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

Lion Mining Company v. Secretary of Labor, MSHA, Docket No. PENN 94-71-R. (Judge Hodgdon, July 26, 1996)

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Stillwater Mining Company v. Secretary of Labor, MSHA, Docket Nos. WEST 95-539-RM, etc. (Judge Amchan, July 31, 1996)

Secretary of Labor, MSHA v. Vecellio & Grogan, Inc., Docket No. SE 96-9-M. (Chief Judge Merlin, August 1, 1996)

Secretary of Labor, MSHA v. Primrose Coal Company, Docket Nos. PENN 96-125, etc. (Judge Melick, August 14, 1996)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 9, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 94-19
CONSOLIDATION COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is an order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that Consolidation Coal Company ("Consol") violated 30 C.F.R. § 75.340, which sets forth fire protection requirements applicable to underground water pumps.[2] Administrative Law Judge

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[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 75.340 provides, as pertinent:

> (a) Underground . . . water pumps shall be located in noncombustible structures or areas or equipped with a fire suppression system . . . . This equipment also shall be--
>
> (1) Ventilated by intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places; . . .
>
> . . . .
>
> (b) This section does not apply to--

William Fauver found that Consol violated section 75.340(a), that neither of the exemptions contained in sections 75.340(b)(4) and (6) applied, that the violation resulted from unwarrantable failure, and that the violation was "serious." 17 FMSHRC 231, 234, 235 (February 1995) (ALJ). The Commission granted Consol's petition for discretionary review. For the reasons that follow, we affirm the judge.

I.

Factual and Procedural Background

On April 7, 1993, Inspector Richard McDorman issued an order under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), charging a violation of section 75.340(a) at Consol's Arkwright No. 1 Mine, an underground coal mine located in West Virginia. 17 FMSHRC at 231; Gov't Exs. 1, 16. McDorman, accompanied by Mike Jackson of Consol's safety department, inspected the No. 68 water pump, an electrically-powered ThroMor pump, located in a crosscut in an intake escapeway on the 2 South longwall development section. 17 FMSHRC at 231, 233; Tr. 26, 72-73.

The pump's purpose was to remove water from a swag (low point) in an abandoned section of the mine adjacent to the 2 South section. 17 FMSHRC at 232; Tr. 74. After one to one-and-a-half weeks, the water was removed from the swag. Tr. 80-81. Although Consol had made preparations to move the pump inby to the next swag as the section advanced, the absence of water on the section made the move unnecessary. Tr. 84.

The pump had 7½ horsepower, and was 14 to 16 inches high, 18 to 20 inches wide, and 6 feet long. 17 FMSHRC at 232; Tr. 73. It weighed 300 to 350 pounds, and was located about 20 crosscuts from the working face and about 1800 feet from the loading point. *Id.*

The water pump was not located in a noncombustible enclosure or equipped with a fire suppression system. 17 FMSHRC at 231. The air ventilating the water pump was not coursed into the return air entry; rather it was used to ventilate the working section. *Id.* at 231-32. For these conditions, McDorman issued the order charging the violation. Gov't Ex. 1. He designated the violation not significant and substantial. *Id.* The Secretary proposed a civil penalty assessment of $2,400.

. . . .

(4) Pumps located on or near the section and that are moved as the working section advances or retreats; [and]

. . . .

(6) Small portable pumps.

At trial, Consol did not dispute that its pump failed to comply with the requirements of section 75.340(a). C. Posthearing Br. at 1-2. Rather, Consol argued to the judge that the pump was exempt from the regulation under either sections 75.340(b)(4) or (6). *Id.*

The judge concluded that Consol violated the regulation, determining that neither the (b)(4) nor the (b)(6) exemption applied. 17 FMSHRC at 233-35. The judge concluded that the (b)(4) exemption was inapplicable because the pump was about 1800 feet outby the loading point and did not advance with the working section.[3] *Id.* at 234. He ruled that the (b)(6) exemption was inapplicable because the pump was not a "small portable pump." *Id.*

The judge also concluded that the violation resulted from Consol's unwarrantable failure. *Id.* at 234-35. He determined that it was not reasonable, without first inquiring into MSHA's enforcement position, for Consol to rely on the exemptions because the pump was "too heavy to lift to be considered a 'small portable pump,' and because it was not moved as the working section advanced or retreated." *Id.* at 234. The judge also concluded that Consol's claims of exemption under (b)(4) and (6) appeared to be after-the-fact litigation positions, and that Consol had been operating without knowing that the safety standard governing pumps had changed five months before the violation. *Id.* at 234-35.

Although the judge noted that Inspector McDorman designated the violation as not significant and substantial, he nevertheless concluded that the violation was serious. *Id.* at 234. He found that in the event of a fire reaching the pump's fuel tank, the resulting smoke would have contaminated the intake entry and escapeway with a reasonable likelihood of serious injury. *Id.* The judge assessed a civil penalty of $2,400. *Id.* at 239.

II.

Disposition

With respect to the (b)(4) exemption, Consol argues the judge erred in finding that "the pump was not moved as the working section advances or retreats." C. Br. at 2. It asserts that the pump was removed from service, and that it was unnecessary to move the pump as the section advanced because of the absence of water on the advancing section. *Id.* Concerning the (b)(6) exemption, Consol contends that the judge erred in finding that the pump was not a "small portable pump." *Id.* It submits the judge's reliance on the pump weight was material error. *Id.* at 2, 5-7. With respect to the judge's unwarrantable failure finding, Consol argues that its interpretation of the regulation was plausible and found support in the preamble and other MSHA documents disseminated to the industry. *Id.* at 2, 5. With respect to the judge's finding that the violation was serious, Consol argues the pump did not have a fuel tank and was not in operating

[3] The judge inadvertently characterized this as the (b)(6) exemption.

condition at the time the order was issued, and thus there was no proof that a hazard existed. *Id.* at 2, 8, 9.[4]

The Secretary argues that, with regard to the (b)(4) exemption, the pump was not located "at or near" the working section, and that the pump was not "moved as the working section advanc[ed]." S. Br. at 11-13. With regard to the (b)(6) exemption, the Secretary submits that the pump was not portable, and that weight is a legitimate factor in the determination of portability. *Id.* at 7-11. With respect to the judge's unwarrantable failure finding, the Secretary argues that it was not reasonable for Consol to have believed its pump qualified for an exemption. *Id.* at 15 n.5, 16. He submits that Consol was aware that pumps such as the No. 68 ThroMor were required to be in compliance with the cited standard. *Id.* at 15. With respect to the judge's finding that the violation was serious, the Secretary emphasizes that the pump was in operating condition, and that there was one gallon of oil in the pump's motor. *Id.* at 7 n.2.

A. Consol's Motion to Strike

1. Ventilation Meeting Materials

The Secretary's brief contained an attachment consisting of ventilation information meeting sign-in sheets and notices and internal MSHA memoranda setting forth schedules for informational meetings on the Secretary's ventilation regulations. Consol seeks to strike these materials on the ground that they were not before the judge and because Consol did not have the opportunity of cross-examination with regard to the authenticity, veracity and relevance of the materials. C. Mot. to Strike at 1-3.

The Commission has made clear that "the adjudication process is best served if the judge is first given the opportunity to admit and examine all the evidence before making his decision." *Climax Molybdenum Co.*, 1 FMSHRC 1499, 1500 (October 1979). As the Commission has

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[4] Consol also argues that the language of section 75.340(b)(4) and (6) failed to give fair warning of the Secretary's interpretation of the regulation, and that Consol therefore should not be held to have violated the regulation or engaged in unwarrantable conduct. C. Br. at 4, 5-6, 7-8. However, Consol did not raise this argument in its PDR and the Commission did not direct *sua sponte* review of the issue. Under section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823 (d)(2)(A)(iii), the Commission's review is limited to those questions raised by the PDR. *See also* 29 C.F.R. § 2700.70(f) (1995); *Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1429 & n.7 (D.C. Cir. 1989). Accordingly, we do not reach the notice argument. Furthermore, Consol did not raise this argument before the judge, another prerequisite for review under section 113(d)(2)(A)(iii) of the Mine Act. The Commission has declined to address arguments not presented to the judge. *E.g., Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1316-17 (August 1992).

noted, "it is the obligation of parties to prove their case *before the judge*, not on review by reference to detailed material not presented to the judge and not subject to the rigors of cross-examination." *Union Oil Co. of Cal.*, 11 FMSHRC 289, 301 (March 1989) (emphasis in original). This rule of procedure under the Mine Act accords with settled principles of law limiting the record on review to that developed before the trier of fact. *Id.; see also* Fed. R. App. P. 10(a); *United States v. Sanga*, 967 F.2d 1332, 1335-36 n.2 (9th Cir. 1992).

Because the materials were not part of the record before the judge, we grant Consol's motion to strike them, and consequently do not rely on them or on references to them contained in the Secretary's brief.

2. *Webster's Third New International Dictionary (Unabridged)* (1986) *("Webster's Third")*

Consol also asks the Commission to strike the references in the Secretary's brief to the definitions of "portable" and "mechanize" contained in *Webster's Third.* In his brief to the Commission and post-hearing brief to the judge, the Secretary relied on similar definitions in *The American Heritage Dictionary* (New College ed. 1980) and *Webster's New World Dictionary* (Second college edition, 1980). S. Br. at 10; S. Posthearing Br. at 11-12. The Commission has relied on *Webster's Third* in its decisions. *See, e.g., Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996); *Ideal Cement Co.*, 12 FMSHRC 2409, 2410 n.2 (November 1990); *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (October 1989). The Commission has never held that a party is limited to citing only those authorities previously cited to the judge.

Accordingly, we deny Consol's motion to strike the Secretary's references to definitions of "portable" and "mechanize" in *Webster's Third.*

B. Violation of section 75.340(a)

As Consol concedes that its pump did not comply with the requirements of section 75.340(a), its challenge to the judge's determination that it violated section 75.340 centers on whether the judge correctly concluded that the pump was not exempted from the mandatory standard under section 75.340(b)(4) and (b)(6).

The Commission has recognized that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989), citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). We think it clear that Consol's cited pump is not covered by the section 75.340(b)(4) and (6) exemptions and, accordingly, we resolve this case on the basis of the plain language of the regulation.

1. The section 75.340(b)(4) exemption

Under section 75.340(b)(4), section 75.340(a) "does not apply to . . .[p]umps located on or near the section *and* that are moved as the working section advances or retreats." 30 C.F.R. § 75.340(b)(4) (emphasis added). The judge concluded that this exemption did not apply to Consol's pump because "[t]he pump was about 1800 feet outby the loading point and did not advance with the working section." 17 FMSHRC at 234.

The parties agree that "pumps located on or near the section" refers to the "working section." C. Br. at 7-8; S. Br. at 11. The "working section" is the area "[f]rom the section loading point, being the tail piece and back to the working faces." Tr. 29; 30 C.F.R. § 75.2. Because the pump was about 1800 feet outby the loading point, we conclude that it was clearly not "on" the working section. We also think that, at a distance of 1800 feet outby the loading point, the pump was clearly not "near" the working section. Inspector McDorman testified that "near" would be two to three crosscuts outby the loading point. Tr. 40. He also suggested that "near" could possibly be four crosscuts outby the loading point, referring to 30 C.F.R. § 75.214(a), which requires supplementary roof support materials to be within four crosscuts of each working section. Tr. 55. The pump was approximately 2000 feet or 20 crosscuts outby the working face, and approximately 18 crosscuts outby the loading point. 17 FMSHRC at 232; Tr. 26-27 (based on Inspector McDorman's estimate of 100 feet from crosscut to crosscut). Even when the pump was closest to the working section, at the time of its installation about two weeks earlier, it was still more than "1,000 feet from the pump to the face" and "[a]pproximately 800 feet" from the pump to the section loading point. Tr. 43, 62-63. Accordingly, substantial evidence supports the judge's conclusion that the pump was not located on or near the working section.[5] 17 FMSHRC at 234.

As to the (b)(4) prerequisite the pump be "moved as the working section advances or retreats," the pump had been stationary throughout the entire two weeks subsequent to its installation, while the section advanced approximately 1,000 feet during this same period. 17 FMSHRC at 234; Tr. 43, 62-63. Inspector McDorman testified there was no indication the pump was to move with the working section, because the entire purpose of the pump's presence was to dewater the old works adjacent to the section. Tr. 61, 64. Mike Jackson of Consol's safety department testified that the pump would have been left in the location in which the inspector

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

found it "so long as it kept pumping water out of the adjacent area." Tr. 90. Based on this evidence, Consol did not meet the plain requirement of (b)(4) that the pump be moved in order to qualify for the exemption. Jackson testified that Consol was entitled to the (b)(4) exemption because it *intended* to move the pump with the section as needed to pump out water, but since there was no need to pump out the water as the face moved, the pump remained where it was cited. Tr. 84-85. We agree with the judge that an intent to move the pump does not satisfy the prerequisite for the (b)(4) exemption. 17 FMSHRC at 234.

Consol also argues that it had removed the pump from service for about one week prior to the citation, and therefore was not required to move it as the working section advanced. C. Br. at 2. The judge found that the pump was energized and ready to operate. 17 FMSHRC at 232. Inspector McDorman's testimony supports the judge's finding. Tr. 21, 43, 47. To the extent Consol's witness Jackson testified to the contrary, Tr. 79, and Consol's electrical examination reports indicated the pump was out of service, Gov't Ex. 4, the judge essentially made a credibility determination. A judge's credibility findings should not be overturned lightly and are entitled to great weight. *In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995). We therefore decline to disturb the judge's finding that the pump had not been removed from service.

In sum, we conclude that the judge correctly determined that Consol did not fall within the (b)(4) exemption.

2. The section 75.340(b)(6) exemption

Under section 75.340(b)(6), section 75.340(a) "does not apply to . . . [s]mall portable pumps." We think the judge correctly concluded that, because of its 300 to 350 pounds of weight, Consol's pump was not a small portable pump within the meaning of section (b)(6). *See* 17 FMSHRC at 234. The preamble to the final rule indicates the Secretary's intention that such pumps be "easily relocated without the aid of mechanized equipment; capable of being moved frequently; and installed in such a manner to facilitate such movement." 57 Fed. Reg. 20,868, 20,889 (May 15, 1992). This language is similar to the language describing "small portable pumps" in MSHA's Program Policy Letter P91-V-12 (effective July 17, 1991) ("PPL"), which was issued under section 75.340's predecessor standard, 30 C.F.R. 75.1105 (1992). Tr. 31-32; Gov't Ex. 2; C. Ex. 4. Under the PPL, "[p]ortable pumps are: small normally permissible or submersible pumps; easily relocated without the aid of mechanized equipment; capable of being moved frequently; and installed in such a manner to facilitate such movement." Gov't Ex. 2; C. Ex. 4. These definitions are consonant with the normally understood meaning of "portable," which is defined as "capable of being . . . easily or conveniently transported" and "light or manageable enough to be readily moved." *Webster's Third* at 1768.

Substantial record evidence supports the judge's conclusion that Consol's pump was not a small portable pump. Neither Consol nor the Secretary disputes the judge's finding concerning the weight of the pump. Tr. 26, 74. Inspector McDorman indicated it would take five or six

people with ropes to pull the pump. Tr. 38. As to the preamble's declaration that an exempt pump be "easily relocated without the aid of mechanized equipment," McDorman testified that the pump was usually moved by a scoop, which is a mechanized piece of equipment. Tr. 37-38. Mike Jackson of Consol's safety department testified that if a scoop had been available, it would have been used to load the pump up and move it. Tr. 81. Jackson also testified that lacking a scoop, they would probably jack the pump up, put it on a four-wheel cart, move it down the heading, and reset it. *Id.* McDorman further stated that two to three people could move the pump on a small pulley cart with wheels. Tr. 59. Accordingly, McDorman testified that the pump was not a small portable pump in light of the description in the preamble to the final rule. Tr. 30, 31. Thus, the plain language of the exemption clearly makes it inapplicable to Consol's pump.

We reject Consol's argument that weight is not a legitimate criterion for assessing the applicability of the exemption. Weight is an essential element in considering portability and comports with common usage, regulatory history and common sense.

C. Unwarrantable failure

Unwarrantable failure constitutes aggravated conduct exceeding ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991).

In *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994), the Commission set forth the following factors among those to be considered in making an unwarrantable failure analysis: "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance."

Substantial record evidence supports the judge's finding. As to the length of time the violative condition existed, the inspector testified that he designated the violation unwarrantable failure because the pump had been in the same location for over two weeks. Tr. 42-44. Weekly electrical examinations had been conducted on March 25 and April 2. Tr. 44-45. As to the extensiveness of the violation, the pump did not have fireproof housing. Tr. 43. Consol did not meet the fire suppression requirements in lieu of the housing. *Id.* The pump was not ventilated properly, coursing the intake air into the return airway. *Id.* The pump was ready to be used. Tr. 21. The record does not indicate compliance with any of the other alternatives in section 75.340(a)(2) and (3). As to Consol's efforts to eliminate the violative condition, the record indicates Consol made none.

The Commission has recognized that "if an operator reasonably believes in good faith that the cited conduct is the safest method of compliance with applicable regulations, even if it is

in error, such conduct is not aggravated conduct constituting more than ordinary negligence." *Southern Ohio Coal Co.*, 13 FMSHRC 912, 919 (June 1991), citing *Utah Power & Light Co.*, 12 FMSHRC 965, 972 (May 1990)). The operator's good faith belief must be reasonable under the circumstances. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615-16 (August 1994).

Consol argues that it reasonably relied upon an interpretation of the regulation that had definite plausibility and found support in the preamble and other MSHA documents that were disseminated to the industry. C. Br. at 2, 5. The (b)(4) and (b)(6) regulatory exemptions are clearly contrary to Consol's proffered interpretations. Further, Consol does not cite the Commission to specific language in the preamble or to other record evidence of the "other MSHA documents that were disseminated to the industry." Moreover, Consol had placed similar pumps located in other areas of the mine in fireproof enclosures. Tr. 90. Thus, we conclude that Consol's belief in the plausibility of its interpretation was unreasonable under the circumstances.

Consol also argues that the judge erred in stating that it was not reasonable to assume "without first inquiring into MSHA's enforcement position, that the pump qualified for an exemption." C. Br. at 2, 4, 5 (citing 17 FMSHRC at 234). Consol seems to suggest that the judge's finding of unwarrantable failure was significantly predicated on its failure to inquire first into MSHA's enforcement position. In our view, the judge correctly concluded that it was not reasonable for Consol to have believed that the pump qualified for an exemption and that under such circumstances Consol should have inquired into MSHA's enforcement position.

D. "Seriousness" of the Violation

Noting that the inspector cited the violation as not "significant and substantial," the judge concluded that the violation was serious. 17 FMSHRC at 234. He found that, in the event of a fire reaching the pump's fuel tank, the resulting smoke would have contaminated the intake entry and escapeway with a reasonable likelihood of serious injury. *Id.*

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). Although the judge did not specifically relate seriousness to gravity, or separately discuss the gravity criterion, he did assess the penalty based on "all of the criteria in section 110(i)." 17 FMSHRC at 238. Accordingly, we infer that the penalty was based in part on the judge's conclusion that the violation was serious.

Consol argues that because the pump was out of service, substantial evidence does not support the judge's conclusion that the violation was serious. C. Br. at 8. As previously discussed, substantial evidence supports the judge's finding that the pump was not out of service. Consol also argues that the judge erred in finding that the pump had a fuel tank that posed a fire and smoke hazard C. Br. at 2, 8 (citing 17 FMSHRC at 234). Although the pump did not have a fuel tank, we think the judge's finding is harmless error. As the Secretary points out, the pump's

motor did carry a gallon of flammable oil. S. Br. at 7 n.2; Tr. 83. In addition, the pump was not permissible. Tr. 29. The focus of the seriousness of the violation is not 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. *Cf. Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (September 1987) ("gravity" penalty criteria and special finding of S&S not identical although frequently based on same or similar factual circumstances). We conclude that, in light of the presence of combustible material, substantial evidence supports the judge's conclusion that the violation was serious.

III.

Conclusion

For all of the foregoing reasons, we affirm the judge's decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 12, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 93-233
v.	:	
AMBROSIA COAL & CONSTRUCTION COMPANY	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 94-15
WAYNE R. STEEN, Employed by AMBROSIA COAL & CONSTRUCTION COMPANY	:	

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

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge William Fauver correctly determined that Ambrosia Coal & Construction Company

[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

("Ambrosia") violated 30 C.F.R. § 77.404(a)[2] when it operated a highlift with allegedly defective brakes, that the violation was significant and substantial ("S&S")[3] and caused by Ambrosia's unwarrantable failure,[4] and that a civil penalty should be assessed against Ambrosia's employee, Wayne Steen, under section 110(c) of the Mine Act [5] for his alleged knowing authorization of the violation. 16 FMSHRC 2293 (November 1994) (ALJ). For the reasons that follow, we affirm the judge's determinations on these issues, vacate the judge's penalty assessments against Ambrosia and Steen, and remand for reassessment.

I.

Factual and Procedural Background

Ambrosia operates the Ambrosia Tipple, a surface coal mine near Edinburg, Pennsylvania. On June 3, 1992, David Weakland, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), and Charles Thomas, an inspector-trainee, inspected the mine. 16 FMSHRC at 2294. When they arrived, Inspector Weakland and Thomas went to the scale house, where they met Steen, and asked, "[W]ho is in charge here, who is the

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[2] Section 77.404(a) provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe operating condition shall be removed from service immediately.

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

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

[5] Section 110(c) provides in part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any . . . agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c).

foreman?" *Id.*; I-Tr. 27-28.[6] Steen replied that he was the foreman and accompanied the inspectors on their inspection. 16 FMSHRC at 2294.

After leaving the scale house, Thomas asked Inspector Weakland if he could inspect a highlift that he had observed having difficulty stopping as the inspectors drove into the mine. *Id.* Weakland agreed and directed Thomas to notify him if there were any problems. *Id.* Thomas approached the highlift, which was being operated by William Carr, an Ambrosia employee, and asked him about the condition of the brakes. *Id.* Carr replied that they were bad. *Id.*; I-Tr. 250. Thomas instructed Carr to position the highlift on a 30 to 40 degree incline and to engage the parking brake. 16 FMSHRC at 2294. The highlift rolled down the incline. *Id.* Thomas then asked Carr to reposition the highlift on the incline and to apply the service brake. *Id.* The highlift again rolled down the incline. *Id.* Thomas called Inspector Weakland, who, accompanied by Steen, joined them. *Id.* at 2294-95.

Inspector Weakland asked Carr if there were any brakes on the highlift. *Id.* Carr responded, "[N]o, there isn't, [and] there hasn't been." I-Tr. 31. Weakland instructed Carr to raise the bucket and test the service brake. 16 FMSHRC at 2294. The highlift drifted backwards on fairly level ground. *Id.* When Carr engaged the parking brake upon the inspector's instructions, the highlift continued to drift. *Id.*

Weakland testified that, after the brakes were tested, Carr informed him that the highlift had no brakes for several weeks, and that he had notified the foreman, Steen, and recorded the bad brakes in a maintenance log. *Id.* at 2295. Inspector Weakland testified that he then asked Steen why he did not get the brakes repaired, and that Steen had replied that he had contacted the maintenance shop but that it was "like pulling teeth to get things fixed around here." *Id.* The inspectors continued inspecting the highlift and discovered the presence of an accumulation of combustible fuel around a pivot point and the absence of a seatbelt and fire extinguisher. *Id.* Inspector Weakland informed Steen that the highlift was unsafe to operate. *Id.*

Inspector Weakland and Thomas returned to the scale house to look for the maintenance log, discuss the alleged violations, and prepare citations. *Id.* Thomas showed Inspector Weakland a log entitled, "Daily Work and Cost Record," which contained entries noting "bad brakes" for the highlift on May 1, 4, 5, 6, 7, 8, 22, 26, 27, and 28, 1992. *Id.* Some entries were initialed "B.C." for Carr, and some were initialed "W.S." for Steen, indicating that they had operated the highlift on those dates. *Id.*

Weakland issued an order pursuant to section 104(d)(1) of the Act, alleging an S&S and unwarrantable violation of 30 C.F.R. § 77.1605(b), which was later modified to allege a violation of section 77.404(a). I-Tr. 35-36. The face of the citation indicated that it was served to "Wayne

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[6] The hearing of this case is transcribed in two volumes. The first volume, covering June 28, 1994, shall be referred to as "I-Tr." and the second, covering June 29, as "II-Tr."

Steen, Foreman." Gov't Ex. 4. Steen did not object to being identified as a foreman on the citation. 16 FMSHRC at 2300. Weakland and Thomas then conducted a close-out conference with Steen and Carmen Ambrosia, the owner of the mine. I-Tr. 41-42.

Mr. Ambrosia stated that he wanted to observe the brake demonstration. 16 FMSHRC at 2296. The highlift was placed on an incline and Carr was instructed to separately engage the parking brake and the service brake. *Id.* The highlift rolled down the incline without hesitation after each test. *Id.* Mr. Ambrosia told Steen that they could not stay in business operating equipment in such condition. *Id.*

The highlift was then removed from service. *Id.* Later that day, Timothy Yager, a mechanic for Ambrosia, adjusted the brakes. II-Tr. 156-57. The citation was terminated after the brakes held the highlift on an incline during a subsequent test. I-Tr. 44-45; II-Tr. 161.

After the inspectors left the mine, Carr admitted to Steen that he had made all of the entries in the highlift maintenance log. 16 FMSHRC at 2296-97. Steen stated, "I guess that's okay." *Id.* at 2297. Carr testified that, shortly after he told Steen, he also told Carmen Shick, Ambrosia's vice-president in charge of operations, that he had made the entries. *Id.* Shick commented that, "that wasn't a very good idea," but took no action to change the entries. *Id.* On approximately June 6, Steen falsified the official MSHA examination record by adding entries noting the highlift's "bad brakes" for May 30, June 2, and 3, 1992, and stating "repairing highlift" for June 4. *Id.*; II-Tr. 20.

On December 29, 1992, MSHA Special Investigator John Savine conducted an investigation to determine whether Steen should be held individually liable under section 110(c) of the Mine Act for knowingly authorizing Ambrosia's violation. 16 FMSHRC at 2297. Based on that investigation, the Secretary proposed that a penalty in the amount of $3,500 be assessed against Steen. *Id.* at 2303. The Secretary also proposed that a civil penalty in the amount of $7,000 be assessed against Ambrosia for its alleged violation of section 77.404(a). *Id.*

Ambrosia and Steen challenged the enforcement actions and the matters were consolidated and proceeded to hearing before Judge Fauver.[7]

The judge found that Ambrosia had violated section 77.404(a). *Id.* at 2298. He reasoned that the lack of operable brakes on the highlift amounted to an unsafe condition, and that the operator had failed to remove the equipment from service. *Id.* The judge also determined that the violation was S&S because the inoperable brakes posed a number of discrete safety hazards.

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[7] The judge visited the mine between the first and second day of the hearing. II-Tr. 10. He advised the parties that any observations that he made could be included in his findings, and that the parties could propose findings based upon what they considered to be reasonable observations. *Id.* at 10-11.

Id. at 2299. He found the violation unwarrantable because the operator, through Steen, its foreman and mine examiner, knew that the brakes were bad and failed to repair them or remove the highlift from service. *Id.* The judge further concluded that, as a foreman, Steen was a corporate "agent" under section 110(c) of the Mine Act, and that he had knowingly authorized Ambrosia's violation because he had actual knowledge of the bad brakes for at least five days and had failed to repair them or remove the equipment. *Id.* at 2300, 2302. Finally, the judge assessed civil penalties of $11,000 and $4,000 against Ambrosia and Steen, respectively. *Id.* at 2306. He based the penalties, in part, upon his finding that Shick, who he found to be a corporate agent, participated in the falsification of the maintenance log, and that the deliberate cover-up by Steen and Shick increased the need for deterrence provided by higher penalties. *Id.* at 2305-06.

Ambrosia and Steen each filed petitions for discretionary review challenging the judge's determinations, which the Commission granted.

II.

Disposition

A. Violation of Section 77.404(a)

Ambrosia argues substantial evidence does not support the judge's finding that it violated section 77.404(a) because the highlift had sufficient brakes to perform its functions. A. Br. at 19-26. It emphasizes that Carr testified he was not concerned for his safety when operating the highlift because he was working on level ground and loading in first gear, and that he could load trucks without any brakes by "slip[ping] it in reverse and back[ing] up." *Id.* at 21-23; I-Tr. 333. In addition, Ambrosia relies on testimony of its mechanic that the brakes required only adjustment, rather than repair or replacement of parts, and that the adjustment was not extensive. A. Br. at 23-24; II-Tr. 164-65. The Secretary responds that substantial evidence supports the judge's determination because the highlift had no brakes and that such a condition would be recognized as unsafe by a reasonably prudent person. S. Br. at 12-19.

As the Commission has previously recognized, section 77.404(a) imposes two duties: (1) to maintain equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (October 1979). The "[d]erogation of either duty violates the regulation." *Id.* Substantial evidence supports the judge's determination that Ambrosia derogated both duties.[8]

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[8] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163

Equipment is in unsafe operating condition under section 77.404(a) when 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. *See Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (involving identical standard applicable to underground coal mines). Here, the evidence is undisputed that when the parking brake and service brake were tested on fairly level ground, the highlift drifted backwards. I-Tr. 34-35, 187. In addition, the highlift rolled without hesitation down an incline when either brake was engaged. I-Tr. 44, 171, 173; II-Tr. 28-29. Upon observing the brake demonstration on the incline, Ambrosia's owner, recognizing a hazard warranting corrective action, told Steen, "we can't stay in business like this," and "we can't operate equipment like this." I-Tr. 176.

The evidence relied upon by Ambrosia does not, in fact, establish that the highlift was in safe operating condition for the functions it performed. Carr stated that the highlift "had a little bit of brakes on it to get by with," and that the brakes were only "good enough to stop me a little bit on the level." I-Tr. 332, 355. He acknowledged that the brakes were not "good enough to stop me on a ramp" and that he sometimes operated on the ramp. I-Tr. 355. Carr stated that when he was on the ramp, in order to stop the highlift, he "went right around and parked it." I-Tr. 355. Thomas testified that when he observed Carr operating the highlift to load a truck, Carr was having difficulty stopping it. I-Tr. 162-64. Moreover, Carr admitted that he complained about the condition of the brakes to Steen days before the inspection, at least by May 27th or 28th. I-Tr. 329, 332, 336, 353-54. In addition, Carr's statement that he did not need brakes when loading does not establish that the need for brakes would not arise. Inspector Weakland testified that, without brakes, the highlift could collide with a truck driver or another pedestrian, such as a mechanic or supervisor walking across the yard, or with a truck if the highlift operator misjudged distances when loading it. I-Tr. 45-47. Moreover, regardless of the extent of the brake adjustment required, the brakes were inoperable on the incline and on a fairly level surface, where the highlift traveled during normal mining operations.

Therefore, substantial evidence supports the judge's determination that the highlift was not maintained in safe operating condition. Given the undisputed evidence that Ambrosia failed to remove the highlift from service (16 FMSHRC at 2298), we affirm the judge's finding that Ambrosia violated section 77.404(a).

(November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

B. Significant and Substantial

Ambrosia argues that the judge erred in finding its alleged violation of section 77.404(a) was S&S because the Secretary failed to establish that it was reasonably likely operating the highlift would result in injury. A. Br. at 26-30. It submits there was little likelihood of a collision between the highlift and a truck being loaded, or with a pedestrian or structure, because Carr never dropped the highlift's bucket, the highlift was operated at low speed, the highlift could reverse direction, and the brakes were sufficient to stop the highlift on level ground on the day of the inspection.[9] *Id.* at 27-28. Ambrosia also argues that it was unlikely the highlift would roll on to the adjacent highway because the highway was 40 to 50 yards away from the operation of the tipple. *Id.* at 28. The Secretary responds that the judge correctly determined the violation was S&S and that the evidence relied upon by Ambrosia established only that an accident had not yet occurred. S. Br. at 22-23.

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

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

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

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[9] Ambrosia also argues that collision was unlikely because the highlift was noisy, which would warn a pedestrian of its approach, the highlift could stop a distance of eight to ten feet moving forward or ten to twelve feet moving backward by dropping its bucket, and the highlift could be turned. A. Br. at 27-28. As support for these assertions, Ambrosia cites the visit that the judge made to the mine. Because the judge did not include his observations from that visit in his decision, and no evidence was introduced at the hearing establishing those allegations, they are not part of the official record. 30 U.S.C. § 823(d)(2)(C); *see* II-Tr. 10-11.

At issue is whether the judge correctly determined that the Secretary established the third *Mathies* factor.[10] In arguing that injury was not reasonably likely to occur, Ambrosia relies on evidence relating to conditions or practices existing at the time of the inspection. An evaluation of the reasonable likelihood of injury must be made assuming continued normal mining conditions. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

Taking into consideration continued normal mining conditions, substantial evidence supports the judge's determination that the third *Mathies* factor was established. Evidence was undisputed that the brakes were ineffective on the ramp and fairly level ground, where the highlift traveled during normal operations. I-Tr. 34-35, 43-44, 171, 176-77, 188, 355, 387. Inspector Weakland testified that, without brakes, the highlift could collide with a truck driver or other pedestrian in the yard and that, during the inspection, he had observed a truck driver get out of his truck. I-Tr. 46, 52. In addition, he stated that the highlift could collide with a truck it was loading if the highlift operator misjudged distances. I-Tr. 45. Thomas testified that, if the highlift collided with anything in the tipple area, such as coal trucks, telephone poles, or the fuel storage area, the highlift operator could be thrown through the windshield or against the steering wheel. I-Tr. 178.

Carr's statement that he never dropped the bucket to stop the highlift does not preclude the possibility that another operator might do so or that an opportunity would arise when he would find it necessary to do so.[11] Inspector Weakland testified that, if the highlift operator dropped the bucket to stop the highlift, the bucket could collide with the side of the truck, resulting in injuries or fatalities. I-Tr. 45-46. In any event, Thomas stated that shifting the highlift into reverse while it is moving forward, the method of braking used by Carr (I-Tr. 333), would result in a jerking motion and that the operator could be thrown through the windshield, out of the vehicle, or against the steering wheel. I-Tr. 179-80. The hazard to the highlift operator would be greater given that the seatbelt was missing from the highlift. I-Tr. 41.

Furthermore, although the highway was 40 to 50 yards away from coal piles at the tipple, Thomas stated that he believed that the highlift was used in all areas of the mine. I-Tr. 180. He estimated that the highlift weighed 15 to 20 tons, and that it would be heavier and more difficult to stop if it were carrying a load. I-Tr. 181. In addition, there were no berms or guardrails separating the tipple area from the highway, and the highway received a great deal of traffic. I-Tr. 180-81.

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[10] Although Ambrosia also argues that the second *Mathies* element was not established, its discussion of that issue relates to the third *Mathies* element. *See* A. Br. 26-28.

[11] Ambrosia conceded as much in arguing that there was little likelihood of injury in part because the highlift "could stop in a distance of eight to ten feet moving forwards or ten to twelve feet moving backwards by means of dropping the bucket." A. Br. at 28. *See* n.9.

Thus, the evidence relied upon by Ambrosia does not establish that injury was not reasonably likely to occur. Rather, it establishes only that an accident had not yet occurred, which is not dispositive of a finding that the third *Mathies* factor had not been established. *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). Accordingly, we affirm the judge's S&S determination.

C. Unwarrantable Failure

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 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 Corp.*, 13 FMSHRC 189, 193-94 (February 1991) ("*R&P*"); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d at 136 (approving Commission's unwarrantable failure test).

1. Whether Steen's Conduct is Imputable to Ambrosia

The conduct of an "agent" of an operator may be imputed to the operator for unwarrantable failure purposes. *R&P*, 13 FMSHRC at 194. Section 3(e) of the Mine Act defines "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a . . . mine . . . ." 30 U.S.C. § 802(e).

Ambrosia argues that Steen was not an "agent" and that his conduct may not be imputed to it for unwarrantable failure purposes. A. Br. at 17-18. Steen argues that he was not an agent because he was not a foreman and that, rather, he admitted to only being the person in charge at the mine. St. Br. at 3, 5-10. He submits that he did not possess the actual authority customarily exercised by a foreman, including the ability to recommend hiring or firing, discipline employees, change work schedules, adjust pay or terms of employment, or make contracts or decisions regarding the sale of coal. *Id.* at 13-14, 20. The Secretary responds that, as a foreman, Steen was an agent whose conduct was imputable to Ambrosia. S. Br. at 25 n.14, 29-39.

Steen's assertion that his job title was not "foreman" and that there were some supervisory functions that he did not perform is not dispositive of whether he was an agent within the meaning of section 3(e). In considering whether an employee is an operator's agent, the Commission has "relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel." *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995). Here, Steen accompanied the inspectors and attended the MSHA close-out conference as Ambrosia's representative. I-Tr. 27, 175. In the close-out conference, Weakland and Thomas informed Steen that if he had any disagreement with the citations, he had ten days to request a manager's conference. I-Tr. 175. MSHA Inspector Thomas Sellers, who had inspected the mine on July 2, 1991, and March 16, 1992, testified that Steen also acted as the

company representative during those inspections. I-Tr. 280-81. Steen was paid a salary and did not receive additional pay for working more than 40 hours per week, while rank-and-file miners were paid hourly and received time-and-a-half for working overtime. 16 FMSHRC at 2301. Steen, as a certified mine examiner, made required daily examinations at the mine and was responsible for entering his findings in an MSHA examination book. I-Tr. 382; II-Tr. 18-19.

In addition, Steen gave work orders to abate citations. When Inspector Weakland informed Steen that he was going to issue citations for the lack of seatbelt or fire extinguisher and the accumulation of combustible materials, Steen instructed Carr to remove the combustible materials and to get a fire extinguisher. I-Tr. 172. Inspector Weakland observed Steen direct Carr to place a "no smoking" sign on a fuel tank and to place a guard on a tail roller to abate other violations cited during the inspection. I-Tr. 138. MSHA Inspector Sellers testified that during the inspections he conducted, Steen had also called the maintenance shop to explain necessary repairs. I-Tr. 284-85. Thus, as the person "in charge" at the mine, the functions performed by Steen were crucial to the mine's operation and demonstrated an exercise of responsibility normally delegated to management personnel.

Furthermore, the manner in which Steen was treated by those with whom he worked demonstrates an exercise of responsibility normally delegated to management personnel. Carr informed Inspector Weakland that he had reported the bad brakes to Steen, essentially acknowledging Steen's position of responsibility. 16 FMSHRC at 2301. When the inspector asked Steen why he did not get the brakes repaired, Steen did not reply that it was not his job to remove equipment from service and arrange for repairs but, rather, that it was difficult to get repairs made. *Id.* Mr. Ambrosia apparently believed that Steen held a position of responsibility for overseeing conditions at the mine, exclaiming to Steen, "we can't stay in business like this," and "we can't operate equipment like this," after observing the brake demonstration. *Id.*

Therefore, we conclude that substantial evidence supports the judge's determination that Steen was an agent whose conduct was imputable to Ambrosia.[12]

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[12] We also find evidence that Steen held himself out as the employee in charge at the mine and signed official MSHA documents as the mine foreman relevant by analogy to common law agency principles. *See R&P*, 13 FMSHRC at 195 (finding analogous support in common law agency principles). At common law, a principal is liable for the acts of an agent that are apparently within the agent's authority and which the principal permits the agent to exercise. 3 Am Jur 2d *Agency* §§ 78, 79 (1986). A "principal may vest his agent with apparent authority to perform an act by omission as well as commission, and such authority is implied where the principal passively permits the agent to appear to a third person to have authority to act on his behalf." *Id.* at § 79. There is no record evidence that Ambrosia took any actions to demonstrate that Steen did not, in fact, possess authority as the person in charge at the mine.

2. Whether Ambrosia Engaged in Aggravated Conduct

Substantial evidence supports the judge's determination that Ambrosia, through Steen, engaged in aggravated conduct that amounted to more than ordinary negligence when it failed to maintain the highlift in safe operating condition or remove the highlift from service. Carr admitted that he informed Steen of the condition of the brakes on May 27 or 28. I-Tr. 329, 334, 336, 358. Steen conceded that, if Carr stated that he told him about the brake condition, Carr did. I-Tr. 375. Steen maintains that during the end of May, however, he believed the brakes needed adjustment, rather than that they were completely ineffective. I-Tr. 387; II-Tr. 32. The judge's discrediting of that evidence is supported by substantial evidence. On the morning of the inspection, Steen observed Carr loading with the highlift. II-Tr. 12-13. On that day, Carr was observed having difficulty stopping the highlift by Inspector Thomas. I-Tr. 162-63. When tested, the brakes failed to stop the highlift on the ramp and on fairly level ground. I-Tr. 37, 162, 164, 171. Steen himself admittedly falsified the inspection manual to state "bad brakes" on May 30, June 2 and 3.[13] II-Tr. 20. Moreover, on the day of the inspection, when Inspector Weakland asked Steen why he had not had the brakes repaired, Steen did not react with surprise that the brakes required repair. Rather, he stated that it was "like pulling teeth to get things fixed around here." I-Tr. 37; 16 FMSHRC at 2299. Therefore, substantial evidence supports the judge's determination that Steen knew the brakes were bad at least five or six working days before the inspection.

In addition, although he had been informed about the condition of the brakes, Steen failed to remove the highlift from service or insure that the brakes were repaired. Inspector Weakland testified that Steen informed him that he called the maintenance foreman when Carr told him about the brakes, but that the foreman did not send anybody to repair the brakes. I-Tr. 67-68. The judge's finding that Steen, in fact, had not contacted maintenance (16 FMSHRC at 2295), is supported by substantial evidence given the maintenance foreman's testimony that he had not been notified before the inspection that the brakes on the highlift required repair or adjustment. II-Tr. 167-68. In any event, even if Steen had contacted the maintenance shop, he failed to remove the equipment from service until repairs were made. Accordingly, we affirm the judge's determination that Ambrosia's violation of section 77.404(a) resulted from its unwarrantable failure through imputation of the conduct of its agent, Steen.

D. Steen's Liability Under Section 110(c)

Steen argues that the judge erred in concluding that he was a foreman and, therefore, an agent subject to liability under section 110(c) of the Act. St. Br. at 2-3. The Secretary relies upon the same evidence establishing Ambrosia's aggravated conduct to assert that Steen knowingly authorized Ambrosia's violation of section 77.404(a) in violation of section 110(c). S. Br. at 39-40.

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[13] Steen testified that he mistakenly failed to make an entry for June 1. II-Tr. 23.

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety standard, any agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to individual civil penalty. We conclude substantial evidence supports the judge's determination that Steen was liable under section 110(c).

First, Steen's position as the salaried person in charge at the mine who represented the operator during inspections, close-out conferences and in receiving citations, and who gave abatement instructions, was crucial to the mine's functioning and involved a level of responsibility normally delegated to management personnel. *See U.S. Coal*, 17 FMSHRC at 1688. Therefore, Steen was an "agent" within the meaning of section 3(e) of the Act.[14]

Furthermore, substantial evidence supports the judge's determination that Steen knowingly authorized Ambrosia's violation of section 77.404(a). Steen had actual knowledge of the brake condition for at least five or six working days before the inspection but failed to have the brakes repaired or the highlift removed from service. Steen's assertion that he believed the brakes only needed adjustment and not that they were completely ineffective is unpersuasive given the Commission's recognition that, in order to prove section 110(c) liability, the Secretary "must prove only that an individual knowingly acted, not that the individual knowingly violated the law." *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). Steen knew that Carr was operating the highlift after complaining about the condition of the brakes, and observed him loading on the day of the inspection when the brakes were ineffective on the ramp and fairly level ground. In addition, Steen defended his failure to repair the brakes, not with surprise that the brakes were ineffective, but by stating that getting repairs made was difficult. 16 FMSHRC at 2295. Accordingly, we affirm the judge's determination that Steen was liable under section 110(c) of the Act.

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[14] The judge found that Steen's status as a certified mine examiner was relevant to his status as an agent for unwarrantable failure purposes, but not for purposes of Steen's liability under section 110(c). 16 FMSHRC at 2299 n.1, 2300 n.2. The judge reasoned that the Secretary failed to allege in his penalty proposal or prehearing statements that he considered Steen an agent under section 110(c) because he was a certified mine examiner and that, accordingly, Steen had been deprived of timely notice of the theory. *Id.* at 2300 n.2. In arguing on review that Steen was an agent subject to liability under section 110(c), the Secretary relies upon evidence that Steen was a certified mine examiner. S. Br. at 34. Even excluding Steen's function as a certified mine examiner, we conclude that substantial evidence supports the judge's determination that Steen was an agent for section 110(c) purposes.

E. Civil penalties

Ambrosia argues that the judge erred in assessing its penalty by failing to find good faith in achieving rapid compliance and by increasing the penalty from that proposed by the Secretary based on his determination that Shick, who he found to be a corporate agent, participated in the falsification of the maintenance log. A. Br. at 15-17. It argues that the increase in penalty was unreasonable for the additional reason that the Secretary had proposed a penalty of $7,000 based on a contention that the falsified log entries had, in fact, been genuine and provided notice of the brake problem. *Id.* at 16. Steen argues that the penalty assessed against him was excessive. St. Br. at 24-26. The Secretary agrees that the judge erred in assessing both penalties. S. Br. at 41-46.

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). The Commission has cautioned, however, that the exercise of such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act.[15] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings are supported by substantial evidence. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). The judge must make findings of fact on the criteria that "not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg*, 5 FMSHRC at 292-93.

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

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

30 U.S.C. § 820(i).

Contrary to Ambrosia's assertions, the judge did not err in analyzing the penalty criterion of good faith in achieving rapid compliance. As the judge found, the violation of section 77.404(a) was abated as soon as the inspector removed the highlift from service. 16 FMSHRC at 2305. Because the operator had no opportunity to show its good faith in rapidly achieving compliance, the judge properly neither increased nor decreased the penalty based upon his consideration of the factor.

In addition, we reject Ambrosia's argument that the assessment is erroneous because the penalty proposal was based upon the mistaken conclusion that the maintenance log entries were genuine and provided notice to the operator. There is no indication that the judge erroneously concluded he was bound by the Secretary's proposed penalty or that he relied upon the mistaken conclusion that the log entries provided notice. *See* 29 C.F.R. § 2700.30(b) (Judges and the Commission are not bound by the penalty proposal in assessing penalty). In fact, the judge expressly found that the entries were false and provided no notice. 16 FMSHRC at 2304.

The judge abused his discretion, however, in increasing Ambrosia's penalty for deterrence purposes based on his finding that Shick was a corporate agent who participated in the record falsification. The Secretary had not made any allegations of wrongdoing or initiated enforcement proceedings against Shick. The judge, who is not an authorized representative of the Secretary, cannot make findings that create new liability. *Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991).[16] Moreover, although deterring future violations is an important purpose of civil penalties,[17] deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria. *See Dolese Bros.Co.*, 16 FMSHRC 689, 695 (April 1994) (a judge's consideration is limited to the statutory penalty criteria). Deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.

In addition, the judge erred in assessing Steen's penalty. The judge failed to set forth findings applying the statutory criteria to Steen as an individual. Without such findings, Steen does not have sufficient notice of the basis of his penalty, and the Commission does not have the necessary foundation to determine whether the penalty was appropriate. *Sellersburg*, 5 FMSHRC at 292-93.

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[16] We hereby vacate any references in the judge's decision to alleged wrongdoing by Shick.

[17] As recognized in the legislative history of the Mine Act, the purpose of civil penalties is to "convinc[e] operators to comply with the Act's requirements." S. Rep. No. 181, 95th Cong., 1st Sess. 45 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). *See also Consolidation Coal Co.*, 14 FMSHRC 956, 965 (June 1992) (recognizing importance of civil penalties as deterrence).

Accordingly, we vacate the penalties assessed against Ambrosia and Steen and remand for reassessment consistent with this decision.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Ambrosia violated section 77.404(a), that the violation was S&S and resulted from Ambrosia's unwarrantable failure, and that Steen is liable under section 110(c) of the Mine Act for knowingly authorizing the violation. We vacate the penalties assessed against Ambrosia and Steen and remand for reassessment.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 16, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 93-445
	:	PENN 94-54
NEW WARWICK MINING COMPANY	:	

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

DECISION

BY: Jordan, Chairman; and Riley, Commissioner

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raise the issues of whether Administrative Law Judge Arthur Amchan properly concluded that a violation of 30 C.F.R. § 75.400[2] by New Warwick Mining Company ("New Warwick") resulted from its unwarrantable failure to comply with the standard, whether there was no violation of 30 C.F.R. § 75.360(b),[3]

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[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 75.400 states:

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

[3] Section 75.360(b) states, in part:

> The person conducting the preshift examination shall examine for hazardous conditions . . . .

and whether five violations of 30 C.F.R. § 77.202[4] were not significant and substantial ("S&S"). 16 FMSHRC 2451 (December 1994) (ALJ). The Commission granted cross-petitions for discretionary review challenging these determinations. For the reasons that follow, we affirm in part, vacate in part, and remand.[5]

I.

Factual and Procedural Background

A. Docket No. PENN 94-54

New Warwick operates the Warwick Mine, an underground coal mine, in Greene County, Pennsylvania. On July 26-28, 1993, Robert Santee, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the 3 left (012) longwall section of the mine. 16 FMSHRC at 2452. During this period, New Warwick was mining through a rock binder in the coal seam, which generated increased amounts of dust. *Id.* at 2453. In addition, as the longwall shields advanced, they dug into the mine bottom, "rolling" it onto the shield toes.[6] Tr. 110-11. On July 26, Santee found float coal dust accumulations ranging up to 1/4-inch deep on and behind the longwall shields and issued a citation for violation of section 75.400. 16 FMSHRC at 2452; Gov't Ex. 4. He informed the mine superintendent and longwall coordinator that the hose attached to the longwall shear was inadequate to prevent dust from accumulating and that washdown hoses needed to be installed across the pan line. 16 FMSHRC at 2452; Tr. 23, 79, 160.

On July 27, Santee discovered an accumulation of loose fine coal on a pump car at the end of the longwall supply track and issued another citation for violation of section 75.400. 16 FMSHRC at 2452; Gov't Ex. 5. He also observed coal dust accumulations on and behind the longwall shields, but he did not issue a citation because cleanup was being performed. 16

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[4] Section 77.202 states:

> Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.

[5] Chairman Jordan and Commissioners Marks and Riley vote to affirm the judge's determinations that the violation of section 75.400 resulted from unwarrantable failure and that there was no violation of section 75.360(b). Chairman Jordan and Commissioner Riley vote to vacate the judge's determination that the violations of section 77.202 were not S&S and remand for further consideration. Commissioner Marks would reverse the judge's S&S determination.

[6] A shield toe is the horizontal, bottom part of the shield. Tr. 26.

FMSHRC 2452. Santee discussed with the mine safety director the need for continued efforts to prevent violations of section 75.400 at the longwall. *Id.*; Tr. 25, 28.

On July 28, Michael Smith, the longwall foreman on the night shift[7] at Warwick Mine, conducted a preshift examination of the mine from 1:00 to 3:00 a.m. Tr. 21, 128. When Smith examined the 3 left (012) longwall section, he did not note any hazardous accumulations of loose coal or coal dust. Tr. 21, 132. The longwall broke down at approximately 3:30 a.m. Tr. 21. At 5:10 a.m., Inspector Santee, accompanied by Barry Radolec, an inspector trainee, inspected the longwall section. 16 FMSHRC at 2452; Tr. 90. Santee found float coal dust accumulations ranging up to 1/4-inch deep on the longwall shields. 16 FMSHRC at 2452; Gov't Ex. 1. He also found float coal dust accumulations on cables, loose coal accumulations ranging up to 6-inches deep behind the longwall shields, and loose coal mixed with slate rock up to 22-inches deep on some of the shield toes. *Id.*

Based on the foregoing, Inspector Santee issued New Warwick Order No. 3655504, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging an unwarrantable and S&S violation of section 75.400 for failure to clean up the accumulations. 16 FMSHRC at 2452-53; Gov't Ex. 1. In addition, Santee issued New Warwick Order No. 3655505, pursuant to section 104(d)(2), alleging an unwarrantable and S&S violation of section 75.360(b) for failure to note the accumulations in the preshift examination record book. 16 FMSHRC at 2453; Gov't Ex. 2.

The Secretary of Labor subsequently proposed civil penalty assessments of $4,100 and $3,800 for the alleged violations of sections 75.400 and 75.360(b), respectively. New Warwick challenged the proposed assessments, contending that it had not violated the standards, the violations were not S&S, and the violations were not caused by its unwarrantable failure.

Following an evidentiary hearing, the judge concluded that New Warwick had violated section 75.400, that the violation was not S&S, but that it had resulted from New Warwick's unwarrantable failure to comply with the standard. 16 FMSHRC at 2452-56. The judge based the unwarrantable failure determination on his findings that, although the accumulations "had not existed for a long time," the accumulations were extensive, New Warwick should have been on "heightened alert" that such accumulations could occur, and New Warwick had not immediately commenced cleanup of the accumulations. *Id.* at 2455 & n.5. He assessed a civil penalty of $2,000. *Id.* at 2455-56.

Further, the judge concluded that New Warwick had not violated section 75.360(b). *Id.* at 2456. He reasoned that the order was based on the assumption that the accumulations that served as the basis for the violation of section 75.400 were present during the preshift examination. *Id.*

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[7] The night shift worked from 4:00 p.m. to 4:00 a.m. and the day shift worked from 4:00 a.m. to 4:00 p.m. 16 FMSHRC at 2456; Tr. 28.

The judge credited the testimony of Smith, who conducted the preshift examination between 1:00 and 3:00 a.m., that he had not observed any hazardous accumulations of coal or coal dust. *Id.* Recognizing that the longwall broke down at 3:30 a.m., the judge concluded that the accumulations observed by the inspector "may not have been present or may not have been as extensive" during the preshift examination. *Id.* Therefore, the judge determined that the preshift examination "may not have been inadequate" and he vacated the order. *Id.*

The Commission subsequently granted cross-petitions for discretionary review filed by New Warwick, challenging the judge's determination that the violation of section 75.400 was unwarrantable, and by the Secretary, challenging the judge's determination that there was no violation of section 75.360(b).

B. Docket No. PENN 93-445

On May 19, 1993, MSHA Inspector Frank Terrett inspected six overland conveyor belt transfer stations at Warwick Mine.[8] 16 FMSHRC at 2459. Inside five of the transfer stations, Terrett found coal dust accumulations ranging from 1/8-inch to 4-inches deep on top of motors, inside electrical boxes, around belt rollers, and on the floors. *Id.*; Tr. 187, 189-90, 194-95, 208-09. Accordingly, he issued New Warwick five citations, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging violations of section 77.202 for failure to clean up the accumulations. 16 FMSHRC at 2459; Gov't Exs. 17-21. Subsequently, Inspector Terrett modified the citations to designate the violations as S&S. 16 FMSHRC at 2460; Tr. 202, 215-17; Gov't Exs. 17-21.

The Secretary proposed civil penalty assessments totaling $4,060 for the alleged violations. New Warwick challenged the proposed assessments, contending that it had not violated the standard and the violations were not S&S.

Following an evidentiary hearing, the judge concluded that New Warwick had violated section 77.202 but that the violations were not S&S. 16 FMSHRC at 2459-61. He noted that the Secretary's theory that the violations were S&S was based largely on the need for an employee to jump from the second floor of the transfer station to escape a fire resulting from the accumulations. *Id.* at 2461. The judge found that each transfer station had three exits on the first floor and two or three exits on the second floor and that an employee would not have to jump from the second floor to escape a fire. *Id.* Therefore, he concluded that the Secretary had failed

[8] The overland conveyor belt travels over fields from the supplier to the river. Tr. 204. The transfer stations house motor drives that operate contiguous sections of the conveyor belt. 16 FMSHRC at 2459; Tr. 187. Each transfer station is a 20-feet-square, 2-story metal building with a concrete first floor and a grate-type second floor. Tr. 204, 227, 229.

to establish a reasonable likelihood of serious injury. *Id.* The judge assessed civil penalties totaling $1,800. *Id.* at 2462.

The Commission subsequently granted the petition for discretionary review filed by the Secretary, challenging the judge's determination that the violations of section 77.202 were not S&S.

II.

Disposition

A. Docket No. PENN 94-54

1. Unwarrantable Failure

New Warwick argues substantial evidence[9] does not support the judge's finding that the section 75.400 accumulation violation was unwarrantable. It asserts that the accumulations had not existed for a long time and were not extensive, it was not on heightened alert for accumulations, cleanup surpassing the requirements of its cleanup plan had been performed by the night shift, and the area was going to be hosed down on the first pass by the day shift. N.W. Br. at 4-9. The Secretary responds that substantial evidence supports the judge's finding. He asserts that the accumulations were extensive and took at least one shift to amass, New Warwick was on notice that accumulations violated the standard, no cleanup had been performed by the night shift, and New Warwick's compliance with its cleanup plan does not shield it from an unwarrantable failure finding. S. Resp. Br. at 3-10.

The unwarrantable failure terminology is taken from section 104(d) of the Mine 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 (December 1987), the Commission

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

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, 193-94 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission "has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994), *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992).

Preliminarily, the judge's finding that the accumulations "had not existed for a long time" is supported by substantial evidence. The record indicates the accumulations resulted in part from a reduced amount of water applied on the last pass of the longwall shear on the night shift. 16 FMSHRC at 2455. Paul Wells, New Warwick's longwall foreman on the day shift, testified that the night shift had "cut out," i.e., turned around, at the no. 1 shield -- a process which produces a large amount of water mist and dust. *Id.* at 2454; Tr. 107-08, 118, 120. He explained that, during this process the crew usually reduces the amount of water to avoid getting wet from mist caught in the air traveling down the face. Tr. 118. Wells further stated that water sprays on the shear were suppressing dust from the headgate to the No. 40 shield during the last 10 or 15 minutes of the shift, but that a miner probably did not manually hose down the shields. Tr. 118-19, 121-22. In addition, the judge noted that, contrary to Inspector Santee's and Radolec's testimony that it appeared the longwall section had not been cleaned recently and the accumulations had collected over a full shift, Foreman Smith testified that cleanup had occurred during the night shift. 16 FMSHRC at 2453, 2455 n.5, *citing* Tr. 128-30 (longwall shields were hosed down "usually [on] every pass" and two crew members did nothing but shovel).

Although the accumulations had not existed for a long period of time, substantial evidence supports the judge's determination that New Warwick's violation was aggravated given the extensiveness of the accumulations, the fact that New Warwick had been placed on notice that greater efforts were necessary for compliance with the standard, and New Warwick's failure to immediately clean up the accumulations.

First, substantial evidence supports the judge's finding that the accumulations were extensive. 16 FMSHRC at 2455. Float coal dust had accumulated up to 1/4-inch deep on surfaces of the longwall shields, headgate, stageloader, cables, and cable trough, covering energized parts that supply power to the longwall shear. Tr. 18-19, 56, 92-94; Gov't Ex. 1. In addition, loose coal had accumulated up to 6-inches deep behind the longwall shields and loose coal mixed with slate rock had accumulated up to 22-inches deep on some of the shield toes. Tr. 92-93; Gov't Ex. 1. The accumulations were deposited along the entire longwall section, which was 123 shields in length. Tr. 98-99, 108; Gov't Ex. 1.

Second, the judge's finding that New Warwick "should have been on a 'heightened alert' that such accumulations could occur" is also supported by substantial evidence. 16 FMSHRC at 2455, *citing Drummond Co.*, 13 FMSHRC 1362, 1368 (September 1991). The Commission has recognized that repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they place an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64; *Drummond*, 13 FMSHRC at 1363-64, 1368. The record indicates that, during the previous inspection period (April 1 to June 30, 1993), MSHA had found 16 violations of section 75.400 at Warwick. Gov't Ex. 1. Moreover, twice during the two days preceding issuance of the instant order, Inspector Santee informed New Warwick that similar accumulations were not permitted. In fact, the mine superintendent assured Inspector Santee that preventive measures would be taken seriously because MSHA could use it as a basis for an unwarrantable failure finding. Tr. 24.

Finally, substantial evidence supports the judge's finding that New Warwick failed to take sufficient measures to clean up the accumulations. 16 FMSHRC at 2455 & n.5. In *Utah Power and Light Co.*, 11 FMSHRC 1926, 1933 (October 1989), the Commission held that the operator did not demonstrate unwarrantable failure because before and during the inspection, miners were shoveling the accumulations and attempting to abate the condition. Here, New Warwick was not engaged in cleanup when Inspector Santee observed the accumulations. Tr. 22, 108-09, 117, 128-30. Further, New Warwick had not yet implemented Inspector Santee's recommendation that additional washdown hoses be installed to facilitate cleanup of the accumulations. Tr. 79. Given New Warwick's knowledge that the reduction of water would lead to accumulations and that it had been warned during both of the past two days not to allow accumulations to exist, its reliance on the night shift's cleanup efforts or on the anticipated efforts of the day shift was not reasonable. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994) (to support a conclusion that an operator's conduct was not unwarrantable, an operator's good faith belief that its conduct was the safest method of compliance must be reasonable).

Based on consideration of the above factors, we conclude that substantial evidence supports the judge's determination that New Warwick demonstrated aggravated conduct by failing to clean up the accumulations. Accordingly, we affirm the judge's holding.

2. Violation of Section 75.360(b)

The Secretary argues that substantial evidence does not support the judge's finding that there was no violation of the section 75.360(b) preshift examination requirement. He asserts that the accumulations were extensive and took at least one shift to amass, the accumulations likely existed during the preshift examination, and the judge's finding that there was no preshift violation does not accord with his finding that the related accumulation violation was unwarrantable. S. Br. at 6-9. New Warwick responds that substantial evidence supports the judge's finding. N.W. Resp. Br. for Dckt. No. PENN 94-54 at 5-10.

In concluding that the accumulations may not have existed or been as extensive during the preshift examination, the judge credited Foreman Smith's testimony that he had not observed any hazardous conditions over Inspector Santee's assumption that the accumulations had collected over a full shift. 16 FMSHRC at 2456. We find no basis to reverse the judge's credibility determination. The record indicates that the preshift examination of the mine was conducted between 1:00 and 3:00 a.m. (Tr. 21) but does not specify the time at which the longwall section was examined. Smith related that mining conditions were adverse and, as soon as the shields moved, they looked as though they had not been cleaned. Tr. 132. He asserted that the accumulations of float dust in the trough could have amassed in one pass of the longwall shear, which normally takes 30 to 45 minutes. Tr. 86-87, 111-12, 132-33. Thus, the longwall section could have been examined early during the preshift examination and one or more passes of the longwall could have occurred before the longwall broke down at 3:30 a.m. Therefore, the judge's conclusion that the accumulations may not have existed or been as extensive at the time the longwall section was examined is supported by substantial evidence. Accordingly, we affirm the judge's holding that New Warwick did not violate section 75.360(b).[10]

B. Docket No. PENN 93-445

1. Significant and Substantial

The Secretary argues substantial evidence does not support the judge's finding that the section 77.202 accumulation violations in the transfer stations were not S&S. He asserts the judge ignored testimony that an explosion, rather than a fire alone, was reasonably likely to occur and result in serious injury. S. Br. at 9-13. New Warwick responds that substantial evidence supports the judge's finding. It contends that the inspector improperly modified the citations, a fire and subsequent explosion were not likely, and an explosion has never occurred in a transfer station. N.W. Resp. Br. for Dckt. No. PENN 93-445 at 6-12.

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the

[10] We reject the Secretary's argument that the judge's determination that there was no preshift violation is inconsistent with his finding that the violation of section 75.400 was aggravated. Although the accumulations were extensive, they could have amassed following examination of the longwall section.

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

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d at 135; *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985). When examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a "confluence of factors" exists to create such a likelihood. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *see also Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 184 (February 1991).

We agree with the Secretary that the judge erred by failing to address the hazard of explosion. The record indicates that Inspector Terrett was concerned about both the hazards of fire, which could result from deposited coal dust, and explosion, which could result from suspended coal dust. Tr. 192, 195, 201-02, 210-14, 219, 222. Terrett acknowledged that, if there were only a fire, an employee would not have difficulty getting out of the transfer station because he would have warning. Tr. 222-23. He also testified, however, that if the fire were instantaneous and created a dust explosion, an employee would have difficulty escaping and could be "killed right there." Tr. 195, 223. In addition to his concern that an employee might have to jump off of the second floor to escape a fire or explosion, Terrett was concerned that an employee could be burned, inhale smoke or byproducts of the belts, or might not be able to get out of the building. Tr. 201, 202-03, 213.

New Warwick's argument that there is no evidence an explosion has ever occurred in a transfer station is not dispositive of an S&S finding. *Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2046 (October 1994); *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (February 1986). Furthermore, the record does not suggest that Inspector Terrett acted inappropriately by modifying the citations. Terrett testified he modified the S&S designations after realizing the seriousness of the violations. Tr. 202-03, 215. He explained that, as a new inspector, he was inexperienced with "putting [citations] together" and writing modifications. Tr. 216. Terrett stated that he conferred with his supervisor to ensure that the modifications were correct. Tr. 216-17.

Because the judge failed to evaluate evidence or make findings and conclusions regarding the hazard of explosion, we vacate the judge's determination that the violations were not S&S and remand the matter for further consideration.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that the violation of section 75.400 resulted from unwarrantable failure and that there was no violation of section 75.360(b). In addition, we vacate the judge's determination that the violations of section 77.202 were not S&S and remand for further consideration.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur in this decision, with the exception of the disposition regarding the violations of 30 C.F.R. § 77.202. In view of the record evidence, I conclude that the violations were S&S and therefore I would reverse the judge's contrary conclusion.

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 20, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 93-123-M
	:	WEST 93-286-M
D.H. BLATTNER & SONS, INC.	:	WEST 94-5-RM

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

DECISION

BY THE COMMISSION:

In these consolidated contest and civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge John J. Morris determined that D.H. Blattner & Sons, Inc. ("Blattner"), an independent contractor, was required to file an operator legal identity report under 30 C.F.R. § 41.20.[2] 16 FMSHRC 1762 (August 1994) (ALJ). For the reasons set forth below, we affirm his decision.

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[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 41.20, entitled "Legal identity report," provides, in part:

> Each operator of a coal or other mine shall file notification of legal identity and every change thereof with the appropriate district manager of the Mine Safety and Health Administration by properly completing, mailing, or otherwise delivering form 2000-7 "legal identity report" which shall be provided by the Mine Safety and Health Administration for this purpose.

I.

Factual and Procedural Background

Blattner is a construction company engaged in a variety of projects, including highway construction and mining. 16 FMSHRC at 1763-64. These cases involve three citations issued to Blattner for failure to file a legal identity report at three separate mining operations: the Yankee Project and Aurora Partnership Mines in Nevada and the Van Stone Mine in Washington State. *Id.* at 1763. Prior to the issuance of the citations, Blattner obtained a contractor identification number pursuant to 30 C.F.R. § 45.3,[3] which it used on all of its jobs at mines. *Id.* at 1764.

A. Yankee Project

The Yankee Project Mine is an open pit, heap leach gold mine[4] owned by USMX, Inc. ("USMX"). 16 FMSHRC at 1764. Prior to the citation at issue, USMX had a mine identification number, No. 26-02190, covering the entire operation. Tr. 51; R. Ex. 1. The mine contains a pit area, a crushing and leaching operation adjacent to the pit, and a mill area that is 5 miles away. Tr. 46, 49-51; R. Ex. 10. On October 17, 1991, Blattner entered into a contract with USMX to perform services in the pit, including drilling, blasting, loading, hauling and dumping ore and waste material. 16 FMSHRC at 1764; J. Ex. 1, at 14-16. Blattner retained a subcontractor, ICI Explosives ("ICI"), to perform drilling and blasting work. 16 FMSHRC at 1764.

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[3] Section 45.3, entitled "Identification of independent contractors," provides, in part:

> (a) Any independent contractor may obtain a permanent MSHA identification number. To obtain an identification number, an independent contractor shall submit to the District Manager in writing the following information:
>
> (1) The trade name and business address of the independent contractor;
>
> (2) An address of record for service of documents;
>
> (3) A telephone number at which the independent contractor can be contacted during regular business hours; and
>
> (4) The estimated annual hours worked on mine property . . . .

[4] Heap leaching is a process to extract gold by use of cyanide carbon solution. Tr. 27.

In September 1992, Steven A. Cain, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the Yankee Project Mine and learned that Blattner was extracting ore from the pit and supplying it to USMX to process. *Id.* at 1771. He discovered from the Safety Director at USMX, Ken Gubler, that USMX basically had nothing to do with Blattner's safety program and that Blattner was responsible for the safety of its employees and those of ICI in the pit. *Id.*; Tr. 29-30. Cain consulted with MSHA Supervisory Mine Inspector Paul Belanger. Tr. 30-31, 207. Belanger telephoned Yankee Project and learned from USMX Manager of Operations Jim Kentopp that USMX was responsible for the mill and the crushing but had no involvement in the daily supervision of Blattner's operation in the pit. Tr. 214-15.

After consultation with other MSHA officials, Belanger determined that Blattner needed to submit a legal identity report. Tr. 31, 207-08; Deposition of Vernon Gomez, MSHA Administrator of Metal/Nonmetal Mines dated April 30, 1993, at 95 (incorporated into the record at Tr. 556). When Blattner refused to comply, Inspector Cain issued a citation on September 14, 1992, for failure to file such a report. Tr. 31; Gov't Ex. 1. Under protest, Blattner completed a legal identity report and the citation was terminated. Gov't Ex. 1. As a result, two legal identity numbers, one covering the pit where Blattner operated and the other covering the milling and crushing operations run by USMX, were assigned to the project. Tr. 59-61; Gov't Ex. 1; R. Ex. 1.

B. Van Stone

The Van Stone Mine is an open pit lead and zinc mine owned by Equinox Resources, Inc. ("Equinox"). 16 FMSHRC at 1765, 1772. On November 19, 1990, Blattner contracted with Equinox to perform services such as blasting, loading and hauling of ore and waste materials. 16 FMSHRC at 1765; J. Ex. 2, at 2. Blattner retained a subcontractor, Roundup Powder, for drilling and blasting. 16 FMSHRC at 1765.

After an MSHA staff meeting where the subject of Blattner's activities was discussed, MSHA Supervisory Inspector Collin Galloway asked an inspector to investigate Blattner's responsibilities at the mine. *Id.* at 1772. The inspector reported that Blattner was in charge of mining operations in the pit and that Equinox was running the mill. *Id.*

Inspector Galloway informed Blattner that, because it was responsible for safety in the pit, it needed to file a legal identity report. *Id.* When Blattner refused, he issued a citation. *Id.* Blattner completed a legal identity report and the citation was terminated. Gov't Ex. 2. As a result of Blattner's filing, the Van Stone Mine was assigned two separate mine identity numbers, one for the pit and one for the mill. Tr. 137-38, 149.

C. Aurora Partnership

The Aurora Partnership Mine is an open pit, heap leach gold and silver mine owned by the Aurora Partnership ("Aurora"). 16 FMSHRC at 1766; Tr. 165. It consists of a pit, where the ore is extracted, and, approximately a mile away, a mill for processing gold and silver from the ore. Tr. 165-66, 176. On June 16, 1993, Blattner entered into a contract with Aurora to provide services in the pit, including drilling, blasting, crushing, loading and hauling ore and non-ore material, and preparing and maintaining haul roads and pit walls. 16 FMSHRC at 1766; J. Ex. 3, at 4. Blattner subcontracted the drilling and blasting work to ICI and the crushing to Fisher Industries. 16 FMSHRC at 1766.

Blattner took over the mining activities from Lost Dutchman Construction ("Lost Dutchman"), which previously had submitted a form 2000-7 and was assigned a legal identity number. 16 FMSHRC at 1772. Aurora was assigned a separate legal identity number for the milling and leaching operation. Tr. 177.

On an inspection of Aurora in June 1993, Inspector Robert Morley learned that Blattner might be replacing Lost Dutchman. Tr. 168-71. He informed Blattner's job superintendent, Bob Cameron, that Blattner would need to fill out a report and assume Lost Dutchman's legal identity number. Tr. 171. Morley left a report for Blattner to complete. Tr. 172. On July 29, 1993, Larry Turner, Senior Mine Engineer for Aurora, notified MSHA in writing that Blattner would serve as the prime contractor for mining activity. 16 FMSHRC at 1772. Cameron also informed Morley that, as of August 2, Blattner would be mining the property. Tr. 171. On September 2, Morley visited the mine, learned that Blattner had not filed a report, and issued Blattner a citation. 16 FMSHRC at 1772; Tr. 171; Gov't Ex. 3. Under protest, Blattner completed a legal identity report and assumed Lost Dutchman's identity number. Tr. 177, 193-94; Gov't Ex. 3. Blattner filed a notice of contest disputing the citation.

The three proceedings were consolidated for trial. The only issue before the judge was whether Blattner was required to file a legal identity report under section 41.20. 16 FMSHRC at 1763. After an evidentiary hearing, the judge found that Blattner "exercised direct supervision and control over the ore extraction process and the health and safety of the miners so involved" at the three mines. *Id.* at 1771. In concluding that Blattner qualified as an operator obliged to complete a legal identity report, the judge reasoned that "requiring Blattner to comply with [section 41.20] directly promotes the safety goals of the Act." *Id.* at 1768, 1771. The judge affirmed the Secretary's proposed penalties of $50 for each of the two civil penalty proceedings and dismissed Blattner's contest. *Id.* at 1777.

II.

Disposition

Blattner does not dispute that it is an operator under the Act. B. Br. at 14. Rather, relying on MSHA's Enforcement Policy and Guidelines for Independent Contractors, 45 Fed. Reg. 44,494, 44,497, 44,498 (1980) ("Enforcement Guidelines") and Part 45 of MSHA's Program Policy Manual ("PPM"), Blattner maintains that, under the regulatory scheme, it is only required to submit information required of independent contractors. *Id.* at 8, 11-14, 23-27. Blattner contends that, because it is neither a "designated independent contractor" under 30 C.F.R. § 41.1(a), or a "production-operator" under 30 C.F.R. § 45.2(d), it cannot be required to file a legal identity report. *Id.* at 9-11, 16-23. Blattner further argues that MSHA's decision to require independent contractors to file operator reports constitutes a major policy change and, as such, is invalid because the change was not implemented pursuant to proper rulemaking procedures. *Id.* at 27-32.

The Secretary asserts that his interpretation of his own implementing regulations should be given deference. S. Br. at 11-12. The Secretary also argues that Blattner meets the definition of operator in section 41.1(a), by its plain terms, because it (1) "control[led] or supervise[d]" the three mines and (2) qualified as a "designated independent contractor." *Id.* at 14-15 & n.3. The Secretary contends that substantial evidence supports the judge's finding that Blattner was a production-operator at each of the three mines. *Id.* at 27-28. According to the Secretary, the Enforcement Guidelines and the PPM are non-binding and specifically provide MSHA with the discretion to require independent contractors to file operator identity reports. *Id.* at 17-26. The Secretary maintains that the decision to require Blattner to file legal identity reports reflects his longstanding interpretation of the Part 41 reporting requirements and does not constitute a substantive rule subject to rulemaking requirements. *Id.* at 33-34. The Secretary further argues that he cannot be estopped from acting on a violation even if he did not cite an identical condition in the past. *Id.* at 34-35.

Section 109(d) of the Mine Act provides that "[e]ach operator of a . . . mine subject to this chapter shall file with the Secretary the name and address of such mine and the name and address of the person who controls or operates the mine." 30 U.S.C. § 819(d). Section 3(d) defines an operator as "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). Section 103(h) further authorizes the Secretary to require an operator to provide information and reports as are necessary to the Secretary to administer the Mine Act. 30 U.S.C. § 813(h).

The Secretary's implementing regulations mirror the statutory provisions. Section 41.20 provides that "[e]ach operator . . . shall file notification of legal identity . . . by properly completing, mailing, or otherwise delivering form 2000-7 'legal identity report.'" An operator is defined in section 41.1(a) as "[1] any owner, lessee, or other person who operates, controls, or

supervises a coal or other mine or [2] any designated independent contractor performing services or construction at such mine."

Based on Blattner's status as an operator under the plain terms of section 41.1(a), we conclude that the Secretary properly cited Blattner for failing to file an operator's legal identity report under section 41.20.[5] Blattner qualifies as a "person[6] who operates, controls, or supervises a coal or other mine" within the meaning of section 41.1(a). Further, substantial evidence[7] supports the judge's determination that "Blattner exercised direct supervision and control over the ore extraction process and the health and safety of the miners so involved." 16 FMSHRC at 1771. The three MSHA inspectors who issued the citations testified that Blattner supervised and was responsible for safety in the pits of the three mines. Tr. 37-39, 126, 128, 135-36, 175-76, 188-90. Blattner witnesses also testified that Blattner supervised, trained and directed its employees and subcontractors in the pit areas. Tr. 430-31, 520-21, 544-47. Blattner had its own equipment, which it maintained. Tr. 37. Blattner played a predominant role in the pits. As former Senior Mine Engineer at Aurora, Larry Turner, testified, Blattner had 45 to 50 employees, including subcontractor employees, in the pit whereas Aurora had only a small force. Tr. 263-64. He also testified that Blattner ran its own safety program and performed supervision in the pit. Tr. 262-63, 266; Gov't Ex. 8. The contracts between Blattner and the owners specify that Blattner was to supervise the work it had contracted to perform. J. Ex. 1, at 3-4; J. Ex. 2, at A-15; J. Ex. 3, at 8. The record showed that Blattner was responsible for administering safety programs in the pits. Tr. 37-38, 130, 262, 430-32, 523-24. In addition, Blattner hired, directly

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[5] Because Blattner meets the definition of an operator under the first clause of section 41.1, the Commission does not reach the question of whether Blattner is also a "designated independent contractor" under the second clause of section 41.1(a).

[6] 30 C.F.R. § 41.1(b) defines "person" as "any individual, sole proprietor, partnership, association, corporation, firm, subsidiary of a corporation, or other organization."

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

paid, and was responsible for subcontractors who performed blasting and drilling in the three mines as well as crushing at Aurora. Tr. 38, 431-32, 437, 523-24, 544-47; Gov't Ex. 8.[8]

We reject Blattner's contention, as did the judge, that it cannot be both an independent contractor under Part 45 and an operator under the reporting requirements of section 41.20. *See* 16 FMSHRC at 1768-70. Nothing in the language of the Part 41 and Part 45 regulations states that the coverage in each provision is mutually exclusive. The Commission has recognized that an entity may be both an operator and an independent contractor. *Joy Technologies Inc. - Coal Field Operations*, 17 FMSHRC 1303, 1306-09 (August 1995); *Lang Brothers, Inc.*, 14 FMSHRC 413, 419-20 (September 1991) (published March 1992). *See also Ass'n of Bituminous Contractors v. Andrus*, 581 F.2d 853, 861-62 (D.C. Cir. 1978) (independent contractor qualifies as an operator under the Coal Act). Thus, the fact that Blattner filed an independent contractor report under section 45.3 did not relieve it from filing an operator report under section 41.1(a). We do not reach Blattner's argument that it is not a production-operator under section 45.2(d) and therefore does not have to file a legal identity report. Blattner's status under Part 45 is not determinative of whether it must file an operator report under Part 41.[9]

Blattner's contentions that the citations are invalid because they are contrary to MSHA's PPM and Enforcement Guidelines are also unpersuasive. As the judge correctly pointed out, the Enforcement Guidelines and the PPM are not binding on the Secretary or the Commission. *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981) ("[T]he Manual's 'instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission].' . . . [T]he express language of a statute or regulation 'unquestionably controls' over material like a . . . manual.") (citations omitted); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1360 (September 1991). In *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986), the court held that the specific Enforcement Guidelines at issue here were non-binding on the Secretary because they were general statements of policy, "replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit." Moreover, the Enforcement Guidelines and the PPM give the Secretary the discretion to require an independent

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[8] Blattner's argument that it did not exercise "prime and overall responsibility" over the properties, *see* B. Br. at 19-20, is unpersuasive. Section 41.1(a) does not require an operator to have overall responsibility for the mine property.

[9] We are also unmoved by Blattner's argument that confusion will be created by assigning multiple mine numbers to one property. The Fourth Circuit long ago recognized under the Coal Act that there can be multiple mines at a single site. *Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 246 (4th Cir. 1977). Congress specifically approved *Bituminous Coal Operators' Ass'n* in enacting the Mine Act. S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

contractor to file an operator report. The preface to the Enforcement Guidelines states that they are for the guidance of MSHA inspectors in making their "individual enforcement decisions." 45 Fed. Reg. at 44,495. The guidelines caution that nothing in them is meant to alter the basic compliance responsibilities of production-operators. 45 Fed. Reg. at 44,497. Additionally, the PPM provides that "[m]illing operations that receive ores from an underground or a surface mine on the same property may be assigned a separate identification number or may share the same identification number as the mine." Gov't Ex. 6 (PPM) at 1.

Thus, we also reject Blattner's additional contention that, because the citations represent a change in MSHA rule and policy, the Secretary must proceed by notice and comment rulemaking. Since section 41.20 applies to Blattner by its clear terms, rulemaking was not needed. When a governmental action "restates an obligation imposed by . . . regulations," it is not subject to notice and comment rulemaking. *State of Indiana, Dept. of Public Welfare v. Sullivan*, 934 F.2d 853, 856 (7th Cir. 1991). Moreover, as a factual matter, substantial evidence supports the judge's rejection of Blattner's claim that the citations signified a change in MSHA policy. *See* 16 FMSHRC at 1777. The record contains evidence that MSHA required a number of other contractors to file such a report prior to 1992, the year in which Blattner claims the policy changed. Tr. 203, 207; Gomez Dep. at 80; Gov't Ex. 6 (PPM) at 9 (dated July 1, 1988) (independent contractor classified as a mine operator is required to file legal identity report). Although some conflicting testimony on this point exists (*see* Tr. 142-43, 182-83), the judge made a credibility determination that no change in policy occurred; such determinations are not to be overturned lightly and are entitled to great weight. *In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995).

We also reject Blattner's argument that the Secretary abused his discretion in citing it for a violation of section 41.20. "The Commission and courts have recognized that the Secretary has wide enforcement discretion," which is reviewable by the Commission. *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994), (citing *Bulk Transportation*, 13 FMSHRC at 1360-61); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989); *Brock v. Cathedral Bluffs*, 796 F.2d at 538. In this case, we find no basis to conclude that the Secretary abused his discretion.

Blattner argues, in effect, that the Secretary should be estopped from enforcing the regulation because the Secretary had not required Blattner and other similarly situated contractors to file such reports in the past. As we have already noted, the judge determined that the Secretary required other contractors to file such reports in the past, and we see no basis for overturning that finding.

Accordingly, we conclude that Blattner plainly met the regulatory definition of operator and that the Secretary properly required Blattner to file an operator legal identity report.

III.

Conclusion

For the reasons set forth above, we affirm the judge's determination that Blattner violated section 41.20 by failing to file a legal identity report and accordingly affirm the penalties assessed as well as the dismissal of the contest proceeding.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 24, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 96-318-M A.C. No. 10-00402-05551
KINROSS DeLAMAR MINING COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 26, 1996, the Commission received from Kinross DeLamar Mining Company ("Kinross") 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).[1] The Secretary of Labor filed a response, indicating that he does not oppose the motion for relief filed by Kinross.

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

[1] On September 6, Kinross filed an amended motion, identical to its original request except that it contains an express reference to a supporting affidavit and an original copy of that affidavit, which is attached to its request as Exhibit 3.

Kinross states that it mailed a timely request for a hearing ("Green Card") to the Department of Labor's Mine Safety and Health Administration ("MSHA"), thirty days after it received a Proposed Assessment Form mailed to its mine by MSHA. It asserts that, because of the inaccessible location of its mine, its does not receive regular mail deliveries from the nearest U.S. Post Office, but must make arrangements to pick up and deliver its mail, resulting in a one-day delay in the actual receipt of its mail. K. Mot. at 1-2. Kinross therefore explains that, although the notice of proposed penalty was delivered to the post office on June 24, 1996, it did not receive it until June 25. *Id.* at 2, 4. Kinross further asserts that it mailed and postmarked its Green Card on July 25, but that the postmaster over-stamped, or re-postmarked, the Green Card for July 26. *Id.* at 2-3, 5. Attached as exhibits to Kinross' motion are copies of the certified mail receipt accompanying the notice of proposed assessment, Kinross' Green Card, and an affidavit by Mary Barraco, Kinross' Superintendent of Safety and Environmental Services.

The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)"), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994).

The Commission has observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996). It appears from the record that Kinross had a reasonable basis for believing that it timely mailed its Green Card. Even assuming the Green Card was not in fact timely mailed, the untimeliness could be properly found to be attributable to "inadvertence" or "mistake" within the meaning of Rule 60(b)(1) -- due to the unique mail service situation at the Kinross mine. Accordingly, in the interest of justice, we grant Kinross' unopposed request for relief and reopen

the penalty assessment that became 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

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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September 24, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 96-349
	:	A.C. No. 15-16454-03575
v.	:	
	:	Docket No. KENT 96-350
GREEN COAL COMPANY , INC.	:	A.C. No. 15-16454-03576

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 26, 1996, the Commission received from Green Coal Company, Inc. ("Green Coal") a request 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). On September 10, the Commission received the Secretary of Labor's response, opposing the request.

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

The only reasons offered by Green Coal for the late filing of its hearing requests are that the company has been involved in bankruptcy proceedings, and that it is attempting to cut costs in order to save the mine operation and employee jobs. Section 110(i) of the Mine Act includes, among other criteria to be considered by the Commission in assessing penalties, "the appropriateness of such penalty to the size of the business," and "the effect on the operator's ability to stay in business." 30 U.S.C. § 820(i). The Act nonetheless imposes certain burdens

and responsibilities on operators, perhaps the least of which is to sign the "Green Card" accompanying a citation and mail it to the address printed on the card in order to perfect their due process right to a hearing. Green Coal failed to timely file "Green Card" notices of contest challenging the proposed penalty assessments by the Department of Labor's Mine Safety and Health Administration ("MSHA").

The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)"), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994). Relief from a final order is available in circumstances such as a party's mistake, inadvertence, or excusable neglect. Requests to reopen under Rule 60(b) must be made within a reasonable time and are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied,* 484 U.S. 1027 (1988). *See also Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 619 n.1 (April 1990). Rule 60(b) is "the mechanism by which courts temper the finality of judgments with the necessity to distribute justice" and "is a tool which trial courts are to use sparingly. . . ." *Randall*, 820 F.2d at 1322; *Pit*, 16 FMSHRC 2033, 2034 (October 1994).

Green Coal has offered no satisfactory explanation for its failure to timely file hearing requests in these cases. The mere fact that it is involved in bankruptcy proceedings, or in cutting costs, does not, in itself, provide a basis for relief under Rule 60(b). Moreover, Green Coal has failed to provide any explanation of how its involvement in bankruptcy proceedings or cost-cutting contributed to the late submission of its hearing requests. Thus, Green Coal has failed to set forth grounds establishing that Rule 60(b) relief is appropriate for the uncontested assessments that became final by operation of section 105(a) of the Mine Act. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995); *North Star Contractors, Inc.*, 17 FMSHRC 886, 887 (June 1995); *Pit*, 16 FMSHRC at 2034. Accordingly, we conclude that Green Coal's request does not justify relief under Rule 60(b).

For the foregoing reasons, Green Coal's request for relief is denied.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 94-381
CANNELTON INDUSTRIES, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 95-100
CHARLES PATTERSON, employed by CANNELTON INDUSTRIES, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 95-101
GEORGE RICHARDSON, employed by CANNELTON INDUSTRIES, INC.	:	

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

ORDER

BY: Jordan, Chairman; and Riley, Commissioner

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 29, 1996, Administrative Law

[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this order. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

Judge Todd Hodgdon issued a decision in which he concluded that Cannelton Industries, Inc. ("Cannelton") violated 30 C.F.R. § 75.400 by failing to clean up an accumulation of coal under a conveyor belt, that the violation was significant and substantial ("S&S") and the result of unwarrantable failure, and that Charles Patterson and George Richardson, employed by Cannelton, knowingly authorized the violation by failing to have the accumulation cleaned up. 18 FMSHRC 651, 654-61 (April 1996) (ALJ). The judge ordered Cannelton, Patterson, and Richardson to pay civil penalties of $3,600, $500, and $500, respectively. 18 FMSHRC at 661-62. The Commission granted the petition for discretionary review filed by counsel for Cannelton, Patterson, and Richardson, challenging the judge's determinations.

On July 15, 1996, counsel for Cannelton, Patterson, and Richardson filed a motion to remand and reopen the record and motion to stay review proceedings. Counsel explains that the movants' counsel at the hearing, an inexperienced attorney within the same law firm, failed to present certain relevant evidence because its existence "slipped his mind." Mot. at 5 & Att. B. He asserts the failure to present the evidence was not the result of culpable conduct by the movants and the evidence establishes a defense that would have altered the outcome of the case had it been admitted. *Id.* at 9. Attached to the motion are photocopies of the evidence and the affidavit of the hearing counsel. Atts. A & B. Counsel requests that, pursuant to Fed. R. Civ. P. 60(b),[2] the Commission remand the matter to the judge, order the record to be reopened for the taking of additional evidence, and stay review proceedings pending the judge's decision on remand.[3] Mot. at 9-10. He asserts that the Secretary of Labor would not be prejudiced by the granting of the motion. *Id.* at 9.[4]

On July 18, 1996, the Secretary filed an opposition to the motion and a motion to strike. He argues that the movants have not established a basis for relief under Rule 60(b) and that he

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[2] Rule 60(b) states, in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

[3] Counsel also requests that briefing be stayed pending the Commission's consideration of the motion. Mot. at 3. On July 17, 1996, the Commission issued an order staying the filing of briefs until further notice.

[4] On July 18, 1996, counsel filed a supplemental statement to the motion, contending that the judge incorrectly stated the date on which the citation was issued and that, in view of the correct date, the additional evidence is relevant to whether Cannelton had notice of the accumulation. Supp. Statement at 1.

would be prejudiced by the granting of relief and requests that the Commission deny the motion. S. Opp. at 4-13. In addition, the Secretary requests that the evidentiary material attached to the motion and all references thereto be stricken from the record because it was not properly introduced. *Id.* at 13-14.

On August 2, 1996, counsel for Cannelton, Patterson, and Richardson filed an opposition to the Secretary's motion to strike. Counsel argues that submission of the evidentiary material is necessary to justify reopening the record and requests that the Commission deny the motion to strike. C. Opp. at 3-5.

A final Commission judgment or order may be reopened under Rule 60(b)(1) & (6) in circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988). Rule 60(b) is "the mechanism by which courts temper the finality of judgments with the necessity to distribute justice" and "is a tool which trial courts are to use sparingly. . . ." *Randall*, 820 F.2d at 1322. *See also Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 619 n.1 (April 1990).

In *Midwest Minerals, Inc.*, 12 FMSHRC 1375 (July 1990), the Commission denied an operator's motion to remand and reopen the record for the taking of additional evidence where its non-attorney representative failed to introduce evidence relevant to its defense. The Commission reasoned:

> Because the adequacy of a party's representation at hearing is linked to the party's choice of its representative, we must look askance at any request that Rule 60(b) relief be granted because the party's chosen representative is claimed to have performed ineffectually at the hearing before the judge resulting in an adverse decision. Routinely granting such relief would . . . unfairly provide a losing party "a second turn at bat."

Id. at 1377. Similarly, in this case, the attorney's failure to present evidence at the hearing does not provide a basis for reopening the record.

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993), the Supreme Court reaffirmed the principle that "clients must be held accountable for the acts and omissions of their attorneys." *Id.* at 396 (citing *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962), *United States v. Boyle*, 469 U.S. 241 (1985)). The Court further explained that whether a party's neglect is excusable is an equitable determination in which consideration should be given to "all relevant circumstances surrounding the party's omission." *Id.* at 395. The Court emphasized that the focus is upon the neglect of both the clients and their counsel. *Id.* at 397. Here, counsel for Cannelton, Patterson, and Richardson asserts that the movants had provided the

evidentiary material to the attorney, who was in possession of it during the hearing. Mot. at 5 & Att. B. Thus, knowledge of the evidentiary material can be charged upon both the movants and their attorney.

We conclude that movants have not met the criteria for relief under Rule 60(b). Although it is unfortunate that the evidentiary material "slipped the attorney's mind," the movants must be held accountable for the failure of counsel. Accordingly, we deny the motion to remand and reopen the record and the motion to stay review proceedings.

With regard to the motion to strike, the Secretary points out that the evidentiary material in question was not part of the record before the judge and was not subject to cross-examination or rebuttal. S. Opp. at 13. He correctly asserts that the Commission's consideration on review of this extra-record evidentiary material would contravene section 113(d)(2)(C) of the Mine Act, 30 U.S.C. § 823(d)(2)(C).[5] S. Opp. at 13-14. Therefore, we grant the motion to strike the evidentiary material and references to it from the motion insofar as it addresses the merits of the case. *See Midwest*, 12 FMSHRC at 1377 n.3.

Cannelton, Patterson, and Richardson are hereby ordered to file opening briefs within 30 days of the date of this order. Other briefs shall be filed in accordance with 29 C.F.R. § 2700.75(a).

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

[5] Section 113(d)(2)(C) states, in part:

> For the purpose of review by the Commission . . . the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review.

Commissioner Marks, concurring in part and dissenting in part:

With respect to the Secretary's motion to strike, I concur with the disposition of the majority to grant the motion.

However, I find that the circumstances supporting Cannelton's motions to remand and reopen the record and stay review of these proceedings sufficiently demonstrate excusable neglect under Fed. R. Civ. P. 60(b)(1). Accordingly, I would grant Cannelton's motions.

Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 5 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 95-29-M A.C. No. 03-01640-05511
v.	:	
REB ENTERPRISES INCORPORATED, Respondent	:	Docket No. CENT 95-30-M A.C. No. 03-01640-05512
	:	REB Enterprises Inc.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-239-M A.C. No. 03-01640-05517 A
v.	:	
HAROLD MILLER, Employed by REB ENTERPRISES INC., Respondent	:	REB Enterprises Inc.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-240-M A.C. No. 03-01640-05518 A
v.	:	
RICHARD E. BERRY, Employed by REB ENTERPRISES INC., Respondent	:	REB Enterprises Inc.

DECISION

Appearances: Daniel J. Haupt, Mine Safety and Health Administration, U.S. Department of Labor, Dallas, Texas, and Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; James E. Crouch, Esq., Cypert, Crouch, Clark & Harwell, Springdale, Arkansas, for the Respondent.

Before: Judge Weisberger

Statement of the Case

At issue in these consolidated cases are citations and orders issued by the Secretary ("Petitioner") to REB Enterprises Inc., ("REB"), alleging violations of various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Also at issue are citations issued to Harold Miller, and Richard E. Berry, alleging violations of Section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Pursuant to notice, a hearing was held in Fayetteville, Arkansas in June 11, 1996. REB filed a post-trial brief on July 17, 1996. Petitioner's post-hearing brief was filed on August 5, 1996. On August 14, 1996, REB's response to petitioner's post-hearing brief was filed.

I. Jurisdiction

REB operates a limestone quarry. As a part of the mining operation, overburden is first removed exposing limestone rock which is then blasted. The rock is then further crushed, stockpiled, and subsequently sold to customers. There is no evidence that any REB product is sold or used outside the state of Arkansas.

It is the position of REB and the individual Respondents, Miller, and Berry, that REB's operation is not subject to the Act's jurisdiction.

Section 4 of the Act provides that each mine ". . . the operations or products of which affect commerce," shall be subject to the Act.

In Jerry Ike Harless Towing, Inc., and Harless, Inc., (16 FMSHRC 683 (April 11, 1984)), the Commission analyzed the scope of the Commerce Clause of the Constitution as follows:

> The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. Fry v. United States, 421 U.S. 542, 547 (1975); Wickard v. Filburn 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted Section 4 of the Mine Act. Marshall v. Kraynak, 604 F.2d 231, 232 (3d Cir. 1979), cert. denied 444 U.S. 1014 (1980); United States v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993). In Lake, the mine operator sold all its coal locally and purchased mining supplies from a local dealer. 985 F.2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand." Id. Harless, supra at 686.

It is significant to note that a product mine at the quarry at issue, SP-2, which is used as a highway road base, was sold to a contractor who used the product in construction work performed on Arkansas state highway No. 412, which runs West from Arkansas, and crosses over and continues into the state of Oklahoma. Also, a Case bulldozer which was in operation at the mine on August 16, 1994, was manufactured in Racine, Wisconsin i.e., outside the state of Arkansas. Given these uncontested facts, and considering the broad principles enunciated by the Commission in Harless Towing, supra, and based on the authority of the sixth circuit in Lake, supra, I am constrained to find that REB's operation affected interstate commerce, and hence was subject to the Act's jurisdiction.

II. Citation No. 4327635.

At the hearing, Petitioner moved to withdraw this citation due to the lack of evidence to support it. Based upon Petitioner's representations, the motion was granted.

III. Citation No. 4327775.

James Clifton Enochs, an MSHA inspector, testified that on August 16, 1994, he reviewed REB's records. According to Enochs, the records indicated that the most recent test for continuity and resistance of the grounding system, was on April 8, 1993. According to Enochs there was no record of any test subsequent to that date and prior to his inspection on August 16, 1994. Enochs issued a Citation alleging a violation of 30 C.F.R. § 57.12028 which provides as follows: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative." (Emphasis added.)

Based upon the uncontradicted testimony of Enochs, I find that the most recent test of the continuity and resistance of the grounding system recorded by REB was April 8, 1993. I reject REB's argument that, in essence, there was no violation of Section 57.12028, supra, since it had until the end of the calendar year 1994 to perform and record the relevant testing.

Section 57.12028, supra, requires continuity testing "annually"' after installation. Websters Third New International Dictionary, (1986 Edition) ("Webster's") defines the word "annually" when used as an adjective as follows "***2: . . . done, or acted upon every year or once a year ... ." "Year" is defined in Webster's, as relevant, as follows: "c: a period of time equal to one year on the Gregorian calendar but beginning at a different time." In contrast, Webster's defines a "calendar year" as follows: "a period of a year beginning and ending with the dates which are conventionally accepted as marking the beginning and end of a numbered year." Hence, applying the common meaning of the adjective "annually", I find that Section 57.12028 supra, by its terms, is not satisfied by performing and recording the relevant test anytime within a calender year. I

conclude that Section 57.12028, supra, is not complied with if the relevant test was not performed and recorded within a year subsequent to the last such test. Since the last recorded test had been recorded more than twelve months prior to the date of the inspection, August 16,1994, I find that Section 57.12028 supra, has been violated. I find that a penalty of $50 is appropriate.

IV. Citation No. 4327776.

A. Violation of 30 C.F.R. § 57.14131(a)

Enochs testified that on August 16, 1994, as part of his inspection, he went to the pit along with Ray King, who was the foreman at the time. Enochs walked over to a R-20 Euclid haul truck to introduce himself to the driver. He climbed up to the running board and noticed that the driver, Ron Alexander, did not have his seat belt on. Enochs issued a Citation alleging a violation of 30 C.F.R. § 57.14131(a) which provides as follows: "Seat belts shall be provided and worn in haulage trucks".

Respondent did not impeach or contradict the testimony of Enochs regarding his observations. Accordingly his testimony in this regard is accepted. Based on his testimony, I find that on August 16, 1994, the driver of the R-20 Euclid haul truck was not wearing his seat belt. I thus conclude that REB violated Section 57.14131(a), supra,

B. Significant and Substantial

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

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

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

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

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

The truck at issue hauls material from the pit to the crusher over the roadway which Enochs described as being "somewhat rough" (Tr. 32). According to Enochs the roadway is mostly level but goes down an incline at the area of the crusher. Enochs indicated that there are other haul trucks and equipment operating in the area.

Enochs opined that should the truck overrun a berm, the operator would be thrown from the vehicle and severely injured because he was not wearing a seat belt. Also, Enochs opined that

should the truck run into another piece of equipment, the operator would be thrown into the windshield, and could be injured thereby. According to Enochs, there is constant spillage on the road, and if the truck should run over a large boulder, "it could throw the steering wheel, it could throw the unit itself" (Tr. 57). He opined that, based upon his experience, the occurrence of an accident resulting in the truck being wrecked is quite possible. According to Enochs, thirty percent of fatalities in the mining industry involve haulage units. He opined that should the truck roll over, the driver would most likely suffer a fatality, as he did not have a seat belt on. Enochs indicated that he investigated five or six situations in which haul trucks had rolled over.

Richard E. Berry, the owner, principal stockholder, and President of REB, indicated that REB has been operating a limestone quarry at the location in issue since 1988. According to Berry the distance from the pit to the crusher is approximately a quarter of a mile. He testified that at the crusher the roadway goes down a grade for about 100 feet, where it flattens out for 700 to 800 feet, and then goes up a grade that rises about thirty feet, and then becomes flat again. The roadway is between sixty to seventy feet wide, but narrows down to twenty feet for approximately 100 feet where the road goes up a grade. Berry said that the trucks that are driven over the roadway are about eight to nine feet wide, and generally pass one another.

I find, that REB did violate a regulatory standard, i.e., Section 56.14131(a) supra. I also find that this violation contributed to the hazard of the operator of the haul truck being injured should the truck collide with another vehicle or object, or overtravel a berm. However, the record does not establish the speed at which the haul truck regularly operates. There is no evidence that there was any problem with the truck's brakes, or that the truck had any other mechanical malfunction. Further, based upon the uncontradicted testimony of Berry, the roadway was wide enough to safely accommodate two trucks traveling in different directions. Although Enochs testified that the roadway was "somewhat rough" and that spillages were common, he did not proffer any evidentiary facts based upon his observations to support these conclusions.

Based upon the above record, I find that it has not been established that an injury producing event, i.e., the haul truck in question colliding with another object with such force and speed as to cause the driver to lose control of the truck, or to dislodge the driver, was reasonably likely to have occurred. I thus find that the third element in Mathies supra, has not been established. I find that it has not been established that the violation was significant and substantial.

C. Unwarrantable Failure

It is the Secretary's position that the violation herein constituted an "unwarrantable failure". As such, it is incumbent upon the Secretary to establish that REB's actions herein were more than ordinary negligence, and reached the level of aggravated conduct (Emery Mining Corp., 9 FMSHRC 1997 (1987)).

According to Enochs, a Mr. Hermstein, an MSHA inspector informed him that an industrial assistance program handouts concerning haulage were passed out to REB's supervisors, Ray King, and a Mr. Goody. Enochs stated, in essence, that Hermstein told him that he had spent three hours with King and Goody "... for the employees to make sure they preshift each unit, wear their seat belts brakes, steering, the major concerns" (sic) (Tr. 18). He also indicated that " . . . King had been warned by MSHA during the industrial assistance session on the seat belt usage and how important it was. There was--seemed to be no effort to enforce the seat belt law" (sic) (Tr. 33). According to Enochs, when he asked the cited driver of the haul truck why he had not been wearing a seat belt, he said that "nobody made a big deal about it" (Tr. 34). Enochs indicated that King did not say anything when the driver was cited, did not correct the condition or tell the driver that he had to wear the belt. Enochs said that King "... seemed somewhat indifferent to the whole situation" (Tr. 34). Enochs indicated that on the date of the inspection, he went inside REB's office and did not see any notices posted informing employees of the need and necessity to wear seat belts.

According to Berry, a sign is posted outside the building where employees check in, advising them of the need to wear seat belts. He also testified that a notice was posted in the office

advising employees of the need to wear seat belts.[1] I observed Berry's demeanor, and found that his testimony on these points was credible.

It is incumbent upon Petitioner to establish, by a preponderance of the evidence, that the violation at issue resulted from REB's aggravated conduct. Petitioner relies upon the heresay testimony of Enochs that King had been warned by MSHA personnel in an industrial assistance session regarding the use of seat belts at REB's facility. Neither King nor the MSHA personnel who allegedly imparted this information to King testified on behalf of Petitioner. I find the testimony of Enochs in this regard is inherently unreliable due to its heresay nature, and cannot be relied upon to establish that King received such a warning. Petitioner also relies upon an out of court statement by the driver of the cited truck to Enochs that "nobody made a big deal" out of the wearing of seat belts. This person was not called upon by Petitioner to testify to establish this point. I do not assign any probative value to Enochs' heresay testimony as such testimony is inherently unreliable. I find Enochs' testimony that, when cited, King did not provide much of a response and "seemed indifferent", to be too subjective, and thus not to be accorded any probative value. Further, I accept the testimony of REB's witnesses regarding the information that was posted on REB's premises concerning the use of seat belts. For these reasons, I find that it has not been established that the violation herein resulted from REB's unwarrantable failure.

D. Penalty

I find that Petitioner has not established that REB's negligence herein was more than moderate. I find that the driver of the truck, who was not wearing a seat belt, could have been seriously injured should the truck have been significantly jolted upon hitting another object, or should it have overturned. I

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[1]This notice was admitted in evidence as Defendant's Exhibit 30, is dated April 1995. However, Harold Miller, a REB employee who testified, and was found to be a credible witness on this point, testified that he could not recall any differences between the notice that was posted in the office on August 16, 1994, and Defendent's Exhibit 30.

thus find that the violation herein was more than a moderate level of gravity. Taking into account the balance of the factors set forth in Section 110(i) of the Act, I find that a penalty of $700 is appropriate for this violation.

V. Order No. 4327622, and Docket Nos. CENT 95-239-M and CENT 95-240-M.

A. Violation of 30 C.F.R. § 56.14131(g)

On August 16, 1994, Enochs, in the presence of King, observed a Case bulldozer in operation at the top of the highwall. According to Enochs, the bulldozer was approaching him at an angle of approximately 45 degrees. Enochs estimated that when he was about thirty or forty feet away from the bulldozer, he noticed that the driver, Bill Jacobs, was not wearing a seat belt. He said that it was "obvious" that the operator did not have a seat belt on (Tr. 130). Enochs issued an Order alleging a violation of 30 C.F.R. § 56.14130(g) which, in essence, requires the wearing of seat belts.

Harold Miller, the lead man at the time, testified that he was in the area when Enochs told Jacobs to put his seatbelt on. Miller indicated that he could not tell if Jacobs was wearing a seat belt. On cross examination Enochs indicated that a photograph of the bulldozer in question taken subsequent to the date of his inspection, (Defendant's Ex. 8) depicts a bulldozer at the approximate angle that the bulldozer was at when cited by him. He was unable to tell by looking at this photograph if the driver was wearing a seat belt. Enochs was shown two other pictures of a driver sitting in the bulldozer at issue (Defendant's Exs. 7, and 28) and he was not able to tell if the driver was wearing a seat belt.

REB has not offered any eyewitness testimony to directly impeach or contradict Enochs' observation that Jacobs was not wearing a seat belt. Specifically, Miller's testimony that he could not tell if Jacobs was wearing a belt when Enochs told the latter to put his belt on, is insufficient to contradict Enochs' testimony. The record does not establish that Miller observed Jacobs from the same distance and direction as observed by Enochs. Also, although Enochs could not tell whether the driver depicted in REB's photographs was wearing a seat belt, there is

no evidence that these photographs accurately depict the view that Enochs would have seen from the specific vantage point that he had on August 16, 1994, when he saw the bulldozer at issue and cited it. Accordingly, I accept Enochs' testimony, and find that Jacobs was not wearing a seat belt when cited. Hence, I find that REB did violate Section 56.14130(g), supra.

B. Significant and Substantial

According to Enochs, the violation should be characterized as significant and substantial. He pointed out that he observed tracks within five feet of the edge of the highwall. According to Enochs, the highwall was eighty feet above the next level. Enochs indicated that in normal operations, at times the blade of the bulldozer "will catch on a hard rock area, seam or something like that, and it shakes, shake the machine and the operator pretty bad, substantially, and it could throw him off the machine. You know, cause him to lose control" (sic) (Tr. 131). Enochs also opined that the bulldozer could accidentally run over the highwall, as the berm in the area varied between knee to waist level, and consisted only of overburden material.

On the other hand, on cross examination, it was elicited from Enochs that the bulldozer as seen by him was not operating "at a high rate of speed" (Tr. 146). Further, on cross examination Enochs was unable to state how often bulldozers have been driven off a highball each year.

Miller explained that in stripping the overburden ". . . we stay at least ten foot away from it [the highwall] with any dozer" (sic.) (Tr. 185). Berry explained that in normal operations the overburden is cleared in stages working from top down. He indicated that in normal operations, the closest the bulldozer would get at the edge of a highwall was thirty to forty feet (Defendant's Ex. 33). He opined that the tracks observed by Enochs might have been placed by the bulldozer during the clearing of the overburden, when those tracks would have been located thirty to forty feet from the edge of the highwall. Enochs did not explain how, in normal operations, the bulldozer would go within five feet of the edge of the top of an existing

highwall.[2] I thus find that it has not been established that in normal operations the bulldozer would go within five feet of the edge of the top of an existing highwall.

Based upon all of the above, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event, and thus it has not been established that the violation was significant and substantial.

C. Unwarrantable Failure

1. Summary of the Testimony

Enochs testified that Jacobs had told him on the date the Citation was issued that he sometimes wears a seat belt, and sometimes does not. In contemporaneous notes taken by Enochs, he indicated that Jacobs stated that "no one makes a big deal about it". (Defendant's Ex. 32). I do not assign much probative weight to this testimony, as it is heresay and thus inherently unreliable. The declarant did not testify, and accordingly was not present in court to be cross examined.

Dale St. Laurent, an MSHA investigator, interviewed Jacobs who told him that REB did not have any seat belt policy, and that no one have ever made him wear a seat belt. St. Laurent testified that he also interviewed a Mr. Yates, a serviceman, who told him that in the year prior to the inspection "he had never seen either of those two dozer operators wear a seat belt ... . He doesn't remember anyone ever yelling at Mr. Berry or Mr. Miller or anyone ever yelling at anybody to put seat belts on" (Tr. 245). St. Laurent indicated that Yates told him that there wasn't any policy regarding seat belts and that one told him to wear seat belts (Tr. 162). According to St. Laurent, Yates told him that Jacobs had told him (Yates) that Miller and. Berry never told him to wear a seat belt.

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[2]On rebuttal, Enochs indicated that when he arrived at the top of the highwall, bulldozers were backing out onto a thirty foot area that had been stripped. However, he did not testify specifically how close these vehicles were to the edge of the highwall.

According to Enochs, Miller who was the supervisor on the site, was present when the bulldozer was cited, but did not take any corrective action. Enochs indicated that the fact that Jacobs was not wearing a seat belt was obvious as the cab was open.

Miller indicated that he arrived at work on August 16, at 6:00 a.m. and left the site at 7:00 a.m. to get some parts, returning about 9:00 a.m. He testified that he had been on the site for about ten minutes when he saw Enochs talking to Jacobs. He indicated that when Enochs came up to Jacobs and told him to put a seat belt on, he (Miller) could not tell whether Jacobs was wearing a seat belt. I observed Miller's testimony and found him credible in these regards. Enochs indicated on cross examination, that he was thirty to forty feet away from Jacobs when he observed that Jacobs did not have a seat belt on, and that Miller was approximately ten yards further back. Within his context I find that there is no evidence that Miller knew that Jacobs had not been wearing a seat belt when cited.

Miller indicated that subsequent to September 1995, he has been the supervisor at the quarry but that in August of 1994, he was only the "lead man" (Tr. 175). He stated that in this capacity it was his responsibility to operate equipment, and get the dirt stripped. He said that in general, his supervisor, Ray King, told him what to do on the site, and he in turn passed this information on to the other equipment operators. He said that he did not have any authority to punish the men, and did not have any authority to hire or fire. He stated that he was never told what to do regarding the punishment to be given the men. He indicated that he did not tell the men what equipment to use.

2. Discussion

There is no evidence that King, the quarry supervisor, or Miller, had notice or acknowledge that Jacobs was not wearing a seat belt. There is no evidence that King, prior to Enochs' issuance of the Order at issue, was in any position to have observed that Jacobs was not wearing a belt. Having observed Miller's demeanor, I find his testimony credible, that on August 16, he had only been at the site for approximately ten minutes prior to Enochs' issuance of the Order, and had not observed Jacobs being without a belt. When Enochs observed

Jacobs being without a belt he was 10 yards closer to Jacobs than Miller. There is no evidence that, Miller was in any position to have observed that Jacobs was not wearing a seat belt. I note Enochs' testimony that King had received a special warning, and training from MSHA regarding the need to ensure the compliance at the site with the seat belt standard. However, this testimony was not based upon Enochs personal knowledge, but rather was based upon statements of another inspector made to him. Because of the inherently unreliable nature of heresay testimony I do not assign any probative weight to Enochs' heresay testimony, in evaluating the critical issue of REB's unwarrantable failure. For the same reason, I do not assign any probative weight to Enochs' and St. Laurent's testimony about out of court statements made by Jacobs and Yates concerning the attitude of their supervisors regarding the use of seat belts, and the policy of REB in this area. On the other hand, I find, as discussed above, (IV(c) infra), that the credible evidence establishes that REB had indeed posted in its office information regarding the requirement for its employees to wear seat belts while on the job. Miller indicated that prior to the date of the Order at issue, in his capacity as lead-man, he had not enforced seat belt rules as he did not want to be hard on the men. However, the record does not establish that Miller, on the date the Order at issue was issued, had any official duties or responsibilies toward enforcing compliance with the mandatory seat belt standard. Within this context, I find that it has not been established that the violation was the result of REB's unwarrantable failure.

D. Penalty

I find that REBs negligence was no more than moderate. I find that a penalty of $500 is appropriate.

E. Section 110(c) violations. Docket Nos. CENT 95-239-M, and CENT 95-240-M)

1. The Legal Standard to be Applied

Section 110(c) of the Act subjects certain individuals to civil penalties if the Secretary can sustain his burden of proving that: (1) a corporate operator committed a violation of a mandatory health or safety standard (or an order issued under the

Act); (2) the individual was an officer, director, or agent of the corporate operator; and (3) the individual "knowingly authorized, ordered, or carried out" the violation.

A violation by the corporate operator must be established and such violation must be proved in the proceeding against the individuals. Kenny Richardson, 3 FMSHRC 8, 10 (January, 1981), aff'd sub nom. Richardson v. Secretary of Labor, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). The Secretary also has the burden of proving that the person charged is an agent of the corporate operator. Under Section 3(e) of the Act "agent" is defined as "any person charged with responsibility for the operation of all or part of a coal or other mine, or the supervision of miners in a coal or other mine."

Finally, the Secretary must prove that the agent "knowingly authorized, ordered or carried out" the violation. The appropriate legal inquiry in this regard is whether the corporate agent "knew or had reason to know" of the violative condition. Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984), citing Kenny Richardson, 3 FMSHRC 8, 16 (January 1981). In Kenny Richardson, the Commission stated:

> If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC supra, at 16.

In order to establish section 110(c) liability, the Secretary must prove only that the individuals knowingly acted, not that the individuals knowingly violated the law. Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August, 1992). In Roy Glenn, 6 FMSHRC 1583 (July, 1984), the Commission held, however, that something more than the possibility of an underlying violation must be shown to establish "reason to know". 6 FMSHRC at 1587-8. Moreover, a "knowing" violation requires proof of aggravated conduct and not merely ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August, 1994).

a. Miller

Miller testified that on the date in issue, he was only a "lead man" (Tr. 175), and did not become the quarry supervisor until September 1995. He was asked whether he was Jacob's supervisor and he answered as follows. "I guess you can call me that, yes, sir" (Tr. 176). Miller indicated that he did verbally discipline the men working on the top of the highwall. Also, he indicated that it was his responsibility, in addition to operating the equipment on the top of the highwall, to transmit to the men the directions he had received from his supervisor, (King), regarding the tasks to be performed on the site. He indicated that he did not have the authority to hire and fire, was not told what to do regarding disciplining the men at the site, and did not assign equipment to the men. Petitioner has not rebutted or impeached this testimony.

I find that Petitioner has failed to adduce sufficient evidence to establish that Miller had any significant responsibility for the operation at the highwall, or that he supervised the other miners working at that site. There is no evidence whether he was paid as an hourly employee, or as part of management. There is no evidence regarding any description of his official duties and responsibilities. There is no evidence that he had any direct responsibility for controlling the acts of the miners on the highwall, that he had the authority to initiate the assignment to them of their tasks, that he was responsible for their performance and duties, that he had the responsibility to discipline them if they did not perform their duties properly, that he was responsible for the safety of the miners and their operation, or that he was responsible to ensure that the mandatory safety standards were complied with by the men at the highwall. Within this context, I conclude that the Secretary has not met his burden in establishing that Miller was an "agent". Accordingly, I find that Petitioner has not established that Miller violated Section 110(c) of the Act.

b. Berry

Berry was the owner, principal stockholder, and President of REB on the date in issue. He thus was an officer and came within the purview of Section 110(c), supra. It is incumbent upon the Secretary to establish that Berry knew or had reason to know of

the violative condition (Roy Glenn, supra.) There is no evidence that he had any information that gave him any knowledge or reason to know that Jacob was not wearing a seat belt. (See, Kenny Richardson, supra at 16). For the reasons discussed above, (IV (C) infra,) I find that as President, Berry's policy toward the wearing of seat belts was manifested by the posting of material informing employees of their responsibility to wear seat belts.[3] I observed Berry's demeanor. I find his testimony credible that although he personally feels that a person has the right not to wear a seat belt, he does not condone not wearing a seat belt. I also accept his testimony that on five or six different occasions when he saw employees not wearing a seat belt, he told them to put on a seat belt and warned them that they would be sent home the next time they were found to be without a seat belt.[4]

Within the context of the above evidence I find that it has not been established that Berry knew or reasonably should have known that Jacob was not wearing a seatbelt when cited. Nor is there sufficient evidence of aggravated conduct on his part. For these reasons, the 110(c) action against him shall be dismissed.

VI. Order No. 4327625.

A. Violation of Section 56.14130(g), supra.

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[3]Berry's testimony that REB has employees sign its safety policy (Defendant's Ex. 28) when they start to work for REB, was not impeached or contradicted. I therefore accept this testimony. I note that this policy requires that seat belts "be worn at all times of vehicle operation" (Defendant's Ex. 28).

[4]REB's official policy provides that the first offence of a failure to comply with the policy to wear a seat belt, will result in "remainder of day of violation off without pay" (Defendant's Ex. 28). Berry's action in warning, but not discipline the employees he had caught not wearing a seat belt might lead to an inference that REB has been unduly lax in not discipline employees for not wearing a seat belt. However, since Berry did issue a warning, I cannot conclude that Berry's conduct is to be equated with aggravated conduct, nor can it be the basis of a Section 110(c) action.

Approximately one hour after Enochs had cited the bulldozer operator for not wearing a seat belt, he observed Jim Farrish operating a John Deere bulldozer, but not wearing a seat belt. According to Enochs he was at a forty five degree angle facing the bulldozer. Enochs indicated that when he was sixty to seventy feet away from Farrish, and approximately six to eight feet above the ground that Farrish's bulldozer was being operated on, he saw that Farrish was not wearing a seat belt. Enochs issued an Order alleging a violation of Section 56.14130(g) supra, which requires the wearing of seat belts.

Miller indicated that he spoke with Farrish later on that afternoon, and Farrish informed him that he had the seat belt on, but that he undid it when he saw Enochs approach him. I find this heresay testimony inherently unreliable, and insufficient to rebut or contradict Enochs' testimony regarding his observations. There is no other evidence of record to contradict Enochs' testimony regarding his observations. I thus find that REB did violate Section 56.14130(g) supra, as alleged.

B. Significant and Substantial

According to Enochs, the bulldozer in question was being used to cut a ramp, and was being operated down an incline. He said that, when cited, Farrish was "very close to a steep incline" (Tr. 229). He described the area as consisting of "unconsolidated material, very steep drop off" (sic) (Tr. 230). Enochs opined that in the event the bulldozer would travel over the "hill" the operator would definitely be severely injured (Tr. 231).

Respondent did not offer any evidence to impeach Enochs' testimony with regard to his observation of the terrain, and his opinions regarding the likelihood of an injury producing event, and the seriousness of any resulting injury. I thus find, based on the testimony of Enochs, that an injury producing event was likely to have occurred, and that there was a reasonable likelihood that the driver would have been injured as he was not wearing a seat belt. There was also no contradiction or impeachment of Enochs' testimony that the resulting injury would reasonably likely have been permanently disabling. I thus find that it has been established that the violation was significant and substantial (See Mathies, supra).

C. Unwarrantable Failure

Enochs indicated that the instant Order was the fourth Citation/Order that he had issued that morning involving not wearing a seat belt. He indicated that the violative condition was obvious, and that no corrective action was being taken by management. Petitioner did not adduce any evidence that, subsequent the issuance of the other seat belt violations by Enochs, King had any opportunity to check whether other employees were wearing their seat belts. There is no evidence regarding King's actions subsequent to the first set of seat belt citations and orders issued. There is no evidence regarding his activities between the time the first Citations/Orders were issued, and the issuance of the instant order.

According to St. Laurent, Yates, had told him that in the year prior to the instant inspection he never saw the two bulldozer operators wearing their seat belts. St. Laurent testified that he asked Yates if efforts were made to make employees wear seat belts, and Yates told him that when he was hired, no one told him to wear a seat belt. St. Laurent testified that Yates also told him that he did not recall anyone yelling at anyone else to put a seat belt on. St. Laurent testified that he asked a Mr. Cunningham, a plant operator who also operated equipment, about seat belts and the latter told him that "what the normal posture was there is that if a guy wanted to wear them, fine, and if he didn't then that was okay, too" (Tr. 246).

For the reasons stated above, (V(c) infra), I find the heresay testimony of St. Laurent regarding what Yates and Cunningham told him to be inherently unreliable. I thus do not assign it any probative value in evaluating the critical issue of REB's unwarrantable failure, if any. I note that neither Yates nor Cunningham was called by Petitioner to testify. Within the above context, I find that it has not been established that this violation was as the result of REB's unwarrantable failure. I find that a penalty of $500 is appropriate.

D. 110(c) violations

1. Miller

For essentially the reasons set forth above, (V(E)(a) infra), I find that it has not been established that Miller was liable under Section 110(c) of the Act, and hence that action against him shall be dismissed.

2. Berry

I find that the heresay testimony of St. Laurent with regard to out of court statements by Yates and Cunningham is insufficient to establish Berry's liability under Section 110(c) of the Act. Further, for the reasons set forth above, (V(E)(b) infra), I find that Petitioner has failed to establish any liability on Berry's part under Section 110(c) of the Act. Therefore that action against him shall be dismissed.

VII. Citation No. 4327624

On August 6, Enochs observed a track mounted trackhoe operating in the stripping area. He said that this equipment is used for excavating dirt, is track mounted, and rotates and revolves. He said that the front and side window on the right side was "cracked in several places" (Tr. 217), and that the driver's vision would be obscured. He described the breakage as being "pretty extensive throughout the whole panel" (Tr. 221).

Enochs issued a Citation alleging a violation of 30 C.F.R. § 56.14103(a) supra, which provides, as pertinent, that if windows are provided on self-propelled mobile equipment, "[t]he windows shall be maintained to provide visibility for safe operation."

REB did not offer any evidence to contradict Enochs' testimony regarding his observations. I therefore accept Enochs' testimony, and find that REB did violate Section 56.14103(a) supra. I find that a penalty of $50 is appropriate.

VIII. Order No. 4327626.

On August 16, Enochs observed a Case backhoe being operated.

According to Enochs it was being used as a loader, as it had a bucket on the front. He said that King had told him that it was being used to clean spilled material. Enochs said the backhoe was equipped with wheels, had a loader bucket in front, and a backhoe bucket in the back. He opined that it was a combination loader/backhoe. According to Enochs, the vehicle was not provided with a seat belt.

On cross examination Enochs indicated that a wheel loader is different than a backhoe, and that the vehicle in question was in use when he inspected it.

Enochs issued an Order alleging a violation of 30 C.F.R § 56.14130(a)(3) which provides, in essence, that seat belts shall be installed on "wheel loaders and wheel tractors".

It is incumbent upon Petitioner to establish that, as commonly understood in the mining industry, a reasonably prudent person familiar with the industry, the terms "wheel loaders" or "wheel tractors" encompass the vehicle in question. Enochs' opinion that the vehicle was a combination loader/backhoe is not accorded much weight, as he did not set forth in detail the basis for his opinion. Further, aside from this opinion Petitioner has not proffered any evidence as to how the terms "wheel loader" or wheel tractor" are commonly understood in the mining industry. For these reasons, I conclude that Petitioner has failed to meet his burden, and that this Order shall be dismissed.

IX. Order No. 4327628.

Enochs indicated that on August 16, at about 12:00 p.m., he was on a walkway which was approximately ten feet above where a loader was being operated. Enochs noted that his point of observation was approximately twenty feet removed from the loader. Enochs testified that he saw the driver, Ron Alexander, drive under him. Enochs said that he saw Alexander's hands on the loader's controls. According to Enochs, Alexander then turned off the loader, did not unbuckle his seat belt, and climbed out of the loader. According to Enochs, the loader was being used to load material from a stock pile. Enochs issued an Order alleging a violation of Section 56.14130(a)(3) supra.

Based upon Enochs' testimony that I find credible, and that was not contradicted by any other eyewitness, I conclude that Alexander was not wearing a seat belt when cited by Enochs. However, there is no evidence in the record that a seat belt had not been installed on this vehicle. Accordingly, I find that it has not been established that REB was in violation of Section 56.14130(a)(3), which provides that seat belts shall be installed on loaders. Hence, Order No. 4327628 is to be dismissed.

X. Order No. 4327631.

A. Violation of 30 C.F.R. § 56.14107(a)

According to Enochs, on August 16, 1994, he observed that there was no guard at the tail pulley of the radial stacker conveyor belt. According to Enochs, the belt was in operation, and the pinch point of the tail pulley which was not guarded, was approximately two feet above the ground. Enochs issued an Order alleging a violation of 30 C.F.R. § 56.14107(a) which, as pertinent, provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, . . . chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury."

REB did not proffer the testimony of eyewitnesses to contradict or impeach the observations of Enochs. REB's defense appears to be based upon 30 C.F.R. § 56.14107(b) which provides that guards are not required where the exposed moving parts "are at least seven feet away from walking or working surfaces". In this connection, REB elicited from Enochs, on cross-examination, that the unguarded tail pulley was not located in the normal path of travel. Berry indicated that there was no reason to go to the cited area, except to perform maintenance on the belt. In that event, the belt would not be in operation.

I note Enochs' testimony that there was nothing to restrict access to the unguarded tail pulley which was located only two feet above the ground. The ground was the surface upon which men can walk or work. Accordingly, the terms of the exception set forth in Section 56.14107(b) supra, has not been met. I thus find that REB did violate Section 56.14107(a) supra.

B. Significant and Substantial

In essence, Enochs concluded that the violation was significant and substantial, inasmuch as the pinch point was exposed, and there were no barriers or signs warning persons of this condition. Enochs opined that a person could easily get caught up in the self-cleaning pulley which was not smooth. According to Enochs, the pulley was located behind an exit door, and was in a "natural traffic walkway area" (Tr. 277). However, he did not elaborate with sufficient specificity the basis for this opinion. Enochs opined that should an injury occur as a result of the violative condition, it would be at least permanently disabling.

On the other hand, Berry opined that there was no reason to walk in the cited area. Berry indicated that, in exiting the shop, the path taken to other parts of the plant would not place a person within twenty five, or thirty feet of the pulley. He also was not aware of any injuries at this site.

Within the context of this evidence, I conclude that it has not been established that an injury producing event was likely to have occurred. Accordingly, I find that it has not been established that the violation was significant and substantial.

C. Unwarrantable Failure

Enochs testified, in essence, that his conclusion that the violation was as a result of REB's unwarrantable failure, was based upon the fact that King was given a handbook by MSHA setting forth the need for guarding. For the reasons set forth above, (IV(c) infra), I do not assign any probative value to this heresay testimony. I thus conclude that it has not been established that the violation herein was as a result of REB's unwarrantable failure.

D. Penalty.

The tail pulley in question was self-cleaning, and was located only two feet above the ground. REB did not contradict

Enochs' testimony that the unguarded self-cleaning pulley can grab a person's clothing, and wrap a person up in the tail pulley. I thus conclude that the gravity of the violation was relatively high. I find that a penalty of $500 is appropriate for this violation.

XI. Citation No. 4327632

On August 16, Enochs observed that there was an unguarded V-belt drive on the simplicity belt vibratory screen. He indicated that the V-belt drive was approximately three feet above the walkway. The pulley itself was located about twenty feet off the ground. Enochs issued a Citation alleging a violation of Section 56.14107(a) supra.

REB did not offer the testimony of any witness to impeach or contradict Enochs' observations. Accordingly, I find that it has been established that the drive belt was not guarded, and that someone could be caught in the belt drive. I find that the unguarded pinch point was located three feet above the walkway. Although the pulley was twenty feet above the ground, I find that the exception set forth in Section 56.14107(b) supra, does not apply, as the unguarded pinch point was three feet above a surface where persons can walk. I thus find that it has been established that REB did violate Section 56.14107(a) supra. I find that a penalty of $50 is appropriate.

XII. Citation No. 4327633.

Enochs observed that the V-belt drive of a thirty horse power vibratory shaker drive belt, was not guarded. He indicated that the belt machine and pulley were located along the walkway, but probably fifteen feet off the ground. REB did not impeach or contradict his testimony. I find, consistent with the discussion above (XI infra,) regarding Citation No. 4327632, that REB did violate Section 56.14107(a) supra, and that the exception set forth in Section 56.14107(b) supra, does not apply. I find that a penalty of $50 is appropriate for this violation.

ORDER

It is ORDERED as follows: (1) Order Nos. 4327626, and 4327628, and Citation No. 4327635, and Docket Nos. CENT 95-239

and 95-240 shall be DISMISSED; (2) Citation No. 4327776 and Order Nos. 4327622 and 4327631 shall be amended to Section 104(a) citations, and Order No. 4327625 shall be amended to a Section 104(a) Citation that is significant and substantial; and (3) that Respondent shall, within 30 days of this decision pay a total civil penalty of $2,400.

Avram Weisberger
Administrative Law Judge

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SEP 5 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-258 A.C. No. 42-01944-03649
v.	:	
ENERGY WEST MINING COMPANY, Respondent	:	Cottonwood Mine

DECISION

Appearances: Robert Cohen, Esq., Office of he Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Timothy M. Biddle, Esq., Lisa A. Price, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Energy West Mining Company (Energy West) with the violation of the mandatory safety standard 30 C.F.R. § 75.202(a). Energy West is the operator of the Cottonwood Mine, an underground coal mine, located in Emery County in Southwestern Utah.

MSHA issued the single citation in question after its investigation of a "coal outburst" or "bounce" [1] which occurred in the 4th left working section of the Cottonwood Mine on May 16, 1994, at approximately 12:38 p.m. in a large uncompleted proposed

[1] The terms "coal outburst" and "pillar bounce" for purposes of this decision are used interchangeably and essentially mean the same condition. The Dictionary of Mining, Mineral and Related Terms defines a bounce: a. a sudden spalling off of the sides of ribs and pillars due to excess pressure; a bump. .... (United States Bureau of Mines), 1967 Edition.

pillar. The pillar was not fully formed by completion or mining of surrounding entries and crosscuts. (Tr. 421).

There was a mining crew working in the section, but no miners suffered any injuries as a result of the bounce. Nevertheless, because ventilation on the section was disrupted and production stopped more than an hour, MSHA was notified of the incident. MSHA Inspector Baker was at the mine at the time the bounce occurred on May 16, 1994, and immediately went to the 4th left section to investigate. Baker did not issue a citation at that time but did issue the citation in question a full two weeks later on June 1, 1994. The citation alleges a violation of 30 C.F.R. § 75.202(a) which provides as follows:

> 30 C.F.R. § 75.202 Protection from falls of roof, face and ribs:
>
> (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

II

ISSUES

The Petitioner in his post-hearing brief states the issues for decision as follows:

> 1. Did the Secretary establish that a reasonably prudent person familiar with the coal mining conditions at the Cottonwood Mine would have provided additional measures to prevent bounces in 4th left section? See the Commission's decision in Canon Coal Company, 9 FMSHRC 667 (1987).
>
> 2. Did the evidence establish that Energy West violated 30 CFR 75.202(a) at the Cottonwood Mine because the operator failed to take adequate roof and rib support de-stressing measures in the 4th left section, an area prone to "bounces" and "coal outbursts"?
>
> 3. Can the Secretary establish a violation of 30 CFR 75.202(a), even if there is no evidence that Energy West violated its approved roof control plan?

4. If the evidence established that Energy West violated 30 CFR 75.202(a), what is the appropriate amount of civil penalty that should (be) assessed by the presiding Administrative Law Judge?

III

STIPULATIONS

1. Energy West and its Cottonwood Mine are subject to the Federal Mine Safety and Health Act.

2. The Commission has jurisdiction over this proceeding.

3. The citation at issue was issued by an authorized representative of the Secretary and was properly served on an agent of Energy West.

4. The citation was abated in good faith.

5. Energy West, Cottonwood Mine, is a large underground coal mine.

6. Energy West's ability to continue in business will not be affected by an assessment of a reasonable civil penalty if the Secretary proves a violation in this case.

IV

BACKGROUND

Energy West's Cottonwood Mine is an underground coal mine located under East Mountain in southwestern Utah. At the time of the May 16th bounce which resulted in the citation, the Cottonwood Mine employed 225 hourly workers, represented by the United Mine Workers of America ("UMWA"), and 60 management personnel. Cottonwood produced 3.5 million tons of clean coal in 1994.

The Cottonwood Mine is a "multi-seam" mine. Energy West's Deer Creek Mine lies 85-110 feet above the Cottonwood Mine workings. The amount of "overburden," or cover, over the Cottonwood mine ranges up to 2,100 feet. The cover in the area where the bounce occurred, the 4th left section, was approximately 1,600 feet.

Energy West mines the coal from Cottonwood Mine with longwall equipment. To prepare for set-up of the longwall unit, continuous mining machines develop gate entries, or roads, off a main line, outlining a solid block of coal to be mined by the longwall mining equipment. In the Cottonwood Mine, these solid blocks of coal, or longwall panels, range from 600-750 feet in

width and can vary from 1,500 to 5,000 feet in length. After the longwall equipment is set up at the end of the gateroads, a shear cuts coal along the face of the panel. It takes approximately four months for longwall equipment to mine the entire block of coal between the gateroads, producing about 800,000 tons of coal.

Cottonwood began development of the main entries ("mains") in Second North in 1990. As the mains were developed, continuous mining machines also developed "neck-offs" to begin gateroads for future longwall panels on both the east and west, or right and left, sides off Second North.

These neck-offs were started at the same time as the main entries to create space for future construction when Cottonwood was ready to begin longwall mining in the panels intersecting Second North. The neck-off areas off the mains of Second North were rooms separated by pillars of coal for support. They were the beginning of development of gateroads for future longwall panels and were necessary to allow access to complete necessary ventilation work and belt drive installation for future mining. (See Ex. R-2).

The neck-off areas had three entries with 100-foot pillars separating the entries. Because longwall gateroads must only have two entries adjacent to the coal to be cut with longwall equipment, the three neck-off entries were later reduced to two gateroad entries. Once narrowed to two entries, two large pillars, 50' by 100', separated the gateroad entries. There were no significant differences in the layout of each neck-off area on the east and west sides of Second North. Solid coal lay beyond the place where three entry mining stopped in each neck.

The Second North main entries in Cottonwood Mine were directly under old mains in the Deer Creek workings above. At the time Second North was developed in Cottonwood, the areas above in Deer Creek had already been mined and were not active. Since the Second North mains had to remain open during longwall mining for ventilation, for a conveyor belt, and for transportation of material and miners, a protective 400-foot "barrier" of solid coal paralleled the mains on both sides of Second North. A similar barrier lay directly above in the Deer Creek works.

Development of the panel neck-offs in Cottonwood's Second North required mining under the Deer Creek barrier. Carl Pollastro, the Mine Manager and General Superintendent testified: "Any time that mining penetrates these barriers, there is stress that's induced by virtue of this barrier and the mining pressures that are transferred from the works above." This stress or pressure is a naturally occurring consequence of multi-seam mining. Crossing under the Deer Creek barrier while developing panel neck-offs as occurred in Second North was a common practice for Cottonwood; for example, the development of the neck-offs in

First North involved "at least 11 penetrations of the barrier," with the same type of pillar layout and entry configuration as in Second North. There were about 25 development sections in Cottonwood with similar configurations that involved multi-seam mining. Once gateroad development progressed past the barrier, the pressures caused by barrier penetration dramatically decreased.

After the Second North mains and the longwall panel neck-offs were developed. Cottonwood began the second stage of development; extending two-entry gateroads from the neck-offs for the full length of each successive panel. This work began in each panel with the neckdown from three entries to two entries.

The 8th left and 9th left panels were the first in Second North to be fully developed and retreated with the longwall unit, with 10th right, 11th right and 12th right following thereafter. Mining then moved to the remaining panels on the right or east side of Second North, with gateroad development and longwall retreat mining starting with 8th right and proceeding south to each panel below until all the longwall panels on the east side in Second North (8th to 1st) were mined.

By the end of January 1994, mining was ready to resume on the west side of Second North. The 6th left gateroads were the first scheduled to be developed for longwall mining. As mining began in the neck-off area in 6th left, roof falls and rib bounces occurred in the entries that had already been developed. Because of safety concerns and logistical convenience. Two new entries were developed to the south of the previously developed entries in the 6th left original neck-off so the unstable area would not have to be traveled. Thus, the 6th left entry and pillar configuration in the neck-off area was slightly different than the remaining panels on the west side of Second North.

V

As the neck-down to two entries continued in 6th left, it became apparent that Deer Creek barrier pressure was causing roof and rib stability problems in that area. As a result, Kevin Tuttle, then Chief Safety Engineer at the Cottonwood Mine and Carl Pollastro, then Manager and General Superintendent at the Cottonwood Mine, met with James E. Kirk, then Acting Subdistrict Manager of the MSHA Subdistrict Office in Price, Utah, to discuss steps that could be taken to reduce or eliminate outbursts of ribs and roof falls. Mr. Kirk and Blake Hanna, an MSHA roof control expert, visited Cottonwood to observe the roof conditions caused by the overlying Deer Creek barrier. The discussions between Cottonwood and MSHA at this time focused on the safest way to continue gateroad development in 6th left, while future panels in Second North were mentioned, no proposals for these panels were made at this time.

VI

In light of the roof control difficulties in 6th left and knowing the Deer Creek barrier also would have to be crossed during gateroad development in the 5th, 4th, 3rd, and 2nd left panels, Cottonwood management met with the hourly workers in crew meetings to discuss additional safeguards to minimize the hazards. A particular concern involved the pillars in neck-off sections previously developed in 1991 along Second North to allow for subsequent longwall mining. As development proceeded in future Second North panels under the Deer Creek barrier, it was believed important to take measures to "soften" the 1991 pillars so they would not build up pressures caused by penetration under the Deer Creek barrier. Cottonwood's management decided that the 1991 pillars in the remaining Second North neck-offs should be notched to make them smaller and more likely to yield as they absorbed overburden pressure.

"Notching" a pillar means cutting enough coal out of the center of a pillar to allow the release of the stress that naturally and dynamically builds in a pillar as active mining around it forces it to absorb overburden pressures. A notched pillar converges upon itself in a controlled manner so that the likelihood of a sudden outburst of coal or "bounce" is reduced. Pillar notching can be hazardous depending on the circumstances, but those hazards can be minimized by limiting the number of miners near the pillar while the notch is being cut.

Reduction of pillar size through notching created potential for small outbursts, but such activity was a positive sign since it indicated that the pillar was yielding effectively and in a controlled manner.

VII

THE PILLAR NOTCH PLAN

Having decided that notching the remaining 1991 pillars in Second North was necessary to protect the miners, Cottonwood's management formulated a pillar notch plan to supplement its approved roof control plan and asked the Union to review it. Cottonwood incorporated several Union suggestions into its notch plan and the Union approved it. Cottonwood then submitted the notch plan to MSHA on February 2, 1994, as an amendment to its roof control plan. The plan was accompanied by a cover letter summarizing it. (Ex. G-3).

The notch plan provided that the pillars created in 1991 during the development of Second North mains would be notched to relieve stress before further development of gateroads for longwall panels. The plan was detailed; it contained four pages of text and diagrams specifically outlining the procedures to be

followed for notching the 1991 pillars in the 5th, 4th, 3rd, and 2nd Left section in Second North. Additionally, the plan included a diagram of the west side of Second North and detailed diagrams for the development of the gateroads in the 5th, 4th, 3d and 2d left sections. Those diagrams showed that notches also were to be cut in the "new" and smaller pillars to be created as the three gateroads in the neck-offs angled down to two gateroads. The new pillars showing notches on the plan diagrams were to be the last pillars under the Deer Creek barrier and Cottonwood believed it prudent to notch these new pillars after they were formed, using the same notching process as used for the 1991 pillars and for the same reason, to relieve overburden pressure.

The notches in the 1991 pillars in the 5th through 2nd left sections were to be cut 40' deep into the center of the pillar, because they were to be smaller, the newly developed pillars were to have 30' notches into their centers (Ex. G-3, Tr. 266-67). Neither the notch plan nor the cover letter summarizing it specified any particular time for notching during the process of mining, neither in terms of which of the 1991 pillars would be notched first, nor when new pillars would be notched during the gateroad development process. (Ropchan, Tr. 182; Pollastro, 265-266, 324).

There was conflicting use of the word "sequence" at the hearing. "Sequence" can refer to the order in which particular pillars were to be notched. (Tr. 421). "Sequence" of notching could also refer to whether a notch in a new pillar was to be cut before or after the pillar was fully formed by completion of mining of surrounding entries and crosscuts. Under either definition, there was no sequence specified in the notch plan.

VIII

THE CONFERENCE CALL

MSHA and Cottonwood agreed to a conference call on February 4, 1994, to discuss the notch plan. Kevin Tuttle, Cottonwood's Chief Safety Engineer, went to the MSHA Subdistrict Office in Price, Utah, where he joined Tony Gabossi, MSHA's Subdistrict Manager. Tuttle and Gabossi called the MSHA District Office in Denver, where several MSHA representatives had gathered to discuss the plan. The MSHA officials in Denver who participated in the conference call were Bill Holgate, MSHA's District Manager, and Jerry Taylor, an MSHA engineer, as well as several officials from MSHA's Technical Support, Safety and Health Technology Center, including Sid Hansen, engineer, and David Ropchan, engineer.

During the conference call, MSHA officials wanted several additions to the notch plan before approving it. Specifically, MSHA required that 20' of roof exposed in each notch be

permanently bolted. Further, MSHA required that additional roof support, in the form of timbers or square sets, be installed in the entry where a notch would be started. Nothing was added to the plan about when the notches would be cut in either the 1991 pillars or in the new pillars to be created during gateroad development. Mr. Tuttle immediately made the MSHA required changes to the notch plan and faxed them to the MSHA District Office. The notch plan was approved by District Manager Holgate by letter on February 4, 1994, the day the conference call occurred. (See Ex. G-3).

IX

THE IMPLEMENTATION OF NOTCH PLAN IN 5TH LEFT SECTION

Shortly after the notch plan was approved by MSHA on February 4, 1994, Cottonwood implemented the plan in 5th left of Second North. (Ex. R-3; Tr. 268). The 1991 pillars were notched according to the notch plan. (Ex. G-3 at 6, R-3). The #1, #2 and #3 gateroad entries were developed under the general mine plan. (Tr. 321). Once the entries proceeded far enough for the #5 crosscut, the crosscut was mined from the #1 entry to break through at the #2 entry. (Tr. 270). After a new pillar came into existence between crosscuts #4 and #5, it was notched as shown in the 5th left diagram attached to the plan. Since there were no reportable bounces or significant roof falls during the notching in 5th left, Cottonwood considered its notching technique a success in controlling the pressures exerted by the overlaying Deer Creek barrier.

MSHA did not monitor Cottonwood's implementation of the approved notch plan in 5th left and there was no evidence that there was any further communication between Cottonwood and MSHA about the plan or mining conditions until after the bounce in 4th left in May 1994.

There was evidence of only two events at MSHA connected with Cottonwood's notch plan between February 4, 1994, and May 16, 1994, neither of which involved anyone from the company. First, almost six weeks after MSHA's approval of Cottonwood's pillar notch plan, Mr. Ropchan said he prepared a memorandum about his recollection of the subjects discussed in the February 4, 1994, conference call but he did not send a copy of his memorandum to anyone at Cottonwood or MSHA. (Ex. G-6; Tr. 174). Second, Mr. Hansen testified that sometime after the conference call he developed computer simulations to evaluate mining methods that he thought could be used to notch the pillars under the plan. (Tr. 126). He used generic assumptions; he did not visit the Cottonwood Mine nor collect data about it to conduct this analysis. (Tr. 150). Mr. Hansen never discussed the results of his analysis with Cottonwood, nor did he provide the company with a copy of his results. (Tr. 164). Mr. Ropchan and Mr. Hansen had no

further involvement in these issues. (Hansen, Tr. 98, 141; Ropchan, Tr. 181, 189).

X

THE IMPLEMENTATION OF NOTCH PLAN, 4TH LEFT SECTION

Gatewood development in 4th left, the panel immediately south of 5th left, commenced after the notch plan had been implemented successfully in 5th left. The layout of the 4th left section was identical to that in 5th left with respect to pillar size and configuration. The 1991 pillars in 4th left were notched successfully under the procedures established in the notch plan. New gateroad development began in 4th left precisely as it had in 5th left. The #1, #2 and #3 entries were driven up to the place where #5 crosscut was to be cut. (Tr. 273-74). On Friday, May 13, 1994, a minor, non-reportable bounce occurred along the north rib of the #1 entry. Supplemental timber support was set in the #1 entry near crosscut #4. (Tr. 361).

XI

THE MAY 16TH BOUNCE IN 4TH LEFT SECTION

On the morning of May 16, 1994, because the north rib of the #1 entry had been unstable the preceding Friday, Lester Jorgensen, shift foreman, instructed Leonard Reid, section foreman, to mine crosscut #5 from entry #2 to #1 to keep the miners away from the north rib of entry #1, even though mining the crosscut in this direction was against ventilation. Mr. Jorgensen wanted the crosscut mined in this fashion to protect the miners from a potential outburst from the north rib along the #1 entry.

At the start of the day shift on May 16, 1994, the continuous mining machine was in the #2 entry in 4th left. The #5 crosscut had been started from the #2 entry but could not be driven from the #2 to the #1 entry as planned because the #1 entry had not been entirely bolted by the end of the shift on the preceding work day. The floor of that entry was partially obstructed by sloughage from the bounce the preceding Friday; loose coal had been pushed toward the end of that entry and had to be removed before bolting could be completed. Under its mine plan, Cottonwood cannot break a crosscut through to an unbolted entry. (Tr. 429). The continuous miner was brought from the #2 entry to the #1 entry to clean the entry. After that task was completed, the continuous miner was moved to the #3 entry so the roof bolting machine could be set up in the #1 entry to bolt the roof in the remaining 35-40 feet still unbolted. (Tr. 368, 397). When the bolting was completed in the #1 entry, the continuous miner was to be brought to the #2 entry to cut the #5 crosscut through to the #1 entry. After the #5 crosscut was bolted, and the ventilation established, the next step was to cut a notch in the

newly created pillar between the #4 and #5 crosscuts as required by the notch plan. However, operations were interrupted when a rib bounce occurred at 12:38 p.m. The bounce blew coal from newly exposed ribs into the #1 entry, into the #4 crosscut and into the #2 entry for a short distance. Although a roof bolting crew was in #1 entry when the bounce occurred, no one was injured. (Tr. 277).

Although the outburst was an instantaneous release of pressure with considerable force there was little damage. (Tr. 340). [2] The bounce was reported to MSHA because production was stopped for more than one hour, in most part due to the disruption to ventilation and the Company's investigation of the event.

Carl Pollastro, the Mine Superintendent, was notified of the bounce by Leonard Reid and immediately went to 4th left to investigate. James Baker, an MSHA inspector, and Jan Lyall, an MSHA inspector trainee, were at the mine for a regular inspection when the bounce occurred and Mr. Pollastro told them about it. Inspector Baker and Mr. Lyall also went to 4th left.

XII

THE CITATION

MSHA Inspector Baker inspected the area on May 16th right after the bounce and issued a 103(k) order to "contro[l] the area until [he] could complete an investigation." Later in the day Baker terminated the 103(k) order and allowed Cottonwood to continue developing the 4th left gateroads without any change in mining procedures. He allowed Cottonwood to complete the #5 crosscut to define the pillar between the #4 and #5 crosscuts before cutting the notch into the newly created pillar. (Tr. 92). Baker did not issue a citation on May 16, 1994, or during the following two weeks.

Inspector Baker returned to the mine over the next two days to interview mine personnel and on May 19, 1994, accompanied Warren Andrews, of Denver Technical Support, who conducted a technical investigation of the bounce. Mr. Andrews took photos of the bounce area in 4th left and eventually prepared a report. Baker did not learn of Andrews' report for several months.

Mr. Baker prepared MSHA's official accident investigation report. (Ex. G-2). This report was released on October 7, 1994.

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[2] The bounce knocked down the ventilation line curtain and dislodged approximately eight of the square set timbers set in the area on the previous Friday. (Tr. 346, 403). The concussion from the bounce also dislodged part of an overcast. (Tr. 276, 347, 403). There was no damage to the roof. (Tr. 79, 346).

Baker concluded that the block of coal bounded on three sides by the #1 and #2 entries and the #4 crosscut should have been notched prior to the bounce (Tr. 47), and before #1 entry was advanced to where it would intersect the #5 crosscut. However, Baker was unsure whether his suggested sequence of mining would have prevented a bounce; he believed "it may have prevented it. It may not." (Tr. 47-48). Baker could not conclude definitively that the actions of the mining crew in 4th left caused or affected the bounce in any way. (Tr. 84).

On June 1, 1994, Mr. Baker, two weeks after his first investigation of the bounce, issued a citation to Cottonwood, alleging a violation of 30 C.F.R. § 75.202(a), not because of his conclusions about when the notch should have been cut but because, in his opinion, "no steps were taken to prevent the bounce that could have seriously injured those two roofbolters that were working in that #1 entry." (See Citation 3588448, Ex. G-1; Tr. 48). Had the roofbolters not been in the #1 entry when the bounce occurred--for example, if the bounce had occurred when no work was being done, or if the roofbolters had been elsewhere at the time of the bounce--Baker would not have issued any citation for the bounce. It is undisputed that no violation of Cottonwood's roof control plan occurred.

XIII

THE ABATEMENT

To abate the citation, MSHA required Cottonwood to submit a revised notch plan. The revised plan limited the length the #1 and #2 entries could be driven before a notch was cut in newly developed pillars. In other words, MSHA required a notch to be driven on the advance of the #1 entry. The revised plan required by MSHA to abate the citation did not require Cottonwood to develop the new pillars in any different or smaller configuration and the layout of the gateroads in 4th left and the gateroads in the remaining sections to be developed under the plan (3rd left and 2nd left) were identical to the layouts specified in the original notch plan submitted by Energy West and approved by MSHA. The citation was abated after Cottonwood submitted this revised plan.

XIV

CONCLUSION

The citation issued by MSHA Inspector Baker two weeks after he first investigated the May 16th outburst charges Cottonwood with the violation of 30 C.F.R. § 75.202(a). It alleges that "The operator failed to protect persons from the hazards related to falls of roof, face, or ribs and outbursts as a coal outburst

(bounce) occurred in the 4th left section ... ." (The citation does not mention the fact no one was injured.)

Section 75.202(a) is not a strict liability standard. It does not impose liability whenever a "bounce" occurs. To establish a violation, the Secretary, by a preponderance of evidence, must demonstrate a lack of reasonable care on the part of the operator. Under the Commission decision in Canon Coal Co., 8 FMSHRC 667 (1987) to prove a violation of 30 C.F.R. § 75.202(a) the Secretary must demonstrate by a preponderance of the evidence a lack of reasonable care on the part of the mine operator. To determine if the standard has been violated, an objective standard of a reasonably prudent person is applicable. In the present case I find that a preponderance of the evidence presented fails to prove that Cottonwood acted in any manner other than that of reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, in both recognizing potential outburst hazards and in undertaking measures designed to avoid those hazards.

In this case there was commendable cooperation and earnest work by both the operator and MSHA to prevent any significant coal outburst. In spite of their best efforts, the May 16th outburst did occur. Fortunately no one was injured.

It is only by hindsight that MSHA speculates that perhaps notching pillar No. 5 even before it was completely formed "may" have prevented the bounce. Inspector Baker who issued the citation testified "it may have prevented it. It may not." (Tr. 84).

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence fails to establish the violation of 30 C.F.R. § 75.202(a).

ORDER

Citation No. 3588448 and its corresponding proposed penalty are **VACATED** and this case is **DISMISSED.**

August F. Cetti

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 6 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-719-M
Petitioner	:	A.C. No. 42-02086-05503
v.	:	
	:	Monroc Pit
WISER CONSTRUCTION,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Paul Ronald Lewis, *pro se*, Wiser Construction, Moapa, Nevada, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Wiser Construction, L.L.C., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $10,000.00.

A hearing was held on May 9, 1996, in Las Vegas, Nevada. For the reasons set forth below, I affirm the citations and assess a penalty of $7,500.00.

Background

On December 7, 1993, MSHA Mine Inspector James V. Skinner issued 107(a) Order and 104(a) Citation No. 2653620, 30 U.S.C. §§ 817(a) and 814(a), to Wiser Construction for a violation of

section 56.3131 of the regulations, 30 C.F.R. § 56.3131.[1] Miners were withdrawn from the southeast section of the pit and the citation issued because the inspector found that loose, unconsolidated material and large rocks found at the top and upper section of the 300 feet high highwall posed an imminent danger to the operator of a front-end loader working at the foot of the highwall.

Discussions with the company resulted in an agreement that starting at the top of the highwall, the company would

> begin to bench that down so it became a multiple bench mine, rather than just a large highwall. It would be a series of stair steps, maybe to illustrate, where the mine would be benched with a smaller highwall and then a bench, and then just stair-stepping it down until it became manageable. The agreement was that -- the crushers were at the base of that highwall, a safe distance away, but what had to be done was to maintain a slope nearly at the angle of repose, which was approximately 37 degrees, with the material being pushed from the upper benches and maintain a slope, so that the material could be safely loaded from the toe of that broken rock pile.

(Tr. 9-10.) The "angle of repose" is "approximately the angle at which broken or loose, unconsolidated material will come to rest, just on a natural angle, just as it's piled or pushed into the pile." *Id.*

On June 8, 1994, MSHA Inspector Richard R. Nielsen was inspecting a mine adjacent to the Monroc Pit when his attention

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[1] Section 56.3131 requires that:

> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard shall be corrected.

was directed to Wiser Construction's operations. It appeared to him that the angle of repose was not being maintained and that there was no margin of safety for the loader operators. Consequently, he interrupted the inspection that he was performing and went to the Monroc Pit.

After inspecting the pit, he issued Order/Citation Nos. 4332892 and 4332893, under sections 107(a) and 104(a). Both alleged violations of section 56.3131 of the regulations.

Order/Citation No. 4332892 stated:

> On June 8, 1994 at about 1515 hours a front-end loader loaded material from the toe of the highwall at the southeast section of the pit. Loose ground was hanging on the highwall which was about 37 meters (120 feet) high. Order No. 2653620 was issued on 12/7/93 and remained outstanding, was modified on 12/08/93 "to allow excavation on the outer perimeter of the broken material toe in the southeast section of the pit. . . . this modification allows for outer perimeter excavation if a safety margin (horizontal distance) is maintained between the vertical solid highwall and the excavation area." The safety margin of sloped material and horizontal distance was not maintained as required by Order No. 2653620. This constitutes working in the face of Order No. 2653620.

(Govt. Ex. 1.)

Order/Citation No. 4332893 stated:

> Two front-end loaders were extracting material from the toe of the highwall at the middle section of the pit. There was loose ground on the highwall which was about 37 meters (120 feet) high. The mined material had been extracted from the toe of the highwall to the extent that the rock face of the highwall was exposed and the wall was sloped much steeper than the angle of repose. Loose ground on the highwall was of sufficient size to cause fatal injury to the loader operator if it were to strike the loader cab or come through a cab window.

(Govt. Ex. 4.)

Findings of Fact and Conclusions of Law

During the hearing, the Respondent's representative was asked if he was contesting the citations or just contesting the penalty. He stated: "I'm more in opposition to the penalty. I felt like the citations the way they understood them and the way we understood them were a little different. But to say that's a 100-percent safe operation on that highwall, I'd be lying to you and I'm not going to do that." (Tr. 55.) I agree with his assessment of the case.

Based on the evidence presented by the Secretary, I conclude that the Respondent twice violated section 56.3131 on June 8, 1994, by failing to slope its loose and unconsolidated material to the angle of repose. I further conclude that the large boulders and other loose material located on the highwall made it reasonably likely that the front-end loader operators working at the foot of the highwall, instead of at the toe of the sloped material as they should have been, would be seriously injured if work continued in that manner. Finally, I conclude that the company's failure to maintain the proper slope on the highwall resulted from "high" negligence in view of the previous order/citation and discussions with MSHA inspectors.

Civil Penalty Assessment

The Secretary has proposed a civil penalty of $10,000.00 for these two violations. The company argues that the penalty is unreasonable when its safety record and financial condition are taken into account. It is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the six criteria, the pleadings indicate that this is a small mine and that the company is a small operator. The company's history of assessed violations is good. On the other hand, these were both serious violations as the operator's negligence was high and the likelihood of death or serious bodily injury resulting from the violations was also high.

The Respondent claims that if the "penalty is not abated it will severely hamper our cash flow capabilities for continuing as an ongoing business." (Resp. Ex. A at p. 4.) The burden of establishing that payment of a civil penalty would adversely affect a company's ability to stay in business is on the company. *Sellersburg Stone Co.* at 1153 n.14. As evidence of its financial situation, the company has submitted a balance sheet, a statement of operations and a schedule of work in progress, all dated September 30, 1995. (Resp. Ex. A at pp. 12-14.)

While these documents, which do not purport to be either audited or certified, apparently show a loss of $35,919.00, they do not show that payment of a penalty of $10,000.00 would adversely affect the company's ability to continue in business if it chose to do so. *Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994). In fact, the company's representative admitted as much at the hearing when he stated: "I mean, I wouldn't say that I wouldn't be able to remain in business, just not at the same degree of integrity that I can right now." (Tr. 52.) Consequently, I conclude that imposition of the proposed penalty will not adversely affect the company's ability to remain in business.

These violations were specially assessed at $5,000.00 each. The special assessment justification for Citation No. 4332892 includes the statement that the violation was the result of intentional conduct on the part of management. This is apparently because the citation stated that the violation resulted from the operator's "reckless disregard." However, at the hearing it was revealed that the parties agreed at the close-out conference that the negligence would be reduced to "high." Accordingly, the Secretary moved to amend the citation to reduce the level of negligence to "high" and the motion was granted. (Tr. 32-33.)

Because of the reduction in the degree of negligence, the penalty should be reduced accordingly. Therefore, considering all of the criteria in section 100(i), as discussed above, I conclude that a penalty of $3,750.00 for each citation, for a total penalty of $7,500.00, is appropriate.

ORDER

Accordingly, Order/Citation Nos. 4332892 and 4332893 are **AFFIRMED**. Wiser Construction, L.L.C., is **ORDERED TO PAY** a civil penalty of **$7,500.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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SEP 1 1 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-646
Petitioner	:	A.C. No. 15-05423-03734
v.	:	
MANALAPAN MINING COMPANY,	:	Mine No. 1
Respondent	:	
	:	Docket No. KENT 93-884
	:	A.C. No. 15-16733-03546
	:	
	:	Mine No. 7

DECISION ON REMAND

Before: Judge Weisberger

On August 30, 1996, the Commission issued a decision in these cases in which it, inter alia, reversed my decision (16 FMSHRC 1669 (August 1994)), that Order No. 4238749 was not S & S, and remanded the matter to me "for penalty reassessment" (Docket No. KENT 93-646, et al., 18 FMSHRC ___, slip op. at 9, (August 30, 1996)).[1]

I take cognizance of the Commission recitation of the Secretary's evidence showing the following: two miners were in the mines for four hours without a preshift examination; the miners' equipment included torches; the bolter was energized; there was a possibility of the presence of low oxygen; and that the mine roof had a tendency to fall, and the mine had

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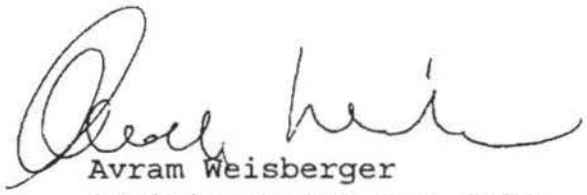
[1]Pursuant to the Commission's direction, I hereby correct a clerical oversight with respect to Docket No. KENT 93-882, and indicate that it contained only one Citation i.e., No. 3003352, which was vacated. I thus order that Docket No. KENT 93-882 be dismissed.

follows: "During idle periods, methane can build up, and other unforseen hazards can develop." (slip op. supra, at 8). Based on these factors, I find that the gravity of the violation was relatively high. I also reiterate my initial finding that Respondent's conduct was more than ordinary negligence (16 FMSHRC supra, at 1703). I thus find that a penalty of $5,000 is appropriate for the violation cited in this order.

It is ORDERED that, within 30 days of this decision. Respondent shall pay a total civil penalty of $5,000 for the violation cited in Order No. 4238749, minus any penalty previously paid for this violation.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 20 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-646
Petitioner	:	A.C. No. 15-05423-03734
v.	:	
MANALAPAN MINING COMPANY,	:	Mine No. 1
Respondent	:	
	:	Docket No. KENT 93-884
	:	A.C. No. 15-16733-03546
	:	
	:	Mine No. 7

AMENDED DECISION

Before: Judge Weisberger

Due to clerical error, the second paragraph of the decision in these cases isued on September 11, 1996, is amended to read as follows:

I take cognizance of the Commission's recitation of the Secretary's evidence showing the following: two miners were in the mine for four hours without a preshift examination; the miners' equipment included torches; the bolter was energized; there was a possibility of the presence of low oxygen; and that the mine roof had a tendency to fall, and the mine had experienced several roof falls. The Commission also noted as follows: "During idle periods, methane can build up, and other unforseen hazards can develop." (slip op. supra, at 8). Based on these factors, I find that the gravity of the violation was relatively high. I also reiterate my initial finding that Respondent's conduct was more than ordinary negligence (16 FMSHRC supra, at 1703). I thus find that a penalty of $5,000 is appropriate for the violation cited in this order.

Avram Weisberger
Administrative Law Judge

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SEP 12 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-15
Petitioner	:	A. C. No. 36-07270-03526
v.	:	
	:	L & J Energy Company
L & J ENERGY COMPANY, INC.,	:	
Respondent	:	

DECISION ON REMAND

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Robert G. Spencer, President, L & J Energy, Co., Inc., Grampian, Pennsylvania, for the Respondent.

Before: Judge Weisberger

On April 22, 1996, the Commission issued a Direction for Review Order in which it granted L & J's Petition for Discretionary Review on the issue of its ability to continue in business. The Commission remanded the matter to me "for appropriate proceedings on this issue".

On May 3, 1996, in a telephone conference call with representatives of both parties, the latter were ordered to communicate with each other to determine whether the matter at issue could be resolved by a settlement agreement. On May 13, 1996, in a subsequent telephone conference call, the parties advised that they were unable to settle this matter but requested a one month extension to allow L & J to submit documentation to the Secretary in support of its position. In a follow-up telephone conference call on June 18, 1996, the parties advised that they were unable to settle this matter, and L & J requested an opportunity to present testimony. The Secretary did not

object to this request. A hearing was scheduled for July 9, 1996, to allow L & J to present evidence on the issue of its ability to continue in business.

In general, the operator bears the burden of establishing that payment of civil penalty would adversely effect its ability to continue in business (See, Sellerburg Stone Company v. FMSHRC 736 F2d 1147, 1153, n.14 (7th Cir. 1984) citing, Buffalo Mining Company, 2 IBMA 226, 247-48-251-252 (1973)). At the hearing, L & J offered in evidence financial statements covering the calendar years 1994 and 1995. A cover letter on the letterhead of Johnston, Nelson & Shimmel, Certified Public Accountants was attached to these statements. The cover letter indicates that the statements of income and earnings were reviewed, but that the review was ". . . substantially less in scope than an examination in accordance with generally accepted auditing standards . . . ." (Operator's Exh. A-1, pg. 1) It thus is not an audit, and accordingly is not entitled to any probative value. Further, the cover letter indicates that the information included was based on the representations of the management of L & J. No one having personal knowledge of the data set forth in the financial statments testified on behalf of L & J. Accordingly, there is no basis in the record to establish the veracity and trustworthiness of the figures set forth in the statements including reports of deficits of $403,541 for 1994 and $471,884 for 1995. Thus, these figures are not accorded any probative weight.

L & J also offered in evidence a statement from Debra A. Young, the Comptroller of Hepburnia Coal Company, indicating that the coal tonnage produced by L & J from October 1995 through March 1996 totalled 170,982.82 tons sold and that 33,000 tons "were needed to breakeven". (Operator's Exh. A-3). The statement contains the following opinion "An additional assessment resulting from this case could hinder if not completely halt his efforts to save this company." However, it is significant to note that Young, who testified, does not work for L & J, did not prepare any of the financial data proffered by L & J and did not have personal knowledge of this data. Accordingly, her statements are not accorded any probative weight. In the same fashion, no probative weight is accorded Operator's Exhibit A-5 listing the expenses of L & J, as Young

indicated that the data contained therein were compiled by L & J's bookkeeper, who did not testify. Accordingly, in the absence of testimony from persons having personal knowledge to authenticate the data in this exhibit, I do not accord any probative value to this data.

Respondent relies on Operator's Exhibit A-6 setting forth expenses and income for the period December 1995 through May 1996 which shows a total loss for this period of $156,923.68. However, there was no testimony presented to provide a basis to establish the veracity of the figures set forth in that document. The statement was prepared by the bookkeeper, who did not testify. Accordingly no probative weight is assigned to the figures set forth in this statement.

In view of all these facts, I conclude that L & J has not proffered competent evidence to establish that the imposition of civil penalties would significantly impair its ability to continue in business. I reiterate my earlier findings regarding the factors set forth Section 110(i) of the Act (16 FMSHRC supra at 449-450), and reiterate my prior finding that a civil penalty of $87,500 is appropriate.

ORDER

It is ORDERED that if Respondent has not already paid the total civil penalty of $87,500, then Respondent shall pay $87,500 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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SEP 12 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-537-M
Petitioner	:	A.C. No. 26-00015-05534
v.	:	
	:	Mine: Nevada Cement Co.
NEVADA CEMENT COMPANY,	:	
Respondent	:	

DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Nevada Cement Company pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $10,000.00. For the reasons set forth below, I affirm the citations and assess a penalty of $7,500.00

Prior to hearing, the parties agreed to stipulate to the facts in the case and to submit the case in writing. The stipulated facts and briefs have been filed by both parties.

Background

After reporting for work on the morning of May 22, 1995, Preston Niemeyer was directed by his supervisor to replace the muffler on a 1972 International flat bed service truck. The truck was equipped with a five-speed manual transmission. The truck was in the central bay of Nevada Cement's truck shop. It was in first gear, but the parking brake had not been set or placed in the "on" position and the wheels had not been chocked or blocked.

While lying under the truck and removing the exhaust pipe from the exhaust manifold, Niemeyer apparently touched part of the exhaust pipe's heat shield to the starter solenoid. As a result, the engine started and the truck rolled over him, causing fatal injuries. The truck traveled about 32 feet before it stopped when it struck another parked vehicle. The accident occurred at about 6:50 a.m.

MSHA's investigation of the accident resulted in the issuance of Citation Nos. 4140701 and 4140702. Both citations state that: "On May 22, 1995, a fatal powered haulage accident occurred at the plant's truck shop. A mechanic was working on a service truck when the engine accidentally started and rolled over the victim who was under the truck working on the exhaust system." Citation No. 4140401 alleges a violation of section 56.14207, 30 C.F.R. § 56.14207,[1] because "the truck's parking brake had not been set to prevent unintentional movement." Citation No. 4140702 alleges a violation of section 56.14105, 30 C.F.R. § 56.14105,[2] because "the truck had not been blocked/chocked to prevent accidental movement."

Findings of Fact and Conclusions of Law

The parties have agreed to settle Citation No. 4140702. A reduction in penalty from $4,000.00 to $3,000.00 is proposed. In addition, they have agreed that if Citation No. 4140701 is affirmed, the penalty should be reduced from $6,000.00 to $4,500.00. They disagree, however, as to whether the Respondent violated section 56.14207.

The Respondent argues that Citation No. 4140701 should be dismissed because it does not apply in this situation. According to Nevada Cement, section 56.14207 applies only to vehicles that have been parked and left unattended, *i.e.* "without a person in proximity," not vehicles that have been parked for the purpose of

---

[1] Section 56.14207 provides, in pertinent part, that "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set."

[2] Section 56.14105 requires, in pertinent part, that "[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion."

performing repairs and/or maintenance on them. (Resp. Br. at 4-5.) The company further argues that the two violations at issue arise from same incident and, therefore, amount to overcharging. (Resp. Br. at 9.) I find that section 56.14207 was applicable to this accident and that both sections were properly cited in this case.

There do not appear to be any Commission decisions dealing with either of these sections as cited in this case. Nevertheless, if there is a question as to whether a regulation applies to a specific incident, the Commission has directed that the question be answered by using the "reasonably prudent person test." That is, "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.* 12 FMSHRC 2409, 2416 (November 1990).

In essence, the Respondent argues that the truck in this case was not "unattended" because the mechanic was present, albeit underneath the truck. However, it is obvious that the purpose of the regulation is to prevent mobile equipment from moving when someone is not in a position to stop it. Thus, "unattended," as used in the regulation, means more than someone not being in proximity to the vehicle. I find that mobile equipment is "unattended" when no one is present who can prevent it from moving. This is consistent with the first definition found in *Webster's Third International Dictionary 2482 (1986)* that "unattended" means "not attended: **a:** lacking a guard, escort, caretaker, or other watcher."

Clearly, Niemeyer was not in a position, lying underneath the truck, to prevent it from rolling forward. Consequently, the truck was unattended while he was working on it. Accordingly, I conclude that a reasonably prudent person familiar with the mining industry and with the requirements of section 56.14207 would have recognized that in such a situation the regulation requires that the parking brake be set.

Contrary to the Respondent's argument, I do not find that the two regulations are mutually exclusive. It is not a matter of either setting the parking brake when the equipment is parked or blocking the wheels when the parked vehicle is being repaired. Because a person performing repairs or maintenance on a vehicle is often in an exposed position if the vehicle were to move, just

as Niemeyer was in this case, it is completely logical that the regulations would require both that the parking brake be engaged and that the wheels be blocked. This makes sure, as best as possible, that the vehicle cannot move.

As the Commission has observed: "The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard." *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (January 1981). Here, although the two violations arose from the same event, "the citations are not duplicative because the two standards impose separate and distinct duties upon the operator." *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993).

Therefore, I conclude that Nevada Cement was properly cited for a violation of section 56.14207. I further conclude that the company violated the regulation when the parking brake was not set while Niemeyer was working underneath it.

Civil Penalty Assessment

The parties settlement agreement provides for a penalty of $4,500.00 for Citation No. 4140701 and $3,000.00 for Citation No. 4140702, for a total penalty of $7,500.00. Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i).

ORDER

Accordingly, the motion for approval of settlement is **GRANTED**, Citation Nos. 4140701 and 4140702 are **AFFIRMED** and Nevada Cement Company is **ORDERED TO PAY** a civil penalty of **$7,500.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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SEP 20 1996

HAROLD HOLTZ, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 96-7-D
v.	:	DENV CD 95-13
	:	
FALKIRK MINING COMPANY, Respondent	:	Mine ID 32-00491

DECISION

Appearances: Steven L. Latham, Esq., Bismarck, North Dakota for Complainant;
Charles S. Miller Jr., Esq., Fleck, Mather, & Strutz, Bismarck, North Dakota for Respondent.

Before: Judge Fauver

This is a complaint under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., alleging discrimination on February 23, 1995, when Respondent notified Complainant that he was being placed on probation for six months because of an incident with its safety manager at a bar.

Holtz contends that the safety manager, Archie Gilliss, gave a false and exaggerated account of the incident as a means of retaliating against him because of his protected activities under § 105(c). He further contends that this was part of a pattern of false and exaggerated reports by Gilliss against him in retaliation of his protected activities. As evidence of a pattern, he cites two prior adverse actions in 1993 and 1994. Falkirk Mining denies any discrimination or hostility toward Holtz' protected activities and contends that the prior adverse actions are barred by the statute of limitations.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative and reliable evidence establishes the following Findings of Fact

and further findings in the Discussion below:

FINDING OF FACT

1. On December 17, 1990, Harold Holtz was involved in a fatal accident at the Falkirk Mine, a surface coal mine operated by Respondent Falkirk Mining Company in Bismarck, North Dakota. Falkirk is a subsidiary of the North American Coal Corporation. The mine produces coal for sale or use in or affecting interstate commerce.

2. The accident involved a collision between a large coal hauler operated by Holtz and a scraper. The operator of the scraper was killed. Holtz suffered shoulder injuries that required surgery and rehabilitation of several months.

3. Holtz had a substantial disagreement with management concerning the cause of the accident and safety rules he believed were necessary to prevent future accidents. Management did not find Holtz at fault in the accident. The disagreement arose from Holtz' belief that management was covering up its responsibility for conditions that led to the accident.

4. MSHA issued two citations on December 19, 1990, and a third on January 22, 1991, based on its investigation of the accident.

5. Holtz disagreed with MSHA's investigation report as well as mine management's account of the accident. He frequently expressed his complaints to management, especially to Archie Gilliss, the mine safety manager. Gilliss advised him to report his concerns to MSHA if he was not satisfied with the investigation or had more information to assist the investigation. Holtz had many contacts with MSHA concerning its investigation and its preparation for a hearing on its citations. Holtz was expected to testify at the hearing.

6. The citations were settled on September 22, 1992, with a 90% reduction in penalties and a major reduction in the charges. Holtz was very upset over the settlement and felt that it was a white-washing of serious violations. On a number of occasions, he expressed his opinion to persons at the mine and others, including MSHA officials, that there was collusion between

Falkirk's management and MSHA, and that mine management and MSHA had engaged in a cover-up of serious safety violations.

7. On February 24, 1993, more than two years after the accident, MSHA inspected the Falkirk Mine following a complaint from an unidentified caller. During the inspection, in which no violations were found, Holtz asked to talk to the inspectors. Holtz met with Inspectors Larry Keller and James Beam and again complained about the investigation of the 1990 accident and settlement in 1992. This was not a new subject for the MSHA inspectors. Holtz had voiced the same complaints to Keller and other MSHA officials on a number of occasions. Holtz testified that he had 8-10 conversations with at least three different MSHA officials prior to the February 1993 inspection.

8. Keller was concerned about Holtz' emotional reaction to the 1990 accident and investigation and Holtz' statement to him that he continued to have disturbing flashbacks when ever he drove by the scene of the accident. Keller was concerned that a person driving a coal hauler carrying 300 tons of coal at 55 m.p.h. needed to be concentrating 100% on what he was doing in order to operate the equipment safely.

9. At the conclusion of the February 1993 inspection, Keller talked to Archie Gilliss, mine safety manager, about Holtz' continued emotional reaction to the 1990 accident and investigation, his flashbacks, and how his emotional state might affect his ability to concentrate fully on operating the large coal hauler. Keller noted that the company had an employee assistance program and asked Gilliss if the company could provide Holtz some assistance, meaning professional counseling. Gilliss prepared a memorandum to his files concerning his discussion with Keller and reported the matter to mine management. After consultation with legal counsel, management decided to take Holtz off the equipment and place him on paid medical leave for psychological evaluation. The decision was a collective one and involved Falkirk's President, Falkirk's Manager of Human
 Resources, Holtz' line supervisors, and Gilliss.

10. Holtz was very upset with Falkirk's decision to require him to undergo psychological evaluation. He filed a § 105(c) discrimination complaint against Falkirk on March 22, 1993,

contending that Gilliss lied about Keller's comments in order to retaliate against Holtz' protected activities.

11. MSHA investigated Holtz' discrimination complaint and determined there had been no violation of § 105(c). After receiving MSHA's decision, around November 1, 1993, Holtz elected not to pursue his complaint before the Review Commission.

12. In this proceeding, which involves a later discrimination complaint (in 1995), Holtz contends that Gilliss demonstrated a pattern of hostility toward Holtz' protected activities. As part of the pattern, Holtz contends, Gilliss lied to Falkirk's management concerning the extent of Keller's remarks to Gilliss following the February 1993 inspection. Holtz testified that he talked to Keller and that Keller had denied stating that he considered Holtz to be a safety risk to himself and his fellow miners or a "time bomb" ready to go off, as Gilliss had reported to management. Keller testified that he expressed to Gilliss his concerns about Holtz' inability to put the accident behind him and the possibility that he was not able to maintain his concentration while operating the large coal hauler. Keller also testified that he mentioned Holtz' flashbacks and asked Gilliss whether there was something that Falkirk could do in terms of providing Holtz with counseling. In large part, Keller confirmed Gilliss' account of the conversation, although Gilliss may have exaggerated some of Keller's statements.

13. In March 1993, Holtz went on medical leave with full pay and benefits. Dr. Tello, the physician staffing Falkirk's Employee Assistance Program, referred him to Dr. Peterson, a clinical psychologist who was not connected with Falkirk. Dr. Peterson saw Gilliss and also had him see a psychiatrist, Dr. Thakor, who also was not connected with Falkirk. Following those consultations, Dr. Peterson reported to Falkirk that Holtz had unresolved psychological conflicts as a result of the 1990 accident and strongly recommended that Holtz receive counseling from either a psychiatrist or a psychologist. Dr. Peterson noted that there was a significant ongoing conflict between Holtz and the mine staff. He described Holtz as being a "worrisome, tense individual who is likely to be rigid and stubborn in relationships." He also reported that Holtz "is suspicious of others and has difficulty trusting." At the same time, however,

Dr. Peterson reported that he did not consider Holtz to be a danger to himself or others in carrying out his job responsibilities.

14. Following Dr. Peterson's report, Holtz was returned to duty as a coal hauler operator, but was required to attend further counseling as recommended by Dr. Peterson. The additional counseling was performed by Dr. Hanlon, who was not connected with Falkirk. Although this situation was somewhat unique, Falkirk has taken similar actions with regard to other employees. In one instance, Falkirk required a dragline operator who was having emotional problems to obtain assistance and in other instances had referred personnel to its EAP program when there were unexplained problems with their job performance.

15. After returning to duty, Holtz' relationship with mine management continued to be poor. Holtz' immediate supervisor, Mr. Davison, wrote in Holtz' employee evaluation on October 7, 1993, the following:

> Harold's basic attitude toward his job as a coal hauler is satisfactory. It is also satisfactory toward his supervisor. However, with respect of his attitude toward the company as a whole and particularly toward members of management, it is much below average. Much if not all is manifest from his involvement in the fatal accident of 12/17/90 and a subsequent evaluation this summer. There have been times when Harold was emotionally upset that I believe Harold was not 100% committed to his primary job as Coal Hauler Operator. I feel Harold needs to put these incidents behind him emotionally and move on with his job and his future at Falkirk. [Ex. C-4]

16. On August 3, 1994, Gilliss had an incident with Holtz in the shift change area at the mine. Gilliss reported to Falkirk's management that Holtz asked him, "Have you talked to your high ranking MSHA official buddy that you are in cahoots with lately?" Gilliss stated in his report that when he asked Holtz what he meant, Holtz referred to Inspector Keller and the conversation between Keller and Gilliss that precipitated Holtz being sent for psychological evaluation. Gilliss also reported that when Holtz began talking about this subject, Holtz got red-faced and angrier and angrier, pointed his finger at Gilliss, and

with a very hard and glaring stare, stated "I'll see you in court." Tr. 197-200.

17. Based upon Gilliss' report, management gave a written warning to Holtz on August 11, 1994. The written warning concluded:

> Your comments and behavior towards Mr. Gilliss are totally uncalled for and is unacceptable behavior by one employee towards another at the Falkirk Mine, thus, any similar behavior in the future will result in stronger discipline, up to, and including termination.
>
> You have been previously advised of your right to pursue legal action or avail yourself to the appropriate state or federal authorities if a problem exists but when you sue [sic] this as a device to threaten and intimidate other employees; this behavior is unacceptable and subject to disciplinary action. [Ex. C-5]

18. On the evening of February 21, 1995, Holtz happened to come across Gilliss in a bar at the Comfort Inn motel in Bismarck, North Dakota, about fifty miles from the Falkirk Mine. During "happy hour," Gilliss was in the bar with his brother-in-law and several of his family members who were staying at the motel. Holtz was in the bar with his wife and another couple. When Gilliss came into the bar, his party happened to take a table next to Holtz' table. Gilliss later reported to management that Holtz glared at him from Holtz' table and that at one point Holtz stood by Gilliss' table for several minutes and stared at Gilliss without talking and, finally, when Gilliss acknowledged his presence (by saying, "Hello, Harold") Holtz simply walked away without comment. Gilliss reported to management he felt threatened by this conduct, particularly given the setting in which it took place and not knowing what might happen next.

19. Holtz testified that he simply stood a few moments at Gilliss' table for an opportunity to greet him, and then left. He denied he did so in a threatening or intimidating manner.

20. Several persons testified about the incident in the Comfort Inn in addition to Gilliss and Holtz: Gilliss' brother-in-law David Laber, Holtz' wife, and one of the individuals who

was with the Holtz party, Mr. Robertson. Although there were some discrepancies in the accounts given by these witnesses as to exactly where persons were situated at various points during the evening and other like details, these discrepancies were not unusual. Considering the testimony of these witnesses along with the testimony of Gilliss and Holtz, I find that Holtz did pause at the table at which Gilliss was seated and did stare at Gilliss without speaking. Gilliss' report to management stated that Holtz stood near his table for "several minutes." I find that this was an exaggeration and that Holtz stood at the table about 30 seconds.

21. As a result of Gilliss' report to management, management made the decision, after consultation with legal counsel, to place Holtz on six months probation. The written notice of probation was given on February 23, 1995. The notice referred to the prior warning on August 11, 1994, and stated that he was being placed on probation because he had engaged in further objectionable conduct of an intimidating nature. Ex. C-6.

22. Holtz filed a second § 105(c) discrimination complaint against Falkirk, dated March 24, 1995, which is the subject of this proceeding. The complaint was investigated by MSHA, which concluded that there had been no violation of § 105(c).

23. During probation, Holtz continued working but was denied a wage increase and a yearly bonus paid to other employees. The wage increase was given as of the date of his completion of probation and the bonus for the prior year was then paid.

24. At the time of the hearing, May 1996, Holtz was employed at the Falkirk Mine and there had been no further incidents in his employment relationship. Management had installed traffic safety rules and Holtz was performing his job well.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Section 105(c)[1] of the Act protects miners and others from discrimination because of the exercise of rights under the Act, including making safety complaints to the mine operator or to MSHA.

A miner alleging discrimination under § 105(c) establishes a prima facie case of discrimination by proving that he or she engaged in protected activity and the adverse action complained of was motivated in part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co. 3 FMSHRC 803,817-18 (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. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it is also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. Pasula, 2 FMSHRC at 2799-2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

As the Commission and Courts have repeatedly noted, direct evidence of discriminatory motive is rare. Usually discrimination can be proven only by circumstantial evidence upon which the trier of fact draws an inference regarding the employer's motivation. Secretary of Labor on behalf of Chacon v.

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

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

Phelps Dodge Corporation, 3 FMSHRC 2508, 2510 (1981).

The most common circumstances upon which such an inference may be based are the employer's knowledge of the protected activity, hostility towards the protected activity (animus), nearness in time between the protected activity and the adverse action, disparate treatment of the complainant and similarly situated employees, and the resort to pretextual grounds for the adverse action against the complainant.

Section 105(c) protects the exercise of rights under the Act, but not misconduct. Abusive or threatening conduct toward a supervisor or management staff in raising a safety complaint may run the risk that the operator will take disciplinary action for conduct that is not protected by § 105(c).

Protected Activities

Holtz was engaged in numerous protected activities. He disagreed with the company's account of the 1990 accident and raised complaints about safety rules needed to prevent similar accidents. His voicing of these concerns to mine management and the mine safety manager was protected against retaliation under § 105(c).

His numerous contacts with MSHA concerning its investigation and its preparation for a hearing on citations were protected under § 105(c). His status as a prospective witness at the hearing was protected.

His filing of a § 105(c) complaint of discrimination in 1992 was a protected activity.

Finally, his complaints about the 1992 settlement of the citations and penalties were protected activities to the extent that they raised questions of a violation of the Act or regulations for the proper enforcement and administration of the Act.

Disposition of the Issues

Holtz contends that Falkirk's probation decision was based on Gilliss' account of the incident in the Comfort Inn on February 21, 1995, and that Gilliss gave a false and exaggerated account to retaliate against Holtz because of his protected activities. Holtz contends that Gilliss demonstrated a pattern of hostility toward his protected activities as evidenced by the probation decision and Falkirk's two prior adverse actions of placing Holtz on medical leave for psychological evaluation in 1993 and its written reprimand in 1994. Holtz contends that all three actions were based on Gilliss' accounts of the facts which were false or exaggerated by Gilliss to retaliate against Holtz' protected activities. The company denies any discrimination or hostility because of Holtz' protected activities and asserts that the 1993 and 1994 actions are barred by a 60 day statute of limitations.

The two prior adverse actions are not part of Holtz' present complaint of discrimination, and will not be adjudicated here as liability claims. However, they will be considered under the issue whether management through Gilliss demonstrated a pattern of hostility toward Holtz' protected activities.

1. Medical leave for psychological evacuation

In March 1993, Gilliss reported to management that MSHA Inspector Keller had expressed concerns about Holtz' emotional state and safety as a heavy equipment operator. Based upon Gilliss' account of Keller's remarks, management decided to place Holtz on medical leave for psychological evaluation.

Holtz testified that Keller told him that he did not tell Gilliss that Holtz was a danger to himself or others, or a "time bomb" waiting to go off, as Gilliss had reported to management. Keller testified that he expressed concerns about Holtz' inability to put the accident behind him and the possibility that he was not able to maintain full concentration while operating the large coal hauler. Keller also testified that he mentioned Holtz' flashbacks about the accident and asked Gilliss whether there was something that Falkirk could do in terms of providing Holtz with counseling. I find that the essence of the inspector's safety concerns about Holtz' emotional state was

conveyed in Gilliss' report to management, even though Gilliss may have exaggerated or misstated some of Keller's remarks.

The evidence does not indicate that Gilliss' report to management was motivated in any part by Holtz' protected activities. Gilliss did not demonstrate hostility toward Holtz' protected activities. Instead, he recommended that Holtz contact MSHA if he had any further complaints or facts to assist the investigation of the 1990 accident. Gilliss' report about Keller's remarks was in March 1993, which was about six months after the settlement of the citations and almost two years after Holtz first started complaining to the company and to MSHA about the accident and the investigation. There is no close relationship in time between Holtz' protected activities and Gilliss' report of Keller's remarks.[2] The evidence indicates that Gilliss was motivated to alert management to Keller's safety concerns about Holtz because of the significance of a federal mine inspector expressing concerns about the emotional state and possible safety risk of a heavy equipment operator.

2. Written warning on August 11, 1994

Gilliss wrote a memorandum to his files on August 3, 1994, concerning a confrontation with Holtz in the shift change area. Based upon Gilliss' report to management, management issued a written warning to Holtz on August 11, 1994.

This incident was long after the 1990 accident and 1992 settlement of the citations with MSHA. The evidence indicates that Gilliss' motivation in reporting the August 3 incident to management was his concern about abusive and intimidating behavior by Holtz rather than Holtz' protected activities.

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[2]Holtz' statements to Keller during the February 1993 inspection were protected activities. However, the evidence indicates that Gilliss' motivation in reporting Keller's safety concerns about Holtz was to alert the company to a federal inspector's concerns, not to retaliate against Holtz for protected activities.

3. Letter of probation on February 23, 1995

The controlling issue in this case is whether Gilliss' account of the Comfort Inn incident, which induced management's probation decision in February 1995, was motivated in any part by Holtz' protected activities.

On February 22, 1995, Gilliss prepared a memorandum of an incident with Holtz at the Comfort Inn bar on February 21, 1995. Ex. C-12. This memorandum was the basis of his report to management, which led to management's decision to place Holtz on probation for six months. Gilliss' report to management is an integral part of management's decision because it provided the facts accepted by management as the basis for its probation action. If Gilliss' report is found to be tainted by discrimination, management's decision would be similarly tainted.

Although Gilliss' memorandum of the incident contains some exaggerations, I find that the essence of Holtz' conduct that disturbed him, i.e., standing at his table and staring at him without talking, was conveyed in his report. The evidence does not preponderate to show a nexus between Gilliss' report to management and any protected activities by Holtz. Instead, the evidence indicates that the motivation of Gilliss and management was to address conduct they perceived as intimidating and a violation of the August 11, 1994, written warning.

In summary, after proving his protected activities, Holtz had the burden to prove that there was some nexus between his protected activities and the challenged adverse action.

The evidence does not show a nexus between any of the three adverse actions (in March 1993, August 1994, and February 1995) and Holtz' protected activities. First, the evidence does not show that Respondent had hostility toward Holtz' protected activities. Gilliss and management on several occasions told Holtz that if he had continuing concerns about the 1990 accident or the investigation he should contact MSHA. The accident occurred in December of 1990 and the settlement of the citations was approved in September 1992. During this time Holtz had a number of contacts with both MSHA and Falkirk management and Gilliss concerning his complaints about the investigation and his perceptions that Falkirk had misrepresented the facts and

covered up serious violations and was "in cahoots" with MSHA and its attorneys. Yet during this period Holtz was not disciplined by Falkirk and was given good evaluations for his job performance. Secondly, the evidence indicates that each of the three adverse actions had a close relationship in time with conduct that was not protected by § 105(c). The decision to place Holtz on medical leave for psychological evaluation in March 1993 directly followed the concerns raised by MSHA Inspector Keller about Holtz' emotional state and possible safety risk as a heavy equipment operator. The written warning on August 11, 1994, was triggered by an August 3 incident that the operator perceived as employee misconduct, not an activity protected by § 105(c). Finally, the probation decision on February 23, 1995 was based on conduct on February 21 that the operator perceived as a violation of the August 1994 written warning and not an activity protected by § 105(c).

For the above reasons, I find that the evidence does not establish a violation of § 105(c). Even if the evidence were found to prove that the probation decision was motivated in some part by Holtz' protected activities, I find that the operator affirmatively proved that it considered Holtz' unprotected conduct and would have put him on probation for that conduct alone.

Respondent's Motion to Recover Attorney Fees and Costs

Respondent contends that Holtz' discrimination complaint is without merit and was filed as a tactic to forestall or chill legitimate personnel actions and to re-litigate claims barred by the statute of limitations. It requests a finding that Holtz has abused the discrimination complaint process and moves for recovery of attorney fees and costs under the Commission's Rules of Practice, 29 C.F.R. § 2700.1, and Fed. R. Civ. P.11.

I find that the complaint rests upon substantive contentions, and was not frivolously brought. Holtz had good faith, substantial concerns about what he perceived to be management's failure to acknowledge its own role in contributing to the fatal accident, its delays in adopting and following traffic safety rules, and its participation in a "white-washing" settlement of MSHA's charges and civil penalties. Holtz also felt frustrated by management's failure to spend time with him

after the accident to get his input on the facts and safety issues he perceived about the accident and concerns he felt about the loss of a co-worker's life. He felt isolated by management after a traumatic accident that he believed could have been prevented through the observance of proper traffic safety rules. On good faith grounds, although not meeting his burden of proof, Holtz believed Gilliss and management retaliated against him because of his protected activities. Factual issues as to the two prior adverse actions were relevant in considering whether Gilliss, a key management agent, demonstrated a pattern of hostility toward Holtz' protected activities. In sum, I find that Holtz has not abused the discrimination complaint process.

CONCLUSIONS OF LAW

1. Respondent's Falkirk Mine is subject to the Act.

2. Complainant, Harold Holtz, has failed to prove a violation of § 105(c) of the Act.

3. In bringing this action, Complainant has not abused the discrimination complaint process.

ORDER

WHEREFORE IT IS ORDERED that:

1. The complaint is DISMISSED.

2. Respondent's motion to recover attorney fees and costs is DENIED.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 20 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-233
Petitioner	:	A.C. No. 36-04109-03520
v.	:	
	:	Ambrosia Tipple
AMBROSIA COAL &	:	
CONSTRUCTION COMPANY,	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-15
Petitioner	:	A.C. No. 36-04109-03522 A
v.	:	
	:	Ambrosia Tipple
AMBROSIA COAL &	:	
CONSTRUCTION COMPANY	:	

ORDER ON REMAND

Before: Judge Fauver

On September 12, 1996 the Commission remanded these cases to the judge for reassessment of civil penalties.

The Secretary shall have 15 days from the date of this Order to propose the amounts of reassessed civil penalties against Ambrosia and Steen with the reasons therefor consistent with the Commission's decision in this case and in Sellersburg Stone Co., 5 FMSHRC 287, 293-3 (1983). Each Respondent shall have 10 days to

reply to the Secretary's proposed penalties and to recommend counter-proposals with the reasons therefor consistent with the above decisions.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 26, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 96-103-M A.C. No. 20-00773-05525-A
v.	:	Lyon Sand & Gravel
RAYMOND P. ERNST, EMPLOYED BY LYON SAND & GRAVEL CO., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 96-104-M A.C. No. 20-00773-05524-A
v.	:	
SCOTT BANDKAU, EMPLOYED BY LYON SAND & GRAVEL CO., Respondent	:	Lyon Sand & Gravel

ORDER OF DISMISSAL

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against respondents, Scott Bandkau and Raymond P. Ernst, under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 810(c), hereinafter referred to as the "Act". Respondents seek to have the petitions dismissed on the ground that the Secretary has failed to act in a timely manner.

These cases involve one citation and four orders issued to respondents' employer, Lyon Sand & Gravel Company, under section 104(d) of the Act, 30 U.S.C. § 814(d), for alleged violations of the Act and its mandatory standards. The five violations were issued on September 21, 1994.

On February 26, 1996, the Secretary issued notices of proposed civil penalty assessments against respondents and on March 22, 1996, respondents timely requested a hearing. 29 C.F.R. § 2700.26. The Secretary had 45 days after receipt of the hearing requests to

file his penalty petitions. 29 C.F.R. § 2700.28. In these cases the Secretary received respondent Ernst's hearing request on March 26, 1996, and respondent Bandkau's request on March 27, 1996. Therefore, the petitions were due on May 10, 1996, and May 13, 1996, respectively. 29 C.F.R. § 2700.8.

The Solicitor failed to file the penalty petitions. On June 4, 1996, orders were issued to the Secretary to show cause within 30 days why these cases should not be dismissed for untimely filing.

On July 12, 1996, the Solicitor filed the penalty petitions. The petitions were accompanied by a motion for leave to file them out of time which offered the following explanation:

> The Secretary devoted many hours of review to the above-captioned case in order to determine if a civil penalty was appropriate based on the facts as known to him. This review required the scheduling of meetings between interested parties, both live and by phone which took considerable time and effort. Therefore, the Secretary was not able to reach a conclusion about whether to file a Petition for Assessment of Civil Penalty in the instant case before now.

On August 13, 1996, respondents filed a motion to dismiss. Respondents complain that the penalty petitions were not filed within the required 45 days and point out that they were not filed until after show cause orders were issued. Respondents further complain that the subject citation and orders were issued on September 21, 1994, almost 22 months before the penalty petitions were filed. It is respondents' assertion that the Secretary has failed to demonstrate adequate cause and they have been prejudiced by the delays.

On August 22, 1996, the Solicitor filed a letter stating that he would not be filing additional motions.

The Commission permits late filing of penalty petitions where the Secretary demonstrates adequate cause for the delay and where the respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

The reasons offered by the Solicitor in these cases to justify the late filings fall short of what is required for a showing of adequate cause. The Solicitor makes the briefest of responses which contains only general statements about events which allegedly caused the untimeliness. The specific circumstances are not addressed. The Solicitor refers to many hours of review, but the actual times spent and the chronology of those times are undisclosed. He mentions many meetings between interested parties, but does not say who the parties were or when the meetings took place. Finally, the Solicitor fails to sufficiently answer respondents' allegations because he does not distinguish between the delay in filing the penalty petition and the delay in the investigation phase. Because the Solicitor's explanation is general and vague, it could apply to any 110(c) case where timeliness becomes an issue.

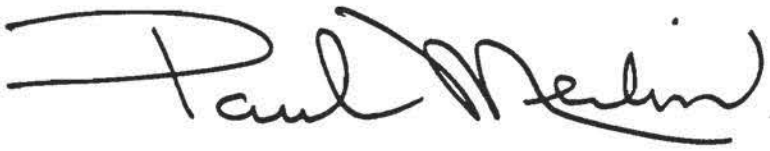
In James Lee Hancock, Employed by Pittsburg and Midway Coal Company. 17 FMSHRC 1669 (September 1995), I granted requests from the Solicitor for extensions of time to file the penalty petition and rejected claims that there were undue delays by MSHA during its investigation and by the Solicitor in filing the penalty petition. However, in Hancock the Solicitor provided a detailed exposition of the problems encountered in considering the case as well as the sequence of events that occurred. Based upon those circumstances, he justified the time used by the Secretary both in investigation and in filing the penalty petition. The Solicitor here has done none of these things.

It is axiomatic that section 110(c) is an integral and important part of enforcement under the Mine Act. When Solicitors are confronted with allegations such as those made by the respondents here, they must do more than recite generalizations unrelated to what transpired in the case.

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

In light of the foregoing, the Solicitor's motion to file the penalty petitions out of time is DENIED.

It is ORDERED that these cases be DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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SEP 26 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MARTY P. BODEN, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 95-417-D
v.	:	
LION COAL COMPANY, COUGAR COAL COMPANY, successor to LION COAL COMPANY, Respondent	:	Swanson Mine Mine I.D. 48-00082

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Brian W. Steffensen, Esq., counsel and registered agent, Cougar Coal Company, Corporate Secretary, Lion Coal Company, for Respondent.

Before: Judge Cetti

This case is before me upon the complaint by the Secretary of Labor on behalf of Marty P. Boden under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act". The complaint alleges that Lion Coal Company (Lion Coal) violated § 105(c)(1)[1] of the Act when it

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

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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an

discharged Marty P. Boden from his position as belt foreman at the Swanson Mine. For the reasons discussed below, I find that Respondent Lion Coal violated section 105(c)(1) when it discharged Mr. Boden in the afternoon of the same day that there had been an early morning Code-a-Phone inspection of the operator's Swanson Mine. It is undisputed that the Code-a-Phone inspection resulted from Boden's report to MSHA about unsafe conditions at the Swanson Mine.

Liability is also assessed against Respondent, Cougar Coal Company (Cougar Coal), as the successor to Lion Coal for the reasons set forth in my decision in Secretary of Labor, on behalf of Marty P. Boden, v. Lion Coal Company and Cougar Coal Company, successor to Lion Coal Company. 9 FMSHRC 1620, 1624 (Sept. 1995).

Having considered the evidence presented at the hearing and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. At all relevant times, Respondent Lion Coal and its successor Cougar Coal engaged in the production of coal at the Swanson Mine and, therefore, each is an operator within the meaning of section 3(d) of the Mine Act.

2. The Swanson Mine is an underground coal mine and is a mine as defined by section 3(h) of the Mine Act, the products of which affect interstate commerce.

3. At all relevant times, Marty Boden was employed by Respondent Lion Coal as a belt foreman and as a miner as defined by section 3(g) of the Mine Act.

4. Matt Breneman at all relevant times was the mine superintendent and manager at the Swanson Mine. He was the person with the highest authority at the mine site and had authority from the operator of the Swanson Mine to discharge Boden.

5. Marty Boden engaged in protected activity when on November 7, 1994, Mr. Boden contacted the MSHA offices in Delta, Colorado, and Arlington, Virginia, to report unsafe working

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alleged danger or safety or health violation in a coal or other mine or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

conditions at the Swanson Mine. Specifically, he complained about the belt rollers, the rock dusting and the returns. Boden's phone calls of November 7, 1994, caused MSHA to perform a Code-a-Phone inspection at the Swanson Mine on November 9, 1994.

6. The Code-a-Phone message had safety complaints that were the same complaints that Boden had repeatedly made to management. The mine superintendent Breneman could tell from the complaints in the Code-a-Phone message that Boden was the one who made the complaints to MSHA that resulted in the inspection. After the Code-a-Phone inspection was completed, Matt Breneman talked to the mine's Board of Directors in Salt Lake City. Board members put the call on a speaker phone and board members R. Anderson (Dick), J. Lipscomb and Brian Steffensen participated in the call. Breneman discussed with them the inspection and the complaints set forth in the Code-a-Phone mes-sage. In the course of that conversation, Mr. Steffensen told Breneman to fire Marty Boden. Immediately on hanging up the phone Breneman discharged Mr. Boden.

7. Mr. Boden was discharged the afternoon of November 9, 1994, in retaliation for his complaints to MSHA about unsafe conditions at the Swanson Mine. Boden's complaints to MSHA resulted in the MSHA Code-a-Phone inspection of the mine on the morning of November 9, 1994.

8. Boden was discharged for engaging in the above refer-enced protected activity. No affirmative defense was estab-lished.

9. At the time of his discharge on November 9, 1994, Marty Boden's regular rate of pay was $1,000 - a week.

10. Marty Boden's job at the Swanson Mine, but for his illegal discharge on November 9, 1994, would have continued up through April 17, 1995, the date his replacement, Dennis Keller, was laid off due to lack of work.

11. Because of credit problems, the shareholders of Lion Coal voted to create Cougar Coal in order to continue the opera-tion of the Swanson Mine. Cougar Coal was incorporated in the state of Wyoming on November 29, 1994.

12. On November 29, 1994, Lion Coal sold the company for a nominal fee and transferred its coal mining business and most of its assets to the newly formed Cougar Coal Company.

13. After the November 29, 1994, sale and transfer stated above Cougar Coal continued to mine coal at its Swanson Mine without a break during the change of the operator from Lion Coal to Cougar Coal.

14. Cougar Coal is the successor of the Lion Coal Company.

15. At the August 29, 1995, hearing, Cougar Coal filed a Notice of Bankruptcy stating that "Respondent Cougar Coal Company is the Debtor in Possession in Bankruptcy No. 95C-21320, United States Bankruptcy Court for the District of Utah, Central Division. Cougar's voluntary petition for relief under Chapter 11 of the Bankruptcy Code was filed on March 15, 1995." This Notice of Bankruptcy was handed to Judge Cetti by counsel Brian W. Steffensen while Judge Cetti was sitting on the bench just moments before going back on the record with the hearing in this matter at 9 a.m. on August 29, 1995, with the request that it be filed. (Tr. I of 8/29/95 pg. 8).

16. Counsel Brian W. Steffensen at all relevent times, was the secretary for Lion Coal and the secretary and a registered agent for Cougar Coal.

DISCUSSION AND FURTHER FINDINGS

The general principles governing analysis of discrimination cases under the Mine Act are well established. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in some part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 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. If an 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 in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom.

Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). The Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the (protected) activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity, and coincidence in time between the protected activity and the adverse action. Chacon, supra at 2510.

The Secretary presented the testimony of the mine manager and superintendent Matt Breneman; the belt foreman and Complainant Marty Boden; the MSHA special investigator Leslie Y. Lorenzo; the former company safety manager Anna Marie Boden; Ron Kalvis, a shop foreman; Greg Brown, who worked under Boden on the belts; Dennis Keller, who took over Boden's duties as belt foreman when Boden was discharged; Ron Hoffman and Tara Whittaker.

The Respondent presented primarily the testimony of management witnesses who testified that they were not satisfied with Mr. Boden's work performance as belt foreman and were also concerned about his use or possible misuse of a company gas card and company telephone. Their testimony indicated that Lion Coal management was in the process of investigating Mr. Boden's work performance and were planning to make a closer check on his work performance with the view of possibly terminating his employment before they became aware of Marty Boden's Code-a-Phone message to MSHA.

I was impressed with the credibility of the testimony of Matt Breneman, the mine superintendent and manager of the Swanson mine. I credit his testimony. He, as well as other witnesses, testified that the safety complaints in the Code-a-Phone message were the same complaints that Boden had repeatedly made to management, and he (Breneman) could tell from the complaints set forth in the Code-a-Phone message that Boden was the one who made the complaints to MSHA. After the Code-a-Phone message was received at the mine and the Code-a-Phone inspection completed,

Matt Breneman in a long distance phone call to Salt Lake City discussed the matter with the mine's Board of Directors. The board members put his call on a speaker phone, and R. Anderson (Dick), J. Lipscomb and Brian Steffensen participated in the call. Breneman discussed with them the Code-a-Phone inspection and the complaints set forth in the Code-a-Phone message. In the course of that conversation Brian Steffensen admittedly told Breneman that he was "not afraid" to fire Marty Boden. The mine manager replied he had no reason to fire Boden. Brian Steffensen then told him to fire Boden for "malfeasance". Breneman hung up the phone, looked at Boden and said "they want me to fire you" for "malfeasance." He briefly discussed the situation with Boden and it was determined that in order not to jeopardize his own job, Breneman would have to do what he was told to do. He fired Boden. Boden then immediately left the mine.

The record satisfactorily establishes that the reason given for firing Boden, "malfeasance", was pretextual. The evidence presented fails to establish that Boden misused the company gas card or misused the company phones as asserted by Respondent.

It is worthy of note that Boden had no prior disciplinary action taken against him nor were there any letters of reprimand in his personnel file. He received no reprimands or warnings of any kind. Matt Breneman, Boden's supervisor, was certainly the person in the best position to evaluate Boden's work and testified that Boden had satisfactorily performed all duties. One of the miners on Boden's crew, Greg Brown, testified that Boden was a good supervisor and worked with the crew to get things done.

While it is true that some needed maintenance work was not performed, the reason being that management would not authorize the necessary funds. It satisfactorily appears from the record that Boden did the best job he could do with what he had to work with.

The preponderance of the evidence established that Boden was discharged on November 9, 1994, in retaliation for his protected activity in violation of § 105(c) of the Mine Act.

The purpose of reinstatement is to place a miner, as closely as possible, in the situation he would have occupied, but for the illegal discrimination. Boden was employed by Lion Coal from September 1994 through November 9, 1994, as a belt foreman. His normal rate of pay was $1,000 a week. On his illegal discharge Boden was replaced by Dennis Keller who took over Boden's job of supervising the belt crew and his other duties as belt foreman. Dennis Keller was "laid off" April 17, 1996 due to lack of work at the Swanson Mine. The mine was closing down at that time. The Secretary contends that Boden is entitled to back-pay at his normal rate of $1,000 a week from November 9, 1994, the date of his illegal termination, to April 17, 1995, the date Dennis

Keller, who replaced him, was laid off due to lack of work. On review and evaluation of the evidence of record, I agree with the Secretary that Boden is entitled to back pay at the rate of $1,000 a week for the period from the 9th of November 1994 through the 17th of April 1995.

COUGAR COAL COMPANY, SUCCESSOR TO LION COAL COMPANY

It has been established that Respondent Cougar Coal is the successor to Lion Coal in the case of Lion Coal Company, Cougar Coal Company as successor to Lion Coal Company. 17 FMSHRC 1620 (Sept. 1995).

The evidence established that on November 29, 1994, for $10.00 and other consideration, Cougar Coal assumed the right to the title and an interest in all assets of Lion Coal except for claims against the Selengos and their affiliates, cash on hand, current accounts receivable and inventory. (Gov't. Ex. 10-B). After the November 29, 1994, transaction, the day-to-day operations at Swanson Mine continued by Cougar Coal without a break. The mine continued to produce coal. The mine and the appurtenances associated with the mining activities remained the same. The workforce remained substantially the same. Both Mine Superintendent Gene Picco and Mine Manager George Herne, who have been employed at this mine for several years continued their employment with Cougar Coal.

Mining methods and procedures did not change and the same jobs were required to be filled. Cougar Coal adopted all of Lion Coal's MSHA-approved plans and stated that they anticipate no change in mining practices. Cougar Coal used the same machinery, equipment and methods of production.

George Herne, mine manager for Cougar Coal, in his letter to the MSHA District Manager under the letterhead of Cougar Coal Company dated January 13, 1995, stated in relevant part:

> Cougar Coal Company has taken over the operations of the Swanson Mine, ID #48-00082 from Lion Coal Company. At this time Cougar Coal anticipates no change in the mining practices employed at the Swanson Mine. For this reason Cougar Coal Company will continue to operate under Lion Coal Company's approved mining plans, and accepts these mining plans as their own. (Gov't. Ex. 10-A, pg. 4, Tr. 479).

In addition, the corporate officers and directors for Lion Coal Company and Cougar Coal Company are substantially the same as follows:

James Lipscomb - Chairman and President of Lion Coal Company and President of Cougar Coal Company

Hal Rosen - Treasurer of Lion Coal Company and Treasurer of Cougar Coal Company

Richard Anderson - Vice-President of Lion Coal Company and Vice-President of Cougar Coal Company

Brian Steffensen - Secretary of Lion Coal Company and secretary and registered agent for Cougar Coal Company. Brian Steffensen is also counsel of record who was present and participated in all proceedings in this matter.

Thus, under the nine-factor successorship guideline enunciated Munsey v. Smitty Baker Coal Company Inc., 2 FMSHRC 3463 (1980) Cougar Coal is the successor to Lion Coal and, as such, along with Lion Coal, is properly subject to joint and several liability for back-pay to Marty Boden and the civil penalty for the violation of 105(c) of the Act.

On consideration of the statutory criteria in section 110(i of the Act that is relevant in this discrimination case, particu larly the financial situation of the Respondents inability to continue mining, the closure of the mine and the continuing bankruptcy proceeding of the successor Cougar Coal Company, I conclude the appropriate civil penalty in this case is $400.00.

ORDER

It is **ORDERED** that the Respondent, Lion Coal Company and Cougar Coal Company jointly and severally:

1. Pay Marty P. Boden full back-pay with interest for the period from November 9, 1994, through April 17, 1995, at his normal rate of pay of $1,000.00 a week less appropriate Federal and State tax withholding payable to said governmental agencies.

2. Expunge from Marty P. Boden's personnel records all references to his discharge and the circumstances involved in the discharge.

3. Pay a civil penalty in the amount of $400.00 to the Secretary of Labor for the violation of section 105(c) of the Act.

4. This decision constitutes my final disposition of this proceeding.

August F. Cetti
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Brian W. Steffensen, Esq., LION COAL COMPANY, 675 East 2100 South, Suite 350, Salt Lake City, UT 84106 (Certified Mail)

COUGAR COAL COMPANY, 1554 9th Street, Rock Springs, WY 82901 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 27 1996

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. SE 96-112-R
v.	:	Citation No. 4476618; 1/3/96
	:	
	:	No. 4 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 01-01247

DECISION

Appearances: R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama for Contestant. William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama for Respondent.

Before: Judge Fauver

This is a contest proceeding under § 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The parties have filed cross motions for summary decision.

Having considered the stipulations, exhibits, and the record as a whole, I find that the record establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Jim Walter Resources, Inc., operates an underground coal mine, known as Mine No. 4, which produces coal for sale or use in or affecting interstate commerce.

2. On January 3, 1996, it was operating nonpermissible diesel-powered buses and locomotives within 150 feet of pillar workings in the No. 4 Mine. The diesel-powered vehicles

contained electrical components including an alternator, battery, starter, circuit breakers, diodes, fuses, relays, resistors, and solenoids.

3. Based upon the above facts, the Secretary issued a citation charging a violation of 30 C.F.R. § 75.1002.1-(a).

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

General Principles

"Where the language of a statutory or regulatory provision is clear, the terms of that provision must be enforced as they are written ...." Utah Power & Light Co., 11 FMSHRC 1926, 1930 (1989); see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 842-43 (1984). The "ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning" (Western Fuels-Utah, Inc., 11 FMSHRC 278,283 (1989) (citing Old Colony R.R. v. Commissioner, 284 U.S. 552, 560 (1932)).

Under the Mine Act, if a statutory provision is ambiguous or silent on a point in question, an inquiry is required into the reasonableness of the Secretary's interpretation. If the Secretary's interpretation is found to be reasonable, it is given deference by the Commission and the courts. Special weight is given to an agency's interpretation of its own regulation. The Supreme Court has stated that the agency's interpretation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Company, 325 U.S. 410, 414 (1945); and see Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980); and Secretary of Labor ex rel. Bushnell v. Connelton Industries, Inc, 867 F.2d 1432, 1433, 1435 (D.C. Cir. 1989). To warrant deference the agency's interpretation must be consistent with due process. That is, an agency's interpretation of its regulation cannot be said to be reasonable if the regulation as interpreted fails to give fair warning of the conduct required or prohibited.

Disposition

Section 75.1002-1(a) provides in part:

> (a) Electric equipment other than trolley wires, trolley feeder wires, high-voltage cables, and transformers shall be permissible, and maintained in a permissible condition when such equipment is located with 150 feet from pillar workings ....

The controlling issue is whether § 75.1002-1(a) applies to Contestant's diesel-powered buses and locomotives.

Section 75.1002 is a verbatim adoption of § 310(c) of the 1969 Coal Mine Health and Safety Act, which was not changed by the 1977 Amendments to the 1969 Act. Section 310(c) was enacted to prevent certain nonpermissible electric equipment (specifically, "trolley wires and trolley feeder wires, high-voltage cables and transformers") from being located with 150 feet of pillar workings. The standard is intended to "prevent such equipment from being located in the ventilating current which might contain [explosive] mixtures of gas and [float coal] dust." 13 F.R. 11777, 11778 (June 14, 1972). Section 310(c) does not specify other electric equipment, such as electric-powered vehicles. Because of this omission, in 1972 the Secretary proposed an amendment to § 75.1002 by adding § 75.1002-1, stating it was needed because "electric equipment other than trolley wires trolley feeder wires, high-voltage cables, and transformers may be located with 150 feet form pillar workings ... and are subject to the [same] hazards." 37 F.R. 11777, 11778 (June 14, 1972). The amendment became effective February 23, 1973. 38 F.R. 4974-76.

The Secretary contends that diesel-powered vehicles are "electric equipment" within the meaning of § 75.1002-1(a) because they contain electric components, e.g. alternators, batteries, starters, solenoids, and circuit breakers, and the vehicles and components present the same hazards as other nonpermissible equipment.

This is a case of first impression. However, several decisions give some guidance.

In U.S. Steel Mining Company, Inc., 15 FMSHRC 1541 (1993), the Commission held that "electrical circuits that perform electrical functions exclusively" and components of such circuits, such as circuit breakers, are "electric equipment" within the meaning of § 75.512 (which requires examination and testing of "electric equipment"). The Commission gave deference to the Secretary's interpretation, which it found to be reasonable and supported by the definition of "equipment" in the Institute of Electrical and Electronic Engineers Standard Dictionary of Electrical and Electronic Terms.[1]

In Amax Coal Company, 16 FMSHRC 1837 (1994), the trial judge held that "electric equipment" as used in § 75.400 (which prohibits combustible accumulations "in active workings, or on electric equipment therein") includes diesel-powered equipment. The judge's rationale was that "the Congressional concern about electric equipment as a potential ignition source is equally applicable to diesel equipment." On appeal the Commission declined to adopt this rationale. Instead, the Commission deferred to the Secretary's interpretation, holding that the phrase "in active workings" includes both a physical area of a mine and all equipment located within it whether electric or nonelectric. It thus declined to hold that diesel equipment is "electric equipment" under the regulation.

In Mettiki Coal Company, 11 FMSHRC 2435 (1989), I held that § 75.512's requirement to inspect "electric equipment" does not apply to diesel-powered locomotives. I observed that after the citation was issued, the Secretary proposed a regulation to require that "all diesel-powered equipment [in underground coal mines] be examined and tested weekly ...", with a preamble indicating that § 75.512 does not apply to diesel-powered equipment. I also observed that the Secretary's position in Mettiki was inconsistent with various existing and proposed regulations, in that wherever the Secretary intended to apply a standard to "mobile diesel-powered transportation equipment," "diesel-powered equipment," "electrical components on mobile

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[1]The IEEE Dictionary defines "equipment" as: "A general term including material, fittings, devices, appliances, fixtures, apparatus, and the like used as a part of or in connection with, an electrical installation."

diesel-powered transportation equipment," or "All electrical and diesel-powered equipment," those words were stated in the regulation or proposed regulation.[2]

A striking example is the Secretary's proposed standard for § 57.36302 ("Permissible Equipment") which provides in part: "All electrical and diesel-powered equipment used in or beyond the last open crosscut shall be permissible. * * * Nonpermissible electrical and diesel-powered equipment shall be kept at least 150 feet from pillar recovery workings...." 50 F.R. 23612, 23639 (June 4, 1985). This proposed regulation is inconsistent with the Secretary's contention that the term "electric equipment" in § 75.1002-1(a) includes diesel-powered equipment.

Another example is the Secretary's proposed § 75.1907(a)(1), which would require that diesel-powered equipment be permissible if used in locations where permissible electric equipment is required. The Secretary's position is that "the proposed standard removes any confusion which may exist as to whether nonpermissible diesel-powered equipment can operate within 150 feet of the longwall face" (Secretary's counsel's letter, August 28, 1996).

In light of the confusion in the regulations, I find that the Secretary's interpretation that diesel vehicles are "electric equipment" under § 75.1002-1 (a) is not entitled to special weight. However, based upon an independent analysis, I conclude that the prohibition of § 75.1002-1(a) reasonably applies to nonpermissible diesel-powered equipment.

Section 75.1002-1(a) supplements § 75.1002 by providing that "Electric equipment <u>other than</u> trolley wires, trolley feeder wires, high-voltage cables, and transformers <u>shall be permissible</u> ... when located within 150 feet from pillar workings ..." (emphasis added). Because of the focus upon all electric equipment, the term "electric equipment" in § 75.1002-1(a) reasonably includes electric components of diesel-powered vehicles. This conclusion is supported by the Commission's

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[2]See, for example, 30 C.F.R. §§36.2(a), 36.3-36.6, 36.9, 36.28-36.31, 36.41 and proposed rules published at 54 F.R. 40950 (October 4, 1989), and 50 F.R. 23612 (June 4, 1985).

decision in U.S. Steel Mining Company, supra. Since § 75.1002-1(a) applies to the electric components of diesel-powered vehicles, it would be contrary to the logic and safety intent of the standard to hold that nonpermissible diesel-powered vehicles may be operated within the restricted area although their electric components must be kept in permissible condition. It is axiomatic that an interpretation of a regulation should be rejected if it produces an absurd result or frustrates the purpose of the underlying statute. Natural Resources Defense Council, Inc. v. EPA, 907 F.2d 1146, 1156 (D.C. Cir. 1990). Accordingly, I hold that the prohibition of § 75.1002-1(a) applies to Contestant's diesel-powered vehicles.

CONCLUSIONS OF LAW

1. Contestant's No. 4 Mine is subject to the Act.

2. Contestant violated § 75.1002-1(a) as alleged in Citation No. 4476618.

ORDER

WHEREFORE IT IS ORDERED that Citation No. 4476618 is AFFIRMED and this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 6, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 96-98-M A. C. No. 48-01019-05525A
v.	:	Gypsum Quarry No. 6
ROGER CHRISTENSEN, EMPLOYED BY GEORGIA-PACIFIC CORPORATION, Respondent	: : : :	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 96-99-M A. C. No. 48-01019-05526A
v.	:	Gypsum Quarry No. 6
JESSE MARTINEZ, EMPLOYED BY GEORGIA-PACIFIC CORPORATION, Respondent	: : : :	

ORDER DENYING MOTION TO DISMISS
ORDER ACCEPTING LATE FILING
ORDER OF ASSIGNMENT

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against the individual respondents, Roger Christensen and Jesse Martinez, under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 810(c), hereinafter referred to as the "Act".

The instant cases are based upon a citation dated August 22, 1994, issued to respondents' employer, Georgia-Pacific Corporation, for an alleged violation of the Act and its mandatory standards. A penalty petition was previously filed under section 110(a) of the Act, 30 U.S.C. § 810(a), against the employer and that case, Docket No. WEST 95-326, is presently on stay before Administrative Law Judge August F. Cetti pending assignment of these cases.

Respondents have filed motions to dismiss on the ground that the Secretary has failed to timely file the penalty petitions. The Secretary filed a response.

On April 5, 1996, the respondents filed a supplement in support of their motions to dismiss advising that the inspector who issued the citation for these cases recently died of cancer. Respondents assert that they are further prejudiced by this development.

On April 15, 1996, an order was issued directing the Solicitor to respond to the respondents' April 5 supplemental reply and advise how she wished to proceed in this matter.

On May 15, 1996, the Solicitor advised that a mistake has occurred and the inspector who issued the citation for these cases has not died and is available to testify. It remains to be resolved whether the respondents' original motion to dismiss should be granted.

On November 13, 1995, the Secretary of Labor issued proposed penalty assessments against respondents. Thereafter, respondents filed timely requests for hearing which were received by the Secretary on December 7, 1995. The Secretary had 45 days after the hearing requests to file the penalty petitions. 29 C.F.R. § 2700.28. The petition for Docket No. WEST 96-98-M was filed on February 6, 1996, and the petition for Docket No. WEST 96-99 was filed on February 1, 1996. 29 C.F.R. § 2700.5(d). The petitions were due on January 22, 1996, and therefore, were 10 and 16 days late respectively.

The Solicitor attached a notice to her penalty petitions stating that the petitions were untimely because the employees of the Department of Labor together with many other parts of the Government were placed on furlough from December 15, 1995, to January 8, 1996. The Solicitor advises that these cases were received by the Denver Office of the Solicitor on December 24, 1995, when the office was closed due to the shutdown. When the office reopened, petitions were filed with the Commission in the order they were received. In addition, the Solicitor states that the Secretary requested an extension of time in a letter sent to the undersigned prior to the shutdown advising that certain filings would be late due to the shutdown and requesting that the time for filing be tolled.

In seeking to have these cases dismissed because the petitions were not timely filed within 45 days, respondents argue that the Secretary has failed to demonstrate adequate cause for the late filing. Respondents assert that their requests for

hearing were filed one week prior to the furlough and the Government reopened two weeks prior to the date the petitions were due. According to respondents, they have been prejudiced because the citation in question was issued over a year and half ago and they have not had access to all information supporting the petitions.

The arguments of respondents are not persuasive. The delay was caused by the three week partial government shutdown which caused a backup in the Solicitor's work. When the Government reopened, it was not just a matter of filing the petitions in these cases, but of coping with all the work which had not been processed for the period involved. The Solicitor's approach of filing petitions in order of their receipt was fair and reasonable. The shutdown constituted good cause for the Solicitor's brief delay in filing the petitions. Secretary of Labor v. Bruce Eaton, Employed by Austin Powder Company, Docket No. YORK 96-13-M, unpublished (March 3 1996). See also, Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

Respondents allege they have been prejudiced by the delay in filing the petitions. Much of the delay occurred between the issuance of the citation and the Notice of Proposed Assessment, almost fifteen months. I previously have held that a seventeen month delay in assessing penalties against an individual under section 110(c) does not constitute grounds for dismissal. A comprehensive investigation and various levels of internal review are necessary for a proper evaluation of agent liability and the existence of a knowing violation in a 110(c) case. Secretary of Labor v. James Lee Hancock, Employed by Pittsburg & Midway Coal Co., 17 FMSHRC 1671, 1674-1675 (September 1995). See also, Cedar Creek Quarries et al., 17 FMSHRC 1509 (August 1995). Also, respondents have furnished no specifics beyond the general assertion of prejudice. I will not in these cases infer prejudice solely from the passage of time.

In light of the foregoing, the respondents' motions to dismiss these cases are DENIED, and it is ORDERED that the late filed penalty petitions be ACCEPTED.

It is further ORDERED that these cases be assigned to Administrative Law Judge Cetti.

All future communications regarding these cases should be addressed to Judge Cetti at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Colonnade Center
Room 280, 1244 Speer Boulevard
Denver, CO 80204

Telephone No. 303-844-3993

Paul Merlin
Chief Administrative Law Judge

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Cement, Lime & Gypsum Workers, 161 Washakie, Lovell, WY 82431

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 23, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 96-245-M A. C. No. 35-03287-05513
v.	:	
R. J. TAGGART CONSTRUCTION COMPANY, INCORPORATED, Respondent	:	Taggart Portable

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement for the one violation in this case. A reduction in the penalty from $9,500 to $6,000 is proposed. A fatality is involved.

Citation No. 3918001 was issued as a 104(d)(1) citation for a violation of 30 C.F.R. § 56.9200(d) because a miner, who was being trained on a front-end loader, was riding unsecured on the outside of the operator's cab. The loader backed over a large rock causing the miner to fall to the ground. He was run over by one of the loader tires and killed.

I cannot approve the settlement motion. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

The violation in this case is the ultimate in gravity. However, the settlement motion fails to discuss any of the facts surrounding the fatality or identify the reasons for the proposed reduction. The parties have submitted nothing more than a boilerplate motion. I cannot approve any penalty for this fatality when I do not know what happened. There is no excuse for the Solicitor to submit such a motion which accomplishes nothing except to create additional and unnecessary work for the Office of the Chief Administrative Law Judge.

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

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

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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Mr. Robert J. Fisher, Accountant, P. O. Box 7298, Salem, OR 97303

Douglas White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U. S. Department of Labor, Room 414, 4015 Wilson Boulevard, Arlington, VA 22203

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
August 26, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 96-252 A. C. No. 15-12602-03584
v.	:	Preparation Plant
MANALAPAN MINING COMPANY, INCORPORATED, Respondent	:	

ORDER ACCEPTING APPEARANCE
DECISION APPROVING PARTIAL SETTLEMENT
DECISION DISAPPROVING PARTIAL SETTLEMENT
ORDER TO SUBMIT INFORMATION
ORDER TO PAY

Before: Judge Merlin

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

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlements for the five violations in this case. A reduction in the penalties from $762 to $475 is proposed.[1]

The parties propose to settle one of the five violations, Citation No. 4243577, for the originally assessed penalty of $50. I have reviewed this violation in light of the six criteria and determine that this proposed settlement is appropriate.

With respect to the four remaining violations, the parties propose reductions in the penalties.

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[1] The CLR has subsequently filed a motion to amend the settlement to reflect the correct settlement amount as $474 instead of $634. The motion is granted.

Citation No. 4243542 was issued for a violation of 30 C.F.R. § 77.401(a)(2) because a bench grinder was not provided with a tool rest on either grinding wheel. The originally assessed penalty was $178 and the proposed settlement is $50. The CLR advises that the grinder was inoperable at the time because the motor was burned out. Citation No. 4243545 was issued for a violation of 30 C.F.R. § 77.205 because the steps leading to a conveyor belt were obstructed with loose coal. The originally assessed penalty was $178 and the proposed settlement is $125. Citation No. 4243576 was issued for a violation of 30 C.F.R. § 77.401(a)(2) because a tool rest for a Champion Blower Floor Model bench grinder was not adjusted as close as practical to the wheel. The originally assessed penalty was $178 and the proposed settlement is $125. Citation No. 4243581 also was issued for a violation of 30 C.F.R. § 77.401(a)(2) because the tool rest for a Queen City Floor Model grinding machine was not as close as practical to the wheel. The originally assessed penalty was $178 and the proposed settlement is $125. The CLR advises that the significant and substantial designations and negligence findings for all these violations remain unchanged.

I cannot approve the settlement motion as submitted for these four violations. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based upon consideration of these criteria.

The parties offer an explanation for the reduction proposed for Citation No. 4243542, but the recommended penalty amount of $50 for this citation is usually reserved for non-significant and substantial violations. As noted above, the parties do not request any modification and maintain that the violation remains significant and substantial. However, the explanation offered for the reduction would support a modification deleting significant and substantial.

With respect to the other three violations, Citation Nos. 4243545, 4243576 and 4243581 where a reduction from $178 to $125 is sought for each, there are no reasons or recommendations to support the reductions.

This motion is atypical. Conference and Litigation Representatives routinely submit detailed motions which support their recommendations.

In light of the foregoing, it is ORDERED that the motion for approval of settlement for Citation No. 4243577 be APPROVED.

It is further ORDERED that the motion for approval of settlements for Citation Nos. 4243542, 4243545, 4243576 and 4243581 be DENIED.

It is further ORDERED that within 30 days of the date of this order the parties submit appropriate information to support their settlement motion for Citation Nos. 4243542, 4243545, 4243576 and 4243581. Otherwise, this case will be set for hearing.

It is further ORDERED that within 30 days of the date of this order the operator PAY the $50 penalty for Citation No. 4243577.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Ronnie R. Russell, Conference & Litigation Representative, U.S. Department of Labor, MSHA, HC 66, Box 1762, Barbourville, KY 40906

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Mr. Richard D. Cohelia, Safety Director, Manalapan Mining Co., Inc., P. O. Box 311, Brookside, KY 40801-0311

/gl

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

September 4, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER DENYING MOTION TO DEEM ADMISSIONS ADMITTED

The Secretary filed a motion entitled "Motion to Deem Admissions Admitted and to Allow Adverse Inferences or, in the Alternative, to Continue Trial." In the motion, the Secretary states that Newmont Gold Company ("Newmont") failed to respond to his discovery requests. He states that he needs this information in order to prepare for hearing set to commence on October 16, 1996. The Secretary asks that he be allowed to draw adverse inferences from Newmont's failure to respond, and specifically asks that all of the Secretary's requests for admission be deemed admitted. In the alternative, the Secretary asks that the hearing in these cases be continued.

Newmont filed answers to the Secretary's discovery requests on August 26, 1996. Newmont states that on July 31, 1996, it informed the Secretary that it would need more time to respond to these discovery requests because of the number of requests made and the complexity of the requests. The Secretary's motion was received by my office on August 20, 1996.

Given the fact that Newmont has now responded to the discovery requests and that these requests were complex and numerous, the Secretary's motion is **DENIED**. The Secretary's request for a continuance is also **DENIED**. Because the hearing is a little over a month away, the parties **SHALL** make every effort to respond to discovery as soon as possible. I am available to discuss, in a conference call, whether a discovery cut off date should be established, if the parties want one.

Richard W. Manning
Administrative Law Judge

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

September 4, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-434-M
Petitioner	:	A.C. No. 26-00500-05542
	:	
v.	:	Docket No. WEST 95-467-M
	:	A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY,	:	
Respondent	:	South Area - Gold Quarry

ORDER DENYING MOTION TO COMPEL
ORDER DENYING CROSS-MOTION FOR PROTECTIVE ORDER

The Secretary of Labor filed a motion to compel Newmont Gold Company ("Newmont") to answer his discovery requests. Newmont filed a response in opposition to the Secretary's motion and a cross-motion for a protective order. The Secretary filed a response to Newmont's cross-motion. For the reasons set forth below, I deny both motions.

I. Motion to Compel

The Secretary's motion to compel seeks responses to his first set of discovery requests, which include 35 requests for admission, 30 requests for the production of documents, and 30 interrogatories. These requests were made on June 28, 1996.

Newmont filed answers to these discovery requests on August 26, 1996. In response to the Secretary's motion, Newmont states that on July 31, 1996, it informed the Secretary that it would need more time to respond to these requests because of the number of requests made and the complexity of the requests. The motion to compel was received by my office on August 1, 1996.

Given the fact that Newmont has now responded to the discovery requests and that these requests were complex and numerous, I deny the Secretary's motion to compel.

The Secretary's motion also asks that I compel Newmont to answer his second set of discovery requests. This part of the Secretary's motion is discussed below.

II. Cross-Motion for Protective Order

Newmont filed a cross-motion for a protective order to prohibit the Secretary from engaging in *ex parte* contacts with Newmont employees and requiring the Secretary to disclose all previous *ex parte* contacts. In the cross-motion, Newmont asserts that counsel for the Secretary communicated with Newmont employees about these proceedings despite the fact that counsel knew that Newmont is represented by an attorney. Counsel for Newmont states that such communications were unethical because they violated the ABA Model Rules of Professional Conduct. Newmont cites a number of cases where courts imposed protective orders to prevent opposing counsel from conducting *ex parte* interviews with current employees of the corporate party. Newmont requests that the protective order cover all Newmont employees, including hourly employees.

In response, the Secretary argues that the Secretary may "ethically contact rank and file, non-agent, non-supervisory employees of mine operators" without the permission of counsel for the operator. (Sec. Response at 2-3). He also contends that he is authorized by the Federal Mine Safety and Health Act to directly contact miners without the permission of counsel for the operator. Finally, counsel for the Secretary states that she did not violate ethical standards by sending a letter to two of Newmont's employees.

It is clear that counsel for the Secretary sent a form letter to two Newmont employees. The letter states that the employees gave statements to an MSHA investigator and that the Secretary's attorney needs to discuss "the health conditions during your employment with Newmont, particularly with regard to the exposure of mercury...." (Cross-motion, Attachment 1) The letter asks the employee to fill out an enclosed form and return it to the Secretary. The form requests the address, day phone number, and evening phone number of the employee. The two particular employees may be salaried employees, but that is not entirely clear. Neither employee returned the enclosed form.

Newmont correctly states that the Mine Act holds a mine operator strictly liable for safety and health conditions at its mine. As a consequence, it argues that any Newmont employee, including the two subject employees, could potentially take actions or make statements to the Secretary that could impute liability to Newmont under 30 U.S.C. § 820(a), setting forth civil penalties, and section 820(d), setting forth criminal penalties. Newmont cites *Rochester and Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991), in which the Commission stated that "a rank-and-file employee ... is an agent of an operator when carrying out the required examinations entrusted to him by the operator."

The parties thoroughly briefed this issue. The above summary does not include all of the arguments made. I agree with the Secretary's position on this issue, as set forth at pages 1 through 22 of his response to Newmont's cross-motion. I find that counsel for the Secretary did not engage in unethical conduct when she sent letters to Newmont employees who had given statements to the MSHA special investigator. The cases cited by Newmont involved private parties. The ethical standards with respect to *ex parte* contact differ when the party involved is a federal enforcement agency, such as the Department of Labor. The U.S. Department of Justice has developed ethical standards that its attorneys are required to follow when contacting employees of a represented corporation. The standard provides that a government attorney should not contact a current employee of a represented party if the employee is a controlling individual. 28 C.F.R. § 77.10(a). A controlling individual is defined as "a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding." *Id.* The preamble to this rule states that "organizations should not be shielded from effective criminal and civil law enforcement prosecution simply by retaining counsel." (59 *Fed. Reg.* 39910, 39924, as quoted in Sec. Response at 4-5). I find that the general principles established by the Department of Justice are applicable to these cases.

The Secretary states that it does not intend to contact "managers, supervisors, or agents of the respondent." (Sec. Response at 7). The Secretary further states that he will not consider the acts or omissions of the miners that he wants to contact to be "legally imputed" to Newmont or their statements to be "admissions" binding on Newmont. *Id.* The Secretary contends that a rank-and-file miner becomes an agent of the operator only if the operator delegates a specific statutory duty to the miner and then only to the extent the miner is acting within the scope of this specific duty. Finally, the Secretary states that he "has no intention or desire to contact, even in a preliminary way, the respondent's agents, supervisors, or managers outside of the formal discovery process." *Id.* at 23.

The Secretary has considerable enforcement authority under the Mine Act. Part of this authority includes the right to confer with miners about safety and health conditions at the mine. 30 U.S.C. § 813. The Secretary is not required to obtain the operator's prior approval before discussing health or safety conditions with miners. The Mine Act defines a miner as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). The Commission's rules of procedure recognize this right by prohibiting its judges from disclosing or ordering the Secretary to disclose to a mine operator or his agent the name of an informant who is a miner. 29 C.F.R. § 2700.61.

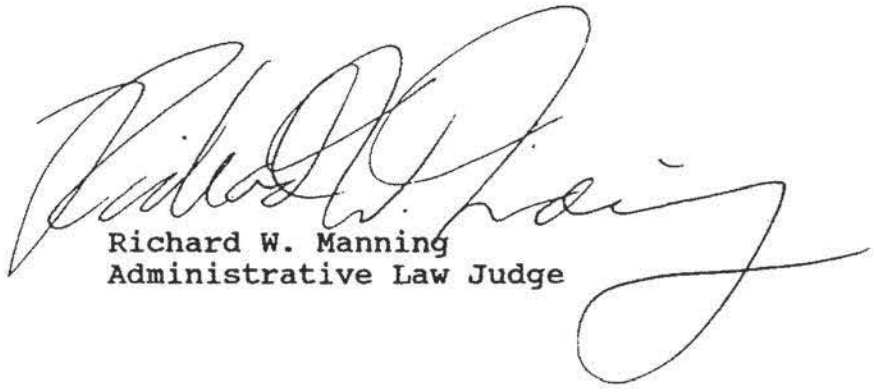
I conclude that Newmont's arguments set forth in its cross-motion for a protective order lack merit. As stated above, I base my conclusion on the Secretary's arguments set forth in his response to the cross-motion, which I have briefly summarized above. Counsel for the Secretary may informally contact Newmont employees who are not "agents, supervisors, or managers" of the company.

III. Conclusion and Order

Given my ruling set forth above, Newmont has several options. First, it can rely on counsel for the Secretary's assurance that she will not informally contact its agents, supervisors, or managers. I conclude that this assurance was made in good faith and note that this has been the Secretary's policy under the Mine Act. Second, Newmont may instruct its agents, supervisors and managers not to discuss the issues raised by these cases with representatives of the Secretary. Third, Newmont may respond to the Secretary's second discovery request by providing counsel with names and other pertinent information about those employees that Newmont believes are agents, supervisors, or managers of the company. I will resolve any disputes if the Secretary believes that one or more of the individuals listed is not an agent, supervisor, or manager of the company.

Because I have ruled in favor of the Secretary with respect to Newmont's cross-motion for a protective order, I deny the Secretary's motion to compel with respect to his second discovery request. As a result of my ruling, the Secretary does not need this information. Newmont may provide all or part of such information as it wishes, as described above. Of course, I expect the counsel for the Secretary to adhere to her assurance that she will not attempt to informally contact Newmont's agents, supervisors, or managers, and that when she contacts an employee she will first determine whether the individual is an agent, supervisor, or manager before she proceeds any further. If she determines that the individual is an agent, supervisor, or manager, she shall terminate the informal contact. I also expect the Secretary to follow, as applicable, the principles established by the Department of Justice at 28 C.F.R. § 77.9(a)(1) and (b). Finally, Newmont should understand that if an agent, supervisor, or manager initiates an informal contact with the Secretary, such person may be an informer entitled to the protection of 29 C.F.R. § 2700.61. See also, 28 C.F.R. § 77.10(e).

For the reasons set forth above, the Secretary's motion to compel is **DENIED** and Newmont's cross-motion for a protective order is **DENIED.**



Richard W. Manning
Administrative Law Judge

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September 9, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER GRANTING, IN PART, SECRETARY'S MOTION FOR A PROTECTIVE ORDER

On August 13, 1996, the Secretary of Labor filed a motion for a protective order. On August 26, 1996, Newmont Gold Company ("Newmont") filed a motion to dismiss, or in the alternative, to compel and for lesser sanctions ("motion to dismiss"). Newmont answered the Secretary's motion for a protective order in its motion to dismiss. On September 6, the Secretary filed his response to Newmont's motion to dismiss. Both the Secretary's motion for a protective order and Newmont's motion to dismiss involve events that occurred at depositions of MSHA employees that Newmont scheduled for the week of July 22, 1996, in Vacaville, California.

Both motions accuse the other side of acting in bad faith at the depositions. The Secretary alleges that counsel for Newmont harassed the deposition witnesses, asked personnel questions of these witnesses that were beyond the scope of discovery, improperly sought advisory opinions from witnesses, and improperly sought to exclude the Secretary's technical advisor from the depositions. Newmont alleges that the Secretary improperly terminated the Vacaville depositions at great cost to Newmont. Newmont alleges that the Secretary applied insupportable, all encompassing definitions of evidentiary privileges that prevented the witnesses from answering legitimate questions.

Although each motion relies on the opposing party's conduct at the Vacaville depositions to support its arguments, I find that the two motions raise different legal issues and I conclude that I should issue a separate order for each motion. In the present order, I enter my ruling on the Secretary's motion. I will rule on Newmont's motion shortly.

I. Background

The Commission's rules of procedure provide that upon motion of a party or upon his own motion, "a judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense." 29 C.F.R. § 2700.56(c). This provision empowers the judge to consider a motion for a protective order and grants considerable discretion to the judge to regulate the course of discovery. *See*, also Fed. R. Civ. P. 26(c) & 30(d); 29 C.F.R. § 2700.55.

Newmont scheduled the deposition of seven MSHA employees. It appears that the depositions were contentious from the start. Apparently, counsel for the Secretary terminated the depositions on July 25, 1996, before they were completed. The issues raised by the Secretary in his motion concern the conduct of Newmont's counsel at the depositions. Each of the Secretary's requests are discussed separately below.

II. Deposition of MSHA Inspector Jaime Alvarez

The Secretary contends that Newmont asked questions of Inspector Alvarez that were intended to personally humiliate and embarrass him and were beyond the scope of prior acts related to credibility. Counsel asked a number of personal questions that were designed to test the credibility of the witness. Before he asked these questions, counsel for Newmont told Mr. Alvarez that some of his questions "may sound somewhat personal," but advised him not to "take it that way." (Alvarez Depo. at 21). The questions that were the most objectional to the Secretary include: "Have you ever bounced a check?," "When was the last time you told what is commonly known as a lie, an untruth?," "Do you consume alcohol?," "Isn't it a fact that you have consumed illegal substances within two or three days of the conduct of an inspection?," and "Have you ever submitted false expense reports?" (Sec. Motion at 4; Alvarez Depo. at 25, 42-44). The Secretary contends that counsel for Newmont engaged in a series of such personal questions that had no "legitimate purpose and were obviously asked in bad faith and in a manner to unreasonably annoy, embarrass, oppress, and humiliate the witness." (Sec. Motion at 5).

A party is generally permitted to inquire into issues of credibility during a deposition. Such inquiries, however, should be limited to questions that "may reveal information affecting the credence afforded to a witness' trial testimony." *Davidson Pipe Co. v. Laventhol and Horwath*, 120 F.R.D. 455, 462 (S.D.N.Y. 1988). Thus, the questions must be designed to obtain information that has some bearing on the credibility of a witness.

In *Davidson*, the court set forth five factors for analyzing whether deposition questions relate to the witness's credibility. First, the prior acts that are being examined "must demonstrate a propensity for deception." *Id.* Personal habits or a history of getting into trouble during high school, for example, do not demonstrate a propensity for deception. Second, the prior acts must have occurred "in a context where there is a premium on veracity." *Id.* Thus, prior incidents of deception that are "unimportant or excusable" are not probative of veracity. *Id.* at 463. Asking a witness whether he has ever lied is too broad because the question is not limited to situations where veracity is important. The third factor is the "lapse of time between the prior act and the ... testimony." *Id.* Questions about incidents in the distant past should not be asked unless they are very probative of the witnesses truthfulness. A conviction for submitting false tax returns twenty years earlier would be probative, while the fact that the witness misstated his age on an employment application twenty years earlier would not.

The forth factor is the relationship between "the subject matter of the prior deceptive act and that of the instant litigation." *Id.* As "the connection becomes more attenuated, so does the probative value of the evidence." *Id.* The final factor in "determining whether credibility-related discovery is appropriate is whether the party seeking disclosure has a foundation for its inquiry." *Id.* "This consideration is not concerned with the admissibility of the evidence sought; rather, it involves the question of whether there is a reasonable likelihood that any pertinent evidence will be elicited." *Id.* The inquiring party must have "a factual basis for believing that prior acts of deception will be revealed." *Id.* This factor is designed to prevent "fishing expeditions" into credibility issues.

I find that many of the questions posed by counsel for Newmont do not pass the *Davidson* test. In reaching this conclusion, I do not imply that such questions were asked in bad faith. Rather, I find that many of the questions have little bearing on credibility. For example, whether a witness has consumed alcohol is not probative of truthfulness. It is not clear whether counsel for Newmont had a "factual basis" for believing that prior acts of deception would be revealed. In his response to the Secretary's motion, counsel for Newmont states that his questions "were perfectly appropriate in that Newmont believes that [Inspector Alvarez] lied under oath...." (Newmont response at 26). Newmont states that the factual basis for this conclusion is that the inspector could not recall receiving a copy of a particular memorandum that lists his name as a recipient. *Id.* at 26-27. Newmont alleges that the inspector knew of the memorandum because he saw it and distributed it within the past 18 months. I find that the inspector's testimony does not provide a proper foundation for a belief that he lied under oath. Newmont cannot use this testimony as a basis to ask

unfocused questions, such as "When was the last time you remember bouncing a check?," or "What's the last time you remember lying?" (Alvarez Depo. at 25). In addition, it does not appear that Newmont had any foundation for asking other questions, such as, "Isn't it a fact that you have consumed illegal substances within two or three days of the conduct of an inspection?" Such a question should not be asked without some factual basis for making the allegation.

Newmont is permitted to question a witness's credibility at a deposition. It is not my intention to frustrate Newmont's ability to probe the veracity of a witness. Nevertheless, the questions must seek information that has some bearing on credibility. Accordingly, **IT IS ORDERED** that at any future depositions, the attorney conducting the deposition **SHALL** heed the factors set forth in *Davidson* when posing questions designed to inquire into the witness's credibility.

III. Manner of Conducting Depositions

The Secretary contends that the "Secretary's witnesses and counsel should be protected against rudeness, threats, and intimidation by Respondent's counsel that were unduly oppressive and burdensome during depositions." (Sec. Motion at 9). The Secretary argues that the "overall tone and manner" of Newmont's counsel "was clearly within the prohibited conduct contemplated by" the Commission's rules and the Federal Rules of Civil Procedure. *Id.*

The Secretary contends that Newmont's counsel threatened the Secretary's witnesses and counsel with sanctions on 12 occasions. The Secretary alleges that counsel for Newmont referred to Inspector Alvarez as a "liar" in front of the witness. The Secretary also states that counsel for Newmont threatened to report MSHA personnel to the Department of Labor's Office of the Inspector General under certain circumstances. Finally, the Secretary alleges that counsel for Newmont snooped around the MSHA Vacaville offices while he was there. As result, the Secretary asks that I directly supervise all future depositions.

Counsel for Newmont contends that the Secretary prohibited his witnesses from answering legitimate deposition questions by improperly imposing objections on the basis of various privileges and states that he was simply trying to get the Secretary to cooperate. He alleges that the Secretary's attorneys failed to conduct themselves "in accordance with civility and in accordance with the Rules of Professional Responsibility and the applicable Rules of Procedure." (Newmont response at 26).

It is quite clear from reading the transcript that the depositions degenerated into a test of wills very quickly. It is

possible for an attorney to represent his or her client vigorously while maintaining a civil, professional, and cordial manner. I did not review the transcript to determine if and when Newmont's counsel overstepped the bounds of professional conduct. I will not "baby-sit" counsel during depositions.

The issues raised in this part of the Secretary's motion are intertwined with the issues raised in Newmont's motion to dismiss, including the terms and conditions of any future depositions. I will rule on these issues in my order concerning Newmont's motion to dismiss. Accordingly, **IT IS ORDERED** that counsel for the parties **SHALL** conduct themselves in a civil, professional and cordial manner in any future depositions and at the hearing in these cases.

IV. Hypothetical Questions

The Secretary contends that "Respondent should be prevented from seeking advisory opinions from MSHA regarding the consequences of future, hypothetical violations of the Mine Safety and Health Act." (Sec. motion at 11). The Secretary states that many of the questions at the depositions concerned "abstract, hypothetical issues of possible future MSHA violations" that do not relate to the dispute between the parties in these cases. *Id.* The Secretary argues that these inquiries, "involving the application of law to theoretical future factual scenarios, were outside the scope of permissible discovery and were excessive and burdensome." *Id.*

The Secretary points to a series of questions asked of Paul Belanger. The Secretary asserts that Mr. Belanger "was asked a four part question regarding one hypothetical bead of mercury inside the Newmont 'boneyard' on a piece of equipment, and was asked to consider nine factors in evaluating his advisory opinion." (*Id.*; Belanger Depo. at 47-62). The Secretary also alleges that Mr. Belanger was asked a significant number of other questions concerned unrelated matters, such as what citations might be issued for not posting and barricading loose ground. The Secretary contends that such questions were outside the scope of discovery as they do not concern matters reasonably calculated to lead to the discovery of admissible evidence. He objects to questions seeking an advisory opinion on these issues.

It appears that the Secretary's concern is not that some hypothetical questions were asked, but that "the examination of witnesses on such abstract issues extended for hours at a time, which was unduly annoying and oppressive to the Secretary's witnesses." (Sec. motion at 13). The Secretary acknowledges that the subject matter for discovery is broadly construed, but contends that Newmont's counsel "went beyond the most liberal interpretation of that standard with his theoretical questions."

Id. He contends that a "protective order restraining counsel from further questions of this nature is appropriate and necessary." *Id.*

"A trial court has a duty ... to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense." *Dolgow v. Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971). This discretion to limit discovery is "necessarily broad." *Id.*

In this instance, I find that such limitations are required. MSHA's witnesses are not in the position to give advisory opinions. Presenting an MSHA employee with a broad or complicated hypothetical question is unlikely to lead to the discovery of admissible evidence particularly if the hypothetical is not closely related to the facts of the case. First, each MSHA witness is likely to give different answers to a series of broad or complicated hypothetical questions. Each answer is simply the opinion of one employee and does not necessarily reflect the Secretary's position. Second, a series of hypothetical questions that are not tied to the facts of the case will simply elicit an off-the-cuff opinion from the witness because he does not have the opportunity to think about the issue or talk about it with his supervisors. The response of the witness may not be the same if he faced the "hypothetical" situation during an actual MSHA inspection. Thus, the answer to the question is likely to be meaningless. Finally, a series of lengthy hypothetical questions that involve close questions of law and policy are overly burdensome. A single MSHA employee is simply not in a position to answer such questions.

I understand why Newmont wants to probe the boundaries of the Secretary's interpretation of the cited standards. Such inquiries are permissible so long as the questions are calculated to lead to the discovery of admissible evidence. Broad or complicated hypothetical questions that are not rooted in the facts at issue do not accomplish this result.

Accordingly, **IT IS ORDERED** that counsel for Newmont, in any future depositions, **SHALL** refrain from asking a series of broad, complicated, or lengthy hypothetical questions of MSHA witnesses that do not relate directly to the facts at issue in these proceedings.

V. Informant's Privilege

The Secretary states that during the deposition of Inspector Drussel, after counsel for the Secretary asserted the informant's privilege, counsel for Newmont continued to ask for information about Newmont employees who may have discussed the matter with

the inspector. The Secretary asserts that the questions were designed to reveal identifying information regarding informants.

The deposition transcript reveals that counsel for Newmont asked numerous questions about who Inspector Drussel talked to in March 1995 when he determined that the ZADRA office was used as a lunchroom. The Secretary objected on the basis of the informant's privilege. Counsel for Newmont continued to ask questions that, if answered, might reveal the identity of an informant, such as who the inspector met with or talked to during his inspection.

The Commission stressed the importance of the informant's privilege under the Mine Act. Bright Coal Co., 6 FMSHRC 2520 (November 1984). The Commission held that this privilege is applicable to the furnishing of information to government officials concerning violations of the Mine Act. 6 FMSHRC at 2524. It is the name of the informant, not the contents of a statement, that is protected, unless disclosure of the contents would tend to reveal the identity of an informant. Asarco, 12 FMSHRC 2548, 2554 (December 1990), citing Roviaro v. United States, 353 U.S. 53, 60 (1957). Under Commission Rule 2700.61, a judge shall not order a person to disclose the name of an informant who is a miner. A miner is defined as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).

Accordingly, **IT IS ORDERED** that counsel for Newmont, in any future depositions, **SHALL** refrain from asking Inspector Drussel or other MSHA officials for the names or titles of miners that met with or talked to MSHA officials.

VI. Attendance at Depositions

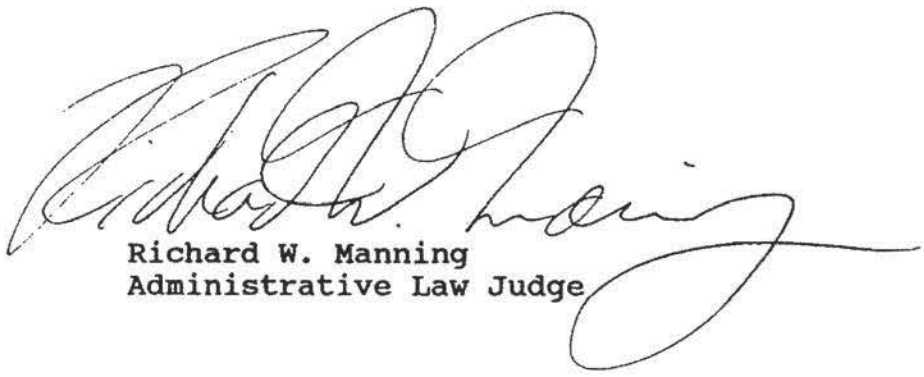
At the July depositions, the Secretary sought to have Paul Belanger present as a technical representative. Mr. Belanger was also scheduled to be deposed by Newmont. Newmont wanted to exclude Mr. Belanger until his deposition was completed. When the parties contacted me, I inquired as to whether Mr. Belanger's deposition could be held first so that his testimony could be taken before the testimony of the other MSHA witnesses. The parties informed me that it would be difficult to rearrange to order of depositions. On that basis, I ruled that Newmont could exclude Mr. Belanger until his deposition was completed.

In the motion, the Secretary asks that Mr. Belanger be permitted to attend future depositions of MSHA witnesses. The Secretary states that he needs Mr. Belanger at the depositions to provide technical assistance. The Secretary also states that Newmont deposed Mr. Belanger in July but that Newmont did not release him because it stated that Mr. Belanger's deposition is "continuing" in nature. (Sec. motion at 17).

The Secretary has the right to have its technical representative at the depositions of MSHA witnesses. Newmont was given the opportunity to depose Mr. Belanger in July. Accordingly, **IT IS ORDERED** that the Secretary **SHALL** be permitted to have Mr. Belanger present at depositions of MSHA employees as his technical representative. If it so chooses, Newmont may complete the deposition of Mr. Belanger before it deposes other MSHA witnesses.

VII. Conclusion and Order

The Secretary's motion for a protective order is **GRANTED** to the extent set forth above. Requests for relief not granted in this order are **DENIED**.



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Administrative Law Judge

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September 13, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER DENYING IN PART AND GRANTING IN PART NEWMONT'S MOTION TO DISMISS

On August 26, 1996, Newmont Gold Company ("Newmont") filed a motion to dismiss, or in the alternative, to compel and for lesser sanctions ("motion to dismiss"). The Secretary of Labor filed his opposition to Newmont's motion to dismiss on September 6, 1996. In the motion to dismiss, Newmont moves for an order "(1) dismissing this action on the grounds that the Secretary improperly terminated Respondent's depositions or, in the alternative, to require the continuation of the depositions at Respondent's counsel's office in Washington, D.C. at the Secretary's expense; (2) requiring the Secretary's witnesses to answer deposition questions previously objected to on the grounds of the informant's and deliberative process privileges; and (3) compelling the Secretary to disclose all attorney-client communications and other documents subject to the deliberative process and work product privileges, on the grounds that the Secretary has affirmatively waived those privileges." (Newmont Motion at 1).

I. Background

On July 22, 1996, counsel for Newmont, his technical advisor, and Newmont's corporate safety director traveled to Vacaville, California to take the depositions of seven employees of MSHA. Newmont alleges that at the depositions its counsel was "confronted with a barrage of unfounded objections and improper instructions to the witnesses not to answer questions." (Newmont Motion at 2). Newmont states that counsel for the Secretary "repeatedly instructed the witness not to answer questions about what documents he had reviewed to prepare for the deposition, with whom (outside the Solicitor's office) the witness had shared the documents, and other non-privileged areas of inquiry." *Id.*

at 6. Newmont contends that the Secretary's attorneys applied and insupportable, all encompassing definition of privileges that precluded the witnesses from answering questions about anyone they had ever talked to about the inspection or the policies at issue. Newmont alleges that the two solicitors "abandoned civil and courteous conduct" by interrupting Newmont's counsel. Finally, Newmont maintains that "in the midst of Mr. Alvarez's deposition ... the Secretary's counsel inexplicably 'walked out' and refused to conduct any of the remaining depositions." *Id.*

Newmont also contends that the Secretary waived any privileges that it might assert in these cases concerning MSHA policies with respect to mercury because MSHA "voluntarily and knowingly disclosed to the public two internal attorney-client communications relating to mercury citations." *Id.* at 7. It maintains that the Secretary has waived the attorney-client, deliberative process, and work product privileges as a result of these disclosures.

As a consequence of the Secretary's actions in these proceedings, Newmont requests that the cases be dismissed and seeks other alternative relief. Each of Newmont's points are discussed separately below.

II. Request to Dismiss Proceedings

Newmont recognizes that it is seeking extraordinary relief: the dismissal of the Secretary's case. It states, however, that a case may be dismissed if a plaintiff willfully or in bad faith thwarts legitimate discovery. As described above, Newmont states that the Secretary prevented it from asking legitimate questions of MSHA witnesses and then terminated the depositions without reason. It maintains that the Secretary's "repetitions obstructive tactics" should result in sanctions and that dismissal is an appropriate sanction in these cases. (Newmont Motion at 9). Newmont contends that the Secretary continued to instruct its witnesses not to answer questions on the basis of the deliberative process privilege after the judge ruled that the Secretary's application of the privilege was overly broad.

The Secretary maintains that his "decision to terminate the depositions, after five warnings to counsel for Respondent, does not involve misconduct" that warrants the dismissal of a case. (Sec. Opposition at 2). He also contends that dismissal is not justified on the basis that he continued to assert privileges. The Secretary states that its assertion of privileges should not be "characterized as willful or deliberate disobedience of a court order." *Id.* The Secretary maintains that his only means of preserving the privilege was to instruct the witnesses not to answer privileged questions. He states that his conduct at the depositions was not willful or in bad faith.

When an objection is made at a deposition, the deponent is ordinarily required to answer the question with the objection noted in the record. "A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3)." Fed. R. Civ. P. 30(d). Paragraph (3) of this rule provides that "[a]t any time during a deposition, on motion of a party ... and upon a showing that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court ... may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of taking the deposition...."

In this case the Secretary terminated the deposition without permission of the court. Ordinarily, that could be an indication of bad faith. In this instance, I was not available because I was on vacation at the time of the depositions and could not be reached. Fed. R. Civ. P. 37 empowers Federal District Courts to "impose the extreme sanction of dismissal or default where there has been flagrant, bad faith disregard of discovery duties." *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990)(citation omitted). Under the facts of these cases, I find that the Secretary's actions were not flagrant and were not taken in bad faith, as discussed below.

From the start, the subject depositions were contentious. Counsel for the Secretary accused counsel for Newmont of harassing MSHA witnesses and counsel for Newmont accused counsel for the Secretary of obstructing the discovery process by raising unfounded evidentiary privileges. On Tuesday, July 23, the parties were able to reach me while I was on vacation. They asked me to rule on the deliberative process privilege. In my brief ruling, I stated that an answer to a question concerning "the circumstances that led to the issuance of these particular citations and orders ... is not protected by the deliberative process privilege, and that to the extent that it is, the Respondent's need for that information outweighs the Secretary's need to protect the privilege." (Drussel Depo. at 167). I held that discussions about the adoption of MSHA policy is protected by the privilege. The Secretary stated that it disagreed with my ruling. *Id.* at 168.[1]

At the depositions that followed my oral ruling, counsel for the Secretary continued to object to any question that inquired into areas that counsel believed to be protected by the

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[1] Subsequently, the Secretary filed a motion for reconsideration and the issue was briefed by the parties. I issued an order on August 30, 1996, addressing the deliberative process privilege in more detail.

deliberative process privilege. The parties attempted to reach me on other occasions that week but were unsuccessful. The Secretary terminated the depositions. At the time he terminated the depositions, counsel for the Secretary accused counsel for Newmont of speaking his name in contempt, conducting the depositions in an unprofessional manner, and generally conducting himself in a manner that was harassing, degrading, intimidating, and annoying. (Alvarez Depo. at 141-43).

I reviewed those portions of the deposition transcripts that were sent to me by the parties. It is impossible to determine from a "cold" transcript whether or not counsel for Newmont overstepped the bounds of professional conduct, as alleged by the Secretary. On September 9, 1996, I granted, in part, the Secretary's motion for a protective order. In the order, I ruled that many of the questions counsel asked Mr. Alvarez to test his credibility had, in fact, little bearing on credibility. I also ruled that some of the hypothetical questions asked of Paul Belanger were too broad or complicated to provide relevant information. Finally, I ruled that counsel continued to ask questions about information that might reveal the identity of an informant after the Secretary raised an objection.

Newmont's justification for filing the motion to dismiss is that the Secretary made unfounded objections and improperly instructed witnesses not to answer questions. Appendix A to Newmont's motion sets forth some of the questions that Newmont believes should have been answered. Counsel states that termination of the depositions was improper because he was simply attempting to obtain answers to legitimate discovery questions. My review of the deposition transcripts reveals that the Secretary did continue to make broad objections to Newmont's inquiries on the basis of the deliberative process privilege. These objections were based on an interpretation of this privilege that is broader that my oral ruling of July 24 and appears to be broader than my ruling on reconsideration of August 30, 1996.

Nevertheless, Secretary's counsel did not flagrantly or in bad faith ignore his discovery duties. I find that the response of counsel for the Secretary to the events and disputes that occurred at the depositions does not demonstrate a "callous disregard" of the responsibilities counsel owed to this tribunal and Newmont. *National Hockey League, Inc. v. Metro Hockey Club, Inc.*, 427 U.S. 639, 640 (1976). As discussed in more detail below, I find that both parties were responsible for the failure of the July depositions. Accordingly, Newmont's motion to dismiss is **DENIED**.

III. Request to Reschedule all Depositions in Washington

If these proceedings are not dismissed, Newmont requests that I order that its counsel be permitted to take and complete the subject depositions in its offices in Washington, D.C. at the Secretary's cost. It believes that allowing "Newmont to finish the unjustifiably incomplete and wrongfully terminated depositions at the Secretary's cost is a clearly allowable remedy for such misconduct." (Newmont Motion at 11).

The Secretary contends that Newmont has not "presented any valid reason for an order compelling the Secretary to pay expenses and make its witnesses available at Respondent's counsel's offices in Washington, D.C." (Sec. Opposition at 6). He states that to qualify for such an order, the Secretary's "conduct must frustrate a 'fair' examination of the deponent...." *Id.* The Secretary argues that such a fair examination was not being conducted by Newmont's counsel. "Since the Secretary's efforts to safeguard privileges and protect its witnesses from undue oppression were made in a sincere and conscientious manner and in the spirit of cooperating with discovery to the extent allowable by the Commission and Federal Rules, the facts and legal precedent do not support the imposition of monetary or other sanctions or costs on the Secretary." *Id.*

In the Secretary's motion for a protective order, filed August 13, 1996, the Secretary requested that I personally supervise all remaining depositions in these proceedings. In this regard, the Secretary requested that the remainder of the depositions "be held in the Office of the Administrative Law Judges in Denver, Colorado during such time as the Judge may be present to rule on disputed matters and observe the conduct of the parties." (Sec. Motion for Protective Order at 18-19). The Secretary asked that costs of travel be borne by Newmont. *Id.*

Fed. R. Civ. P. 30(d)(2) provides, in part, that if the court finds that "an impediment, delay, or other conduct ... has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by the parties as a result thereof."

Judges are granted considerable discretion to regulate the course of discovery. Discovery is designed to enable a party to narrow the issues, obtain evidence for use at trial, and gain information about where and how such evidence can be obtained. 8 Wright & Miller, *Federal Practice and Procedure*, §2001 at 15. In reviewing the deposition transcripts and the arguments of the parties, I find that neither party conducted themselves within the spirit of these concepts. Although I make no finding that either counsel acted in bad faith, I do find that counsel failed to conduct themselves in a manner designed to facilitate the

narrowing of issues and exchange of information. Counsel for the Secretary attempted to keep secret as much of the information about the citations and orders as he possibly could. In particular, Counsel's application of the deliberative process privilege was overly broad. On the other hand, counsel for Newmont frequently pushed beyond the boundaries of legitimate discovery. Some examples are set forth in my order granting, in part, the Secretary's motion for a protective order, dated September 9. It is apparent that the degree of cooperation and trust between counsel was low to nonexistent.

I find that both parties were directly and indirectly responsible for the failure of the July depositions. Accordingly, Newmont's motion that I order the Secretary to make the subject witnesses available for further depositions at Newmont's counsel's offices is **DENIED**, as is Newmont's request for costs.

If Newmont wishes to continue these depositions it may do so at the MSHA Vacaville office. In the alternative, the parties may, by mutual agreement, schedule these depositions in the Commission's Denver courtroom. Each party would bear its own costs. The parties should check with my office to make sure that the courtroom is available on the desired dates. I will not agree to any arrangement in which I attend these depositions, but I will make myself available to resolve disputes.

IV. Request to Compel Production of Withheld Documents

Newmont contends that the Secretary "knowingly and voluntarily disseminated to the public documents which otherwise might be entitled to the deliberative process, attorney-client, and work product privileges." (Newmont motion at 14). The documents in question are: (1) a memorandum entitled "Alcoa Briefing," which discusses the implementation of 30 C.F.R. § 56.20011 and other standards with respect to mercury at Alcoa's Port Comfort, Texas, facility; and (2) a memorandum from Gretchen Lucken, Trial Attorney, to J. Davit McAteer, which discusses the same issues. Newmont contends that these memos (the "Alcoa memos") have been given to an number of gold mine operators in Nevada as justification for MSHA's enforcement policies with respect to section 56.20011.[2] Newmont argues that the Alcoa memos are directly relevant to the issues in these cases because they explain MSHA's enforcement policies. Newmont asserts that the Secretary has waived any privilege for the information contained in the Alcoa

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[2] The standard provides, in part, that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches."

memos by voluntarily disclosing this information to mine operators.

The Secretary contends that the Alcoa memos are irrelevant to these proceedings because they involve "potential action MSHA might take in the future, [a] hypothetical situation involving barely-detectable levels of mercury." (Sec. Opposition at 9). The Secretary also states that the disclosure of the Alcoa memos was not voluntary because it was released by an MSHA employee who had no authority to do so. The Secretary believes that since the Alcoa memos are "irrelevant to these proceedings, even under the discovery standards for relevance, the Court need not further consider the waiver issue." *Id.* at 11.

The Alcoa memos set forth MSHA's "action level" for requiring warning signs for mercury. That is, they state that MSHA requires barricades or warning signs whenever mercury is detected above certain specified levels under various scenarios. I find that this information is highly relevant to these cases. It contains a statement of MSHA policy with regard to the interpretation of one of the standards involved in these cases. Whether or not the mercury levels detected at the Newmont mine were "far above the 'detection level'" as alleged by the Secretary is not controlling. *Id.* at 10. The Alcoa memos set forth what MSHA believes to be the actions required by mine operators to inform its employees of the presence of a mercury hazard.

Newmont states that several MSHA inspectors distributed the Alcoa memos to mine operators to explain their enforcement action. Newmont's claim is supported by an affidavit. Accordingly, I find that MSHA's dissemination of the memos was voluntary. The fact that the disclosure was not specifically authorized by MSHA's Arlington headquarters is irrelevant.

The Alcoa memos appear to be protected by the attorney-client privilege and the work product rule, and may have initially been protected by the deliberative process privilege. The D.C. Circuit stated:

> Although the attorney-client privilege is of ancient lineage and continuing importance, the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege least it be waived. The courts will grant no greater protection to those who assert a privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost "even if the disclosure is inadvertent."

In re Sealed Cases, 877 F.2d 976, 980 (1989)(citation omitted).

I agree with these principles, which also apply to the deliberative process privilege and the work product rule. I find that the Secretary waived these privileges, as discussed below.

I also find that much of the information contained in the Alcoa memos are not covered by the deliberative process privilege. My order of August 30, 1996, briefly sets forth the boundaries of the deliberative process privilege, which I will not repeat here. I stressed, however, that the deliberative process privilege does not apply to those parts of a document that set forth agency policy. Such a document is not deliberative but is an expression of the agency's decision with respect to an issue. "[E]ven if [a] document is predecisional at the time it is prepared, it can lose that status if it is adopted, informally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States Gas Corp. v Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Accordingly, I find that the Secretary waived any privileges it may have had with respect to information concerning what it refers to as the "action level for warning signs" for mercury under 30 C.F.R. § 56.20011.[3] In making this determination, I have relied on the arguments set forth in Newmont's motion and reply to the Secretary's opposition.[4] This waiver is not unlimited, however. In accordance with my authority to control the course of discovery, I make the following limitations. First, the waiver does not apply to the informant's privilege. Second, it does not apply to attorney-client communications concerning this particular litigation that occurred after the commencement of these cases. Third, it does not apply to predecisional deliberations or any information that was not adopted as MSHA policy. That is, those documents or parts of documents that are "recommendatory in nature," "reflect the personal opinions of the writer," or are a "draft of what will become a final document" need not be disclosed. *Id.*

Newmont is entitled to information concerning MSHA's policies with respect to mercury under the cited standards. Thus, the Secretary shall provide Newmont with all documents

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[3] I limit my finding of waiver to the standards discussed in the Alcoa memos. As discussed above, however, the Secretary should understand that a document or portion thereof containing an expression of MSHA's policies with respect to section 56.20014 for mercury is not protected by the deliberative process privilege.

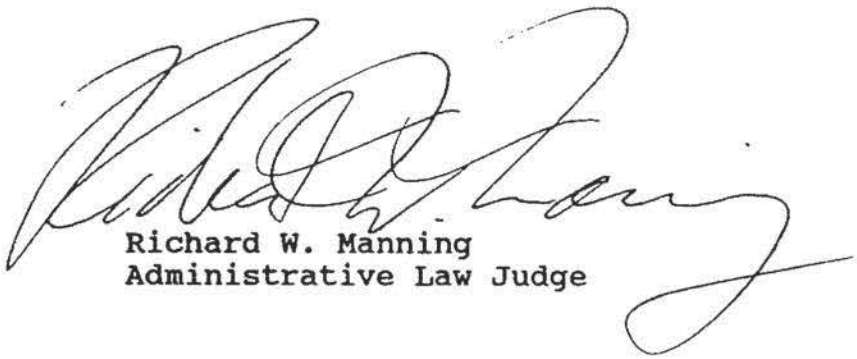
[4] In these briefs, Newmont states that the Alcoa memos were part of the Secretary's "secret rulemaking process." By granting Newmont's motion with respect to waiver, I do not signal my agreement with Newmont's characterization.

previously withheld that set forth MSHA policies for citing operators under 30 C.F.R. § 56.20011 when mercury is detected. In addition, at any future depositions, the Secretary's witnesses shall answer questions concerning such MSHA policies and questions about how these policies were relied upon at Newmont's mine. The limitations set forth above with respect to documents apply equally to deposition questions.

For the reasons set forth above, that part of Newmont's motion to dismiss that seeks to compel the Secretary to provide information concerning MSHA policies for mercury under section 56.20011 on the basis that the Secretary waived certain privileges is **GRANTED**, to the extent described above.

V. Conclusion and Order

Newmont's motion to dismiss is **DENIED**, except as otherwise set forth above.



Richard W. Manning
Administrative Law Judge

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

September 16, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-434-M
Petitioner	:	A.C. No. 26-00500-05542
	:	
v.	:	Docket No. WEST 95-467-M
	:	A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY,	:	
Respondent	:	South Area - Gold Quarry

ORDER GRANTING SECRETARY'S MOTION FOR PROTECTIVE ORDER

Newmont Gold Company ("Newmont") noticed the deposition of J. Davitt McAteer. On September 9, 1996, the Secretary filed a motion for a protective order to shield Mr. McAteer from deposition by Newmont. Newmont filed an opposition to the Secretary's motion. For the reasons set forth below, I grant the motion.

The citations and orders that are the subject of these proceedings concern alleged mercury contamination at the South Area Gold Mine. By order dated July 10, 1996, I granted the Secretary's motion for a protective order that precluded Newmont from taking the deposition of Andrea Hricko, Deputy Assistant Secretary for the Department of Labor's Mine Safety and Health Administration ("MSHA"). 18 FMSHRC 1304, 1307-08 (July 1996). I determined that Ms. Hricko should be granted "limited immunity from being deposed" in matters about which she had no personal knowledge. *Id.* at 1307 (citation omitted). I determined that it was unlikely that Ms. Hricko had "direct personal factual information" about the citations and orders in these cases. *Id.* at 1308 (citation omitted). I also found that the information sought was available from other sources. I applied a balancing test and determined that "the burden placed upon Ms. Hricko and MSHA if a protective order is not granted is significantly greater that the burden placed on Newmont if a protective order is granted." *Id.*

Mr. McAteer, Assistant Secretary of Labor for Mine Safety and Health and Solicitor of Labor, is a high level government official who enjoys limited immunity from testimonial obligations. The Secretary contends that Mr. McAteer has no personal knowledge of the facts relating to the citations at issue. He also argues that Mr. McAteer has no "unique knowledge regarding

the mercury policy relating to the regulations at issue." (Sec. Motion at 2). The Secretary states that Margie Zalesak, Chief of the Health Division for Metal/Nonmetal, who will be an expert witness, is available to discuss MSHA policy as it applies to this case. Accordingly, the Secretary contends that Newmont's interest in deposing Mr. McAteer does not outweigh the government's limited immunity.

Newmont states that Mr. McAteer is aware of the existence and meaning of two memoranda addressed to him (the "Alcoa memos") and that these memos are "the very linchpin of this litigation." (Newmont Opposition at 2). The Alcoa memos were discussed in my order of September 13, 1996, concerning Newmont's motion to dismiss. The Alcoa memos discuss the implementation of 30 C.F.R. § 56.20011 and other standards at an Alcoa facility. In my order, I determined that information contained in the Alcoa memos is relevant to these cases.

Newmont states that the Alcoa memos were "evaluated by him in determining whether to proceed in the *Alcoa* litigation, and [came] from his office to the MSHA field offices as the Secretary's policy guidance." *Id.* Newmont argues that my ruling with respect to Ms. Hricko is not controlling because Mr. McAteer has "specific knowledge on the illicit mercury enforcement policy being used." *Id.* at 5. Finally, Newmont argues that the Secretary's attempts to substitute Ms. Zalesak for Mr. McAteer is improper.

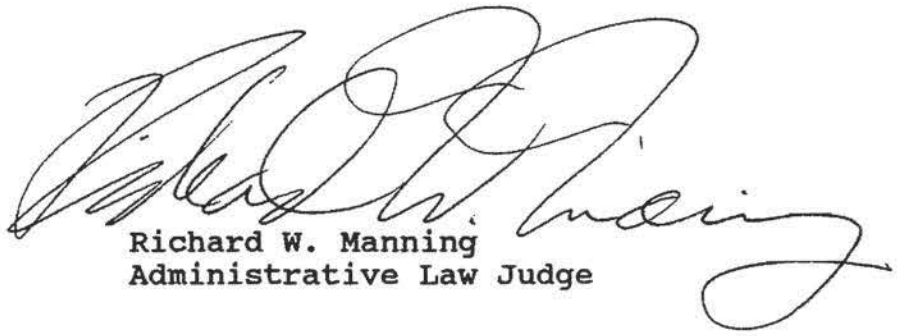
Although Mr. McAteer has knowledge about MSHA policies concerning mercury exposure at gold mines, I sincerely doubt he has specific knowledge about the implementation of these policies at Newmont's South Area Gold Mine. Any knowledge he has about the citations and orders in these cases came about as a result of this litigation or briefings by his staff.

The fact that Mr. McAteer has specific knowledge about MSHA enforcement policy or that MSHA enforcement policy emanated from his office does overcome his limited immunity from testimony. Mr. McAteer has knowledge about MSHA enforcement policy with respect to many if not all of MSHA's safety and health standards. Many of these policies originated in his office or the office of his predecessors. Thus, under Newmont's logic, Mr. McAteer could be ordered to testify in virtually any case in which the mine operator questions the agency's enforcement policies.

Nothing in the record or Newmont's arguments convinces me that Mr. McAteer has any special or unique evidence to offer in these cases. Anything that he knows about the citations and orders in these cases he obtained from others. If he issued written or oral instructions concerning the agency's enforcement policies for mercury, Newmont can obtain this information from local MSHA officials or from Ms. Zalesak, Chief of the Health

Division. I agree with the Secretary that Mr. McAteer has no "unique knowledge" regarding mercury policy with respect to the standards at issue.

Using the balancing test set forth in my order of July 10, 1996, I find that the burden placed upon Mr. McAteer and the Department of Labor if a protective order is not granted is significantly greater than the burden placed upon Newmont if a protective order is granted. Accordingly, the Secretary's motion for a protective order to shield J. Davit McAteer from deposition by Newmont is **GRANTED**.



Richard W. Manning
Administrative Law Judge

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September 18, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER ALLOWING LIMITED ENTRY UPON LAND

The Secretary requested permission to enter the South Area Gold Quarry owned by Newmont Gold Company ("Newmont") for the purpose of preparing for trial in this matter. In particular, the Secretary seeks permission for his attorneys and "five technical experts/inspectors" to visually inspect the mine, take samples, and photograph and videotape the mine. The Secretary states that the "purpose of the inspection is for generalized familiarity with the mine and mine environment and its equipment, possible development of photographic or videotaped exhibits, inspection of the physical layout, and a determination of good faith compliance with the standard." (Sec. Motion to Compel Discovery at 1-2).

Newmont opposes the Secretary's request for an inspection of the mine. First, Newmont contends that the Secretary's request is "hopelessly vague" on the areas to be inspected at the mine. (Newmont Motion to Quash at 5). In addition, the Secretary seeks to bring both his attorneys and inspectors on the visit. It contends that the Secretary's counsel is not authorized to conduct its own enforcement inspection with MSHA inspectors. Third, Newmont contends that the Secretary's request to take samples is without foundation. It argues that the citations and orders were abated over 18 months ago and the conditions at the mine are not the same. In the alternative, Newmont states that if the Secretary is permitted to inspect the mine, the inspection should be restricted to certain areas and the Secretary's activities should be limited.

Fed. R. Civ. P. 34 permits a party to enter upon land of an opposing party for the purpose of inspection. The Commission's rules provide that a party may seek "permission to enter upon property for inspecting, copying, photographing, and gathering information." 29 C.F.R. § 2700.56(a). Such an inspection is, of course, subject to general limitations of sections 2700.56(b) and

(c). In addition, because "entry upon a party's premises may entail greater burdens and risks than mere production of documents, a greater inquiry into the necessity for the inspection" is warranted. *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904, 908 (4th Cir. 1978).

I construe the Commission's rules to permit the type of inspection that the Secretary has requested. In this case, I find that the Secretary has presented sufficient justification for its inspection. I find, however, certain limitations are appropriate. First, the citations and orders in these cases were issued in discrete areas of the mine. Accordingly, the Secretary's inspection shall be limited to the "boneyard," the AARL room, and the ZADRA room. The Secretary's party may briefly tour other areas to get an idea of the configuration of the mine.[1]

I do not understand why the Secretary would like to take samples. Samples of the cited areas taken more than 18 months after the citations and orders were issued would have little or no relevance to the issues in these cases. Newmont represents that the "environmental and physical layouts of the three areas have been altered since the citations were issued...." (Newmont Motion to Quash at 4). The Secretary hints that the samples may be relevant to "a determination of good faith compliance with the standard." (Sec. Motion to Compel at 2). The violations alleged in the citations and orders in the subject cases have all been abated, so evidence of violations during the inspection by the Secretary's party would not be relevant to good faith issues. Nevertheless, under section 103(a)(4) of the Mine Act, authorized representatives of the Secretary have the authority to sample for health hazards to determine "whether there is compliance with the mandatory health or safety standards." Accordingly, authorized representatives of the Secretary may take samples under the authority of that section.

Newmont is entitled to have one or more representatives accompany the inspection party. Because the inspection by the Secretary's party is not a formal enforcement inspection but is being conducted in preparation for trial, Newmont is entitled to

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[1] Under section 103(a), authorized representatives of the Secretary are permitted to inspect any section of the mine without advance notice to determine whether Newmont is complying with MSHA's safety and health standards. The purpose of this inspection, however, is to allow the Secretary to prepare for hearing on citations and orders that have already been issued. While I do not have the authority to prohibit an authorized representative from entering other areas of the mine if he believes that a violation or an imminent danger is present, the Secretary's inspection party shall otherwise comply with the restrictions set forth in this order.

(1) the results of any sampling; (2) any raw data obtained; and (3) an opportunity to view photographs and videotapes. The Secretary's party shall take all necessary precautions to protect Newmont's trade secrets.

All members of the Secretary's party shall conduct their inspection in such a manner as to minimize their disruption of Newmont's operation. In general, they shall not talk with Newmont employees without the permission of the Newmont representative. As stated in my order of September 4, 1996, authorized representatives of the Secretary have a general authority to discuss safety and health issues with miners without the mine operator's prior approval. The purpose of this special visitation, however, is to examine those areas of Newmont's mine that were involved in the citations and orders. Accordingly, this visitation cannot be used by the Secretary to interview Newmont employees. Newmont shall make at least one individual available who can describe the facilities being visited and answer basic questions.

Accordingly, the Secretary's request to enter Newmont's South Area Gold Quarry is **GRANTED** as set forth above. Newmont's motion to quash is **DENIED**, except to the extent set forth in this order.

Richard W. Manning
Administrative Law Judge

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September 18, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER DENYING MOTION FOR RECONSIDERATION

On this date, I entered an order granting the Secretary's motion to enter the South Area Gold Quarry owned by Newmont Gold Company ("Newmont") under the authority of 29 C.F.R. § 2700.56. I limited the scope of the visitation, as set forth in the order.

By telephone, Newmont asked that I reconsider my ruling. Newmont contends that the Secretary does not seek the visitation for a valid discovery purpose but merely to educate his attorneys and expert witnesses. It states that a party may only obtain discovery of "any relevant ... matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). Newmont argues that this visitation will not uncover relevant matters and will not lead to the discovery of relevant evidence. It also contends that the visitation puts an undue burden on its operation. Newmont believes that the Secretary wants the visitation to educate his witnesses in preparation for trial. The Secretary disagrees with Newmont's characterization and believes that the visitation is consistent with the purposes of discovery.

Although the Secretary cannot pinpoint any particular fact that may be obtained as the result of the visitation, he believes that the visitation may lead to the discovery of relevant evidence. I agree. It is impossible for the Secretary to set forth any particular fact in advance of the visitation that the Secretary's party will discover that will be relevant, admissible, or lead to the discovery of admissible evidence. When a party seeks documents, for example, the party does not know if any information in the documents will lead to the discovery of relevant evidence, it just believes that it may. During the visitation, the Secretary's industrial hygienist may see things that causes him to make inquiries after he leaves the property or that leads him consider other matters when developing his expert testimony.

The same is true of the Secretary's medical expert. The purpose of discovery is to prepare for trial, so the fact that the visitation will aid the Secretary in that preparation does not mean that the visitation is beyond the scope of discovery.

The Secretary's visitation party will be viewing the areas where the alleged violations occurred. There is no substitute for direct observation. During the visitation, the Secretary's experts will be able to see the particular facilities involved and their observations may lead them to consider additional facts or circumstances. Their observations may be relevant to the issues in these cases and may be offered as evidence.

Accordingly, Newmont's motion for reconsideration of my order allowing the Secretary limited entry upon Newmont's mine is **DENIED.**

Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 17, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-204-M
Petitioner	:	A. C. No. 04-00204-05519
	:	
v.	:	National Quarries
NATIONAL QUARRIES,	:	
Respondent	:	

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlements for the four violations in this case. A reduction in the penalties from $28,500 to $19,950 is proposed.

The four violations in this case were issued as the result of a fatal accident. MSHA determined that proper procedures for handling a misfired hole were not followed, causing a miner to be fatally injured when he inadvertently drilled into a charged hole.

I cannot approve the settlement motion. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

The proposed settlement remains a substantial amount. However, the proposed reduction of 30% also is substantial. The Solicitor has not offered any reasons to support the suggested settlement. I will not approve settlements where there is no justification for what I am being asked to approve. That a fatality is involved, compounds the error.

This is not the first time this Solicitor has submitted an inadequate settlement motion. In Bennie Wayne Curtis, Emp. by Canyon Country Enterprises, 17 FMSHRC 1810 (October 1995), I disapproved a recommended settlement from this Solicitor in a section 110(c) case where he gave no reasons. Also, in Chandler's Palos Verdes Sand & Gravel, 16 FMSHRC 1926 (August 1994), where an accident had occurred, I disapproved a proposed settlement unaccompanied by reasons and told the Solicitor that the fact that the suggested penalties remained substantial did not in and of itself warrant approval. In both cases the Solicitor subsequently submitted supplemental motions which were eventually approved. I would think that by now this Solicitor would realize that a settlement motion without reasons is a waste of everyone's time.

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

It is further ORDERED that within 20 days of the date of this order the Solicitor submit appropriate information to support his settlement motion. Otherwise, this case will be heard as scheduled.

Paul Merlin
Chief Administrative Law Judge

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