 (July 1999).

The record is not devoid of evidence from which it could be inferred that Howard's layoff was motivated, in part, by his protected activity. It is not necessary, or appropriate in this proceeding, to decide whether or not to draw such an inference. I find that the evidence discussed above establishes a nonfrivolous issue as to improper motivation.

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<sup>6</sup> The process is complicated by potential movement between job classifications. Cress, who may have been erroneously classified on Cumberland's records, moved into a maintenance position, and avoided being laid off from an underground face position. Similarly, a maintenance worker whose position might be eliminated, and who was also qualified to be an underground face miner, could move to that job classification and "bump" a less senior face miner.

<sup>7</sup> Cumberland offers an explanation in its brief, pointing out that the pre- and post-restructuring staffing plans show that three additional electricians were retained at the Blue Ridge Mine. Ex. G-1, G-2. Resp. Br. at 17. However, it would seem that the retention of an additional three miners would have reduced the number affected, i.e., changed it from 63 to 60, not increased it.

I find that there is reasonable cause to believe that Howard may have been discriminated against as alleged in his complaint, and conclude that the Application for Temporary Reinstatement has not been frivolously brought.

**ORDER**

The Application for Temporary Reinstatement is **GRANTED**. Cumberland River Coal Company is **ORDERED TO REINSTATE** Howard to the position that he held prior to May 14, 2009, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.



Michael E. Zielinski  
Senior Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 New Jersey Avenue, NW, Suite 9500

Washington, DC 20001-2021

September 8, 2009

|                              |   |                             |
|------------------------------|---|-----------------------------|
| SECRETARY OF LABOR,          | : | TEMPORARY REINSTATEMENT     |
| MINE SAFETY AND HEALTH       | : | PROCEEDING                  |
| ADMINISTRATION, (MSHA),      | : |                             |
| on behalf of MARK GRAY,      | : | Docket No. KENT 2009-1429-D |
| Complainant                  | : | BARB CD 2009-13             |
|                              | : |                             |
| v.                           | : |                             |
|                              | : |                             |
| NORTH FORK COAL CORPORATION, | : | Mine ID 15-18340            |
| Respondent                   | : | No. 4 Mine                  |

**DECISION AND ORDER GRANTING APPLICATION FOR  
TEMPORARY REINSTATEMENT**

Appearances: Derek Baxter, Esq., and Matthew Babington, Esq., Office of the Solicitor , U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary; Tony Oppeward, Esq., Lexington, Kentucky, and Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, on behalf of Mark Gray; Steven M. Hodges, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801- et seq., the "Act". North Fork Coal Corporation (North Fork) has requested a hearing on the Secretary's application for temporary reinstatement of Mark Gray filed August 13, 2009, pursuant to Commission Rule 45, 29 C.F.R. § 2700.45. Expedited hearings were thereafter held in Wise, Virginia.

Commission Rule 45(d), 29 C.F.R. § 2700.45(d) limits the scope of these proceedings as follows:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity

to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

The Commission has further held that it is “not the judge’s duty . . . to resolve . . . conflict[s] in testimony at this preliminary stage of proceedings.” *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). At a temporary reinstatement hearing the judge must determine whether the evidence mustered by the miner to date establishes that his complaint is nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement. *Jim Walter Resources Inc.* 920 F.2d 738 at 744 (11<sup>th</sup> Cir. 1990). The Circuit Court further stated that the “not frivolously brought” standard is indistinguishable from the “reasonable cause to believe” standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, it is equated with a criteria of “not insubstantial or frivolous” and “not clearly without merit.” *Jim Walter Resources Inc.*, 920 F.2d at 745.

In his report to the Department of Labor’s Mine Safety and Health Administration (MSHA) filed June 15, 2009, Mr. Gray stated as follows:

I feel I was terminated because I refused to roof bolt an entire cut-through of about 60 feet plus in depth. I also made safety complaints. I want my job back plus all benefits due me.

At hearings Mr. Gray testified that he has been a miner since 1981 and a roof bolter operator for 16 or 17 years. He began working for North Fork in 2007 as a roof bolter. He worked with a partner, Chris Sheeks, on a double headed Fletcher roof bolter. Sheeks would work one side of the bolter while Gray operated the other. In a statement to MSHA investigator Guy Fain, Jr., on July 31, 2009, Gray explained that section foreman Tom Cornett had arrived at the mine only about two months before his discharge on May 15, 2009. Before that, his foreman, known as “Moondog”, had complained to Gray that the mine ventilation curtains were not being hung by Gray. According to Gray, Moondog would tell Gray to shut down the roof bolter and hang curtains. After Cornett took over as foreman, he “seemed to get mad” when Gray shut down the bolter to hang ventilation curtains.

Gray explained that, while working on the roof bolter he would often find methane readings in the .9% to 1% range and would therefore stop roof bolting and hang ventilation curtains, presumably to reduce the methane concentrations. According to Gray, Foreman Cornett, when observing this activity, expressed his dissatisfaction with Gray (presumably for holding up production by not working on the roof bolter) by just walking off “like he was upset” and by no longer talking to him (Tr. 28).

Gray also testified at hearings that sometime in April 2009, he was roof bolting in the 01

section where normal cuts were 30 feet deep. His foreman, Tom Cornett, then asked him to bolt a deep cut of about 55 feet and he did. After bolting the deep cut he told Cornett that he would not bolt another one like that. Gray testified that it was illegal to take such deep cuts as it was not permitted in the roof control plan and that it was not safe. It had a "raggedy" top with mixed sandstone and slate which would not bond together. "It would fall out on me". According to Gray, three days later he was asked to take another deep cut of about 55 feet and he refused. Gray testified that it was not safe to do so with the "raggedy" top and that it was in violation of the mine roof control plan. According to Gray, after this exchange with Cornett their interactions changed and Cornett "wouldn't talk to me like he used to, or anything".

According to Gray, about a week later, on May 15, 2009, he was fired by second shift supervisor, Robert Estevez. Estevez purportedly told him only that he had been "complained about" and when asked who reported on him, Estevez replied only "well it don't matter, you know, I'm gonna believe my section foreman before I would you". Gray testified that Estevez gave him no written notice nor any further explanation as to why he was discharged. Gray maintained that no one in management had ever complained about his work and that he had never received any verbal or written warnings.

Considering the testimony and statements of Mr. Gray it is apparent that he engaged in protected activity when he told his foremen that he had to hang ventilation curtains and that he made protected safety complaints and engaged in a protected work refusal in refusing to roof bolt what he perceived to have been a dangerous deep cut, one which was well in excess of the 40-foot cuts permitted by the mine's roof control plan. A work refusal is protected under the Act under conditions the miner reasonably and in good faith believes to be hazardous. See *Miller v. FMSHRC*, 687 F.2d 194, 195-196 (7<sup>th</sup> Cir. 1982). It is also apparent from the testimony of Mr. Gray that he communicated his reasons for the work refusal to his foreman. Gray's discharge on May 15, 2009, was the adverse action. In addition there is evidence that the adverse action was motivated by the protected activity. There is evidence that Gray's foreman had knowledge of the protected activity and that he showed hostility towards the protected activity by demonstrating anger about that activity. In addition, there was close proximity in time- -only one week and two weeks- -between the protected activity and the adverse action. Finally, there is evidence that Gray was given no reason for his discharge. See *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981); rev'd on other grounds *sub. nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

While the Respondent presented a number of witnesses and witness statements to contradict the testimony of Mr. Gray and which could at a trial on the merits reflect upon the credibility of his testimony, as previously noted, it is not the judge's position to resolve conflicts in testimony at this preliminary stage of proceedings. At a temporary reinstatement proceeding the judge must determine only "whether the evidence mustered" by the miner to date establishes that his complaint is non-frivolous," not whether there is sufficient evidence of discrimination to justify permanent

reinstatement. *Jim Walter Resources Inc.*, 920 F.2d at 744.

Under the circumstances, and within this framework of law, I have no difficulty in concluding that the complaint of Mark Gray in this case was not frivolously brought. Whether the Secretary can establish a *prima facie* case of discrimination and whether the Respondent could affirmatively defend such a case are questions to be deferred for trial on the merits of any subsequent discrimination case.

**ORDER**

North Fork Coal Corporation is hereby ordered forthwith to temporarily reinstate Complainant Mark Gray to the position he held as of the date prior to his discharge on May 15, 2009, (or to an equivalent position) at the same rate of pay, with the same hours and with the same benefits as he had as of the date prior to his discharge.



Gary Melick  
Administrative Law Judge  
(202) 434-9977

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/lh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 9, 2009

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION, (MSHA), :  
Petitioner : Docket No. PENN 2008-189  
v. : A.C. No. 36-05018-136171  
CUMBERLAND COAL RESOURCES LP, : Cumberland Mine  
Respondent :

**DECISION**

Appearances: Paul A. Marone, Esq., Office of the Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for the Petitioner;  
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for the  
Respondent.

Before: Judge Weisberger

**Statement of the Case**

This case is before me based upon a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary"), seeking the imposition of a civil penalty for the alleged violation by Cumberland Coal Resources, LP ("Cumberland") of 30 C.F.R. § 75.380(d)(7)(iv), at four separate locations.<sup>1</sup> Subsequent to notice, this case was heard in Pittsburgh, Pennsylvania. Following the hearing, each party filed proposed findings of fact, a brief, and a reply brief.

**I. Stipulations**

The parties stipulated as follows:

1. Cumberland is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 803(d), at the coal mine at which the citations at issue in this proceeding were issued.

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<sup>1</sup>The petition also seeks the imposition of penalties for the alleged violation of various other standards. These citations were settled by the parties prior to the hearing (See III) (F), *infra*)

2. Operations of Cumberland were issued in this proceeding are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. At all material times involved in this case, the products of the subject Mine, or the operations or products thereof, affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 804.
5. The individual whose signature appears in Block 22 of the citations at issue in this proceeding was acting in his official capacity as an authorized representative of the Secretary of Labor when Citation Nos. 7019884, 7019885, 7019887 and 7019889 were issued.
6. Payment of the total proposed penalty of \$39,161.00 for the subject Citations will not affect Cumberland's ability to continue in business.
7. The Citations Nos. 7019884, 7019885, 7019887 and 7019889 are authentic copies of the subject Citations, with all appropriate modifications or abatements, if any, and may be admitted into evidence for the purpose of establishing their issuance.
8. The Cumberland Mine (the "Mine") mined a total of 7,515,984 tons of coal in 2006.
9. Affiliated companies to Cumberland produced 71,492,892 tons of coal in 2006.
10. Cumberland was assessed 224 violations over 676 inspection days during the 15 months preceding the issuance of the subject Citations.
11. The Assessed Violation History Report reflecting the

history of violations of Cumberland is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

12. True copies of the citations that are at issue in this proceeding were served on Cumberland as required by the Mine Act.
13. Citation No. 7019884 was issued on December 6, 2007, for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iv), and alleged as follows:

The lifeline provided in the #1 entry (belt), secondary escapeway for the 5 Butt East Longwall (011-0) working section was not maintained in a usable condition for the entire length of the escapeway. The lifeline was hung from the mine roof with J hooks and could not be reached by a miner or pulled down in most areas. The lifeline was also hung above cables in several areas and could not be pulled down for use.

14. Citation No. 7019885 was issued on December 7, 2007, for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iv), and alleged as follows:

The lifeline provided in the #2 track entry, primary escapeway for the 5 Butt East Longwall (011-0) working section was not located in such a manner for miners to use effectively to escape in the event of an emergency. The lifeline was hung from the mine roof directly over the longwall mule train, supply cars and mantrips for a distance of approximately 450 feet. Cables and hoses were also hung under the lifeline at several locations.

15. Citation No. 7019887 was issued on December 10, 2007, for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iv), and alleged as follows:

The lifeline provided in the #2 track entry, primary escapeway for the 8 Butt East (027-0) working section was not located in such a manner for miners to use effectively to escape. The lifeline was hung directly over top of 5 supply cars, rail car, and a personnel carrier from the end of the track outby for a

distance of approximately 120 feet. There was also no means provided to get on a lifeline where miners could enter the escapeway at man doors. The lifeline was hung 8 feet from the mine floor and could not be reached. Water line was hung under the lifeline at the #35 crosscut. This is the third citation issued for this condition this quarter.

16. Citation No. 7019889 was issued on December 11, 2007 for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iv) and alleged as follows:

The lifeline provided in the #2 track entry the primary escapeway for the 15 Butt East (029-0) working section was not installed in such a manner for miners to use effectively to escape. The lifeline was hung from the mine roof directly overtop of a rail truck, 8 supply cars and a mantrip. The distance of approximately 300 feet from the end of the track.

17. At all relevant times herein, the average width of the belt and track entries in the Mine was sixteen (16) feet.
18. At all relevant times herein, the average height of the mine roof in the belt and track entries in the Mine was seven and one-half (7½) feet.
19. The 5 Butt East section of the Mine on December 6, 2007 was a retreating longwall section.
20. On December 6, 2007, portions of the lifeline in the #1 belt entry secondary escapeway for the 5 Butt East Longwall (011-0) working section of the Mine was hung from the mine roof with "J" hooks and high voltage hangers.
21. The secondary escapeway for the 5 Butt East Longwall is the belt entry in a set of three entries which comprise the longwall headgate. Each entry is isolated by stoppings from the other entries. The belt entry contains a CO monitoring system which will detect low levels of carbon monoxides and provide alerts and alarms at 5 and 10 ppm of CO above ambient respectively.

22. The belt entry was ventilated with intake air that had not ventilated the longwall face.
23. On December 7, 2007, the lifeline in the #2 track entry primary escapeway for the 5 Butt East Longwall (011-0) working section of the Mine was hung from the mine roof with Hilti fasteners. The fasteners are plastic and the tip at the end of the fasteners bends down when pressure is applied.
24. The track entry of the 5 Butt East Longwall headgate was isolated from the belt by stoppings.
25. The track entry of the 5 Butt East Longwall headgate contained intake air that had not ventilated the working section and was traveling in an inby direction.
26. On December 10, 2007, the lifeline in the #2 track entry primary escapeway for the 8 Butt East section of the Mine was hung from the mine roof with Hilti fasteners. The fasteners are plastic and the tip at the end of the fasteners bends down when pressure is applied.
27. The 8 Butt East section was a three entry longwall development section. Each entry was isolated by stoppings from the other entries.
28. The track entry of the 8 Butt East section was isolated from the belt and No. 3 entries by stoppings. It contained intake air that had not ventilated the working section and was traveling in an inby direction.
29. On December 11, 2007, the lifeline in the #2 track entry primary escapeway for the 15 Butt East section of the Mine was hung from the mine roof with Hilti fasteners. The fasteners are plastic and the tip at the end of the fasteners bends down when pressure is applied.
30. The 15 Butt East section was a three entry longwall development section. Each entry was isolated by

stoppings from the other entries.

31. The track entry of the 15 Butt East section was isolated from the belt and No. 3 entries by stoppings. It contained intake air that had not ventilated the working section and was traveling in an inby direction.
32. Requirements for lifelines in escapeways were first established as part of an emergency temporary standard issued on March 9, 2006, published at 71 Fed. Reg. 12252. A copy of the rule and preamble are offered into evidence as Government Exhibit 20. Cumberland does not object to the admission of this exhibit.
33. The requirement for lifelines in escapeways became a final rule on December 8, 2006, and was published at 71 Fed. Reg. 71430. A copy of the rule and preamble are offered into evidence as Government Exhibit 21. Cumberland does not object to the admission of this exhibit.
34. MSHA addressed policy issues with respect to lifelines in "Training Questions for Emergency Mine Evacuation, Emergency Standard Compliance Guide." A copy of such questions and answers are offered into evidence as Government Exhibit 22. Cumberland does not object to the admission of this exhibit.
35. MSHA also addressed policy issues with respect to lifelines in "Emergency Mine Evacuation, Emergency Standard Compliance Guide, Volume 2," dated April 7, 2006. A copy of such questions and answers are offered into evidence as Government Exhibit 23. Cumberland does not object to the admission of this exhibit.
36. MSHA also addressed policy issues with respect to lifelines in "Emergency Mine Evacuation, Emergency Standard Compliance Guide, Volume 3," dated June 16, 2006. A copy of such questions and answers are offered into evidence as Government Exhibit 24.

Cumberland does not object to the admission of this exhibit.

37. MSHA addressed policy issues with respect to lifelines in "Emergency Mine Evacuation Final Rule Questions and Answers, May 3, 2007." A copy of such questions and answers are offered into evidence as Government Exhibit 25. Cumberland does not object to the admission of this exhibit.
38. A diagram of a sample portion of the # 1 belt entry, secondary escapeway of the 5 Butt East section, with approximate distances, is offered into evidence as demonstrative evidence as Joint Exhibit 1.
39. A diagram of a sample portion of the # 2 track entry, primary escapeway of the 5 Butt East section, with approximate distances, is offered into evidence as demonstrative evidence as Joint Exhibit 2.
40. A diagram of a sample portion of the #2 track entry, primary escapeway of the 8 Butt East section, with approximate distances, is offered into evidence as demonstrative evidence as Joint Exhibit 3.
41. A diagram of a sample portion of the # 2 track entry, primary escapeway of the 15 Butt East section, with approximate distances, is offered into evidence as demonstrative evidence as Joint Exhibit 4.

## **II. Findings of Fact and Discussion**

### **A. Interpretation of Section 75.380(d)(7)(iv)**

Section 75.380(d)(7)(iv), provides as follows:

(d) Each escapeway shall be—

\* \* \*

(7) Provided with a continuous, durable directional lifeline or equivalent device that shall be—

\* \* \*

(iv) Located in such a manner for miners to use effectively to escape;

Thus, the regulation requires, as pertinent, that an escapeway shall be (1) provided with (2) a continuous durable directional lifeline or equivalent device that shall be (a) located in such a manner for miners to use (b) effectively to escape.

Established Commission case law regarding the interpretation of a regulatory term was set forth in *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 651-52 (Aug. 2008) as follows:

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation... is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)).<sup>5</sup>

The "language of a regulation . . . is the starting point for its interpretation." *Dyer*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning of the word. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997)(table).

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<sup>5</sup> The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation [] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts' review, involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of*

*Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

The terms in the standard at issue are not defined in the regulations. Thus, reliance is placed on the common meaning of the operative term, "effectively". Webster's Third New International Dictionary, (2002 ed.) ("Webster's") defines "[E]ffective", when used as an adverb, as follows: "in an effective manner". "[E]ffectively" as an adjective, is defined as follows: "1a: capable of bringing about an effect: productive of results."

In support of its position that the cited manner of location of the lifeline was in conformity with the terms of 75.380(d)(7)(iv), Cumberland argues that "the essence of the standard is whether a lifeline would be available to aid a person to get out of the mine in an emergency." (Cumberland's Proposed Findings of Fact and Post-Hearing Brief, at 25) ("Cumberland's Brief"), and that the "determination of whether a violation exist depends upon whether the lifeline is located in a fashion that would permit miners to use it during escape." (Cumberland's Brief, at 26).

On the other hand, the Secretary argues, in essence, that the regulatory standard, which requires that lifelines be located in a manner to use effectively to escape, is not complied with if the lifelines location would have substantially hindered or impeded miners from using the lifeline quickly to escape in the event of an emergency. (See Secretary of Labor's Proposed Findings of Fact, Conclusions of Law, and Memorandum in Support, at 22. ("Secretary's Brief). I find the Secretary's argument to be reasonable, as it is supported by the regulatory scheme of the requirement for lifelines, its regulatory history, the regulatory context, and the sentence structure of the standard at issue.

The sentence structure of the regulatory phrase at issue, the location of lifelines "in such a manner for miners to use effectively to escape;" Section 75.380 (d)(7)(iv), clearly indicates that the word "effectively," between the phrase "to use" and the phrase "to escape" is meant to modify the latter phrase. Thus, based on the common meaning of the term "effectively" as set forth above, I find that the clear meaning of the standard at issue is that the location of a lifeline shall be in such a manner for miners to use it to escape in "an effective manner."

Further, it is significant to note that the requirements for lifelines and the manner of their location, Section 75.380(d)(7)(iv), are placed under Section 75.380, which sets forth the regulatory mandate for the provision of escapeways and all their requirements, including lifelines. Thus, any interpretation of the requirement relating to the manner of the location of lifelines must be consistent with Section 75.380 as a whole, and must be in harmony with and not in conflict with the objective of Section 75.380. (See *American Coal Company*, 29 FMSHRC 941, 948 (Dec. 2007); *Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002) (quoting *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)).

In *American Coal Company*, the Commission held that an operator violates Section 75.380(b)(1)'s requirement to "provide" escapeways when its miners are "substantially hindered or impeded from accessing designated escapeways." 29 FMSHRC at 948. In reaching this conclusion, the Commission set forth the following regarding the purpose and legislative history of escapeways which is equally applicable to the case at bar:

There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is 'to allow persons to escape quickly to the surface in the event of an emergency.' S. Rep. No. 91-411, at 83, *Legis. Hist.*, at 209 (1975)." 29 FMSHRC at 948 (emphasis added.)

Based on the regulatory scheme and legislative history it is manifest that (1) the purpose of escapeways is to allow miners to quickly escape, and (2) the requirements of lifelines are included in the same standard that mandates the provision of escapeways. Thus, it is not logical to accept an interpretation of Section 75.380(d)(7)(iv) that would permit lifelines to be located in a manner that would not similarly achieve the purpose of allowing miners to escape quickly.

Further, I take cognizance of the regulatory history of the requirements for lifelines. Section 75.380(d)(7)(iv) was first promulgated in an Emergency Temporary Standard ("ETS") 71 Fed. Reg. 12252, (Mar. 9, 2006). The SUMMARY of the ETS recognized "the grave danger that [miners] face when they evacuate a mine after an emergency occurs." *Id.* The summary sets forth the following regarding the utility of the proper positioning and location of lifelines: "the proper positioning of the lifeline regarding height, accessibility, and location as determined by the mining conditions improves the ability of miners to effectively use lifelines to escape during emergency situations." (*Id.* at 12261)(emphasis added) This language is reiterated in the preamble to the final rule 71 Fed. Reg. 71430, 71437, Dec. 8, 2006, which promulgated Section 75.380(d)(7)(iv), with the same wording as was set forth in the ETS.

Accordingly, it is clear from the regulatory history of Section 75.380(d)(7)(iv), that the manner of the location of lifeline for miners "to use effectively to escape" is intended to mean a location which "improves the ability of miners to effectively use lifelines to escape during emergency situations." As set forth above, in such circumstances the need is for miners to escape quickly (*see American Coal*, 29 FMSHRC at 941 (Dec. 2007)). I thus find, based on all the above, that the clear wording of 75.380(d)(7)(iv), requires that lifelines must be located in a manner for miners to use "effectively" to escape, i.e., to achieve the results of a quick escape in an emergency.

## **B. The Citations at Issue**

### **1. Citation No. 7019884**

On December 6, 2007, MSHA special investigator, Thomas H. Whitehair II inspected the No. 1 belt entry, the secondary escapeway for the longwall section. He inspected the escapeway, outby from the number 44 crosscut to the number 7 crosscut, a distance of approximately 6,650 feet. A lifeline, not under tension, was suspended from the roof. The height of the lifeline throughout the escapeway from the number 44 crosscut to the number seven crosscut was approximately seven feet eight inches. At more than two locations between the number 24 crosscut and the number seven crosscut, the lifeline was located above cables that ran perpendicular to the lifeline.

Also, portions of the lifeline were suspended by four-inch long hooks shaped like the letter J (“J hooks”).<sup>3</sup> The J hooks were approximately 50 feet apart. The hooks, which were attached to the roof at the top, were open-sided and curved upward at the bottom to hold the lifeline. They were not pointed in the same direction throughout the escapeway.

Whitehair, upon observing these conditions, issued Citation No. 7019884 alleging a violation of Section 75.380(d)(7)(iv).

Cumberland argues, in essence, that the location of the lifeline cited by Whitaker, i.e. suspended along portions of its length from “J” hooks and hung at some location above cables, did not render the lifeline “ineffective.” Cumberland’s Brief at 27). In this connection, Cumberland asserts that “[i]t was possible to remove the lifeline from the J-hooks by either grasping or removing it with any number of available tools within the mine, such as a hammer, a cap piece, or a wedge.” (sic) (Cumberland’s Brief at 27). This assertion appears to be based upon testimony elicited from Whitehair on cross examination, wherein he conceded that miners carry tools like hammers, and they “possibly” could reach up and flip the lifeline out of the J-hooks with one of those tools. (Tr. 158). Also, Whitehair stated on cross examination that this “probably” could be done with a cap piece. (Tr. 158). He was asked whether the lifeline could be flipped out of the other hooks once it was removed from “one of the hooks” and he testified that “I expect you could... .” (Tr. 158). However, significantly he testified as follows regarding the delay in escaping resulting from the need to flip the lifeline from the J hooks:

... I believe that anything that would delay the miners’ escape by trying to flotate and flip a lifeline with a stick when you can’t see what you are even doing to get on that lifeline, to me, it’s not adequate and it can’t be safely used to escape the mine.

The lifeline should be readily available for a miner to be able to get on that lifeline and quickly escape.

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<sup>3</sup>Other portions were suspended by various hangers or clips.

\* \* \*

... I think it would take considerable doing and a considerable amount of time to do it.

I mean, you have to bear in mind that you are totally blind. You can't see. You have no sense of direction, you know, and all you are trying to do is blindly try to flip this out of a hanger, ... .  
(Tr. 158-59).

I accord considerable weight to this opinion, as it is based upon conditions attendant upon a fire or explosion necessitating the use of an escapeway and a lifeline, i.e., smoke and limited visibility.

Cumberland also relies on the testimony of Michael A. Konosky, its Senior Safety Representative who was with Whitaker when the citations were issued. Konosky testified that if he came upon a cable below the lifeline he would “[I]eave it go, walk under the hose and grab it on the other side”. (Tr. 205). He also opined that he could do that in smoke “[b]ecause I know where its at. It ain't like you got to hunt for it. It would be right ... in the middle of [a four foot walkway between the rib and the structure].” (*Id.*). I find this testimony speculative regarding the action of miners in an emergency mine evacuation in conditions of fire and smoke.

Further, I find that the need for miners escaping during an emergency to flip the lifeline from the overhead open J-hooks in order to access the lifeline would certainly impede their escape in an emergency. In the same fashion, the presence of cables below the lifeline in the entry at several locations prevents access to the lifeline on a “continuous” basis. Thus, miners would be delayed by losing contact with the lifeline at the point of its intersection with the cable, and then having to relocate it by feel would further hinder their escape especially in conditions where vision is obscured due to the presence of smoke.

As set forth above, (*see, supra*, Section III (A)), the regulatory purpose of the requirements of lifelines and escapeways is, to allow miners to quickly escape in an emergency. Also, applying, in this context, the plain meaning of the terms of Section 75.380(d)(7), as discussed above, I find that the suspension of the lifeline by numerous J-hooks, and its location above cables would not enable miners to use it “effectively” to escape. I thus find that it has been established that the cited location of the lifeline was violative of Section 75.380(d)(7)(iv).

## 2. Citation No. 7019885

On December 7, 2007, Whitehair inspected the lifeline in the No. 2 track entry of the 5 Butt East longwall section from the last outby piece of track equipment in the entry at around the No. 38 crosscut, inby to the inby end of the lifeline, a distance of approximately 750 to 850 feet. This entry was the primary escapeway for the longwall section. The lifeline in the escapeway was located over various track equipment for a distance of 450 feet. The lifeline was hung in the

middle of the entry, and was positioned over the track equipment 12 to 24 inches from its edge on the walkway side. The various pieces of track equipment were all at least seven feet wide and between three and five feet high. In addition, at various locations along the cited lifeline, cables and waterlines, located approximately seven inches down from the roof, ran perpendicular and under the lifeline at issue. Upon observing these conditions, Whitehair issued Citation No. 7019885, alleging a violation of Section 75.380(d)(7)(iv).

Cumberland argues that the lifeline in the cited area was capable of being used effectively. Cumberland asserts, *inter alia*, that the lifeline could be accessed by standing on the track equipment, track rail, or the ballast. Also, Cumberland argues that the lifeline could be reached more easily at the inby end, and that there were pull-downs that hung down from the lifeline at various locations in the track entry.<sup>4</sup>

Whitehair expressed his concerns regarding the location of the lifeline above track equipment as follows:

Q What effect if any did the equipment on the track have on the miner's ability to use the lifeline in that escapeway?

A Well, I had two concerns. My first concern was, if a miner or miners were using the lifeline in order to escape, obviously they would be in smoke so thick that they couldn't see or they wouldn't be using the lifeline, and the miners would get on the lifeline at the end. It would pull down like it's designed to do and they would be hastily trying to escape.

At some point, the lead miner is going to run right into the end piece of equipment that is in the middle of the entry or close to the middle of the entry, and my belief was that he could very easily be injured, he could fall, he could rupture his breathing bag on his SCSR, and that was one concern.

My other concern is that if the lifeline was pulled down on top of this equipment, that there were areas that the lifeline could snag, become entangled and prevent the miners from using it.

Tr. 101

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<sup>4</sup>Not much weight was accorded this assertion in light of the fact that the record does not establish the existence of pull-downs along the lifeline in the cited area. The only evidence on this point consist of the testimony of Konosky, who was with the inspector during the inspection of the cited area. Konosky indicated that he was not sure that the pull-downs were in place at the time of the inspection.

This testimony was not impeached on cross-examination, and therefore I accept it.

Based on all the above, I conclude that the location of the lifeline above track equipment for approximately 500 feet, and water lines and cables at some points, would tend to impede or hinder the escape of miners in an emergency. As such, I find that the location of the lifeline herein was not positioned in such a manner for miners to use "effectively to escape." *see* Section 75.380(d)(7)(iv). Thus, I find that the location of the lifeline in the entry at issue was not in conformity with Section 75.380(d)(7)(iv).

**3. Citation No. 7019887**

On December 10, 2007, Whitehair inspected the lifeline in the number two track entry, the primary escapeway for the Eight Butt East section of the mine. He examined the lifeline in by from the No. 35 crosscut to the end. He indicated that the lifeline, which was hung from the mine roof approximately seven and a half feet above the floor, was located over various track equipment at a point approximately one to two feet in from the outer edge of the equipment, for a distance of approximately a hundred and twenty feet. In addition, at the No. 35 cross cut, the lifeline was located over a waterline that ran perpendicular to the lifeline. He issued a citation alleging a violation of 30 C.F.R. § 75.380(d)(7)(iv).

The location of the lifeline at issue herein was essentially the same, i.e. over track equipment and a waterline, as the location cited in Citation No. 719885. For the reasons set forth above, (*See, supra* Section III (B)(2)), I find the location of the lifeline herein similarly to be not in conformity with Section 75.380(d)(7)(iv). Thus, I find that the location of the lifeline violated Section 75.380(d)(7)(iv).

**4. Citation No. 7019889**

On December 11, 2007, Whitehair inspected the lifeline in the No. 2 track entry, the primary escapeway for the Fifteen Butt East section of the mine. He indicated that the lifeline, which was hung approximately seven and a half feet above the floor, was located above track equipment for approximately three hundred feet. The lifeline was located at a one to two feet in from the outer edge of the equipment. He issued a citation alleging a violation of Section 75.380(d)(7)(iv).

Since the cited condition is essentially the same as that cited in Citation No. 7019885, I find, for the reasons set forth above, *supra* Section III(B)(2), that the location of the lifeline herein violated section 75.380(d)(7)(iv).

**C. Notice**

In essence, it is the position of the Cumberland that, prior to the issuance of the citations at bar, it had not been provided with any notice that the manner in which the cited lifelines were

located was not in conformity with the requirement of Section 75.380(d)(7)(iv). In this connection, Cumberland cites the facts that these conditions had never before been cited in any inspection subsequent to the promulgation of Section 75.380(d)(7)(iv), that neither the regulatory history regarding the promulgation of Section 75.380(d)(7)(iv), nor its placement within 30 C.F.R. Part 75 Subpart D is instructive regarding what is to be considered an “effective” location for lifelines, and that the Secretary had failed to provide any definitive guidance regarding the subject of the placement of lifelines, or on how Section 75.380(d)(7)(iv) is to be applied.

In evaluating whether an operator has received notice of the regulations of a mandatory standard the Commission has adopted a reasonably prudent person test. As set forth in *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694 (July 2002):

The appropriate test for notice is “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

In *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656, (Aug. 2008), the Commission<sup>5</sup> reiterated the following “reasonably prudent person” standards:

[T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

*Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), “in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement,” but whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The reasonably prudent person is based on an “objective standard.” *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

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<sup>5</sup>Although two of the four Commissioners filed a separate opinion regarding one of the matters at issue, all of the Commissioners were in agreement regarding, *inter alia*, the decision on the issue of notice.

In *Lodestar*, 24 FMSHRC 694-95, the Commission identified various factors that are relevant in deciding whether a party had notice of a regulation's requirements as follows:

In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors are relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. See *Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); See also *Diamond Roofing Co. v. Occupational Safety and Health Review Comm.*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997).

The parties stipulated that subsequent to the promulgation of Section 75.380(d)(7)(iv), Cumberland had not been previously cited for a violation of the standard until December 6, 2007, when Citation No. 7019884 was issued, even though the lifeline had been located in the same manner since the promulgation of the standard. Also, I note that the Secretary has not provided any express written guidance with regard to the specific manner of location of the lifeline to satisfy the requirements set forth in Section 75.380(d)(7)(iv). However, as set forth above, (See *supra*, Section III (A)), I take cognizance of the regulatory history of the mandate of lifelines, the regulatory context of the standard at issue, its sentence structure, and the common meaning of its terms. As discussed above, (See *supra*, Section III (A)), the combination of all these factors clearly establishes that the manner of the location of lifelines is to achieve the result of enabling miners to use the lifeline "effectively to escape," i.e., a quick escape in an emergency. Within the above context, I find that a reasonably prudent person would have recognized that the manner of the installation of the lifelines at issue was not in conformity with Section 75.380(d)(7)(iv). As such, Cumberland's argument regarding lack of notice is rejected.

#### **D. Significant and Substantial**

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

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

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

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission stated further as follows:

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

(Emphasis added)

I find that the record establishes, as set forth above, (*See, supra*, Section III(B), that Cumberland violated a mandatory standard, i.e., Section 75.380(d)(7)(iv), in four locations, and that these violations contributed to the hazard of miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape. At issue is the third element of *Mathies*, which asks whether there is a reasonable likelihood that the hazard contributed to a violation will result in an injury, i.e., a reasonable likelihood of an injury-producing event. (*See, U.S. Steel Mining Co.*, 7 FMSHRC, 1125). In other words, the question is whether there was a reasonable likelihood that the hazard contributed to by the violative conditions of the location of the lifelines, i.e., a delay in the evacuation in the event, of an emergency necessitating the use of such lifelines resulting in injury, is dependent upon the existence of a reasonable likelihood of an injury-producing event i.e., a fire or explosion. The Secretary has failed to adduce the existence of facts that, in normal mining operations, would have tended to establish that there was a reasonable likelihood of a fire or explosion. Indeed, Whitehair conceded on cross-examination that a fire or explosion that would lead to reduced visibility to the point where use of a lifeline was necessary was not reasonably likely.<sup>6</sup>

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<sup>6</sup>The Secretary asserts, in essence, that the third element of *Mathies* must be "viewed in the context of continuing mining operations and of an emergency necessitating use of the

Therefore, for all the above reasons, I find that the third element set forth in *Mathias*, 6 FMSHRC 1 has not been established and thus that it has not been established that the violations were significant and substantial.

#### **E. Penalty**

I find, based on the parties' stipulations, that Cumberland produced over seven and a half million tons of coal at the subject mine, and that affiliated companies produced over 71 million tons of coal in 2006. The Secretary acknowledged that the fact that Cumberland was assessed for 224 violations during 676 inspection days in the fifteen months prior to the violation at issue was evidence of a low history of violations. The parties stipulated that the proposed penalties will not affect Cumberland's ability to continue in business. I find that the violations were abated in a timely fashion, and as such Cumberland exhibited good faith.

As set forth above, (*See supra*, Section III (D)), I found that the violations were not significant and substantial based on the lack of evidence that an injury-producing event was reasonably likely to have occurred. As such, an injury of a reasonably serious nature was not reasonably likely to have occurred. However, I note Whitehair's testimony that, in the event of a fine or explosion, due to the manner in which the lifeline was located, miners would either be delayed or prevented from using it to escape, which could result in a fatal injury due to carbon monoxide poisoning. (*See* Tr. 158) This opinion was not impeached or contradicted. Thus, within this context, I find that the level of gravity was more than moderate.

I take cognizance of the fact that I rejected Cumberland's claim that it did not have any prior notice that the manner in which the lifeline was hung constituted a violation of the standard at issue. (*See supra*, Section III (C)) However, this finding was made based on an application of the objective reasonable prudent person test which requires an analysis of the following factors: "the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing

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escapeway, and by analogy, the lifeline." (Secretary's Brief at 31). The Secretary cites the following cases in support of its position: *Twentymile Coal Co.*, 29 FMSHRC 806 (Sept. 2007) (Judge Manning), *Harlan Cumberland Coal Co.*, 19 FMSHRC 911 at 916-17 (May 1997) (Judge Barbour), and the dissenting opinion of two Commissioners in *Manalapan Mining Co. Inc.*, 18 FMSHRC 1375, 1386 (Aug. 1996), that ("the only logical way to evaluate the gravity or seriousness of a fire suppression violation is to consider the effect the violation would have in the event for its use arises)." I note that this dissenting opinion by only two Commissioners is not of any precedential value, and thus not binding. I choose not to follow it, as it is not in harmony with the express terms of the requirement of the third element in *Mathies*, 6 FMSHRC 1, as set forth in *U.S. Steel* 7 FMSHRC 1125. For the same reasons, I choose not to follow *Twentymile Coal Co.* 29 FMSHRC 806 and *Harlan Cumberland Coal Co.*, 19 FMSHRC 911, also, both decisions were issued by fellow Commission judges, and are not binding.

the regulated community with ascertainable certainty of its interpretation of the standard in question.” *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002).

On the other hand, the level of an operator’s negligence requires, *inter alia*, an analysis of the following factors: the extent of the violative condition, the length of time it had existed, the operator’s efforts at abating the violative condition, whether the 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 condition is obvious or poses a high degree of danger. (*See, Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987)).

I note that the violative location of the cited lifelines was obvious, extensive, and had existed for a considerable period of time. Also, I note that Cumberland did not adduce evidence that it had not been aware of the manner of their location. However, I place considerable weight on evidence mitigating the level of Cumberland’s negligence. In this connection, I note that although the mine had been inspected on various occasions subsequent to the promulgation of Section 75.380(d)(7)(iv), Cumberland had not been cited for the manner in which the lifeline was located until the first citation at issue herein was issued on December 6, 2007. Of most significance is the fact that the Secretary had not provided Cumberland with any express guidance setting forth specifically what manner of location of lifelines would be considered to be not in conformity with the cited standard.

Within this context, I find that the level of Cumberland’s negligence in regard to all the citations at issue to have been low.<sup>7</sup>

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<sup>7</sup>The Secretary conceded that the level of Cumberland’s negligence relating only to the first citation issued, No. 7019884, was low because it had previously not been cited for a violation of this standard which had been promulgated approximately a year before. The Secretary argues that once this first violation was cited on December 6, in essence, “Cumberland certainly knew or should have known of the hazardous conditions of the other lifelines ... [and that its] continued failure to take any action to present, correct, or limit exposure to these hazards at least moderate negligence.” (Secretary’s Brief, at 34). However, the first citation, No. 7019884, cited a violation of Section 75.380(d)(7)(iv), based on the allegation that the lifeline was hung from J-hooks and could not be reached by a miner or pulled down. Also, in several areas the lifeline could not be pulled down as it was hung over cables. It might be inferred that subsequent to the issuance of this citation other lifelines that extended over cables or waterlines (which would be considered by the issuing inspector to be violative of Section 75.380(d)(7)(iv), were hazardous as argued by the Secretary. However, such an inference would clearly not apply to the location of lifelines over various track equipment as alleged in Citations 7019885, 7019887 and 7019889, conditions that had never before been cited, and for which it had not received any specific guidance from the Secretary.

Considering all of the above factors set forth in Section 110(i) of the Mine Act, and placing considerable weight on the low level of the operator's negligence, I find a penalty of \$3,000 is appropriate for each of the violations found herein.

**F. Citation Nos. 7025493, 7025495, 7025975, 7025976, 7025980, 7019883, 7025981 and 7025182**

On April 24, 2009, the Secretary filed a motion to approve a partial settlement relating to the above docket numbers. The motion seeks the approval of a settlement agreement between the parties, which proposes that the total penalty for these citations be reduced to \$2,935.

I have considered the representation of the parties and find that the settlement is a fair resolution and consistent with the Mine Act. I approve the settlement and grant the motion.

**ORDER**

It is **Ordered** that, within thirty days of this Decision, Cumberland pay a total civil penalty of \$14,935.00.

  
Avram Weisberger  
Administrative Law Judge  
202-434-9940

**Distribution:**

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/lp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
601 New Jersey Avenue, NW, Suite 9500  
Washington, DC 20001-2021

September 17, 2009

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT  
MINE SAFETY AND HEALTH : PROCEEDING  
ADMINISTRATION, (MSHA), :  
on behalf of MARK GRAY, : Docket No. KENT 2009-1429-D  
Complainant : BARB CD 2009-13  
: :  
v. : :  
NORTH FORK COAL CORPORATION, : Mine ID 15-18340  
Respondent : No. 4 Mine

**AGREED SUPPLEMENTAL ORDER GRANTING ECONOMIC TEMPORARY REINSTATEMENT**

This matter is before me upon an Application for Temporary Reinstatement, filed by the Secretary on August 13, 2009 (“the Application”), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (c)(2), for an order requiring North Fork Coal Corporation (“North Fork”) to temporarily reinstate Mark Gray to his former position as dayshift bolter at its No. 4 Mine, or to a similar position at the same rate of pay.

North Fork requested a hearing on the Application which I conducted in Wise, Virginia on September 2, 2009. By my Decision and Order dated September 8, 2009, I granted temporary reinstatement.

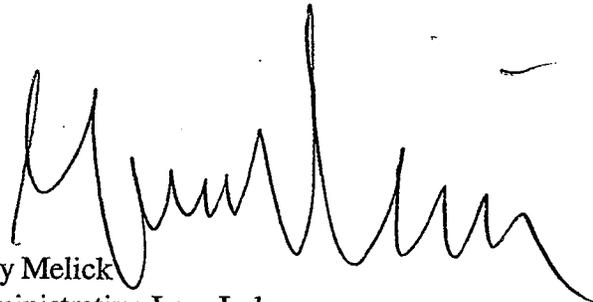
Thereafter, the parties negotiated the terms of economic temporary reinstatement, the terms of which have been agreed upon by the Secretary, North Fork and the miner, Mark Gray and are as follows:

1. North Fork shall economically reinstate Mark Gray, rather than place him back to work. This economic reinstatement begins on September 14, 2009. North Fork shall pay Gray the amount of \$1,179.70 per week on the scheduled payday, less all appropriate and necessary deductions. This amount is based on Gray’s hourly wage rate of \$23.50 per hour, and the average of 40 hours of regular time and 6.8 hours of overtime that he worked per week during the three months prior to his discharge. North Fork shall mail the paycheck to Gray’s home address at P.O. Box 465, Grays Knob, Kentucky 40829, on the same day that paychecks are issued to North Fork’s other miners.
2. As a part of this economic temporary reinstatement, North Fork shall provide health

insurance to Mark Gray as an employee. North Fork also shall provide any and all other employment benefits, including production and safety bonuses, that he would receive or be entitled to as a North Fork employee.

3. Economic temporary reinstatement of Mark Gray shall continue pending final order on any discrimination complaint which may hereafter be filed, unless otherwise ordered upon motion of a party.

WHEREFORE, it is ORDERED that North Fork ECONOMICALLY REINSTATE Mark Gray in accordance with this order.



Gary Melick  
Administrative Law Judge  
(202) 434-9977

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/lh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

September 19, 2008

|                                   |   |                            |
|-----------------------------------|---|----------------------------|
| SECRETARY OF LABOR,               | : | CIVIL PENALTY PROCEEDING   |
| MINE SAFETY AND HEALTH            | : |                            |
| ADMINISTRATION (MSHA),            | : | Docket No. CENT 2007-153-M |
| Petitioner                        | : | A.C. No. 39-01401-109634   |
|                                   | : |                            |
| v.                                | : |                            |
|                                   | : | Cedar Rapids Plant         |
| WEATHERTON CONTRACTING CO., INC., | : |                            |
| Respondent                        | : |                            |

**DECISION BASED ON THE RECORD**

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the Act). Weatherton Contracting was issued two citations on September 7, 2006, by MSHA Inspector Robert Lindeman under section 104(a) of the Act alleging violations of section 30 C.F.R. § 56.5001(a)/.5005. Citation No. 7939675 alleges that the front-end loader operator was exposed to a shift-weighted average of 2.63 mg/m<sup>3</sup> of respirable silica dust. Citation No. 7939676 alleges that the crusher operator was exposed to a shift-weighted average of 3.48 mg/m<sup>3</sup> of respirable silica dust. The exposures in both citations exceeded the threshold limit value. Feasible engineering controls were not in use to control employee dust exposure and there was no respiratory protection program in place. Water sprays were not in use at the plant. Inspector Lindeman designated each citation as significant and substantial (“S&S”) and the Secretary proposed a penalty of \$124.00 for each citation.

During a conference call, the safety director for Weatherton Contracting stated that the company does not dispute that the miners were overexposed to silica dust. It contends, however, that the violations should not have been designated as S&S. Weatherton has not received any other citations alleging an overexposure to silica dust. The parties asked me to decide this case based on the existing record and on their arguments. I agreed to this procedure and the previously scheduled hearing was canceled.

The Secretary states that Weatherton Contracting has four portable crushing operations in South Dakota. Apparently complaints have been filed with the Environmental Protection Agency and the U.S. Forest Service by citizens in the area about the amount of dust produced by the operations. The Secretary states that Weatherton Contracting was not using water sprays to control dust at its crusher because the clay soil turns to slick mud with the application of water.

The Secretary agrees that, for this reason, it is difficult for Weatherton Contracting to control dust at its plants.

The Secretary argues that Inspector Lindeman would testify that the sampling analysis indicated a 17% silica dust content. Both the loader and crusher operators were substantially overexposed to silica dust. During discovery the Secretary learned that the masks worn by employees at Weatherton Contracting are NIOSH approved but there was no indication that the employees had been fit tested. Inspector Lindeman would testify that fit tests are essential to ensure that the mask is working properly. He would also testify that the loader operator was not wearing any sort of mask and that the door for the loader was open during part of the shift.

The Secretary argues that the inspector's S&S determinations should be affirmed. She maintains that the citations should be presumed to be S&S based on the logic of the Commission's decision in *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986). Because the miners were not wearing fit-tested personal protective equipment, it can be assumed that they were breathing air that contained more than the permissible level of quartz dust. She also argues that the principles I set forth in *Spencer Quarries*, 28 FMSHRC 1005 (Nov. 2006) are applicable to the facts of this case. In addition, Weatherton Contracting did not have a program in place to monitor the exposure levels of its employees and, as a consequence, it would not have any way to determine if miners were being over-exposed to silica dust. This fact, "in combination with the non-use of a dust mask by the front-end loader operator and the failure to fit test employees, establishes that the overexposed miners suffered a discrete health hazard and that . . . there was a reasonable likelihood that the hazard contributed to by the violation would result in an illness of a reasonably serious nature." (S. Submission at 3).

Weatherton did not submit a formal written argument but, during the conference call, stated that the Secretary failed to establish that the violations were S&S. It asks that I modify the citations to delete the S&S determinations.

I find that the Secretary established that the violations were S&S. Because the Commission's *Consolidation Coal* decision concerned the rather unique situation of underground coal mines, I decline to apply the S&S presumption to this case. A violation is classified as S&S "if based upon the 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). In the case of a citation alleging a violation of a health standard, 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 hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in

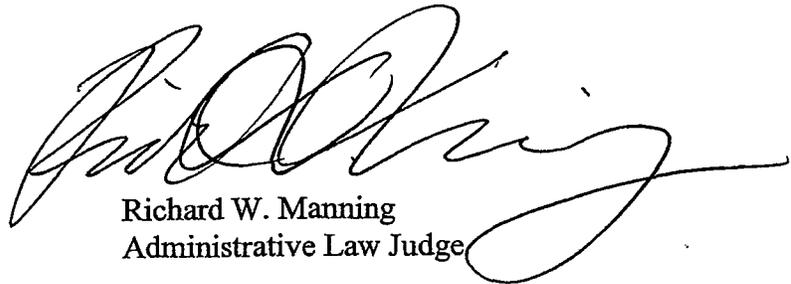
question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an illness will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The parties do not dispute that the violations occurred. I find that the record establishes that there was a reasonable likelihood that the hazard *contributed to* by the violation would result in an illness of a reasonably serious nature. The equipment operators were significantly overexposed to silica dust. Neither miner was wearing a fit-tested respirator. Weatherton Contracting did not have in place a program for monitoring the silica dust exposure levels of its employees so it had no way of knowing whether they were being overexposed. Taking into consideration continuing mining operations, I find that the violations were S&S and serious.

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Weatherton Contracting's plant had a history of one violation in the two years prior to September 7, 2006. Weatherton Contracting is a small, intermittent operator that employed about 10 people and worked about 13,000 hours in 2006. The violations were abated in good faith. Weatherton Contracting did not establish that the penalties assessed will have an adverse effect on its ability to continue in business. The violations were the result of the company's moderate negligence. Based on the penalty criteria, I find that the Secretary's proposed penalty of \$124.00 for each citation is appropriate.

### **ORDER**

Accordingly, Citation Nos. 7939675 and 7939676 are **AFFIRMED** and Weatherton Contracting Co., Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$248.00 within 40 days of the date of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.



Richard W. Manning  
Administrative Law Judge

Distribution:

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Anna McLaughlin, Safety Director, Weatherton Contracting Co., P.O. Box 151, Beresford, SD 57004-0151 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
601 New Jersey Avenue, NW, Suite 9500  
Washington, DC 20001-2021

September 24, 2009

|                             |   |                                 |
|-----------------------------|---|---------------------------------|
| NICHOLS CONSTRUCTION, INC., | : | CONTEST PROCEEDING              |
| Contestant                  | : |                                 |
|                             | : | Docket No. VA 2007-17-R         |
| v.                          | : | Citation No. 7316750;11/17/2006 |
|                             | : |                                 |
| SECRETARY OF LABOR,         | : |                                 |
| MINE SAFETY AND HEALTH      | : | Buchanan Mine                   |
| ADMINISTRATION, (MSHA),     | : | Mine ID 44-04856 PZF            |
| Respondent                  | : |                                 |
|                             | : |                                 |
|                             | : |                                 |
| SECRETARY OF LABOR,         | : | CIVIL PENALTY PROCEEDING        |
| MINE SAFETY AND HEALTH      | : |                                 |
| ADMINISTRATION, (MSHA),     | : | Docket No. VA 2007-24           |
| Petitioner                  | : | A.C. No. 44-04856-106332 PZF    |
| v.                          | : |                                 |
| NICHOLS CONSTRUCTION, INC., | : | Buchanan Mine                   |
| Respondent                  | : |                                 |

**DECISION**

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor, Mine Safety and Health Administration (“Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act”), charging Respondent Nichols Construction, Inc. (“Nichols”) with one violation of 30 C.F.R. § 50.10 and proposing a civil penalty of \$60.00. The general issue before me is whether Nichols is an “operator” within the meaning of 30 C.F.R. § 50.2(c) and, if so, whether it violated 30 C.F.R. § 50.10 by failing to report the accident at issue within the specified time period. If a violation is found it will then be necessary to determine an appropriate civil penalty under the criteria set forth in Section 110(i) of the Mine Act.

On May 4, 2006, Richard Cox, an employee of Nichols, was fatally electrocuted while clearing brush along a right-of-way beneath an electrical line at the Buchanan Mine No. 1 Preparation Plant, operated by Consolidation Coal Company (“Consol”). On November 17,

2006, Citation No. 7316750 was issued to Nichols for a violation of 30 C.F.R. § 50.10.<sup>1</sup>

A hearing was originally scheduled for August 13, 2009. However, on July 14, 2009, the parties submitted a Joint Motion to Cancel Hearing and to Submit Case on Stipulated Record and Briefs, which was granted July 17. The parties each filed their initial briefs on August 13, 2009, and their reply briefs on August 20.

The parties stipulated to the following facts:

1. Nichols Construction, Inc. (hereinafter "Nichols") was a construction contractor performing electrical work for CONSOL Energy, Inc. at the Buchanan Mine site and property, which is a "coal or other mine[]" as defined in section 102(h)(1) of the Federal Mine Safety and Health Act, 30 U.S.C. § 802(h)(1).
2. Nichols was performing service or construction duties at the Buchanan Mine site and property at which the citation at issue in this proceeding was issued.
3. MSHA Inspector Delmer Hess was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation involved in this proceeding was issued.
4. A true copy of the citation that is at issue in this proceeding, along with all continuation forms and modifications, was served on Nichols Construction, Inc. or its agent as required by the Mine Act.
5. An electrocution accident occurred at approximately 1:00 p.m., May 4, 2006, resulting in fatal injuries to Richard Cox, an employee of Nichols Construction, Inc., while performing work at the Buchanan Mine site and property.
6. Nichols Construction, and Mr. Cox specifically, were performing brush clearing operations along the right of way beneath an electrical line operated by Consol. While clearing brush Mr. Cox came in contact with a guy wire for a pole that was not properly secured, contacted the energized wire on the pole, and was subjected to an electrical shock.
7. The accident site was located in the proximity of pole-mounted transformers providing power to an electric motor driven pump utilized to deliver water to the Consolidation Coal Company Buchanan Mine #1 Preparation Plant. The pump was located in a pump-house adjacent to the pole on which the transformers were mounted. This area was a remote and normally unoccupied location.
8. Shortly before 1:00 p.m. Jason Jackson, a foreman for Nichols, made a call on a mobile radio to Nichols' Vansant, Virginia office to report the accident and request an ambulance.
9. Christopher Ratliff, a Foreman employed by Nichols, received the mobile radio call from Jason Jackson. Ratliff telephoned "911" emergency assistance at 12:55:55 p.m.

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<sup>1</sup> An identical citation was issued to Consol for the same accident involved in the case at bar. *See Consolidation Coal Co.*, VA 2007-38. That citation was the subject of a previously approved settlement agreement.

- requesting an ambulance, as noted in the Buchanan Sheriff's Office Call Report. Thereafter, Ratliff responded to the accident site.
10. At approximately 1:30 p.m., Christopher Ratliff attempted to contact Mike Horn, Chief Engineer for Consolidation Coal Company's Buchanan Operation. Horn did not answer the telephone and Ratliff left a message on the answering machine regarding the accident. Christopher Ratliff did not speak with Mike Horn on May 4, 2006.
  11. At approximately 1:55 p.m., Christopher Ratliff arrived at Clinch Valley Medical Center (CVMC), Richlands, Virginia, in the ambulance with the victim. Mr. Ratliff was performing CPR on the victim while he was transported.
  12. At approximately 2:00 p.m., Christopher Ratliff contacted an electrician employed by Consol Energy who was working at the Consol Energy Buchanan Mine #1 Preparation Plant.
  13. At 2:15 p.m., S. Shoursky, M.D. pronounced the death of the victim at the CVMC Emergency Room, as stated in the Report of Investigation by Medical Examiner.
  14. At 3:30 p.m., Christopher Ratliff contacted Kim Noah, Safety Supervisor for Consolidation Coal Company. Ratliff informed him of the accident, and requested the numbers for the state and federal mine safety offices. Mr. Noah informed Mr. Ratliff he (Noah) would make the notifications.
  15. Kim Noah contacted the MSHA Vansant Virginia Field Office by telephone at 3:45 p.m. and reported the accident to Linda Coleman, MSHA Health Department secretary, Vansant field office, Vansant (Oakwood), Virginia.
  16. Linda Coleman advised Kim Noah to contact Richard Salyers, Assistant District Manager, MSHA, in Norton, Virginia.
  17. Shortly after his conversation with Linda Coleman, Kim Noah contacted Richard Salyers, informing him of the accident.
  18. Neither Christopher Ratliff, Foreman, nor anyone else employed by Nichols, reported the fatal accident directly to MSHA.
  19. Joint Exhibit 1 is an authentic copy of Citation No. 7316750, with the abatement, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
  20. The gravity of this violation is low because it was not reasonably likely to result in a reasonably serious injury or illness, and it was not "significant and substantial."
  21. The failure to observe the standard was due to a moderate degree of negligence on the part of the operator.
  22. The violation involved in this matter was abated in good faith.
  23. The sixty dollar (\$60.00) penalty proposed for this violation will not affect the ability of Nichols to remain in business.
  24. Nichols is a small operator.
  25. No citations or orders were issued to Nichols in the 24 month period preceding the accident.
  26. This violation meets the criteria for a single penalty assessment of \$60.00 pursuant to 30 C.F.R. § 100.4.
  27. Based on the factors set forth at Section 110(i) of the Act, 30 U.S.C. § 820(i), including

the degrees of negligence and gravity, the size of the operator, the operator's history of violations, the operator's good faith in attempting to abate the violation, and the effect on the operator's ability to continue in business, if the citation is upheld the proposed penalty of \$60.00 is reasonable and will serve the purpose of the Act in the event that a violation is found to have occurred.

(Joint Proposed Stipulated Record).

Nichols argues in its briefs that it is not an "operator" within the definition contained in Section 50.2(c)(1) and therefore is not subject to the reporting requirements of Section 50.10. Nichols bases this argument on the fact that Section 50.2(c)(1)'s definition of "operator" is a narrow definition that only applies to an entity that "operates, controls, or supervises a coal mine," and Nichols contends that it had no degree of ownership or control over mining operations at the Buchanan Mine.

Nichols also argues that, assuming *arguendo* that it is considered to be an "operator" and thus subject to Section 50.10, it nonetheless met its reporting obligations under the regulation by conferring with Consol shortly after the accident. Nichols argues that the record demonstrates that its foreman, Christopher Ratliff ("Ratliff") attempted to contact Consol several times immediately following the accident for the purposes of conferring and coordinating their notification to MSHA. Once Ratliff first spoke with a Consol employee, Kim Noah, Safety Supervisor, Mr. Noah notified MSHA within 15 minutes of speaking with Ratliff. That, argues Nichols, meets the notification requirement of Section 50.10.

The Secretary argues in her briefs that Nichols is an "operator" as defined in Section 50.2(c)(1) because that definition of "operator" is identical to and incorporates the definition of "operator" contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 ("Coal Act"), which includes construction contractors like Nichols. The Secretary cites to the Fourth Circuit's decision in *Bituminous Coal Operators' Association, Inc. v. Secretary of the Interior*, 547 F.2d 240 (4th Cir. 1977) to support the proposition that construction contractors, like Nichols, can be considered "operators" within the meaning of the Coal Act if it supervises a specific area of a coal mine. It is the Secretary's contention that Nichols was supervising and exercising control over the area where the accident occurred.

Furthermore, the Secretary argues, Nichols did not meet its reporting requirement as required by Section 50.10. It is the Secretary's position that Nichols had many opportunities to contact MSHA, and Nichols' delay in notification was not justified by its attempt to coordinate its compliance efforts with Consol. Furthermore, the Secretary argues, Nichols did not have to confer with Consol because Ratliff knew himself that it was a reportable accident. Therefore, the Secretary maintains that a \$60.00 civil penalty should be imposed.

30 C.F.R. § 50.10 states that "[t]he operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator

knows or should know that an accident has occurred.” Therefore, the threshold inquiry is whether Nichols qualifies as an “operator” within the definition contained in Section 50.2(c)(1) and thus subject to the requirements of Section 50.10. The Part 50 definition of “operator is, “(1) Any owner, lessee, or other person who operates, controls, or supervises a coal mine.” 30 C.F.R. § 50.2(c)(1). There is no dispute that this is the definition to be applied.<sup>2</sup>

It is a well-established rule of construction that when the language of a regulatory provision is clear, the terms of that provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Here, there is no evidence of contrary intent on the part of the regulator, and enforcing the language as written would not lead to absurd results. Therefore, looking to the plain language of the Section 50.2(c)(1), it appears that Nichols meets the definition of an “operator” because it was exercising supervision and control over the work being done in this remote area of the mine site. From the stipulated record, I find that Nichols was exercising supervision and control over the work being performed at that particular area of the mine. Consol had no representative or foreman supervising the work and, to the contrary, Nichols had its own foreman present to supervise. Therefore, I find that Nichols was an “operator” within the meaning of Part 50.

Having determined that Nichols is an “operator” as enumerated in the Part 50 definition, the next question is whether Nichols violated the reporting requirements imposed by Section 50.10. As stated above, Section 50.10 requires mine operators to “*immediately* contact MSHA at once without delay and *within 15 minutes* . . . once the operator knows or should know that an *accident* has occurred.” (Emphasis added.)

An “accident” is defined as, “(1) A death of an individual at a mine; (2) An injury to an individual at a mine which has a reasonable potential to cause death.” 30 C.F.R. § 50.2(h)(1), (2). With the benefit of hindsight, it is clear that this was an “accident” within the regulatory definition because the incident resulted in a death. Therefore, at 2:15pm on the day of the incident, when Mr. Cox was pronounced dead, the incident was clearly a reportable accident within the meaning of Section 50.2(h)(1).

However, a reportable accident could also stem from “[a]n injury to an individual at a mine which has a reasonable potential to cause death.” 30 C.F.R. § 50.2(h)(2). What exactly constitutes an injury with a “reasonable potential to cause death” is not defined in the regulations,

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<sup>2</sup> Nichols also meets the statutory definition of “operator” contained in the Mine Act i.e. “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d).

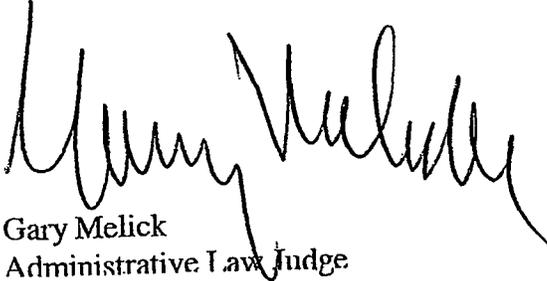
but the Commission has provided some guidance on this issue. The Commission has held that a miners' near electrocution, combined with an 18-foot fall in which he hit his head on a hard surface constituted a *per se* reasonable potential to cause death. *Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003). Also, the Commission has held that the very fact that CPR is necessary is sufficient to establish that a particular injury had a reasonable potential to result in death. *Id.*

There is evidence in the stipulated record that Ratliff was performing cardio-pulmonary resuscitation (CPR) on Mr. Cox in the ambulance on their way to the hospital at between 12:55 p.m and 1:55 p.m. Under *Cougar Coal*, 25 FMSHRC at 520, the fact that CPR was performed is *per se* evidence that the injury had a reasonable potential to result in death. Therefore, it is clear that this was a reportable accident at the time that Ratliff was performing CPR on Mr. Cox.

The regulation requires that an accident be reported "immediately . . . without delay." However, there is no definition of "immediately" contained within the regulations. The Commission has interpreted the immediacy requirement of Section 50.10 to afford the operator "a reasonable opportunity for investigation into an event prior to reporting to MSHA. . . . [This investigation] must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous actions." *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). Furthermore, the immediateness of an operator's notification shall be evaluated "on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting." *Id.*

In the case at bar, the evidence demonstrates that MSHA was not notified of the accident until 3:45 p.m. This was almost three hours after the incident took place, and approximately two hours from the time that this incident could first reasonably be considered an "accident" within the meaning of Section 50.2(h)(2).

For the aforementioned reasons, I find that Nichols violated Section 50.10. The parties have stipulated that the \$60.00 proposed civil penalty is reasonable under the "Section 110(i)" criteria and I agree. Therefore, Nichols is **ORDERED** to pay the proposed \$60.00 civil penalty within 40 days of this Order.



Gary Melick  
Administrative Law Judge  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 30, 2009

|                         |   |                             |
|-------------------------|---|-----------------------------|
| JAYSON TURNER,          | : | DISCRIMINATION PROCEEDING   |
| Complainant             | : |                             |
|                         | : | Docket No. WEST 2006-568-DM |
| v.                      | : |                             |
|                         | : |                             |
| NATIONAL CEMENT COMPANY | : | Lebec Cement Plant          |
| OF CALIFORNIA,          | : | Mine ID 04-00213            |
| Respondent              | : |                             |

**DECISION**

Appearances: Jayson Turner, Complainant, Pine Mountain Club, California, *pro se*;  
Francina M. Segbefia, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,  
Washington, DC, for Respondent.

Before: Judge Bulluck

This proceeding is before me on a Complaint of Discrimination filed by Jayson Turner against National Cement Company of California, Incorporated (“National Cement” or “NCC”), under section 105(c) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(c). The complaint alleges unlawful discharge from employment in retaliation for having made safety complaints to National Cement.

Turner filed a Discrimination Complaint with the Mine Safety and Health Administration (“MSHA”) pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on July 25, 2006. Ex. C-9.<sup>1</sup> In a letter to Turner dated August 18, 2006, MSHA notified him that, based on its investigation of the allegations contained in the Complaint, it had concluded that a violation of section 105(c) had not occurred. Turner, *pro se*, initiated this instant proceeding before the Commission on August 31, 2006, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).<sup>2</sup>

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<sup>1</sup> Section 105(c)(2) provides, in pertinent part: “Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against . . . by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.”

<sup>2</sup> Section 105(c)(3) provides, in pertinent part: “If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary’s determination, to file an action in his

A hearing was held in Pasadena, California. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that, although Turner engaged in activity protected by the Act, he has failed to prove that his protected activity served as the basis for his termination by National Cement; assuming, *arguendo*, that it did, National Cement discharged him for reasons that are wholly unrelated to his protected activity.

## I. Factual Background

National Cement operates the Lebec Cement Plant in Kern County, California. Jayson Turner worked at the Lebec Plant as an electrician for 10 years and 3 months. Tr. 36. During the period relevant to these proceedings, Turner worked the swing shift, 2:00 p.m. to 12:30 a.m., Sunday through Wednesday. Tr. 65, 77. While employed by National Cement, Turner had a second job with Innovative Construction Solutions (“ICS”), a contractor that provided water treatment services to National Cement on the premises of its Lebec Plant. Tr. 32-33, 90-91, 110-11, 263. Turner’s job at ICS had flexible hours, with no set schedule. Tr. 116.

On September 24, 2003, Turner did not report to his job at National Cement for “personal reasons.” Ex. R-6. On that day, however, his supervisor, chief electrician Julius Wetzel, observed Turner at the ICS building. Tr. 528. Normally, during that time, Turner would have been working his shift at National Cement, instead of working for ICS. Tr. 62. In a letter dated October 1, 2003, Wetzel issued a “written verbal” reprimand to Turner, stating that on September 24, he was “absent from work without consent of the Company,” and warning him that if such an incident happened again, it would result “in more severe disciplinary action, including possible discharge.” Ex. R-6.<sup>3</sup>

On June 13, 2006, Turner informed Wetzel, orally and in writing, that he would be taking the following day off to go to a doctor’s appointment. Tr. 64; Ex. R-7. The following day, June 14, from approximately 10:30 a.m. until 1:30 p.m., Turner visited the ICS building to show the water treatment facility to his daughter, who was visiting Turner from out of town. Tr. 33-34, 68-70, 112-13.<sup>4</sup> While at ICS, Turner engaged in work, and “logged in some activities.” Tr. 80,

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own behalf before the Commission . . . .”

<sup>3</sup> Turner’s Personnel File (containing this document at NCC 160), Safety Committee notes from February 2006 through June 2006, and Joseph Kowalski’s Personnel File were admitted into evidence after the hearing as ALJ Exhibit 1 (Ex. ALJ-1).

<sup>4</sup> Turner offered conflicting testimony regarding his time of arrival at ICS. In direct testimony, Turner stated that he arrived at 12:30 p.m. Tr. 69. On cross examination, Turner was shown his discovery response to National Cement, in which he stated that he arrived at ICS at 10:30 a.m. Tr. 112. When pressed, Turner admitted that he arrived at the earlier time, 10:30 a.m. Tr. 113. I discredit Turner’s assertions at the hearing that he arrived at 12:30 p.m., and find that he arrived at 10:30 a.m.

114; Ex. R-4. After leaving the Lebec Plant property, Turner had lunch with his daughter and, at 4:00 p.m., went to his doctor's appointment. Tr. 69, 74-76.

On June 14, several National Cement employees informed Wetzel that "Turner was at the ICS water treatment plant." Tr. 532; Ex. R-8. Wetzel went to the ICS building and spoke with the supervisor there. He testified to being informed that Turner had been working:

A. I asked the supervisor if Mr. Turner was there.

\* \* \*

He said, "No, he just left."

Q. Did you ask anything else?

A. I asked if Mr. Turner was working.

Q. And what was his response?

A. He said, "Yes."

Tr. 533. Wetzel reported his findings to his immediate supervisor, electrical manager Bill Russell, and to plant manager Byron McMichael, in a written statement dated June 15, 2006. Tr. 535; Ex. R-8. McMichael was ultimately responsible for deciding what disciplinary measures, if any, National Cement would take against Turner for the June 14 incident.

Tr. 249-50. McMichael reviewed Turner's Personnel File (*see* Ex. ALJ-1) and, in a meeting with Turner, Wetzel, and union representative, Neal Janousek, announced his decision to suspend Turner "pending discharge." Tr. 282; Ex. R-1. McMichael subsequently decided to terminate Turner's employment and by notice dated June 23, 2006, provided Turner with the company's reason:

On Wednesday, June 14, 2006, you were on the premises of NCC working for Innovative Construction Solutions, Inc. The same day . . . you missed your entire shift (2:00 p.m. until 12:30 a.m.) at NCC. . . . As a result of your working for another firm on a day that you were absent from NCC and your less than acceptable performance, you are being terminated effective Friday, 6-23-06.

Ex. R-2.

## II. Findings of Fact and Conclusions of Law

A complainant alleging discrimination under section 105(c) of the Act, 30 U.S.C. § 815(c), establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the

adverse action complained of was motivated in any part by that activity. See *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by protected activity. See *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. See *id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; see also *Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). In determining whether a mine operator's adverse action was motivated by the protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." 3 FMSHRC at 2510 (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Id.* at 2510-12; see also *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (Apr. 1991). The Commission has also held that an "operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case" and that "knowledge . . . can be proved by circumstantial evidence and reasonable inferences." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999) (citing *Chacon*). In *Bradley v. Belva Coal Co.*, the Commission enunciated several indicia of legitimate non-discriminatory reasons for an employer's adverse action, including evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. 4 FMSHRC 982, 993 (June 1982).

Before his employment was terminated, Turner repeatedly engaged in protected activity when he brought safety concerns to the attention of his supervisors.<sup>5</sup> He testified that on at least

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<sup>5</sup> Section 105(c)(1) of the Act provides, in pertinent part, that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation."

four occasions he raised such concerns.<sup>6</sup> He alleges that he requested that National Cement provide him with electrically rated tactile gloves. Tr. 19-20, 105-06. National Cement's safety manager, Randy Logsdon, testified that he told Turner that he had researched the availability of such gloves in his equipment catalogs, but could not find any thin rubber or latex gloves that had an electrical rating. Tr. 361-63. During January 2006, Turner complained to management that the lack of lights on a manlift made it unsafe to operate the equipment at night. Tr. 49-50. In late May 2006, Turner also complained that a medium voltage disconnect, which he mistakenly energized, was mislabeled and not properly locked and tagged out of service. Tr. 20-25; Ex. C-2. When Turner energized this piece of equipment, it caused the entire plant to lose power. Tr. 25-26. He was subsequently disciplined for his mistake in a written warning that was placed in his Personnel File. Ex. C-5; ALJ-1. Lastly, on June 12, 2006, Turner complained to management that he had been directed to troubleshoot ignition controls on Pre-Calciner burners in an area that was very hot and gassy, needlessly placing him at risk. Tr. 43-45.

Although Turner raised these safety concerns in the months and days preceding his termination, he did not produce any evidence that these protected activities were in any way related to his termination. To the contrary, McMichael credibly testified that when he decided to terminate Turner, he knew nothing of Turner's concerns regarding electrical gloves, lack of lights on the manlift, or troubleshooting the Pre-Calciner burners. Tr. 238, 272-73, 310. I also credit McMichael's testimony that, although he was aware of Turner having caused a plant shut down the previous month, he considered the incident a disciplinary matter in reaching his decision to discharge Turner, rather than an instance of Turner having raised a complaint about the safety of equipment. Tr. 237-38, 273-74. I also credit the testimony of Wetzal that his recommendation that Turner be discharged, was based upon Turner's "poor job performance and his activities during the incident with the [ICS] water treatment plant," and not on any safety complaints made by Turner. Tr. 527, 539.

Assuming, *arguendo*, that Turner's various complaints served as the basis for the decision by National Cement to discharge him, I find, nevertheless, that the company offered credible evidence, unrebutted by Turner, clearly establishing that he was discharged for legitimate, business-related reasons, entirely unrelated to any protected activity, and that the company would have taken the adverse action based solely on Turner's conduct respecting his outside employment at ICS.

Turner was fully aware that National Cement had placed limitations on his outside employment at ICS. Tr. 32-33, 245-47. On October 1, 2003, the company warned Turner that working for ICS in a manner that interfered with his employment at National Cement would result in "severe disciplinary action, including possible discharge." Ex. R-6. The work that Turner performed for ICS on June 14, 2006, occurred before he was scheduled to report for duty at 2:00 p.m. Tr. 69. National Cement terminated him, nevertheless, because "[h]e chose to give his services to ICS (his part-time employer) that day, rather than National Cement." Resp. Br. at

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<sup>6</sup> Turner withdrew his allegation that he made a fifth safety complaint concerning unsafe conditions existing on a blower. Tr. 123-24; Comp. Br. at 4.

8 (citing Tr. 276-77, 334). McMichael testified that, in his opinion, Turner “could have scheduled [his] blood pressure test some other time and interrupted [his] work with ICS . . . and provided services for [National Cement] that day.” Tr. 334. He also opined that Turner could have made “other arrangements to avoid missing work, he could have [come] to work and then left and [run] over and had his blood pressure checked and [come] back to work.” Tr. 270. Wetzel testified that it was the company’s position that Turner “could have scheduled his doctor’s appointment previous to the time he [was] supposed to be at work. . . . He had all morning to schedule the appointment some other time where it didn’t interfere with his obligations at National Cement.” Tr. 484. The company’s position, that it was unnecessary for Turner to have missed his entire shift to have his blood pressure checked, was clearly conveyed to Turner at the time of his suspension, pending discharge. Ex. R-1. In other words, National Cement remains firmly entrenched in its expectation that if Turner was going to provide his services to anyone on June 14, 2006, a regularly scheduled workday, he should have worked for National Cement, his primary employer. *See also* Tr. 340-42.

One of Turner’s fellow workers at the Lebec Plant, William Edminister, advanced Turner’s position that National Cement should not have discharged him for having worked at ICS on June 14. Edminister testified that, “because this was on [his] own time before [his] shift. . . . What you do on your own time and off the clock is none of the company’s business. You shouldn’t have to answer [to] the company for what you do off the clock.” Tr. 142-43, 171.

McMichael testified that requesting a full day of leave for a doctor’s appointment is not an unusual occurrence at National Cement. Tr. 269. He explained that “the plant has what is referred to as a no-fault attendance program. The system really doesn’t care whether you’re there or you’re not there. It’s like a bank account. You put money in and you take money out. . . . So it’s just a way of keeping a record that it’s controlled.” Tr. 271. Turner, himself, explored McMichael’s rationale for firing him, given that he had taken the day off:

- Q. Why do you think it was necessary to fire me for – for doing what I did, for working the same day at the – at the water treatment plant because I had taken the day off?
- A. It was my opinion after having warned you about that prior to that, having worked for a contractor on our site, which is annoying to me to start with. We hire people to work for us, we want them to be there and perform their work and you deprived us of your work that day. And to me, that was very irritating and time for a change.

Tr. 252; see also Tr. 283-85.

Turner’s poor performance – specifically, the incident involving the roller mill motor – also served as a basis for his termination. Ex. R-2. This incident occurred on May 24, 2006, when Turner energized a medium voltage disconnect that he mistakenly believed supplied power to a particular roller mill motor that would not start. However, the equipment that Turner

energized was, in fact, the wrong equipment, and when he energized it, power to the entire plant was knocked out. Tr. 20-26. Turner complained to management that his error was due to the fact that the equipment was mislabeled and not properly locked and tagged out. Tr. 20-25; Ex. C-2. However, Bill Russell testified convincingly that the company had trained its electrical personnel on the power supply for the roller mill system, and opined that Turner should have been aware that he was about to energize the wrong equipment. Tr. 190, 205-06. As Russell explained: “The old raw mill had been out of service for at least five years when this happened. . . . Everybody knew it was out of commission for the last five years. He shouldn’t have been over there. The starter where you go [to energize] the physical roller mill *is in an entirely different building.*” Tr. 205-06 (emphasis added). I credit Russell’s testimony that Turner should have known what equipment to energize and, given that the incident occurred 21 days before the ICS incident, I conclude that it served as a proper basis for consideration in Turner’s termination.

At the hearing, Julius Wetzel testified that Turner’s poor performance primarily motivated him to recommend to McMichael that Turner be discharged for his unauthorized work at ICS. Wetzel explained that Turner “doesn’t listen. He’s very hard to communicate with and he takes a lot of things personal that shouldn’t be personal.” Tr. 460. Wetzel also testified that Turner “didn’t follow instructions. . . . The few other people in the shop expressed the concern that they would not work with him. They didn’t like working with him.” Tr. 488. Over the two days that this matter was tried before me, Turner repeatedly disrupted the proceedings, and consistently exhibited a disquieting lack of self control, for which he was repeatedly admonished on the record. *See, e.g.*, Tr. 96, 131-32, 185-86, 435-37, 465-66, 528-30. Based on my own observations of Turner’s refusal to follow instructions and, having experienced, first hand, his general uncooperative nature throughout the entire hearing process, I fully credit Wetzel’s testimony.

While it is clear that Turner was afforded the right to defend his behavior prior to his discharge, it is also evident that National Cement gave little weight to his protestation that he understood the company’s policy to only prohibit work at his outside job during his normally scheduled shift. Tr. 82-86. The record supports a conclusion that Turner could well have misunderstood the breadth of National Cement’s policy, and that he had considered his actions on June 16 to have been in compliance with the company’s mandate that outside employment not interfere with the primary job, considering that the prior “written verbal” generally describes the prohibited conduct as “being absent from work without the consent of the Company,” and fails to set forth in specific terms the violative conduct and the requirements of the policy. Ex. R-6. It is also evident that Turner’s troubles as an outside contractor to ICS are rooted in the water treatment plant’s location on the Lebec Plant’s premises. It is highly probable, especially in light of National Cement’s no-fault attendance program, that had Turner conducted his business away from the job site on his day off, none of his activities, before, during or after his shift ended, would have been called into question. While the decision to terminate Turner, rather than mete out lesser discipline, may appear to have been harsh, and even unfair, my task, under the Act, is to determine whether the adverse action was motivated in any part by Turner’s protected activity. In this regard, it is well settled that “[t]he Commission and its judges have neither the statutory

charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity.” *Chacon*, 3 FMSHRC at 2516. The weight of the evidence, as well as Turner’s deportment during the hearing, compel me to conclude that Turner was a difficult employee, and that National Cement had ample grounds, unrelated to his protected activity, upon which to terminate his employment.

It is clear, based on the record in its entirety, that Turner’s non-conformance with National Cement’s policy regarding outside employment, and his less than satisfactory performance, motivated National Cement to terminate his employment, and that he would have been terminated on the sole basis of his conduct respecting his work at ICS, irrespective of any protected activity.

**ORDER**

Accordingly, inasmuch as Turner has failed to establish, by a preponderance of the evidence, that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination of Jayson Turner against National Cement Company of California, Incorporated, under section 105(c) of the Act, is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 30, 2009

|                              |   |                             |
|------------------------------|---|-----------------------------|
| SECRETARY OF LABOR,          | : | TEMPORARY REINSTATEMENT     |
| MINE SAFETY AND HEALTH       | : | PROCEEDING                  |
| ADMINISTRATION, (MSHA),      | : |                             |
| on behalf of LIGE WILLIAMSON | : | Docket No. KENT 2009-1428-D |
| Complainant                  | : | PIKE CD 2009-06             |
| v.                           | : |                             |
|                              | : |                             |
| CAM MINING, LLC,             | : | Mine ID 15-18911            |
| Respondent                   | : | Number 28 Mine              |

**DECISION**

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;  
Mark Heath, Esq., Spilman, Thomas & Battle, Charleston, West Virginia, for the Respondent.

Before: Judge Feldman

This matter, heard on September 2, 2009, in Pikeville, Kentucky, is before me based on an application for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against CAM Mining, LLC (CAM Mining) on behalf of Lige Williamson. This statutory provision prohibits operators from discharging or otherwise discriminating against miners who have complained about alleged safety or health violations, or who have engaged in other safety related protected activity. Section 105(c)(2) of the Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner pending the full resolution of the merits of his discrimination complaint. The parties' briefs, filed on September 24, 2009, have been considered.

**I. Statement of the Case**

This temporary reinstatement proceeding is analogous to a preliminary hearing. Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 44(c), 29 C.F.R. § 2700.44(c), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Courts and the Commission have concluded that the "not frivolously brought"

standard in section 105(c) is satisfied when there is a “reasonable cause to believe” that the discrimination complaint “appears to have merit.” *Centralia Mining Company*, 22 FMSHRC 153, 157 (Feb. 2000) (citations omitted).

The Secretary contends Williamson engaged in protected activity on or about April 20, 2009, when he allegedly communicated ventilation related complaints to his foreman, McArthur Swiney. CAM Mining denies that the alleged ventilation complaints occurred. Williamson’s employment was terminated on May 15, 2009, following a May 13, 2009, confrontation between Williamson and Swiney. The confrontation occurred immediately after Swiney criticized Williamson when a shuttle car, operated by Williamson, struck and damaged a water line and power cable.

In view of the Secretary’s minimal burden of proof, without resolving any credibility issues, Williamson shall be given the benefit of the doubt that his alleged April 20, 2009, ventilation complaint occurred. However, the Secretary has not demonstrated that Williamson was the victim of any meaningful retaliation during the intervening period from April 20 through the May 13, 2009, confrontation. Williamson has conceded that he was not given any job assignments that were inconsistent with his job duties as a utility man. In fact, Williamson testified that, at his request, he was reassigned to lighter duty operating a shuttle car because his knee condition limited his ability to hang curtains.

Rather, Williamson’s admissions that he “cussed” Swiney on May 13, 2009, and that he believed he would lose his job for “cussing” his foreman out, reflect that there is no reasonable cause to believe there is a nexus between Williamson’s alleged April 20, 2009, protected activity and his May 15, 2009, termination for insubordination. (Tr. 92). Accordingly, the Secretary’s temporary reinstatement case shall be dismissed because it does not appear to have the requisite merit to demonstrate that it has not been frivolously brought.

## II. Findings of Fact

There are two types of continuous mining sections at the No. 28 Mine. A super section is ventilated by a double split of air that allows the simultaneous operation of two continuous miners in separate entries. A normal continuous mining section is ventilated by a single split of air. In a single split of air the continuous miners operate on an alternating basis in separate entries.

Lige Williamson is 55 years old. Prior to Williamson’s May 15, 2009, termination, Williamson had been employed at CAM Mining’s No. 28 Mine as a utility man in a continuous mining section, for approximately 21 months. His job duties involved construction and maintenance of ventilation controls. Specifically, he was responsible for building concrete permanent stoppings (brattices), hanging temporary stoppings (fly pads), and maintaining the line curtain in all of the section entries. (Tr. 28, 29, 20-25).

Williamson was transferred from the No. 2 super section to the No. 1 section in the middle of April 2009. (Tr. 34). Prior to Williamson's transfer the No. 1 section had been a super section. However, in April 2009 the section was being operated on a single split of air. Williamson's new section foreman was McArthur Swiney. Swiney is 66 years old and he has approximately 49 years of mining experience. (Tr. 342). When Williamson started working on the No. 1 section, he was performing normal utility duties involving the construction and maintenance of ventilation controls.

The No. 1 section has seven entries. The left hand continuous miner operated in the No. 1 through 4 entries. The right hand continuous miner operated in the No. 4 through 7 entries. Three shuttle cars loaded coal from the two miners. The left and center shuttle cars carried loads from the left hand continuous miner. The right shuttle car carried loads from the right hand continuous miner. The shuttle cars were equipped with booms that could be raised or lowered to transfer coal from the belt on the continuous miner into the shuttle car.

After working a few days in the No. 1 section, Williamson reportedly noticed loaded shuttle cars exiting from two different entries at the same time. Although Williamson could not see or hear both the left and right hand continuous miners at the same time, he surmised that one continuous miner was starting operations before the other continuous miner had stopped. In such an event, methane and dust from the first continuous miner could be transferred inby to the other continuous miner by the same split of air sweeping the face.

a. The Alleged April 20, 2009, Protected Activity

On or about April 20, 2009, Williamson alleges that he told Swiney that he believed that there was overlapping operation of the continuous miners when each miner began its advancement into its entry. Williamson stated that Swiney did not respond to Williamson's complaint. Williamson testified, "[Swiney] didn't say nothing, just looked at me like I was stupid." (Tr. 38-39).

Williamson testified that after he complained to Swiney he was asked to do various tasks that required physical labor including shoveling ribs, shoveling the tail piece area, and building brattices. However, Williamson does not claim that he was asked to perform any job duties that were inconsistent with the duties of a utility man. In fact, Williamson testified, "I'm not going to say [Swiney] particularly made me do things outside my job title." (Tr. 40). Williamson stated that the stress caused by Swiney's treatment of him caused Williamson to seek medical treatment for chest pain. No medical documentation has been proffered.

Williamson returned to work after approximately two days of medical leave. In addition to his stress related complaints, Williamson had a history of knee problems that were exacerbated by the physical demands of constructing concrete stoppings. Upon Williamson's return Swiney permitted Williamson to switch jobs with a shuttle car operator to help lessen the stress on Williamson's knees. However, Williamson claims that before he complained about ventilation

Swiney called him "Lige." After his complaint Williamson alleges that Swiney referred to him as "asshole." Significantly, Williamson has conceded that he never reported his alleged ventilation complaint to any other CAM Mining official during the period of April 20, 2009, when the complaint reportedly was communicated to Swiney, until May 15, 2009, when he was terminated for insubordination. (Tr. 178, 183-84, 203-04).

Swiney testified that Williamson never complained to him about ventilation. Swiney also denies that he called Williamson "asshole." CAM Mining denies that the continuous miners in the No. 1 section were operating simultaneously. In support of its denial CAM Mining emphasizes that Williamson's reported belief is speculative since he did not personally observe both continuous miners operating at the same time. Moreover, CAM Mining maintains that the No. 1 section lacked the electrical capacity to operate both continuous miners simultaneously:

On May 5, 2009, 104(a) Citation No. 8227386 was issued to CAM Mining for a violation of the mandatory safety standard in section 75.370(a)(1), 30 C.F.R. § 75.3701(a)(1) that requires a mine operator to follow an approved ventilation plan. The citation was issued because the No. 1 section was operating on a single rather than two distinct splits of air as provided in the existing approved ventilation plan. The citation was terminated on May 7, 2009, after CAM Mining submitted an updated ventilation plan to conform with its single split of air operation. The violation cited in Citation 8227386 was designated as non-significant and substantial (non-S&S) in nature, and, the violation was attributed to a low degree of negligence.

b. The May 13, 2009, Insubordination

With the exception of whether or not Williamson pushed Swiney, the relevant events surrounding the May 13, 2009, confrontation between Swiney and Williamson are not in dispute. On the night of Wednesday, May 13, 2009, Swiney told Williamson to use the shuttle car to load coal from the right side continuous miner that was operating in the No. 4 entry. Williamson loaded the shuttle car and proceeded from the continuous miner down the last open cross cut making a right turn into the No. 5 entry on his way to the loading dock. Williamson testified that, upon turning in to the No. 5 entry, the shuttle car hit a wet spot in a dip in the mine floor. The shuttle car slid through the intersection severing the water line and pinching the power cable for the continuous miner. As a result, a fountain of water began streaming into the air.

Upon seeing the stream of water, Swiney approached the shuttle car to determine what had happened. Swiney accused Williamson of not raising the boom to avoid contact with the water line and cable. When Swiney approached, Williamson conceded he was aggravated because striking the cable and water line is a mistake that is not supposed to happen. (Tr. 163-164; 190-191). Specifically, Williamson testified:

Q. So you didn't like it when Mr. Swiney came up and told you if you had your boom up, you wouldn't hit the water line, did you?

A. When Mr. Swiney came up, I was aggravated for hitting the line. A carman does not like to make a mistake like that. You are particularly cautious about mine cable and water line. I was aggravated before Mac got over there.

Williamson alleges that upon arriving at the shuttle car Swiney shoved his finger in Williamson's face and that Swiney called him a "God damn dumb ass." (Tr. 86-87, 88). Williamson testified that Swiney retreated as Williamson exited the shuttle car toward Swiney. Williamson testified, "I told him that he was going to quit his god damn dogging on me. That he'd been dogging me for two fucking weeks and I was tired of it and it's going to fucking stop now was my basic words to him." (Tr. 91, 93)

Swiney alleges that as Williamson jumped out of the shuttle car, Williamson pushed him in the chest causing him to stumble backwards to within three to four feet from the rib. Williamson denies shoving Swiney. Immediately after their confrontation, Swiney telephoned shift foreman Danny Conn to meet him and Williamson at the end of the track so that Williamson could be escorted out of the mine. Swiney and Williamson used a man trip to travel to meet Conn. When Conn arrived he could see that both Swiney and Williamson were upset. Williamson denied Swiney's claim that he had been pushed.

When Conn and Williamson reached the surface, Williamson asked Conn if he was terminated. Conn told Williamson to return to the mine the next day to speak to Mine Superintendent Frank Smith. Williamson did not tell Conn about his alleged history of ventilation complaints because he didn't believe that was "the issue . . . at that particular moment." (Tr. 178).

At the end of the shift, Swiney completed an employee disciplinary report which stated that "Lige cut miner cable and water line with S/C Mac talked to him and he got off S/C and pushed Mac against rib." This report was co-signed by Frank Smith. (Resp. Ex. 2; Tr. 283).

Swiney also wrote a contemporaneous hand written statement to Frank Smith dated May 15, 2009, stating:

Lige cut miner cable and water line I told him if he had raised his boom he wouldn't have cut it. He jumped out of his car and started pushing me around and said that I had been on his case for 2 or 3 days. I called out and told Danny Conn to come inside and get him. If you want him to work, I don't need him, put him somewhere else.

(Resp. Ex. 1).

Thursday, May 14, 2009, Williamson returned to the mine to discuss with Smith the incident that had occurred on the previous night. Based on the information that had previously been provided to Smith by Swiney, Smith informed Williamson that he was being suspended for three days with intent. Williamson understood that to mean that he was being terminated. Williamson asked for a termination slip, but was not given one before he left the mine.

Smith forwarded a request to terminate Williamson to Jack Holbrook, CAM Mining's general manager. Holbrook signed the termination notice on May 15, 2009, citing insubordination as the basis for the discharge. (Gov. Ex. 7). Prior to his termination, Williamson did not inform Conn or Smith that he had complained to Swiney about ventilation, or, that Swiney had called him an "asshole." (Tr. 182-183).

On Friday evening, May 15, 2009, Williamson telephoned Smith at home. Williamson told Smith that if he had something to say to him he should "[have] the balls to tell him face to face." (Tr. 185). Williamson also told Smith that any rumor that Williamson had complained to MSHA inspectors was not true. (Tr. 195). The termination notice, sent to Williamson by certified mail, was received on Saturday, May 16, 2009.

### III. Procedural Framework

Unlike a trial on the merits in a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act as well as Commission Rule 44(c), 29 C.F.R. § 2700.44(c), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 44(c) provides:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of [her] application for temporary reinstatement the Secretary may limit [her] presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

In its decision in *Jim Walter Resources, Inc., v. FMSHRC*, 920 F.2d 738 (11<sup>th</sup> Cir. 1990), the Court noted the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court stated:

The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit

construed the ‘reasonable cause to believe’ standard as meaning whether an agency's ‘theories of law and fact are *not insubstantial or frivolous*.’

920 F.2d at 747 (emphasis in original) (citations omitted).

While the Secretary is not required to present a *prima facie* case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the “not frivolously brought” standard. As a general proposition, to demonstrate a *prima facie* case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in safety related activity protected by the Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. See *Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

#### IV. Disposition

As a threshold matter, the evidence in this preliminary temporary reinstatement proceeding must be viewed in a light most favorable to the complainant because it is not the judge's duty to resolve conflicts in testimony at this preliminary stage of the proceedings. *Secretary o/b/o Earl Charles Albu v. Chicopee Coal Company, Inc.*, 21 FMSHRC 717, 719 (July 1999). Thus, we start with the proposition, for the purposes of this matter, that Williamson communicated a good faith ventilation complaint to Swiney on April 20, 2009.

Thus, assuming that Williamson engaged in protective activity on April 20, 2009, we must determine whether there is reasonable cause to believe that Williamson's May 15, 2009, termination was motivated, at least in part, by that protected activity. As a threshold matter, there is no evidence that any significant retaliatory action was taken by CAM mining in response to Williamson's alleged complaint. Even if Swiney responded to Williamson's alleged complaint by calling him an “asshole,” there is no evidence that Swiney had any retaliatory intent. In this regard, Williamson has admitted, “I'm not going to say [Swiney] particularly made me do things outside my job title.” (Tr. 40). On the contrary, Williamson was given lighter shuttle car duty *after* his alleged complaint. Similarly, given the absence of any retaliation prior to the May 13 incident with Swiney, there is no evidence that CAM mining believed Williamson had complained to MSHA about ventilation issues. (Tr. 127).

Moreover, Williamson admits he never reported any concerns of disparate treatment by Swiney to any CAM Mining official. It is only after he was terminated that Williamson now claims his reported protected activity was a material factor in his job loss. Significantly, Williams testified he did not tell Conn about his alleged history of complaining about ventilation to Swiney because he did not believe that was “the issue . . . at that particular moment.” (Tr. 178). Williamson also did not report his alleged ventilation complaint during his May 14, 2009, meeting with Smith when Williamson was advised he was being “suspended with intent.”

Throughout this proceeding, the Secretary has treated the May 13, 2009, confrontation as a trivial event. It is not mentioned in Williamson’s initial safety complaint filed with MSHA on May 29, 2009, wherein Williamson avers that he “was discharged for making a safety complaint.” (Gov. Ex. 1). In addition, the May 13, 2009, incident is not referred to in the Secretary’s Application for Temporary Reinstatement, nor in the affidavit by MSHA Special Investigator Alan Howell filed in support of the Secretary’s application. Rather, when distilled to its core, the Secretary’s case is, in essence, that CAM Mining was lying in wait after Williamson engaged in protected activity on April 20, 2009, until it was fortuitously rewarded by Williamson’s May 13, 2009, confrontation with Swiney, with no evidence of intervening retaliatory action. In other words, the Secretary argues that Williamson’s May 15, 2009, termination for insubordination is a subterfuge for Williamson’s protected activity, despite no evidence that Conn, Smith or Holbrook, knew about Williamson’s alleged complaint, or, that Williamson was the victim of retaliation during the interim period from April 20 until his May 13, 2009, misconduct.

To determine if the evidence as presented by the Secretary reflects the subject discrimination complaint has not been frivolously brought, we examine the events of May 13, 2009. Williamson concedes he was upset with himself for striking the water line and power cable with the shuttle car. Although there is no evidence that Williamson intended to hurt Swiney, it is apparent that Swiney’s criticism was not well received. Even if physical contact did not occur, the accounts of both Swiney and Williamson support the fact that there was a serious verbal confrontation. In fact, Williamson admits he, in effect, threatened Swiney when he told Swiney he was tired of Swiney “dogging” him and “it’s going to fucking stop now.” (Tr. 91, 93). Williamson also recognized that he could be fired for “cussing” his foreman. (Tr. 92). Although profanity and expressions of aggression may be excused when they are uttered by a complainant who is provoked by a mine operator’s response to his protected activity, obviously severing a water line and damaging a trailing cable are not activities protected by the Mine Act. *Sec’y o/b/o Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 305-07 (Mar. 2000) (excusing behavior that occurs in response to a mine operator’s wrongful provocation). Consequently, there are no mitigating circumstances to excuse Williamson’s aggressive response to Swiney’s criticism. Thus, even a superficial analysis of the evidence presented by the Secretary clearly reflects that, when Williamson threatened 66 year old Swiney, he did so at the risk of his termination.

As a final matter, the Secretary apparently now concedes the May 13, 2009, incident at least justified CAM Mining's suspension of Williamson.<sup>1</sup> However, she argues, in effect, that termination was unjustifiably harsh and motivated by Williamson's earlier ventilation complaint. Having conceded that suspension for Williamson's insubordination was warranted, the Secretary has abandoned any claim that her application for temporary reinstatement is not frivolous. Whether a miner is suspended or terminated for insubordination is within a mine operator's discretion, absent a showing that the discipline is disproportionate to the misconduct and motivated by discriminatory intent. The Secretary's disparate treatment claim, based on the assertion that other CAM Mining employees have been suspended rather than terminated for past instances of misconduct, is unavailing. Past instances of suspension for misconduct do not preclude future terminations for just cause.

In the final analysis, the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (citations omitted). Rather, Commission judges must "analyze the merits of a mine operator's alleged business justification for the challenged adverse action." *Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

In this preliminary proceeding, the issue to be resolved is the merits of the Secretary's assertion that CAM Mining's justification for Williamson's termination is an implausible attempt to hide its discriminatory motive. It is undisputed that Williamson's May 13, 2009, confrontation constituted insubordination. Company written policy reflects that insubordination is grounds for dismissal. (Resp. Ex. 3). The Secretary's contention that CAM Mining was also motivated by Williamson's earlier protected activity is frivolous because it is based only on speculation.

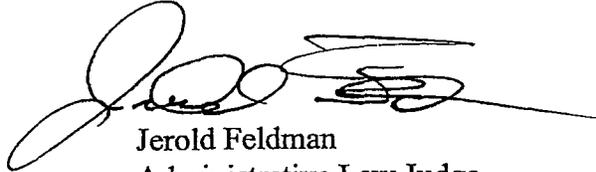
Viewing the evidence in a light most favorable for the Secretary, the Secretary has failed to satisfy her burden of demonstrating there is a reasonable cause to believe Williamson's reported protected activity played any role in his May 15, 2009, termination. Consequently, this case does not appear to have merit and is therefore frivolously brought.

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<sup>1</sup> At trial, without providing any details, the Secretary presented testimony that CAM Mining previously had suspended William Gillespie for "cussing" his foreman. (Tr. 127-29).

**ORDER**

Accordingly, **IT IS ORDERED** that the Secretary's application for the temporary reinstatement of Lige Williamson **IS DENIED**. Consequently, **IT IS FURTHER ORDERED** that this temporary reinstatement proceeding **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail and Facsimile)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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October 8, 2009

|                            |   |                               |
|----------------------------|---|-------------------------------|
| SIDNEY COAL COMPANY, INC., | : | CONTEST PROCEEDINGS           |
| Contestant                 | : |                               |
|                            | : | Docket No. KENT 2007-217-R    |
|                            | : | Order No. 6643560; 02/21/2007 |
| v.                         | : |                               |
|                            | : | Docket No. KENT 2007-218-R    |
|                            | : | Order No. 6643561; 02/21/2007 |
| SECRETARY OF LABOR,        | : |                               |
| MINE SAFETY AND HEALTH     | : |                               |
| ADMINISTRATION (MSHA),     | : |                               |
| Respondent                 | : |                               |
| SECRETARY OF LABOR,        | : | CIVIL PENALTY PROCEEDING      |
| MINE SAFETY AND HEALTH     | : |                               |
| ADMINISTRATION (MSHA),     | : | Docket No. KENT 2008-51       |
| Petitioner                 | : | A.C. No. 15-18381-125442      |
| v.                         | : |                               |
| SIDNEY COAL COMPANY, INC., | : |                               |
| Respondent                 | : | Taylor Fork Energy            |

**DECISION**

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;  
Ramonda C. Lyons, Esq., Dinsmore & Shohl, LLP, Charleston, West Virginia, on behalf of Sidney Coal Company, Incorporated.

Before: Judge Zielinski

These cases are before me on Notices of Contest filed by Sidney Coal Company, Incorporated, and a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Petition alleges that Sidney is liable for two significant and substantial (“S&S”) violations of the Secretary’s Mandatory Safety Standards for Underground Coal Mines, and proposes the imposition of civil penalties in the total amount of \$38,000.00. A hearing was held in Pikeville, Kentucky, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Sidney committed the violations, but that they were not S&S, and impose civil penalties in the amount of \$20,000.00.

### Findings of Fact - Conclusions of Law

On February 21, 2007, MSHA inspector Terry Phillips, Jr., conducted an inspection of Sidney's Taylor Fork Energy mine, which is located in Pike County, Kentucky. Phillips had inspected the mine previously, and was familiar with its layout and operation. One of the production operations at the mine was a "supersection," which consisted of two production sections operating side-by-side in seven entries, designated MMU 005 and MMU 006. Section 005 consisted of entries #1 through #4, and section 006 comprised entries #5 through #7. They were served by intake air traveling down the #5 entry where it was split, and traveled across the sections to the returns in entries #1 and #7. Sidney was allowed to operate a continuous miner on each of the sections. There were ten miners working in the 005/006 sections on the second shift, which started at 4:30 p.m. The foreman was Tim Thornbury.

Phillips went underground about 10:00 p.m., and rode on a track mantrip with Billy May, an electrician. Upon his arrival at the mine, Phillips had indicated that he intended to inspect the belt entry. A call was made to the underground working section to notify Thornbury that there was an MSHA inspector on the property and that he would be inspecting the belt. While en route, Phillips changed his mind and decided to inspect the 005/006 sections. When the mantrip approached a switch in the track, he told May that he wanted to go to the working sections, and they proceeded in that direction. Tr. 25. They encountered an outbound supply car, which required that the mantrip back up past the switch to allow it to pass. Tr. 29. Phillips was concerned that the delay would allow the production crew to be apprised of his impending arrival. Because he wanted to "surprise them," he got off the mantrip, and continued on foot, walking down the #4 belt entry approximately 15-20 breaks to the face. Tr. 94. When he arrived at the feeder, he observed someone doing paperwork in the #3 entry near what he thought was the power center. While he could not positively identify the individual, he believed that it was Thornbury. Tr. 30-31, 94-96; Ex.G-3.

While Phillips traveled to the working section coal was moving on the belt, and he could hear the 005 section continuous miner running. Tr. 39. However, just before he arrived at the #3 entry where the miner was located, it was shut down. Within approximately two minutes he reached the face, and found the air thick with coal dust. No line curtain had been hung and there was virtually no air movement in the entry in by the last open crosscut. The miner operator and a shuttle car operator were unrolling a new roll of line curtain, apparently preparing to hang it. When Phillips approached, one of the men said, "Too late, he's here." Tr. 33; Ex. G-3. The mine's approved Ventilation Plan required that line curtain be maintained no further than 44 feet from the face and eight feet from the discharge end of the scrubber unit mounted on the rear of the miner, and it was apparent that the face had been advanced well beyond 44 feet. He and Thornbury later measured the distance from the face to the in by edge of the last open crosscut at 75 feet. Tr. 54-55; Ex. G-1, G-4 at 8.

Phillips could hear the 006 section continuous miner cutting coal in the #6 entry. Tr. 39. He suspected that the same conditions existed there. However, in less than a minute, the miner

in the #6 entry was shut down. Tr. 34. Phillips told the men in the #3 entry to remain where they were. He ran to the #6 entry, and discovered virtually the same conditions that he had found in the 005 section. Tr. 35. The entry had been driven well over 44 feet (later measured at 69 feet), no line curtain had been hung, air movement was virtually non-existent, and coal dust was thick in the air. Miners were also in the initial stages of preparing to install line curtain.

Phillips was upset with the conditions he had found, and inquired, "Where the hell is the boss?" He proceeded back toward the #3 entry and encountered Thornbury in the last open crosscut. Phillips addressed him in an emotional state, asking, "What the hell are you doing?" Thornbury indicated that he had seen Phillips in the belt entry and had tried to get up to the faces to tell the men to get line curtain up. Tr. 49, 94-95; Ex. G-3.

Phillips and Thornbury proceeded to the #3 entry and took measurements. They determined that the distance from the outby side of the last open crosscut to the most inby row of roof bolts in the entry was 69 feet (49 feet from the inby side of the crosscut), and that the miner had cut another 26 feet into the coal seam. Phillips attempted to measure the quantity of air moving in the entry, but it was insufficient to register on his anemometer. They also took measurements in the #6 entry, and found that the entry had been advanced a total of 89 feet from the outby side of the last open crosscut, 20 feet past the last row of bolts. Thornbury, who assisted in taking the measurements, agreed that they were accurate. Tr. 172.

Phillips issued Citation No. 6643560 and Order No. 6643561, alleging that Sidney failed to follow its approved Ventilation Plan. Sidney timely contested the Citation and Order and the proposed penalties.

#### Citation No. 6643560

Citation No. 6643560 alleges a violation of 30 C.F.R. § 75.370(a)(1), which requires that operators develop and follow a Ventilation Plan approved by the MSHA District Manager.

The violation was described in the "Condition and Practice" section of the Citation as follows:

The section foreman was not following the approved Ventilation Plan on the #2 section in that the left miner (005 MMU) was cutting coal in the #3 entry face without any ventilation controls in place. The distance from the corner to the last row of roof bolts was measured at 69 feet and the miner had already cut 26 feet for a total distance of 95' with no line curtain and no air movement. There was no air movement in this #3 face area and suspended float coal dust was easily seen in the air. Therefore foreman violated the plan by having no line curtain hung and not having sufficient air in the face. Foreman Thornbury engaged in aggravated conduct constituting more than ordinary negligence in that he allowed this miner to cut coal in the #3 face with no ventilation controls exposing his crew

of men to an explosion hazard and breathing of coal dust and rock dust. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-1.

Phillips determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that ten persons were affected, and that the operator's negligence was high. The Citation was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A specially assessed civil penalty in the amount of \$17,500.00 was proposed for this violation.

#### Order No. 6643561

Order No. 6643561 also alleges a violation of 30 C.F.R. § 75.370(a)(1), on virtually the same facts with respect to the #6 entry in the right side of the supersection (006 MMU). Ex. G-2. Phillips similarly determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that ten persons were affected, and that the operator's negligence was high. The Order was also issued pursuant to section 104(d)(1) of the Act. A specially assessed civil penalty in the amount of \$20,500.00 was proposed for this violation.

#### The Violations

The alleged violations are virtually identical, and the critical facts and analysis of gravity, whether they were S&S and the result of the operator's unwarrantable failure are the same. Accordingly, they will be considered together. Sidney concedes that it violated its approved Ventilation Plan as alleged in the Citation and Order. Resp. Br. at 3. The #3 and #6 entries had previously been advanced a minimum of 49 feet each, and roof bolts had been installed. They had then been advanced another 26 and 20 feet, respectively, and no line curtain had ever been hung. As Thornbury admitted, "as soon as they started cutting, they should have had [line curtains] up." Tr. 191-92. Sidney challenges the S&S and unwarrantable failure designations.

#### Significant and Substantial

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

The Commission has explained that:

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.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the failure to hang line curtains in conformance with the requirements of the Ventilation Plan. Phillips cited the violations as S&S because he believed that it was reasonably likely that a spark from the cutting heads of the continuous miners would ignite the suspended coal dust, causing an explosion that would, in a "worst case scenario," result in fatal injuries to all ten miners working on the sections.<sup>1</sup> Tr. 102. There is little question that an explosion would

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<sup>1</sup> Phillips also mentioned that miners inhaling the dust could contract "black lung or silicosis." Tr. 80. However, no dust samples were taken that day, and that aspect of potential injury was not pursued further. Tr. 129-30. Line curtain was required only as the face was advanced beyond 44 feet. Any exposure to excessive dust attributable to the violation would have occurred for a relatively short duration, as the faces were advanced to the next break. While respiratory diseases associated with dust exposure are serious injuries, the evidence does not support a finding that the violations were reasonably likely to cause a respiratory disease.

result in immediate fatalities to at least the miner operator, and any other miner working in the entry. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event – here, an explosion.

Phillips testified that “four sides of the pentagon for explosion” were present – oxygen, confinement, suspension and fuel – and that the only missing factor was an ignition source. Tr. 62. As to that factor, he was aware that exposure levels to dust had been reduced at the mine because of the presence of quartz or silica, an indication of the presence of sandstone, which could cause sparks when struck by a miner’s cutting head. Some 10-12 inches of rock was being cut in the subject headings, and Phillips posited that a spark would supply the missing element for a disastrous explosion. Tr. 73. He did not identify any other potential ignition sources. Tr. 82.

The Commission has provided a framework for analyzing whether a fire or explosion is reasonably likely to occur.

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a ‘confluence of factors’ was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990) (*‘UP&L’*); *Texasgulf*, 10 FMSHRC at 500-03.

*Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997).

The Secretary argues that the *Enlow Fork* factors were satisfied for each violation, and relies on assertions that methane was present. She asserts that “The mine has a history of methane,” and “Four of five elements for an explosion were present in this entry: oxygen, confinement, dust suspension, and fuel (coal, coal dust, and methane).” Sec’y Br. at 6. That methane is highly explosive at concentrations between 5% and 15% has been well-documented. However, the Secretary’s attempt to cast the analysis in terms of a potential methane explosion finds virtually no support in the record.

Phillips testified that there was no methane in the subject entries, and he did not identify the presence of methane as a factor in his description of the explosion hazard. Tr. 62-63, 106. He also related that Sidney’s continuous miners were equipped with scrubbers, whereas, those in mines that liberated appreciable quantities of methane were not, because of the potential explosion hazard presented by the scrubber motors. Tr. 56. The “history of methane” evidence was elicited by the Secretary on re-direct questioning of Phillips, where he indicated that an unspecified quantity of methane had been detected, apparently on one occasion, in bottle samples taken at two evaluation points on a longwall panel bleeder system. Tr. 136-37. Thornbury detected no methane during his preshift examination, which was conducted shortly before the

alleged violations. Tr. 162; Ex. R-1. He believed that the methane detected in bottle samples taken by Phillips was the first indication of methane in the mine, and was of low concentration. Tr. 176-77. Had the evidence established the presence of any significant quantity of methane in the #3 and #6 entries, there would be little question that the violations were S&S. However, there was no methane present.

The nature of the hazard posed by coal dust suspended in air is more difficult to evaluate. It is apparent that coal dust, in general, does not pose nearly the explosion hazard that methane does. Moreover, if the dust posed such a hazard, it could be expected that there would have been a number of fires or explosions occurring in the mining process. Yet, as Phillips acknowledged, he was aware of none. Tr. 106. Nor was Thornbury. Tr. 176. The Ventilation Plan required that line curtain be hung no more than 44 feet from the face, and eight feet from the scrubber discharge. Presumably, the ventilation air current would be drawn back out the entry after passing the end of the curtain. Consequently, the area in proximity to a miner's cutting head, where the sparks postulated by Phillips would occur, would typically be filled with coal dust. If the suspended dust posed a serious hazard, as the Secretary contends, it would seem that ignitions at the face would not be unusual occurrences. The absence of evidence of such ignitions, raises a serious question about the likelihood of coal dust being ignited by a spark.

It may be that suspended coal dust, under certain circumstances, can pose an explosion hazard comparable to that of methane. Here, however, there is no evidence of concentrations or other characteristics that would render it a serious explosion hazard, or whether such conditions existed in the area of the violations. Without more, the presence of coal dust in the entries, and the possibility that a spark would be generated by the miner's cutting head, do not establish that an injury-causing event was reasonably likely to occur.

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Phillips certainly qualifies as an experienced MSHA inspector. However, I find that the Secretary has failed to carry her burden of proving that it was reasonably likely that an injury producing event would occur, as opposed to could occur. Accordingly, I find that the violations were not S&S. *See Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996) (to prove S&S nature of violation Secretary must prove that it is reasonably likely that an injury producing event *will* occur, not that one *could* occur).

#### Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an 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) ("R&P"); *see also Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *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 Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *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. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Citation was issued pursuant to section 104(d)(1) of the Act, which requires that the violation be both S&S and the result of an unwarrantable failure. 30 U.S.C. § 814(d)(1). The violations alleged in the Citation and Order have been held not to have been S&S. Consequently, it is unnecessary to decide the unwarrantable failure issue. However, it is necessary to address the issue of Sidney's negligence, which is alleged to have been high. Because the S&S findings herein may, or may not, become final, the issue of unwarrantable failure will be addressed for the sake of judicial economy.

The Secretary argues that the violations were the result of Sidney's unwarrantable failure and high negligence primarily because its agent, Thornbury, knowingly permitted the violations. Sec'y Br. at 7. Sidney contends that Thornbury did not knowingly permit the violations, because he discovered them shortly before Phillips arrived and instructed his miners to take corrective action. It also argues that the violations were not extensive, had existed for only a short period of

time, were promptly abated, and it had not been put on notice that greater compliance efforts were needed. The violations were abated promptly, and their gravity was not as serious as charged. They were reasonably extensive in that they involved both of the entries on the supersection in which mining was being done. They existed for only 20 minutes or so because of Phillips' arrival. I find that, had he not traveled to the faces, they would have existed for a considerably longer period of time, most likely until the entries had been driven up to the location of the next crosscut. Sidney had not been put on notice by MSHA that additional compliance efforts were needed. However, Thornbury had previously experienced problems with the hanging of curtains in the 006 section, which should have put Sidney on notice of an increased potential for violations in that area. Tr. 181.

Judged by the traditional factors reiterated in *Lopke Quarries*, whether Sidney's negligence rose to the level of unwarrantable failure would present a close question. However, as noted therein, the involvement of an agent of the operator is an important consideration. On the facts of this case, the issue turns on foreman Thornbury's actions.

Some of the pertinent facts are not in dispute. Thornbury testified that he traveled to the #3 and #6 faces, found mining being done in violation of the Ventilation Plan, and told the miners to get line curtain up. Tr. 164. His presence at the faces immediately preceded Phillips', because the miners were shut down a minute or two before Phillips arrived. Thornbury testified that he did not know that Phillips was on the section, that he did not know that the Ventilation Plan was not being complied with until he arrived at the faces, and that he took immediate corrective action. Tr. 164. Phillips believed that Thornbury saw him as he came down the belt line, and hurried to the faces because he knew that the Ventilation Plan was not being complied with. The evidence supports Phillips' version of those events.

When Phillips arrived at the #3 face, one of the miners preparing the line curtain said, "Too late, he's here." Phillips' testimony in that regard is consistent with his field notes, and is un rebutted.<sup>2</sup> The statement strongly indicates that the miners were not only told to erect line curtain, but that an MSHA inspector's arrival was imminent. There is no evidence that anyone other than Thornbury went to the faces and communicated with the men. Consequently, Thornbury must have been aware of Phillips' presence on the section, and his impending discovery of Sidney's noncompliance with the Ventilation Plan. While it is possible that the statement could have been made if Thornbury had simply passed on the fact that he knew an inspector was on the property, I find it more consistent with Thornbury's having actual knowledge of Phillips' presence. Thornbury's having seen Phillips approaching is also a somewhat more likely explanation for the timing of his and Phillips' visits to the faces.<sup>3</sup>

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<sup>2</sup> Thornbury testified that he did not hear the statement. Tr. 171. However, he was not in the area at the time, having left to warn the miners in the #6 entry.

<sup>3</sup> Thornbury testified that he traveled to the faces after completing his preshift examination, over an hour after he had been told that an inspector was on the property.

Phillips testified that Thornbury told him that he saw him go past the feeder and he tried to get up to the faces to tell the men to get their curtain up. Tr. 49. Thornbury denied making that statement. Tr. 168. However, the statement was recorded by Phillips in the notes that he made contemporaneously with the inspection and issuance of the Citation and Order. Tr. 48-49; Ex. G-3. I find that Thornbury made the statement, and that he saw Phillips approaching and hurried to the section faces because he knew that the crews were not complying with the Ventilation Plan.

As noted above, supervisors, like foreman Thornbury, are agents of the operator and are held to a high standard of care. Thornbury's knowing toleration of the violations easily satisfies the Secretary's burden of proving that the operator's negligence was high, and that the violations were the result of its unwarrantable failure.

### The Appropriate Civil Penalties

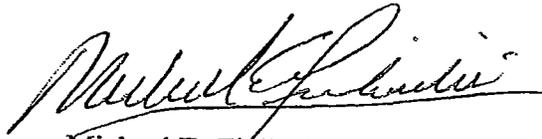
Sidney is a medium-sized operator, with a medium-sized controlling entity. The assessment data reflects that it had 271 violations over 136 inspection days during the applicable period, a relatively high incidence of violations. Sidney does not contend that payment of the proposed penalty will affect its ability to continue in business. The violations were abated within minutes. Phillips used a "worst case scenario" in determining that ten persons would be affected by the violations. Tr. 102. His reasoning was that, in the event of an explosion, the continuous miner and shuttle car operators working in the subject entry would be killed immediately, and other personnel working on the section would become disoriented in the smoke and could eventually succumb to the conditions as their self-contained self-rescuers exhausted their capacity. However, he testified that he did not believe that an explosion would actually result in ten fatalities. Tr. 102. In the event of an explosion, it is reasonable to expect that miners in the immediate area would suffer fatal injuries. However, while others on the supersection might also be injured, it is unlikely that all ten would suffer an injury. I find that four miners were affected by each violation, two fatally, and two with injuries resulting in lost work days or restricted duty.

Citation No. 6643560 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. A civil penalty of \$17,500.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. I impose a penalty in the amount of \$10,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Order No. 6643561 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. A civil penalty of \$20,500.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. I impose a penalty in the amount of \$10,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

**ORDER**

Citation No. 6643560 and Order No. 6643561 are **AFFIRMED, as modified**, and Respondent is **ORDERED** to pay a civil penalty in the amount of \$20,000.00, within 30 days of this decision.



Michael E. Zielinski  
Senior Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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October 8, 2009

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 2007-264  
Petitioner : A.C. No. 01-014901-114900-01  
v. :  
 : Docket No. SE 2007-271  
 : A.C. No. 01-01401-114900-02  
JIM WALTER RESOURCES, INC., :  
Respondent : Mine: No. 7 Mine

**DECISION**

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;  
Guy W. Hensley, Esq., Jackson Kelly, PLLC, Brookwood, Alabama, for the Respondent.

Before: Judge Weisberger

**Statement of the Case**

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”), alleging violations by Jim Walter Resources, Inc. (“Jim Walter”) of various mandatory safety standards set forth in Title 30, Code of Federal Regulations.

Pursuant to notice, the cases were duly scheduled and heard in Birmingham, Alabama on June 10, 2009. Subsequent to the hearing, each party filed a brief. Neither party filed a reply brief.

**I. Docket No. SE 2007-271**

**A. Citation No. 7691427**

**1. Findings of Fact**

On July 16, 2007, MSHA Inspector Harry Wilcox inspected Jim Walter’s No. 7 Mine, an underground coal mine. In the course of his inspection, he examined the alternate escapeway located in the intake air entry. According to Wilcox, two parallel stoppings, constructed from solid concrete blocks, extended from the floor to the ceiling and laterally across the entry from

the right rib, looking inby, to the middle of the entry. A regulator was located within the concrete blocks, and extended from the middle of the entry to the left rib. According to Wilcox, the small size of the regulator opening as well as pressure created by the high volume of intake air flowing through the regulator towards the face prevented passage through the regulator. An airlock that extended from the right rib to the middle of the entry allowed passage in either direction through the approximately six foot gap between the two stoppings.

A lifeline was provided in the entry for miners to use to escape in the event of diminished visibility caused by smoke resulting from a fire or explosion. The lifeline, which extended from the roof, was secured to the inby and outby sides of the airlock, but did not continue inside the airlock between the stoppings. Thus, when escaping outby in an emergency with diminished visibility, miners could escape in an outby direction by following the lifeline up to the inby airlock door. However, at that point it would be necessary to open the airlock door, and traverse the six foot distance inside the airlock to the outby door without the benefit of a lifeline. After opening the outby airlock door and re-entering the entry, it would be necessary to locate the lifeline in order to continue outby to escape.

Wilcox issued a citation alleging a violation of 30 C.F.R. § 75.380(d)(7), which was modified two days later to allege a violation of 30 C.F.R. § 75.380(d)(7)(i), which requires, as pertinent, that each escapeway should be provided with a “continuous, ... lifeline ... that shall be (i) Installed and maintained throughout the entire length of each escapeway ... ;” (emphasis added).

## 2. Discussion

Jim Walter did not adduce any evidence contrary to the facts set forth above, nor did it impeach the inspector’s testimony in these regards.

It appears to be Jim Walter’s position that the lifeline was in compliance with Section 75.380(d)(7)(i). Jim Walter relies on the testimony of Ricky Parker, a safety supervisor, that miners travel the escapeway every ninety days, and that no one has had any problem negotiating the lifelines through the airlock.

In addition, Jim Walter relies on an MSHA computer-generated document, RX-1, which the inspector identified as “Q and As” (Tr. 43.), which provides that “If doors cannot be avoided, the lifeline should be secured to the stopping on either side of the door.” Jim Walter argues that it was in compliance with the cited standard, as the lifeline was secured to the stopping on either side of the door. However, there is not any indication that RX-1 was promulgated pursuant to notice and comment.

Further, RX-1 is not consistent with the plain meaning of the regulation at issue, which requires that lifelines be, *inter alia*, “continuous.” *Webster’s Third New International Dictionary* (2002 ed.) (“*Webster’s*”) defines continuous as “characterized by uninterrupted extension in

space: stretching on without break or interruption.” Inasmuch as the lifeline at issue did not continue through the airlock and there was a six foot break or interruption in the lifeline, I find that it was not “continuous” within the common meaning of that term. Accordingly, I find that the lifeline was not in compliance with Section 75.380(d)(7)(i).<sup>1</sup>

### 3. Penalty

Parker testified, in essence, that Jim Walter secured the lifeline to stoppings on either side of the airlock, in reliance on the “Q and As” (RX-1), “that was given out to us for compliance guidelines.” (Tr. 52) I observed his demeanor, and find his testimony credible in this regard. I find that the level of Jim Walter’s negligence was low. Taking into account all of the factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i) (“Mine Act”), and placing most weight upon the low level of Jim Walter’s negligence, I find that a penalty of \$20.00 is appropriate for this violation.

#### B. Citation No. 7691428

##### 1. Finding of Fact and Discussion

On January 23, 2007, Wilcox inspected the main fan area on the surface of the Jim Walter No. 7 Mine. A temporary vibration sensor cable was in use to monitor the vibration of the fan

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<sup>1</sup>Jim Walter argues, based on the following testimony of Parker, that the installation of a continuous lifeline through the airlock “presents several problems that threaten safety by interfering with the integrity of the lifeline.” Jim Walter Resource’s Proposed Findings of Fact and Conclusions of Law, at 4 (“Jim Walter’s Brief”):

- Q. Are there any problems with running a lifeline through an airlock door, as Mr. Wilcox described previously?
- A. Yes, sir. We’re having problems now with the doors constantly cutting the lifeline in two, damaging the lifeline. We’re having to replace the lifeline continuously, due to the abrasion of the door shutting against it and the vibration due to the enormous amount of air currents coursing through that ventilation control.

(Tr. 56.)

Thus, Jim Walter’s argument in defense is essentially based upon a diminution of safety which, according to well-established Commission caselaw, has been held to not constitute a defense in an enforcement proceeding unless the Secretary has first entered a finding of such diminution at a modification proceeding. See *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989), citing *Sewell Coal Co.*, 5 FMSHRC 2026 (Dec. 1983), and *Penn Allegh Coal Co.*, 3 FMSHRC 1392 (June 1981).

shaft to ensure that it would not cause the shaft to fail. The cable entered the metal compartment for the sensor control through a door. It did not enter through any fitting; the door was closed against the cable.

Wilcox issued Citation No. 7691428, alleging a violation of 30 C.F.R. § 77.505, which requires as follows: "Cables shall enter metal frames of motors, splice boxes, and electric compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings."

Jim Walter urges that the citation be dismissed, and cites Wilcox's testimony that the cable had been placed inside the metal compartment only on a temporary basis, that the current on the cable "would be milliamps," and that he did not find any cable damage. (Tr. 75.) Jim Walter argues, in essence, that under these circumstances, Section 77.505 does not apply.

However, the mandate of Section 77.505 is clear and unequivocal in requiring that cables enter metal frames of electrical components "only through proper fittings." The language of Section 77.505 does not provide for any exceptions. Thus, to rule in favor of Jim Walter would result in the amendment of Section 77.505, which is manifestly beyond the powers of a Commission Judge.

## **2. Conclusion**

I find that the record establishes that the cable entered an electric compartment through its door and not "through proper fittings." Thus, I find that it has been established that Jim Walter violated Section 77.505.

Considering all the factors set forth in Section 110(i) of the Mine Act, I find that a penalty of \$60.00 is appropriate for this violation.

### **C. Citation No. 7691429**

The parties stipulated that a violation of 30 C.F.R. § 77.504 occurred as alleged in Citation No. 7691429, and that \$60.00 is an appropriate penalty for this citation. Secretary's Brief and Argument, at 1, and Jim Walter's Brief, at 2.

## **II. Docket No. SE 2007-264**

### **A. Citation No. 7690414**

#### **1. Findings of Fact**

On September 29, 2006, MSHA inspector Russell Weekly inspected Jim Walter's truck shop. He indicated that four overhead lights in the left corner of the ceiling on the east side of

the shop were burnt out. According to Weekly, “[t]he area that these lights would have illuminated was not very adequately lit, even at the time of day the citation was issued, which was 0800.” (Tr. 154.)

Weekly opined that a person walking to and from supply cabinets located on the east side of the shop could trip over an approximately 3/4 of an inch thick steel plate that was located under the cabinets. He asserted that persons working the evening or night shifts “could very possibly” trip over the steel plate since the area would be dark without the benefit of sunlight. (Tr. 162.)

Weekly issued a citation alleging a violation of 30 C.F.R. § 77.207, which provides that “[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, ... and working areas.”

According to Parker, the floor of the structure at issue was sixty to seventy feet long, and thirty to forty feet wide. He indicated that a garage door ten to twelve feet wide and approximately fifteen feet high was located on the east side of the shop and was normally kept open.

Parker testified that opaque fiberglass skylights extended around the perimeter of the walls of the building. The skylights, which were approximately six feet high, were located “from halfway to three quarters of the [50 foot high] wall.” (Tr. 235.)

According to Parker, there were four lights in the ceiling, in addition to the four cited by Weekly. Also, there were a total of seven wall lights located halfway up the walls, and distributed among the four walls. Parker testified that there were two cap lights in the shop, and “we have” tripod and hanging lights although he did not see them in the shop. (Tr. 244.)

Parker, who was the inspector during the latter’s inspection, testified that “We didn’t have a problem seeing anything that we needed to see at the time.” (Tr. 245.) He opined that the illumination was sufficient.

## 2. Discussion

I take cognizance of the inspector’s opinion that the illumination in the shop was not sufficient to provide safe working conditions due to the absence of four overhead lights. However, the weight to be accorded this opinion is diluted by considering the presence of opaque sky lights covering a significant portion of the walls surrounding the building. Further, I note the presence of additional ceiling and wall lights, and the availability of cap lights. I, thus, find the record does not establish that, during the daylight shift, illumination was insufficient.

Further, since the inspection was only during daylight, it is mere conjecture that the illumination would not have been sufficient during the evening and night shifts. There was not

any evidence adduced regarding the amount of illumination shed by all the operative lights located on the walls and ceiling. Moreover, I note the presence of additional portable lights, as well as the availability of cap lights. Also, I note that Weekly did not indicate the spatial relationship between the inoperative overhead lights, the working areas, and the location of the supply cabinets where the potential tripping hazard of a steel plate was located.

For all these reasons, I find that the Secretary has failed to adduce sufficient evidence to establish, by a preponderance of evidence, that due to the lack of four ceiling lights, the illumination remaining was not sufficient to provide safe working conditions. For these reasons, I find that it has not been established that Jim Walter violated Section 77.207. Accordingly, Citation No. 7690414 is **Dismissed**.

**B. Citation 7690415**

**1. The Secretary's Case**

Weekly testified that there were not any weatherproof covers over two 110-volt wall outlets that were located inside the shop. He indicated that a Jim Walter employee told him that the area is sprayed down and washed out daily. He opined that if water was inadvertently sprayed into the outlets in question, which were located four feet off the floor, the person doing the spraying could suffer an electrical shock due to a short circuit. Weekly issued a citation alleging a violation of 30 C.F.R. § 77.516.

Section 77.516 provides, as pertinent, that "all wiring and electrical equipment installed after June 30, 1971, shall meet the requirements of the national electric code in effect at the time of the installation." In support of the violation, the Secretary proffered a 1968 edition of the National Electric Code ("GX-10"). Jim Walter objected to the admissibility of GX-10, and after listening to arguments, the objection was sustained.<sup>2</sup>

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<sup>2</sup>The ruling sustaining the objection is set forth as follows, except for corrections of matters not of a substantive nature:

Section 77.516 imposes a duty on an operator to meet the requirements of the National Electric Code in effect at the time of installation.

There isn't any evidence in the record of the time of the installation of the shop, or any of the cited items. Therefore, the record is inadequate to establish that the 1968 edition, GX10, was the edition that was applicable on the date in question, i.e., the code that was "in effect" at the time of installation. Since it has not been established that GX-10 is relevant, I find it is inadmissible.

(Tr. 207-208.)

After the Secretary rested, Jim Walter made a motion for summary decision which was granted. The decision granting Jim Walter's motion is set forth below, with the exception of non-substantive changes, and the addition of matters that were inadvertently omitted.

## 2. Bench Decision

The Secretary has the burden of establishing a violation, which entails establishing all elements of a violation. Section 75.516 requires an operator to comply with the requirements of the National Electric Code "in effect at the time of the installation."

The Secretary has not presented any evidence with regard to the time of the installation, either of the structure that is at issue or specifically with regard to the wiring and installation of the outlets at issue. Thus, the Secretary has failed to establish which edition of the code was in effect at the time of the installation.

The Secretary proffered a copy of five pages from a 1968 edition of the National Electric Code (GX-10).<sup>3</sup> Jim Walter objected to its admissibility. After each party argued the merits of the objection, the objection was sustained. As such, GX-10 is not part of the record.

Thus, since the Secretary did not proffer the Code that was "in effect at the time of installation" (Section 75.516), it is clear that the Secretary has not established a violation of Section 75.516.

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<sup>3</sup>The Secretary cites GX-10, page four, paragraph 410-54, which requires that "[a] receptacle installed in damp or wet locations to be of the waterproof type." GX-10, p. 3, defines "wet location" as follows: "A location subject to saturation with water or other liquids; such as, locations exposed to weather, washrooms in garages and like locations."

There was not any evidence presented that the outlets at the location cited were subject to saturation. The inspector indicated that Mark Talbert, the truck shop foreman, stated that the floor area was washed out. The inspector opined that an uncovered outlet located on the inside wall of the structure four feet off the ground might, in the process of washing down the floor, be inadvertently hit by the water, causing possible damages. Such a situation is far short of the requirement of being subject to saturation.

There is not any evidence that the location of the outlets were subject to saturation of water or other liquids. Further, the location cited is not similar to those that are given as examples under the definition of wet location on page three of GX-10, such as the locations exposed to weather, washrooms in garages, and like locations.

For these reasons, the Jim Walter's motion is granted, and Citation No. 7690415 shall be **Dismissed**.

**C. Citation No. 7690728**

**1. Findings of Fact**

On November 2, 2006, MSHA inspector Billy Johnson inspected Jim Walter's underground mining operation. He indicated that a JOY 12-27 continuous miner ("left side miner") was not being operated. He noticed that it did not have a rock bar (pry bar). He indicated that when he cited it, it was located in the No. 2 entry, and "I think [it was] in the last open crosscut." (Tr. 284.) Johnson opined that although the miner was not being operated when it was cited, if it was intended for the miner to be used, then a rock bar is needed.

Johnson indicated that in the operation of the continuous miner, draw rock could be encountered in the roof which would require the rock to be pulled so it would not fall and injure miners.

According to Johnson, he told Joe Martin, a union safety man who was with him, and Red Morgan, a manager, to show him "a bar" if there was one in the face area, and they both said that bars were not kept in the face area; they were kept on the equipment. (Tr. 287.)

Johnson issued Citation No. 7600728 alleging a violation of Section 75.211(d), which, as pertinent, provides that a "a bar for taking down loose material shall be available in the working place or on all face equipment except haulage equipment."

Parker indicated that he spoke to some persons who had first-hand knowledge of the operation in the area in question. These persons told Parker that MSHA allowed the practice of removing the bar from a miner that had backed out of the face and parked, and placing it on the miner being operated on the other side of the section.

**2. Discussion**

By its clear terms, Section 75.211(d) provides that, in essence, an operator is in compliance if a bar is "available in the working place or on all face equipment." Thus, since the clear wording of Section 75.211(d) sets forth its obligations in the alternative, an operator is in compliance if either a bar is available in the working place, or is on all face equipment. Thus, to establish a violation, the Secretary must establish that a bar was neither available in the working place, nor on all face equipment. For the reasons that follow, I find that the Secretary has not met this burden.

**a. "[A]vailable in the working place"**

“Available” is defined in *Webster’s*, as pertinent, as follows: “(4): that is accessible or may be obtained.” Accessible, as pertinent, is defined in *Webster’s* as pertinent, as follows “(4): capable of being used.”

Section 75.211(d) does not define the phrase “working place.” However, 30 C.F.R. § 75.2 defines “working place” as “the area of a coal mine inby the last open cross-cut.”

When Johnson issued the citation at issue, a bar was not physically located in the working place. However, as testified to by Johnson on cross-examination, a bar was “retrieved ... within five minutes” of the time the citation was written. (Tr. 293.) (emphasis added) It is significant to note that the citation was issued pursuant to the examination of the left side miner, which was located in the last open crosscut, i.e., “that open passageway connecting entries closest to the working face.” *Jim Walter Resources, Inc.*, 11 FMSHRC 21, 26 (Jan. 1989). (emphasis added) I also note that the working place” was inby the last open crosscut. Jan. 30 C.F.R. §75.211. Accordingly, since (1) it took only five minutes to “retrieve” a bar allowing Johnson to terminate the citation, and (2) Johnson was apparently at the location of the cited miner in the last open crosscut, it may be concluded that, when cited, it would have taken approximately five minutes to bring a bar to the working place, i.e., inby the last open crosscut.

Accordingly, I find that the bar was “available” in the “working place” within the common meaning of the former term. To rule otherwise would result in the amendment of Section 75.211(d) by substituting the word “located” for the word “available” and deleting the latter word. Clearly this is a function beyond the scope of the powers of a Commission Judge.

### 3. Conclusion

For all the above reasons, I find that Jim Walter was in compliance with the first phrase of Section 75.211(d), i.e., that a bar be “available in the working place.” Thus, since the clear wording of Section 75.211(d), requires that a bar be available at the working place “or” an all face equipment, I find that Jim Walter satisfied one of the alternate mandates of Section 75.211(d). Therefore Citation No. 7690728 shall be **Dismissed**.

#### D. Citation No. 7689496

##### 1. Findings of Fact

On January 2, 2006, MSHA inspector Edward Nicholson inspected the track entry while traveling the entry in a personnel carrier that rode on tracks. He observed airborne dust while traveling in and out of the entry. He indicated that there was sufficient dust to hinder visibility on the track.

Nicholson issued a citation alleging that Jim Walter was not in compliance with its ventilation and dust control plan (“Plan”), and as such violated 30 C.F.R. § 75.370(a)(1).

Specifically, he indicated that the basis for the citation was the non-compliance with “page 3” of paragraph E of the Plan. According to Nicholson, as a consequence of the cited conditions, a miner could develop respiratory diseases.

Parker indicated that he travels the area frequently and that “it’s virtually impossible” to keep all dust out of intake air:

due to ... the large amount of velocity of air we have coursed down through that entry especially, if you have – numerous personnel carriers that can be traveling in this one entry of the track, where we have deposited rock dust on the roof and the ribs, it also goes on the floor.

The vibration of the machine traveling the metal tracks, the turbulence caused by all these pieces of equipment, can cause the rock dust to fall from the ribs or roof and even be picked up from the sides of the track because of this, in conjunction with the dust that can be on the equipment itself.

(Tr. 335-36.)

Parker traveled the cited entry with the inspector. He indicated that the cited conditions “[did not] constitute dust under the law.” He explained his opinion as follows:

[D]ue to the minute amount that was present. ... [and] due to the amount of velocity mass in the air, the dust is there for a few minutes; and then it's gone. It's moved rather quickly away.

Q. Are you saying that any dust that's airborne is evacuated from the area by the mine?

A. Yes, sir. It doesn't linger in the area.

(Tr. 337-38.)

## 2. Discussion

30 C.F.R. § 75.370(a)(1), as pertinent, provides as follows: “The operator shall develop and follow a ventilation plan ... The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.” (emphasis added)

The ventilation plan, as pertinent, provides as follows:

\* \* \*

E. BELT AND TRACK HAULAGE SYSTEM

The belt and track haulage system will follow a dust control program. The dust control program is one or any combination of the following items:

1. Removing accumulations of loose, dry coal
2. Rockdusting
3. Wetting with water or other wetting agent.

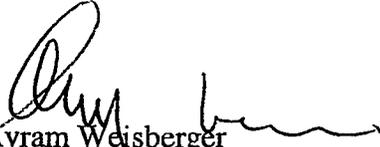
(GX 12.)

The clear language of Section 75.370(a)(1), as pertinent, requires that an operator follow a ventilation plan which shall be designed to control dust. In other words, the plan shall be followed to control dust. These requirements are unequivocal, and do not provide for any exemption from compliance, as urged by Jim Walter, based upon an impossibility to keep all of the dust out of the intake air due to its velocity. It is significant that Parker did not specifically impeach or contradict Nicholson's testimony that, when cited, dust was observed in the air which impaired visibility. Further, I observed the witnesses' demeanors, and I find Nicholson's testimony regarding the presence of airborne dust to be credible. I find that at the time cited, due to the presence of dust in the air that impaired visibility, Jim Walter was not "following a dust control program." Accordingly, I find that Jim Walter violated Section 75.370(a)(1).

According to Nicholson, Jim Walter did have a program for keeping the track wet in the cited area. I also note Parker's testimony that if an area is deemed necessary for wetting or rock dusting, he "would get in touch with the proper management person to get that action taken." (Tr. 334.) Also, based on Parker's testimony that was not impeached or contradicted, I take cognizance of the difficulty to keep all dust out of the air due to the velocity of air in the entry, and the operation of carriers on the track causing the production of dust. I thus find the level of Jim Walter's negligence to be significantly mitigated. Considering this finding, as well as the other factors set forth in Section 110(i) of the Mine Act, I find that a penalty of \$20.00 is appropriate.

**ORDER**

It is **Ordered** that the following citations be **Dismissed**: 7690414, 6790415, and 7690728. It is further **Ordered** that, within 30 days of this decision, Jim Walter shall pay a total civil penalty of \$120 for the violations found herein.

  
Avram Weisberger  
Administrative Law Judge

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/lp

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>TH</sup> STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-3577/FAX 303-844-5268

October 16, 2009

|                             |   |                                 |
|-----------------------------|---|---------------------------------|
| MOUNTAIN COAL COMPANY, LLC, | : | CONTEST PROCEEDING              |
| Contestant                  | : |                                 |
|                             | : | Docket No. WEST 2007-409-R      |
| v.                          | : | Citation No. 7291353; 3/26/2007 |
|                             | : |                                 |
| SECRETARY OF LABOR,         | : | West Elk Mine                   |
| MINE SAFETY AND HEALTH      | : | Mine Id. 05-03672               |
| ADMINISTRATION, (MSHA),     | : |                                 |
| Respondent                  | : |                                 |
|                             | : |                                 |
| SECRETARY OF LABOR,         | : | CIVIL PENALTY PROCEEDING        |
| MINE SAFETY AND HEALTH      | : |                                 |
| ADMINISTRATION (MSHA),      | : | Docket No. WEST 2008-129        |
| Petitioner                  | : | A.C. No. 05-03672-128598        |
|                             | : |                                 |
| v.                          | : |                                 |
|                             | : | West Elk Mine                   |
| MOUNTAIN COAL COMPANY, LLC, | : |                                 |
| Respondent                  | : |                                 |

**DECISION**

Appearances: Laura E. Beverage, Esq., and Dana M. Svendsen, Esq., Jackson Kelly PLLC, Denver, Colorado, for Mountain Coal Company, LLC; Mary Forrest-Doyle, Esq., and Tracy B. Agyemang, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on a notice of contest filed by Mountain Coal Company, LLC (“Mountain Coal”) and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). An evidentiary hearing was held in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs. For the reasons set forth below, I find that the Secretary established a violation of the safety standard.

Mountain Coal operates the West Elk Mine, a large underground coal mine in Gunnison County, Colorado. The mine extracts coal in panels using a longwall system. As discussed

below, the parties settled several of the citations prior to the hearing, so only Citation No. 7291353 was at issue at the hearing.

## I. BACKGROUND

### A. The Citation and Stipulations.

On March 26, 2007, Inspector Brad Allen issued Citation No. 7291353 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.1725(a), in part, as follows:

The mine operator failed to maintain mobile and stationary machinery and equipment in safe operating condition and machinery and equipment that was in unsafe condition was not removed from service immediately. Numerous hydraulic hoses on the support shields in MMU 010-0 at 20 headgate had rubber jacketing torn back and the wire braid shields were damaged with multiple broken strands on each hose. Both high pressure feed hoses and return line hoses were damaged along the rear walkway of the shields. Hose sizes ranged from #6 to #16 in size and hydraulic pressure was as high as 5000 pounds per square inch. Thirteen miners were working in the longwall area during this shift and the longwall was operating shearing coal on the previous shift. . . . Ruptured or broken high pressure hydraulic hoses can cause fluid injection, hose whip injuries, or compromise the operation of the support shields. . . .

The inspector determined that an injury was reasonably likely and that a fatal accident could occur. He determined that the violation was of a significant and substantial nature (“S&S”) and that the company’s negligence was moderate. Section 75.1725(a) provides that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” The Secretary proposes a penalty of \$5,300.00 for this citation.

The parties filed joint stipulations, in which they agreed that the mine is subject to the Mine Act and that the Commission has jurisdiction to hear the case. Other facts were also stipulated to, including the following:

6. The 13 cited hoses are included within the meaning of the term “equipment” as used in § 75.1725(a).

7. Between November 2006 and the time the [citation] was issued in March 2007, Mountain Coal was operating one longwall section, Panel 20, which was approximately 1,000 feet wide.

12. Typically, a longwall crew at West Elk consisted of five miners and one supervisor, including a headgate operator, a headgate shearer operator, a tailgate shearer operator, two shield movers and a production supervisor. In addition, there were usually two mechanics and a maintenance supervisor assigned to each longwall production shift.

13. At the time of issuance of the [citation], Daniel Kunde was employed in the position of Longwall Maintenance Coordinator at . . . West Elk. At that time, [four other employees] were working in the position of Longwall Maintenance Supervisor at . . . West Elk. Daniel Kunde has 30 years of experience working in underground Mines. He has been employed at the West Elk Mine for over 19 years, all of the time spent on the longwall. In his position as the Longwall Maintenance Coordinator, he oversees daily maintenance and setups on the longwall, and is responsible for the direction of the front line Longwall Maintenance Supervisors. He has been a Longwall Maintenance Coordinator for five years . . . .

14. Miners typically travel along the longwall by walking in the "front walkway," between the panline and the leg cylinders of the shields.

15. Miners typically do not enter the "back walkway," except to perform inspections, repair, replace a hose, or if the front walkway is obstructed given the confined dimensions of the area.

16. None of the 13 cited hoses were located in the front walkway.

17. The 13 cited hoses were all inner-shield hoses, rather than shield-to-shield.

18. Failure of any of the 13 cited hoses would not result in shield failure.

19. The hydraulic fluid used in 12 of the cited hoses was comprised of approximately 95% water and 5% emulsion fluid.

20. The hose locations depicted in red in Respondent's . . . Exhibit 17 are accurate.

## II. SUMMARY OF THE EVIDENCE

This case raises technical issues concerning the safety of hydraulic hoses. As a consequence, I have included in this decision a detailed summary of the evidence presented.

### A. Brad Allen

Inspector Brad Allen testified that he worked in the mining industry for 13 years prior to joining MSHA. (Tr. 9). Allen spent two of those years working on a longwall as a headgate operator, shield puller, longwall mover, and fill-in foreman. (Tr. 10-11). He has never worked on a longwall with a front and back walkway like the one at West Elk. (Tr. 67).

Allen testified that on March 26, 2007, he and two other MSHA inspectors were at West Elk to conduct a permissibility inspection. (Tr. 14, 49). The three MSHA inspectors were accompanied by three Mountain Coal employees, including Dan Kunde. (Tr. 14-15). During the inspection Allen noted that numerous hydraulic hoses on the longwall shields had torn and deteriorated outer jackets and broken wire braiding. (Tr. 15). Allen inspected the hoses from the front and back walkways. (Tr. 272). No deck plates were removed during the inspection and at no time did Allen climb down to look at the underside of the hoses. (Tr. 272, 274). Allen issued Citation Number 7291353 under section 75.1725(a) for the unsafe operating condition of multiple hoses.<sup>1</sup> (Tr. 15, 26). All of the cited hoses were located in the back walkway. (Tr. 45). None of the hoses were cited for deficiencies with their fittings. (Tr. 61).

Allen testified that he determines whether a hose is in a safe operating condition by looking at the manufacturer's recommendations for that specific hose, the overall physical appearance of the hose, whether there are exposed or broken wire strands, and the condition of the fittings. (Tr. 27-28, 62). Allen testified that MSHA puts "a lot of stock in manufacturer recommendations," but he could not remember the manufacturer of these particular hoses. (Tr. 27, 60). Additionally, he testified that manufacturers generally provide conservative product recommendations in order to protect the people working around the equipment, as well as to protect themselves from litigation. (Tr. 71-72).

Allen testified that, when examining a hose, he first looks for obvious external damage by performing a quick visual inspection. (Tr. 18-19). If he observes damage to the outer jacket of the hose, then he clears any debris from the damaged area to determine if the wire braiding under the outer jacket has been damaged. (Tr. 21). He looks for broken wire strands by running the flat edge of a screwdriver blade along the strands. (Tr. 21). If there are broken wire strands then those strands will move as the screwdriver passes over them. (Tr. 21). During his inspection, each cited hose had at least one broken wire strand, in addition to a damaged outer jacket. (Tr. 18-26). Allen believes that the outer jackets appeared to have been "torn" as opposed to "rubbed

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<sup>1</sup> At the time of the citation, Allen mistakenly believed that if a hose were to fail, shield failure would be a possibility. He later determined that this was not likely given the presence of check valves that prevent the shield from collapsing if there is a hose failure. (Tr. 53)

through.” (Tr. 73). If there are broken wire strands, then the hose’s ability to contain the hydraulic fluid has been compromised. (Tr. 28). A violation exists if there is one broken wire strand on any hose. (Tr. 43, 49-50).

Allen testified that a hose failure could result in hydraulic injection or whipping hose injuries to the miners on the longwall. (Tr. 28-29; Ex. G-4). Falling roof rock, corrosive mine water, the moving of longwall components in close proximity to the hoses, and cutting and welding around the hoses could all exacerbate the risk of hose failure; however, Allen could not say whether these conditions exist at West Elk. (Tr. 30-31, 50, 67-68). Allen testified that, while he did not know the actual service pressures of the hoses, a hydraulic fluid injection injury could occur at a pressure of 100 psi, but the severity of the injury may be less at lower pressures or if the stream has been deflected off of another surface before hitting a miner. (Tr. 41-42, 45, 63-65). Hydraulic fluid could spray from the hoses in the back walkway to the front walkway. (Tr. 45, 76). Additionally, it is possible for a miner to be on the front walkway of an inactive shield and be in the direct line of sight of pressurized hoses on an activated adjacent shield that is being advanced. (Tr. 269-270). A miner could be in that position if he was using the controls on the inactive adjacent shield to advance the activated shield. (Tr. 271, 275-277). Allen could not say if this is the practice used at West Elk, but he did state that he had seen people making adjustments from adjacent shields, although he could not recall how often he had seen it. (Tr. 275-278).

Allen acknowledged that the West Elk miners do utilize personal protective equipment, such as Airstream helmets with face shields, rain suits, gloves, and safety glasses. (Tr. 68-70, 74-75, 78-79). However, he noted that not all of the miners wear all of this equipment, and some of the equipment, such as cotton backed gloves and rain suits, would probably not be adequate to protect against a hydraulic fluid injection injury. (Tr. 68-70, 74-75, 78-79).

Allen found that the violation involved a moderate degree of negligence on the part of Mountain Coal. (Tr. 33). Allen determined that 13 people had the potential to be injured, but he could not recall exactly how he arrived at that number. (Tr. 71-75). He found that an injury was “reasonably likely” to occur given the hoses’ location in the back walkway, and the location of the damage on the hoses. (Tr. 46-47). Allen testified that the MSHA website provides guidance materials and links to outside materials that discuss hose safety practices. (Tr. 36-37; Ex. G-5). Allen testified that his personal notes from the day of the citation indicate a conversation with Kunde, during which Kunde stated that the operator had not done a very good job with the hoses and agreed with the violation. (Tr. 41; Ex. G-2).

## **B. James Angel**

James Angel is a mechanical engineer in the mechanical engineering safety division of MSHA in Triadelphia, West Virginia. (Tr. 80). He has a bachelor’s degree in mechanical engineering and has worked for MSHA for 26 years. (Tr. 80; Ex. G-9). He spends the majority of his time investigating accidents and providing technical assistance to inspectors and mine

operators. (Tr. 80-81). Angel is an active member of multiple professional organizations and is currently involved in setting safety standards for personal protection on machinery, fire protection standards for earth moving equipment, tire out-of-service guidelines, and tire fire handling guidelines. (Tr. 81-82).

Angel testified that his experience with hydraulic hoses is mainly in the areas of fire protection, and abrasion and failure of hoses on diesel-powered equipment. (Tr. 82). He has been involved in the approval of multiple regulations and rules utilized by MSHA. (Tr. 81). He has never been directly involved in investigating a hydraulic hose failure, but he has been indirectly involved with an investigation of a whipping hose injury. (Tr. 108-109).

Angel prepared a report on the hydraulic hoses. (Tr. 84; Ex. G-10). He did not see the actual hoses until after the report was prepared. (Tr. 96). He prepared the report using manufacturer literature, the cited safety standard, the citation, MSHA materials, and photographs of the hoses. (Tr. 81, 84-85, 126-127). Based on his analysis of these materials, Angel testified that once the structural component of the hoses, i.e., the wire braiding, has been compromised, the hoses are no longer fit for use and present a risk of injury. (Tr. 86). Angel described the hoses as all having exposed wire braiding, all with at least one broken wire strand, and some with areas of corrosion. (Tr. 97-101). Once the wire braiding is exposed it will start to deteriorate and eventually lead to hose failure; however, there is no way to tell how long it would take for a hose to fail. (Tr. 86, 129). Because hoses are "consumable items" they should be replaced when the structural integrity has been compromised. (Tr. 101). Additionally, Angel testified that one hose had a damaged ferrule, which could cause the hose to come loose while under pressure and whip around. (Tr. 98). A ferrule is the metal fitting at the ends of each hose.

At the time of his report, based on the information that he had, Angel believed that abrasion had caused the damage to the hoses. (Ex. G-10). Prior to the hearing, after viewing the hoses in person, he concluded that many of the hoses had actually been damaged by exposure to high temperatures.<sup>2</sup> (Tr. 96-97). Angel testified that this kind of damage could have been caused by exposure to a fire or oxy-acetylene cutting or welding, although he was not aware of either occurrence at West Elk. (Tr. 98, 111-112). The report did not include any analysis regarding the anticipated direction that the fluid would be ejected if a hose were to fail. (Tr. 147). Angel stated that all of the layers of wire braiding reinforcement would have to fail for the hose to fail. (Tr. 130). The only damage he viewed was to the outermost layer of wire braiding. (Tr. 126). If the rubber separating the layers of wire braiding remains intact, then, barring heat damage, you would not expect water or other corrosive materials to affect the inner levels of wire braiding. (Tr. 159, 161-162). Heat damage can penetrate into a hose and affect the strength of all layers of wire braiding, but Angel could not tell from viewing the hoses whether the inner layers of braiding had been affected. (Tr. 131-132). There is no field test for checking interior damage to a hose. (Tr. 157).

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<sup>2</sup> Angel testified that the hose with the damaged ferrule was the only hose that presented anything more than a minimal risk of whipping hose injury. (Tr. 150).

Angel testified that hose failure can cause injuries such as fluid injection, fluid in the eyes, fluid on walking surfaces causing slippery conditions and leading to falls, and a minimal risk of whipping hose injuries. (Tr. 86-87). Fluid injection injuries can occur at pressures much less than what the cited hoses were operating at, but, to be injured, the individual must be within inches of the hose. (Tr. 145-147). Cloth gloves, leather gloves, and PVC rain suits do not provide adequate protection against fluid injection injuries, and safety glasses cannot totally prevent hydraulic fluid from getting into a miner's eyes. (Tr. 102-104). Additionally, he was not aware of any MSHA fatalities from fluid injection, or written materials regarding specific injuries that resulted from hoses that were in a similar condition to those at issue. (Tr. 119-120).

Angel testified that the testing conducted by Olof Jacobson, Mountain Coal's expert witness, can only determine if that specific hose would have failed under the test conditions. (Tr. 92-93). Pressure ratings and cycling impulses are internal factors that affect the strength of a hose. (Tr. 156). The actual hoses were not rendered unsafe by the pressures they were subjected to, but rather by external damage and environmental conditions that the hoses operated in. (Tr. 93-94). Outside factors that can affect the strength of a hose are addressed by the outer jacket or additional covers that make the hose more resistant to abuse. (Tr. 156). Jacobson's tests did not take into account any of the environmental factors that were present at the mine. (Tr. 93-94).

Angel also testified that while manufacturers do vary to some degree, they are "surprisingly uniform" in their recommendation that hoses be taken out of service once the wire braiding is exposed. (Tr. 107). Angel believes that manufacturers recommend that hoses be removed from service when the outer layer of wire braiding has been exposed because it is difficult to determine all of the factors that can affect a hose. (Tr. 157). Angel maintains that a prudent operator would follow these recommendations. (Tr. 122). A broken strand is confirmation that the structural integrity of the hose has been compromised. (Tr. 124).

Angel testified that "safety factors" and "percentage of service ratings" relied upon by Mr. Jacobson are irrelevant once a hose has been damaged to the point that the safety guidelines issued by hose manufacturers suggest that the hose be taken out of service. (Tr. 106, 136, 144). Safety factors are intended to protect against unknown factors that the manufacturer cannot predict, rather than known factors like visible damage to the outer jacket and wire braiding, as is the case here. (Tr. 105-106).

### **C. Dan Kunde**

Dan Kunde, who has worked in longwall maintenance at the West Elk mine for 19 years, has been the maintenance longwall coordinator since 2005 and is in charge of purchasing equipment, supervising maintenance personnel, and looking after the general maintenance of the longwall system. (Tr. 165-66). Kunde testified that he works with hydraulic hoses on a daily basis. (Tr. 167).

The hoses on the longwall are examined on a weekly and monthly basis, in addition to being examined on an ongoing basis by the production crews. (Tr. 184-185). The deck plates that the hoses pass under are situated such that you can see underneath the plates on one edge. (Tr. 192). Most of the hoses in the back walkway can be viewed and examined from the front walkway. (Tr. 201). It is Mountain Coal's policy that no one may be on a shield while it is activated or being moved. (Tr. 181). While Mountain Coal has no written criteria for what is considered a safe or unsafe hose, factors that are considered include the location of the hose, and the pressures, cycles, and operating conditions of the hose. (Tr. 170, 186, 202).

Kunde testified that all of the cited hoses were intrashield<sup>3</sup> hoses located in the back walkway and that all of the worn areas were either under the deck plates or facing downward into the floor rather than facing the front walkway. (Tr. 171-180, 185). Given that the back walkway is a confined area where it is hard to move around and that equipment is never moved through it, the only reason anyone would be in the back walkway would be for permissibility inspections. (Tr. 181, 200). The hoses are fixed in a staple-lock fitting and cannot spin. (Tr. 195). Fluid from a pinhole perforation could ricochet off of something and be redirected toward the front walkway where miners work. (Tr. 205). Most miners on the longwall wear personal protective equipment such as Airstream helmets with impact resistant face shields, safety glasses with side shields, leather gloves, shin guards, and rain jackets. (Tr. 182-183).

Kunde testified that it is highly unlikely that high temperatures caused the damage to the hoses since there had been no fires, cutting, or welding in the back walkway. (Tr. 180-181). The wear on the hoses is a result of the hoses rubbing against the deck plates. *Id.* Many of the hoses are extremely overrated for their application and operate at only 2% to 3% of their rated capacity. (Tr. 186). The hoses that operate at a pressure closer to their rated capacity are given additional attention by mechanics, who make mental notes about the condition of the hoses. (Tr. 188). All of the hoses have a burst rating of 20,000 psi so that there is no chance a hose will be mistakenly put into service at a pressure beyond its pressure capacity. (Tr. 202). The feed side hoses are only pressurized for three seconds when a shield is moved. (Tr. 170). Mountain Coal has used hoses in a similar condition to those cited and has never had an injury or been cited by MSHA for their use. (Tr. 188-189). Kunde testified that, based on these factors, the wear on the hoses presented no danger and it was reasonable and prudent for Mountain Coal to continue to have the cited hoses in service. (Tr. 187).

Kunde testified that Allen never looked at the hydraulic schematic for the longwall. (Tr. 169). Kunde denies ever telling Allen that Mountain Coal had not done a good job maintaining the hoses. (Tr. 189). Kunde was not present when the hoses were removed from their fittings, but, having seen other hoses removed, he recognized that the damage to the ferrule was most likely the result of having to "smack" the hose a number of different directions to release it from the fitting. (Tr. 178-179, 197).

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<sup>3</sup> The stipulations used the term "inner-shield" hoses. These terms simply mean that both ends of each hose were connected to the same longwall shield so that each hose was confined to a single shield.

#### **D. Olof Jacobson**

Jacobson testified for Mountain Coal as an expert witness in mechanical engineering with expertise in hydraulic hoses. (Tr. 221). Jacobson is currently employed by Jacobson Forensic Engineering as a forensic engineer. (Tr. 211). He has a bachelor's degree in mechanical engineering and a master's degree in applied mechanics, although he has taken no courses on mining engineering. (Tr. 212, 252). Jacobson is an active member of multiple professional organizations and is involved in setting standards for vehicle accident reconstruction engineering, engineering practice, and guidelines for standard engineering practice. (Tr. 212). Jacobson has taught engineering classes and occasionally still lectures at local universities regarding failure analysis, forensic engineering, and ethics. (Tr. 212). He has worked for Public Service Company of Colorado, Samsonite, and various power plants. (Tr. 215-216). In those positions he has designed retrofits for coal-fired power plants that utilized hydraulic hose systems, implemented a hydraulic preventative maintenance program, dealt with hydraulic equipment during the construction and operation of power plants, been involved in the selection of hoses during the design of equipment, and worked on failure analysis issues associated with hydraulic hoses. (Tr. 215-216, 220; Ex. R-23).

Jacobson testified that he examined the mechanical wear on the hoses. (Tr. 223). He stated that the damage to the hoses was restricted to the outer jacket and outermost layer of wire braiding, and that none of the inner layers of wire braiding were damaged. (Tr. 238, 248). Jacobson testified that, in the past, he has assessed heat damage to hydraulic hoses during investigations of fires in mechanical equipment. (Tr. 224). Additionally, he has looked at technical literature on what fire and heat can do to hoses, and has studied standards and standard protocols for investigating fires. (Tr. 224). Using this background, he determined that there was no evidence of heat damage in this instance. (Tr. 224).

Jacobson testified that as part of his investigation he visited the West Elk Mine to see the location of the hoses, how the hoses were bent, how accessible the hoses were, the source of the mechanical wear, and other general service conditions. (Tr. 223, 225). Jacobson stated that the West Elk longwall is designed with relief valves to prevent the hydraulic system from exceeding its maximum service pressure. (Tr. 228-229; Ex. R-21). The hoses utilized by Mountain Coal are "overdesigned" for their application in order to account for the wear and tear that they will be subjected to by the service conditions. (Tr. 235-236). Most of the hoses operate at only a small percentage of their overall pressure rating. (Tr. 229). Based on this information, using "one broken braid . . . [as] the criteria for removing a hose is incredibly overly cautious[,] [and]. . . [i]t is not realistic." (Tr. 237). All of the service conditions need to be considered. (Tr. 236).

Jacobson testified that he often reviews manufacturer literature, and agrees that it should be considered when evaluating the condition of a hose; however, in order for the manufacturers to protect themselves from civil liability, the literature is often very conservative. (Tr. 256-257, 259, 263). Organizations like the International Organization of Standardization ("ISO") and SAE include representatives from hose manufacturers, manufacturers of machinery that use the

hoses, purchasers of the hoses, people who maintain the hoses, and the designers of the hoses. (Tr. 213-214, 263). The SAE standards say nothing about one broken braid being enough to require a hose to be removed from service. (Tr. 264).

Jacobson testified that all of the hoses used at the West Elk mine have a safety factor of four, meaning they are not expected to fail until the actual pressure reaches 400% of the rated pressure. (Tr. 245). The damage to the cited hoses will not eliminate the safety factor, but rather, will cause the safety factor to degrade as more and more braids are broken. (Tr. 235).

Jacobson testified that in order to determine the strength and service life left in the cited hoses, he conducted pressure tests on similar hoses that he purchased (the "exemplar hoses") and on the cited hoses. (Tr. 222). In order to account for continuing environmental factors, the hoses were subjected to higher pressures than what they were subjected to while in service at West Elk. (Tr. 251).

For the exemplar hose testing, he purchased from Mountain Coal's supplier two new hoses of each size that was cited. (Tr. 222, 239; Ex. R-25). Jacobson and a coworker intentionally damaged one exemplar hose in each size in an effort to recreate as closely as possible the most damaged cited hose in that size. (Tr. 222, 239). Jacobson took the three remaining exemplar hoses and removed three to four inches of the outer jacket and first layer of wire braiding reinforcement. (Tr. 222-239). All of the exemplar hoses were then pressurized for approximately ten minutes at 50%, ten minutes at 100%, ten minutes at 150% and twenty minutes at 200% of their rated pressures. (Tr. 241, Ex. R-26). Five of the six exemplar hoses did not fail. (Tr. 241-245). The one hose that did fail had been accidentally damaged during test preparation when the innermost layer of wire braiding was "nicked." (Tr. 239-240, 243-244). In spite of the damage, the hose did not fail until the pressure approached 10,000 psi. (Tr. 244). That failure resulted in a large hole that allowed a low velocity, high volume release of fluid, and not a fine spray. (Tr. 248-249). The exemplar tests revealed that even if the outer jacket and outermost layer of wire braiding were totally removed, the pressure on all the hoses could still go to at least twice the rated pressure, and therefore the safety factor would be no lower than two. (Tr. 245).

Jacobson created the testing protocol for the cited hoses based on the information obtained from the exemplar testing. (Tr. 245-246; Ex. R-27). Not wanting to destroy the cited hoses, he pressure tested all of them for ten minutes at 120% and ten minutes at 140% of their maximum service pressure. (Tr. 245-246). He testified that, based on this testing and analysis, "the hoses in the mine were perfectly safe." (Tr. 246-247; Ex. R-28).

Jacobson testified that based on the information he obtained from the two sets of tests, there was not a threat of imminent failure, the hoses were in a safe working condition, and all of the hoses still had a fairly long service life remaining. (Tr. 246-248). He based his opinion on the fact that the hoses were tested at a much higher pressure than what they would ever see while in service. (Tr. 249-250). None of the cited hoses had been damaged to the extent of the

exemplar hose that failed. (Tr. 250) The exemplar hose that failed still had a safety factor of approximately two. (Tr. 250) This is evidence that the cited hoses would have to be damaged more than the failed exemplar hose for there to be any risk of hose failure at the service pressures used at the mine. (Tr. 250).

### **III. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS**

#### **A. Secretary of Labor.**

The Secretary argues that Mountain Coal violated the safety standard by failing to maintain the cited hydraulic hoses in a safe operating condition. The dictionary definition of "safe" is instructive. "Safe" can be defined as "secure from threat of danger, harm or loss." (Sec'y Br. 12). As a consequence, an operator must maintain equipment "in a condition free from the potential for danger." (Sec'y Br. 12-13). The overwhelming weight of the evidence shows that Mountain Coal failed to meet this requirement. The cited hoses displayed obvious and significant damage. Materials available at MSHA's website, the literature of hose manufacturers, and professional engineering organizations all advise against the use of hoses with exposed or damaged wire braiding. *Id.* at 13-14. The damaged braiding presented a risk of hose failure. Moreover, environmental conditions can affect hoses being used at pressures below the rated capacity. The conditions found in the mine environment exacerbate the risk of hose failure and can lead to further damage. *Id.* A hose failure in this instance could have injured a miner in the front walkway. *Id.* at 15-16. Because Angel has actual experience with underground coal mining, his testimony should be given more weight than Jacobson's testimony. Jacobson's testing is of little value in predicting whether a hose will fail in an underground mine. In cases involving broadly worded safety standards, the Commission has applied the "reasonably prudent person" test. The evidence establishes that Mountain Coal failed to act as a reasonably prudent person when it did not remove the cited hoses from service.

#### **B. Mountain Coal.**

Mountain Coal argues that the citation should be vacated because the subject hoses were not unsafe. The Secretary's criteria for determining when a hose should be removed from service are unreasonable, imprudent, overly cautious, unrealistic, and fail to account for numerous factors that the reasonably prudent person would consider. (Resp. Br. at 13, 17, 18). The evidence establishes that the hoses did not pose a safety hazard to miners. Instead, the Secretary presented theoretical conclusions and assumptions that the hoses would degrade instantaneously or that they would be continued to be used until they failed, neither of which is supported by the evidence. The Commission has rejected allegations of unsafe equipment where the equipment was operating at only a fraction of its capacity and the allegations were not supported by evidence of impending equipment failure or subsequent safety hazard. *Id.* at 16. Mountain Coal argues that its witnesses have extensive experience with and knowledge of hydraulic hoses, and that the Secretary's witnesses failed to understand the importance of considering a wide range of factors when evaluating the safety of hoses. *Id.* at 22. Angel's testimony regarding heat damage

to the hoses and the cut in the ferrule should not be credited. The objective test data obtained by Jacobson established that the subject hoses had considerable service life remaining and would have to suffer damage to the inner layer of wire braiding before there was a risk of failure at the service pressures used at the mine.

#### IV. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### A. Background.

At the time the citation was issued, there were 165 shields on the longwall face and each shield contained 71 hoses, for a total of about 11,715 hoses. The cited hoses were in the back walkway and miners do not normally travel in that area. The primary reason for someone to be in the back walkway is to perform weekly permissibility inspections. When a certified electrician performs this task, the supply hydraulic hoses are not pressurized.

During production shifts, miners advance the longwall by moving the individual shields forward. It takes about three seconds for each shield to advance. The shields are moved electronically by remote control. The supply hoses for each shield are pressurized for about three seconds as the shield moves. Once the pressure is released, check valves lock the shield in place. During normal production, the shearer makes about one pass per hour, during which the supply hoses are pressurized for about three seconds. Miners generally stand about four shields away when a shield is advanced and they wear personal protective equipment.

Mountain Coal has an examination and maintenance program in place at the mine. There are two mechanics and a maintenance supervisor assigned to each longwall production shift. The condition of the hydraulic hoses is continually monitored by maintenance personnel. The hoses are also thoroughly inspected when the longwall equipment is moved to a new panel, which occurred about every six months at the time the citation was issued. Maintenance personnel make the decision to replace a hose by considering the properties of the hydraulic hose, operating conditions and pressures, and the location and extent of the wear. (Tr. 184-188). Hoses that operate under higher pressure receive additional attention.

All of the hoses on the longwall have a pressure rating of 5,000 to 5,800 pounds per square inch ("psi"). The cited hoses were of various lengths and were either 3/8 inch, 1/2 inch, or 1 inch in diameter. All of the hoses on the longwall had a manufacturer-designed safety factor of four and a minimum burst pressure of 20,000 psi. Hydraulic hoses are comprised of multiple alternating layers of synthetic rubber and woven material. The hoses have a center rubber tube to contain the hydraulic fluid. There is a layer of wire reinforcement around the outside of this rubber tube that is wound in an alternating braided diagonal pattern. Depending on the particular hose design, there is at least one additional layer of rubber and wire reinforcement. The hose is covered with a thick rubber protective jacket. The one inch diameter hoses have four alternating layers of rubber and wire reinforcement, while the smaller hoses have two layers. (Tr. 232-233).

The cited hydraulic hoses can be divided into two types: supply and return hoses. The supply hoses on each shield are pressurized only when that shield is moved. These hoses are either ½ inch or 3/8 inch in diameter. Inspector Allen cited seven supply hoses. The normal service pressure for four of these hoses was under 1,000 psi, while three of these hoses experienced pressure up to 5,000 psi. The return hoses are one inch in diameter, remain pressurized during the production shift, and experience service pressures between 100 and 200 psi. Inspector Allen cited six return hoses. As stated above, the return hoses are rated for service pressure of up to 5,000 psi. All of the hydraulic hoses are protected by check valves with relief points, which prevent the hydraulic system components from being subject to pressures greater than the pressure rating of the hoses.

### **B. Analysis.**

The issue in this case is whether the 13 cited hydraulic hoses were in “safe operating condition” as required by section 75.1725(a) of the Secretary’s safety standards. The Commission has long held that, under section 75.1725(a), in deciding whether machinery or equipment is in an unsafe operating condition, the alleged violative condition is measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable safety standard. *Alabama By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

Two factual issues raised by the parties can be disposed of at the outset. First, I reject the Secretary’s argument that the cut ferrule demonstrates Mountain Coal’s lack of reasonable care. Angel speculated that it was likely that the ferrule was damaged when that particular hose was installed. In response, Kunde testified that it was more likely that the damage occurred when the hose was removed from service. There is no reliable evidence to show that this condition existed at the time Inspector Allen issued the citation and he did not include this condition in his citation. As a consequence, this allegation is rejected and I have not considered the damaged ferrule in rendering my decision. Second, Angel testified that, after looking at the hoses, he came to the conclusion that the hoses had been damaged, at least in part, by heat. I credit the testimony of Kunde that there were no sources of heat on the longwall that could have damaged the outer jacket of the hoses. I also credit the testimony of Jacobson on this issue. I find that the conditions cited by the inspector were a result of mechanical damage caused by abrasion with components of the longwall system.

Page two of the citation lists the damage found by Inspector Allen on the 13 hoses. The outer jacket of the hose was split open in each instance and the inspector listed the extent of the damage to the outer layer of wire braiding. The damage can be summarized as follows:

- Shield 16 – #6 hose, 1 broken wire strand at one location;
- Shield 19 – #6 hose, 1 broken wire strand at two locations;
- Shield 22 – #6 hose, 2 broken wire stands at one location;

Shield 26 – #6 hose, 70 to 80 broken wire strands in a 12 inch span;  
Shield 35 – #6 hose, 16 broken wire strands at one location;  
Shield 37 – #8 hose, 3 broken wire strands at one location;  
Shield 54 – #6 hose, 40 broken wire strands at one location;  
Shield 16 – #16 hose, 6 broken wire strands at one location;  
Shield 39 – #16 hose, 56 broken wire strands at one location;  
Shield 40 – #16 hose, 26 broken wire strands at one location;  
Shield 44 – #16 hose, 7 broken wire strands at one location;  
Shield 45 – #16 hose, 46 broken wire strands at one location; and  
Shield 49 – #16 hose, 16 broken wire strands at one location.

The #6 hoses are 3/8 inch supply hoses, the #8 hose is a 1/2 inch supply hose, and the #16 hoses are one inch return hoses. Mountain Coal does not dispute the description of the condition of the hoses in the citation, as summarized above. However, it contends that the damaged areas were under the deck plates. The parties stipulated that the location of each hose is accurately shown on Mountain Coal's Exhibit 17.

Angel prepared a report containing his analysis. (Ex. G-10). Based on Angel's analysis, the Secretary contends that the hazard to be protected against in this case is the accidental release of pressurized hydraulic fluid. Such a release can cause a variety of injuries to miners. Angel listed the potential injuries in his report as "burns from hot fluid, fluid injections, chemical injuries of the eyes, and slips and falls from slippery surfaces." (Ex. G-10 p. 3). Angel also said that someone could be injured or killed by a whipping hose. *Id.* Finally, he stated that miners working "in close proximity to damaged hoses are exposed to these hazards." *Id.*

Angel is concerned that, because the outer jacket had been abraded, the outer wire braiding was exposed and was susceptible to further degradation, especially from acidic mine water and further abrasion. *Id.* at 4. As the wire braiding continues to deteriorate, more wires will be broken and a pin hole spray may develop. If even more wires break, a larger area of failure could develop causing more hydraulic fluid to spray out. Finally, a complete failure of the hose could cause the pressurized end of the hose to whip about.

Angel relied to a considerable extent on literature published by hydraulic hose manufacturers in reaching his conclusions. He states:

Hose manufacturers typically warn the hose user that exposure of the reinforcement wire significantly increases the likelihood of failure of the hoses and increases the safety risk of personnel working with or near the hose. Most manufacturers recommend routine inspection of hoses and that hoses found with exposed reinforcement be immediately removed from service.

*Id.* For example, the “Safety Guide” put out by Alfagomma Hydraulic Hose states that “[e]xposure of the reinforcement will significantly accelerate hose failure” and “[a]ny of the following conditions require immediate shutdown and replacement of hose assembly . . . [d]amaged, cut or abraded cover (any reinforcement exposed).” *Id.*; Ex. G-10 attachment S. Alfagomma and Semperflex manufactured the cited hoses.

Mountain Coal argues that the Secretary’s reliance on manufacturers’ guides is misplaced. These guides are inconsistent because some recommend that a hose be replaced whenever there is any damage to the hose and other guides do not. Moreover, these guides are very conservative because the manufacturers do not know what operating conditions their hydraulic hoses will be subjected to once they are sold. This case must be judged by the reasonable prudent person standard set forth in *Alabama By-Products* rather than manufacturers’ safety guides. Mountain Coal maintains that the recommendations of the ISO and SAE are more instructive. (Exs. C-8, C-30). The ISO recommends regular visual inspections of hydraulic hoses for conditions such as exposed reinforcement, damaged, cut or abraded outer protective layer, and leaks. The ISO provides that factors such as the nature and severity of the application, past experience at the work site, and information provided by manufacturers should be taken into account. (Ex. C-30).

I agree with Mountain Coal that the manufacturers’ guidelines were written to cover all situations and customers, including installations where hoses are not regularly inspected for damage and are subjected to a wide variety of environmental conditions. I have taken these guidelines into consideration but they do not establish a violation of the safety standard.

MSHA has posted “safety ideas” concerning hydraulic hoses at its website. The posting on hydraulic hose maintenance advises mine operators to regularly inspect hydraulic hoses and to routinely change out hoses. (Ex. G-5). There are photographs of hoses that have been damaged. The web page also has links to websites of hydraulic hose manufacturers. A section of a training manual for MSHA inspectors, which has not been posted, discusses safety precautions for longwall shields. (Ex. G-3). The section on visual inspections of hydraulic hoses provides, in part, that “[w]hen a hose shows signs of damage, such as scrapes or cuts, to the extent that the wire braids are broken, a replacement shall be installed during the shift.” *Id.* This language is consistent with the Secretary’s position in this case. Although I have taken this material into consideration in evaluating this case, these documents do not by themselves establish a violation of the safety standard.

Angel does not dispute the results of the laboratory testing performed by Jacobson and he acknowledges that the hoses are manufactured with a safety factor of four. Angel stated, however, that the safety factor designed into hydraulic hoses is “not intended as a reason to permit a known, damaged hose to continue in operation.” (Ex. G-10 at 6).

Angel recognized that miners must be in close proximity to the hose for a safety risk to exist. Indeed, he testified that a miner would have to be “within inches” of a broken hose in

order to sustain an injury from the resulting spray. (Tr. 145-146). He believed that the miners in the longwall section were put at risk because the confined area in which they must work put them in close proximity to the hoses. He was especially concerned that a pin hole leak could develop in a high pressure hose that would spray several feet. This fluid could be injected under the skin of a miner if the force of the spray were strong enough.

Jacobson stated that he determined that the hoses were safe based on his laboratory testing, which took into consideration normal service pressures, the safety factor inherent in the hose design, and the multi-layer construction of the hoses. He also took into account the service conditions he observed in the mine, including the location of the hoses on the back walkway of the longwall, the isolation of the hoses under deck plates, the short duration that the service hoses are pressurized, the ongoing maintenance program, and the personal protective equipment worn by miners. Mountain Coal contends that the court should take into consideration Jacobson's years of professional experience working with hydraulic hoses and Kunde's years of on-the-job experience working with and replacing these hoses at the mine.

Mountain Coal also maintains that the Secretary failed to consider factors that establish that the hoses were fit and safe for their purpose and, instead, relied upon theoretical assumptions that the hoses would either degrade quickly or that they would be kept in service until they sustained sufficient wear to fail. The Secretary ignored the safety features of the longwall system in use at the mine, the location of the wear, the pressures to which the hoses are subjected, and the frequent examinations made by the maintenance crew. Mountain Coal contends that it has safely used these types of hydraulic hoses for years using the same replacement practices without any accidents or injuries. Indeed, Mountain Coal's principal argument in this case is that it intentionally uses hydraulic hoses that are significantly over designed for their purpose at the mine so that the hoses can take some wear and tear and not present a hazard to miners. Frequently replacing hoses presents its own dangers and challenges and the company uses hoses that are designed for considerably higher pressures in order to avoid these hazards.

### **1. Fact of Violation.**

Based on a preponderance of the evidence presented at the hearing, I find that Mountain Coal violated section 57.1725(a). In analyzing the risk of failure, I considered the construction specifications of the hoses, safety features built into the longwall system, the damage present on the hoses and their location, the pressures in the hoses and the duration of these pressures, the nature of the work performed on the longwall, and the regular examinations of the hoses performed by the maintenance crew.

I find that the testing performed by Jacobson was helpful in understanding the capacity and strength of the hoses. However, the pressure tests did not directly take into consideration the mine environment or the continued exposure to the forces that damaged the hoses. Jacobson testified that he accounted for the continued exposure to the mine environment by testing the exemplar hoses at extremely high pressures. Based on these pressures, Jacobson concluded that

there was no risk of hose failure even assuming some degree of continued degradation. I credit Jacobson's testing procedures and find that they were a reliable indication of the safety factor built into the hoses.

The forces that created the abrasion of the cited hydraulic hoses would have continued to further degrade the hoses until such time as the company determined that they should be replaced. I cannot assume that the hoses would have been replaced the day of the inspection. The photographs introduced as exhibits at the hearing show damaged areas on the hoses that were no longer protected from the mine environment by the outer protective layer of rubber. (Ex. G-10 attachments K and P). I was also able to examine the worn areas because Mountain Coal brought the cited hoses to the hearing as a demonstrative exhibit. Water, dirt, and dust could have easily entered the damaged areas and accelerated the rate of deterioration of the wire reinforcement. A number of the hoses were quite badly damaged. For example, the hose on Shield 26 had about 75 broken wire strands. Other hoses were also badly damaged, as shown on page two of the citation. The damage on these hoses was quite evident upon examination and it closely resembled the damage shown on MSHA's Hydraulic Hose Maintenance Guideline. (Ex. G-4).

I credit the testimony of Kunde that the hoses are regularly examined by maintenance personnel and are regularly replaced. Angel was of the opinion that the company would have allowed the hoses to remain in operation until they failed, but he admitted that he had no idea how long that would take. (Tr. 129). There is nothing in the record to support this opinion and I have not given it any weight.

I find that Mountain Coal violated the safety standard for a number of reasons. First and foremost, as stated above, a number of the cited hoses were severely damaged. The gashes in the outer jackets and damage to the wire reinforcement was significant in some cases. (Ex. G-10, attachment K). This damage presented a risk of hose failure. Second, I agree with Angel that the safety factor designed into the hoses is not intended as a reason to permit hoses with significant damage to continue in service. This fact is reflected in the manufacturers' safety guidelines that advise consumers to replace damaged hoses. Third, although Jacobson's testing provided useful information, the tests did not adequately take into account the fact that the damaged outer jackets and wire braids on the hoses were exposed to further wear and corrosion. Fourth, the mining environment is harsh and unforgiving. Events can quickly unfold that will cause a damaged hydraulic hose to fail notwithstanding the company's hose inspection and replacement program. Kunde testified that the damaged areas were under the deck plates or were otherwise on the underside of the hoses. (Tr. 171-180, 185). Because the wear was from abrasion, it is only logical that the worn areas were in places where the hoses rubbed against the deck plates or other components of the longwall shields. The abrasion of the hoses would continue and the additional damage would not be easy to detect. Coal dust and water would likely enter the outer

layers of the hoses and continue to corrode the outer braids. The severely damaged hydraulic hoses were not in safe operating condition and should have been removed from service.<sup>4</sup>

I also find that Mountain Coal had reasonable notice of the requirements of the safety standard as applied to hydraulic hoses. The recommendations of the hose manufacturers and the material published by MSHA put the operator on notice that badly damaged hoses must be removed from service. Previous MSHA inspectors may not have examined hoses closely enough or the hoses may not have been in the same condition.

One of Mountain Coal's principal arguments is that this court should reject the Secretary's position that one broken wire strand renders a hose unsafe. This case does not present such a theoretical issue. As stated above, the issue is whether the hoses cited by MSHA were in safe operating condition. Most of these hoses had more than 10 broken wire strands and five hoses had more than 20 broken strands. This court must base its decision on the facts presented. I do not have the authority to develop a generally applicable test for determining how much wear a hydraulic hose can sustain before it violates section 75.1720(a) and must be replaced. I note that, based on the evidence presented, I may well have vacated the citation if all of the hoses had only sustained slight damage, such as a worn spot with a few broken strands on the outer layer of reinforcement. I base my finding of violation on the condition of the hoses that showed more significant damage and wear than a few broken outer wire strands.

Based on the above, I find that a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized that corrective action was required under the safety standard at the time the citations were issued. A reasonably prudent person would have recognized that the hoses with a significant degree of damage were not in safe operating condition. Mountain Coal would be well advised to take this opportunity to review its hydraulic

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<sup>4</sup> The Commission takes the mine environment into account when analyzing these types of alleged violations. For example, in *Otis Elevator Co.*, the operator was charged with a violation of section 75.1725(a) because the MSHA inspector believed that the ends of the governor rope for the elevator in the mine were improperly installed thereby creating an unsafe condition. The Commission judge affirmed the citation and his holding was affirmed on appeal. 9 FMSHRC 1933, 1942 (Nov. 1987); *aff'd* 11 FMSHRC 1896, 1906-08 (Oct. 1989); 921 F.2d 1285, 1293-94 (D.C. Cir. 1990). In preparation for the hearing, Otis Elevator obtained the services of a forensic expert who subjected a similarly configured wire rope to a stress test. The judge held that the testing conducted by the respondent's expert "demonstrated that the [rope] assembly as configured should withstand a force on the order of ten times as great as the force necessary" for the application at the mine. 9 FMSHRC at 1942. The judge, nevertheless, agreed with the Secretary that "the stress pull test performed under what might be considered laboratory or 'ideal' conditions is an entirely different situation than what actually exists in the mine given the environmental conditions that the equipment must operate in there." *Id.*

hose replacement policies to make sure that the policies are sound and are understood by its maintenance personnel. It also may want to consider reducing its policies to writing.

## **2. Significant and Substantial; Gravity; Negligence.**

I find that the Secretary did not establish that the violation was of a significant and substantial nature. The hoses were in the back walkway, which is behind the leg cylinders. Miners do not work in that area. The back walkway is a confined area where it is difficult to move around.<sup>5</sup> The most common reason for anyone to be in the back walkway is to conduct a permissibility inspection, when the supply hoses are not pressurized, or to replace a hose. As stated above, miners are generally not near the supply hoses when they are pressurized as the shields are moved. Angel testified that a miner would have to be within inches of a hose in order to sustain an injury from the resulting spray. The return hydraulic hoses, which are always pressurized during production, operate at 100 to 200 psi. The return hoses were rated at 5,800 psi and they have four layers of wire braiding. In addition, the miners working along the long wall typically wear protective clothing, as described above. This clothing would protect them from injury. I credit the testimony of Kunde on this issue.

A violation is classified as S&S “if based upon the 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). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). Although the Secretary established the first two elements, I find that the third and fourth elements of the *Mathies* test were not present in the case. Consequently, I modify the citation to delete the S&S determination. I also find that the violation was not serious because, if a hose did leak hydraulic fluid, it is unlikely that anyone would be seriously injured as a result. An injury from a fluid injection or from a whipping hose was unlikely. The most likely injury would be from a slip and fall on a deck plate that was covered with spilled hydraulic fluid.

I also find that Mountain Coal’s negligence was low. I credit the company’s evidence that it has been using the same criteria for determining when a hydraulic hose should be replaced

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<sup>5</sup> In a previous decision, I determined that “[e]ven a small individual would have difficulty walking along the ‘back walkway’ [in a longwall section at the West Elk Mine].” *Mountain Coal Co.*, 26 FMSHRC 853, 855 (Nov. 2004). That finding is equally applicable here.

for years. It has never been issued a citation for the condition of the hoses on the longwall and no accidents have occurred. (Tr. 188-89). A penalty of \$800.00 is appropriate for this violation.

**C. Settled Citations.**

The parties settled Citation Nos. 6684080 and 6684093 that were issued under section 104(a) of the Mine Act and were designated as non-significant and substantial. I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The parties previously settled Citation No. 7291335 and I approved that settlement by order dated January 10, 2008.

**V. APPROPRIATE CIVIL PENALTIES**

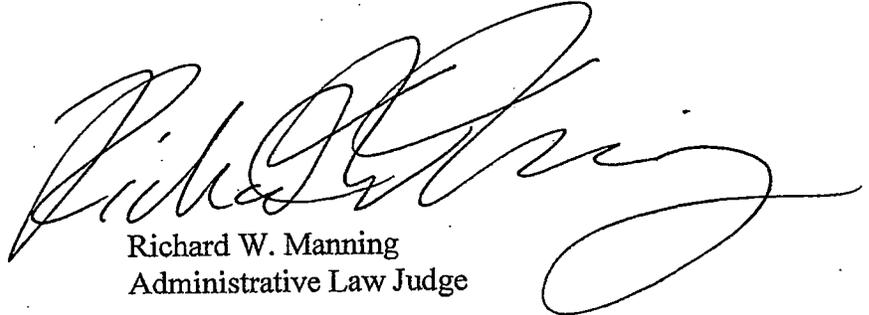
Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Mountain Coal had about 514 paid violations at the West Elk Mine during the two years preceding March 26, 2007. (Attachment to Reply Br. of Sec'y). Mountain Coal is a large mine operator as is Mountain Coal's parent company, Arch Coal, Inc. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect on Mountain Coal's ability to continue in business. The violation was not serious and Mountain Coal's negligence was low. Based on the penalty criteria, I find that a penalty of \$800.00 is appropriate.

**VI. 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:

|         |                      |                   |
|---------|----------------------|-------------------|
| 6684080 | 75.400               | \$5,504.00        |
| 6684093 | 75.400               | 1,412.00          |
| 7291353 | 75.1725(a)           | 800.00            |
|         | <b>TOTAL PENALTY</b> | <b>\$7,716.00</b> |

For the reasons set forth above, Citation No. 7291353 is **MODIFIED** as set forth above. Mountain Coal Company, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$7,716.00 within 30 days of the date of this decision.<sup>6</sup> Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

Distribution:

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 18<sup>th</sup> Street, Suite 2150, Denver, CO 80202-1958 (Certified Mail)

Mary Forrest-Doyle, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Boulevard, 22<sup>nd</sup> Floor, Arlington, VA 22209 (Certified Mail)

RWM

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<sup>6</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE N.W., SUITE 9500  
WASHINGTON, D.C. 20001

October 26, 2009

|                         |   |                                 |
|-------------------------|---|---------------------------------|
| ABUNDANCE COAL, INC.,   | : | CONTEST PROCEEDINGS             |
| Contestant              | : |                                 |
|                         | : | Docket No. KENT 2010-5-R        |
|                         | : | Citation No. 8227636;09/29/2009 |
| v.                      | : |                                 |
|                         | : | Docket No. KENT 2010-6-R        |
|                         | : | Order No. 8227637;09/29/2009    |
| SECRETARY OF LABOR,     | : |                                 |
| MINE SAFETY AND HEALTH  | : | #1 Mine                         |
| ADMINISTRATION, (MSHA), | : | Mine ID 15-18711                |
| Respondent              | : |                                 |

**DECISION**

Appearances: Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky, on behalf of the Contestant;  
Mary Sue Taylor, Esq., and Schean G. Belton, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon the request by Abundance Coal Inc., (Abundance) for expedited hearings to contest Citation Number 8227636 and Withdrawal Order Number 8227637 issued pursuant to Section 104(a) and Section 104(b), respectively, of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". Hearings were expedited pursuant to Commission Rule 52, 29 C.F.R. § 2700.52, and were held on October 14 and 15, 2009. Upon Contestant's request, expedited briefs were filed on October 23, 2009. The general issues before me are whether the violation was committed as alleged in the citation and whether the withdrawal order was properly issued.

Citation Number 8227636, issued September 29, 2009, alleges a non-"significant and substantial" violation of the standard at 30 C.F.R. § 75.336(c) and charges as follows:

The mine owner and superintendant have been notified that samples taken in the sealed area of the Consol of Kentucky, Jones Fork E-3 mine ID# 15-18589 behind the No. 1 set of seals on 9/27/09 contained an explosive mixture of oxygen greater than 10% and methane between 4.5% and 17%. This sealed area is interconnected in a contiguous seam and is located behind the #2 set of seals in this mine, and is a commonly sealed area between these two mines. The mine owner and superintendant were notified that under 30 CFR 75.336 part c

the operator is required to withdraw persons from the affected area, which was explained to be the entire mine. The mine owner stated that the next scheduled production shift would continue unless given an order from MSHA.

The cited standard 30 C.F.R. § 35.336(c) provides in relevant part as follows:

Except as provided in § 75.336(d), when a sample is taken from the sealed atmosphere with seals of less than 120psi and the sample indicates that the oxygen concentration is 10 percent or greater and methane is between 4.5 percent and 17 percent, the mine operator shall immediately take an additional sample and then immediately notify the district manager. When the additional sample indicates that the oxygen concentration is 10 percent or greater and methane is between 4.5 percent and 17 percent, persons shall be withdrawn from the affected area which is the entire mine or other affected area identified by the operator and approved by the District Manager in the ventilation plan, except those persons referred to in § 104(c) of the Act.

Approximately 16 minutes following the issuance of the citation, Order Number 8227637 was issued pursuant to Section 104(b) of the Act directing the closure of the Abundance No. 1 mine.<sup>1</sup> The order charges that “[a]fter a reasonable abatement time the operator stated his intention to not comply with 30 C.F.R. § 75.336(c) unless given an order from MSHA”.

Abundance operates the No.1 mine at issue which is adjacent to the Jones Fork mine owned and operated by Consol of Kentucky (Consol) and the Marshall Coal No. 22 mine. Both the Abundance No. 1 mine and the Marshall Coal No. 22 mine were originally part of the Jones Fork mine but were separated by seals sometime before June 2006. The three mines share a common gob area. Subsequently, 120 psi seals were constructed at the Abundance and Marshall mines on the working section side of the seals. On or about November 27, 2008, Abundance submitted to the Department of Labor’s Mine Safety and Health Administration (MSHA) an “alternate seal sampling plan-ventilation plan revision” advising the that it would not conduct any sampling behind its 120 psi seals. Thereafter, on or about December 12, 2008, MSHA approved Abundance’s “alternate seal

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<sup>1</sup> Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection ©, 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.

sampling plan-ventilation plan revision” accepting Abundance’s proposal that it not conduct any sampling behind its set of 120 psi seals.

As a part of a regular quarterly inspection on September 27, 2009, MSHA inspector Sam Hill took gas readings at, among other locations, the No. 1, seal set of Consol’s Jones Fork mine and found 15% oxygen and 13.3% methane. On the following day, September 28, 2009, Inspectors Hill and Ritchie returned to the Jones Fork mine, inspected seal set No. 1 and found 13.4% oxygen and 17% methane. Based on the second reading and the range covered by the standard, Consol removed the miners from the underground portions of the Jones Fork mine.

Terry Michael Jude, an MSHA inspector, traveled to the Abundance No. 1 mine on September 29, 2009, to report that MSHA had found this explosive mixture of gases behind the No. 1 set of seals at the adjacent Jones Fork mine. Jude advised Abundance officials that, due to the explosive mixture at the Jones Fork mine and pursuant to 30 C.F.R. § 75.336(c), Abundance was required to submit a plan to the district manager and withdraw miners from its mine. Jude also then issued the citation at bar for a violation of 30 C.F.R. § 75.336(c). Abundance owner Ray Slone first told Jude that he would comply with the citation and withdraw the miners; however, about 16 minutes later Slone changed his mind and advised Jude that he would not voluntarily withdraw his miners without an order. Slone advised Jude that he was refusing to withdraw his miners due to his understanding that the 120 psi seals installed in the Abundance No. 1 mine and previously approved by MSHA were sufficient to protect his miners. As a result, Jude issued the “Section 104(b)” Order at bar.

The Abundance 120 psi seals are approximately 4000 to 8000 feet from the No. 1 set of seals in the Jones Fork mine. After the 120 psi seals constructed by Abundance went through the cure period, Abundance was no longer required to sample atmosphere behind those seals, pursuant to its approved ventilation plan. The miners at the Abundance No. 1 mine are not required to travel in the area behind the 120 psi seals and the area behind the 120 psi seals is not used as an escapeway.

John Urosek is employed by MSHA at its technical support center. He is currently chief of the mine emergency operations group and is also responsible for the seal approval group within MSHA’s technical support center. In that capacity he is responsible for administering MSHA’s seal approval program. He has a B.S. degree in mining engineering from Pennsylvania State University and is a registered professional engineer. He was also the chairman of the emergency temporary standard and the final rule committees for what was promulgated as 30 C.F.R. §§ 75.335, 75.336, 75.337 and 75.338. Mr. Urosek is eminently qualified as an expert in mining engineering and, in particular, in regard to mine ventilation and mine explosions. Mr. Urosek has also been designated as the sole decision maker authorized to speak for the Secretary of Labor on this matter and therefore he is the designee to be given deference in interpreting the agency’s regulations should that be necessary. See *Thomas Jefferson University v. Shalala*, 512 U.S. 504-512 (1994) and *Akzo Nobel Salt, Inc., et al. v. Federal Mine Safety and Health Review Commission and Secretary of Labor*, 212 F.3d 1301 (2000).

There are currently ten seals in the Jones Fork mine. The seals in the Jones Fork mine at the No. 1 and No. 2 sets are Mitchell Barrett seals. The Mitchell Barrett seal is recognized as a 20 psi seal. Mr. Urosek was aware that there was an ignition in the sealed area within the Jones Fork mine in 2006. During this ignition in 2006, seals were damaged in the area of the Jones Fork mine. Urosek opined that because the Jones Fork mine has 20 psi seals, the Abundance mine is required to take action not based on the language of the cited standard but on its preamble in the Federal Register and upon a series of questions and answers published by MSHA on the internet. Even though it was Urosek's opinion that Abundance was required to perform sampling behind its set of 120 psi seals, he acknowledged that Abundance had a plan approved by MSHA which would not require them to do so. Urosek opined that this provision in Abundance's ventilation plan (which did not require any sampling behind the 120 psi seals) was issued in error.

Abundance owner Ray Slone testified that in 2006, there was a set of Mitchell Barrett seals about 9,000 feet down the main line entry and another set of Mitchell Barrett seals approximately 4,500 feet down the main line. These Mitchell Barrett seals were pre-shifted on a daily basis and there was no problem with these seals. At some point in time, a set of Omega seals was constructed approximately 1,500-2,000 down the main line. In December 2007, Abundance constructed the 120 psi seals at its mine based on his understanding that these seals would separate him from the Jones Fork mine and the gob area. Indeed, Norman Page, the MSHA district manager and several MSHA inspectors had confirmed his understanding. Moreover, since Slone constructed the 120 psi seals at the Abundance mine, and until the citation at bar, he had not been required by MSHA to perform any sampling of the atmosphere behind those seals. Furthermore, MSHA approved a change in Abundance's mine ventilation plan to acknowledge that no sampling was required behind Abundance's 120 psi seals.

Gary Hartsog has B.S. and M.S. degrees in mining engineering and is licensed in nine states as a professional engineer. He testified that, in the course of his practice, he has been involved on a day-to-day basis with seal issues and as a member of the West Virginia Coal Association and the National Mining Association, has served on several safety commissions. He has also conducted seminars for professional engineers on sealing issues. He is clearly an expert in mine engineering and, in particular, in mine sealing. Hartsog is of the opinion that the regulations found at 30 C.F.R. Sections 75.335 and 75.336 are clear and do not require sampling behind the 120 psi seals after they have reached their strength. Hartsog opined that the Abundance mine is a separate mine by being separated by 120 psi seals. He concluded that based on the regulations there is no expectation that there would be a breach on the Abundance seal side. It is Hartsog's expert opinion that if an operator has 120 psi seals, the regulations found at 30 C.F.R. Sections 75.335 and 336 are not applicable to that mine.

The underlying issue in this case is a question of regulatory interpretation. More particularly the interpretation to be placed on the language in section 75.336(c) that triggers withdrawal of miners when the air sample "taken from the sealed atmosphere with seals of less than 120 psi" reach certain action levels of oxygen and methane. Abundance maintains that since it is undisputed that it had 120 psi seals separating its atmosphere from the sealed atmosphere of the common gob area, the cited standard is not applicable and accordingly there was no violation as charged.

It is a cardinal rule of construction that if a regulation's meaning is plain, the regulation cannot be construed to mean something different from that plain meaning. *Exportal Ltda. v. United States*, 902 F.2d 45,50 (D.C. Cir. 1990); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984), (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). When the language of a provision is plain, the plain language is the meaning of the provision and the sole function of the courts is to enforce the language as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.Na*, 530 U.S. 1, 6 (2002).

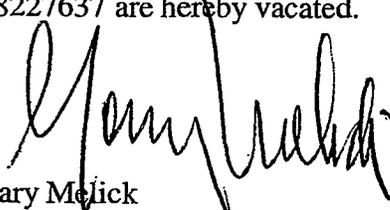
I find the language of the cited standard to be perfectly clear and that since it is undisputed that Abundance was utilizing seals of 120 psi strength separating its workings from the sealed atmosphere at issue, I find that Abundance was in compliance with the requirements of section 75.336(c) and that there was no violation as charged.

The fact that MSHA had indeed approved the very practice that Abundance was following in approving its "alternate seal sampling plan-ventilation plan revision" on December 12, 2008, that permitted Abundance to not conduct any sampling behind its set of 120 psi seals (See Exh. AB-6 and 7) is also certainly consistent with the plain language of section 336(e). Since the cited standard is unambiguous, a second step *Chevron (Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) analysis is not required. *Exportal Ltda* at 50.

Under all of the circumstances I find that there was no violation of the standard at 30 C.F.R. § 75.336(c) and that Citation Number 8227636 must be vacated. Since the "Section 104(b)" order at issue is preconditioned upon the existence of a violation charged in that citation, that order must also be vacated.

### ORDER

Citation Number 8227636 and Order Number 8227637 are hereby vacated.

  
Gary Melick  
Administrative Law Judge  
(202) 434-9977

Distribution:(Facsimile and Certified Mail)

Billy R. Shelton, Esq., Whitney, L. Lucas, Esq., Jones, Walters, Turner & Shelton, PLLC, 151 N. Eagle Creek Drive, Suite 310, Lexington, KY 40509

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001

October 29, 2009

|   |   |                            |
|---|---|----------------------------|
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDING   |
|   | : |                            |
|   | : | Docket No. SE 2007-128-M   |
|   | : | A.C. No. 31-01230-104558   |
|   | : |                            |
| v.  | : |                            |
|   | : |                            |
| JOHNSON PAVING COMPANY, INC.,<br>Respondent   | : | Marion Pit                 |
|   | : |                            |
|   | : |                            |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDING   |
|   | : |                            |
|   | : | Docket No. SE 2008-176-M   |
|   | : | A.C. No. 31-01230-132930 A |
|   | : |                            |
| v.  | : |                            |
|   | : |                            |
| WILLIAM T. PINSON,<br>Respondent  | : | Marion Pit                 |
|   | : |                            |

**DECISION**

Appearances: Dana L. Ferguson, Esq., U.S. Department of Labor, Atlanta, Georgia, on behalf of the Petitioner  
John V. Hawkins, Esq., Johnson Paving Company, on behalf of the Respondent

Before: Judge Barbour

These are consolidated civil penalty proceedings arising under sections 105(a), 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act or Act) (30 U.S.C. §§ 815(a), 820(a), 820(c)). In Docket No. SE 2008-176, the Secretary, acting on behalf of her Mine Safety and Health Administration (MSHA), petitions to assess William Pinson, Johnson Paving Company's ("Johnson Paving" or "the company") quarry foreman, a total of \$1,000 in civil penalties for two alleged violations of the mandatory safety standards for surface metal and nonmetal mines. In Docket No. SE 2007-128, the Secretary seeks to assess Johnson Paving a total of \$13,200 in civil penalties for the same two alleged violations and for three others. The Secretary asserts that all of the alleged violations occurred at Johnson Paving's Marion Pit, a small granite extraction and crushing facility located in McDowell County, North Carolina.

## BACKGROUND

The citation and orders that set forth the alleged violations were issued by MSHA inspector Bonnie Armstrong as a result of her August 1, 2006, inspection of the pit. Inspector Armstrong began working for MSHA in 1996 after receiving MSHA required inspector training. Tr. 28-29. In addition to her duties as an inspector, she also acts as an MSHA special investigator.<sup>1</sup> Tr. 29.

The inspector described the Johnson Paving operation as one in which granite is extracted and crushed to size. Tr. 34. The resultant aggregate is sold to customers or is used by an adjoining plant that is also owned by Johnson Paving. At the adjacent plant, the company makes asphalt. Tr. 33-34. The mine is operated intermittently, and during the winter it might be shut down for up to two months. Tr. 31.

Greg Johnson, the president of the company, confirmed the company is essentially “two-tiered”. Tr. 149. One part of the operation concerns paving, while the other concerns mining. Johnson explained that although he is the owner of the company, he concentrates on the paving side of the business. William Pinson, the foreman Johnson hired, runs the quarry.

Johnson explained that he does not “micro[-]manage.” Tr. 150. Rather, he tends to “[delegate] authority” because it is “kind of impossible” for him to run both sides of the operation. *Id.* As for Johnson’s relationship with Pinson, Johnson explained that he “kind of turn[s] . . . [Pinson] loose with the quarry.” Tr. 149.

When Armstrong arrived at the mine on August 1, she met with Johnson. Armstrong introduced herself and explained why she was at the mine. Armstrong testified she tried to get some basic information about the mine from Johnson. She asked him how many miners worked at the mine. According to Armstrong, Johnson did not know. Soon after that, Johnson asked Pinson to join him and Armstrong. Tr. 32-33. When Pinson arrived, he told the inspector that ten to 11 company employees worked at the mine. Tr. 33. Pinson then accompanied the inspector into the pit. During the course of the inspection, Armstrong took notes and photographs. Tr. 34. According to the inspector, she issued “quite a few” citations for violations, many more than are at issue in the subject cases. Tr. 35. Armstrong testified that

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<sup>1</sup>The company challenged Inspector Armstrong’s qualifications as an inspector and moved for the vacation of the contested citation and orders on the grounds that she lacked the training Congress mandated for the position. Tr. 115. Based on the inspector’s testimony regarding her background and the fact that she is a duly authorized representative of the Secretary, I denied the motion. Tr. 116.

Pinson did not seem surprised by the conditions she cited. Indeed, she remembered his stating he knew about some of the conditions, but “he just didn’t have the people to do the work, to do the repairs.” Tr. 35.

Following Armstrong’s citation of the alleged volations, MSHA assessed civil penalties against both the company foreman and his employer. When Pinson and the company contested the proposed assessments, the Secretary petitioned for their imposition. The matters were heard in Knoxville, Tennessee.

**THE CONTESTED CITATION AND ORDERS**

**SE 2008-176**

| <b><u>ORDER NO.</u></b> | <b><u>DATE</u></b> | <b><u>30 C.F.R §</u></b> |
|-------------------------|--------------------|--------------------------|
| 6120067                 | 08/01/2006         | 56.14100(b)              |

The order states in part:

The inside door latch on the John Deer[e] 370 trackhoe . . . did not function when tested. The equipment operator would reach through the window to the outside latch to open the door. Not being able to open the door from the inside could impede exiting the equipment should there be an emergency. This trackhoe is used in the pit and plant to load haul trucks. This condition had been reported to the quarry foreman by the equipment operator. The [f]oreman engaged inaggravated conduct constituting more than ordinary negligence[,] in that he knew the door latch did not function, and did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov’t Exh. 1.

After the order was issued, it was modified to include additional conditions on the trackhoe, conditions that the inspector believed also violated 30 C.F.R. § 56.14100(b). The modification states:

The steps on the trackhoe were broken off and missing. This creates a slip and fall hazard for the equipment operator when entering or exiting the trackhoe. T[he] top of the track is about 3' from [the] ground level. This condition had been reported to the quarry foreman by the equipment operator. Also[,] mirrors on the trackhoe were broken out. Mirrors are used by the equipment

operator to observe . . . vehicle or foot traffic behind the machine. This condition had been reported to the quarry foreman by the equipment operator. The [f]oreman engaged in aggravated conduct constituting more than ordinary negligence[,] in that he knew the steps and mirrors were broken, and [he] did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard. The trackhoe is used regularly at the pit and the plant to load haul trucks.

Gov't Exh. 1 at 3

Armstrong testified that while in the pit with Pinson, she noticed a trackhoe being operated and she decided to inspect it. The trackhoe is a piece of equipment used to excavate, to dig and to load material. On the day Armstrong saw it, the trackhoe was loading excavated material that was then trucked to the processing plant. Tr. 53. The trackhoe runs on two tracks and the trackhoe's bucket is located at the end of a movable arm. The arm extends from the trackhoe operator's end of the trackhoe's body. The trackhoe operator sits in an "operator's booth" which is located above one end of the tracks. The operator reaches the booth by climbing onto one of two "steps." The steps are welded to the side of the trackhoe above the track on the operator's side of the equipment. Tr. 49.

The operator enters the booth via a door. A window in the door allows the trackhoe operator to see the operator's side of the equipment. The window can be opened for ventilation and other purposes. The booth also has two exterior mirrors that allow the operator to see what is behind and to the side of the equipment. The operator sees what is in front of the equipment through windows located at the front of the booth.

Armstrong and Pinson approached the trackhoe, and Armstrong advised the trackhoe operator she wanted to conduct an inspection of the equipment. Although Armstrong could not recall for sure, she testified the door to the operator's compartment might have been tied open. Tr.69. She wanted to know if the door was operating properly, so Armstrong asked the trackhoe operator if the inside door latch worked. The operator closed the door and used the latch. The door did not open. Rather, the trackhoe operator had to open the side window and reach through it to the outside latch. Tr. 40-41; 157. Armstrong also noticed that steps used to climb from the ground to the operator's compartment were missing and that the trackhoe's outside mirrors were broken.<sup>2</sup> *Id.*; see Gov't Exh. 2, Gov't Exh. 3.

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<sup>2</sup>Armstrong wondered how long these conditions had existed, and she later looked for records of the pre-shift examinations of the trackhoe. She could not find any. In fact, she could not find pre-shift examination records for any piece of equipment used at the mine. Tr. 54.

Armstrong described the trackhoe as being used “regularly” in the pit and plant to load material and finished product. Tr. 41. Although she knew of no instance in which a miner suffered an injury because of a defective interior door latch (Tr. 74), Armstrong believed a serious injury was reasonably likely to occur because the lack of a functioning latch restricted the trackhoe operator’s ability to exit the equipment in the event of a fire, a rollover or another emergency. *Id.*; Tr. 73. In concluding an injury was reasonably likely, she noted that the trackhoe was in use when she inspected it and was used daily. Tr. 42. Should such an injury occur, Armstrong believed that it would result in the trackhoe operator being permanently disabled. *Id.* For example, if a fire occurred, the operator easily could be severely burned before he or she could get out of the equipment. Tr. 74.

In addition, Armstrong testified that the broken mirrors compounded the hazard because the trackhoe operator might not be able to see a person or a vehicle approaching from the rear of the trackhoe and the operator might swing the equipment or back the equipment into the person or vehicle. Tr. 43. Armstrong observed, if a person were hit or run over by the trackhoe, crushing injuries were reasonably likely to occur. *Id.* Moreover, because the steps were missing from the side of the equipment, the trackhoe operator had to step up onto the top of the track to get into the operator’s compartment, and the track was approximately three feet off of the ground. Tr. 49. Because of the height of the required “step up,” Armstrong felt that the equipment operator was more than likely to slip and fall while climbing into the operator’s compartment. Such a fall could result in the operator[’s] spraining his or her ankle or breaking his or her leg. Tr. 43. She added that the trackhoe was entered and exited “at least a couple of times a day.” *Id.*

Armstrong attributed the broken door latch, the broken mirrors and the missing steps to Johnson Paving’s “high” negligence. Tr. 45. Armstrong recalled the trackhoe operator telling her that he reported the conditions to Pinson. In addition, according to Armstrong, Pinson told her he knew about the condition of the door latch (Tr. 45, 71-72) and that the mirrors and steps had been broken since the previous April. Tr. 45-46.

However, Pinson disputed Armstrong’s testimony that he told her he knew about the condition of the door latch. He stated he did not know about the latch until the day of the inspection, when Armstrong asked the truck driver to open the door from the inside. Tr. 157, 206. Pinson testified that he specifically recalled telling Armstrong that he did not remember the trackhoe operator ever saying the latch did not work. Tr. 157; *see also* Tr. 158.

Armstrong was asked if she knew why the trackhoe’s defects had not been corrected. She responded she did not know, but she remembered Pinson saying to her that he “didn’t have the people to help him get things done.” Tr. 47. Because the condition of the missing steps and broken mirrors was obvious and because Armstrong believed Pinson knew about the conditions and did not correct them, Armstrong found the conditions were due to Johnson Paving’s

unwarrantable failure. Tr. 53. Indeed, with regard to all of the conditions she observed and cited in the contested citation and orders, Armstrong stated she based her findings that the conditions were due to the company's unwarrantable failure on the fact that Pinson "knew [the] conditions existed and that they continued to exist and they had not been corrected." Tr. 79.

Terry Lingenfelter testified that he works as a special investigator for the agency. In his capacity as a special investigator he conducts investigations of possible "knowing" violations on the part of the agents of operators. Agents of operators are subject to individual civil penalties under section 110(c) of the Act when they commit such violations. In October 2006, Lingenfelter conducted a section 110(c) investigation into the circumstances surrounding the trackhoe order and another order (Order No. 6120071). Tr. 181-184. In October 2006, Lingenfelter interviewed miners who worked at the mine when the trackhoe order was issued. He also interviewed Pinson. Lingenfelter testified that Pinson told him he did not know that the trackhoe's inside door latch was broken until August 1. Tr. 186. Lingenfelter also asked Pinson about the broken mirrors and missing steps. According to the investigator, Pinson did not have much to say. *Id.* However, the trackhoe operator told Lingenfelter that on several occasions he had "relayed" the information about the conditions to Pinson. According to the trackhoe operator, Pinson responded he "[had] it covered." Tr. 187. The only explanation Pinson gave to Lingenfelter for not correcting the conditions was that he did not have a mechanic to do the work. Tr. 187-188. Lingenfelter acknowledged that he did not actually see the trackhoe; however, from speaking with Inspector Armstrong, Lingenfelter understood that the conditions were "very obvious." Tr. 189, 190.

Based on what he was told by Pinson and by the trackhoe operator, Lingenfelter concluded Pinson, who as the foreman was an "agent" of the company, knew or had reason to know about the trackhoe's cited conditions and that he "took no action to insure the safety of the miners with [regard to the] . . . conditions." Tr. 188. Therefore, in Lingenfelter's view, Pinson violated section 110(c) of the Act. Tr. 188, 205-206.

### THE VIOLATION

Section 56.14100(b) requires "defects on any equipment . . . that affect safety . . . [to be] corrected in a timely manner to prevent the creation of a hazard to persons." There is no doubt the trackhoe was defective in several ways that affected safety. The company does not dispute that the trackhoe had a non-functioning inside door latch, was missing the steps by which its operator accessed the vehicle, and had broken mirrors. Each of these conditions "affected safety," in that each was capable of causing or contributing to the cause of an injury-producing accident.

The record also establishes that two of the three conditions were not timely corrected.

Both the inspector and Lingenfelter testified the trackhoe operator told them he reported the conditions to Pinson and the operator told Lingenfelter he did so more than once. Armstrong recalled Pinson telling her the steps had been missing and the mirrors had been broken since the previous April. While Pinson denied he told Anderson he knew about the door latch until Armstrong asked the trackhoe operator to open the door on August 1, Pinson did not deny his prior knowledge of the condition of the steps and mirrors. In addition, the missing steps and broken mirrors were obvious when looking at the trackhoe. Pinson clearly should have had new steps installed and the broken mirrors replaced by August 1. In failing to do so, he was responsible for the company violating section 56.14100(b) as charged.<sup>3</sup>

### S&S AND GRAVITY

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 81 F. 2d 99,103 (5<sup>th</sup> Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 9 FMSHRC 748 (July 1987); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not

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<sup>3</sup>However, because I credit Pinson’s assertion that he did not know about the condition of the door latch until the inspection on August 1, I find the Secretary did not establish the malfunctioning latch violated the standard. Pinson did not have an opportunity to repair the latch in a “timely manner.”

necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).<sup>4</sup>

I have already found that the Secretary established a violation of section 56.14100(b) with regard to the missing steps and broken mirrors. The violation contributed to the hazard of the trackhoe operator suffering a slip and/or fall injury, and it contributed to the hazard that those operating equipment or traveling on foot in the vicinity of the trackhoe would be hit as the trackhoe backed up or swung. In the context of ongoing mining operations, such hazards were reasonably likely to occur, in that the trackhoe operator regularly had to enter and exit the trackhoe operator’s compartment via a route made more difficult and hazardous by the lack of the steps. In addition, other equipment and miners occasionally were in the vicinity of the trackhoe when it was moving backwards or swinging. If the operator of the trackhoe slipped and fell while entering or leaving the trackhoe operator’s compartment, he or she was reasonably likely to sprain an ankle or to break a foot or leg bone. Or, if other equipment or miners were hit by the trackhoe as it backed up or swung, it was reasonably likely the equipment operators or the miners would experience crushing injuries or even death. Therefore, the violation was S&S.

The violation also was serious. As noted, the inspector’s testimony established the trackhoe operator regularly accessed and left the operator’s compartment by climbing up onto the top of the track and by climbing or jumping down from the track. This meant the operator had to “step up” and “step down” a distance of approximately three feet each time he had to enter or leave the equipment. As already stated, the lack of steps subjected him to a slip and/or fall hazard, a hazard that carried with it the possibility of a serious injury. The broken mirrors posed an even greater hazard. The trackhoe could move back and forth and it could swing from side to side. The mirrors, had they not been broken, would have allowed the trackhoe operator to check for vehicular or pedestrian traffic in the path of the trackhoe as it moved. Without the mirrors, the trackhoe operator experienced “blind spots” when it came to what was to his rear and sides. The condition was especially hazardous to others who worked in the pit in the vicinity of the

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<sup>4</sup>With regard to the gravity of all of the alleged violations, the company asserted that Armstrong was applying the regulations inconsistently, in that she found violations of the cited standards to be more serious at the company’s mine than at the mines of other companies. Counsel for the company asked the inspector, “Why are these [alleged violations] . . . so much more dangerous in your mind at Johnson Paving than they are at other places?” The inspector replied, “I’m not comparing Johnson Paving with anyone. I’m looking at what Johnson Paving did and the conditions that surround . . . [what it did] . . . I’m not comparing it to . . . any other place.” Tr. 140. She added she assessed the gravity of a violation on “the conditions that surround[ed] a particular circumstance,” and there is no evidence in the record that Armstrong, an obviously contentious and forthright inspector, acted otherwise. Tr. 141.

trackhoe either as the operators of mobile equipment or as travelers on foot.

### **UNWARRANTABLE FAILURE AND NEGLIGENCE**

Unwarrantable failure is “aggravated conduct, constituting more than ordinary negligence . . . in relation to a violation of the Act.” *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or “a serious lack of reasonable care.” *Id.* 2003-2004; *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 193-194 (February 1991); *see also Rock of Ages Corp. v. Sec’y of Labor*, 170 F.3d 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 53 F.3d 133, 136 (7<sup>th</sup> Cir. 1995) (approving the Commission’s unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure, and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent). Negligence, of course, is the failure to meet the standard of care required by the circumstances.

I conclude the violation was caused by an unwarrantable failure to comply with the standard. The Secretary established that the missing steps and broken mirrors existed for some time prior to inspection, at the most since the previous April, and at the least several days before the inspection. In either event, Pinson timely knew of the conditions; yet he took no action to correct the conditions or to eliminate the hazards by repairing the trackhoe or by taking the trackhoe out of service. Further, the hazards posed by the conditions were serious, and Pinson’s failure in the face of his knowledge of the conditions represented a serious lack of reasonable care. In addition, Pinson’s failure to correct the conditions or to otherwise eliminate the hazards they posed represented a grievous failure to meet the standard of care required of him as the foreman. He was, as the Secretary rightly charges, highly negligent, and his negligence is attributable to the company.

### **PINSON’S INDIVIDUAL LIABILITY**

The Act provides that an agent of a corporate operator may be subject to civil penalties in his individual capacity for knowingly authorizing, ordering or carrying out a violation of the Act. 30 U.S.C. § 820(c). The legal standards governing individual liability were summarized in *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 566-67 (August 2005):

Section 105(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 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 (January 1981, *aff'd on other grounds*, 689 F.2d 632 (6<sup>th</sup> Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSRHC*, 108 F. 3.d 358, 362-364 (D.C. Cir. 1997). To establish Section 110(c) liability, the Secretary must prove that an individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSRHC 1125, 1131 (July, 1992) (*citing United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 559, 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 [or her] 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. *Beth Energy Mines, Inc.*, 14 FMRHRC 1232, 1245 (August 1992).

As made clear in *Kenny Richardson* and *BethEnergy*, as a predicate to individual liability, a corporate operator's agent must be privy to knowledge or information that gives him reason to know of the existence of a violative condition under circumstances wherein his failure to act amounts to aggravated conduct constituting more than ordinary negligence.

The company, as its name indicates, is a corporation. Pinson, who was hired and who worked as the company's foreman, was de facto in charge of the pit and was working as the company's agent. As found above, Pinson knew that the steps on the trackhoe were missing and that the trackhoe's mirrors were broken. He was informed about the conditions and they were visually obvious; yet he did nothing to eliminate the hazards posed. Thus, there is ample evidence to conclude Pinson knew of the conditions, yet permitted them to continue.

I credit Armstrong's testimony that Pinson explained the presence of the conditions by telling her he did not have adequate personnel "to get things done." Tr. 47. Armstrong's memory of what Pinson said is consistent with Lingenfelter's testimony about a more specific conversation he had with Pinson, one in which Lingenfelter remembered Pinson saying he did not have a mechanic to make the necessary corrections. Tr. 187. I believe the statements reflect the fact that the company did not provide Pinson with the resources he needed to ensure a safe work place. It is also noteworthy that when Pinson testified, he offered no explanation for why he did not take the trackhoe out of service until the conditions could be fixed. The bottom line is that Pinson, a supervisor responsible for the safety of those working for him, essentially chose to

continue mining operations in the face of serious hazards. In so doing, he exhibited aggravated conduct constituting more than ordinary negligence. Therefore, he may be held individually liable for the violation of section 56.14100(b).

| <u>ORDER NO.</u> | <u>DATE</u> | <u>30 C.F.R. §</u> |
|------------------|-------------|--------------------|
| 6120071          | 08/01/2006  | 56.14103(b)        |

The order states in part:

The windshield for the . . . welding truck . . . was cracked throughout and had a hole in the top drive side. The truck is used regularly throughout the plant and quarry to perform repairs on the plant and equipment. The truck is around other mobile equipment and employees when traveling around the plant and pit. The damage could create a visibility hazard as well as a cutting hazard to the operator when cleaning the windshield. The quarry foreman stated he used the welding truck yesterday and knew the windshield was broken and cracked and [he] did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 5.

At the plant and in the pit, there were occasions when welding was done to make necessary repairs. To facilitate the work, the company kept welding materials on the bed of a truck and moved the truck around the plant and pit as needed. According to Pinson, on August 1, 2006, the truck was located "up round some scrap metal" in an area he referred to as "the junkyard." Tr. 159. Armstrong testified that she and Pinson approached the truck, and Armstrong noticed that its windshield was cracked. She also noticed a hole at the top of the glass. Armstrong could not remember if she climbed into the cab of the truck and tried to look through the windshield (Tr. 63-64), but as best as she could recall, the cracks and the hole were more to the driver's side of the windshield than the passenger's side. Tr. 64-65; *See*, Exh. 6.

Armstrong asked Pinson if the truck had been used, and he responded it was used the day before the inspection. Armstrong believed the windshield's condition "could obstruct the [truck] operator's visibility" and if the windshield "fogged" and the driver wiped the windshield from the inside, the crack and the hole could pose a cutting hazard to the driver. *Id.*

Pinson did not deny the presence of defects, but he did not believe they obstructed the driver's visibility. He testified, on July 31 the truck could not be started and it was dragged to

where the inspector found it.<sup>5</sup> Pinson sat in the driver's seat and steered the truck. Tr. 169-170. He testified that he could see, and that the cracks and hole did not obstruct his vision. Tr. 160. The company introduced into evidence a photograph that Pinson identified as having been taken the day before the hearing. Tr. 164; Resp. Exh. 7. (Because the truck was taken out of service after it was cited for the defective windshield, the company maintained the photograph showed the condition of the window exactly as it was on August 1, 2006, an assertion the Secretary did not contest. Tr. 162.)

Armstrong testified that an injury was reasonably likely to result from the defective windshield. She noted that the welding truck was used regularly throughout the mine and that it had been used just before she got to the mine. Tr. 56, 58. She observed that the truck traveled in areas where there was foot traffic and that the cracks and hole reduced the ability of the truck driver to see those working or traveling around truck. If because of reduced visibility the truck stuck and ran over someone, a fatality was likely.<sup>6</sup> Tr. 57, 58. Armstrong also believed Johnson Paving was highly negligent in allowing the condition to exist. She recalled Pinson's telling her he knew the windshield was "busted and that he had used the truck" anyway. Tr. 59. She noted that despite being aware of the windshield's condition, Pinson did not do anything to repair it. Tr. 62. This also led her to conclude the condition was the result of Johnson Paving's unwarrantable failure. Tr. 61-62.

Lingenfelter testified the defective windshield represented a knowing violation on Pinson's part. His reasons for reaching that conclusion were basically the same as those regarding his conclusion that Pinson was knowingly responsible for the defective conditions on the trackhoe. Tr. 205-206.

To correct the condition, Johnson Paving took the welding truck out of service by removing all of the welding equipment from the truck and by removing the truck's battery. Tr. 60-61, 163.

### **THE VIOLATION**

Section 56.14103(b) requires in part that damaged windows on self-propelled mobile

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<sup>5</sup>According to Pinson, the battery in the truck was dead. A jump[-]start failed, and the truck was towed by another piece of equipment. Tr. 168.

<sup>6</sup>However, Armstrong admitted she knew of no instances in which miners had been fatally injured by trucks because of cracked windshields. Tr. 75.

equipment that “obscure visibility necessary for safe operation, or create a hazard to the equipment operator” be removed or replaced. There is no doubt the cited truck qualified as self-propelled mobile equipment. While it is true the truck’s battery was dead at the time the defective windshield was cited, the question of whether or not a violation is proven must be considered in terms of continued normal mining operations. Without evidence to the contrary, it is reasonable to assume that in the course of continued normal mining operations the battery would have been recharged or replaced and the truck would have regained its ability to propel itself.

Clearly, the truck’s windshield was damaged. The parties agree it was cracked and that it contained a single hole. This leaves two questions. Did the defects in the windshield “obscure visibility necessary for safe operation” and, did the defects “create a hazard to the [welding truck] operator.” 30 C.F.R. § 56.14103(b). The Secretary has the burden of proof. To establish the violation, a preponderance of the evidence must allow either question to be answered in the affirmative.

The evidence is in conflict as to whether the cracks and hole obscured the truck driver’s visibility so as to create a hazard. Armstrong testified the defects “*could* obstruct the operator’s visibility.” Tr. 56 (*emphasis added*). Pinson, who steered the truck as it was being dragged, testified that he could see where he was going and that his visibility was not obstructed. Tr. 159. Anderson recalled the cracks and the hole as more on the driver’s side of the windshield than on the passenger’s side, and the Secretary introduced a photograph that seemed to indicate this was so. Tr. 64-65; *See* Sec’s Exh. 6. The company introduced a photograph that appeared to show the cracks and hole were more toward the passenger’s side of the windshield. *See* Resp. Exh. 7.

After weighing all of the evidence as to the effect of the defects on the driver’s visibility, I conclude it is in equipoise and the Secretary has not prevailed. A different conclusion might have been reached if Armstrong could have unequivocally testified as to what she saw when she sat in the driver’s seat, but she could not. She did not remember if she climbed into the cab and tried to look through the windshield on the driver’s side. Tr. 63-64. On the other hand, Pinson, who was in the driver’s seat on July 31, was certain he could see. Tr. 159. It also does not help the Secretary’s case that no testimony was offered as to how and from what angle the photograph purporting to show the defective windshield was taken. Such testimony would have given the finder of fact a better basis to evaluate the photograph’s accuracy.

I also conclude the Secretary did not prove by a preponderance of the evidence that the cracks and hole created a hazard to the truck driver. Armstrong believed if the windshield fogged, the driver could cut his or her hand if he or she wiped the windshield from the inside. Tr. 56. However, the Secretary offered no testimony to support her speculation. For example, Armstrong did not testify that she felt the glass and experienced sharp, jagged edges. Section 56.140103(a) required the windshield to be made of “safety glass” or its equivalent. Safety glass

typically cracks rather than shatters. It is common knowledge that such cracks do not necessarily produce edges capable of cutting a person's hand. The same is true for holes in safety glass. Based on the trial record, I cannot find the Secretary proved the cracks and/or the hole in the welding truck's windshield constituted a cutting hazard. For these reasons, the order must be vacated.

SE 2007-128-M

| <u>CITATION NO.</u> | <u>DATE</u> | <u>30 C.F.R.</u> |
|---------------------|-------------|------------------|
| 6120066             | 08/01/2006  | 56.14107(a)      |

The citation as modified states:

The shaft on the quarry pump [was] not guarded to protect persons from contacting the moving parts. [The] pump is started with a switch located by the fan and belt drive; [the] throttle control is located by the rotating shaft. The pump is located on uneven[,] rocky terrain. Persons could be seriously or fatally injured if entangled in the moving parts. This pump is used on a regular basis. The quarry foreman stated he knew the pump was not guarded, and [he] used the pump anyway. The [f]oreman engaged in aggravated conduct constituting more than ordinary negligence[,] in that he knew the pump shaft . . . [was] not guarded and [he] did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 8 at 1, 2

In addition to the trackhoe and the welding truck, Armstrong testified she inspected a pump that was used to remove water accumulations from the pit. Tr. 82-83. Removal of the water was necessary for the company to carry out its extraction and loading operations. Although no water was present in the pit on August 1, Armstrong remembered Pinson telling her he started and used the pump the previous week. *Id.* In addition, she recalled another miner telling her that he used it. Tr. 83.

Armstrong noticed the pump's shaft was not guarded. Tr. 83. Nor was the pump removed from service by being "tagged out" or by having a sign nearby indicating it should not be used. Tr. 91. Armstrong took a photograph of the unguarded shaft. *See* Gov't Exh. 9.

Armstrong believed the missing guard was “reasonably likely” to lead to an injury, because the pump had to be used and the pump’s throttle control was adjacent to the unguarded pump shaft. A person had to stand about 12 inches from the unguarded shaft to start the pump and to “throttle it up.” Tr. 85-87. According to Armstrong, the ground in the pit, including the ground next to the shaft, consisted of “uneven and rocky terrain,” which added to the hazard. Tr. 84, 89. *See also* Gov’t Exh. 9. Armstrong testified that the shaft rotated at a very fast rate, and if a person were caught by the shaft, he or she could be pulled into the shaft and quickly lose an arm. Death could result. Tr. 84-85.

In Armstrong’s opinion, the lack of a guard was the result of Johnson Paving’s “high negligence.” Tr. 90. She testified she remembered Pinson saying he knew the pump should have been guarded. *Id.* She added that Pinson told her “he knew it was wrong to use . . . [the pump] without it being guarded.” *Id.* In addition, she believed the lack of a guard was the result of an unwarrantable failure on the company’s part. She again pointed to the fact that Pinson knew the shaft was unguarded, that he used it anyway and that he took no steps to provide the shaft with a guard. Tr. 91. Johnson Paving corrected the condition by placing a box-type guard around the rotating shaft. Tr. 92; *See* Gov’t Exh. 10.

Pinson stated that the pump the inspector cited had been put in place the day before the inspector arrived. Tr. 153. It was decided to bring the pump to the pit after the bearings failed on a previous pump. According to Pinson, before the inspector saw the pump, it had been run for “a few minutes” to test it. Tr. 153. It was run without a guard so the guard would not have to be removed if something was wrong with the pump. *Id.* When asked by the Secretary’s counsel why he did not guard the shaft after he tested it, Pinson explained that he “got tied up,” that he also had to correct the condition of the park brake on a haulage truck (another condition cited on August 1) and he “figured it was more important to put the brakes on that truck than it was to put a guard on [the] pump.” Tr. 156.

### THE VIOLATION

Section 56.14107(a) requires “[m]oving machine parts [to] be guarded to protect persons from contacting . . . shafts . . . and similar moving parts that can cause injury.” The pump was not removed from service; nor was its shaft guarded. The testimony established the pump was going to be used as mining continued in the pit. The unguarded, rapidly spinning shaft posed a hazard, as Armstrong testified, to those working or standing near it. If a miner were caught in the unguarded, rotating shaft, he or she could have been injured or even killed. Tr. 84-85. For these reasons, I conclude the violation existed as charged.

## S&S AND GRAVITY

The Secretary established the violation was both S&S and serious. All of the S&S criteria were met. There was a violation of section 56.14107(a). The violation posed a safety hazard to miners, in that the unguarded shaft was within 12 inches of the throttle control. Because the control was used when the pump was started (Tr. 85-87), there was a danger the miner whose job it was to start and throttle up the pump would trip or slip and find himself or herself ensnared by the shaft. In fact, given the short distance between the throttle and the unguarded shaft and the uneven terrain in the pit, it was reasonably likely the hazard would occur.<sup>7</sup> Finally, being pulled into the rotating shaft could result in any number of serious injuries or, as Anderson persuasively testified, even in death. Tr. 84-85. Given these reasonably expected consequences if the feared accident occurred, I conclude that the violation was not only S&S, it also was serious.

## UNWARRANTABLE FAILURE AND NEGLIGENCE

The violation was the result of unwarrantable failure on the company's part. As previously noted, Pinson as the supervisor in charge of the pit, acted on the company's behalf. Pinson's testimony established the pump had been in place for a day. He tested it to make sure it worked properly, but he did not guard the shaft after the test was completed. He forthrightly explained that he deferred installing the guard because he considered fixing the park brake on a haulage truck to be "more important." Tr. 156. Setting priorities in correcting violations does not excuse Pinson's failure to meet the standard of care required of him. If Pinson did not have adequate resources to correct both conditions and if he believed guarding the pump's shaft was not a top priority, he should have met the standard by taking the pump out of service. He chose not to do this, and he left the pump shaft unguarded. It is reasonable to expect that in the course of normal mining operations, the pump would have been started and throttled up by a miner as mining continued. Exposing the miner to the hazard of possible dismemberment or worse by deliberately leaving the shaft unguarded constituted a serious lack of reasonable care on Pinson's part and, hence, on the company's part.

Further, due to his status as a foreman, Pinson was held to a heightened standard of care. His choice to forego guarding the shaft and his decision not to take the pump out of service until it was guarded represented the kind of heightened lack of care that signifies high negligence.

| <u>ORDER NO.</u> | <u>DATE</u> | <u>30 C.F.R. §</u> |
|------------------|-------------|--------------------|
| 61200701         | 08/01/2006  | 56.14101(a)(2))    |

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<sup>7</sup>The likelihood of an injury-resultant slip or fall was further increased by the fact that surface water was an occasional problem in the pit.

The order states in part:

The park brake on the . . . haul truck . . . would not hold a grade with a typical load. This truck is used to haul material from the pit to the plant and to the stockpile area at the plant. This condition creates a hazard of this piece of equipment rolling when parked. Persons working in the area or around this truck could be struck or run over[,] causing a serious or fatal injury. The truck is normally parked on level ground when not in use.

Gov't Exh. 11.

During the course of the inspection on August 1, Armstrong and Pinson approached a truck that was used to haul rock to the stockpile. Armstrong did not know how many tons of material the truck held, but she guessed between 15 and 20. The truck was sitting on a small grade at the dump, and Armstrong asked the driver to move the truck a little and then to set its park brake. She wanted to see if the brake would hold the truck on the grade. The driver did as Armstrong requested, and the truck rolled down the grade. Tr. 96. Armstrong believed the lack of an effective working park brake violated section 56.14101(a)(2). However, Armstrong also believed the ineffective brake was "unlikely" to cause a fatal accident. Tr. 97; Gov't Exh. 10. She noted the truck usually was parked on level ground where it would not roll and where it was out of the way of miners and equipment. Tr. 97-98. Although an injury was unlikely, if a miner (probably a mechanic or the operator of equipment used in the vicinity of the truck) were struck by the moving truck, it was reasonable to expect the miner to suffer crushing injuries, injuries that could prove fatal. Tr. 98.

Armstrong testified the defective brake was due to the company's high negligence. She stated Pinson told her that a week before the inspection he became aware of the situation and he ordered the brake to be "tightened . . . up." Tr. 99. Therefore, on August 1, Pinson thought the brake was holding. Tr. 99. However, according to Armstrong, "[T]here was no follow-up . . . to see . . . [if the adjusted brake] was holding."<sup>8</sup> Tr. 99. She also maintained the truck driver said that the brake had not worked properly for "about a month" and "that . . . Pinson knew of the condition." Tr. 100.

The company did not offer any testimony about the condition.

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<sup>8</sup>Armstrong testified she believed one of the reasons for the lack of follow-up was that the company was not doing any pre-shift examinations. Therefore, defects in equipment were not being reported and corrected as required. Tr. 99-100.

## THE VIOLATION

Section 56.14101(a)(2) states: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." The elements of proof required to establish a violation are as stated in the standard. The Secretary must prove: (1) that the cited equipment was "self-propelled mobile equipment" and (2) that the park brake would not hold the equipment with its (a) "typical load" on (b) the "maximum grade" the equipment travels. 30 C.F.R. § 56.14101(a).

The Secretary proved that the haul truck qualified as "self-propelled mobile equipment." The very nature of the truck as described by Armstrong made it self-evident. Further, the Secretary proved that the park brake would not hold the truck on the "maximum grade" it traveled. Armstrong testified, when she inspected the truck it was parked on "a small grade." Tr.96. While there was no specific testimony about the maximum grade the truck traveled, I infer from the inspector's testimony that the small grade either was the maximum grade at the mine or, if not, that since the park brake would not hold the truck on the small grade, it would not hold it on the maximum grade. However, the Secretary did not establish that the brake was incapable of holding the equipment with its typical load. No testimony was offered by the Secretary regarding the truck's typical load nor was testimony offered regarding the load the truck was carrying when it was cited. Armstrong testified regarding the truck's use. She stated it was "used to haul material from the pit to the plant, and it was used in the stockpile area." Tr. 95. However, Armstrong did not describe or otherwise identify the truck's "typical load"; nor did she estimate the load the truck was carrying.<sup>9</sup> Without the missing testimony I cannot determine whether or not the park brake was "capable of holding the equipment with its typical load." 30 C.F.R. § 56.14101(a)(2). Because I cannot rule out the possibility that when Armstrong inspected the truck, it was carrying more than its typical load and the defective brake would have held a lesser but "typical" load, the order must be vacated.

| <u>ORDER NO.</u> | <u>DATE</u> | <u>30 C.F.R. §</u> |
|------------------|-------------|--------------------|
| 6120072          | 08/01/2006  | 56.14132(a)        |

The order states in part:

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<sup>9</sup>The closest Armstrong came to these topics was her statement that the truck was "a stockpile type truck that [held,] I don't know how much 15, maybe 20 tons," but she added, "I'm not sure how much was in there." Tr. 96.

The manually operated horn on the . . . welding truck . . . did not function when tested. The truck is used regularly [throughout] the plant and quarry and is around other mobile equipment and employees when traveling around the plant and pit. Persons could be seriously or fatally injured if struck by the truck while being unaware that it was moving in their direction. The quarry foreman stated he used the welding truck yesterday and knew the horn did not function. The foreman engaged in aggravated conduct constituting more than ordinary negligence[,] in that he knew the horn was not function[ing] and did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 12.

Armstrong testified that during the course of her inspection of the welding truck, the same truck she cited for a defective windshield and broken mirrors, she discovered the truck's manual horn did not work. Tr. 102. Pinson told Armstrong he knew that the horn did not work. Tr. 102. According to Pinson, this was because the truck's battery was dead. If the battery "had 12 volts going through it, [the horn] would" have worked. Tr. 167.

Because the truck was used in the plant and pit on a regular basis and in areas where there could be foot traffic, Armstrong believed it was reasonably likely the lack of a horn would result in an accident. Tr. 102-103. She also noted that the truck frequently was driven in those areas of the pit where there was other mobile equipment and in the "yard area" where material was stockpiled. Tr. 112. (The yard area was frequented by customers' trucks. Tr. 112.) Armstrong could not recall the truck having another type of sound system to alert miners to its presence. Tr. 103. If there was a small air horn on the seat next to the driver, and she was later told that there was, Armstrong did not remember its being there. Tr. 104. Pinson, however, was certain an air horn was on the seat. Tr. 166. He testified he made sure air horns were kept in the cabs or operators' compartments of all mobile equipment at the mine. *Id.* He added, "If your horn went out . . . you could use . . . [the air horn] until the end of your shift and you could [then] get your horn fixed. That's the reason I had . . . [the air horn] in that truck." Tr. 166. Nevertheless, even if an air horn was present, Armstrong believed Johnson Paving still was in violation of the cited standard because "the horn that is provided with the equipment needs to function." Tr. 104.

The inspector found that the lack of a functioning horn was reasonably likely to result in a fatal injury. She maintained "a lot" of service equipment was located on the truck, which meant the truck frequently was visited by miners. In addition, the truck was used "throughout the mining process." Tr. 105. Not only were these miners exposed to the hazard, the lack of a working horn also posed a hazard to the drivers of other trucks and mobile equipment in the pit

and yard. Tr. 112.

Armstrong also believed the company's negligence was "high." Tr. 106. She testified that Pinson told her he used the truck on July 31, the day before the inspection, and that he knew the horn did not work. Tr. 106. This, and the fact that Pinson "didn't do anything to try to correct the condition," justified her finding of unwarrantable failure in addition to high negligence on the company's part. Tr. 107. When asked whether Pinson explained why the horn was not repaired, she stated he only said "he had to do everything himself." Tr. 108.

### THE VIOLATION

Section 56.14132(a) states that "Manually-operated horns . . . provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." As I have already noted, the welding truck was "self-propelled mobile equipment." Further, the cited horn was operated by hand and, thus, was "manually-operated." The horn that came with the truck was "provided," and it is clear that it was a "safety feature." Everyone agreed the horn would not sound. Therefore, it was not "maintained in functional condition," and the violation existed as charged.

### S&S AND GRAVITY

The Secretary did not establish that the violation was S&S. While it is true the truck's horn did not work, the record supports finding another method of warning miners on foot and operators of other equipment of the truck's presence was available to the welding truck's driver. Armstrong did not recall if there was an air horn on the seat next to the driver.<sup>10</sup> Tr. 104. However, Pinson, who had been in the truck the day prior to the inspection, was sure the air horn was present, and he persuasively testified he made certain such horns were routinely kept in the cab of all mobile equipment at the mine. Tr. 166. Balancing Armstrong's lack of memory against Pinson's certainty, I have no trouble in concluding the air horn was indeed present as Pinson asserted. Clearly, the air horn was reasonably likely to be used by the truck driver as mining operations continued, and the presence of an effective alternative to the horn provided with the truck meant that the non-working horn was not reasonably likely to cause or contribute to an injury-producing accident. The presence of the air horn also meant that the violation was not serious.

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<sup>10</sup>This is not surprising since, as noted earlier, Armstrong could not recall climbing into the truck's cab. Tr. 63-64.

## UNWARRANTABLE FAILURE AND NEGLIGENCE

However, the violation was the result of unwarrantable failure on the company's part. Armstrong testified without dispute that Pinson told her he used the truck on July 31 and that he knew the horn did not work at that time. Tr. 106. I conclude Armstrong's recollection is accurate and that, in fact, Pinson did know the horn was not working on July 31. Armstrong's testimony is consistent with Pinson's statement that the battery, which not only started the truck but also operated the horn, was dead the previous day when the truck was towed. Tr. 167. Further, her unrefuted recollection that Pinson's excuse for not repairing the horn was that "he had to do everything himself" (Tr. 108), correlates with her recollection of Pinson telling her, in connection with the trackhoe's defects, that he "didn't have the people to help him get things done." Tr. 47. While these statements call into question the way mine management chose to operate the mine, they in no way excuse Pinson's failure to correct the violative conditions. Armstrong properly noted that, in the face of his knowledge of the defect, Pinson did nothing to try to repair the horn or, in the alternative, to take the horn and the truck out of service. Tr. 107. In failing to act, Pinson, and through Pinson, the company, exhibited a serious lack of reasonable care, a lack of care that signifies not only unwarrantable failure, but also high negligence.

## OTHER CIVIL PENALTY CRITERIA

There is no indication the size of any civil penalties assessed against the company will affect its ability to continue in business, and I find that it will not. There also is no indication the size of any civil penalties assessed against Pinson will affect his ability to meet his day-to-day financial obligations, and I find that it will not.

Recalling Armstrong's testimony that Pinson told her ten to 11 employees worked at the mine (Tr. 33), and noting the Secretary's indication on Exhibit A of the petition that the mine operated between 10,000 and 20,000 hours annually (Petition for Assessment of Civil Penalty, Exh. A at 2), I conclude the operator is small in size.

The parties stipulated that the company showed good faith in abating all of the alleged violations, and I find this was the case. Tr. 164-165.

The Secretary offered into evidence a computer printout showing the history of prior violations in the two years preceding August 1, 2006. The Secretary's counsel stated the printout revealed a small history, a characterization with which the company neither agreed nor disagreed. *See* Joint Exh. 1; Tr. 23-25. Based on the exhibit, I find the Secretary is correct and that the company has a small history. The Secretary offered no evidence or testimony indicating Pinson previously committed knowing violations pursuant to section 110(c) of the Act (30 U.S.C. §

820(c), and I conclude that he did not.

**CIVIL PENALTIES**

**SE 2008-176-M**

| <b><u>ORDER NO.</u></b> | <b><u>DATE</u></b> | <b><u>30 C.F.R. §</u></b> | <b><u>PROPOSED ASSESSMENT</u></b> |
|-------------------------|--------------------|---------------------------|-----------------------------------|
| 6120067                 | 08/0120/06         | 56.14100(b)               | \$500                             |

I have found the Secretary proved the violation to the extent it related to the missing steps and broken mirrors on the trackhoe. I also have found Pinson knowingly allowed the violation to occur. I conclude, however, that Pinson, as a "first-time offender" with no previous history of prior violations, should not be assessed the amount the Secretary proposes. As I have stated, the tenor of the hearing made it clear that Pinson was placed in a position where he did not have the means necessary to ensure safety in a timely manner. It is not clear whether this state of affairs reflected a purposeful policy on top management's part or whether it was the result of Greg Johnson's "hands-off" attitude. *See* Tr. 149. (Having heard Johnson testify, I suspect it was the latter rather than the former.) In either event, it put Pinson in a very difficult position as he tried to keep production going in the face of inadequate maintenance and repair resources. In view of all of the circumstances, I find a penalty of \$250 is appropriate.

| <b><u>ORDER NO.</u></b> | <b><u>DATE</u></b> | <b><u>30 C.F.R. §</u></b> | <b><u>PROPOSED ASSESSMENT</u></b> |
|-------------------------|--------------------|---------------------------|-----------------------------------|
| 6120071                 | 08/01/2006         | 56.14103(b)               | \$500                             |

I have concluded the Secretary did not prove the alleged violation. Accordingly, no penalty can be assessed.

**SE 2007-128-M**

| <b><u>CITATION NO.</u></b> | <b><u>DATE</u></b> | <b><u>30 C.F.R. §</u></b> | <b><u>PROPOSED ASSESSMENT</u></b> |
|----------------------------|--------------------|---------------------------|-----------------------------------|
| 6120066                    | 08/01/2006         | 56.14107(a)               | \$2,000                           |

I have concluded the Secretary proved the violation, that it was serious and result of the company's high negligence. However, in view of the small size of the mine and the small history of previous violations, I also conclude the company should be assessed a lesser amount than the Secretary proposes. As Joint Exhibit 1 reveals, in the two years prior to the violations in question the highest penalty assessed against the company was \$463. Most violations were assessed at \$228 or less. (Excluding the violations at issue, 26 of 41 prior violations were assessed at \$60.) Thus, for this violation of section 56.14107(a) the Secretary has proposed a

penalty significantly larger than any previously assessed. Such a precipitous increase is not warranted, and I find a penalty of \$1200 to be appropriate.

| <u>ORDER NO.</u> | <u>DATE</u> | <u>30 C.F.R. §</u> | <u>PROPOSED ASSESSMENT</u> |
|------------------|-------------|--------------------|----------------------------|
| 6120067          | 08/01/2006  | 56.14100(b)        | \$2,800                    |

I have concluded the Secretary proved the violation, that it was serious and the result of the company's high negligence. For the reasons set forth immediately above I also find the Secretary's proposed assessment to be excessive, and I conclude a penalty of \$1,200 to be appropriate.

| <u>ORDER NO.</u> | <u>DATE</u> | <u>30 C.F.R. §</u> | <u>PROPOSED ASSESSMENT</u> |
|------------------|-------------|--------------------|----------------------------|
| 6120070          | 08/01/2006  | 56.14101(a)(2)     | \$2,800                    |

I have concluded the Secretary did not prove the alleged violation. Accordingly, no penalty can be assessed.

| <u>ORDER NO.</u> | <u>DATE</u> | <u>30 C.F.R. §</u> | <u>PROPOSED ASSESSMENT</u> |
|------------------|-------------|--------------------|----------------------------|
| 6120071          | 08/01/2006  | 56.14103(b)        | \$2,800                    |

I have concluded the Secretary did not prove the alleged violation. Accordingly, no penalty can be assessed.

| <u>ORDER NO.</u> | <u>DATE</u> | <u>30 C.F.R. §</u> | <u>PROPOSED ASSESSMENT</u> |
|------------------|-------------|--------------------|----------------------------|
| 6120072          | 08/01/2006  | 56.14132(a)        | \$2,800                    |

I have concluded the Secretary proved the violation, that it was not serious and that it was the result of the company's high negligence. For the reasons set forth with regard to Citation No. 6120066 and because the violation was not serious, I find the Secretary's proposed assessment to be excessive. I conclude a penalty of \$800 is appropriate.

### ORDER

Within 30 days of the date of this decision, Pinson **SHALL** pay to the Secretary a civil penalty of \$250 for the violation of section 56.14100(b) set forth in Order No. 6120067. In addition, Order No. 6120071 **IS VACATED**. Upon payment of a total penalty of \$250, Docket No. SE 2008-128-M **IS DISMISSED**.

Also within 30 days of the date of this decision, Johnson Paving **SHALL** pay \$1,200 for the violation of section 56.14107(a) set forth in Citation No. 6120066, \$1,200 for the violation of section 56.14100(b) set forth in Order No. 6120067, and \$800 for the violation of section 56.14132(a) set forth in Order No. 6120072. In addition, line 10(a) of Order No. 6120072 **IS MODIFIED** to indicate an injury was “unlikely” and Order No. 6120070 **IS VACATED**. Upon payment of a total penalty of \$3,200, Docket No. SE 2007-128-M **IS DISMISSED**.

*David F. Barbour*

David F. Barbour  
Administrative Law Judge  
(202) 434-9980

Distribution: (Certified Mail)

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/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 2009

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION, (MSHA), :
on behalf of LIGE WILLIAMSON : Docket No. KENT 2009-1428-D
Complainant : PIKE CD 2009-06
v. :
CAM MINING, LLC, : Mine ID 15-18911
Respondent : Number 28 Mine

DECISION ON REMAND
AND
ORDER OF TEMPORARY REINSTATEMENT

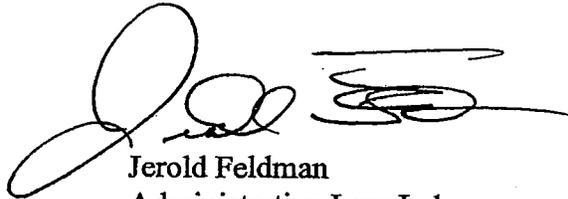
Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for the Complainant;
Mark Heath, Esq., Spilman, Thomas & Battle, Charleston, West Virginia,
for the Respondent.

Before: Judge Feldman

This matter is before me based on an application for temporary reinstatement filed by
the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977
(the Mine Act), 30 U.S.C. § 815(c)(2), against CAM Mining, LLC (CAM Mining) on
behalf of Lige Williamson. The initial decision on the Secretary's application, following a
September 2, 2009, evidentiary hearing, determined that the Secretary failed to satisfy her
burden of demonstrating that the application for temporary reinstatement was not frivolously
brought. 31 FMSHRC \_\_ (Sept. 30, 2009) (ALJ). The Secretary appealed the initial decision.
The Commission has reversed and ordered the retroactive reinstatement of Williamson
effective as of September 30, 2009, the date of the initial decision. 31 FMSHRC \_\_,
slip op. at 8 (Oct. 22, 2009).

Accordingly, IT IS ORDERED that CAM Mining, LLC SHALL IMMEDIATELY
REINSTATE Lige Williamson to the former job position that he held on May 15, 2009, at his
former rate of pay, with back pay effective September 30, 2009. Williamson's reinstatement
shall include entitlement to all benefits associated with his employment including overtime,
if applicable.

Williamson's reinstatement shall not prejudice CAM Mining's right to contest Williamson's discrimination complaint that currently is being investigated by the Secretary. The Secretary should endeavor to complete, as soon as practicable, her investigation so that this matter may proceed to an evidentiary hearing on the merits. If the Secretary, upon investigation, finds that the provisions of section 105(c) have not been violated, she shall file a motion to vacate this Order of Temporary Reinstatement. Alternatively, CAM Mining may move to vacate this temporary reinstatement order if the Secretary declines to prosecute Williamson's complaint pursuant to section 105(c)(2) of the Mine Act. *Peter J. Phillips v. A&S Construction Co.*, 31 FMSHRC \_\_\_, Docket No. West 1057-DM (Sept. 9, 2009).

A handwritten signature in black ink, appearing to read 'Jerold Feldman', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke at the end.

Jerold Feldman  
Administrative Law Judge

Distribution: (VIA FACSIMILE AND CERTIFIED MAIL)

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/rps



**ADMINISTRATIVE LAW JUDGE ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 1, 2009

|                        |   |                           |
|------------------------|---|---------------------------|
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : |                           |
| ADMINISTRATION (MSHA), | : | Docket No. SE 2006-148-M  |
| Petitioner             | : | A.C. No. 40-03268-80642   |
|                        | : |                           |
| v.                     | : | Docket No. SE 2006-163-M  |
|                        | : | A.C. No. 40-03268-82949   |
| SCP INVESTMENTS, LLC,  | : |                           |
| Respondent             | : | Old County Quarry         |

## ORDER TO SHOW CAUSE

These civil penalty matters were remanded on August 6, 2009, for further consideration. These cases concern a mine inspector's refusal to permit a representative of the mine operator to accompany the inspector during an inspection. The initial decision vacated the eleven citations and the one order in issue. 30 FMSHRC 544 (June 2008) (ALJ). The initial decision to vacate the cited violations was based on a determination that the mine inspector abused his discretion by unjustifiably denying the mine operator's statutory right to accompany him during the mine inspection.

The Commission's remand set aside the initial decision on jurisdictional grounds.<sup>1</sup> The Commission noted that a mine inspector is authorized to enter a mine to conduct an inspection, with or without the presence of a mine operator, pursuant to the authority delegated to the Secretary in section 103 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"). (*Slip op.* P.11). The Commission also noted that an operator cannot nullify an inspection by refusing to participate.<sup>2</sup> (*Slip op.* p.12).

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<sup>1</sup> The Commission relied on the language in section 103(f) that ". . . Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this act." 30 U.S.C. § 813(f). Obviously, the only party that can object to jurisdiction under section 103(f) is the mine operator. This provision means that a mine operator cannot successfully attack citations on jurisdictional grounds simply because it was not present during an inspection. As recognized by the Commission, this provision does not vitiate the walkaround rights that are also granted in section 103(f).

<sup>2</sup> I too previously ruled that a mine operator cannot prevent or delay an inspection because of his unavailability or his decision not to participate. *F.R. Carroll, Inc.*, 26 FMSHRC 97 (Feb. 2004) (ALJ).

However, the analysis in this case does not stop simply because the mine inspector was authorized to act as a consequence of his inspection. The Commission is “an independent adjudicative body authorized [by Congress] to hear disputes arising under the Mine Act.” *Energy West Mining Corp. v. FMSHRC*, 40 F.3d 457, 459 (D.C. Cir. 1994) citing 30 U.S.C. §§ 815(d), 823. Fundamental to the Commission’s mandate is the responsibility of determining whether contested citations, issued under section 104(a) of the Mine Act as a result of an authorized section 103(a) mine inspection, should be affirmed, modified, or vacated. 30 U.S.C. § 814(a). Obviously, the authority to inspect a mine and issue citations has no bearing on whether those citations must be sustained by the Commission. Surely the statutory walkaround rights in section 103(f), granted to miners’ representatives as well as mine operators, *are not* illusory.

Although the Commission reinstated and remanded these matters for further action on jurisdictional grounds, the Commission also recognized the substantive distinction between an operator’s unavailability, or its decision not to participate in an inspection, and MSHA’s refusal to allow its participation. While an operator’s absence generally is benign, the Commission concluded that the arbitrary and unreasonable refusal in this case constituted an “impermissible” violation of the mine operator’s section 103(f) statutory walkaround right. (*Slip op.* pps. 7, 9, 10-11, 18).

However, the Commission did not reach a majority consensus concerning the action I now should take. *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff’d on other grounds*, 969 F.2d 1501 (3<sup>rd</sup> Cir. 1992) (“*Penelec*”) (disposition by the Commission requires a majority vote). Two Commissioners suggested that I conduct an exclusionary hearing, apparently predicated on due process concerns, to determine what prejudice, if any, resulted from the denial of walkaround rights. (*Slip op.* p.2). One Commissioner suggested I should exercise my discretion by evaluating the prejudice caused by the mine operator’s lack of an opportunity to present probative evidence during the inspection. *Id.* The remaining Commissioner concluded the refusal of walkaround rights has no effect in this case. *Id.* However, as noted above, a majority of the Commission agreed with the initial decision that the mine operator’s statutory walkaround right was impermissibly violated.

In the performance of its adjudication functions, longstanding case law reflects the Commission’s frequent examination of whether, abuses of discretion, however well intentioned, due process considerations, or prejudice caused to an operator by the Secretary, provide a basis for vacating or denying modifications of citations that are otherwise validly issued. An “abuse of discretion” occurs when “there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (October 1991), *quoting Bothyo v. Moyer*, 772 F.2d 353, 355 (7<sup>th</sup> Cir. 1985) (emphasis added). While the Commission’s remand decision did not specifically characterize the mine inspector’s action as such, it is clear that an impermissible violation of a statutory right that, according to two Commissioners, lacked “common decency,” surpasses the threshold of actions properly deemed as an abuse of discretion. (*Slip op.* p.9).

In view of the Commission's determination that the mine operator's section 103(f) walkaround right was violated, the Secretary **IS ORDERED to SHOW CAUSE** why the citations issued as a consequence of the December 2005 inspection should not be vacated.<sup>3</sup> The Secretary's response must address the following issues that are material in the disposition of these matters.

1. Section 104(a) provides that a mine operator is liable for a violation of any provision of the Mine Act. Since a mine operator is clearly liable, under section 104(a), for an unjustifiable denial of an authorized miners' representative section 103(f) walkaround right, the Secretary should address whether, in view of *Utah Power & Light* and the Commission's remand, she disputes that MSHA's impermissible denial of the section 103(f) walkaround right in this case constitutes an abuse of discretion. In other words, is the Secretary's violation of a statutory right that she is obliged to enforce an abuse of discretion?

2. Longstanding case law supports the proposition that a citation, otherwise properly issued by a mine inspector pursuant to the authority delegated to the Secretary by the Mine Act, can be vacated based on that mine inspector's relevant and material abuse of discretion. *Energy West Mining Company*, 18 FMSHRC 565, 569 (Apr. 1996) and its progeny (abuse of discretion as a basis for vacating a 104(b) order otherwise validly issued); and *Rochester & Pittsburgh Coal Company*, 11 FMSHRC 2159, 2163-64 (Nov. 1989) quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d at 31 (7<sup>th</sup> Cir. 1975) and its progeny (findings and decisions of an inspector are supportable unless there is evidence that he abused his discretion or authority). The Secretary should thoroughly discuss whether or not this case law provides a basis for vacating the citations in issue.

3. In view of the Commission's remand, does the MSHA inspector's unreasonable denial of the mine operator's statutory section 103(f) walkaround right in this case constitute a due process violation? The Secretary should provide a thorough analysis of this question supported by relevant case law.

4. A citation, otherwise properly issued by a mine inspector pursuant to the authority delegated to the Secretary by the Mine Act, can be vacated based on a relevant and material violation of the mine operator's right to due process. *American Coal Company*, 29 FMSHRC 941, 952-53 (Dec. 2007) citing *Gates & Fox Co. V. OSHRC*, 790 F.2d 1189, 1193 (9<sup>th</sup> Cir. 1982). (considerations of due process prevents imposition of a civil penalty and validation of a citation

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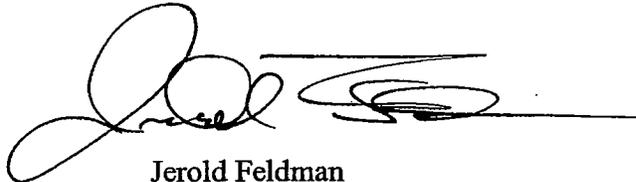
<sup>3</sup> The MSHA inspector's action does not effect the propriety of the Part 46 training violations in 104(g)(1) Order No. 6122908 and Citation No. 6122916 because they were not cited as a consequence of the physical inspection of the mine.

otherwise properly issued). Assuming the impermissible denial of section 103(f) walkaround rights in this case is a due process violation, the Secretary should thoroughly discuss whether or not this case law provides a basis for vacating the citations in issue.

5. Finally, the Commission may deny MSHA's issuance of a citation if it results in legally recognizable prejudice to the operator. *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990) (modification of a citation to allege a violation of a different standard may be precluded upon a showing of prejudice). The Secretary should address whether an unreasonable denial of a mine operator's walkaround right is prejudicial *per se*, and whether prejudice provides a basis for vacating the citations in issue.

### ORDER

**IT IS FURTHER ORDERED** that above information should be provided by the Secretary within 30 days of the date of this Order. The Secretary should specifically address the impact of the cases cited above in her analysis of whether there is an adequate basis for vacating the citations. The Secretary may submit any additional arguments or authorities to support her position. Failure by the Secretary to provide a timely response that directly addresses these relevant issues may result in dismissal of these civil penalty proceedings. SCP Investments, LLC (SCP) shall have 14 days to reply to the Secretary's submission, although a response by SCP is not required.



Jerold Feldman  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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September 10, 2009

|                             |   |                             |
|-----------------------------|---|-----------------------------|
| BILLY BRANNON,              | : | DISCRIMINATION PROCEEDING   |
| Complainant                 | : |                             |
| v.                          | : | Docket No. KENT 2009-302-D  |
|                             | : | BARB CD 2008-07             |
| PANTHER MINING, LLC,        | : |                             |
| Respondent                  | : |                             |
|                             | : | No. 1 Mine                  |
|                             | : | Mine ID 15-18198            |
|                             | : |                             |
|                             | : |                             |
| BILLY BRANNON,              | : | DISCRIMINATION PROCEEDING   |
| Complainant                 | : |                             |
| v.                          | : | Docket No. KENT 2009-1225-D |
|                             | : | BARB CD 2009-07             |
| PANTHER MINING, LLC and     | : |                             |
| MARK D. SHELTON,            | : |                             |
| Respondent                  | : | No. 1 Mine                  |
|                             | : | Mine ID 15-18198            |
|                             | : |                             |
|                             | : |                             |
| SECRETARY OF LABOR,         | : | DISCRIMINATION PROCEEDING   |
| ON BEHALF OF BILLY BRANNON, | : |                             |
| Complainant,                | : | Docket No. KENT 2009-1259-D |
| v.                          | : | BARB CD 2009-09             |
|                             | : |                             |
| PANTHER MINING, LLC,        | : |                             |
| Respondent                  | : | No. 1 Mine                  |
|                             | : | Mine ID 15-18198            |

**ORDER GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINT**

The Complainant, Billy Brannon, moves for leave to amend his initial complaint of discrimination (Docket No. KENT 2009 302-D). The complaint is scheduled to be heard, along with the two other discrimination cases with which it is consolidated, on March 2, 2010. Brannon's amendment would include two additional protected activities that were not specified in his initial complaint, namely: "(1) Brannon's refusal to travel underground without a cap light after Robert Salyer . . . assaulted him and smashed his cap light on January 23, 2008 . . . and (2) Brannon's . . . [completion of ] a 'mine incident report' on January 23, 2008, regarding Salyer's assault of him and his subsequent refusal to travel underground." Motion For Leave to File Amended Complaint of Discrimination ("Motion") at 2. The amended complaint also would

amplify an allegation that Brannon included in his June 15, 2009, Supplementation of the Record (“Supplementation”); namely that Brannon complained to Rick Raleigh, the personnel director for Black Mountain Resources, about Salyer’s assault of him. The proposed amendment would flesh out Brannon’s previous allegation that Brannon complained “to management of Cloverlick Coal/Black Mountain Resources about . . . Salyer assaulting him with a hammer.” Supplementation at 2.

### **BRANNON’S ASSERTIONS IN SUPPORT OF THE MOTION**

Brannon states that although he did not specifically plead the additional protected activities in his original complaint, the incidents were among those pleaded by Brannon in a civil suit he filed against Cloverlick Coal Company and Salyer, pleadings that were attached to his initial complaint. Therefore, according to Brannon, the company, a subsidiary of Cloverlick, “is well aware” that Brannon complained about the cap light incident. In addition, in Brannon’s view, the company also is aware that he filled out the incident report about the assault. Thus, the company cannot credibly assert the proposed amendments come as a surprise, and the company would not be “prejudiced in any way” if the amendments are allowed. Motion at 2-3.

### **THE COMPANY’S RESPONSE**

The company disagrees. The company notes that the facts set forth in the proposed amendments were not mentioned in the complaint Brannon originally filed with MSHA. It also notes that on December 16, 2008, in one of its interrogatories it requested that Brannon describe each protected activity on which he based his claim of discrimination and that it also requested Brannon produce copies of all of the documents pertaining to the alleged protected activities for which he claimed discrimination. Brannon’s responses did not mention the protected activities he now seeks to include in his complaint. Moreover, when the company later deposed Brannon about his alleged protected activities at no time did Brannon mention the “new” ones. Nor did Brannon mention them in response to the order to supplement the record except to state as Brannon noted in his motion that he “complain[ed] to management of Cloverlick Coal/Black Mountain Resources about . . . Salyer assaulting him with a hammer.” Memorandum In Opposition to Motion for Leave to File Amended Complaint (“Opposition”) at 3 (August 14, 2009) (*quoting* Supplementation 2).

The company also views the proposed amendments as untimely because as of the date the motion was filed, the case has been pending for almost five months and Brannon has failed to explain why the alleged additional protected activities were not pleaded earlier. Opposition at 4. Brannon “should not be allowed to add claims . . . when he had ample time and opportunity to raise them previously and states no reason for not having done so.” *Id.* at 5. Granting the motion would cause additional expense to the company by requiring it to amend its defenses, depose Brannon again and possibly amend its pending motion for partial summary decision, and file a supplemental brief in support of the motion. *Id.* at 5.

Finally, the company argues the “new” allegations have not been investigated by MSHA as required by section 105(c) of the Act and that a “miner cannot present claims on his own unless and until the Secretary has made a finding of no discrimination under section 105(c)(3) [of the Act].” Opposition at 6.

### RULING

The amendments **WILL BE ALLOWED**. The Commission has taken a liberal view when it comes to such amendments, especially when, as here, they do not prejudice a party in preparing its defenses. I agree with Brannon that the amendments should come as no surprise to the company. The allegations arise out of the Brannon/Salyer altercation, an incident that triggered Brannon’s initial claims. The company was and is well aware of the incident and the events surrounding it. Further, a careful reading of the company’s opposition fails to reveal an assertion of actual prejudice. While it is true the company may feel compelled to amend its answer, conduct additional discovery, amend its pending motion and supplement its brief in support of the motion, the expenses inherent in such activities are the necessary consequences of litigation, costs the company (and any litigant) must be prepared to bear. Moreover, because the “new” protected activities arise out of the Brannon/Salyer incident there is no need for Brannon to “restart” the section 105(c) investigatory process by “re-complaining” to MSHA. Were another complaint required the subject cases could be even more delayed than is now the case. There are occasions when related but “new” allegations must be allowed in order to end serial litigation, and this is one. *See e.g., Sec. of Labor o/b/o Lawrence Pendley v. Highland Mining Co.*, 30 FMSHRC 459, 496, n.44 (May/June 2008); *aff’d* 31 FMSHRC 61 (January/February 2009); *appeal docketed*, No. 09-3213, (6<sup>th</sup> Cir. March 3, 2009).

This stated, fairness requires that the company not be faced with continuously shifting and augmented allegations. Accordingly, while Brannon’s motion **IS GRANTED**, his assertions of protected activities now are regarded as fixed. Absent extraordinary circumstances, further such amendments to his complaint will not be allowed.

The company has 20 days from the date of this order should it decide to amend its answer, its motion for summary decision and its memorandum in support of its motion. Brannon will have 15 days from the date of any such amendment(s) to respond. The parties are reminded discovery ends on January 15, 2010. Order Granting In Part Complainant’s Motion to Compel (July 24, 2009) at 10. Additional interrogatories, requests for production and depositions must be served and/or conducted by that date.



David Barbour  
Administrative Law Judge

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