

SEPTEMBER 1997

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ADMINISTRATIVE LAW JUDGE ORDERS

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SEPTEMBER 1997

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

Secretary of Labor, MSHA v. Tresca Brothers Sand & Gravel, Docket Nos. YORK 97-17-M, YORK 97-25-M. (Chief Judge Merlin, unpublished Default Orders of May 19 and June 19, 1997.)

Secretary of Labor, MSHA v. White Oak Mining and Construction Co., Docket No. WEST 96-338. (Judge Feldman, August 13, 1997.)

Secretary of Labor, MSHA v. Wayne R. Steen, employed by Ambrosia Coal and Construction, Docket No. PENN 94-15. (Judge Barbour, August 20, 1997.)

There were no cases filed in which review was denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 2, 1997

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

v.

TRESCA BROTHERS
SAND & GRAVEL, INC.

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Docket Nos. YORK 97-17-M
YORK 97-25-M

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

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994). On May 19 and June 19, 1997, Chief Administrative Law Judge Paul Merlin issued Orders of Default to Tresca Brothers Sand & Gravel, Inc. ("Tresca") for its failure to answer the Secretary of Labor's petitions for assessment of civil penalty or the judge's Orders to Respondent to Show Cause. The judge assessed civil penalties of \$2854 and \$2290 in the two cases.

On July 1, 1997, the Secretary filed a Motion for Approval of Settlement in each of these cases with the Commission's Office of Administrative Law Judges. Each motion seeks approval of a settlement involving payment by Tresca of a substantially reduced penalty based upon attached additional information received from the district office of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicating that the underlying citations have been vacated or modified to reduce the proposed penalty. Each motion also states that "approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977." Mot. at 2. Both motions fail to mention the default order issued in each case.

The judge's jurisdiction over these cases terminated when his default orders were issued on May 19 and June 19, 1997, respectively. 29 C.F.R. § 2700.69(b) (1995). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission.


30 U.S.C. § 823(d)(1). The Secretary's settlement motions were received by the Commission on July 3 and July 7, 1997, respectively.¹

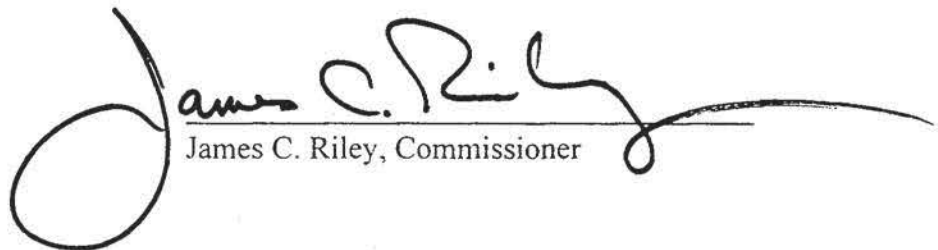
Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). We are unable to evaluate the merits of the Secretary's position on the basis of the present record. In the interest of justice, we reopen the proceedings, treat the Secretary's settlement motions as petitions for discretionary review requesting relief from final Commission decisions, and excuse the late filing in No. YORK 97-17-M. *See, e.g.*, *DCL Constr., Inc.*, No. WEST 95-189-M, Unpublished Order at 2 (May 9, 1996); *Transit Mixed Concrete Co.*, 13 FMSHRC 175, 176 (February 1991).

¹ The settlement motion in No. YORK 97-17-M was received on July 3, several days after the default order in that case had become a final decision of the Commission on June 30, 1997. The settlement motion in No. YORK 97-25-M was received on July 7; the default order in that case became a final order of the Commission on July 29, 1997.

We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 5, 1997

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

v.

THUNDER BASIN COAL COMPANY

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Docket No. WEST 94-370

BEFORE: Marks, Riley, and Verheggen, Commissioners¹

DECISION

BY: Marks and Riley, Commissioners

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 whether former Commission Administrative Law Judge Arthur J. Amchan properly applied the penalty assessment criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), in assessing a civil penalty of \$1300 against Thunder Basin Coal Company ("Thunder Basin") for a violation of 30 C.F.R. § 40.4 and its subsequent failure to abate that violation. 17 FMSHRC 2184, 2189 (December 1995) (ALJ). The Commission granted the petition for discretionary review filed by the Secretary of Labor challenging the judge's penalty assessment. For the reasons that follow, we vacate the judge's penalty assessment and remand for reassessment.

¹ Chairman Jordan recused herself in this matter and took no part in its consideration. 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.

I.

Factual and Procedural Background

This case is the culmination of lengthy litigation involving designation of miners' representatives, pursuant to section 103(f) of the Mine Act, 30 U.S.C. § 813(f), and 30 C.F.R. Part 40,² at the Black Thunder Mine, a large nonunion coal mine operated by Thunder Basin near Wright, Wyoming. In September 1990, eight miners at the mine designated two officials of the United Mine Workers of America ("UMWA") as their section 103(f) representatives. 17 FMSHRC at 2184. Thunder Basin refused to recognize the two UMWA officials as miners' representatives or to post the notice so designating them, as required by section 40.4,³ on the grounds that they were not employees and that their designation was motivated primarily by the desire of some miners to assist the UMWA in its efforts to organize employees at the mine. *Id.* at 2184-85. In March 1992, Thunder Basin sought and obtained an injunction from the U.S. District Court for the District of Wyoming prohibiting the Department of Labor's Mine Safety and Health Administration ("MSHA") from enforcing the Part 40 designation of the two UMWA officials as miners' representatives. *Id.* at 2185. On appeal, the U.S. Court of Appeals for the Tenth Circuit and the Supreme Court both ruled that the district court lacked subject matter jurisdiction to issue the injunction. *Id.*; see also *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970 (10th Cir. 1992), *aff'd sub nom. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). The Tenth Circuit and the Supreme Court both specifically rejected Thunder Basin's argument that it

² Section 103(f) provides:

[A] representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.

30 U.S.C. § 813(f). Regulations promulgated pursuant to this section, which establish procedural and administrative requirements for the designation of a miner representative, are set forth at 30 C.F.R. Part 40.

³ Section 40.4 provides:

A copy of the information provided the operator [concerning the miners' designation of representative] shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

30 C.F.R. § 40.4

would be denied due process if it was forced to risk substantial civil penalties by not complying with the designation of representatives before the merits of its legal arguments were decided by the Commission. 969 F.2d at 975-77; 510 U.S. at 216-18.

On January 21, 1994, two days after the Supreme Court issued its decision, James A. Herickhoff, president of Thunder Basin, wrote a letter to the MSHA district manager in Denver, Colorado, requesting that MSHA issue a citation to resolve the validity of the designation of representatives by miners at the Black Thunder mine. 17 FMSHRC at 2185. The letter stated that Thunder Basin expected MSHA to specify an abatement time "sufficient for the parties to pursue resolution of this important issue before the Commission and the courts." *Id.* On February 22, 1994, MSHA issued a citation alleging that Thunder Basin violated section 40.4. *Id.* The citation required abatement of the violation within 15 minutes. *Id.* When this period elapsed without compliance by Thunder Basin, MSHA issued an order pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b). *Id.*⁴ Later that day, Thunder Basin filed applications for temporary relief and an expedited hearing with the Commission. *Id.* at 2186.

On February 28, 1994, MSHA sent a letter to Thunder Basin requesting the company to abate the section 40.4 violation, and notifying it of MSHA's intention to begin assessing a daily penalty if the violation was not abated by March 1, 1994. S. Br. to ALJ, Ex. B. On March 11, 1994, MSHA informed Thunder Basin of its intent to assess a daily penalty of \$2000 for each day the operator continued to refuse to post the designation form. 17 FMSHRC at 2186. On March 25, 1994, Judge Amchan issued an order denying Thunder Basin's application for temporary relief. *Id.*; *Thunder Basin Coal Co.*, 16 FMSHRC 1033 (April 1994) (ALJ). Two days later, on March 27, MSHA informed Thunder Basin that assessment of a \$2000 daily penalty would commence that day. *Id.* On March 28, Thunder Basin filed a petition for discretionary review of the judge's decision. *Id.* On April 8, the Commission affirmed the judge's decision to deny the application for temporary relief. *Thunder Basin Coal Co.*, 16 FMSHRC 671 (April 1994). Later that day, Thunder Basin posted the miners' representative notice. 17 FMSHRC at 2186.

On May 31, 1994, the Secretary filed with the Commission a civil penalty petition in which it proposed a total penalty of \$26,360: \$360 for Thunder Basin's initial section 40.4 violation and a daily penalty of \$2000 for its failure to abate the violation during the 13-day period from March 27 to April 8, 1994. *Id.* at 2187; Pet. for Assessment of Penalty. Thunder Basin filed an answer and an unopposed motion to stay the penalty proceeding pending the outcome of the underlying proceeding involving its contest of the section 40.4 citation and section 104(b) order, which was granted by Judge Amchan. Answer and Unopposed Mot. for Stay; Stay of Proceedings dated Aug. 2, 1994.

⁴ This order did not require Thunder Basin to withdraw miners from any area of the mine or to cease any of its operations. *Id.* at 2185-86.

On August 24, 1994, Judge Amchan affirmed the citation issued to Thunder Basin for its refusal to post the miners' designation of representatives. *Thunder Basin Coal Co.*, 16 FMSHRC 1849 (August 1994) (ALJ). The judge concluded that the disposition of the case was controlled by the Commission's decision in *Kerr-McGee Coal Corp.*, 15 FMSHRC 352 (March 1993), *aff'd*, 40 F.3d 1257 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 2611 (1995).⁵ 16 FMSHRC at 1850. The Commission did not grant Thunder Basin's petition for discretionary review of the judge's decision, which thus became a final order of the Commission. 17 FMSHRC at 2186 n.2. On appeal, the decision was affirmed by the Tenth Circuit in *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275 (1995). 17 FMSHRC at 2186.

In July 1995, following the Tenth Circuit's decision affirming the Commission's final order, Judge Amchan set a hearing date in the penalty proceeding. Notice of Hearing dated July 10, 1995. The hearing was continued and later canceled pursuant to a joint motion of the parties in which they agreed that no material evidentiary facts relating to the penalty assessment were in dispute and that they would stipulate to the relevant facts concerning four of the six statutory penalty criteria. Joint Mot. to Govern Further Proceedings. On November 14, 1995, the Secretary and Thunder Basin submitted stipulations relating to all of the statutory penalty criteria except negligence and good faith. 17 FMSHRC at 2187; Section 110(i) Stips.⁶

Based upon his evaluation of the penalty assessment criteria set forth in section 110(i) of the Mine Act, Judge Amchan assessed a daily penalty of \$100 for the period from March 27 to April 8, 1994 — a total penalty of \$1300. 17 FMSHRC at 2187-89. Noting that the parties had stipulated with respect to four of the six statutory penalty criteria, the judge determined that the only criteria at issue were negligence and the good faith of Thunder Basin in achieving abatement. *Id.* at 2187. Finding that Thunder Basin's failure to post the miners' representative notice was intentional, rather than negligent, the judge concluded that the "real question" was its "good faith." *Id.* He described the dispositive issue as "whether [Thunder Basin] should be

⁵ In *Kerr-McGee*, the Commission held that the designation of union employees as miners' representatives was consistent with section 103(f) of the Mine Act and did not present an impermissible conflict with the National Labor Relations Act. 15 FMSHRC at 360-62. The Commission's decision in *Kerr-McGee* was affirmed by the D.C. Circuit on December 2, 1994 (40 F.3d at 1257), following the judge's decision affirming the underlying citation in this case.

⁶ The parties stipulated that Thunder Basin had 23 violations of the Mine Act in the two years preceding this violation, and that it had no prior violations of section 40.4 and no prior section 110(b) penalties assessed against it. 17 FMSHRC at 2187. The parties also stipulated that Thunder Basin is a large operator, that the proposed penalty of \$26,360 would not affect its ability to continue in business, and that the gravity of the violation was low since the violation was not "significant and substantial," no persons were likely to be affected, no lost workdays could be expected, there was no likelihood of recurrence, and the order was marked "no [a]ffected area." *Id.*; Section 110(i) Stips. at 1-2.

assessed a substantial civil penalty for its insistence on exhausting all avenues of judicial review prior to complying with the citation.” *Id.* at 2188.

The judge reasoned that the assessment of a penalty in this case required a balancing of two considerations: (1) Thunder Basin’s insistence on getting a “second bite at the apple” in the adjudication process despite the Commission’s controlling decision in *Kerr-McGee*, and (2) the very remote possibility of any danger resulting from the failure to abate. *Id.* at 2189. Balancing these factors, the judge concluded that the \$2000 daily penalty proposed by the MSHA was “much too high given the low gravity of the violation,” and that an appropriate penalty was \$100 per day for the 13-day period from March 27 to April 8, 1994 — a total penalty of \$1300. *Id.*

The Commission granted the Secretary’s petition for discretionary review challenging the judge’s penalty assessment.

II.

Disposition

The Secretary argues that the judge erred by failing to assess any civil penalty for the underlying section 40.4 violation. S. Br. at 7-8; S. Reply Br. at 1-7. The Secretary also argues that the judge erred by not properly applying the six statutory penalty criteria in assessing a daily penalty for Thunder Basin’s failure to abate the section 40.4 violation. S. Br. at 8-21. Specifically, the Secretary contends that the judge failed to properly consider the negligence criterion in determining an appropriate daily penalty. *Id.* at 11-14; S. Reply Br. at 8-9. The Secretary also contends that the judge failed to properly balance the six statutory penalty criteria, and erred by giving controlling weight to the gravity criterion. S. Br. at 14-16. The Secretary contends that the judge’s assessment of a daily penalty of \$100 for the failure to abate constitutes an abuse of discretion. *Id.* at 16-21. The Secretary argues that the nominal penalty assessed by the judge will undermine effective enforcement of the Mine Act and the role of the Commission as arbiter of disputes arising under the Act. *Id.* at 20-21; S. Reply Br. at 11-13. The Secretary also disputes Thunder Basin’s argument that its failure to abate the violation was not the result of a lack of good faith. S. Reply Br. at 9-11.

Thunder Basin argues that the judge did not fail to assess a penalty for the section 40.4 violation, as alleged by the Secretary, because his decision indicates that the \$1300 penalty assessed was based upon the both the underlying violation and the 13-day period of non-abatement. T.B. Br. at 8-9. Thunder Basin also argues that the judge properly considered the statutory penalty criteria, including negligence, and did not give undue weight to the gravity of the violation, and that there is no basis for the Secretary’s assertion that the judge’s penalty assessment is not supported by substantial evidence. *Id.* at 9-14. In addition, Thunder Basin contends that the statutory criteria warrant the imposition of no more than a nominal penalty in this case, and that there is no deterrent purpose to be served by imposition of a larger penalty,

because it acted reasonably and in good faith to obtain a prompt resolution of the issues relating to the validity of the miners' designation of representative. *Id.* at 14-25.

A. Governing Principles

Section 110(a) of the Mine Act, 30 U.S.C. § 820(a), requires the assessment of a civil penalty for all violations of the Mine Act and the mandatory standards and regulations promulgated thereunder.⁷ Section 104(b) provides that, if the Secretary finds that a mine operator has not totally abated a violation within the time set in the citation, and the period of time set for abatement shall not be extended, he shall issue an order withdrawing miners from the affected area. Section 110(b), 30 U.S.C. § 820(b), provides for the assessment of a daily civil penalty of up to \$5000 for each day during which the operator fails to correct the violation for which a citation has been issued.⁸

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Act.⁹ *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March

⁷ Section 110(a) provides, in part:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this [Act], shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$50,000 for each such violation.

30 U.S.C. § 820(a).

⁸ Section 110(b) provides:

Any operator who fails to correct a violation for which a citation has been issued under section [104(a)] within the period permitted for its correction may be assessed a civil penalty of not more than \$5,000 for each day during which such failure or violation continues.

30 U.S.C. § 820(b).

⁹ Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

[1] the operator's history of previous violations, [2] the

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 with regard to the penalty criteria are supported by substantial evidence.¹⁰ Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal."¹¹ *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). The judge must make "[f]indings of fact on each of 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.

B. Assessment of a Penalty for the Underlying Section 40.4 Violation

The Mine Act contains separate provisions authorizing the assessment of civil penalties for violations of the Act and mandatory health or safety standards, and for the failure to timely abate such violations, with different specified maximum penalties for each. While the judge acknowledged that the Secretary proposed the assessment of separate penalties of \$360 for the underlying section 40.4 violation and \$26,000 for the failure to abate that violation (\$2000 daily penalty for a period of 13 days), in making his penalty assessment he focused on the failure to abate and never explicitly addressed the issue of an appropriate penalty for the violation itself. 17 FMSHRC at 2187-89. The judge analyzed the statutory penalty criteria primarily with respect

appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

30 U.S.C. § 820(i).

¹⁰ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

¹¹ The Commission has explained that "[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Broken Hill Mining Co.*, 19 FMSHRC 673, 676 (April 1997) (quoting *Sellersburg*, 5 FMSHRC at 294 (citation omitted)).

to facts surrounding the failure to abate, and did not separately discuss facts relating to the section 40.4 violation. *Id.* Given the mandatory language of section 110(a) — providing that an operator found to have violated the Act or a mandatory health or safety standard “shall be assessed a civil penalty” (30 U.S.C. § 820(a) (emphasis added)) — the judge’s failure to assess any penalty for the section 40.4 violation amounts to legal error that necessitates a remand.

While Thunder Basin contends that the \$1300 penalty was intended by the judge to apply to both the section 40.4 violation and the subsequent failure to abate, there is no indication in the judge’s decision that this was in fact his intention.¹² Although, as the Secretary concedes (S. Reply Br. at 7 n.3), it would not be improper for the judge to assess one total penalty for both the violation and the failure to abate, the judge must at least indicate that this is his intention and provide some analysis of the statutory penalty criteria with reference to the violation. Because the judge failed to do either, we remand the case for assessment of a separate penalty for the section 40.4 violation.

C. The Application of Section 110(i) Penalty Criteria

We also conclude that the judge abused his discretion in analyzing the statutory penalty criteria with respect to Thunder Basin’s failure to abate the section 40.4 violation, and therefore vacate his penalty assessment and remand for reassessment.¹³

First, it does not appear that the judge actually considered all of the statutory criteria in determining an appropriate penalty for Thunder Basin’s failure to abate. While the parties stipulated as to the facts with respect to four of the six statutory penalty criteria, the judge appears to have totally disregarded three of these four factors (other than gravity) in assessing a penalty. At least two of these three factors — size and ability to continue in business — weigh against a significant reduction in the penalty assessed for Thunder Basin’s failure to abate.

¹² Thunder Basin’s suggestion (T.B. Br. at 9, 11, 22-23) that the \$1300 penalty assessed by the judge reflects a quadrupling of the \$360 penalty proposed by the Secretary for the section 40.4 violation finds no support in the judge’s decision, and is inconsistent with the analysis employed by the judge in determining an appropriate penalty in this case. It is apparent from the judge’s decision that the \$1300 total penalty was based on assessment of a reduced daily penalty of \$100 for the 13 days from March 27 to April 8, 1997. 17 FMSHRC at 2189. The judge does not even mention the \$360 penalty proposed for the section 40.4 violation in the penalty assessment section of his decision. *Id.* at 2187-89.

¹³ Commissioner Riley notes his dissenting colleague’s observation that, “we have allowed penalty assessments to stand that were supported by far less analysis.” Slip. op. at 14 (citing *Sunny Ridge Coal Co.*, 19 FMSHRC 254 (February 1997)). Having dissented in that case on the very issue for which it is cited (19 FMSHRC at 276-78), Commissioner Riley is confident that the Commission’s disposition of the instant case is consistent with his position in *Sunny Ridge*.

While there is no requirement that equal weight must be assigned to each of the penalty assessment criteria, it is well established that all six statutory criteria must at least be considered in assessing civil penalties and that a judge's failure to do so constitutes reversible error. See *Wallace Bros., Inc.*, 18 FMSHRC 481, 483 (April 1996), and cases cited; *Mettiki Coal Corp.*, 13 FMSHRC 760, 773 (May 1991). See also *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984). In *Jim Walter Resources, Inc.*, 19 FMSHRC 498 (March 1997), the Commission vacated a judge's penalty assessment where the judge failed to "make specific findings on all six penalty criteria," including criteria that were the subject of stipulations by the parties. *Id.* at 501.

The judge's analysis of the negligence criterion also represents an abuse of discretion. The judge's only mention of this criterion — one of two statutory criteria that the parties did not stipulate to — was his observation that Thunder Basin's failure to post the notice of representative was intentional rather than negligent. 17 FMSHRC at 2187. It appears that the judge concluded that, because the relevant conduct of Thunder Basin was intentional, the negligence criterion was essentially inapplicable. While an intentional violation will not always be found to be indicative of high negligence,¹⁴ the Commission has held that some types of intentional conduct warrant a finding of high negligence. See *Consolidation Coal Co.*, 14 FMSHRC 956, 961, 970 (June 1992) (affirming judge's finding of high negligence where operator intentionally changed its method of reporting hours worked by miners, thereby taking "the law into its own hands by deciding for itself what the law means and how it can best be applied"). Indeed, "intentional misconduct" is one of the standard phrases used by the Commission to describe an unwarrantable failure. See *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991); *S & H Mining, Inc.*, 17 FMSHRC 1918, 1922-23 (November 1995). The judge's failure to provide any meaningful analysis of the negligence criterion, or to factor that criterion into his penalty assessment for Thunder Basin's failure to abate, constitutes reversible error.¹⁵

With respect to gravity, it has been recognized that allowing non-employees to serve as miners' representatives is consistent with Congress' underlying objectives of improving miner health and mine safety, since third parties may provide valuable safety and health expertise, use their knowledge of other mines to spot problems and suggest solutions, and take actions without the threat of pressure from the employer. *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257,

¹⁴ See, e.g., *Mettiki*, 13 FMSHRC at 770-71; *Midwest Minerals, Inc.*, 12 FMSHRC 1375, 1379 (July 1990).

¹⁵ Thunder Basin asserts that an intentional violation does not merit a finding of high negligence when the operator's conduct "was based . . . on its erroneous legal interpretation of the Secretary's authority," relying on *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). T.B. Br. at 9 n.8. This reliance is misplaced, however, since in *U.S. Steel* there was no prior Commission decision comparable to the controlling *Kerr-McGee* decision in this case addressing the precise legal issue in dispute.

1263 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 2611 (1995) (citing *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447, 451-52 (10th Cir. 1990)). It follows that, as a result of Thunder Basin's refusal to honor the miners' designation of their section 103(f) representatives, the miners were deprived of the full measure of protection because their selected representatives were unable to point out safety and health hazards that the miners themselves might not have recognized or been willing to report. Therefore, Thunder Basin's failure to abate the section 40.4 violation could have compromised the safety of miners. However, since the Secretary stipulated that there is no likelihood of injury due to Thunder Basin's violation (17 FMSHRC at 2187), the Commission is precluded from applying its own analysis to the question of gravity.

D. The Daily Penalty Assessment

Finally, it appears from the judge's decision that, in reducing the daily penalty assessed for Thunder Basin's failure to abate to \$100 from the \$2000 amount proposed, a 95% reduction, he gave controlling weight to the low gravity of the violation and may not have adequately considered other factors that cut against a reduction in the proposed penalty — in particular, Thunder Basin's lack of good faith in failing to abate the violation. Despite identifying Thunder Basin's good faith as the "real question" in assessing a penalty, finding that MSHA reasonably refused to extend the abatement period, and concluding that Thunder Basin acted unreasonably in relying on assurances that it would not be subject to daily penalties if it chose to litigate rather than abate (taken from decisions that predated the Commission's controlling decision in *Kerr-McGee*), the judge appears to have assigned little weight to this lack of good faith in determining an appropriate penalty for the failure to abate. 17 FMSHRC at 2187-89. *See Jim Walter Resources*, 19 FMSHRC at 501 (vacating penalty assessment where judge "did not indicate how or whether [his] findings and conclusions [regarding operator's good faith attempts to achieve compliance] relate to his penalty assessment"). Given the "wide divergence between the penalties proposed by the Secretary and those assessed by the judge," which amounted to a 95% reduction in the proposed penalty, the judge was, at a minimum, required "to provide a sufficient explanation of the bases underlying the penalties assessed." *Sellersburg*, 5 FMSHRC at 293.

We also note that the Secretary demonstrated considerable restraint and forbearance in assessing a penalty for Thunder Basin's failure to abate the violation. The Secretary was statutorily authorized to seek a daily civil penalty of up to \$5000 per day for the failure to abate, and could have sought daily penalties for a far longer period of time, beginning on February 22, 1994 — the day the section 104(b) order issued. Instead, the Secretary gave Thunder Basin several opportunities to abate the violation and waited until March 27, several days after the judge denied the operator's motion for temporary relief, to begin imposition of a daily penalty of \$2000 — only 40% of the authorized maximum daily penalty. 17 FMSHRC at 2186. Given the significant restraint demonstrated by the Secretary in assessing a penalty for Thunder Basin's failure to abate the section 40.4 violation, in the face of controlling Commission precedent, for a month-and-a-half after the issuance of a section 104(b) order, the judge's further reduction of that proposed penalty by a factor of 95% constitutes an abuse of discretion.

For a company with the size and resources of Thunder Basin, a daily penalty of \$100, even multiplied over 13 days to yield a total penalty of \$1300, is likely to have little financial impact, and therefore minimal deterrent effect. If so, then the penalty assessed for Thunder Basin's failure to abate would not achieve the intended purpose of civil penalties under the Mine Act, which is to "convinc[e] operators to comply with the Act's requirements." *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 n.17 (September 1996) (quoting 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)). It has been recognized that "stiffer penalties against larger mines are necessary, at least in part, to ensure that operators of mines with more complex management structures would notice and correct violations." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1135 (D.C. Cir. 1989). Moreover, section 110(b) of the Act, which authorizes the Commission to assess a penalty of up to \$5000 a day for each day that a violation continues, demonstrates Congress' emphasis on the need for significant penalties in response to operator recalcitrance in situations where, as here, the violation is not abated in a timely manner.

A civil penalty of the magnitude assessed by the judge in this case is likely to discourage operators, particularly large companies with extensive financial resources, from abating violations while they litigate their validity — a result that, as the judge acknowledged, is contrary to the enforcement scheme embodied in the Mine Act. 17 FMSHRC at 2188-89. Significantly, in the *Kerr-McGee* case, which first raised the issue of the validity of a designation of union employees as miners' section 103(f) representatives, the operator abated its section 40.4 violation in response to the threatened imposition of daily penalties before proceeding to litigate the matter before the Commission and the D.C. Circuit, even though that issue was then an unsettled question of first impression. 15 FMSHRC at 355. In this case, by contrast, Thunder Basin, a large operator represented by able counsel, made a conscious decision not to abate its section 40.4 violation and to continue litigating the validity of the citation notwithstanding contrary Commission case law. It must therefore be prepared to bear the consequences of that decision.

Civil disobedience is an honorable tradition in American jurisprudence. However, it is not undertaken without risk by those who believe they are making a principled stand. Many civil rights protestors, with a far greater claim of injustice, fully expected legal sanction for their civil defiance. Only when their suffering awakened public consciousness did their civil disobedience begin to achieve the goal of changing the law.

Here we have a corporate actor engaging in a legal stand-off with a governmental agency over what it believes is a matter of principle. Certainly Thunder Basin, or any other litigant, should not be exposed to greater punishment for forcefully exercising due process rights. However, no party is, or should be, automatically entitled to a discount from a lawful penalty of the magnitude applied here merely because they invoke the righteous mantle of civil protest. This is especially true where the amount of a daily sanction for noncompliance is known and its potential accumulation is entirely in the hands of the protesting party.

In our view, these deficiencies in the judge's penalty assessment amount to an abuse of discretion. Accordingly, we vacate the judge's assessment and remand for reassessment of a penalty consistent with this decision.

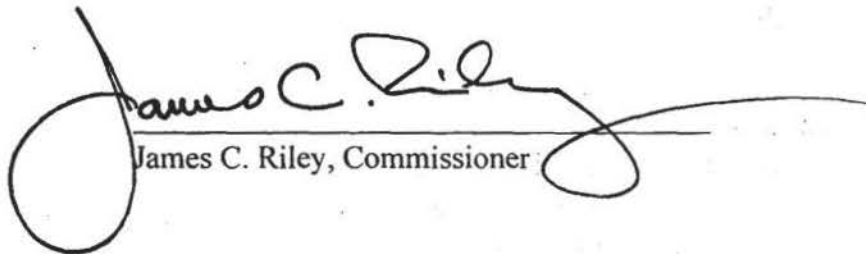
III.

Conclusion

For the foregoing reasons, we vacate the judge's penalty assessment and remand to the Chief Administrative Law Judge for reassignment and reassessment of civil penalties.¹⁶

A handwritten signature in black ink, reading "Marc Lincoln Marks". The signature is written in a cursive style with a large initial "M".

Marc Lincoln Marks, Commissioner

A handwritten signature in black ink, reading "James C. Riley". The signature is written in a cursive style with a large initial "J".

James C. Riley, Commissioner

¹⁶ Judge Amchan has since transferred to another agency.

Commissioner Verheggen, dissenting:

I join in my colleagues' decision with the exception of Sections II.C and II.D, from which I dissent. In those sections, my colleagues find an abuse of discretion where I find none.

The principles governing the Commission's de novo authority to assess civil penalties for violations of the Mine Act are well established. First, "findings of fact on the [six] statutory penalty criteria must be made." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Findings on each of the criteria may be made either by the judge or can be entered by the Commission based on record evidence. *See Sellersburg*, 736 F.2d at 1153. When reviewing a judge's factual findings on the six penalty criteria, we apply the substantial evidence test. 30 U.S.C. § 823(d)(2). Having made findings on the criteria, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty assessment scheme. *Sellersburg*, 5 FMSHRC at 294. *But see Jim Walter Resources, Inc.*, 19 FMSHRC 498, 501 (March 1997) ("Deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.") (citation omitted). We review a judge's penalty assessment under an abuse of discretion standard. *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984); *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986) (the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act).

Here, the parties stipulated the facts as to four of the six criteria, stipulations which the judge duly noted in discussing his penalty assessment. 17 FMSHRC at 2187.¹ The judge was thus required to make findings on only two criteria: the degree to which Thunder Basin was negligent, and the company's demonstrated good faith in "attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i). The judge essentially found that Thunder Basin was not negligent at all. Although I believe that this finding is not clearly articulated, it nevertheless is supported by substantial evidence. The Secretary herself defines negligence in terms of the risk of harm arising out of a particular course of conduct. 30 C.F.R. § 100.3(d). Here, the Secretary *stipulated* that there was no likelihood of injury due to Thunder Basin's violation. 17 FMSHRC at 2187. It is hard to imagine any more convincing evidence in support of the judge's conclusion. By couching his finding in terms of Thunder Basin acting "intentionally" (*id.*), the judge confused the issue. Insofar as his finding is unclear, however, I would have the Commission enter its own finding of no negligence based on the compelling evidence cited above. *See Sellersburg*, 736 F.2d at 1153.

¹ The Commission has been reluctant to discount stipulations on the penalty criteria entered by litigants. In *Mettiki Coal Corp.*, 13 FMSHRC 760, 772 (May 1991), although the judge made an implicit finding of no good faith abatement, in vacating the judge's penalty assessment the Commission found that Mettiki abated the two violations at issue "in good faith," after noting that evidence supported the parties' stipulation to this effect.

The judge also found that the company's failure to abate the violation was unreasonable in light of a Commission decision, *Kerr-McGee Coal Corp.*, 15 FMSHRC 352 (March 1993), *aff'd*, 40 F.3d 1257 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 2611 (1995), that arguably controlled the outcome of this case. This finding is amply supported by the relevant evidence, which is simply the timeline of this case, recited by the judge in some detail. 17 FMSHRC at 2185-86.

The only question remaining is whether the judge *abused his discretion* when assessing the daily penalty for Thunder Basin's continuing violation of 30 C.F.R. § 40.4. I differ from my colleagues and conclude that he did not.

After making the requisite findings, including noting the parties' stipulations, the judge discussed the factors that most affected his assessment: the gravity of the violation and Thunder Basin's abatement efforts. My colleagues are unable to cite a single instance where we have directed one of our judges to go beyond what the judge did here. In fact, we have allowed penalty assessments to stand that were supported by far less analysis. In *Sunny Ridge Coal Co.*, 19 FMSHRC 254 (February 1997), the judge made no separate findings of fact on any of the penalty criteria with respect to three highwall violations. *Id.* at 262-64, 265-66, 268. A majority of Commissioners nevertheless culled both the judge's decision and the record and found facts on which findings could be entered. *Id.* After all the findings were in, the majority stated:

The question remains whether, in light of the . . . findings, the penalty assessed by the judge is excessive. The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, discretion bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Although the penalty assessed by the judge exceeds that originally proposed by the Secretary before the hearing, based on the facts developed in the adjudicative record, *we cannot say that the penalty is inconsistent with the statutory criteria or the Act's deterrent purposes*. We thus find that the judge's penalty assessment did not constitute an abuse of discretion.

Id. at 263-64 (emphasis added, footnotes omitted).

The judge's penalty in *Sunny Ridge* was affirmed despite the fact that neither the judge nor the Commission discussed the interrelation between the factual findings on the criteria and the penalties assessed. Here, too, it is impossible to say that Judge Amchan's penalty assessment is inconsistent with the statutory criteria or the Act's deterrent purposes. Certainly, he did not abuse his discretion. If anything, his assessment improves upon the Secretary's penalty proposal

of \$360 for the underlying violation and \$2,000 per day for 13 days for the continuing violation. 17 FMSHRC at 2187. There is no apparent rational relationship between the Secretary's *nominal* proposed penalty for the underlying violation and the much higher proposed daily penalty, which the judge rejected as "much too high given the low gravity of the violation." *Id.* at 2189. In light of the findings on each of the criteria, the only consideration that would have justified a daily penalty significantly higher than the underlying penalty was Thunder Basin's failure to abate the violation in light of the *Kerr-McGee* decision, which the judge found to be unreasonable.² This is exactly one of the grounds on which the judge imposed a more than nominal daily penalty. *Id.*

I would thus affirm the judge's assessment of a daily penalty of \$100 per day for 13 days.


Theodore F. Verheggen, Commissioner

² In light of the six statutory penalty criteria of section 110(i), I fail to see the relevance of what my colleagues characterize as the "considerable restraint and forbearance [demonstrated by the Secretary] in assessing [the daily] penalty." Slip op. at 10. The manner in which the Secretary exercises her prosecutorial discretion is not a factor the judge could have considered under section 110(i).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

September 15, 1997

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

v.

FORT SCOTT FERTILIZER - CULLOR,
INCORPORATED

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

v.

JAMES CULLOR, employed by
FORT SCOTT FERTILIZER - CULLOR,
INCORPORATED

Docket No. CENT 92-334-M

Docket No. CENT 93-117-M

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

DECISION

BY THE COMMISSION:

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"), are before the Commission for a second time. They involve Administrative Law Judge Jerold Feldman's decision on remand that significant and substantial ("S&S") violations of 30 C.F.R. § 56.14101¹ for defects in the brakes on two haulage trucks were not the result of unwarrantable failure by Fort Scott Fertilizer - Cullor, Inc. ("Fort Scott") and that an agent of Fort Scott was not personally liable under section

¹ Section 56.14101 provides, in part:

(a) *Minimum requirements.* (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

110(c) of the Mine Act, 30 U.S.C. § 820(c), because the defective brakes were caused by employee misconduct. 17 FMSHRC 1330 (August 1995) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging these determinations and the judge's assessment of civil penalties. For the reasons that follow, we affirm in part, vacate in part, and remand.

I.

Factual and Procedural Background

On May 22, 1992, William Burris and Timothy Ragland, two truck drivers at Fort Scott's limestone quarry in El Dorado, Missouri, telephoned a District Office of the Department of Labor's Mine Safety and Health Administration ("MSHA") and, asserting that the brakes on a 30-ton haulage truck (the "big Euclid") and a 15-ton haulage truck (the "small Euclid") were defective, requested an inspection. 17 FMSHRC at 1331, 1333; Tr. 96, 165. On May 27, they informed James Cullor, a Fort Scott supervisor, that the brakes on their trucks were inoperable. 17 FMSHRC at 1333. He instructed them to park the trucks, which were then in use, so that the brakes could be checked. *Id.* MSHA Inspector Michael Marler arrived shortly thereafter. *Id.*

The brakes were tested and found to be defective. 17 FMSHRC at 1333-34. Inspector Marler issued a citation for the big Euclid, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and a section 104(d)(1) withdrawal order for the small Euclid, alleging violations of section 56.14101. *Id.*; Exs. P-2 & P-4. The inspector designated the alleged violations as S&S and the result of Fort Scott's unwarrantable failure to comply with the cited standard. Exs. P-2 & P-4. After repairs were made to the trucks, the citation and withdrawal order were terminated. *Id.* Subsequently, the Secretary filed a civil penalty petition against Cullor, charging him with knowingly authorizing, ordering, or carrying out the violations. 17 FMSHRC at 1330-31.²

In his initial decision, the judge found, in essence, that the drivers were disgruntled employees who had caused the violative conditions by tampering with, i.e., loosening, the slack adjusters on the trucks' brakes. 15 FMSHRC 2354 (November 1993) (ALJ). The judge concluded that deliberate employee misconduct is a defense to liability under the Mine Act and, on that basis, dismissed the penalty proceedings against both Fort Scott and Cullor. *Id.* at 2362-63.

² In June 1992, Burris and Ragland were terminated by Fort Scott. 17 FMSHRC at 1334. Failure to wear steel-toed boots was given as the reason. *Id.* Both filed discrimination complaints with MSHA against Fort Scott pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). *Id.* MSHA subsequently determined that Fort Scott had not discriminated against the complainants in violation of the Act. *Id.*

The Commission reversed the judge's conclusion that deliberate employee misconduct is a defense to operator liability for Mine Act violations. 17 FMSHRC 1112, 1115 (July 1995) ("*Fort Scott P*"). Because he relied, in part, on impermissible considerations, i.e., the drivers' complaint to MSHA regarding the truck brakes, the Secretary's failure to prosecute their discrimination complaints, and the Secretary's refusal to produce the investigatory report related to those complaints, the Commission also vacated his finding that such misconduct had occurred. *Id.* at 1116-18. The case was remanded for further analysis of the employee misconduct issue insofar as it was relevant to the determination of unwarrantable failure, negligence, and Cullor's liability, if any, under section 110(c). *Id.* at 1115-19. The Commission also instructed the judge to evaluate evidence that the drivers had made previous complaints about brake problems and that their complaints had been ignored. *Id.* at 1118. The Commission directed the judge to determine whether the violations were S&S and caused by Fort Scott's unwarrantable failure, to assess penalties against Fort Scott based on the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and to determine whether Cullor was personally liable. *Id.*

In his decision on remand, the judge reaffirmed his conclusion that the drivers had caused the defective condition of the brakes by tampering with the slack adjusters. 17 FMSHRC at 1335, 1337-38. With regard to the Commission's instruction that he evaluate evidence that the drivers had made previous complaints about brake problems and that their complaints had been ignored, the judge found the drivers' allegations "self-serving and refuted by [Fort Scott's mechanic] who denied ever receiving pertinent complaints." *Id.* at 1338. He further found the legitimacy of such complaints undermined by Burris' testimony that the big Euclid's brakes held on May 25, which was 3 days after Ragland had complained to MSHA about the brakes. *Id.* The judge determined that the violations were S&S because the inoperable truck brakes posed a substantial likelihood that serious or fatal injuries would occur. *Id.* at 1336. Based on his finding of employee misconduct, the judge determined that the violations were not caused by Fort Scott's unwarrantable failure and that Cullor was not personally liable. *Id.* at 1339. Noting that the employee misconduct mitigated the degree of Fort Scott's negligence, he assessed civil penalties of \$10 for each of the two violations. *Id.* at 1340.

II.

Disposition

The Secretary argues that substantial evidence does not support the judge's finding that loose slack adjusters were the primary cause of the inoperable truck brakes and that the loose slack adjusters resulted from employee misconduct. PDR at 15-28.³ In this regard, the Secretary asserts that the judge again erred in relying on the fact that one of the drivers contacted MSHA regarding the truck brakes and in drawing a negative inference from the Secretary's decision not to present testimony from the MSHA inspector who investigated the two drivers' discrimination

³ Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary designated her petition for discretionary review as her brief.

complaints. *Id.* at 8-15. Finally, the Secretary argues that the judge erred in failing to consider all six statutory criteria for penalty assessment and in according dispositive weight to the negligence criterion. *Id.* at 28-30. She requests that the judge's decision be reversed. *Id.* at 28, 31.

Fort Scott, a *pro se* operator, responded to the Secretary's petition in the form of a letter, stating that "although [it] did not agree with everything in [the judge's initial] ruling, [it] felt he was trying to be fair and had a pretty good understanding . . . of what really happened." F. S. Letter dated December 15, 1995, at 2. Fort Scott asserts that it has paid the civil penalties with a check marked "Final," the check was accepted for payment, and it feels that its obligation has been fulfilled. *Id.*

A. Scope of Review

In her petition for discretionary review, the Secretary focuses on the judge's finding of employee misconduct, without relating how that finding affects the judge's ultimate conclusions regarding unwarrantable failure, negligence, and section 110(c) liability. *See* PDR at 8-30. Nevertheless, she requests that the Commission "reverse the judge's decision." *Id.* at 31. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(f), 29 C.F.R. § 2700.70(f), provide that Commission review is limited to the questions raised in a granted petition for discretionary review. *E.g.*, *Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1429 (D.C. Cir. 1989). We construe the Secretary's petition to implicitly request reversal of the judge's unwarrantable failure, negligence, and section 110(c) conclusions.⁴

B. Unwarrantable Failure

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 determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991); *see also* *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). In cases involving brake failure, the Commission has looked to the operator's abatement efforts in determining whether the violation was the result of unwarrantable failure. *E.g.*, *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1562 (September 1996) (affirming unwarrantable failure finding where, although employee-agent had been informed about bad condition of highlift's brakes, he failed to remove it from service or ensure that brakes

⁴ We urge the Secretary to make her pleadings explicit, particularly when a *pro se* litigant and section 110(c) liability are involved.

were repaired); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (August 1994) (affirming unwarrantable failure finding where two foremen were aware of shuttle car's serious brake problem and failed to follow up appropriately by remedying it).

The judge's finding of employee misconduct is not dispositive of the unwarrantable failure issue because, irrespective of the cause of the defective brakes, Fort Scott was responsible for abating the dangerous condition upon becoming aware of it. See *Cyprus Plateau*, 16 FMSHRC at 1608. Inspector Marler designated the violations as unwarrantable failure based on his belief that Fort Scott had been informed of the brake problems early on the morning of May 27 but that it failed to remove the trucks from service before hauling more loads that day. Tr. 203-04; Exs. P-2 & P-4. Therefore, we focus on Fort Scott's actions after it became aware of the defective condition of the brakes on May 27.

The judge found that the drivers' May 27 brake complaints had not been "communicated" to Cullor. 17 FMSHRC at 1338. In our view, this finding refers to the drivers' alleged complaints to Cullor early on the morning of May 27, before the quarry's highloader broke down. In addition, the judge found that Inspector Marler's assertion that Cullor ignored the May 27 complaints was "inconsistent with the evidence that the trucks were parked by the work shed and not in service (although not tagged out) when [he] arrived." *Id.*; see also *id.* at 1333, 15 FMSHRC at 2358-59.

The record contains conflicting testimony regarding the events of May 27. Burris testified that he had told Cullor early that morning that the big Euclid did not have any brakes and that Cullor "seemed unbothered by it." Tr. 78-79; see also Tr. 80-81, 96-97. He stated that he continued driving the truck until the highloader broke down, at which time he parked it. Tr. 79-80, 97. However, Burris also testified that, immediately before he parked the truck, he had complained to Cullor that "it wouldn't stop on level ground" and that Cullor told him to "park it." Tr. 103. Burris acknowledged that Cullor did not have a chance to examine the truck before the inspector arrived. Tr. 103. Ragland also testified that he had told Cullor early that morning that the small Euclid had bad brakes due to a leaking foot valve and that Cullor told him to "[r]un it." Tr. 143-45. He stated that he continued driving the truck until just before the inspector arrived, at which time it was parked at the shed. Tr. 145-46, 151. He asserted, however, that the truck had not been parked for repairs. Tr. 151. In addition, Inspector Marler testified that, when he arrived at the quarry, the trucks were parked by the shed but they had not been not tagged out and no repair work was being performed. Tr. 182-83. He asserted that Cullor had told him that the trucks were parked due to repair work on the highloader and that the trucks were ready to be placed into service as soon as the highloader was repaired. Tr. 183, 191, 275. According to Marler, Burris had told Cullor early that morning about the bad brakes on the big Euclid and Cullor told him "to keep driving it and not to complain so much about the equipment." Tr. 186. Marler testified that Cullor admitted that he had been told about the bad brakes but that "the driver was a liar and complained too much and was very unreliable. So he didn't put much faith in what he told him." Tr. 190-91; see also Tr. 203, 220.

On the other hand, Cullor testified that Ragland told him early that morning that the small Euclid might have a leaking foot valve but that it would not cause brake failure. Tr. 286-87. According to Cullor, however, after the highloader broke down, Ragland told him that the brakes were not working and Cullor told Ragland to park the truck so the brakes could be examined. Tr. 286-87, 292. Cullor testified that he did not know about the brake problems until after the highloader broke down, when Burris said that the big Euclid would not stop on level ground and Ragland said that the foot valve was leaking on the small Euclid. Tr. 289-92, 297, 329-30, 331. He stated that he had told both drivers to park the trucks so the brakes could be examined. Tr. 291-92, 312, 329-30, 330-31. Cullor denied telling Burris and Ragland to continue driving the trucks following their complaints. Tr. 311-12, 327, 331, 346. Cullor testified that he told Inspector Marler that the trucks were parked for repairs and that they had not been tagged out because they had not been parked for very long. Tr. 293-94, 315.

We conclude that the judge implicitly credited Cullor's testimony that he did not know about the brake problems until after the highloader broke down and that he responded by directing both drivers to park the trucks so the brakes could be examined. See 17 FMSHRC at 1333, 1338. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (September 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (December 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). Here, we conclude that the Secretary has failed to offer compelling reasons to take the "extraordinary step" of reversing the judge's credibility determination. See *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (November 1986).

In light of the conflicting testimony presented by the witnesses, we conclude that the judge was within his discretion in crediting Cullor. Based on the judge's credibility determination, we conclude that substantial evidence supports his conclusion that Fort Scott effectively abated the dangerous condition upon becoming aware of it.⁵ Accordingly, we affirm his determination that the violations were not the result of Fort Scott's unwarrantable failure.⁶

⁵ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁶ Given our conclusions regarding the events of May 27, we do not need to reach the Secretary's argument that substantial evidence does not support the judge's determination that the violations were caused by employee misconduct. Regardless of the cause of the defective

C. Section 110(c) Liability

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove 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. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

Based on the judge's credibility determination, discussed *supra*, that Cullor did not know about the brake problems until after the highloader broke down and that he responded to the drivers' complaints, we conclude that substantial evidence supports his determination that Cullor did not knowingly authorize, order, or carry out the violations. Accordingly, we affirm the judge's determination that Cullor is not liable under section 110(c).

D. Penalty Assessment

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). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act.⁷ *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94

brakes, Fort Scott's actions on May 27, as found by the judge, do not rise to the level of aggravated conduct constituting unwarrantable failure.

⁷ Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the

(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 with regard to the penalty criteria 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 "[f]indings of fact on each of 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.

In *Fort Scott I*, the Commission explicitly directed the judge to "assess appropriate penalties against Fort Scott based on the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i)." 17 FMSHRC at 1118. On remand, however, the judge addressed only the criterion of negligence. 17 FMSHRC at 1339-40. We agree with the Secretary that, by limiting his penalty assessment discussion to the negligence criterion, the judge failed to adequately consider the other penalty criteria. Accordingly, we vacate the judge's penalty determination and remand for findings of fact and reassessment of all of the penalty criteria.⁸

person charged in attempting to achieve rapid compliance after notification of the violation.

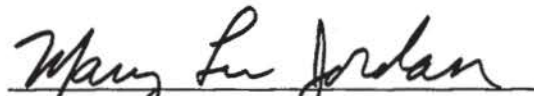
30 U.S.C. § 820(i).

⁸ With regard to Fort Scott's argument that it has paid the civil penalties with a check marked "Final," we note that payment of civil penalties does not affect the Secretary's right to petition for review of a judge's decision within 30 days. *See* 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a).

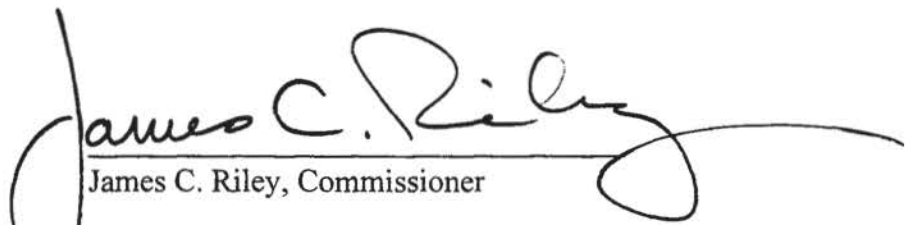
III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that the violations were not the result of Fort Scott's unwarrantable failure and that Cullor is not liable under section 110(c), and vacate the judge's penalty assessment and remand for analysis consistent with this opinion.


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 25, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. KENT 94-996
v.	:	KENT 94-997
	:	KENT 94-998
HARLAN CUMBERLAND COAL	:	KENT 94-1024
COMPANY	:	KENT 94-1307

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq. (1994). At issue is whether Commission Administrative Law Judge Roy J. Maurer correctly found that Harlan Cumberland Coal Company ("Harlan Cumberland") violated 30 C.F.R. §§ 70.207(a) and 70.208(a)¹ when the Department of Labor's Mine Safety & Health Administration ("MSHA") failed to receive several respirable coal dust samples that Harlan Cumberland was required to submit to MSHA on a bimonthly basis. 17 FMSHRC 1551, 1554, 1557 (September 1995) (ALJ). Also at issue is whether the \$3000 in penalties assessed by the judge against Harlan Cumberland for its alleged violations are supported by substantial evidence. *Id.* at 1555, 1558. The Commission granted Harlan Cumberland's petition for discretionary review challenging these determinations. For the reasons that follow, the judge's findings of violations are affirmed and his penalty assessments are vacated and remanded.

¹ Section 70.207(a) states in relevant part: "Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly [sampling] period." 30 C.F.R. § 70.207(a). Section 70.208(a) states in relevant part: "Each operator shall take one valid respirable dust sample from each designated area on a production shift during each bimonthly [sampling] period." 30 C.F.R. § 70.208(a).

I.

Factual and Procedural Background

Harlan Cumberland operates the C-2 Mine in eastern Kentucky near the town of Gray's Knob. On November 16, 1993, Eddie Sargent, Harlan Cumberland's safety director, certified on Dust Data Cards that designated area samples were taken that same day at sampling points 904-0 and 904-1 in the C-2 Mine pursuant to section 70.208(a). Ex. R-1; Tr. 115-117. During December 1993, Matthew Coots, a section foreman at the C-2 Mine, and Jeremy Madon, the superintendent of Harlan Cumberland, certified on Dust Data Cards that five designated occupation respirable coal dust samples were taken on Mechanized Mining Unit ("MMU") 004-0 in the C-2 Mine pursuant to section 70.207(a). Ex. R-2; Tr. 120-23.

MSHA did not receive either of the designated area samples, or two of the five designated occupation samples. 17 FMSHRC at 1553, 1556-57. Nor did Harlan Cumberland offer any direct evidence at the hearing on this matter that the samples MSHA failed to receive were ever actually mailed. *Id.* at 1554, 1557. The company's standard procedure was to transport its respirable dust samples to its offices in Gray's Knob, a task generally done by Sargent. *Id.* at 1554. The dust cassette card numbers for each sample were typically logged into a book for the particular mine from which the sample had been collected; then the sample would be placed in a box designated for outgoing mail. *Id.* The practice was for Clyde Bennett, Harlan Cumberland's general manager, to then take the dust samples from the company's office to a nearby post office and place them in the U.S. mail for non-certified delivery. *Id.*, Tr. 153.

On December 9, 1993, in response to two Advisories of Noncompliance sent out by MSHA's Respirable Dust Processing Laboratory, MSHA Inspector Calvin E. Riddle issued two citations, Nos. 9885355 and 9885356, alleging that Harlan Cumberland violated section 70.208(a) because it failed to take a valid respirable dust sample during the October/November 1993 bimonthly sampling cycle for sampling points 904-0 and 904-1. 17 FMSHRC at 1553. On January 14, 1994, in response to another Advisory of Noncompliance, Riddle issued Citation No. 9885368 alleging Harlan Cumberland violated section 70.207(a) because it failed to take five valid respirable dust samples during the November/December 1993 bimonthly sampling cycle for MMU 004-0. *Id.* at 1556-57. The Secretary subsequently proposed \$1000 penalties for each of the alleged violations of section 70.208(a). S. Pet. for Assessment of Penalty, Ex. A (August 18, 1994). The Secretary also proposed a \$3500 penalty for the alleged violation of section 70.207(a). S. Pet. for Assessment of Penalty, Ex. A (August 24, 1994). Harlan Cumberland contested each of these penalties.

The judge noted that sections 70.207(a) and 70.208(a) require submission of valid respirable dust samples and concluded that, to determine the validity of a sample, it must be received and examined by MSHA. 17 FMSHRC at 1554, 1557. Finding that MSHA received none of the samples at issue, the judge determined that Harlan Cumberland violated sections 70.207(a) and 70.208(a). *Id.* at 1554-55, 1557. The judge concluded that the violations of

section 70.208(a) resulted from Harlan Cumberland's "moderate" negligence. *Id.* at 1555. He also found that the company had a "propensity to repeatedly violate this same section of the standards." *Id.* Noting that he had considered "all the statutory criteria in section 110(i) of the Mine Act," 30 U.S.C. § 820(i), but without making any separate findings of fact on any of the criteria except the negligence criterion, the judge assessed a penalty of \$1000 for each violation of section 70.208(a). *Id.* The judge concluded that Harlan Cumberland's violation of section 20.207(a) was "serious" and due to the company's "moderate" negligence. *Id.* at 1557. Without making any other findings on the penalty criteria, he assessed a \$1000 penalty for this violation. *Id.* at 1558.

II.

Disposition

Harlan Cumberland argues that under the plain meaning of sections 70.207(a) and 70.208(a), it complied with the standards when it took the samples and placed them in the mail. H.C. Br. at 8-13. The company faults the judge's interpretation of the cited standards as requiring MSHA's receipt of a sample to render the sample "valid," arguing that it is impossible for an operator to guarantee that MSHA will receive a sample. *Id.* at 11-13. Harlan Cumberland also argues that the penalty assessed by the judge is excessive and not supported by substantial evidence. *Id.* at 13-14. The Secretary responds that "MSHA cannot determine whether a dust sample is valid for purposes of Sections 70.207 and 70.208 unless it receives the sample." S. Br. at 10. The Secretary argues that the Commission should defer to this interpretation of sections 70.207(a) and 70.208(a), and reject Harlan Cumberland's argument that operators comply with these standards merely by collecting samples and placing them in the mail. *Id.* at 14, 17. The Secretary also argues that substantial evidence supports the judge's conclusion, regarding his penalty assessment for the violations of section 70.208(a), that Harlan Cumberland had "a persistent problem of failure to submit valid dust samples." *Id.* at 17-18 n.11. The Secretary contends the judge correctly determined that the violation of section 70.207(a) was serious "because it rendered the dust standards unenforceable." *Id.*

A. Violations

We do not agree with Harlan Cumberland's contention that it complied with sections 70.207(a) and 70.208(a) merely by taking the requisite respirable dust samples and placing them in the mail. Instead, the plain language of these standards, when read in conjunction with the provision in Part 70 defining "valid respirable dust sample," requires receipt and examination by MSHA. 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. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (September 1996) (citations omitted). It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises. *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). Since the meaning of sections 70.207(a) and

70.208(a) is clear and unambiguous, we need not address the Secretary's contention that her interpretation of the standards is entitled to deference.

At issue here is whether Harlan Cumberland complied with the requirements of sections 70.207(a) and 70.208(a) to take "valid respirable dust samples." The term "valid respirable dust sample" is defined elsewhere in MSHA's Part 70 regulations as "a respirable dust sample collected and submitted as required by [Part 70], and not voided by MSHA." 30 C.F.R. § 70.2(p). Thus, to comply with sections 70.207(a) and 70.208(a), three elements must be met. First, an operator must collect respirable dust samples in accordance with the many requirements of Part 70 regulating how, where, by whom, and under what conditions such samples are to be collected. *See* 30 C.F.R. §§ 70.201-70.208. Second, an operator must submit its samples to MSHA. This requirement is addressed by section 70.209(a), which requires that "[t]he operator shall transmit within 24 hours after the end of the sampling shift all samples collected to fulfill the requirements of this part . . . to [MSHA's] Respirable Dust Processing Laboratory, . . . P.O. Box 18179, Pittsburgh, Pennsylvania" 30 C.F.R. § 70.209(a). Finally, to be valid, an operator's samples must not be voided by MSHA for some reason. A dust sample taken pursuant to section 70.207(a) will be voided, for example, if no production takes place on the shift sampled. *See* Ex. G-15, Advisory No. 0051.

The judge construed sections 70.207(a) and 70.208(a) as requiring that operators' samples be *received* by MSHA in order to determine their validity. 17 FMSHRC at 1554, 1557. The judge also defined a valid sample as one that "complies with the appropriate dust standard." *Id.* at 1554. Although this definition is incorrect — validity depends not on compliance with the dust standards of Part 70, but rather on MSHA's determination of whether any circumstances warrant voiding a particular sample — we nevertheless find that the judge reached the proper conclusion. MSHA's definition of "valid respirable dust sample" includes the clear and unambiguous requirement that, to be valid, a sample must not be voided *by MSHA*. It follows that MSHA cannot determine whether any circumstances warrant voiding a dust sample unless it receives and examines the sample. Any risk that the samples might not reach MSHA properly lies with the operator. Once received by MSHA, the agency must then assume responsibility for the orderly processing of the samples to determine their validity. Accordingly, we conclude that the judge properly determined that Harlan Cumberland violated sections 70.207(a) and 70.208(a) when MSHA failed to receive the samples at issue.

B. Penalties

The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, bounded by proper consideration of the statutory criteria of section 110(i) of the Mine Act and the deterrent purposes underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Section 110(i) requires Commission judges to consider the

following six criteria in assessing appropriate civil penalties:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] 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). Findings of fact on each of these statutory criteria must be made. *Sellersburg*, 5 FMSHRC at 292.

Here, the judge made no findings for any of the violations on the appropriateness of the penalties he assessed to Harlan Cumberland's size, whether the company showed good faith in abating the violations, or the company's history of previous violations. These omissions necessitate a remand so that the requisite findings can be made.

Although the judge also made no findings on the effect of the penalties he assessed on Harlan Cumberland's ability to stay in business, the parties stipulated that a reasonable penalty would have no affect on the company's survival. Ex. J-1 ¶ 4. On remand, this must be taken into consideration when the penalties are reassessed.

The judge made no gravity findings with respect to the two violations of section 70.208(a). He concluded that Harlan Cumberland's violation of section 70.207(a) was "serious." 17 FMSHRC at 1557. Although the gravity criterion is frequently analyzed in terms of "seriousness" (see *Consolidation Coal Co.*, 18 FMSHRC at 1549), the judge offered no specific factual findings in support of his conclusion. Such supporting findings are required. *Sellersburg*, 5 FMSHRC at 292; see also *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (a judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision). We thus direct the judge to make specific findings on the gravity criterion on remand.

The judge found that Harlan Cumberland was moderately negligent in connection with each violation. 17 FMSHRC at 1555, 1557. He offered no explanation for his finding of moderate negligence with respect to Harlan Cumberland's violation of section 70.207(a), which we direct him to do on remand. In explanation of his negligence findings with respect to the two violations of section 70.208(a), the judge stated that "[t]he record is clear that MSHA did not receive the subject dust cassettes, and that, without more, is enough for me to find ordinary or 'moderate' negligence." *Id.* at 1555. We find this analysis of the negligence criterion inadequate.

The judge found that Harlan Cumberland took the requisite samples. 17 FMSHRC at 1555. Thus, the only omission for which the judge could have found Harlan Cumberland negligent is failure to mail the samples. But the judge made no finding regarding whether the samples were mailed. The judge observed that Harlan Cumberland “was unable to establish that the cassettes were actually mailed to MSHA.” *Id.* at 1555. But he failed to analyze and weigh the disputed circumstantial evidence in the record on this question. On the one hand, Harlan Cumberland offered evidence that respirable dust samples were routinely mailed according to a well-established procedure. *See* Tr. 148-49. On the other hand, the Secretary argued that Harlan Cumberland failed to adduce any evidence that the samples at issue were either logged according to the company’s mailing procedures or actually mailed, and that, thus, “the weight of the circumstantial evidence demonstrates the cassettes were not mailed.” S. Proposed Findings of Fact and Conclusions of Law at 4-6.

If the company actually mailed the samples, it was not at all negligent. It would be inequitable to impute to Harlan Cumberland the negligence of the U.S. Postal Service in failing to deliver the samples. Any failure by the company to place the samples in the mail, however, would constitute some degree of negligence. We therefore direct the judge to make specific findings on this issue on remand.

But this is not the end of the inquiry concerning whether Harlan Cumberland was negligent, or the degree of its negligence. The Commission has held that “a history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction and thus, this history may be relevant in determining the degree of the operator’s negligence.” *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992). Regarding his assessment of penalties for the violations of section 70.208(a), the judge noted that he considered Harlan Cumberland’s “propensity to repeatedly violate this same section.” 17 FMSHRC at 1555. But the judge failed to explain the basis of this finding, nor did he relate it to the negligence criterion.

Although Harlan Cumberland’s C-2 Mine had been cited once before for a violation of section 70.207(a) when MSHA did not receive samples as required (*see* Ex. G-13), the record contains no prior violations by the C-2 Mine of section 70.208(a). Even if the judge had reasoned that a prior violation of section 70.207(a) should have put Harlan Cumberland on notice that it needed to take greater efforts to ensure the MSHA received its respirable dust samples collected pursuant to section 70.208(a), one prior violation does not establish a “propensity to repeatedly violate” the cited standard. However, several of Harlan Cumberland’s other mines had also been cited during 1993 for similar violations of both standards. *See* Exs. G-12, G-14, G-16, G-17, G-18, and G-19.² These other violations *could* have placed Harlan Cumberland on notice of a problem with its mailing of respirable dust samples. However, the judge failed to

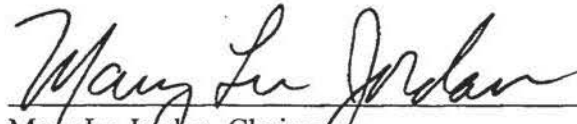
² The C-2 Mine was cited on May 18, 1993 for a violation of section 70.207(a), but this violation was based on a sample being received but voided because of “invalid production.” Ex. G-15. This violation is thus irrelevant for purposes of determining whether Harlan Cumberland was on notice that it needed to take greater efforts to ensure the MSHA received its respirable dust samples.

explain whether this was his rationale, and if so, how the violations at other mines could have put the C-2 Mine on notice of a problem. We therefore direct the judge to make specific findings on this issue on remand.

III.

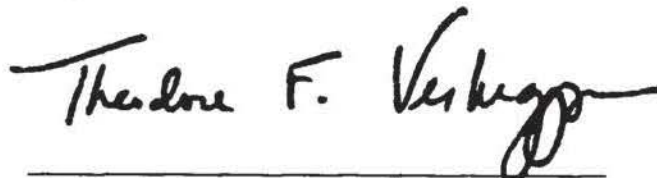
Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Harlan Cumberland violated sections 70.207(a) and 70.208(a), and we vacate his penalty assessment and remand for reassessment consistent with our decision.


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 29, 1997

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of RICHARD E. GLOVER
and LEON KEHRER

v.

CONSOLIDATION COAL COMPANY

Docket No. LAKE 95-78-D

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

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge Gary Melick properly found that Consolidation Coal Company ("Consol") violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1),¹ when it transferred mine representatives Richard Glover and Leon Kehrer from their positions as "scooter barn" mechanics to positions as underground mechanics. 17 FMSHRC 957 (June 1995) (ALJ). The Commission granted Consol's petition for discretionary review challenging the judge's holding. The National Mining Association ("NMA") and the United Mine Workers of America ("UMWA") sought and were granted amicus status in this proceeding, and an oral argument was

¹ Section 105(c)(1) provides in pertinent 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, [or] representative of miners . . . because of the exercise by such miner, [or] representative of miners . . . of any statutory right afforded by this [Act].

held. For the reasons that follow, we affirm the finding of violation but remand for further analysis as to the civil penalty.

I.

Factual and Procedural Background

Glover and Kehrer had worked as scooter barn mechanics at Consol's Rend Lake Mine for many years. 17 FMSHRC at 959. The scooter barn is located underground and, on June 21, 1994, was situated about 150 feet from the bottom of the "B" shaft. *Id.* It is a shop area that measures 18 feet by 70 feet with rock walls, a beamed ceiling, and a cement floor containing equipment including welders, drill presses, and grinders. *Id.* The mechanics in the scooter barn repair diesel and battery-operated mantrips and other rubber-tired equipment, such as tractors and scoops. *Id.*; Tr. 24, 84-86. Consol assigned one mechanic for each of three shifts to work in the scooter barn. 17 FMSHRC at 959; Tr. 11, 56. The three shifts rotated every 2 weeks; the rotations were designated as A, B, and C turns. Tr. 16.

Glover had worked at the mine for 25 years and for 17 of those years he was a scooter barn mechanic. 17 FMSHRC at 959. He worked the A turn and, for 5 or 6 years, had been the alternate walkaround representative for the shift. *Id.* at 958-59; Tr. 16, 42, 155. Before that, he had been a union safety committeeman. Tr. 42. Kehrer had worked at the mine for 21 years, and was the scooter barn mechanic and walkaround representative for the C turn. 17 FMSHRC at 959; Tr. 103-04, 155. When Glover and Kehrer worked the day shift rotation, walkaround duties consumed approximately two-thirds of their time.² 17 FMSHRC at 959; Tr. 43, 50-51, 55. During their absence, other mechanics filled in as replacements in the scooter barn. Tr. 155-57.

Assistant master mechanic Johnny Robert Moore and mine superintendent Joseph Wetzel testified that on June 11, 1994, a meeting of supervisory personnel was held to discuss various problems at the mine. Tr. 173-74, 208. Inadequate transportation and mantrip availability were identified as major problems and management decided to station a mechanic in the scooter barn on a 24-hour basis. 17 FMSHRC at 960-61; Tr. 173-74, 208-09.

On Friday, June 21, 1994, the maintenance foreman on the A turn, Vernell Burton, informed Glover that he was being transferred to a working section because he was acting as representative of miners and walking with the state and federal inspectors. 17 FMSHRC at 959; Tr. 27, 151. Burton told him that there was a possibility that if Glover stopped his walkaround duties he could remain in the scooter barn. 17 FMSHRC at 959; Tr. 28.

² The judge found that the Complainants spent 4 out of 5 days on walkaround during the day shift. 17 FMSHRC at 959. However, the record testimony establishes that they did not walk around all day; on each of the days they walked around, Glover and Kehrer returned to the scooter barn with approximately 1 ½ hours remaining in their shift. Tr. 51.

That same day, assistant master mechanic Moore announced to Kehrer that he was being removed from the scooter barn because he was a walkaround with the state and federal authorities. 17 FMSHRC at 959-61; Tr. 76-77, 181. Moore told Kehrer that if he relinquished his walkaround responsibilities he could remain in the scooter barn. 17 FMSHRC at 960; Tr. 76. Billy R. Sanders, an inspector with the State of Illinois, Department of Mines and Minerals, was present for and testified to this conversation. 17 FMSHRC at 959-60; Tr. 76-77.

Kehrer then spoke to Scott Wamsley, maintenance superintendent, who repeated that Kehrer was being removed because of his walkaround duties and that he either had to quit his walkaround duties or lose his job as scooter barn mechanic. Tr. 90. Kehrer also spoke with mine superintendent Wetzel, who stated that the transfer was not because he was a walkaround but because Consol wanted to make the scooter barn more productive. Tr. 91-92.

On Monday, June 24, Burton instructed Glover to report to working section 1-G as a maintenance mechanic. 17 FMSHRC at 959; Tr. 20. At the end of the shift, Glover and Kehrer went to see Wetzel and Wamsley. 17 FMSHRC at 959. Wetzel informed them that the "official" reason for the transfer was to make the scooter barn more productive and that they did not have the option of quitting their walkaround duties to stay in the scooter barn. 17 FMSHRC at 959; Tr. 31, 95.

The transfers did not result in a change in job classification or salary rate. Tr. 23, 33, 219. Glover and Kehrer were transferred as mechanics to the working sections, where they worked high voltage electrical equipment and were exposed to hazards such as dust, methane, and roof falls. 17 FMSHRC at 959-60; Tr. 24, 105. The miners were not given any additional training after the transfers. Tr. 24, 97-98. Not feeling safe in his new assignment, Glover subsequently bid on a motorman job, taking a pay cut of \$1.00 per hour and, because that shift already had a walkaround representative, relinquishing those responsibilities as a result. 17 FMSHRC at 959; Tr. 20, 26, 70-71.

Glover and Kehrer filed a complaint alleging discrimination under the Mine Act with the Secretary of Labor who filed a complaint on their behalf. Consol contested the complaint and the proceeding was assigned to Judge Melick for a hearing.

The judge concluded that Consol violated section 105(c)(1) by transferring the Complainants from the scooter barn, and gave three alternative rationales for his determination. First, the judge found that the operator's "policy," i.e., the transfer, was "facially discriminatory" because it "effectively" barred miners' representatives from becoming or remaining scooter barn mechanics, discouraged miners who might wish to work as scooter barn mechanics from becoming miners' representatives, and restricted miners' rights to select whom they wished to represent them. 17 FMSHRC at 963 (emphasis added). Second, the judge found the transfers discriminatory under the Commission's test enunciated in *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on*

behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981) (“*Pasula-Robinette*” analysis), because Glover and Kehrer were members of a protected class who had engaged in protected activity prior to the transfer, and the transfer was motivated solely by their protected activity. 17 FMSHRC at 963-64. Third, the judge stated that, assuming *arguendo*, the “mixed motive” analysis under *Pasula-Robinette* was applicable, Consol’s business justification of transferring the Complainants to secure 24-hour coverage in the scooter barn did not outweigh Congressional intent to protect miners exercising their walkaround rights under the Act. *Id.* at 964-65. The judge ordered Consol to reinstate the miners to their previously-held positions and assessed a \$10,000 civil penalty against Consol. *Id.* at 965.

II.

Disposition

Consol argues that the judge erred in reaching a conclusion that will require operators to engage in major restructuring of their workforces and provide accommodation for walkaround representatives that work undue hardship on production activities. PDR at 6-13.³ Consol contends that the judge’s decision is not supported by substantial evidence because the totality of circumstances demonstrates that Complainants’ transfer was not unlawfully motivated but motivated by the operator’s legitimate business need to have mechanics in the scooter barn on a regular basis. *Id.* at 13-14, 20. Consol stresses that the evidence established that the operator wanted the miners to continue their walkaround duties, and that the Secretary failed to prove that the transfer discouraged or interfered with walkaround rights at the mine. *Id.* at 14-15. Consol further asserts that the transfers were not facially discriminatory and, even if they were, the judge erred in concluding that “an operator may not raise as a defense the lack of discriminatory motivation or valid business purpose” in cases of facial discrimination. *Id.* at 15-19 (quoting 17 FMSHRC at 962).

In support of Consol’s position, amicus NMA adds that the facial discrimination analysis in *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201 (February 1994), does not apply to this case. NMA Br. at 3-10. Even if the analysis were to apply, NMA asks the Commission to revisit its holding in *Swift*. *Id.* at 7-8 & n.2, 11-17. NMA further argues that, in accordance with Congressional intent, Consol was entitled to exercise its legitimate management rights to accommodate allegedly pervasive inspections conducted by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). *Id.* at 1-2 & n.1, 17-22.

The Secretary responds that the judge properly concluded that the transfers violated section 105(c) under either a facial discrimination or *Pasula-Robinette* analysis. S. Br. at 8-11. The Secretary additionally argues that Consol’s policy impermissibly interfered with the exercise

³ Consol designated its PDR as its brief.

of the walkaround right protected under Mine Act section 103(f), 30 U.S.C. § 813(f). *Id.* at 8-31. The Secretary disagrees with Consol's assertion that the transfers were due to the miners' absences, pointing to the statements of the miners' immediate supervisors that the transfers were based on their status as walkaround representatives. *Id.* at 22. The Secretary contends that the transfers constituted an adverse action, noting that the scooter barn had fewer dangers than the working sections and asserting that the scooter barn was a more desirable position than those to which the miners were transferred. *Id.* at 26-28. She asserts that Consol's transfer had the effect of chilling the miners' right to choose their walkaround representative. *Id.* at 28-29.

In support of the Secretary, amicus UMWA asserts that Consol's primary defense, that operators should not be required to engage in a "major restructuring" in order to comply with the Act, is incorrect because an operator must comply with the provision of the Mine Act in order to operate a mine and is not at liberty to choose only those provisions that are easy or inexpensive to satisfy. UMWA Br. at 9. UMWA contends that the Secretary did not dictate any restructuring, but rather Consol chose a solution to its transportation difficulties that impermissibly infringed on miners' rights under section 103(f) of the Mine Act. *Id.* at 10-12.

A. Discrimination

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18. 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. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The judge determined that the "specific action by Consol in transferring the Complainants in this case for their activities as miners' representatives" was "discriminatory under the customary analysis applied to discrimination cases." 17 FMSHRC at 963. As the judge found, there is "no dispute" that both Glover and Kehrer, as miners' representatives, "were members of a protected class and had engaged in protected activity prior to their transfer." *Id.* at 963-64. The protected activity consisted of Complainants' service as walkaround representatives pursuant to Mine Act section 103(f), which provides that "a representative authorized by his miners shall be given an opportunity to accompany the Secretary . . . during the physical inspection of any

coal or other mine. . . .” 30 U.S.C. § 813(f). Accordingly, we conclude that the judge correctly determined that the Secretary proved the element of protected activity.⁴

The judge concluded that Consol’s transfer of the miners from the scooter barn to the section mechanic job satisfied the second element of the *Pasula-Robinette* prima facie case, adverse action. 17 FMSHRC at 964. The judge reasoned that the section mechanic position was “less desirable and more hazardous work.” *Id.* at 961. Substantial evidence supports this finding.⁵ Glover and Kehrer testified that working in the sections exposed miners to hazards, such as dust, methane and roof falls, that were not present in the scooter barn, an enclosed underground shop area constructed of concrete floor, block walls, and beam ceiling. Tr. 11, 26, 105. Both Complainants testified that the section equipment consisted of high voltage machines that were far more dangerous than the machinery they worked on in the scooter barn. Tr. 20, 24, 105. Section work also involved heavy lifting whereas the scooter barn did not. Tr. 105. Consol conceded that the “scooter barn is fraught with fewer dangers than is a working section.” PDR at 5 (citing Tr. 26-27, 45). Both Glover and Kehrer had worked in the scooter barn for many years (17 FMSHRC at 959), and neither miner was given additional training after the transfer, increasing the danger of their new positions. Tr. 24, 97-99. Glover testified that he bid out of the section job because he had not performed that job in 17 years and felt unsafe. Tr. 20. The distinct nature of and qualifications for the two jobs was confirmed by mine superintendent Wetzel. Tr. 219, 230. Although the Commission has never directly addressed the issue, transfers to more arduous or difficult work have been held to be discriminatory under the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1994) (“NLRA”). *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1320-21 (5th Cir. 1994); *Manufacturing Services Inc.*, 295 NLRB No. 31, 131 LRRM 1501 (June 1989).⁶ Likewise, we conclude that the judge correctly determined that

⁴ Substantial evidence establishes that, in June 1994, Glover and Kehrer were serving terms as alternate safety committeeman and safety committeeman, respectfully, having been appointed by union officials and their appointments confirmed by vote of local union membership composed of Rend Lake miners. Tr. 16, 238, 241-45. This method of designation satisfies 30 C.F.R. § 40.2(b), which states “[m]iners or their representative organization may appoint or designate different persons to represent them” Thus, we reject the suggestion of NMA and Consol that the Complainants were not properly designated miners’ representatives.

⁵ Under the Mine Act, an administrative law judge’s findings of fact are to be affirmed if they are supported by substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1555 (September 1992).

⁶ The Commission has looked for guidance to case law interpreting similar provisions of the NLRA in resolving questions arising under the Mine Act. *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (December 1990).

the transfer of these two longstanding scooter barn mechanics to a more dangerous assignment on the section was adverse. 17 FMSHRC at 961, 964.⁷

Because the record established that work on the sections was more dangerous, we reject NMA's assertion that the transfer was merely an action that the miners disliked. Compare *Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1533 (August 1990) (adverse action "is not simply any operator action that a miner does not like"). Further, NMA's contention that, although the scooter barn was safer, Glover and Kehrer were exposed to dangerous section conditions while on walkaround, misses the point. The transfer to the working sections meant that the Complainants would be spending nearly *all* their working time in the more dangerous position. By contrast, because Glover and Kehrer were not on walkaround when on the second and third shift rotations, the Complainants, prior to the transfers, spent more than two-thirds of their working time in the safer environment of the scooter barn. Tr. 50-51.⁸

Substantial evidence also establishes that the adverse action was motivated by the protected activity. We agree with the judge that, "it cannot be disputed that the adverse action was solely motivated by the fact that the Complainants were performing their duties as representatives of miners." 17 FMSHRC at 964. In *Pasula*, the Commission noted that section 105(c) proscribes adverse action "because" a miner engages in a protected activity, whereas the comparable provision of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801

⁷ The Secretary sought to introduce supplemental authorities on this point by a letter dated June 2, 1997. Consol, by its letter dated June 4, 1997, opposed and requested that the authorities be stricken from the record. We do not address Consol's request because our conclusion does not rely on the Secretary's supplemental authorities. As a consequence, Consol's request to strike those authorities is denied as moot.

⁸ On May 16, 1997, the Commission granted the Secretary's motion to strike certain portions of Consol's response to the brief of amicus curiae UMW. We reasoned that, pursuant to 30 U.S.C. §§ 823(d)(2)(A)(iii) & 823(d)(2)(c), the disputed materials, consisting of an affidavit and two attached exhibits that were not part of the evidentiary record before the judge, were not properly subject to our review. Consol filed a motion requesting the Commission to reconsider its May 16 order or, alternatively, for the Commission to remand and reopen to consider the disputed materials. For the reasons set forth in the May 16 order, we also deny Consol's petition for reconsideration and motion to remand. Moreover, the materials Consol seeks to introduce in its petition and motion are not probative of the discrimination issue. That Complainants may have moved to non-section jobs after reinstatement, as Consol asserts, does not pertain to the relevant comparison — between the section and scooter barn mechanic jobs — in measuring the adverse nature of the transfer. In addition, our finding of discrimination does not rest on the ground that Consol's petition and motion were attempting to refute, i.e., that a discriminatory effect was shown because Glover took a lower-paying job and gave up his walkaround responsibilities. See Pet. for Recons. and Mot. to Remand at 4.

et seq. (1976) ("1969 Coal Act") used the term "by reason of the fact that." 2 FMSHRC at 2798. We explained the change by reference to the report of the Senate Committee that drafted section 105(c)(1), which states "[w]hensoever protected activity is *in any manner* a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977) ("S. Rep."), 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 624 (1978) ("Legis. Hist.") (emphasis added)). Here, the protected walkaround duties contributed not just "*in any manner*" to the transfers, they were the sole motivating factor behind the adverse transfers.⁹

We are unpersuaded by Consol's attempt to treat Glover's and Kehrer's absences from the scooter barn (as opposed to the exercise of their walkaround rights) as the motivating reason for their transfer. The absences resulted from, and were inextricably intertwined with the Complainants' exercise of walkaround rights, which are statutorily protected under the Mine Act. Thus, we agree with the judge that the adverse action, in the form of the transfers, was taken as a result of the inevitable consequences of engaging in this protected activity.

The Commission has previously recognized the link between walkaround rights and absenteeism. In *Secretary of Labor on behalf of Truex v. Consolidation Coal Co.*, 8 FMSHRC 1293 (September 1986), we noted that, in enacting the walkaround right, Congress recognized "that an operator would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights." *Id.* at 1299. Consequently, we must consider the protected activity's inescapable result (absenteeism) in applying the "motivation" prong of the *Pasula* test in this case. Accordingly, we conclude that, under *Pasula*, the judge properly

⁹ Commissioner Verheggen further notes that Supervisors Burton and Moore expressly told Glover and Kehrer at the time of their transfer that the transfer was because they were walkaround representatives. 17 FMSHRC at 959-61. Faced with an argument similar to Consol's here that the statements of lower-level supervisors were inartful and should not be held violative of the NLRA, the D.C. Circuit observed:

A rough and ready point made by a supervisor in overalls, the kind of supervisor who is really more naturally engaged in conversation with the workers, may be far more credible and influential so far as the ordinary worker is concerned than a necessarily more formal, structured and purposeful statement of a high-ranking executive.

International Brotherhood of Teamsters v. NLRB, 435 F.2d 416, 417 (D. C. Cir. 1970). Commissioner Verheggen believes that Consol's post hoc explanations fail to obscure the initial "rough and ready point" expressed so forcefully by Burton and Moore. These statements are central to Commissioner Verheggen's finding that the adverse transfers were motivated by the exercise of protected walkaround rights.

found that the transfers were motivated by the Complainants' protected activity, and that the Secretary made a prima facie case of discrimination under section 105(c).

An operator can rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Alternatively, an operator can establish an affirmative defense by showing that it was also motivated by a miner's unprotected activity, and that it would have taken the adverse action in any event for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799.

Because the absences stemmed solely from the exercise of the walkaround right, they cannot be considered unprotected activity, and therefore do not establish the basis for an affirmative defense. See *Price and Vacha*, 14 FMSHRC at 1556 (affirmative defense was not available when two miner representatives were discharged for not complying with a discriminatorily applied policy). Further, because all of the miners' activity in this case was protected, the Commission cases cited by Consol (PDR at 12), such as *Mooney v. SOHIO Western Mining Co.*, 6 FMSHRC 510 (March 1984) and *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8 (January 1984), which found that employers legitimately discharged miners for excessive absences, are inapposite. In those cases, unlike the case at bar, the employees' absences did not arise from their participation in protected activity. *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891 (May 1987), relied upon by the NMA, (NMA Br. at 12-15), is likewise distinguishable. There the Commission found that a Part 90 miner did not engage in protected activity when seeking a particular job. 9 FMSHRC at 900. In the present case, substantial evidence supports the judge's finding that walkaround representatives Glover and Kehrer engaged in protected activity.

Consol's and NMA's additional arguments also lack merit. Consol contends that, because employers are only required to "reasonably accommodate" qualified persons under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (1994) ("ADA") and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1994) ("Rehabilitation Act"), by analogy, only reasonable accommodation of an employee's protected walkaround activities is required under the Mine Act. PDR at 8. However, under the ADA and the Rehabilitation Act, unlike the Mine Act, Congress imposed a reasonable accommodation requirement on employers to accommodate covered persons. 42 U.S.C. § 12111(9); 42 U.S.C. § 12112(b)(5) (ADA); *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979) (Court found an obligation of reasonable accommodation under discrimination provision of the Rehabilitation Act); *Alexander v. Choate*, 469 U.S. 287, 300 n.20 (1985) (same). The Mine Act contains no reasonable accommodation language, nor have the Commission or the courts construed the Act to adopt a reasonable accommodation approach. On the contrary, the Mine Act's legislative history has led the Commission and courts to conclude that section 105(c) is to be construed "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act]." S. Rep. at 36, *Legis. Hist.* at 624 (quoted in *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480 (August 1982), and *Pasula*, 2 FMSHRC at 2791);

see also *Secretary of Labor v. Cannelton Industries*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (Congress intended Mine Act to be liberally construed). We also reject NMA's assertions that, because of MSHA's "pervasive" inspections, an operator need only reasonably accommodate Complainants' exercise of their rights under section 103(f). NMA Br. at 2, 21-22.¹⁰

In sum, we affirm the judge's determination that Consol's transfer of walkaround representatives Glover and Kehrler violated section 105(c) of the Mine Act.¹¹

B. Penalty

Consol argues that the imposition of a \$10,000 penalty is unwarranted given the lack of affirmative evidence of discriminatory intent and the existence of no final section 105(c) violations at the mine in the past 10 years. PDR at 21-22. The Secretary asserts that, while a \$10,000 penalty is appropriate in this case, remand is necessary because the judge failed to discuss the six penalty criteria under section 110(i), 30 U.S.C. § 820(i). S. Br. at 31-32.

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Act.¹² *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 with regard to the penalty criteria are supported by substantial evidence. The judge must make "[f]indings of fact on each of the

¹⁰ Because we reject NMA's argument that MSHA's inspection presence calls for reasonable accommodation, we do not address its accompanying request that the Commission take judicial notice of statistics pertaining to the number of coal mines and MSHA inspectors in the years 1975-1995. NMA Br. at 2 n.1.

¹¹ In light of our disposition, the Commission does not address whether the transfers were facially discriminatory under the analysis of *Swift*, 16 FMSHRC 201, nor whether that case need be revisited, as the operators assert.

¹² Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

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.

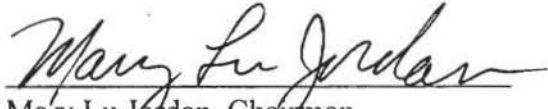
It does not appear that the judge considered all of the statutory criteria in determining an appropriate penalty for Consol’s discrimination violation. The judge did not separately discuss facts relating to any of the criteria. Instead, the judge stated that “[c]onsidering the serious impact Consol’s actions herein would have on the willingness of persons to serve as miners’ representatives and the intentional and obvious discriminatory nature of the actions,” a \$10,000 penalty was warranted. 17 FMSHRC at 965. This statement does not satisfy the requirements we set out in *Sellersburg*.

Accordingly, we vacate the judge’s penalty assessment and remand for entry of detailed findings as to each of the six section 110(i) criteria, and assessment of an appropriate penalty. In particular, we instruct the judge to explain his finding that the “nature” of Consol’s action was “intentional” in relation to the negligence criterion. See *Thunder Basin Coal Co.*, 19 FMSHRC ___, slip op. at 9, No. WEST 94-370 (September 5, 1997). Although we do not address Consol’s overall contention that the penalty amount is too high, we reject its assertion that the absence of any final section 105(c) determinations at the mine should mitigate the penalty. As we explained in *Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552 (April 1996), “section 110(i) requires the judge to consider the operator’s general history of previous violations . . . [including] [p]ast violations of *all* safety and health standards. . . .” *Id.* at 557 (quoting *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992) (emphasis added)). Accordingly, on remand, the judge should consider Consol’s general history of violations at the mine, not only its prior section 105(c) violations.

III.

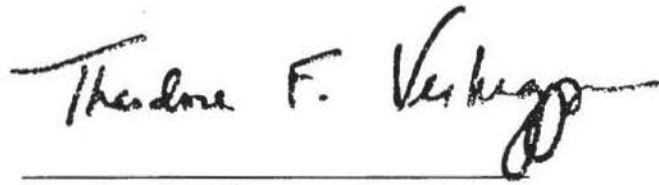
Conclusion

For the foregoing reasons, we affirm the judge's finding of violation, but vacate the penalty assessment and remand for reassessment.


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James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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WASHINGTON, D.C. 20006

September 29, 1997

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

v.

AMAX COAL COMPANY

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Docket No. LAKE 95-267

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the issue of whether the conceded failure by AMAX Coal Company ("AMAX") to extend a line curtain to within 40 feet of a working face, a violation of its ventilation plan and thus of 30 C.F.R. § 75.370(a)(1),¹ was the result of the AMAX's unwarrantable failure.² Administrative Law Judge Arthur Amchan found the violation unwarrantable. 17 FMSHRC 1747 (October 1995) (ALJ). The Commission granted AMAX's petition for discretionary review challenging that determination. For the reasons that follow, the judge's decision stands as if affirmed.

¹ Section 75.370(a)(1) provides in part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager." AMAX violated the provision of its ventilation plan which stated that "[w]hen mining on advance utilizing flooded bed scrubber miners and blowing canvas, line curtain will be maintained to within 40 feet of the working face with a minimum airflow of 8,000 cfm behind the curtain." G. Ex. 3; Tr. 26-27.

² 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.

Factual and Procedural Background

On the morning of November 8, 1994, MSHA ventilation specialist Robert M. Montgomery was inspecting an area of the 2 West/Main West-South ("2W/MWS") section of AMAX's Wabash Mine in eastern Illinois. 17 FMSHRC at 1747; Tr. 14, 23. That day, AMAX section foreman Kyle Wethington was in the No. 6 entry of the section prior to the commencement of mining in that entry. 17 FMSHRC at 1749. Wethington, along with William Rowe and Tommy Stephens, the two miners who were to mine in that entry with the remote control continuous miner, had cleaned up gob in the entry before beginning to cut coal. *Id.*; Tr. 109, 112-13. At around the time the miners began cutting the coal, Wethington left the No. 6 entry to examine some stoppings that had been blown at the head of the belt, a condition to which Wethington was alerted by another MSHA inspector present at the mine that day. 17 FMSHRC at 1749; Tr. 110-11, 113-14. At that time, the line curtain in the entry was within 40 feet of the face, consistent with the Wabash Mine's ventilation plan requirement for working faces. 17 FMSHRC at 1749; Tr. 112-13.

In the 40 to 45 minutes that Wethington was away from the No. 6 entry, Rowe had completed three cuts into the coal, and was finishing the fourth and final cut when Wethington returned. 17 FMSHRC at 1749; Tr. 100, 106, 114-15, 202, 224. In mining the first and second cuts, the continuous miner was advanced 20 feet on the right side of the face, then 20 feet on the left. 17 FMSHRC at 1749; Tr. 193. Thereafter the mining machine was moved back to the right to advance another 15 to 20 feet, at which time the line curtain should have been extended to stay within 40 feet of the face. 17 FMSHRC at 1749; Tr. 90, 194. However, Rowe and Stevens admitted that the curtain was never moved from its original position. 17 FMSHRC at 1749; Tr. 200, 203, 224. Thus, the third cut on the right and the fourth and final cut on the left took place while AMAX was in violation of its ventilation plan. 17 FMSHRC at 1749.

Upon his return to the No. 6 entry, Wethington instructed Stevens regarding the miners' next task, which was to cut coal in the No. 5 entry. *Id.* at 1750. Meanwhile, Inspector Montgomery, who was inspecting the working faces of that section of the mine, came upon a ram car waiting to enter the No. 6 entry as soon as another ram car, operated by Robert Scott, left the entry. *Id.* at 1747-48; Tr. 23. When the waiting ram car entered the No. 6 entry, Inspector Montgomery followed it, and saw foreman Wethington walking out of the entry. 17 FMSHRC at 1748. After Wethington noticed the inspector heading into the No. 6 entry he turned around. *Id.*; Tr. 23-24, 40-41. Wethington then walked back to the working face and ordered Rowe to shut down the continuous miner and leave to obtain additional material to extend the line curtain 20 feet. 17 FMSHRC at 1748; Tr. 116-18, 127, 198. Wethington also instructed Stevens to get a ladder so that additional curtain material could be hung. Tr. 216.

Once the face and the line curtain were in his view in the No. 6 entry, Inspector Montgomery immediately noticed that the line curtain was much farther away from the face than

it should have been. 17 FMSHRC at 1748; Tr. 24. Bruce Thompson, an AMAX section supervisor who was accompanying Inspector Montgomery, also recognized that the curtain was not in the proper position. Tr. 172; 182-83. Inspector Montgomery measured the distance from the end of the unextended line curtain to the tail of the continuous mining machine at between 20 and 25 feet. 17 FMSHRC at 1748; Tr. 24. As the continuous miner was approximately 35 feet long, that meant that the end of the curtain was 55 to 60 feet from the face, rather than within 40 feet, as required by AMAX's ventilation plan. 17 FMSHRC at 1748; Tr. 26-28, 81-82, 220.

Inspector Montgomery cited AMAX for a significant and substantial ("S&S")³ violation of 30 C.F.R. § 75.370(a)(1) due to an unwarrantable failure to comply with the requirements of its ventilation plan. 17 FMSHRC at 1748. The unwarrantable failure designation was based on Inspector Montgomery's belief that Wethington was present for at least one load of coal being loaded onto a ram car while the line curtain out of place, and that, until he saw Inspector Montgomery, Wethington did not intend to correct the problem. Tr. 24, 40-41, 73.

AMAX conceded that it violated the Mine Act, but contested the S&S and unwarrantable failure designations. 17 FMSHRC at 1748. The judge found the violation to be non-S&S. *Id.* at 1753.

On the unwarrantable failure issue, the judge credited the account of ram car operator Scott, who testified foreman Wethington was in the No. 6 entry for approximately five minutes, over that of Wethington, who claimed that he was in the No. 6 entry for only one minute before starting to leave again. *Id.* at 1750 & n.2; Tr. at 116. The judge also found the violation to be an obvious one, on the basis of the testimony of AMAX section supervisor Thompson that, when he accompanied Inspector Montgomery into the No. 6 entry, he immediately recognized that the location of the line curtain was in violation of the Wabash Mine ventilation plan. *Id.* at 1751. In addition, the judge inferred that Wethington's "about-face" upon seeing Inspector Montgomery was precipitated by (1) Wethington's knowledge that the line curtain's location violated the ventilation plan, and (2) Wethington's belief that Inspector Montgomery would immediately notice it. *Id.* Concluding that Wethington was aware that the line curtain was not close enough to the face before he saw Inspector Montgomery, the judge held that "[s]ince Wethington knew that the violation existed and ignored it, his conduct is sufficiently aggravated to constitute an 'unwarrantable failure.'" *Id.*⁴

³ The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), 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 After trial but before the issuance of the judge's decision, a civil penalty proceeding commenced against Wethington under section 110(c) of the Mine Act. Over Wethington's objections, the same judge granted the Secretary's motion to stay that proceeding until the Commission ruled on the instant appeal. 18 FMSHRC 467 (March 1996) (ALJ). In that decision, the judge held that he would not permit Wethington to relitigate in the section 110(c)

II.

Disposition

AMAX claims that it was improper for the judge to credit the testimony of ram car driver Scott over foreman Wethington regarding the amount of time that Wethington was in the No. 6 entry, in light of Scott's bias against AMAX and the consistency of the testimony of Wethington and miner Stevens. A. Br. at 13 & n.3. AMAX also contends that the judge's inference that Wethington knew of the violation at the time he saw Inspector Montgomery was neither reasonable nor sufficiently supported by the grounds cited. A. Br. at 12-17. AMAX states that application of the proper criteria and relevant precedent leads to the conclusion that the conduct at issue was not unwarrantable (A. Br. at 6-10), and that in reaching the opposite conclusion, the judge erred by applying an improper "should have known" test, relying on knowledge of the existence of a condition as the sole basis for his conclusion that aggravated conduct had occurred, and failing to evaluate all of the appropriate criteria. A. Br. at 17-20. The Secretary responds that the judge's finding of unwarrantable failure is supported by substantial evidence that Wethington's conduct was intentional, in that Wethington knew of the violative condition and intentionally ignored it until he encountered Inspector Montgomery. S. Br. at 6-10. According to the Secretary, when misconduct is found to have been intentional, it is immaterial that the judge failed to consider other factors which also may be relevant to unwarrantable failure determinations. S. Br. at 10-11.

Chairman Jordan and Commissioner Marks would affirm the judge's decision. Commissioners Riley and Verheggen would reverse the judge's decision. Under *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

III.

Separate Opinions of the Commissioners

Chairman Jordan and Commissioner Marks, in favor of affirming the decision of the administrative law judge:

For the reasons that follow, we conclude that foreman Wethington's conduct was aggravated and therefore the judge properly determined that the violation was unwarrantable.

The judge held that "[s]ince Wethington knew that the violation existed and ignored it, his conduct is sufficiently aggravated to constitute an 'unwarrantable failure.'" 17 FMSHRC at 1751 (citing *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987)). In

proceeding the issue of his knowledge of the violation. *Id.* at 468-70.

order to determine the correctness of the judge's ruling, we must address the following two issues. First, is there substantial evidence in the record to support the determination that Wethington was aware of the violation and yet intentionally chose to ignore it? Second, does a foreman who intentionally ignores a violation engage in "aggravated conduct," even though the violation is expected to be of short duration and poses low risk?⁵

In resolving the first question, we conclude that substantial evidence supports the judge's conclusion that Wethington was aware of the violative condition in the subject No. 6 entry, and that he intentionally failed to order the advancement of the line curtain. The judge based his determination on three factors. First he found that Wethington was in the No. 6 entry for five minutes, instead of for only the one minute alleged in Wethington's version of events. In making this finding, the judge credited ram car driver Scott's testimony over Wethington's testimony. 17 FMSHRC at 1750 n.2. He found Scott to be the more disinterested witness of the two and noted that Scott appeared to have a recollection of the events equal or superior to that of Wethington. *Id.* Amax urges the Commission to overturn this credibility determination, contending that Wethington's testimony on this point was supported by the testimony of Stevens (a miner helper present in the entry), and suggesting that Scott's testimony established that he had a reason for bias against AMAX. A. Br. at 13 n.3.

We have examined Stevens' testimony and do not agree that it is more consistent with Wethington's testimony than it is with Scott's testimony regarding the length of time Wethington was present in the No. 6 entry.⁶ We have also examined the testimony which Amax suggests demonstrates Scott's bias and conclude that this testimony is also insufficient to disturb the judge's credibility resolution. It is well established that "a judge's credibility 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), *appeal docketed sub nom., Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995).

Our review of the testimony of both Scott and Wethington confirms the judge's conclusion that Scott's recollection of the events was as good as, if not better than, that of Wethington. Scott testified that he saw Wethington in the No. 6 entry on consecutive ram car trips Scott made that were approximately five minutes apart. 17 FMSHRC at 1750 n.2; Tr. 95,

⁵ The ALJ determined the violation to be non-S&S and the Secretary did not appeal that ruling.

⁶ Contrary to AMAX's claim (A. Br. at 13 n.3), Stevens did not testify that Wethington was in the entry for only the time it took to load one or two ram cars. Rather, in answering a question regarding how long Wethington was "over there," Stevens stated for "one or two" ram cars. Tr. 215. From the context of the questioning, Stevens testimony more likely referred to the amount of time Wethington spent speaking to Stevens than the amount of time Wethington was in the No. 6 entry. Neither Stevens nor Rowe testified that either had noticed Wethington returning to the No. 6 entry or when he began to again leave.

97-98, 100, 106, 116. Thus, we conclude that the judge did not abuse his discretion in crediting this testimony, and that substantial evidence supports the judge's finding that Wethington was in the No. 6 entry for approximately five minutes.

The second factor supporting the judge's inference of Wethington's knowledge was the obvious nature of the violation. Although Wethington maintained that he did not notice the position of the line curtain, Amax section supervisor Armstrong testified that the violative condition was immediately obvious once the working face was in view. 17 FMSHRC at 1751.

The third and by far the most compelling basis supporting the inference that Wethington had prior knowledge of the violation was Wethington's conduct when he saw the inspector approaching. At that time he made an "about-face," returned to the subject entry, and immediately directed the crew to advance the line curtain as required by law. *Id.* at 1750.

Amax takes issue with the inference the judge drew from Wethington's "about-face," and his immediate decision to advance the line curtain once Wethington realized that Inspector Montgomery was about to inspect the No. 6 entry. Although Wethington testified that he did not notice that the line curtain was too far back when he was first in the No. 6 entry, the judge concluded Wethington was unlikely to react in such a rapid fashion if he was not previously aware of any violations there. *Id.* at 1750-51.

In considering the evidentiary effect of inferences, the Commission has held that judges may draw inferences from record facts so long as those inferences are "inherently reasonable and there [exists] a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (November 1989). While it is possible that other inferences could have been drawn from Wethington's actions, it is for the trier of fact to decide between reasonable inferences, and it is not necessary that the inference drawn by the judge be more likely to be correct than other permissible inferences. *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995). Accordingly, we conclude that the judge's inference was reasonable and should not be disturbed by the Commission.

Based on the finding that Wethington was in the No. 6 entry for five minutes, Armstrong's testimony regarding the obviousness of the violative condition, and the inference the judge drew from Wethington's "about-face," the judge concluded that Wethington knew that the line curtain had not been extended as the ventilation plan required. 17 FMSHRC at 1750-51. We agree and conclude that the facts as found by the judge provide substantial evidence that Wethington knew of the violative condition.

The remaining issue is whether Wethington's conduct was aggravated and therefore unwarrantable. For the following reasons we affirm the judge's finding of unwarrantability.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission explained that unwarrantable failure should not be equated with ordinary negligence. It requires “aggravated” conduct resulting from more than “inadvertence,” “thoughtlessness” or “inattention.” *Id.* at 2001. In *Emery* the Commission referred to unwarrantable failure in terms such as “indifference,” “willful intent,” “serious lack of reasonable care” and “knowing violation.” *Id.* at 2003.

Our colleagues claim that under *Virginia Crews Coal Co.*, 15 FMSHRC 2103 (October 1993), a foreman’s knowledge of a violation is insufficient to establish aggravated conduct. Slip op. at 10. They contend further that the limited duration and low risk posed by the line curtain violation preclude a finding of aggravated conduct in this case. *Id.* at 10-11. We disagree. Unlike our colleagues, we do not find *Virginia Crews* to be dispositive of this issue given the vast difference in circumstances presented in this case.

In *Virginia Crews*, the inspector designated a roof control violation as unwarrantable even though there was no direct evidence that anyone, other than the preshift examiner, had observed the violation. 15 FMSHRC at 2105. Moreover, the foreman had received the preshift examiner’s report only an hour and a half before the inspector’s visit, and “[n]o activity occurred in the cited area during that period.” *Id.* at 2106. Under these circumstances, the Commission declined to uphold the unwarrantable failure designation because “*there was no credible evidence to establish that [Virginia Crews] deliberately and consciously failed to act or engaged in conduct which one may reasonably conclude was aggravated.*” *Id.* at 2107 (emphasis added). The short time between the examiner’s report and the inspector’s visit, as well as the lack of mining activity during that time, precluded the foreman’s behavior from being considered “aggravated conduct.”⁷

In stark contrast to *Virginia Crews*, the judge in this case found that credible evidence established that Amax, through its foreman Wethington, not only knew of the existence of the misplaced curtain but also decided to ignore the violation and let mining continue without correcting the violation. Wethington claimed his failure to order the line curtain moved resulted from inadvertence or inattention, but this contention was rejected by the judge, who concluded that Wethington *was* aware of the violative condition and chose to ignore it until he saw the

⁷ It is worth noting, therefore, that the statement in *Virginia Crews* regarding the insufficiency of a “knew or should have known” test is actually dicta since there was no evidence to show that the foreman whose conduct was under review either knew or should have known about the violation prior to receiving the preshift examiner’s report. In *Virginia Crews* the Commission was simply restating the fundamental principle of *Emery* that “a breach of a duty to know is not necessarily an unwarrantable failure.” *Id.* at 2107. Indeed, *Virginia Crews* generally has been cited for the proposition that a “should have known” or “had reason to know” standard is insufficient to prove unwarrantability. See *Peabody Coal Co.*, 18 FMSHRC 494, 498 n. 7 (April 1996); *Wyoming Fuels Co.*, 16 FMSHRC 1618, 1628 (August 1994); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1614 (August 1994).

MSHA inspector. Wethington's behavior thus can be accurately characterized as "intentional misconduct," which the Commission has concluded "is a form of unwarrantable failure for purposes of the Mine Act." *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

The Commission's precedent on such intentional misconduct, regardless of the violation's duration or risk, is clear and consistent. In *Youghiogheny*, the Commission upheld an unwarrantable failure determination because the foreman deliberately violated the roof control plan, even though the Commission also concluded that the violation was not S&S, as it posed minimal risk. 9 FMSHRC at 2011, 2013. In *New Warwick Mining Co.*, 18 FMSHRC 1365 (August 1996), the Commission concluded that a violation resulting from deliberate action was unwarrantable, notwithstanding that the inspector had not even designated the violation as S&S. In our decision, we relied upon neither the duration of the violation nor the risk it posed.⁸ *Id.* at 1370-71. See also *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 16-17 (January 1997); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1572-74 (September 1996) (holding in both cases that accumulations violations were unwarrantable, although not S&S). Moreover, in some cases where a violation has been found S&S, the Commission has based its unwarrantable failure determination on the knowing, indifferent or willful conduct of the supervisory agent, rather than on the gravity of the violation. See *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1562 (September 1996); *S&H Mining, Inc.* 15 FMSHRC 956, 960 (June 1993).⁹

Accordingly, our colleagues' opinion, focusing as it does on the limited duration and minimal danger posed by the line curtain violation,¹⁰ not only is inconsistent with precedent but

⁸ The case law thus establishes that while the Commission has identified various factors in determining unwarrantability — such as the extent of a violative condition, the length of time that it existed, whether the violation was obvious, and whether the operator had been placed on notice that greater efforts are necessary for compliance — the Commission only uses those factors when the operator's cognizance of the violative condition remains at issue. Where, as here, that issue has been decided, the factors are irrelevant in determining unwarrantability.

⁹ It bears noting that section 104(d) of the Mine Act predicates the issuance of withdrawal orders upon successive unwarrantable failure violations, regardless of whether those violations are also deemed to be significant and substantial. See, e.g., *Int'l Union, United Mine Workers of America v. Kleppe*, 532 F.2d 1403, 1407 (D.C. Cir. 1976).

¹⁰ Relying on a stipulation by the Secretary at the outset of the hearing, our colleagues view Amax's "good faith in quickly abating the violation" as an additional factor "militating against an unwarrantable failure finding." Slip. op. at 11. In light of the judge's subsequent finding that Wethington commenced abatement efforts only when faced with imminent discovery by the inspector, we cannot consider those efforts as militating against an unwarrantable failure finding. See *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (January 1997) ("[p]ost-citation efforts are not relevant to the determination whether the operator has engaged in aggravated conduct in

also troubling because it conceivably could be read as excusing a foreman's decision to ignore a violation unless the condition poses a significant risk to miners. Such an approach can have disastrous consequences because it ignores the dangerous environment created when management appears to condone violative conduct by employees. Wethington's failure to make any reference to the line curtain as he instructed Stevens on the next task could be viewed by the employees as tacit approval to cut corners.

Miners who decide to ignore a safety requirement may miscalculate the risk involved. Although the area of the mine involved in this proceeding had not experienced methane in any significant amount, methane is unpredictable. The mine itself was a gassy mine subject to 5-day spot checks by MSHA. Indeed, eight or nine months prior to the instant citation, Amax had to discontinue mining in another area of the mine because methane kept exceeding the 1% level. 17 FMSHRC at 1752. These facts underscore the point that these miners might not be as lucky the next time they either deliberately or inadvertently fail to comply with a ventilation requirement.

For the foregoing reasons, we conclude that the judge's determination that the violation was unwarrantable should be affirmed.


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner

allowing the violative condition to occur").

Commissioners Riley and Verheggen, in favor of reversing the decision of the administrative law judge:

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 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991) (“*R&P*”); *see also* *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that it existed, whether the violation was obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator’s efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). The Commission also takes into account the degree of danger posed by a violation and whether supervisory personnel were present when the violation took place. *Midwest Material Co.*, 19 FMSHRC 30, 34-35 (January 1997) (citing cases).

In finding unwarrantable failure, the judge simply held that “[s]ince Wethington knew that the violation existed and ignored it, his conduct is sufficiently aggravated to constitute an ‘unwarrantable failure.’” 17 FMSHRC at 1751 (citing *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2107, 2011 (December 1987)). Regardless of whether or not substantial evidence supports the judge’s factual finding regarding Wethington’s state of mind, we believe that, because the judge took only Wethington’s knowledge of the violation into account in finding unwarrantable failure, he failed to apply the proper test for unwarrantable failure and thus committed reversible error.

In *Virginia Crews Coal Co.*, 15 FMSHRC 2103 (October 1993), the Commission held that knowledge of a violation, by itself, is insufficient to establish aggravated conduct. In that case, the Commission explicitly rejected the notion that actual or constructive knowledge alone establishes unwarrantable failure, since such an approach would make unwarrantable failure indistinguishable from ordinary negligence. *Id.* at 2107. As the Commission has long regarded unwarrantable failure as something more than ordinary negligence (*see Emery Mining Corp.*, 9 FMSHRC at 2001), the judge’s decision cannot be upheld.¹¹

¹¹ Relying on *R&P*, the Secretary argues that the judge’s decision should be upheld on the ground that Wethington’s conduct in ignoring the violation was “intentional.” S. Br. at 5-6. *R&P*, involving deliberate misconduct in the form of falsification of weekly examination records (13 FMSHRC at 190-92), is readily distinguishable from the omission at the center of this case. We also note that neither the trial record nor the Secretary’s post-hearing brief indicates that the Secretary took the position below that Wethington had actual knowledge of the violation.

Consideration of the following relevant factors leads us to conclude that the record supports only one determination: that AMAX's violation of its ventilation plan was not the result of AMAX's unwarrantable failure. First, it is not disputed that AMAX was in violation of its ventilation plan for a relatively short period of time. Approximately 15 minutes elapsed between the time the line curtain should have been extended and the time the continuous miner was shut down so that it could be extended. Tr. 201. Even the judge described the violation as one of "rather short duration" (17 FMSHRC at 1753), though he failed to account for it as a factor in his unwarrantable failure analysis.

The judge's factual findings in favor of the Secretary's position also support that characterization. The judge found that Wethington was present for no more than five minutes of the time period in which the curtain was out of place. *Id.* at 1750 n.2. Moreover, as it is also clear that AMAX's operations in the No. 6 entry would have been complete in a matter of minutes (*Id.* at 1749; Tr. 100, 106, 114-15, 202, 224), it would not be fair to assume that only the presence of Inspector Montgomery prevented the violative condition from continuing for a much longer period of time.

Another factor militating against an unwarrantable failure finding is AMAX's good faith in quickly abating the violation. That AMAX demonstrated good faith in abating the citation was stipulated by the Secretary at trial. Tr. 7. The Commission has been reluctant to discount stipulations entered into by litigants. *See Mettiki Coal Corp.*, 13 FMSHRC 760, 772 (May 1991). Moreover, while post-citation abatement efforts are generally not relevant to a finding of unwarrantable failure, in this case AMAX started abating the violation before the citation was issued. 17 FMSHRC at 1748. In addition, the Secretary has pointed to no evidence of previous violations of this type by AMAX. While at trial the Secretary submitted a printout of previous citations at the Wabash Mine (G. Ex. 1), she did not state whether any of the violations for which AMAX was cited involved a ventilation plan provision, much less a line curtain placement violation.

The final factor that persuades us that an unwarrantable failure finding is uncalled for is the low degree of danger posed by the violation under the circumstances. The judge held that the violation was non-S&S, finding that an ignition or explosion was unlikely to occur because of the failure to extend the line curtain. 17 FMSHRC at 1753. The Secretary did not appeal this conclusion.


In finding the violation non-S&S, the judge took into account that the section of the Wabash mine where the No. 6 entry is located, 2W/MWS, does not have a history of high methane liberation. *Id.* The judge also considered that the highest reading in the No. 6 entry from the continuous miner's methane monitor was 0.6 percent, and that the great majority of preshift examination methane level measurements in 2W/MWS taken around the time of the violation were at or below 0.3 percent. *Id.* In addition, methane level readings of zero were taken immediately after Inspector Montgomery's discovery of the ventilation plan violation. Tr.

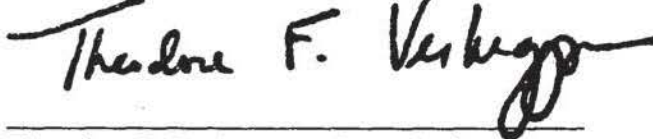
89, 185. Thus, all evidence of 2W/MWS methane levels established that AMAX was in conformance with MSHA requirements.

The only factors which we believe could possibly support a finding of unwarrantable failure are the obviousness of the violation, as was impliedly found by the judge, and Wethington's status as a foreman.¹² Under Commission precedent, however, these two factors, by themselves, have not been sufficient to establish unwarrantable failure. In *Virginia Crews*, knowledge of a roof control plan violation, including by the responsible foreman, was not sufficient to establish unwarrantable failure. 15 FMSHRC at 2103-07. The Commission so held even though the judge had found the violation S&S and that it had been noted during a pre-shift examination conducted at least 30 minutes prior to its discovery by the MSHA inspector. *Id.* at 2106. As the instant violation was found to be not S&S and to have existed for an even shorter period of time, *Virginia Crews* suggests that an unwarrantable failure finding is inappropriate in this case.

While the Commission has found unwarrantable failure where a foreman knew of a violation but failed to appropriately remedy the problem, such cases involved violations which were found to pose a high degree of danger under the circumstances. See *Cypress Plateau Mining Corp.*, 16 FMSHRC 1604 (August 1994) (knowing operation of shuttle car with inoperable brakes S&S violation and unwarrantable); *Cypress Plateau Mining Corp.*, 16 FMSHRC 1610 (August 1994) (ordering miners to work in intersection under roof known to be unsupported in mine with history of roof falls S&S violation and unwarrantable). This is not such a case.

Accordingly, we would reverse the judge's unwarrantable failure finding and remand for assessment of an appropriate civil penalty in light of our decision.


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

¹² In determining unwarrantable failure, the Commission has held foremen to high standard of care. See, e.g., *Youghioghery*, 9 FMSHRC at 2011 (quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (April 1987)); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

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SEP 2 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-272
Petitioner	:	A.C. No. 05-04461-03528
	:	
v.	:	
	:	New Elk Preparation Plant
BASIN RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Andrew Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Basin Resources, Inc. ("Basin Resources"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 and 820. The petition alleges two violations of the Secretary's safety regulations. The hearing in this and nine other Basin Resources cases was held in Denver, Colorado, on August 5 - 6, 1997.

The Secretary filed a motion to amend the petition for penalty to add Entech, Inc., and Montana Power Company as respondents in these and other Basin Resources cases. For the reasons set forth in *Basin Resources, Inc.*, 19 FMSHRC 699, 699-704 (April 1997), the Secretary's motion is denied.

At the hearing, Basin Resources stated that it was not contesting the fact of violation in these citations or the other determinations made by the inspector in the citations. (Tr. 579-80). It only contests the amount of the penalty proposed by the Secretary for each of the two citations. It contends that the Secretary's penalties are too high taking into consideration the civil penalty criteria set forth in section 110(i) of the Mine Act.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

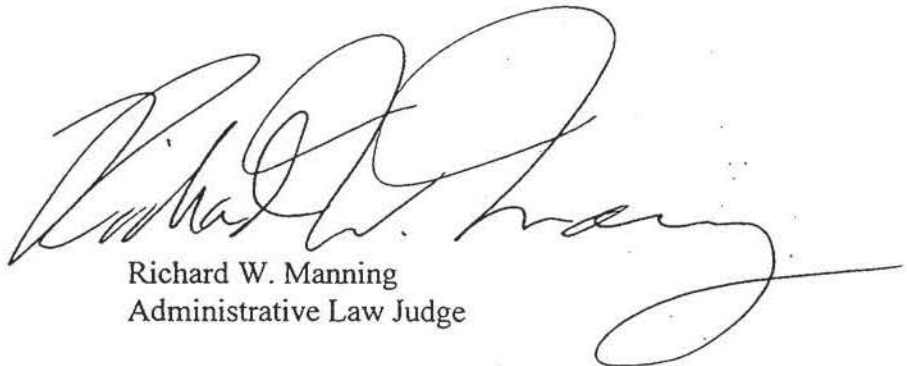
Citation No. 4057358, issued on December 29, 1995, alleges a violation of 30 C.F.R. § 77.502. The citation states that a power cord was damaged, but that an injury was unlikely. The inspector determined that the violation was not of a significant and substantial nature ("S&S") and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$288.00 for the violation.

Citation No. 4057359, issued on December 29, 1995, alleges a violation of 30 C.F.R. § 77.205(b). The citation states that safe access was not provided for a 480-volt control box because mud and refuse was allowed to accumulate around the box, but that an injury was unlikely. The inspector determined that the violation was not S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$288.00 for the violation.

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that about 102 citations were issued at the New Elk Preparation Plant in the 24 months preceding December 29, 1995. (Exs. P-1 & P-2). I also find that Basin Resources was a medium to large mine operator. (Ex. J-1). Basin Resources shut down its Golden Eagle Mine and New Elk Preparation Plant at the end of December 1995. The mine and preparation plant are no longer producing coal. Basin Resources has been unable to sell the Golden Eagle Mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected its ability to continue in business. Basin Resources demonstrated good faith in abating all of the violations. (Ex. J-1). Both violations were serious. Based on the penalty criteria, I find that a penalty of \$175.00 for each citation is appropriate.

II. ORDER

The Secretary's motion to amend the petition for assessment of penalty is **DENIED**, the citations listed above are hereby **AFFIRMED**, and Basin Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$350.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 4 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-11
Petitioner	:	A. C. No. 46-06750-03578
v.	:	
	:	Peats Branch No. 3 Mine
HOBET MINING, INC.,	:	
Respondent	:	

DECISION

Appearances: Pamela Silverman, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
William C. Miller II, Esq., Jackson and Kelly, Charleston, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor against Hobet Mining, Inc. (Hobet) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act" seeking a civil penalty of \$2,072 for one violation of the mandatory standard at 30 C.F.R. § 77.409.

The citation at bar, Citation No. 4401472, alleges as follows:

The model 8,200 Marrion [sic] dragline co No. 113417 was being operated in the presence of persons (rock truck drivers) exposed to hazard from its operations in that the boom and bucket of said dragline was being operated, swung, loaded, and empty over top of the trucks and drivers hauling spoil out of No. 1 shovel pit. This citation was issued in conjunction with imminent danger order 4401471 therefore no abatement date or time was set.

The cited standard, 30 C.F.R. § 77.409(a), provides in relevant part that "shovels, draglines, and tractors shall not be operated in the presence of any person exposed to a hazard from its operation . . ."

Experienced Mine Safety and Health Administration (MSHA) Inspector Ernest Thompson was assigned to the subject Peats Branch No. 3 Mine. The operation involves the

removal of mountain overburden to reach multiple coal seams. End loaders, shovels, and draglines are utilized in the process. Inspector Thompson arrived at the mine around 8:00 a.m., on the morning of September 4, 1996. Commencing his inspection he was driving on the haul road toward the pit about 200 to 300 yards behind union representative Danny Spencer and West Virginia State Mine Inspector Randall Bailey. At a point where the haul road narrowed and began a curve and about 50 feet away, Thompson observed the dragline bucket cross over the haul road 30 to 40 feet above. The dragline was digging on the left, turning 180 degrees and dropping spoil material.

The bucket also passed directly over a haulage truck at a time when Thompson was 100 to 150 yards away. State Mine Inspector Bailey agreed with Thompson that the bucket had passed right over the truck. Thompson therefore asked Bailey to bring the pit foreman to the scene. When pit foreman Jay Curry arrived, Thompson told him to have the bucket swing over the curve. Curry made the request by radio but was told by the dragline operator that he had lost power. Curry thereupon drove up to the dragline. Within 15 or 20 minutes Thompson saw the dragline tramming back from the road. Thompson subsequently asked Curry why he did not have the bucket dropped as was requested and Curry responded that he "didn't want to lose any more time, so he decided to move the dragline" (Tr. 32).

According to Thompson, the subject dragline had a 72 cubic yard bucket capable of holding approximately 100 tons of material. Thompson estimated the bucket to be 13 to 14 feet across at the lip, about 15 to 16 feet high and 14 to 15 feet deep. The boom was about 320 feet long.

Thompson opined that the violation was "significant and substantial" because the bucket was being swung over an occupied haul truck and there was a "possibility" of a rock dropping on the truck, a piece of the bucket breaking off, the bucket itself falling or the brakes failing. He noted that when the bucket was full, loose material would fall off. He had also seen loose rock riding in the rigging of the dragline. He further noted that the buckets get "beat up," the teeth get broken and the spreader bar can break. Hoist ropes can also break or unravel with the potential of causing serious injuries to a haul truck driver. Thompson also opined that the dragline operator could accidentally pull the wrong lever and inadvertently drop the boom and/or load onto a haulage truck. Thompson opined that it was reasonably likely for an accident to occur and for the resulting injuries to be fatal. Thompson also concluded that the operator was moderately negligent because the foreman "should have known" of the violative practice.

Randall Bailey, a surface mine inspector for the West Virginia Office of Miners Health Safety and Training, corroborated the testimony of Thompson in significant respects. He too observed the dragline bucket swing over the haulage road and, more specifically, observed the bucket directly over the haulage truck. Bailey also heard Thompson tell pit foreman Curry to lower the bucket to the road to determine its reach. This was not done and, after Curry left to go to the dragline, Bailey observed that its lights went out. Driving up to the dragline he observed that it had been moved. Bailey cited the operator for this incident for a violation of

West Virginia law (Government Exhibit No. 5) and the operator paid the violation without contesting it.

Based on the credible testimony of both the Federal and state mine inspectors, I conclude that the violation is proven as charged and was "significant and substantial." A violation is "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove:

(1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard — that is a measure of danger to safety — contributed to by the violations, (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 reasonable serious nature.

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an injury (*U. S. Steel Mining Co.*), 6FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U. S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In reaching these conclusions I have not disregarded the testimony of pit foreman William Curry that he had earlier had the dragline operator swing the bucket and drop it in the direction of the haulage road. However, he did not have the bucket dropped at the point where the inspectors later requested him to do so. Curry further acknowledged that following Inspector Thompson's specific request to drop the bucket where requested, he decided to move the dragline. His explanation for failing to comply with the request strongly suggests that he knew of the violative practice (Tr. 180-182).

I have also not disregarded the testimony of dragline operator Joseph Dever, that early in the shift he had cast the bucket toward the road but found that it did not reach. I conclude however that he must not have cast the bucket in the direction in which inspectors had observed

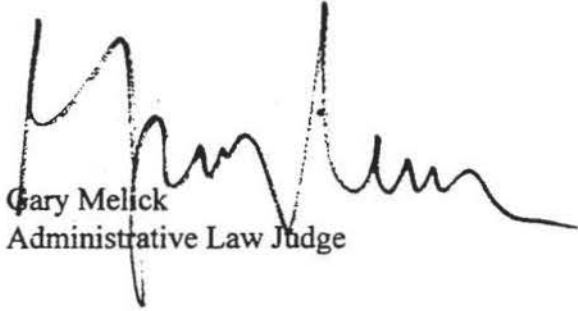
the bucket swinging over the road. Under all the circumstances I can give Dever's testimony but little weight.

I must also conclude based on the credible observations of the two inspectors that the points at which Hobert's surveyor, Gary Joe Lane, was shown by Foreman Curry to begin his measurements must not have been the actual location of the dragline at the time of the violation. Accordingly, the testimony of Lane is likewise entitled to but little weight.

I find that the cited condition was obvious and therefore should have been observed by responsible management. I therefore accept the Secretary's contention that the operator is chargeable with moderate negligence. Considering all the criteria under section 110(i) of the Act, I find that a civil penalty of \$2,000 is appropriate for the violation herein.

ORDER

Hobet Mining, Inc. is **DIRECTED** to pay a civil penalty of \$2,000 within 30 days of the date of this decision.


Gary Melick
Administrative Law Judge

Distribution:

Pamela Silverman, Esq., Office of the Solicitor, U. S. Department of Labor, 2015 Wilson Boulevard, Suite 400, Arlington, VA 22203 (Certified Mail)

William C. Miller II, Esq., Jackson & Kelly, 1600 Laidley Tower, P. O. Box 553, Charleston, WV 25322 (Certified Mail)

dcp

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

September 5, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 97-17-M
Petitioner	:	A.C. No. 19-00364-05513
	:	
v	:	
	:	
TRESCA BROTHERS	:	
SAND & GRAVEL, INC.,	:	Tresca Bros. Sand & Gravel
Respondent	:	

ORDER VACATING DEFAULT
ORDER TO REOPEN
DECISION APPROVING SETTLEMENT
ORDER TO PAY
ORDER OF DISMISSAL

Before: Judge Merlin

This case is before me pursuant to the Order of the Commission dated September 2, 1997.

On March 24, 1997, I issued a show cause order giving the operator thirty days to respond. On May 17, 1997, an order of default was issued directing the operator to pay the proposed penalties in this case. On July 1, 1997, the Solicitor filed a motion to approve settlement. A review of Commission records indicates that the Solicitor telephoned my law clerk on April 22, 1997, advising that the matter had settled. The telephone call was however, not noted in the file. I find the call constitutes a timely response to the show cause order and that the default was issued in error. Accordingly, the case is reopened so that the settlement motion can be considered.

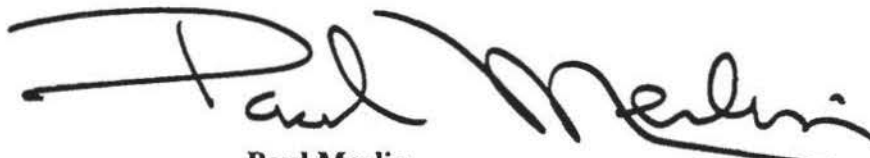
The Solicitor in his settlement motion proposes a reduction in the penalties for Citation Nos. 4569689 and 4569691 from \$651 to \$460. I have reviewed the documentation and representations and conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

With respect to the remaining violations, Citation Nos. 4569688, 4569690, 4569692, 4569698, and 4569699, the Solicitor advises that MSHA has vacated the violations and requests that the penalties be dismissed.

Accordingly, it is **ORDERED** that the default dated May 19, 1997, be and is hereby **VACATED** and the case **REOPENED**.

It is further **ORDERED** that the motion for approval of settlements be **GRANTED**, and that the operator **PAY** a penalty of \$460 within 30 days of the date of this order.

It is further **ORDERED** that the penalties for Citation Nos. 4569688, 4569690, 4569692, 4569698, and 4569699 be **DISMISSED** because MSHA has vacated the violations.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Ralph R. Minichiello, Esq., Office of the Solicitor, U.S. Department of Labor, E-375, John F. Kennedy Federal Bldg., Boston, MA 02203

John Tresca, President, Tresca Brothers Sand and Gravel Inc., P.O. Box 189, Millis, MA 02054

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

September 5, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 97-25-M
Petitioner	:	A.C. No. 19-00364-05514
	:	
v	:	
	:	
TRESCA BROTHERS	:	
SAND & GRAVEL, INC.,	:	Tresca Bros. Sand & Gravel
Respondent	:	

ORDER VACATING DEFAULT
ORDER TO REOPEN
DECISION APPROVING SETTLEMENT
ORDER TO PAY
ORDER OF DISMISSAL

Before: Judge Merlin

This case is before me pursuant to the Order of the Commission dated September 2, 1997.

On April 16, 1997, I issued a show cause order giving the operator thirty days to respond. On June 19, 1997, an order of default was issued directing the operator to pay the proposed penalties in this case. On July 1, 1997, the Solicitor filed a motion to approve settlement. A review of Commission records indicates that the Solicitor telephoned my law clerk on April 22, 1997, advising that the matter had settled. The telephone call was however, not noted in the file. I find the call constituted a timely response to the show cause order and that the default was issued in error. Accordingly, the case is reopened so that the settlement motion can be considered.

The Solicitor seeks a settlement for Citation No. 4569705, in the original amount of \$220. I have reviewed the documentation and representations and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

With respect to the remaining violations, Citation Nos. 4569702, 4569703, and 4569704, the Solicitor advises that MSHA has vacated the violations and requests that the penalties be dismissed.

Accordingly, it is **ORDERED** that the default dated June 19, 1997, be and is hereby **VACATED** and the case **REOPENED**.

It is further **ORDERED** that the motion for approval of settlement for Citation No. 4569705 be **GRANTED**, and that the operator **PAY** a penalty of \$220 within 30 days of the date of this order.

It is further **ORDERED** that the penalties for Citation Nos. 4569702, 4569703, and 4569704 be **DISMISSED** because MSHA has vacated the violations.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with the first name "Paul" written in a larger, more prominent script than the last name "Merlin".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Ralph R. Minichiello, Esq., Office of the Solicitor, U.S. Department of Labor, E-375, John F. Kennedy Federal Bldg., Boston, MA 02203

John Tresca, President, Tresca Brothers Sand and Gravel Inc., P.O. Box 189, Millis, MA 02054

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

303-844-3577/FAX 303-844-5268

SEP 11 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-25
Petitioner	:	A.C. No. 05-02820-03772
	:	
v.	:	Docket No. WEST 96-124
	:	A.C. No. 05-02820-03777
	:	
BASIN RESOURCES, INC.,	:	Docket No. WEST 96-158
Respondent	:	A.C. No. 05-02820-03783
	:	
	:	Golden Eagle Mine

DECISION

Appearances: William W. Hulvey and Peter D. Campbell, Conference and Litigation Representatives, Mine Safety and Health Administration, U.S. Department of Labor, Morgantown, West Virginia, and Edward Falkowski, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Andrew Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Basin Resources, Inc. ("Basin Resources"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 and 820. The petitions allege 39 violations of the Secretary's safety and health regulations. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and Basin Resources filed a post-hearing brief.

The Secretary filed a motion to amend the petitions for penalty to add Entech, Inc., and Montana Power Company as respondents in these and other Basin Resources cases. For the reasons set forth in *Basin Resources, Inc.*, 19 FMSHRC 699, 699-704 (April 1997), the Secretary's motion is denied.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Docket No. WEST 96-25

1. Citation No. 4057791

On May 31, 1995, Inspector Jeffery Fleshman issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.370(a)(1). In the citation, the inspector alleged that the ventilation plan was not being followed in that excessive air leakage, 44,743 cfm, was allowed to flow outby between the airlock doors in entry No. 5 of the 3 north section between crosscut Nos. 22 and 24. The citation states that the airlock doors were not being maintained in a workmanlike manner because the bottom of the door was too short for the opening. He determined that the violation was not significant and substantial ("S&S") and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$2,606 for the alleged violation.

Inspector Fleshman testified that the ventilation plan requires that all ventilating devices, including doors, be installed in a workmanlike manner and maintained in a condition to serve the purpose for which they were installed. (Tr. 14; Ex. G-1). He stated that an airlock door is designed to allow equipment to pass through an area without short-circuiting the air courses. He stated that at the airlock door in question, Basin Resources had cleaned the roadway underneath the doors and failed to lower the skirting under the doors. (Tr. 15-16). He stated that there was about six inches of clearance between the bottom of the skirt on each door and the mine floor. He determined that about 44,700 cfm of air was passing between the airlock doors. Kay Hallows, the former safety director for the mine, testified that the space under the doors was created over time due to traffic through the doors and efforts to keep the area clean. (Tr. 258).

Basin Resources contends that it did not violate the ventilation plan because the ventilation requirements in the section were still being met. I disagree. The Secretary is not contending that insufficient air was reaching various areas in the section, but is arguing that the doors were not being maintained in a workmanlike manner. Basin Resources' arguments relate to the gravity of the violation, which the Secretary does not dispute. The Secretary agrees that the violation was neither serious nor S&S and that the section had "plenty of air." (Tr. 32). I find that the Secretary established a violation. A penalty of \$200 is appropriate for this violation.

2. Citation No. 4057468

On June 20, 1995, Inspector Fleshman issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.370(a)(1). In the citation, the inspector alleged that the ventilation plan was not being followed in that a Joy continuous mining machine was being operated on the 3 north section with only 10 of the 15 bottom head sprays present. He determined that the violation was not S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$903 for the alleged violation.

Inspector Fleshman testified that the ventilation plan requires five sprays on each of three blocks of bottom sprays. (Tr. 18; Ex. G-2). He stated that the cited continuous miner was equipped with only two blocks of sprays on the bottom with five sprays each. Thus, the continuous miner was equipped with only 10 bottom sprays rather than 15. He also testified that the citation was abated, not by adding five more sprays, but by changing the ventilation plan to indicate that the continuous miner was required to have only ten sprays. (Tr. 41). The inspector admitted that Basin Resources had contacted MSHA's ventilation group before he issued the citation about amending the plan to provide for only ten sprays on the bottom of continuous miners. (Tr. 42). Inspector Fleshman testified that he issued the citation because he was directed to do so by his field office supervisor. (Tr. 41). He indicated that the difference between the plan and the continuous miner was a "typical oversight" that is generally corrected by amending the plan. (Tr. 42). Basin Resources' testimony is consistent with the inspector's.

I find that the Secretary established a violation, but that the violation was of a technical nature only. The continuous miner was designed to have ten sprays on the bottom and neither party considered that the design presented a safety or health hazard. I find that the violation was not serious and that Basin Resources was not negligent. A penalty of \$1 is appropriate.

3. Citation No. 4057472

On June 21, 1995, Inspector Fleshman issued a section 104(a) citation alleging a violation of 30 C.F.R. § 77.400(c). In the citation, the inspector alleged that adequate guarding was not provided in the main slope belt-transfer building where a person could come in contact with the east side of the No. 3 belt-drive pulley. The citation states that the distance between the partial guard and the belt-drive pulley was 1.7 feet. He determined that the violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$1,450 for the alleged violation. The safety standard states, in part, that guards at conveyor-drive pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

Inspector Fleshman testified that Basin Resources had placed danger tape across the area. (Tr. 46). He stated that the operator was using danger tape in lieu of guarding and that such tape does not comply with the regulation. The guard was on the ground about four feet away. He determined that the violation was S&S because there was a potential that someone would be seriously injured by the violation. (Tr. 48-51).

Basin Resources argues that the danger tape satisfied the requirement of the standard and that the standard provides an exception for testing. I reject these defenses. First, it is clear that danger tape would not prevent anyone from "reaching behind" and "becoming caught between the belt and the pulley." Second, there is no indication that testing was being performed at the time the citation was issued. I hold that the testing exception in subsection (d) of the standard is, in essence, an affirmative defense. The mine operator has the burden to come forward with evidence that testing was taking place because it would have greater access to such evidence.

I also find that the violation was S&S. While the danger tape made it less likely that anyone would purposefully reach around the guard and come in contact with the moving parts, someone could trip or stumble while walking down the walkway that was a few feet away. The inspector testified that the pinch point would be "easy" to contact, if someone walking in the area stumbled or fell. (Tr. 49). The unguarded area was within a few feet of a walkway. I credit his testimony in this regard. The fact that he also stated that the condition was a "potential accident waiting to happen" does not disprove the third element of the Commission's four part *Mathies* S&S test, as contended by Basin Resources. A penalty of \$1,000 is appropriate.

4. Other Citations.

Basin Resources also contested 14 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

B. Docket No. WEST 96-124

1. Citation No. 4058130

On August 15, Inspector Melvin Shiveley issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.333(c). In the citation, the inspector alleged that a man door in the 3 left section at crosscut No. 1 was not maintained to provide access through the door. The citation states that an MSHA required report prepared by Basin Resources indicated that an employee was injured when he tried to pass through the door because the high volume of air knocked him off balance. He determined that the violation was S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,450 for the alleged violation.

Inspector Shiveley testified that it was difficult to open the door because of the high volume of air pushing against the door. (Tr. 71). He stated that he did not go through the door because the air could pull you through. He believed that if a miner let go of the door as he passed through, the door could slam against him causing a serious injury. (Tr. 73). He also stated that he discussed the condition with the miner who had been injured while traveling through the man door. (Tr. 88).

Tom Sciacca, a former accident-prevention coordinator at the mine, testified that Inspector Shiveley did not observe the cited condition prior to issuing the citation. (Tr. 228, 234; Ex. R-H). He stated that the inspector handed him the citation on the surface before they went underground. Mr. Hallows testified that the reported injury was the first and only injury that occurred at the mine while a miner was passing through a man door. (Tr. 262).

Inspector Shiveley was not sure if he examined the door before issuing the citation. (Tr. 85, 87). He based the citation on his review of the injury report (MSHA Form 7001). The safety standard provides, in part, that personnel doors "shall be of sufficient strength to serve their intended purpose of maintaining separation and permitting travel between air courses...." I find that the Secretary did not establish a violation of this standard. The fact that the door was difficult to open and travel through does not establish that it was not of sufficient strength to separate air courses or permit travel between the air courses. In addition, the fact that one miner was injured while traveling through the door does not establish that the door was unsafe to travel through. This mine contained many similar doors between intake and return air. Proving that one man was injured does not establish that the door was unsafe to travel through. Accordingly, the citation is vacated.

2. Citation No. 4058064

On August 21, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.380(d)(1). In the citation, the inspector alleged that the alternate escapeway in entry No. 3 of the 3 north mains was not maintained in safe condition at crosscut No. 27 because water was allowed to accumulate in the area. He determined that the water was between 1 and 18 inches deep in an area that was 30 feet long and as wide as the entry. The citation states that there was a pump in the area but that it was not operating. He determined that the violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$1,971 for the alleged violation. The safety standard requires escapeways to be maintained in a safe condition to "always assure passage of anyone, including disabled persons."

Inspector Shiveley testified that Basin Resources had constructed a bridge over the water but that it was floating and that you could not see the floor of the entry through the water. (Tr. 59). He said that the pump was clogged with debris. (Tr. 66). Jeffery Salerno, a former safety inspector at the mine, testified that there were two pumps operating to remove the water at the time the citation was issued. (Tr. 253; Ex. R-I). He further testified that the water was present because the PVC pipe that brought water into the section was broken in four locations. (Tr. 254). He stated that the pipe was under high pressure, in part, because it dropped 500 feet as it descended into the mine.

I find that the Secretary established a violation. I credit Inspector Shiveley's description of the conditions in the area. I also find that the violation was S&S. The Secretary established that it was reasonably likely that the hazard contributed to would result in an injury of a reasonably serious nature. I find that Basin Resources' negligence was somewhat less than moderate because it was in the process of building a bridge and trying to remove the water. A penalty of \$800 is appropriate.

3. Other Citations

Basin Resources also contested 17 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

C. Docket No. WEST 96-158

1. Order No. 4058129

On August 15, 1995, Inspector Shiveley issued a section 104(d)(2) order alleging a violation of section 75.400. In the order, the inspector alleges that accumulations of float coal dust were allowed to exist in the belt entry for the 3 north mains between crosscut Nos. 56 and 62, for a distance of 840 feet. The order states that the float coal dust covered the mine floor from rib-to-rib. It states that the area was black, the belt was operating, and the dust was dry. Inspector Shiveley determined that the violation was S&S and was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$8,500 for the alleged violation. Section 75.400 provides, in part, that coal dust, including float coal dust deposited on rock-dusted surfaces, shall be cleaned up and not be allowed to accumulate in active workings.

Inspector Shiveley testified that the float coal dust accumulations were extensive. He stated that there was coal dust on the belt structure, the ribs, and the floor. (Tr. 92; Ex. G-4). He testified that the coal dust extended into the crosscuts. The belt was carrying coal and there was coal dust in suspension. He observed three people in the area. Some of the miners were shoveling around the tailpiece at crosscut No. 62. (Tr. 93). He believed that the belt system could act as an ignition source for the coal dust. For example, the belt could rub against the belt structure, or rollers could become stuck or get hot. (Tr. 96, 103). He compared the coal dust to gun powder in terms of its tendency to explode easily. He believed that there was enough float coal dust in the area to cause "a pretty good-sized explosion." (Tr. 98).

Before he went underground, Inspector Shiveley reviewed the mine's belt record book. He believed that the record book showed that float coal dust had been present in the entry for several days. He testified that these records noted the presence of float coal dust between August 10 and August 14 and did not indicate that the accumulation had been cleaned up. (Tr. 101-111; Ex. R-J). He determined that an unwarrantable failure order should be issued, in large part, because of these records. Inspector Shiveley recommended that the order be specially assessed because the "condition was reported in the record book from 8-10-95 to 8-14-95, [and] no action was taken to correct condition." (Special Assessment Review Form). He further testified that an operator is required to record whether a hazardous condition has been corrected in the record books. (Tr. 123-24). He also relied on his experience inspecting the Golden Eagle Mine. (Tr.

142, 147-51). The condition was terminated in about one hour by rock dusting the cited area. (Tr. 120).

Derrel Curtis, the former mine superintendent, testified that float coal dust can be deposited quickly along a belt line at the Golden Eagle Mine. He stated that because the mine liberates high levels of methane, a blowing ventilation system was used which caused air to move at high velocities. (Tr. 296-97). As this air passes by a point in a belt system that tends to pulverize coal, the air will pick up the fine coal dust and spread it down the entry in a "very short period of time." (Tr. 297). Mr. Curtis testified that if you have a spillage along the belt, float coal dust will be dispersed in the area in a matter of minutes. He stated that the mine uses an automated rock dusting system as well as trickle dusters to control float coal dust. He further testified that the belt had been recently moved to the cited entry and the automated rock dusting system had not yet been installed. (Tr. 301).

Mr. Curtis further testified that Inspector Shiveley reached an incorrect conclusion from the belt record book. He testified that a particular page may not show that an accumulation had been cleaned up and that the absence of a notation about accumulations on the next few shifts indicates that the accumulation was cleaned up. He countersigned the belt record book and testified that the book shows that on August 12 and 13 the accumulation had been cleaned up and that the accumulation cited by the inspector must have been created on August 14. (Tr. 303-17; Ex. R-J). Mr. Curtis testified that the presence of float coal dust in the crosscuts and along the belt line did not indicate that the condition had existed for a long period of time. He stated that such conditions can be created in a short period of time. He believed that the fact that it only took about an hour to abate the condition shows that the condition had not existed for a long period of time because more rock dust has to be applied to long-standing accumulations. (Tr. 328-29).

I find that the Secretary established a violation. Although Inspector Shiveley did not take a sample of the dust, he was unequivocal in his opinion that the accumulation could propagate a fire or explosion. An accumulation exists under section 75.400 if the Secretary establishes that "the quantity of the combustible materials is such that ... it likely could cause or propagate a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980). I credit Inspector Shiveley's testimony on this issue. I also credit his testimony concerning the presence of ignition sources.

I also find that the violation was S&S. I find that the Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element of the test is important in this case: whether it was reasonably likely that the hazard contributed to would result in an injury. This element does not require the Secretary to establish that it was more probable than not that an injury would result from the hazard contributed to by the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The test is whether an injury is reasonably likely. There were several ignition sources along the belt, as described by Inspector Shiveley, and it was reasonably likely that the float coal dust would be ignited given continuing mining operations.

The more difficult issue is whether the violation was caused by Basin Resources' unwarrantable failure to comply with the safety standard. Basin Resources argues that Inspector Shiveley's reliance upon the belt record book is misplaced. It contends that a fair reading of the entries in the record book establishes that any hazardous conditions that existed prior to August 14 had been corrected and that the conditions cited by the inspector had just occurred. Second, it argues that the fact that the float coal dust covered a large area, does not justify an unwarrantable failure finding because the record establishes that the float coal dust can be dispersed at the mine in only a few minutes. Third, it argues that management's reaction to the dust was reasonable, as there were miners shoveling loose coal in the area in preparation for applying rock dust. Finally, it argues that the mine was in the process of implementing steps to improve its dust control systems.

I find that the Secretary established that the violation was the result of Basin Resources' unwarrantable failure. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission has held 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 and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

I agree that the belt record book does not establish that this particular condition had continuously existed since August 10. I also agree that the record establishes that it is possible for float coal dust to be deposited on the entry and belt structure in a relatively short period of time. But I disagree that Basin Resources was exercising reasonable care in addressing the float coal dust problem that existed at the mine. Basin Resources moved the belt to a new location and operated it without extending the automatic rock dusting system into the area. It knew that it had a problem with float coal dust because a high volume of air was necessary to disburse methane yet it continued to allow float coal dust to accumulate along the belt on a regular basis. Although Basin Resources apparently cleaned up accumulations or applied rock dust fairly regularly, accumulations would reoccur just as regularly. I credit Inspector Shiveley's testimony that belts are frequently "dirty" at the mine and that miners often simply spot clean "little areas." (Tr. 145-47). The mine has a significant history of violations of section 75.400. The Special Assessment Review Form accompanying Order No. 4057625, discussed below, indicates that the mine had been issued about 14 orders and 47 citations for violations of section 75.400 in the previous year. (Ex. G-8). The history of previous violations for the mine indicates that 130 citations and orders were issued for violations of section 75.400 between August 30, 1993 and August 29, 1995. (Ex. G-3).

Thus, in reviewing the evidence as a whole, I find that Basin Resources was not adequately addressing the problems associated with float control dust at the mine. Rather, as

demonstrated by the order at issue, it would allow accumulations to develop and then abate the condition when it was convenient. Basin Resources had been put on notice that greater efforts were necessary to comply with the standard and its response was inadequate. Its efforts were particularly inadequate because of the high degree of danger posed by accumulations of float coal dust. Accordingly, I conclude that the degree of negligence demonstrated by this violation was high and that the violation was a result of Basin Resources' aggravated conduct. A penalty of \$5,000 is appropriate.

2. Citation No. 4057622

On September 5, 1995, MSHA Inspector Shiveley issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.202(a)(1). In the citation, the inspector alleged that the mine roof in entry No. 3, inby crosscut No. 44, in the 4 left section was not adequately controlled to prevent roof material from falling. The citation states that vertical yield control supports ("VYC") were used as supplemental support in the area and that these supports failed to control the roof. He determined that the violation was S&S and was caused by Basin Resources' moderate negligence. Inspector Shiveley issued Order No. 4057621 at about the same time alleging that these conditions created an imminent danger. The Secretary proposes a penalty of \$5,000 for the alleged violation. Section 202(a) provides, in part, that roof and ribs in "areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls" of the roof or ribs.

Inspector Shiveley testified that the VYC supports were so badly crushed and broken that they did not control the roof. (Tr. 154). The area cited was a bleeder entry and the bad top started about one crosscut beyond the longwall machine. He stated that some of the VYCs were bowed out, some were lying on their side, and others were bent. (Tr. 156). He stated that the entry was under heavy pressure because the longwall had mined past the area. Inspector Shiveley testified that the roof was severely broken and loose rock was present. He considered the condition to be so dangerous that he issued an imminent danger order.

Thomas Morris, a former shift supervisor at the mine, testified that the mine had been having problems with traditional wooden cribs. (Tr. 277). He further stated that the VYCs were not performing as well as he had hoped. He stated that the mine was in the process of getting chicken wire and steel beams to support the roof. (Tr. 278, 289). He also stated that Hercules cribs were going to be installed in certain areas. Mr. Curtis testified that the cited area was experiencing severe floor heaving. (Tr. 332). He stated that miners had been in the area to begin installing additional cribs to support the roof. He described the measures that were being taken to address the problem. (333-36). Finally, Mr. Hallows testified that the mine had started rehabilitation work before the citation was issued. (Tr. 352; Ex. R-K).

I find that the Secretary established a violation. I credit Inspector Shiveley's description of the roof condition. I also find that the violation was S&S. The Secretary established that it was reasonably likely that the hazard contributed to would result in an injury of a reasonably serious nature. I find that Basin Resources' negligence was less than moderate. I credit the

testimony of its witnesses that it was aware of the problem and was taking steps to address it. A penalty of \$1,500 is appropriate.

3. Order No. 4057625

On September 9, 1995, Inspector Shiveley issued a section 104(d)(2) order alleging a violation of section 75.400. In the order, the inspector alleges that accumulations of loose coal and fine coal were allowed to exist in the belt entry in the 4 left section from the tail roller outby crosscut No. 43 to crosscut No. 23. The order states that the accumulations were in contact with the bottom belt and rollers at several locations. It also states that piles of loose coal were under the belt that were between six and nine inches high. It also states that float coal dust was along the rib on the off-side of the belt in several locations. Inspector Shiveley determined that the violation was S&S and was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$9,500 for the alleged violation.

Inspector Shiveley testified that he observed piles of loose coal between 6 and 12 inches deep under the belt. (Tr. 177). He saw coal in contact with the belt where a rib had sloughed off and fallen against the belt. Coal was also in contact with the belt rollers. (Tr. 181). He also observed float coal dust along the lower rib on the offside of the belt between crosscut Nos. 2 and 43, almost the entire length of the belt. The accumulations were dry. He testified that coal was being transported on the belt at the time he observed the condition. He did not see anyone cleaning in the area. (Tr. 179). He took samples of the accumulations and the combustible content ranged between 67.4% and 36.6%. (Ex. G-7).

Inspector Shiveley was concerned that miners working inby the accumulations could be endangered because of the presence of ignition sources. (Tr. 185). The belt and rollers were rubbing against the coal in a number of areas. He testified that the belt record book indicated that the area needed to be cleaned up. (Tr. 187; Ex. R-O). He did not observe any miners cleaning along the belt. (Tr. 188). He stated that it took Basin Resources about 24 hours to terminate the order. (Tr. 190-91). He determined that the violation was the result of Basin Resources' aggravated conduct based on the fact that the record book indicated that the area needed to be cleaned up. He conceded that it is possible that the rib fell against the belt earlier in the shift which could cause the belt to become misaligned and spill the coal and coal dust he observed. (Tr. 200).

Mr. Morris testified that the cited entry was subject to rib rash. (Tr. 272). Large sections of the rib sometimes fail and fall onto the belt. He further stated that the belt entry could be clean and within an hour you could have accumulations caused by the rib falling onto the belt. *Id.* The belt would become misaligned after the fall and material would spill into the entry rather quickly. Mr. Morris stated that coal dust and float coal dust would be created as well.

Mr. Curtis testified that the accumulation that Inspector Shiveley relied upon to show aggravated conduct in the belt record book had, in fact, been cleaned up. (Tr. 339-40). The pre-shift mine examiner's report for the day shift on September 6 states: "Cleaning 4L belt from tail

to 36XC both sides.” (Ex. R-0 p. 11). The on-shift examiner’s report for the same shift states: “Cleaned from tail to 36XC on both sides and from 9 to 10 XC both sides.” *Id.* at 12. Mr. Shiveley issued the order at 5:30 p.m. on September 6, after the examinations had been made. Mr. Curtis explained that the entry was on a downhill slope and the tail piece slid down, throwing the belt “off train,” causing a spillage. (Tr. 341). He testified that mine personnel were aware of the situation and that miners had been working on the graveyard and day shifts to correct the condition. *Id.* He stated that miners were not cleaning at the time of the MSHA inspection because the No. 11 belt was experiencing difficulties that needed immediate attention and miners were assigned to correct that problem. He also testified that a rib had become loose and fallen down immediately prior to the MSHA inspection. (Tr. 344-45). Mr. Curtis stated that if the rib had fallen earlier, the condition would have been noted in the belt record book.

Basin Resources does not seriously contest the violation or the inspector’s S&S determination. (BR Br. at 19-20). It argues that the Secretary did not establish that the violation was the result of Basin Resources’ aggravated conduct. Although many of the findings that I made in analyzing the unwarrantable failure issue with respect to Order No. 4058129 are also applicable here, I find that the present violation was not caused by Basin Resources’ aggravated conduct. Because of extenuating circumstances, I reduce the level of negligence to moderate. I credit the testimony of Messrs. Morris and Curtis that Basin Resources had cleaned up or mostly cleaned up the accumulations along the belt that had been recorded in the belt record books. A section of rib fell prior to the inspector’s arrival on the section. Thus, most or all of the accumulations were new. Miners were at the No. 11 belt at the time of Inspector Shiveley’s inspection because of reports of several bad splices along that belt, which had the potential of causing the belt to break. (Tr. 342-43). Management was aware of the spillage and were sending miners to the area once the situation at the No. 11 belt was stabilized. While the failure to immediately clean up the belt demonstrates negligence, it does not constitute aggravated conduct. I credit the inspector’s testimony that the mine’s belt entries were often dirty and that Basin Resources had been put on notice that greater efforts were necessary. Nevertheless, I find that the mitigating circumstances described above warrant a reduction in the degree of negligence. The order is modified to a section 104(a) citation. A penalty of \$2,500 is appropriate for this violation.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Basin Resources was issued 862 citations and orders in the 24 months preceding October 17, 1995, and that Basin Resources paid penalties for 734 of these citations and orders during the same period. (Ex. G-3). I also find that Basin Resources was a rather large mine operator. (Ex. R-Q). The Golden Eagle Mine shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders’ equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources’ financial condition into consideration and find that the civil penalty assessed in this decision would not

have affected its ability to continue in business. The Secretary has not alleged that Basin Resources failed to timely abate the citations and orders. Unless otherwise noted above, all of the violations were serious and the result of Basin Resources' moderate negligence. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

III. ORDER

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

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
<u>WEST 96-25</u>		
4057802	75.333(d)(2)	\$200.00
4057803	75.1107	200.00
4057788	75.1100-2(f)	200.00
4057789	75.202(a)	400.00
4057790	75.351(f)(1)	200.00
4057791	75.370(a)(1)	200.00
4057792	75.202(a)	400.00
4057796	75.1202-1(b)(3)	200.00
4057797	75.370(a)(1)	200.00
4057462	75.503	400.00
4057463	75.370(a)(1)	200.00
4057468	75.370(a)(1)	1.00
4057470	75.1202-1(b)(3)	200.00
4057471	77.1605(a)	200.00
4057472	77.400(c)	1,000.00
4057474	77.400(a)	800.00
4058076	75.202(a)	1,200.00
<u>WEST 96-124</u>		
4057274	75.400	400.00
4057275	75.1725(a)	400.00
4058121	75.904	200.00
4058122	75.1722(b)	1,200.00
4058123	75.1722(a)	1,200.00
4058124	75.400	400.00
4058125	75.333(c)(3)	200.00
4058126	75.333(c)(3)	200.00
4058127	75.400	400.00
4058128	75.362(a)(2)	400.00

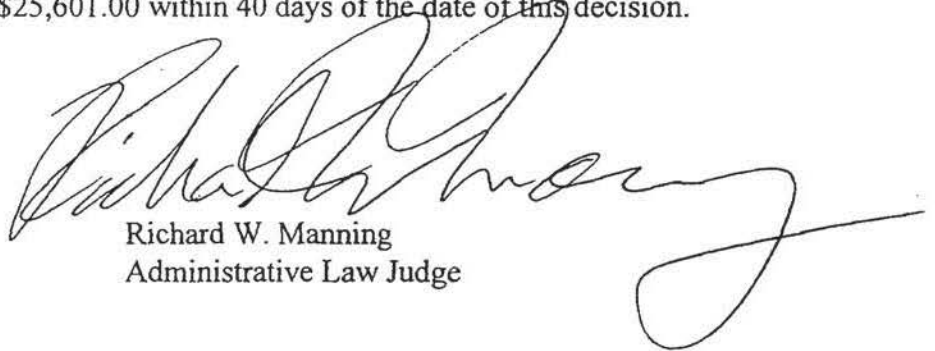
<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4058130	75.333(c)	Vacated
4058061	75.512	200.00
4058062	75.202(a)	1,200.00
4058063	75.335(a)(1)(iv)	200.00
4058064	75.380(d)(1)	800.00
4058139	75.1702	200.00
4058140	75.400	400.00
4058065	75.1405	1,200.00
4058066	75.1725(a)	1,200.00

WEST 96-158

4058129	75.400	5,000.00
4057622	75.202(a)	1,500.00
4057625	75.400	2,500.00

Total Penalty	\$25,601.00
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Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is **DENIED**, the citations and orders listed above are hereby **VACATED, AFFIRMED, or MODIFIED** as set forth above, and Basin Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$25,601.00 within 40 days of the date of this decision.



Richard W. Manning
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

September 10, 1997

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
on behalf of MICHAEL D. BROWN	:	PROCEEDING
Complainant,	:	
	:	Docket No. KENT 97-316-D
v.	:	BARB CD 97-11
	:	BARB CD 97-12
BOOGAR MAN MINING, INC.,	:	
DEMA COAL COMPANY, INC.,	:	Mine ID 15-02755
A & J FUELS, INC., BARRY MOORE,	:	Mine No. 1
and FREDDIE HUNTER,	:	
Respondents	:	

ORDER OF TEMPORARY REINSTATEMENT

This case is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Michael D. Brown, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The application seeks reinstatement of Mr. Brown as an employee at the No. 1 mine operated by Boogar Man Mining, Inc., or its successor, A & J Fuels, Inc., in Knott County, Kentucky,¹ pending a decision on the Complaint of Discrimination the Secretary has filed against the Respondents on behalf of Brown. For the reasons set forth below, I grant the application and order Mr. Brown's temporary reinstatement.

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

¹ Barry Moore and Freddie Hunter are principal shareholders in Boogar Man Mining, Inc. and Dema Coal Company, Inc. is alleged to exercise control over the No. 1 mine in the production of coal. Accordingly, Moore, Hunter and Dema are operators within the meaning of section 3(d) of the Act, 30 U.S.C. § 802(d), and are Respondents to this proceeding along with Boogar Man and A & J Fuels.

Rule 45(c), 29 C.F.R. § 2700.45(c), provides:

Within 10 days following receipt of the Secretary's application for temporary reinstatement, the person against whom the relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint is not frivolously brought, he shall issue immediately a written order of temporary reinstatement.

The Application for Temporary Reinstatement was served on Freddie Hunter as Agent for Service of Boogar Man Mining; C. Graham Martin, Esq., as Agent for Service for A & J Fuels; Carl Ray Johnson as Agent for Service for Dema Coal Company; and Barry Moore and Freddie Hunter, individually, on August 19, 1997, by certified mail, return receipt requested. Return receipt cards indicate that Carl Ray Johnson received the application on August 21 and Freddie Hunter received the application both personally and as agent for service on August 22. Barry Moore refused to accept the application by mail. On August 27, Maurice Mullins, an MSHA Special Investigator, attempted to personally serve Moore, but he again refused to accept service. Finally, on September 8, the envelope addressed to C. Graham Martin, Esq., was returned to the Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, marked "unclaimed."

More than 10 days have elapsed from the date that those Respondents who received the application received it. No request for a hearing on the application has been made by any respondent.

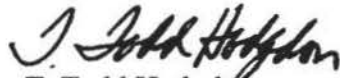
Brown alleges in his application that he was discharged by Boogar Mining on April 1, 1997, because he made safety complaints to Moore and Hunter with regard to working under unsupported roof and refusing to do so in the future. He also alleges that when he returned to the mine on May 2, 1997, to pick up his final pay check "he was threatened with bodily harm, threatened with a knife, intimidated and harassed by both Barry Moore and Freddy [*sic*] Hunter and never received his final paycheck." An affidavit from Ronnie L. Brock, Supervisor of Special Investigations for MSHA, states that his investigation verified Moore's complaints.

Accordingly, I conclude that Moore's application has not been frivolously brought and that he is entitled to be temporarily reinstated.

ORDER

Michael D. Brown's Application for Temporary Reinstatement is **GRANTED**. The Respondents, jointly or severally, are **ORDERED TO REINSTATE** Mr. Brown to his former

position, which he held on April 1, 1997, as a drill operator at the No. 1 mine, or to a similar position, at the same rate of pay and benefits **IMMEDIATELY ON RECEIPT OF THIS DECISION.**



T. Todd Hodgden
Administrative Law Judge
(703) 756-6213

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/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

'SEP 15 1997

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 97-84-R
	:	Order No. 3493571; 5/16/96
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Robinson Run No. 95 Mine
Respondent	:	Mine ID No. 46-01318

DECISION

Appearances: Elizabeth S. Chamberlin, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, on behalf of Contestant;
Melonie J. McCall, Esq., Office of the Solicitor, U.S. Dept. of
Labor, Arlington, Virginia, on behalf of Respondent.

Before: Judge Melick

This contest proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., the "Act," to challenge a failure-to-abate withdrawal order, No. 3493571, issued by the Secretary of Labor to the Consolidation Coal Company (Consol) under Section 104(b) of the Act. The underlying Section 104(a) citation, No. 3493950, was affirmed by this Administrative Law Judge by decision dated June 19, 1997 (18 FMSHRC 1174) and that decision has since become final.¹

¹ Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

In order to understand the issues concerning the order at bar, it is necessary to understand the facts surrounding the underlying Section 104(a) citation. Accordingly, the decision affirming that citation is set forth in relevant part below:

Citation No. 3493950 issued on March 18, 1996, as modified on March 25, 1996, reads as follows:

Based on the results of (2) valid respirable dust samples collected by MSHA, the average concentration of dust in the working environment of the 013 occupation (clean-up man/belt cleaner) exceeds to 2.0 mg/M3 standard.

The dust samples collected from 2-20-96 to 3-05-96 show an average concentration of 11.22 Mg/M3 for the 013 occupation, 001-0 entity, which is located along the No. 2 5 North Mains belt line from the 6D transfer to the Mains section.

Mine management shall take corrective action to lower the respirable dust and then to sample 701-2 each day until five valid samples are taken and submitted to the Pittsburgh respirable dust processing laboratory.

The cited standard, 30 C.F.R. Section 70.100(a) provides as follows:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations).

Scott Springer, a coal mine health and safety inspector for the Mine Safety and Health Administration (MSHA), set up a dust pump on February 20, 1996, on the belt cleaner who worked the 5 North Mains No. 2 beltline. Under his observation the belt cleaner attached the approved sampling device. At the end of her shift Springer removed the cassette and, following standard procedures, sent it to the Pittsburgh processing laboratory for analysis. On March 5, 1996, Springer took another dust sample on the same miner. That sample was also sent to the Pittsburgh processing laboratory for analysis. Springer subsequently received a computer printout of the samples reporting an average dust concentration of 11.2 mg. per cubic meter. Springer accordingly issued the instant citation on March 18, 1996, for an average concentration of dust in the working environment of the belt cleaner exceeding the 2.0 mg.-per-cubic-meter respirable dust standard.

Consol argues that the Secretary failed to sustain her burden of proving the violation claiming that the sampling and laboratory testing were performed contrary to the Secretary's established procedures and were therefore not reliable. More specifically, Consol argues that the sample results were unreliable because there was a problem with the dust pump used to collect the sample on February 20, 1996. The testimony of Inspector Springer in this regard is undisputed. The pump stopped running for several minutes in the first two hours of sampling. Springer hypothesized that the sampling tube had been pinched-off due the miners position when riding on the mantrip to her work station and that the pump automatically shut off as a result. Springer explained however that the pump itself was not defective and that once the problem was discovered and corrected, the pump operated for the remainder of the shift.

MSHA's dust weighing laboratory chief, Lewis Raymond, testified moreover that for valid sampling the dust pumps need only to operate for 100 minutes. On February 20, 1996, the sampling pump ran for approximately 360 minutes. While agency regulations require dust pump failures to be reported on the dust data card, the failure to report in this case was irrelevant to the validity of the sample. The pump at issue operated for the entire time that the belt cleaner worked along the belt and in excess of the minimum time required for a valid sample. Consol's argument herein is accordingly rejected.

While Consol also alleges that the testing laboratory procedures were contrary to established agency procedures, this allegation is not supported by the evidence. Consol has not established that either the February 20 or March 5 sample exceeded the oversized particle standard necessary to void either sample. Indeed, Raymond found that both samples were normal. Consol's argument in this regard must also therefore fail. The violation is accordingly proven as charged.

Consol acknowledges that, if there was a violation, it was "significant and substantial." Accordingly I find that the violation was also "significant and substantial" and of significant gravity. The Secretary also maintains that the operator was only moderately negligent in that the area tested was not known by prior sampling to have been one of high dust concentration. The Secretary also observes, however, that Consol was placed on notice of possible high dust concentration from prior complaints by the subject belt cleaner dating back to as early as January 1996. I accept the Secretary's evaluation of Consol's negligence as moderate.

The Secretary maintains, however, that Consol did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation. As a preliminary matter it is noted that in order to abate the violation the operator was required to obtain "five valid samples" of the subject belt examiner and to submit those samples to the Pittsburgh respirable dust processing laboratory. The samples are mailed to the laboratory and, following analysis, results are mailed back to the operator. Only then can the operator know whether it is in compliance. There may accordingly be delays of

several weeks between the actual sampling and notification to the operator of the results of the sampling. To further complicate matters and delay compliance efforts, the submitted dust samples may be invalidated by MSHA for any number of reasons, some of which are beyond the control of the mine operator. It is also apparent that respirable dust levels in the ever-changing environment of a coal mine are not a precise constant and that individual exposure may vary depending on that person's work habits and motivation to reduce exposure. Finally, it should be observed that experts in the field may, in good faith, disagree as to the best way to reduce respirable dust exposure.

The citation at bar, issued March 18, 1996, set the abatement or termination for April 1, 1996. An extension for abatement was granted on April 30, 1996, after five valid respirable dust samples for the period March 20, 1996 through April 2, 1996, showed a respirable dust concentration of 2.9 mg. per cubic meter -- still above the 2.0 mg. per cubic meter required by the regulatory standard. In the extension to the citation MSHA Inspector Charles Thomas noted abatement efforts the operator had already taken and others it was planning to take. Those actions were noted as follows:

The velocity has been increased at the No. 74 Block (5N-No.2) to 57' fpm. The velocity of air has been increased to 165 fpm at the 5N mains tail piece. The operator has ordered a different type of spraying system for the belt lines. Also a tamper proof system is being installed at the water spray system outlets to prevent the water from being shut off. The keys will only be given to two authorized persons on each shift. Additional time is granted to the operator to increase the air at the No. 74 block (5N No.2), to install the water systems and install the tamper proof controls for the outlets that control the water flow on the new spraying systems. Sampling will begin on the day shift (4/22/96) and continue until 5 valid samples are collected. The operator will submit a plan prior to sampling. The operator has also agreed to divide the dragging of the affected area between the different shifts.

Inspector Thomas returned to the subject mine on May 6, 1996, and granted another extension of the abatement period noting in the "subsequent action" form dated May 6, 1996, the reasons for MSHA's invalidation of a number of samples. The form indicates as follows:

Four (4) of the five (5) required valid samples were submitted for the 013 occupation between 4-16-96 and 5-6-96. On following dates, samples were taken and voided for following reasons,

- 1) 4-24-96 cassette number 50-234511 did not work entire shift at location
- 2) 4-29-96 cassette number 50-233897 person injured not on location all shift
- 3) 4-30-96 cassette number 50-234515 dust pump bottom failure

Also, the 013 occupation traveled with federal inspector as walkaround 4-23-96 and took one graduated vacation day (4-25-96) during the sampling period from 4-16-96 - 5-6-96, the fifth valid sample was submitted but rejected by the computer as invalid code on 4-22-96 and operator became aware 5-6-96. (18 FMSHRC 1174 - 1177).

On May 16, 1996, Inspector Thomas, accompanied by William Ponceroff, the Chief of Health at MSHA District No. 3, returned to the subject mine. Ponceroff thereafter issued the Section 104(b) closure order now in dispute. The order states as follows:

An adequate effort was not made to abate Citation No. 3493950, dated 3/18/96. The concentrations of respirable dust was 11.22 mg/m³ (average concentration) for the 013 occupation (001-0 entity). This occupation is located along the No. 2, 5 North Mains belt line. Adjustments and corrections were made and the subsequent sample reflected an average concentration 2.9 mg/m³. The citation was extended based on increasing the air, install new auto flow water spray system on the 7-D & 8-D beltlines, install a water spray systems on the No. 2 5-N beltline where intentional shutdown of the spray system is minimized, reinstruct the individual sampled and increase the airflow to 80 fpm after these adjustments were made, the results of the respirable dust samples (average) was 2.2 mg/m³. Upon investigation of the changes after the second continued noncompliance, the following conditions were observed: a tamper proof intentional shutdown of the spray system for the No. 2, 5-N belt was not installed. Two of the 3 sprays (top) were shut off. The top belt was dry from the No. 64 crosscut to the No. 91 crosscut, a distance of 2,700 feet. The water spraying system for the 8D beltline did not have a water spray for the top surface of the top belt. The valve to prevent intentional shutdown of the water spraying system was connected to a hose, but not installed in the water system. A citation for float coal dust was issued at the 8-D belt transfer where coal is dumped on the No. 2, 5 North beltline. The tamper proof valve to prevent intentional shutdown of the sprays for the 7-D system was not installed to prevent the sprays from being shut off. Two of the three bottom sprays were turned off. The 9-D beltline also dumps coal on the 5N, No. 2 beltline. A top spray was not installed to spray the top surface of the top belt. Management was aware that the valve to minimize intentional shutdown was being defeated by using an acetyline wrench. This had occurred on at least 2 occasions. Measures were not implemented to prevent this from happening. Management has failed to assure that the new system for the water were installed and properly maintained. No other means of evaluation were implemented by the company.

As a condition precedent to issuing an order under Section 104(b) of the Act, the Secretary must find that a violation described in the underlying Section 104(a) citation has not been totally abated within the period of time as originally fixed, or as subsequently extended. The burden of proof on this issue is upon the Secretary as the moving party. On the facts of this case, I do not find that the Secretary has met her burden of proving that the underlying violation had not been totally abated within the period of time set forth in MSHA's extension of the abatement period.

It is undisputed that, in issuing the 104(b) order in this case on May 16, 1996, MSHA Inspector Ponceroff relied on the May 10, 1996, "Report of Continuing Non-Compliance," to determine that the violative condition alleged in the underlying citation had not been abated (Gov. Exh. No. 5, Pg. 2). This report reflected that the average concentration of respirable dust in the cited area was 2.2 milligrams per cubic meter between April 22, 1996, and May 3, 1996. The concentrations of respirable dust for these samples ranged from 1.7 milligrams per cubic meter to 2.6 milligrams per cubic meter.

Consol maintains, however, that the 2.2 milligrams per cubic meter average concentration reported in the May 10, 1996, MSHA laboratory report, was not a valid finding because it was based upon an April 24, 1996, respirable dust sample which was not obtained in the "designated area." It is not disputed that the April 24, 1996, sample was in fact invalid because the sample was not taken in the "designated area." The miner sampled did not work in the "designated area" for the entire shift. There is no dispute that if one of the five samples used to calculate the 2.2 milligrams per cubic meter average concentration of respirable dust found in the May 10, 1996, MSHA report was invalid, there would have been an insufficient number of dust samples to have permissibly concluded that the designated area was out of compliance, and was therefore still in violation of the dust standard. See 30 C.F.R. § 70.201(d).


While the Secretary does not dispute that the April 24, respirable dust sample was invalid, she appears to argue that Consol failed to inform MSHA of that deficiency prior to the issuance of the 104(b) order on May 16, 1996. It is reasonable to assume that the burden is upon the mine operator to bring to MSHA's attention any invalidated dust samples since that information on the facts of this case was within the exclusive control of the operator. See also Energy West Mining Company v. FMSHRC, 111 F.3d 900 (D.C Cir. 1997). I find from the credible evidence in this case that Consol did indeed bring this information to the attention of MSHA prior to the issuance of the order.

First, Consol Mine Safety Supervisor, David McCullough, testified that he had attached a note to the dust data card which he submitted to the MSHA laboratory, notifying the laboratory that the sample had not been properly obtained in the designated area. Second, McCullough testified that he informed MSHA Inspector, Charles Thomas, on May 6, 1996, that the April 24, respirable dust sample had not been taken in the designated area because the miner sampled did not work in the designated area for the entire shift. Inspector Thomas confirmed that McCullough had indeed told him on May 6, that the April 24 sample was, in effect, invalid. Thomas also noted on his subsequent action form dated May 6, 1996, that the April 24, 1996, sample had been voided.

Under the circumstances, I find that Consol did in fact inform MSHA, that the April 24, sample was invalid. Clearly then, MSHA knew as of May 6, 1996, that the April 24, 1996, sample was invalid. Since MSHA was on notice that one of the five samples used to calculate the 2.2 milligrams per cubic meter average concentration was invalid, it had no legal basis to conclude that the designated area was out of compliance. Accordingly, the Secretary has not sustained her burden of proving that the cited violation had not been totally abated within the extended abatement period. Accordingly, the order at bar must be vacated.

ORDER

Order No. 3493571 is hereby **VACATED** and this contest proceeding is **GRANTED**.



Gary Melick
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 16 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-210-M
Petitioner	:	A.C. No. 41-03813-05508
v.	:	
	:	Docket No. CENT 95-211-M
NORTON CRUSHED STONE,	:	A.C. No. 41-03813-05509
Respondent	:	
	:	Norton Development
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-49-M
Petitioner	:	A.C. No. 41-03813-05512 A
v.	:	
	:	
MARVIN D. CARLISLE, employed by	:	Norton Development
NORTON CRUSHED STONE,	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-50-M
Petitioner	:	A.C. No. 41-03856-05506 A
v.	:	
	:	
MARVIN D. CARLISLE, employed by	:	Tull Pit
NORTON CRUSHED STONE,	:	
Respondent	:	

DECISION

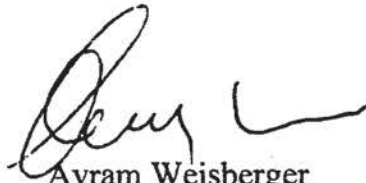
Appearances: Robert A. Goldberg, Esq., Mary K. Schopmeyer, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of the Complainant; Hugh E. Hackney, Esq., Fulbright & Jaworski, Dallas, Texas, for the Respondents.

Before: Judge Weisberger

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve settlement agreement and to dismiss the cases. A reduction in total penalties from \$48,306 to \$22,153 is proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Tom E. Norton Jr., on behalf of Norton Crushed Stone, the Respondent operator, and on behalf of Marvin D. Carlisle, the agent of the operator, shall pay a total penalty of \$22,153 as follows:

1. \$2,017 is to be paid within 30 days of this decision.
2. An installment payment of \$839 shall be paid by August 22, 1997, and remaining installments of \$839 each shall be paid on or before the same day of each successive month until all 23 remaining installments have been paid.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 22 1997

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JAMES RIEKE,
Petitioner

v.

AKZO SALT COMPANY, INC.,
Respondent

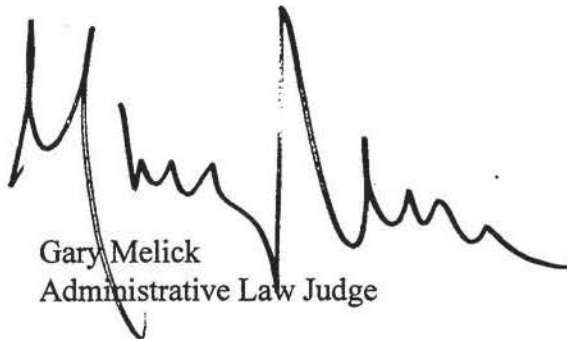
: DISCRIMINATION PROCEEDING
:
: Docket No. LAKE 95-201-DM
:
: NC-CD 94-10
: Cleveland Mine
: Mine ID 33-06994

DECISION ON REMAND

Before: Judge Melick

This case is before me upon remand by the Commission to determine the amount of additional backpay due the Complainant, James Rieke, and to determine whether his July 1996 unrelated discharge is final. The parties have stipulated that this discharge is in fact final and that Rieke was due the sum of \$3,810.14, in damages plus interest as of August 31, 1997.

Accordingly, Respondent, Akzo Nobel Salt, Inc., is directed to pay James Rieke the noted damages, with supplemental interest through the date of payment, within 30 days of the date of this order.



Gary Melick
Administrative Law Judge

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SEP 23 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 92-334-M
Petitioner	:	A.C. No. 23-01924-05520
v.	:	
	:	Fort Scott Fertilizer-Cullor, Inc.
FORT SCOTT FERTILIZER-CULLOR,	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 93-117-M
Petitioner	:	A.C. No. 23-01924-05523 A
v.	:	
	:	Fort Scott Fertilizer-Cullor, Inc.
JAMES CULLOR, Employed by	:	
FORT SCOTT FERTILIZER-	:	
CULLOR, INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Feldman

On September 15, 1997, the Commission remanded this case for an analysis of the six penalty criteria in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i), with respect to the appropriate civil penalty to be imposed in this matter.¹ A nominal \$10.00 civil penalty had been assessed for each of two citations issued for violations of 30 C.F.R. § 56.14101 for defective brakes on two of Fort Scott Fertilizer's haulage trucks. Although Fort Scott stipulated to the defective brake conditions on the trucks in issue, and to the significant and substantial nature (S&S) of these violations, Fort Scott maintained the defective brakes resulted from brake tampering by truck drivers William Burris and Timothy Ragland. Specifically, Fort Scott alleged Burris and Ragland loosened slack adjuster settings on three of the four wheels on

¹ This decision only concerns the appropriate civil penalty to be assessed. The Commission has affirmed the initial findings that the subject violations were not attributable to Fort Scott's unwarrantable failure, and that James Cullor is not liable under section 110(c), 30 U.S.C. § 820(c).

each of the cited haulage trucks shortly before MSHA's May 27, 1997, inspection, which occurred at the request of Burris and Ragland.²

Slack adjusters control the contact of the brake shoe with the brake drum. They are located on the inside of each haulage truck wheel. In view of the large diameter of a haulage truck's tires, slack adjusters are easily accessible from a squatting position. Slack adjusters are adjusted by turning a bolt with an ordinary wrench. The proper setting is tightening the bolt completely and then turning the bolt back half a turn. Truck mechanic Raymond Jenkins testified tightening or loosening slack adjusters is "real easy" and takes "only a minute." (Tr. 36, 49, 50-51). Slack adjusters can be loosened to the point where they would render the brakes ineffective. (Tr. 38-39, 48, 221-22).

In the initial decision, I concluded there was sufficient circumstantial evidence to support the respondents' contention that brake tampering had occurred. 15 FMSHRC 2354, 2361 (November 1993). I concluded that such sabotage is anathema to the Mine Act's goal of preventing unsafe conditions and should not be given recognition. 30 U.S.C. § 801(e). Thus, I vacated the defective brake citations holding that intentional disabling of equipment, as distinguished from other employee misconduct (*e.g.*, a violation of a mandatory safety standard caused by an employee's failure to follow company safety procedures) was an exception to the

² Burris and Ragland reported the defective brake conditions to the Mine Safety and Health Administration (MSHA) on May 22, 1992, and these complaints were the impetus for Inspector Marler's May 27, 1992, inspection that resulted in the subject citations. Burris and Ragland were terminated by Fort Scott on June 1, 1992, four days after Marler's inspection. Burris and Ragland filed discrimination complaints pursuant to section 105(c) of the Act, 30 U.S.C. § 815(c). MSHA investigated these complaints. In separate letters mailed to Fort Scott on July 14, 1992, concerning Burris' and Ragland's complaints, James E. Belcher, MSHA's Chief, Division of Technical Compliance and Investigation, stated "MSHA has determined, in its opinion, the complainant was not discriminated against in violation of section 105(c) (emphasis added)." (Resp. Ex. 1.). The Secretary has mischaracterized MSHA's July 14, 1992, determinations as "prosecutorial discretion." On the contrary, these determinations are admissions that either Burris' and Ragland's complaints were not protected activity under section 105(c), or, that their terminations four days later were, in no part, motivated by their complaints. See *Secretary on behalf of David 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 Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). However, consistent with the Commission directive that considering these facts is impermissible, it is the circumstantial evidence alone, regardless of these admissions, that serves as the basis for the conclusion that Burris' and Ragland's complaints were not made in good faith. 19 FMSHRC __, *slip op.* at 3.

strict liability application of the Mine Act. 15 FMSHRC at 2362-63. Consequently, I vacated the citations in issue.

In its first remand, the Commission, citing, *inter alia*, its decision in *Ideal Cement Co.*, 13 FMSHRC 1346, 1351 (September 1991), concluded the Mine Act imposes strict liability on operators for the violative acts of its employees, even when such acts involve "significant employee misconduct." 17 FMSHRC 1112, 1115 (July 1995). Thus, the Commission determined I erred in treating "deliberate employee misconduct" as a defense to liability and reinstated the citations.³ *Id.*; 19 FMSHRC ___, *slip op.* at 2. The Commission also vacated my findings that tampering had occurred and remanded for further evaluation on that issue. However, the Commission noted that miner misconduct would not be imputable to the operator in determining the degree of negligence for penalty purposes. *Id.* at 1116.

In my remand decision I once again determined there was adequate circumstantial evidence to support the conclusion that tampering had occurred. 17 FMSHRC 1330 (remand decision, August 1995). Since employee misconduct constituting the intentional disabling of brakes is central to resolution of the issue of the appropriate penalty to be assessed, I repeat the circumstantial case that was summarized in the remand decision:

My initial decision noted strong circumstantial evidence of this simple act of tampering. The complaining truck drivers had the motive and opportunity to loosen the slack adjusters. Their own testimony reflects they were disgruntled employees and threats had been made about disrupting quarry operations. Moreover, the complainants were responsible for routine truck maintenance. (Tr. 87). [MSHA Inspector] Marler testified one of the first things a truck driver experiencing brake problems should check are the slack adjusters. (Tr. 29). Yet Burris and Ragland, licensed by the State of Missouri to drive eighteen-wheeler

³ As noted by the Commission, as well as the initial decision in this matter, it is well settled that deliberate employee misconduct is ordinarily not a defense to liability under the Mine Act. 17 FMSHRC at 1115; See also 15 FMSHRC at 2362 (citations omitted). Deliberate employee misconduct is most commonly manifest by a conscious failure to follow company policy or safety rules. Under such circumstances the operator is subject to strict liability, and may be liable for significant civil penalties. However, as discussed *infra*, enforcement of statutory provisions must be viewed in the context of the "design of the statute as a whole." *K Mart Corp. V. Cartier, Inc.*, 486 US 281, 291 (1988). The conduct alleged in this case — using the Mine Act to create a serious hazard so as to subject an operator to Mine Act sanctions under section 110(i) — is distinguishable from the term "deliberate employee misconduct" as it relates to Mine Act liability. Recognizing such an act by imposing a significant civil penalty would undermine the statute's fundamental intent of encouraging safety.

trucks, continued to use their trucks without brakes without this rudimentary check. (Tr. 91). In addition, the pattern of loosened slack adjusters on three out of four wheels on both trucks driven by Burris and Ragland is further evidence of tampering.

Furthermore, Ragland's May 22, 1992, complaint to MSHA that the quarry trucks' brakes were ineffective is also suspect for several reasons. Significantly, despite complaining to MSHA that Fort Scott ignored their brake complaints, Fort Scott truck mechanic Jenkins testified Burris and Ragland never complained to him about brake problems. (Tr. 70). Of greater significance is Burris' testimony that the cited 30 ton Euclid's brakes "held" when he last operated the truck on May 25, 1992, during the interim period between Ragland's May 22 MSHA complaint and Marler's May 27 inspection. (Tr. 106). I can find no reasonable explanation short of tampering to account for this spontaneous remission in the big Euclid's brake system.

Moreover, Burris' testimony lacked credibility. Although Jenkins and Marler testified it is not uncommon for truck drivers to adjust slack adjusters, Burris was reluctant to admit he knew how to make such adjustments. (Tr. 26-27, 36-37, 92, 221). However, both Burris and Ragland ultimately conceded they were familiar with the maintenance and function of slack adjusters. In fact, Ragland told Marler "he knew a little bit about repairing trucks." (Tr. 200). (17 FMSHRC at 1337).

In my remand decision, consistent with the Commission's discussion of strict liability and the fact that employee misconduct is not imputable to the operator, I imposed a nominal penalty of \$10.00 for each of the two citations. This *de minimus* civil penalty was based on the extraordinary circumstances in this case.

In its current remand decision, in considering the issue of unwarrantable failure, the Commission concluded, based on credibility findings, "that [Fort Scott] did not know about the brake problems," and, that upon becoming aware of the brake problems, "[it] responded by directing [Burris and Ragland] to park the trucks so the brakes could be examined." 19 FMSHRC __, *slip op.* at 6. Thus, the Commission concluded it was not necessary to address whether employee misconduct had occurred. Consequently, the Commission's remand, in effect, left the employee misconduct determination undisturbed.

The Commission's remand directs me to reconsider the appropriate civil penalty in light of the six civil penalty criteria in section 110(i) of the Act. A discussion follows.

1. History of Violations

Fort Scott had a history of 24 violations during the two year period preceding the issuance of the citations in issue. (Gov. Ex 1). With the exception of two violations for which \$400.00 civil penalties were assessed, most, if not all, of the remaining violations appear to be non S&S based on numerous assessments ranging from \$20.00 to \$50.00. *Id.* Thus, the history of violations is not a significant consideration in imposing the appropriate penalty in this case.

2. Size of Business

Fort Scott is a small operator.

3. Negligence

Although an operator's fault, or lack thereof, is relevant in assessing a civil penalty, employee misconduct is not imputable to Fort Scott. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1992); *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). The Commission has concluded, based on credibility findings, that the Secretary has not shown, by a preponderance of the evidence, that Fort Scott knew or should have known about the brake problems prior to Burris' and Ragland's complaints, or, that Fort Scott ignored their complaints. 19 FMSHRC __, *slip op.* at 6, 7. Thus, there is no negligence attributable to Fort Scott in this matter. There are no allegations that Burris and Ragland were lacking in supervision, training or discipline. 4 FMSHRC at 1464; *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1988), *aff'd* 870 F.2d 711 (D.C. Cir. 1989). Therefore, the lack of negligence attributable to Fort Scott is a significant mitigating factor.

4. Effect on Operator's Ability to Continue in Business

The \$20.00 civil penalty will not interfere with Fort Scott's continued business operations.

5. Gravity of Violation

Defective brakes on multi-ton haulage trucks pose significant hazards to their occupants and anyone in the vicinity of the defective vehicles. Thus, the gravity of the violations is extremely serious.

Ordinarily, serious gravity, under the doctrine of strict liability, may warrant a significant civil penalty. For example, in *Birmingham Coal & Coke Company*, Docket No. SE 96-99, I denied the Secretary's settlement motion wherein the parties agreed to a reduction in proposed penalties from \$16,000.00 to \$100.00 for two citations issued to an absentee operator for training violations committed by an independent contractor. *Birmingham Coal & Coke Company*, Docket No. SE 96-99 (order denying joint motion to approve settlement, May 28, 1996). The

Secretary's reduction in proposed penalties was based on the concept of strict liability and the operator's lack of knowledge of the violations. In denying the settlement motion, I noted the public interest in ensuring that operators contract with reputable independent contractors, and, to this end, that strict liability without meaningful liability is no liability at all. *Birmingham Coal & Coke Company*, Docket No. SE 96-99, *slip op.* at 3 (decision approving settlement, August 15, 1996).

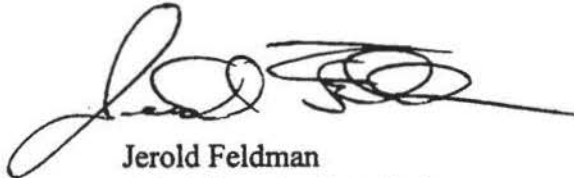
In determining the meaning and applicability of a statutory provision, the Commission looks to "traditional tools of . . . construction," including an examination of the intent of the drafters. *Amax Coal Company*, 19 FMSHRC 470, 474 (March 1997) *citing Local Union 1261, UMW v. FMSHRC*, 917 F.2d 42, 44-45 (D.C. Cir. 1990) (interpretation of Mine Act provision). In this regard, the imposition of a significant strict liability civil penalty in *Birmingham Coal* is consistent with the Supreme Court's analysis of the penalty provisions in the predecessor Federal Coal Mine Health and Safety Act of 1969, that a "major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective." *National Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976). Here, however, giving recognition to equipment sabotage that was motivated by a desire to subject an operator to Mine Act liability, turns the Mine Act on its head. The imposition of a significant penalty in this case will neither minimize future accidents nor serve as a deterrence. On the contrary, significant penalties in this case may only encourage future sabotage and result in serious injury.

6. Good Faith Abatement

The evidence reflects the trucks were parked so their brakes could be examined when Burris and Ragland informed Fort Scott of the brake problems. Thus, this penalty criterion is not a basis for imposing a higher penalty.

ORDER

In the final analysis, a nominal penalty in this case is not imposed because there "is only" strict liability. Strict liability may justify significant penalties. A nominal penalty is imposed in this instance because it is consistent with the penalty criteria in section 110(i) of the Act, and, more importantly, it is consistent with Congressional intent as well as the public interest. Accordingly, the \$10.00 civil penalty for each of the two citations in issue is reinstated. The record reflects Fort Scott has paid the total \$20.00 civil penalty for these citations. Consequently, these proceedings **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 29 1997

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 97-9-D
on behalf of BILLY BRANHAM,	:	NORT CD 96-07
Complainant	:	
v.	:	No. 2 Mine
	:	
TEDDY BEAR, INC.,	:	Mine ID 44-06745
Respondent	:	

DECISION

Appearances: Javier Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant;
Greg Matney, Esq., Katz, Kantor, Perkins & Campbell, Tazewell, Virginia, for the Respondent.

Before: Judge Weisberger

This proceeding is before me based on a Complaint filed by the Secretary of Labor ("Secretary") on behalf of Billy Branham alleging that Teddy Bear, Inc. ("Respondent") discriminated against him in violation of § 105(c)(1) of the Federal Mine Safety and Health Act of 1977. Pursuant to notice, the matter was heard in Abingdon, Virginia on June 4, 1997. After the hearing, the parties entered into a discussion concerning settlement of the litigated issues. The parties subsequently reached a settlement and, on September 19, 1997, filed the following "JUDGEMENT":

1. Respondent Teddy Bear, Inc., is a corporation incorporated under the laws of the State of Virginia, qualified to do business in Virginia, and engaged in the production of coal. It is the owner, lessee, or other person who operates, controls, or supervises Mine No. 2, and is therefore an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Mine Act"), 30 U.S.C. § 802(d).
2. The subject mine No. 2, located in Cleveland, Russell County, Virginia, has products that enter commerce or has operations or products that enter commerce or has operations or products that affect commerce and is a "coal or other mine" as defined in Section 3(h)(1) of the Mine Act. (Sic.)

3. Joe L. Spurrier is the President of Teddy Bear, Inc., and is authorized to bind the Respondent to the terms of this judgment.
4. Complainant, Billy D. Branham, worked as a scoop operator and tailpiece man at the subject Mine No. 2, and at all times during his employment at Teddy Bear, Inc., he was a "miner" as defined in Section 3(g) of the Mine Act, 30 U.S.C. § 802(g).
5. On May 31, 1996, Respondent Teddy Bear, Inc., terminated the Complainant's employment at subject Mine No. 2.
6. On June 3, 1996, the Complainant filed a timely complaint with the Secretary alleging discrimination.
7. On January 31, 1997, the Secretary, on behalf of Billy D. Branham, pursuant to the provisions of Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), filed a complaint with the Federal Mine Safety and Health Review Commission alleging violations of Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). Specifically, the Secretary alleged that the Respondent illegally discriminated against the Complainant on May 31, 1996, when the Respondent fired the Complainant and that the Respondent took such action against the Complainant for his good faith refusal to work in conditions which he reasonably considered to be unsafe and for his safety complaint to the Respondent, which are protected activities under Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1).
8. On March 4, 1997, the Secretary filed an Amended Complaint to include the Secretary's prayer for the assessment of a civil penalty in the amount of \$3,000 for the Respondent's alleged violation of Section 105(c) of the Act, 30 U.S.C. § 815(c).
9. The Respondent's Mine No. 2 had an annual tonnage of 7,119 in 1995.
10. Respondent Teddy Bear, Inc., had an annual tonnage of 7,480 in 1995.
11. The Respondent's Mine No. 2 had 92 inspection days for the period covering the 24 months prior to 5/31/96.
12. The Respondent's Mine No. 2 had 168 violations assessed against it by MSHA for the period covering the 24 months prior to 5/31/96.
13. Teddy Bear herewith asserts that it is currently complying with and agrees in the

future to comply fully with Section 105(c) of the Mine Act. In particular, Teddy Bear, Inc., agrees that it is not and shall not in any manner discriminate 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 the Mine Act because such miner, representative of miners, or applicant for employment has filed or made a complaint under or related to the Mine Act, including a complaint notifying Teddy Bear, Inc., its agents, or the representative of the miners at any coal or other mine, of an alleged danger, or safety or health violation in a coal or other mine, or because such miner, representative of miners, or applicant for employment has instituted or caused to be instituted any proceeding under or related to the Mine Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative or miners, or applicant for employment on behalf of himself or others of any statutory right afforded by the Mine Act.

14. Respondent Teddy Bear, Inc., agrees to the payment of backwages and a civil penalty in full resolution of the monetary disputes presented by this matter. The parties have agreed to the payment of \$2,560 by Teddy Bear, Inc., to the Complainant in gross backwages, which resulted from Complainant's termination. The payment to the Complainant shall be made within 30 days from the entry of this judgment, and the payment shall be made by certified check, cashier's check, or money order and shall be made payable to Billy D. Branham. In addition, the Respondent has agreed to the full payment of the assessed penalty of \$3000. This \$3000 payment shall be made within 30 days from the entry of this judgment, and the payment shall be made by certified check, cashier's check, or money order and shall be made payable to the Mine Safety and Health Administration. Both the \$2,560 payment to the Complainant and the \$3,000 payment to the Mine Safety and Health Administration shall be delivered to Javier Romanach at the following address: U.S. Department of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203.

15. Respondent Teddy Bear, Inc., admits that payment of the aforementioned \$3,000 penalty will not adversely (sic) its ability to continue in business.

16. Teddy Bear, Inc., agrees to expunge from Billy D. Branham's personnel file, and all other records maintained by it or its employees, all references to the events underlying and/or related to the Section 105(c) complaint filed by Mr. Branham.

17. Based upon Billy Branham's satisfactory employment history with Teddy Bear, Inc., neither Teddy Bear, Inc., nor any of its agents or employees will provide any negative references concerning Mr. Branham to any prospective employer. Under no circumstances will Teddy Bear, Inc., or its officers, agents or principals inform any prospective employer of the Section 105(c) complaint filed by Mr. Branham, the circumstances and events underlying and/or related to this

complaint, nor any other instance in which Mr. Branham may have made safety complaints or exercised protected rights under the Mine Act.

18. Teddy Bear, Inc., agrees to post a notice at the subject Mine No. 2 stating that Teddy Bear, Inc., will not violate Section 105(c) of the Act.

19. Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

20. This agreement constitutes the full and complete understanding of the parties with respect to this matter.

21. The complainant has indicated to counsel for MSHA, and by his signature below, that he has reviewed the terms of this agreement and that he is satisfied with the terms of this agreement and has entered into said agreement of his own free will.

22. All parties to this Judgment represent and warrant that the person executing the consent to the entry of this Judgment on their/its behalf is duly authorized to do so.


On the basis of the matters contained herein, I conclude and find that the agreements described in the aforementioned Judgment are appropriate under the criteria set forth in section 110(i) of the Act and find that they satisfy the deterrent intent of the Mine Act and are in the public interest.

In view of the foregoing, IT IS HEREBY ORDERED as follows:

1. Respondent Teddy Bear, Inc., shall pay \$2,560 to Complainant Billy D. Branham in satisfaction of his claims in this proceeding.

2. Respondent Teddy Bear, Inc., shall pay a civil penalty assessment of \$3,000 to MSHA in satisfaction of the alleged violation in these proceedings.

3. The Respondent shall comply forthwith with the terms of the foregoing Judgment. All of the aforementioned payments shall be made by the Respondent within 30 days of the date of this decision and order, and upon full compliance with the foregoing Judgment, this matter is DISMISSED, each party to bear its own fees and other expenses incurred in connection with any stage of this proceeding.


Avram Weisberger
Administrative Law Judge

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

SEP 29 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-370
Petitioner	:	A . C. No. 48-00977-03525
	:	
v.	:	
	:	Black Thunder Mine
THUNDER BASIN COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Merlin

On September 5, 1997, the Commission remanded this case for a reassessment of civil penalties. The parties have waived the filing of briefs.

A citation dated February 22, 1994, issued under section 104 (a) of the Mine Act charged the operator with a violation of 30 C.F.R. § 40.4 for refusing to post a form designating two officials of the United Mine Workers who were not employees of the operator, as miner representatives under section 103(f) of the Mine Act.¹ The abatement time allowed by the citation was 15 minutes, and an order under section 104(b) of the Act for failure to abate was issued on the same day as the citation. However, MSHA did not begin to assess a daily penalty until March 27, 1994, two days after a Commission judge had denied the operator's request for temporary relief. The operator sought temporary relief from the Commission and did not abate the violation until 13 days later when the Commission denied relief.

In its decision the Commission found that the judge's failure to assess a penalty for the initial violation set forth in the citation amounted to legal error that necessitated a remand. Section 110(i) of the Act, 30 U.S.C. § 820(i), identifies six factors which must be taken into account in determining the appropriate amount of penalty. Four of these factors are the subject of stipulations which have been accepted by the Commission. Accordingly, I find that the operator is large in size, imposition of a penalty will not affect its ability to continue in business

¹The operator's argument that non employees cannot serve as a miner representatives was eventually rejected by the Court of Appeals for the Tenth Circuit. Thunder Basin v. Fed. Mine Saf. and Health Rev. Com., 56 F.3d 1275 (1995).

and the violation was non serious. I also find that the history of violations for the two years preceding issuance of the citation consisted of 23 violations and no violation of the cited regulation. The assessment sheet for the citation shows that the operator had 32 inspection days in the two year period and less than one violation per inspection. Considering the operator's large size this is a good history.

The record shows that the citation was given after the operator had requested issuance of a citation so that its refusal to accept non employees as miner representatives could be adjudicated and resolved. As the Solicitor's brief to the Commission acknowledges, in issuing the citation the Mine Safety and Health Administration was cooperating with the operator in attempting to move the matter through the administrative and judicial review process as expeditiously as possible. Clearly, the operator knowingly and intentionally violated the Act by refusing to post the names. An intentional violation usually connotes high negligence. However, in this instance the citation was issued as a result of an agreement between the parties to obtain a prompt ruling on the issue presented. Under these limited circumstances the operator's degree of negligence is mitigated and I find negligence was moderate with respect to the issuance of the citation.

The remaining factor is whether or not the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. Abatement required only the posting of the designation. The 15 minutes allowed was sufficient to post the names. I find there was no good faith abatement. The circumstances relating to the failure to abate are set forth more below in the analysis of the withdrawal order.

Turning to the withdrawal order, I again accept the stipulations of the parties and in accordance therewith find that the operator was large in size, imposition of a penalty will not affect its ability to continue in business, the violation was non serious and history of previous violations was good.

Evaluation of negligence with respect to the order involves circumstances very different from those attendant upon issuance of the citation. There is no dispute that the operator could have abated within the time allowed. However, it intentionally chose not to do so and instead sought temporary relief. The operator knew from the outset that MSHA did not agree to its refusal to abate. The MSHA district manager wrote the operator that he intended to recommend a daily penalty unless abatement occurred by March 1, 1994. However, the operator pursued its application for temporary relief which was denied on March 25, 1994, by a Commission judge. Two days after the judge's denial of relief, the MSHA Director of Assessments wrote the operator that a penalty of \$2,000 per day was being imposed until the violation was abated. Nevertheless, the operator appealed the denial of temporary relief to the Commission. Only when the Commission denied relief thirteen days later did the operator abate. Accordingly, the operator's failure to abate was intentional and its course of conduct was taken with the full knowledge that MSHA did not approve.

There is no question that the operator had the right to seek temporary relief afforded by the statute and regulations. 30 U.S.C. § 815(b)(2), 29 C.F.R. § 2700.46. However, the existence of that right does not mean it can be exercised without consequences, particularly when the course of action selected by the operator poses a conflict with the fundamental statutory scheme. The Mine Act vests enforcement in the Secretary. Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994); Mechanicsville Concrete, Inc., 18 FMSHRC 877, 879 (June 1996). Under Sections 104(b) and 110(b), 30 U.S.C. §§ 814(b), 820(b), the Secretary is given the authority to set times for abatement, determine whether there has been abatement, issue withdrawal orders and propose civil penalties to obtain abatement. The use of these powers, which are critical to proper enforcement, cannot be compromised or inhibited by an operator's decision to pursue adjudicative or judicial avenues of relief. Otherwise, operators, and not the Secretary, will decide the times and terms of enforcement.

In light of the foregoing, I conclude that the operator's intentional and knowing refusal to abate constituted high negligence. Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991); Mettiki Coal Corporation, 13 FMSHRC 760, 770 (May 1991); See Also, Tanglewood Energy, Inc., 18 FMSHRC 1315, 1319-1320 (August 1996). The same considerations compel the conclusion that the operator intentionally and knowingly failed to abate the violation in a timely manner.

I take careful note that the Secretary's proposed penalty is \$2,000 per day. The Secretary's regulations state that the formula used to determine proposed penalty amounts is based upon the six factors of section 110(i). 30 C.F.R. § 100.3. Special assessments also take into account the six factors. 30 C.F.R. § 100.5. However, the Secretary is not required to explain how she arrives at a proposed penalty. Therefore in this case there is no way to know how the Secretary viewed and weighed each of the six criteria. 30 U.S.C. § 820(i); See Also, Conf. Rep. No. 461, 95th Cong., 1st Sess. 58, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1336 (1978); Redland Genstar Incorporated, 19 FMSHRC 442, 446 (February 1997).

In any event, it is well established that penalty proceedings before the Commission and its judges are de novo and that the Secretary's proposed penalties are not binding on the Commission and its judges. Sellersburg Stone Company, 5 FMSHRC 287, 290-29 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); U.S. Steel Mining Co., 6 FMSHRC 1148, 1150 (May 1984); Missouri Rock, Inc., 11 FMSHRC 136, 140 (February 1989); Doss Fork Coal Company, 18 FMSHRC 122, 130 (February 1996); Wallace Brothers Inc., 18 FMSHRC 481, 483-484 (April 1996); Mechanicsville Concrete, Inc., 18 FMSHRC 877, 881 (June 1996). As the Commission stated in its remand order in this case, Commission judges are accorded broad discretion in assessing penalties under the Act and these assessments must reflect proper consideration of the six criteria set forth in section 110 (i).

As set forth herein, I have considered and made findings with respect to the six criteria. It is my reasoned judgment that a penalty of \$350 is an appropriate penalty for the underlying violation. I believe this amount is consistent with lack of gravity, moderate negligence and good

history. In addition, in reaching this amount I have taken into account the operator's large size and ability to continue in business. Finally, I am cognizant of the operator's failure to timely abate, a factor that also is central to reaching an appropriate penalty amount for the order.

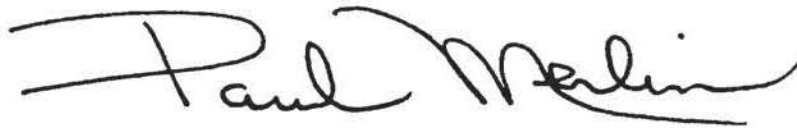
Upon a review of the six criteria it is my reasoned judgment that a daily penalty of \$1,000 per day is suitable for the violation cited in the 104(b) order. In my view this amount recognizes the non serious nature of the violation and the operator's good prior history. However, it also is premised on the finding of high negligence. I further believe this fine is consistent with the operator's large size and ability to continue in business. Finally, the failure to timely abate after issuance of the order has been weighed in the balance. The substantial penalty being assessed is sufficient to have the desired deterrent effect.

ORDER

It is **ORDERED** that a penalty of \$350 be assessed for Citation No. 3589040.

It is further **ORDERED** that a penalty of \$1,000 a day be assessed for the operator's failure to comply with Order No. 3589101 for a total penalty of \$13,000.

It is further **ORDERED** that the operator pay these penalties within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 2 1997

LAUREL RUN MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestants	:	
	:	Docket No. WEVA 94-347-R
v.	:	Citation No. 3964761; 8/1/94
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 94-348-R
MINE SAFETY AND HEALTH	:	Order No. 3964762; 8/1/94
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. WEVA 94-349-R
	:	Order No. 3964763; 8/1/94
	:	
	:	Docket No. WEVA 94-350-R
	:	Order No. 3964764; 8/1/94
	:	
	:	Holden 20-DB Mine
	:	Mine ID No. 46-07770
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 96-177
Petitioner	:	A. C. No. 46-07770-03575
	:	
v.	:	Holden 20-DB Mine
	:	
LAUREL RUN MINING COMPANY,	:	
Respondent	:	
	:	
	:	
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	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 96-176
Petitioner	:	A. C. No. 46-07770-03576A
	:	
v.	:	Holden 20-DB Mine
	:	
	:	
ERNIE WOODS, Employed by	:	
Laurel Run Mining Co.,	:	
Respondent	:	

**ORDER DENYING THE SECRETARY'S
MOTION FOR RECONSIDERATION**

These proceedings involve citations issued as a consequence of MSHA's investigation following a fatal roof fall that occurred at Laurel Run Mining Company's Holden 20-DB Mine on July 25, 1995. Before me for consideration is the Secretary's August 5, 1997, Motion for Reconsideration of the June 9, 1997, Order Granting Respondents' Motion to Strike two of the Secretary's witnesses (19 FMSHRC 1229),¹ the respondents' August 21, 1997, Opposition, and, the Secretary's August 27, 1997, Response. The June 9 Order was issued after the Secretary, relying on the miner witness privilege in Rule 62,² refused to disclose the identity of these witnesses to the respondents prior to two days prior to the scheduled hearing.

As a threshold matter, I am not persuaded by the respondents' opposition that the Secretary's request for reconsideration is untimely. The presiding judge has broad discretion in discovery matters, and I am not unmindful of the serious nature of the sanctions imposed. Accordingly, the respondents' request that the Secretary's Motion for Reconsideration should be denied as untimely **IS DENIED**. The merits of the Secretary's request for reconsideration are discussed below.

Background

On May 28, 1997, and June 2, 1997, I issued Orders, in response to the Respondents' motion to compel, compelling the Secretary to disclose the names of all witnesses she intended to call in these proceedings who formerly were employed by Laurel Run Mining Company but who are no longer working as "miners" in the mining industry. The Orders, noting the plain meaning of the operable term "a miner" in Commission Rule 62, rejected the Secretary's overly broad interpretation that the miner witness privilege should apply to anyone who ever worked in

¹ The underlying May 28, 1997, Order compelling disclosure was issued after the subject witnesses were identified *in camera*. This Order denied the respondents' Motion to Compel with respect to two miners that are currently employed as miners by other operators. Although the May 28 Order initially required the Secretary to disclose the names of three former miner witnesses, the Secretary subsequently decided to call only two of these witnesses. Accordingly, two witnesses have been stricken in these matters.

² Commission Rule 62, 29 C.F.R. § 2700.62 provides:

A judge shall not, until two days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the judge to testify or whom a party expects to summon or call as a witness.

a mine, regardless of the duration of past mining employment and the relevancy and timeliness of such employment to the case at hand.

The Secretary filed a Petition for Interlocutory Review with the Commission on June 5, 1997. The Commission denied the Secretary's petition on June 6, 1997, on the ground that the Secretary failed to demonstrate that "immediate review may materially advance the final disposition" of these proceedings. In denying the Secretary's petition, the Commission noted that it "takes no position on the question of the definition of 'miner' under Commission Procedural Rule 62, 29 C.F.R. § 2700.62." Thus, the Commission preserved the Secretary's right of appeal on this issue. The Commission's June 6 Order, in effect, left undisturbed the May 28 and June 2, 1997, Orders granting the respondents' Motion to Compel.

The Secretary could have avoided sanctions in this case, and retained her right to appeal this discovery issue, by disclosing the identity of her former miner witnesses on Monday, June 9, 1997, the first business day following the Commission's June 6 denial of interlocutory review. Surely disclosing the identity of these former miner witnesses six days prior to trial, rather than two days prior to trial, was not prejudicial to the Secretary's case and would not have placed these witnesses in jeopardy.³ Instead, on June 6, 1997, shortly after the release of the Commission's Order denying review, the Secretary filed a Response to the Court's Order compelling the Secretary to identify her former miner witnesses. In her response, despite the Commission's denial of her Petition for Interlocutory Review, the Secretary stated she "respectfully refuses to disclose the identity of her *miner witnesses* until 9:00 a.m. on Friday, June 13, 1997 (emphasis added)." *Sec'y's Response*, p. 2.

The respondents filed a Motion for Sanctions on June 9, 1997, based on the Secretary's continued refusal to disclose her non-miner witnesses. The respondents sought dismissal of these proceedings with prejudice. In the alternative, the respondents requested that the Secretary's undisclosed witnesses be stricken.

On June 9, 1997, I denied the respondents' motion to dismiss. Noting that the Secretary's continued refusal to abide by the May 28 and June 2, 1997, Orders left me no other alternative, the June 9, 1997, Order granted the respondents' motion to strike the three undisclosed witnesses.

³ The subject witnesses have not been employed by Laurel Run Mining Company for over two years and are not currently employed in the mining industry. These witnesses provided statements to MSHA in the presence of the respondents during MSHA's accident investigation. These witnesses were also deposed by Laurel Run's counsel in a related civil suit. In short, it is undisputed that the identity of these individuals, as well as their anticipated testimony, is well known to the respondents. Thus, even if the Secretary prevailed on appeal on this Rule 62 issue, the subject June 2, 1997, Order compelling disclosure would be harmless error.

The hearing in these proceedings commenced on June 17, 1997, in Charleston, West Virginia. After four days of hearings the proceedings were recessed and scheduled for resumption on September 9, 1997. On August 5, 1997, the Secretary filed a Motion for Reconsideration of the June 9 Order granting the respondents' Motion to Strike. In her motion, the Secretary represents she now is prepared to immediately disclose the names of the subject witnesses.

The Secretary, citing the respondents' June 9 motion to strike, asserts her immediate disclosure prior to resuming the trial will remove any alleged prejudice by the respondents that they are unable "to adequately prepare for the hearing without the disclosure of the Secretary's witnesses." The Secretary also asserts that the testimony of the stricken witnesses is crucial and necessary for a complete record. Finally, the Secretary relies on a January 22, 1997, Order issued by Judge Manning as support for her interpretation that former miners are entitled to the miner witness privilege in Rule 62. *See* 19 FMSHRC 220.

Discussion

The Secretary's current willingness to identify the stricken witnesses during this recess period is too late. The respondents are entitled to the timely disclosure of all of the Secretary's intended witnesses prior to trial in order facilitate their preparation.

With respect to the remaining contention of the Secretary, Judge Manning ruled witnesses were covered under the Rule 62 miner witness provisions even if they were no longer employed by the respondent operator. However, Judge Manning's decision does not reflect whether the witnesses granted the miner witness privilege under Rule 62 were employed by other operators in the mining industry.⁴ Judge Manning's decision also does not address the distinction between the informant's privilege in Rule 61 that protects anonymity⁵ and the miner witness privilege in Rule 62 that sets the time period for disclosing the identity of miner witnesses.

As discussed in the May 28 Order, the informant's privilege is intended to encourage individuals to discuss alleged Mine Act violations with government officials by protecting their anonymity, and, thus, minimizing their exposure to retaliation or harassment. Although Rule 61 limits the applicability of the informant's privilege to miners, the Commission, in the interest of

⁴ Judge Manning concluded, "[i]t appears that some of the Secretary's miner witnesses in these cases are no longer employed [by the respondent]." 19 FMSHRC at 222.

⁵ Commission Rule 61, 29 C.F.R. § 2700.61 provides:

A judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

encouraging the free flow of information to MSHA personnel by protecting anonymity, has concluded the informant's privilege applies to non-miners as well. *Sec'y o/b/o Logan v. Bright Coal Co.*, 6 FMSHRC 2520, 2524 (November 1984).

Here, the Secretary seeks to extend the broad application of the informant's privilege in Rule 61, which is applied to anyone regardless of employment status, to the miner witness privilege in Rule 62. An informant's privilege is predicated on anonymity. Once an informer is designated by the Secretary as an intended witness, that individual ceases to be an anonymous informant and becomes a witness.

Once an individual is designated as a witness, Rule 62 confers upon the Secretary the privilege to delay disclosing the witness until two days prior to the scheduled hearing if the witness is "a miner." The Secretary is entitled to the miner witness privilege even if the witness is employed by an operator that is not the respondent. Application of this privilege is consistent with Congressional concern regarding the possibility of retaliation against miners who participate in enforcement proceedings brought by the Secretary pursuant to the Mine Act. *Bright*, 6 FMSHRC at 2524. However, if the rationale for the privilege does not exist, the privilege is not applicable. There is little potential for retaliation by a mine operator against a witness identified by the Secretary during the brief pretrial witness list exchange period if that witness is no longer employed in the mining industry.⁶

Finally, the informant's privilege is a qualified privilege. For, in the final analysis, due process entitles the respondent to confront witnesses. Thus, even in instances where complete anonymity is desired, when disclosure is essential to the fair determination of a case, the informant's privilege must yield or the case may be dismissed. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). In such cases, the court must determine whether a party's need for disclosure outweighs the public interest in maintaining the privilege. *Bright*, 6 FMSHRC at 2526.

So too, the miner witness privilege is a qualified privilege.⁷ In this instance, given the Commission's denial of interlocutory review, compelling the Secretary's disclosure of intended witnesses on Monday, June 9, rather than Friday, June 13, 1997, particularly when the identity and expected testimony of the prospective witnesses are known to the respondents, does not

⁶ There may be extraordinary circumstances, not present here, where the Secretary may invoke the miner witness privilege for someone who is not currently a miner, such as for a recently laid-off miner subject to recall. However these cases can be dealt with on a-case-by-case basis and do not warrant extending the miner witness privilege to anyone who ever worked as a miner.

⁷ For example, disclosure of miner witnesses two days prior to trial in a case where the Secretary sought to call numerous miner witnesses, may preclude the operator from adequately preparing for trial. Upon such a showing, the miner witness privilege must yield to due process.

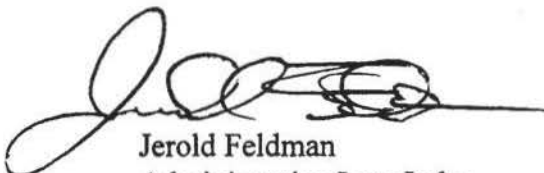
diminish the public interest in maintaining the miner witness privilege, even if the privilege was applicable in these proceedings.

The necessity for striking a witness, particularly in this case involving a fatality, is unfortunate. However, it is fundamental that orders issued by a presiding judge compelling discovery are not advisory in nature, or subject to the approval of the party seeking to avoid disclosure. A judge's discovery order is, however, subject to appellate scrutiny. The Secretary appealed to the Commission, and in a divided opinion, did not prevail.⁸ Our system of laws requires obedience to the majority opinion rather than the dissenting opinion. The government must be held to a high standard of conduct in judicial proceedings. If the record is incomplete, it is due to the actions of the Secretary.

Rule 59, 29 C.F.R. § 2700.59, authorizes the presiding judge "to make such orders with regard to [a failure to comply with an order compelling discovery] as are just and appropriate." Under the circumstances of this case, striking the Secretary's witnesses is not only just and appropriate, it is essential to the integrity of the judicial process.

ACCORDINGLY, the Secretary's Motion for Reconsideration **IS DENIED**. The hearing in these proceedings will resume as scheduled **at 9:00 a.m., Tuesday, September 9 through Friday, September 12, 1997**, if necessary, in Charleston, West Virginia, at the following location:

Kanawha County Courthouse
409 Virginia Street East
County Commission Courtroom, First Floor
Charleston, West Virginia



Jerold Feldman
Administrative Law Judge

⁸ In fact, the Commission, in effect, granted the relief sought by the Secretary by preserving the Secretary's right of appeal on the Rule 62 question.