SEPTEMBER 1998

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

SEPTEMBER 1998

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

Bryce Dolan v. F & E Erection, Docket No. CENT 97-24-DM.
(Judge Feldman, August 5, 1998)

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

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 2, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 98-194-M
NATIONAL LIME & STONE, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 13, 1998, the Commission received from National Lime & Stone, Inc., ("National") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief.

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

National submits that, although it timely filed a notice to contest Citation No. 7821909, it failed to timely file a hearing request to contest the associated penalty proposed by the Department of Labor's Mine Safety and Health Administration ("MSHA"). It explains that its late filing of the hearing request was due to a misunderstanding between counsels for National and the Secretary concerning the need to separately contest the citation and the proposed penalty. Mot. at 3. National claims that it timely filed a notice of contest of the citation on April 7, 1998, and one week later requested expedited consideration of the contest case, which had been assigned to Administrative Law Judge August Cetti. *Id.* at 2. The operator contends that soon thereafter, the parties reached a settlement regarding the penalty amount, which was then reduced

to a written settlement agreement. *Id.* Subsequently, the parties requested and received a stay of the proceedings pending assessment of civil penalties. *Id.* National claims that on June 9, MSHA filed a petition proposing a penalty for the citation. *Id.* The operator asserts that the settlement addressed both the proposed penalty and the citation, and that the settlement "was filed with the Court for approval on July 2, 1998." *Id.* National contends that it believed that, because the parties had agreed to a penalty amount and agreed to move for entry of the settlement, no "green card" needed to be sent, and no separate docket challenging the proposed penalty assessment had to be established. *Id.*

National states that on or about July 13, 1998, the judge notified the Solicitor's office that he could not approve the parties' settlement agreement because a separate action challenging the proposed assessment had not been instituted. *Id.* Subsequently, National filed its "green card" contesting the assessment, but MSHA rejected the petition as untimely because it was sent over 30 days after the proposed assessment had issued. *Id.* National asserts that its failure to file the "green card" in a timely fashion was due to mistake or inadvertence, and that it is entitled to relief under Fed. R. Civ. P. 60(b)(1). *Id.* at 5.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We also have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

National's motion indicates that it intended to contest Citation No. 7821909 and settle the related penalty with the Secretary, and that, but for an apparent mutual misunderstanding between counsel regarding the necessity of challenging the penalty assessment prior to approval of the settlement, National likely would have contested the proposed penalty. In the circumstances presented here, National's late filing of a hearing request amounts to inadvertence or mistake within the meaning of Rule 60(b)(1). *See Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mining facility and its attorneys); *Rivco Dredging Corp.*, 10 FMSHRC 624, 624-25 (May 1988) (granting operator's petition for review when operator filed notice of contest as to alleged violations, but was unaware that contest of civil penalty proposals was required).

Accordingly, in the interest of justice, we grant National's unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 7821909. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

David Farber, Esq.
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

Ruben Chapa, Esq.
Office of the Solicitor
U.S. Department of Labor
230 S. Dearborn St., 8th Floor
Chicago, IL 60604

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 4, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ROSCOE RAY YOUNG	:	
v.	:	Docket No. KENT 98-254-D
LONE MOUNTAIN PROCESSING, INC.	:	

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

DECISION

BY: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), the Secretary of Labor timely filed a petition for review of Administrative Law Judge Gary Melick's decision dismissing the application for temporary reinstatement she had filed on behalf of Roscoe Ray Young pursuant to Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), and Commission Procedural Rule 45(f), 29 C.F.R. § 2700.45(f). *See* 20 FMSHRC 862 (Aug. 1998) (ALJ). Lone Mountain Processing, Inc. ("Lone Mountain"), timely filed its response in opposition. Upon consideration of all of the submissions,[1] we grant the petition for review. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

On September 3, 1997, in anticipation of being laid off the next day (September 4) from his position as a roof bolter at Arch of Kentucky's No. 37 mine, Roscoe Ray Young took a roof bolting test at Lone Mountain's Huff Creek No. 1 mine as part of the employment application

[1] The Secretary moved for leave to file a reply to Lone Mountain's brief in opposition, attaching her reply brief. Lone Mountain responded in opposition to the Secretary's motion. By majority vote of the Commission the Secretary's motion is granted, and her reply brief is accepted for consideration.

process. *Id.* at 862; Tr. 11-12. Later that month, he received a letter from Lone Mountain informing him that a job offer would not be forthcoming because he had failed to meet the requirement that he drill a minimum of 51.43 inches per minute during the test. Tr. 44-46; Gov't Ex. 1. Young claims that he failed to meet the minimum requirement because he encountered unsafe conditions during the test, conditions he immediately brought to the attention of Gary Sisk, Lone Mountain's Division Training Coordinator, who was administering the test. 20 FMSHRC at 862; Tr. 38-41, 50-51.

Young filed a discrimination complaint with MSHA on December 8, 1997, and on July 13, 1998, the Secretary filed a discrimination complaint on his behalf with the Commission in Docket No. KENT 98-255-D. 20 FMSHRC at 862-63; Tr. 16. Accompanying the complaint was the temporary reinstatement application, by which the Secretary seeks an order:

> directing [Lone Mountain] to immediately and on an expedited basis give Young a new roof bolting test under safe conditions and in the presence of an authorized representative of the Secretary, applying the same criteria for employment as [were] applicable on September 3, 1997 and, if successful, to immediately employ him as a roof bolter at the same rate of pay and with the same or equivalent duties assigned to him as from September 3, 1997.

Appl. for Temp. Reinst. at 3. Pursuant to Lone Mountain's request in response to the complaint and application, a hearing was held before the judge on July 30, 1998.

Following the hearing, Lone Mountain moved to dismiss the application based in part on the ground that Young was not a "miner" under the Mine Act for purposes of temporary reinstatement. 20 FMSHRC at 863-64. The judge granted the motion, reasoning that, with respect to reinstatement, section 105(c)(2) refers only to a "miner," and that the statutory definition of the term "miner" does not include an applicant for employment. *Id.* at 864. The judge was also persuaded by the absence of any reference in the temporary reinstatement provision to the term "applicant for employment," in comparison with its appearance eight other times in section 105(c)(1) and (2). *Id.* On review, the Secretary seeks reversal of the judge's decision. S. Pet. at 15.

II.

Disposition

The Secretary urges reversal of the judge's decision on the ground that the temporary reinstatement remedy in the Mine Act can be reasonably interpreted to apply to applicants for employment. *Id.* at 7-8. She contends that the term "miner" is used in connection with that remedy as a shorthand reference which includes applicants for employment. *Id.* at 8-10. She also argues that the legislative history of the statute in general, as well as the specific provisions

governing discrimination remedies, supports a construction of the statute extending the right to temporary reinstatement to applicants such as Young. *Id.* at 5-6, 10-12.

Lone Mountain submits that the judge's decision should be affirmed based on the plain meaning of the language employed in the Mine Act regarding temporary reinstatement. L.M. Br. at 2-12. It also claims that the Commission is without jurisdiction to consider Young's application because the complaint he filed with MSHA was untimely under the terms of the Mine Act. *Id.* at 12-13.

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

Section 105(c)(2) provides in pertinent part:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . [I]f 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. If . . . the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the

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[2] If the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin Coal Co.*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.

> Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. . . . The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to [this] paragraph.

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

We agree with the judge that the plain meaning of section 105(c)(2) limits application of the temporary reinstatement remedy to a "miner" who has filed a discrimination complaint, and that, as an applicant for employment, Young was not a complaining "miner" for purposes of the Mine Act. Examining the term "miner" as it is used in section 105(c)(2), we look first to the definition of that term in the Mine Act. *See Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996) (listing statutory definitions as first source of meaning for terms used in Mine Act). The definition of "miner" in section 3(g) of the Act does not include applicants for employment as miners, but instead limits the term to "any individual *working* in a coal or other mine." 30 U.S.C. § 802(g) (emphasis added). The Secretary has provided us with no explanation of how an applicant for employment can be considered to be a "miner" under that controlling definition.

Instead, the Secretary argues that the term "miner" is used with respect to the temporary reinstatement remedy as a shorthand reference to the pronouncement earlier in section 105(c)(2) that not just miners, but also applicants for employment and miners' representatives, may file discrimination complaints. S. Br. at 8-10. However, the language in section 105(c)(2) to which she directs us does not provide a clear indication that Congress was departing from the plain meaning of the term "miner" that is otherwise provided by statutory definition. This is necessary before we can even consider adopting the Secretary's interpretation of section 105(c)(2). *See CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive."). Accordingly, we decline to hold that the term "miner" is used as a shorthand reference in the temporary reinstatement provision to include applicants for employment.

Indeed, a careful reading of the statute contradicts the Secretary's assertion that "miner" is a shorthand reference for "miner or applicant for employment or representative of miners" in

the temporary reinstatement provision of section 105(c)(2). The temporary reinstatement clause is one of only two instances in which "miner" is used as a stand-alone term in section 105(c)(1) and (2).[3] In section 105(c)(1) and (2), Congress recited versions of the complete phrase "miner, applicant for employment, or representative of miners" eight times — in six instances before mentioning temporary reinstatement and two instances afterward. We find it highly unlikely that Congress would recite the complete phrase six consecutive times, then use a shorthand reference in referring to eligibility for the important and extraordinary statutory right of temporary reinstatement, only to immediately drop use of the shorthand reference and return to reciting the complete phrase (especially when establishing more mundane procedural formalities, such as service of the Secretary's subsequent discrimination complaint). Moreover, in section 105(c)(3), Congress in fact used the term "complainant" as a shorthand notation for those seeking relief under section 105(c). This indicates that where Congress wanted to use shorthand, it knew how to do so without resort to the term "miner." Absent any other indication that Congress, in specifying the circumstances in which a complaining "miner" could be temporarily reinstated, intended to depart from the definition of that term it set forth in the Mine Act, we conclude that the temporary reinstatement remedy does not extend to applicants for employment.[4]

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[3] The term "miner" is used once more in section 105(c)(2), in connection with the "affirmative action" the Commission may order a person found to have violated section 105(c) to take to abate such a violation. *See* 30 U.S.C. § 815(c)(2). However, Congress was careful to state that the referenced remedy — "the rehiring or reinstatement of the miner to his former position with back pay and interest" — is illustrative, and does not limit the range of remedies the Commission could order upon a finding of a section 105(c) violation. *Id.* Consequently, under section 105(c), the Commission has broad authority to remedy discrimination against applicants for employment as well as miners when the underlying merits of their cases have been considered and there have been findings of discrimination.

[4] Contrary to suggestions made by the Secretary (S. Pet. at 10-12), the legislative history of the Mine Act is silent regarding whether the remedy of temporary reinstatement extends to applicants for employment, and therefore provides no support for departing from the statute's definition of "miner." *See* S. Rep. No. 95-181 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978) ("*Legis. Hist.*"). We also reject the contentions of the Secretary and our dissenting colleague that references in section 105(c)(2) and its legislative history to the Commission's broad "make-whole" authority (*see* 30 U.S.C. § 815(c)(2); S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625) provide support for interpreting the temporary reinstatement remedy to extend to applicants. S. Br. at 12-13; slip op. at 10-11. The extraordinary remedy of temporary reinstatement is treated in the statute separately from the Commission's make-whole authority. It is also conditioned, not upon a finding of discrimination, but merely upon a showing that the miner's discrimination complaint is not frivolous. *See* 30 U.S.C. § 815(c)(2). The above-cited statutory language and legislative history, by contrast, relates to the Commission's authority to remedy violations of section 105(c) once there has been a finding of discrimination. Any such finding can only be made, however, once

Consequently, we affirm the judge's dismissal of Young's temporary reinstatement application. We emphasize that our decision should in no way be construed as an indication of our view of the merits of Young's discrimination complaint.[5] The Secretary and Young will have the same opportunity as individuals who have alleged discrimination in other cases to demonstrate before the judge whether discrimination violative of the Act has been perpetrated against Young. If they are successful in doing so, the Commission has authority to fashion an appropriate remedy to make Young whole at that time.[6]

Young's complaint has been heard on the merits. Therefore, contrary to the assertion of our dissenting colleague (slip op. at 11), our decision that an applicant for employment, such as Young, is not entitled to temporary reinstatement under section 105(c)(2) should not be construed as "clos[ing] the door" on the applicant's entitlement to full and complete relief designed to make him whole. It merely means that such relief is available when a final determination is made on the applicant's claim of discrimination, rather than at this preliminary stage of the proceeding.

[5] Indeed, because we dismiss Young's application on a purely legal basis, our decision here is not even an indication of whether his discrimination complaint otherwise meets the statutory standard for temporary reinstatement of not having been frivolously brought.

[6] We decline to address the question of whether Young's complaint to MSHA was timely under the terms of the Mine Act. *See* L.M. Br. at 13. That question is not properly before us in this temporary reinstatement proceeding in which the sole, dispositive issue is whether an applicant for employment can obtain the remedy of temporary reinstatement. The timeliness of Young's complaint is an issue that only can be addressed in the *separate* proceeding arising from that complaint, which is before the judge in Docket No. KENT 98-255-D.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision dismissing the temporary reinstatement application.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting:

I would reverse the judge's determination that the Commission lacks jurisdiction over the question of whether an applicant for employment of a mine may be temporarily reinstated as an applicant under Mine Act section 105(c)(2). That section provides in pertinent part:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may. . . file *a complaint* with the Secretary alleging such discrimination. Upon receipt of *such complaint*, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days . . . , 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*. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference . . . . The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to [this] paragraph.

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

When the Commission reviews the Secretary's construction of the Mine Act, we are confronted with two questions. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). First is the question "whether Congress has directly spoken to the precise question at issue." *Id.* If the intent of Congress is unambiguously clear, that is the end of the matter. *Id.* at 842-43. If, however, Congress has not directly addressed the precise question at issue, the Commission may not simply impose its own construction on the statute. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the Commission is whether the Secretary's answer is based on a permissible construction of the statute. *Id.* at 843.

Adhering to this *Chevron* analysis, I conclude that Congress did not unambiguously manifest its intent that the remedy of temporary reinstatement applies exclusively to miners and not to applicants for employment. In fact, section 105(c)(2) would seem to suggest otherwise. The first sentence of that section enables "any miner or applicant for employment or representative of miners" to bring a complaint with the Secretary alleging discrimination. The second sentence provides that "[u]pon receipt of *such* complaint," the Secretary shall forward the complaint to the respondent and commence an investigation. 30 U.S.C. § 815(c)(2) (emphasis added). The third and key sentence states:

> Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that *such* complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order immediate reinstatement of the miner pending final order on the complaint.

Id. (emphasis added). By using the word "such" to refer back to the complaint of any "miner or applicant for employment or representative of miners," section 105(c)(2) suggests that the complaint of a miner applicant, if not frivolously brought, could be subject to an immediate temporary reinstatement order.

Having found that Congress was, at the least, ambiguous on this issue, I turn to the second question under *Chevron*: whether the Secretary's interpretation is reasonable. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Techns., Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997).

The Secretary argues that the use of the term "miner" in the third sentence of section 105(c)(2) is a shorthand way of referring back to the three terms "miner," "applicant for employment," and "representative of miners." S. Pet. at 8-9 & n.1. Additionally, the Secretary argues that the term "reinstatement" in section 105(c)(2) encompasses reinstatement of an applicant for employment to the situation he was in before any discrimination occurred. *Id.* at 10. In support of her position, the Secretary relies on the definitions of "reinstate" that define the term to mean "to restore to a state or position from which the object or person had been removed," and "to replace in an original or equivalent state." *Id.* (citing Black's Law Dictionary 1287 (6th ed. 1990); Webster's Third New International Dictionary 1915 (1993)). The Secretary asserts that her interpretation is consistent with the legislative history and statutory purpose of section 105(c). *Id.* at 4-14.

I believe that the Secretary's interpretation is a reasonable and permissible construction of section 105(c). The legislative history on this issue is very clear that section 105(c) is to be "construed expansively" and that the full range of its remedies apply to miner applicants. S. Rep. No. 95-181, at 35-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-25 (1978) ("*Legis. Hist.*"). The report of the Senate Committee on Human Resources, the committee responsible for drafting the Mine Act ("Senate Committee") stated:

> Section [105(c)] of the bill prohibits any discrimination against a miner for exercising any right under the Act. It should also be noted that the class protected is expanded from the current [Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act")]. The prohibition against discrimination applies to miners, applicants for employment, and the miners' representatives. The Committee intends that the scope of protected activities be broadly interpreted by the Secretary . . . .
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> . . . .
>
> . . . . The wording of section [105(c)] is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section [105(c)] to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

S. Rep. No. 95-181, at 35-36, *Legis. Hist.* at 623-24.

Thus, Congress contemplated that applicants for employment could seek relief under the discrimination provisions of the Mine Act if they were exposed to unsafe work conditions as part of the application process. This is exactly what has been alleged to have happened here. The Secretary has alleged that applicant Roscoe Ray Young encountered unsafe roof conditions when he took a test to be a roof bolter for Lone Mountain, that he complained to the operator's agent of the unsafe conditions, that given the unsafe conditions he had to work slowly and was unable to complete the test in the time allotted by the operator, and, as a result, was not offered the roof bolting job. 20 FMSHRC at 862.

Pursuant to Congressional mandate that the Secretary "rigorously enforce" discrimination rights (S. Rep. No. 95-181, at 36, *Legis. Hist.* at 624), the Secretary has initiated this application for temporary reinstatement of Young to his status of applicant, seeking to give Young a new test

under safe conditions. Again, Congress has authorized this type of broad relief. The report of the Senate Committee provides:

> It is the Committee's intention that the Secretary propose, and that the Commission require, *all relief* that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. *The specified relief is only illustrative.*

S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625 (emphasis added). With this broad enforcement mandate, the Secretary has very reasonably interpreted the temporary reinstatement remedy provided in section 105(c)(2) to apply to complaints of applicants for employment. It is the Commission now, who by narrowly interpreting section 105(c)(2), is failing to adhere to Congressional mandate to require "all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct." S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625.

In addition, Congress made clear that this Commission was to construe the discrimination provisions under the Mine Act liberally, in a way so as to further the safety goals of the Act. The report of the Senate Committee expressly approved the judicial interpretations of the Coal Act discrimination provision that were contained in *Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir. 1974) and *Phillips v. Interior Board Of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974). S. Rep. No. 95-181, at 36, *Legis. Hist.* at 624. Both of those cases emphasized that the discrimination provisions contained in the Coal Act, the predecessor to the Mine Act, were of a remedial nature and as a consequence were to be liberally construed to enable achievement of legislative objectives. *Munsey*, 507 F.2d at 1210-11; *Phillips*, 500 F.2d at 781-83. Construing section 105(c)(2) liberally, as we are required to do by its remedial nature, leads to one inescapable conclusion: that this Commission has jurisdiction over the Secretary's proposed application for temporary reinstatement in this case.

Finally, the Senate Committee was also "aware that mining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity." S. Rep. No. 95-181, at 35, *Legis. Hist.* at 623. For this reason, it is essential that applicants for mining positions be protected from any unsafe working conditions and be able to bring cases for immediate relief should discrimination occur. Unfortunately, the Commission, by its decision today, has closed the door on an important remedy that could have protected applicants from unsafe conditions or discriminatory behavior.

For these reasons, I cannot join the majority and I dissent. I would remand to the judge to determine whether the Secretary's complaint has been frivolously brought pursuant to Mine Act

section 105(c)(2) and to address Lone Mountain's assertion that applicant Young's complaint was not timely.

Marc Lincoln Marks, Commissioner

Distribution

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Marco Rajkovich, Jr., Esq.
Wyatt, Tarrant & Combs
Lexington Financial Center, Suite 1700
250 West Main Street
Lexington, KY 40507

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 9, 1998

DISCIPLINARY PROCEEDING : Docket No. D 98-1

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

DECISION

BY THE COMMISSION:

This disciplinary proceeding arises under Rule 80 of the Commission's Procedural Rules, 29 C.F.R. § 2700.80.[1] On August 19, 1998, a Commission administrative law judge referred to

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[1] Commission Procedural Rule 80 provides in pertinent part:

> (a) Standards of conduct. Individuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.
>
> (b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct; has failed to comply with these rules or an order of the Commission or its Judges; has been disbarred or suspended by a court or administrative agency; or has been disciplined by a Judge under paragraph (e) of this section.
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> (c) Disciplinary proceedings shall be subject to the following procedure:
>
> (1) Disciplinary referral. . . . [A] Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral. . . .
>
> (2) Inquiry by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth

the Commission a matter which the judge believed may warrant disciplinary proceedings. The substance of the referral concerned guilty pleas entered by the representative of an operator in civil penalty proceedings to criminal violations of mandatory safety and health standards as well as to provisions of Title 18 of the United States Code. On the grounds explained below, we conclude that disciplinary proceedings are not warranted at this time and we dismiss without prejudice the disciplinary referral.

This matter arises in connection with a civil penalty proceeding, *Durbin Coal, Inc.*, Docket No. WEVA 98-65, that is currently pending before Administrative Law Judge William Fauver. In that proceeding, the operator contested various aspects of three MSHA civil penalty assessments on March 26, 1998. Contest of Civil Penalties, Ex. A. On May 5, the Secretary filed a Petition for Assessment of Civil Penalty as well as discovery. On June 1, an Answer to Discovery Request and Answer to Petition for Assessment of Penalty were filed on behalf of Durbin Coal, Inc. ("Durbin") by Connie J. Prater, "Consultant," on the letterhead of "Pra-Mac Enterprises Inc."

On June 15, 1998, the Secretary filed a Motion to Strike and Motion for Default, in which the Secretary asked the judge to strike the answers filed by Prater and to then find Durbin in default, or in the alternative for an order requiring Prater to "explain the manner by which she has satisfied the requirements of 29 C.F.R. § 2700.3."[2] S. Mot. to Strike and Mot. for Default at 3.

> their knowledge of relevant circumstances. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral.
>
> (3) Transmittal and hearing. Whenever, as a result of its inquiry, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, determines that the circumstances warrant a hearing, the Commission's Chief Administrative Law Judge shall assign the matter to a Judge, other than the referring Judge, for hearing and decision. . . .

29 C.F.R. § 2700.80.

[2] Commission Procedural Rule 3, entitled "Who may practice," provides in pertinent part:

> (a) Attorneys. Attorneys admitted to practice before the highest court of any State, Territory, District, Commonwealth or possession of the United States are permitted to practice before the Commission.
>
> (b) Other persons. A person who is not authorized to practice before the Commission as an attorney under paragraph (a)

By filings dated June 22 and June 29, 1998, the Secretary supplemented and amended her motion. Attached to the motion, as amended and supplemented, was a copy of a criminal information filed on January 12, 1995, by the United States Attorney in the United States District Court for the Eastern District of Kentucky. S. Mot. to Suspend Discovery and Mot. to Supplement, Addendum to Ex. B. The information alleged that Prater willfully violated 30 C.F.R. §§ 70.201, 70.207 and 70.208, as well as Mine Act section 110(d),[3] 30 U.S.C. § 820(d), the criminal penalty provision of the Mine Act, by submitting to MSHA on behalf of various mines respirable dust samples that "were fabricated outside of the mines or were otherwise not taken in accordance with the requirements of the Mine Safety Act." *Id.* at 1-2. Exhibit B to the Secretary's motion to strike was a judgment in *United States v. Prater*, Case No. 95-2-1 (E.D. Ky.), entered against Prater on April 19, 1995, for violation of 30 U.S.C. § 820(d) based on her plea of guilty to the information. Also attached to the motion was a copy of a judgment in *United States v. Pra-Mac Enterprises*, Case No. 94-26-S-1 (E.D. Ky.), entered against Pra-Mac Enterprises ("Pra-Mac") on April 18, 1995, for violation of 18 U.S.C. §§ 2 and 1001 based on its pleas of guilty to "count two of superseding indictment." S. Mot. to Strike and Mot. for Default, Ex. A. The indictment was not attached, but the offense is described in the judgment as "Willfully & knowingly falsify, conceal, & cover up & cause to be falisified [sic], concealed & covered up, material facts by submitting fraudulent respirable dust samples to [MSHA]; Aiding and Abetting[.]"[4]

> of this section may practice before the Commission as a representative of a party if he is:
>
> (1) A party;
>
> (2) A representative of miners;
>
> (3) An owner, partner, officer or employee of a party when the party is a labor organization, an association, a partnership, a corporation, other business entity, or a political subdivision; or
>
> (4) Any other person *with the permission of the presiding judge or the Commission.*

29 C.F.R. § 2700.3 (emphasis supplied).

[3] Section 110(d) subjects to criminal punishment "[a]ny operator who willfully violates a mandatory health or safety standard . . . ." 30 U.S.C. § 820(d).

[4] 18 U.S.C. § 1001 states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

In her motion, the Secretary complained that Durbin had failed to comply with Rule 3 of the Commission's Procedural Rules. S. Mot. to Strike and Mot. for Default at 1. The Secretary asserted that Prater is not an attorney admitted to practice in Kentucky or West Virginia, and that she is not otherwise authorized to practice before the Commission under Rule 3. *Id.* at 1-2. The Secretary noted the guilty pleas of Prater and Pra-Mac and suggested that "the judge withhold permission for Connie Prater to represent Respondent or any other party before the Commission." S. Amend't to Mot. to Strike and Mot. for Default at 1-2. She also argued that permission for Prater to represent Durbin should be denied because "Pra-Mac Enterprises Inc., the representative of Durbin Coal Incorporated through Prater . . . , pled guilty to a crime of moral turpitude implicating its tendency for truthfulness, and, thus, the judge and the Secretary have reason to question the reliability of any assertions in its pleadings." *Id.* at 2. In addition, the Secretary contended that, given Rule 80's authorization of disciplinary proceedings against an individual "who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct," the judge should not permit Prater to enter her appearance pursuant to Rule 3. *Id.* at 2 n.1*.

The firm of Patton Boggs, L.L.P. entered its appearance on behalf of respondent Durbin, and on July 1, 1998, filed Durbin's opposition to the Secretary's motion. Durbin asserted that it authorized Prater in writing to act as its agent in filings with MSHA and that she has submitted "dozens of plans and other documents to MSHA on behalf of Durbin." D. Opp'n at 3. Durbin stressed that the guilty pleas of Prater and Pra-Mac were the result of a plea bargain. *Id.* at 4, 6. It denied that either defendant was guilty of a crime of moral turpitude. *Id.* In explanation of Prater's failure to seek permission to practice before the Commission, Durbin stated that she was told by MSHA officials that she did not need to obtain counsel to contest citations on behalf of her clients. *Id.* at 4-5. Durbin also asserted that Prater entered appearances in the past by "filing Answers before the Commission in exactly the same way she did in this case, and those appearances have been routinely accepted without comment." *Id.* at 5. Durbin argued that the Commission has routinely accepted the appearance of non-attorneys under Rule 3, and that an investigation of the background of applicants under that rule would be inappropriate. *Id.* at 6. Durbin also contended that any inappropriate conduct may only be examined pursuant to a disciplinary referral under Rule 80. *Id.* at 7. In this connection, Durbin suggested that the judge consider referring to the Commission under Rule 80 alleged misconduct of the Solicitor, consisting of his asserted "misreading of the law, and other unsubstantiated or wrong claims," as well as his alleged failure to "check[] his facts" and his purported "slander[of Prater's] reputation and integrity." *Id.* at 7-9. Durbin asserted that, under Rule 80, only misconduct occurring in the litigation before the Commission, and not a representative's past conduct, has been a basis for a disciplinary proceeding before the Commission. *Id.* at 8. Durbin requested that Prater be allowed to represent it in the civil penalty proceeding. *Id.*

To date, the judge has not ruled on the Secretary's motion to strike or Durbin's motion under Rule 3 to permit Prater to represent it. On August 18, 1998, the judge made the instant disciplinary referral, attaching the criminal information and judgments submitted by the Secretary in the civil penalty proceeding. According to the judge, those documents "contain information

that may warrant disciplinary proceedings against Connie Prater, who practices before this Commission." Disc. Referral at 1.

In our view, this disciplinary referral is premature. Because the referral was made before the completion of the underlying proceeding, the civil penalty docket continues before the judge. Under Rule 3(b)(4), non-attorneys and individuals not described in subsections (b)(1) through (b)(3) are required to obtain permission from the presiding judge or the Commission to practice before this agency. The judge has yet to rule on Durbin's request under Rule 3 that Prater be allowed to represent it. Thus, it has yet to be determined whether Prater will be practicing before the Commission in the matter that gave rise to this referral. Depending on the outcome of Durbin's request to permit Prater to practice, the Rule 80 proceeding may become moot. In any event, we conclude it is unwise for the disciplinary proceeding to continue while the Rule 3 question is still pending, given the possibly overlapping nature of the two matters.

Accordingly, we terminate this disciplinary referral without prejudice, and express no opinion on whether Prater's guilty pleas warrant disciplinary proceedings under Rule 80.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Connie Prater, Consultant
Durban Coal, Inc.
2057 KY Rt. 850
David, KY 41616

Carl Kirk
Durbin Coal, Inc.
2901 Mayo Trail
Catlettsburg, KY 41129

Henry Chajet, Esq.
David Farber, Esq.
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

Yusuf Mohamed, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 516
Arlington, VA 22203

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 9, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. LAKE 98-197-M A.C. No. 20-03036-05502
BAILEY SAND & GRAVEL CO.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 17, 1998, the Commission received from Bailey Sand & Gravel Co. ("Bailey") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Bailey.

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

In its motion, Bailey requests relief from the final order, but offers no explanation of the reasons for its failure to avoid entry of the final order. We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g.*, *Del Rio, Inc.*, 19 FMSHRC 467, 467-68 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1110-11 (July 1995) (remanding final order when operator misplaced hearing request card); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We also have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the

failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

On the basis of the present record, we are unable to evaluate the merits of Bailey's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Bailey has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Jerald W. Bailey
Bailey Sand & Gravel Company
1060 Toro Drive
Jackson, MI 49201

Sheila Cronan, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 16, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 94-57
CONSOLIDATION COAL COMPANY	:	

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

DECISION

BY: Jordan, Chairman; Marks, and Riley, Commissioners

In 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"), the Secretary of Labor has sought review of Administrative Law Judge David Barbour's determination that a violation of 30 C.F.R. § 75.1101-23(a)[2] by Consolidation Coal Company ("Consol") was not significant and substantial ("S&S").[3] 18 FMSHRC 1189 (July 1996) (ALJ). The Commission granted the Secretary's

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[1] Commissioner Beatty recused himself from this matter and took no part in its consideration.

[2] Section 75.1101-23(a) provides in part:

> Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency.

30 C.F.R. § 75.1101.23(a).

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

petition for discretionary review. For the reasons that follow, we vacate the judge's S&S determination, and remand for further consideration.

I.

Factual and Procedural Background

Consol engages in longwall mining at the Blacksville No. 2 Mine, an underground coal mine in Monongalia County, West Virginia. 18 FMSHRC at 1190, 1191. On March 15, 1993, there were two fire detection systems in the belt entry of the 16-M longwall section of the mine: a heat sensor system, and a carbon monoxide ("CO") detector system. *Id.* at 1194. A CO sensor was installed at the belt drive, another at the regulator, and one every 1000 feet along the beltline toward the face, which was approximately 40 blocks[4] from the mouth of the section. Tr. 30-31, 63-65, 350-52; Gov't Ex. 2. The CO monitoring system on the 16-M section was partially installed, in that a final sensor and an outstation had yet to be installed. 18 FMSHRC at 1195, 1208-09.

The 16-M beltline was ventilated by two splits of air. Tr. 966-68. One air current flowed outby from the longwall face, down the beltline until it entered the return at the regulator. Tr. 72-73, 967. The other air current flowed from the transfer point inby through a box check,[5] over the belt drive, through a second box check, and into the regulator. Gov't Ex. 3; Tr. 72-73, 966-67. The 17-M longwall section was inby the 16-M section in terms of ventilation. 18 FMSHRC at 1216.

On March 15, 1993, Danny Ammons, a miner in charge of the 16-M belt transfer area, traveled to the belt tailpiece to take slack out of the belt. *Id.* at 1202. When he stepped through the first of two airlock doors located at the box check near the belt drive, he noticed smoke and haze around the belt. *Id.* at 1203. When he opened the second door, he observed more smoke and a sudden flare of flames. *Id.* Ammons called the tipple to report the fire. *Id.*

After receiving Ammons' call, the miner at the tipple reported the fire to Gary Kennedy, who was in charge of the 16-M headgate, and to Kenny Stewart, the mine's dispatcher. *Id.* at 1196, 1201-02. While Kennedy was speaking with the tipple man, the heat sensor alarm at the tailpiece activated, confirming the occurrence of the fire on the beltline. *Id.* at 1196. Kennedy turned off the alarm, disconnected the power at the longwall face, and telephoned Ronald Griffin, the shieldman on the section, and informed him that there was a fire on the belt drive and to assemble the crew members at the headgate. *Id.* at 1197, 1198-99.

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[4] One block is equivalent to approximately 90 to 100 feet. Tr. 176-77, 273.

[5] A box check is a stopping containing doors and an opening for the belt, which restricts air flow. Tr. 36.

Dispatcher Stewart activated flashing lights above the mine telephones in the 16-M and 17-M sections, and contacted Mine Superintendent John Straface, and Assistant Superintendent Samuel McLaughlin, among others, and informed them of the fire. *Id.* at 1190, 1202, 1223. Superintendent Straface ordered Robert Welch, a foreman who was coordinating with the dispatcher, to take charge of the situation. *Id.* at 1190, 1217, 1220. Welch told the dispatcher to turn on other emergency lights and to send a water car to the area. *Id.* at 1218. Assistant Superintendent McLaughlin traveled to the site of the fire. *Id.* at 1222-23.

At approximately the time that Ammons had discovered smoke and flames on the beltline, Tim Nester, the 16-M foreman, noticed the 16-M belt slowing and coming to a stop. *Id.* at 1204. About the time that the belt stopped, Nester observed smoke coming through the box check near the regulator, and down the return to the regulator. *Id.* He then saw Ammons, and the two traveled down the track entry and back to the box check near the belt drive. Tr. 313-15. Nester and Ammons put on self rescue devices and walked through the set of airlock doors in the box check. 18 FMSHRC at 1203, 1204. Nester and Ammons observed that one of the sprays of the fire suppression system was spraying water and that there were no flames.[6] *Id.* Nester walked up the left side of the belt to the box check near the regulator, walked through the box check, looked up the belt, crossed the belt, walked through the door on the other side, and walked back to the belt drive. 18 FMSHRC at 1204; Tr. 316-17. Nester called Mine Superintendent Straface and told him that the fire was out and that "everything was okay." 18 FMSHRC at 1204.

Meanwhile, after receiving Headgateman Kennedy's call, Shieldman Griffin, Shear Operator Harold Zupper, Jr., and Harold McClure, the shear operator's helper, left the face and met Kennedy at the headgate. *Id.* at 1197, 1199, 1201. Kennedy and the crew members discussed the route they would take to evacuate. *Id.* at 1197. Kennedy noticed that Gerald Freeland, the 16-M longwall coordinator, was missing, and Kennedy left to go find him. *Id.* at 1197, 1199; Tr. 162. During this time, Foreman Welch spoke with the crew members by telephone, instructing them to gather together. 18 FMSHRC at 1199, 1230. Zupper telephoned Welch to inform him of the route that they would be taking to evacuate. *Id.* at 1199, 1200; Tr. 221-22. Welch informed him that the fire was out, and that the crew should stay together on the section. 18 FMSHRC at 1199-1201, 1219. The crew remained on the 16-M section and did not evacuate the mine. *Id.* at 1199, 1200. In addition, miners were not evacuated from the 17-M section of the mine. *Id.* at 1230.

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[6] The exact duration of the fire is disputed. Ammons estimated that the fire lasted for approximately three minutes. Tr. 296; *see also* Tr. 690, 840-41(Consol's witnesses' testimony regarding the brief duration of the fire). Inspector Shriver testified that the CO monitor print-out indicated that there had been enough CO to activate the alarm from 11 to 17 minutes. Tr. 375, 416-17. Consol's expert, Donald Mitchell, testified that the fire was of a short duration, lasting approximately three minutes, and explained that the high CO reading was a by-product of the wetness of the wood, belting and coal in the area of the fire, and the CO collecting at a point in the ceiling above the belt where the airflow was restricted and the CO sensor was located. Tr. 961-62, 981-88, 1017-1019.

On March 17, miner representatives informed Spencer Shriver, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), of the circumstances surrounding the fire. *Id.* at 1206. Inspector Shriver relayed the information to Richard McDorman, an MSHA inspector who regularly inspected the mine. *Id.* at 1210. Inspectors Shriver and McDorman investigated the incident. *Id.* As a result of the investigation, the inspectors issued four orders, including the order alleging an S&S and unwarrantable violation of section 75.1101-23(a) for Consol's failure to evacuate miners from the 16-M and 17-M sections of the mine after the beltline fire. *Id.* at 1190. In addition, a special investigation of the fire resulted in the issuance of orders under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), to Foreman Welch, Superintendent Straface, and Assistant Superintendent McLaughlin for their conduct related to the alleged violation of section 75.1101-23(a). *Id.* at 1190-91.

Consol, Welch, Straface, and McLaughlin challenged the orders and the matter proceeded to hearing before Judge Barbour. *Id.* at 1191. At the hearing, the parties settled three of the four orders issued to Consol, leaving at issue only the order alleging a violation of section 75.1101-23(a). *Id.* at 1244-45. In addition, the Secretary moved to dismiss the section 110(c) allegations against McLaughlin, and the judge granted the motion. *Id.* at 1238-39.

As to the remaining orders, the judge concluded that Consol had violated section 75.1101-23(a), that the violation was not S&S, although it was caused by Consol's unwarrantable failure, and that Welch and Straface were individually liable for the violation. *Id.* at 1229-37, 1239-44. The judge based his S&S determination on his finding that the Secretary had failed to prove that there was a reasonable likelihood that the three hazards contributed to by the violation, that is, fire intensification, fire rekindling, and suffocation by smoke and fumes, would result in injury. *Id.* at 1233-34. The judge first reasoned that it was not reasonably likely that the fire at the belt drive would intensify if normal mining conditions had continued because the fire was either out when the miners on the 16-M and 17-M sections had not been withdrawn or was extinguished shortly thereafter. *Id.* at 1233. Second, he explained that, even if the fire had rekindled up the belt, it was not reasonably likely that the fire would result in injury because there were heat sensors and CO monitors along that belt that would have detected the presence of another fire, and made its rapid extinguishment likely. *Id.* Finally, the judge concluded that, given the mine's ventilation system, it was not reasonably likely that the smoke and fumes would have gone to the face, suffocating miners. *Id.* at 1233-34. Although he concluded that the violation was not S&S, the judge determined that it was very serious and assessed a civil penalty of $4,000, rather than the penalty of $5,000 proposed by the Secretary. *Id.* at 1238.

The Secretary filed a petition for discretionary review, challenging the judge's S&S determination, which the Commission granted.

II.

Disposition

The Secretary argues that the judge erred in finding that Consol's violation of section 75.1101-23(a) was not S&S. First, she contends that the judge failed to apply the correct legal standard for determining whether a violation is S&S.[7] S. Br. at 9-13. Specifically, the Secretary asserts that the judge erred in relying upon his finding that the fire was extinguished quickly, and that the correct question was not whether the fire was in fact extinguished quickly but, whether in all of the circumstances, it was reasonably likely that it would be extinguished quickly. *Id.* at 11-13. Second, the Secretary argues that the judge erred by failing to address or inadequately addressing material evidence that established the violation as S&S, and erred by relying upon evidence relating to the fire detection, fire suppression, and ventilation systems which the court in *Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995), determined was improper for consideration. *Id.* at 13-19. The Secretary requests that the Commission vacate the judge's S&S determination and remand for analysis of all relevant evidence under the correct standard. *Id.* at 19.

Consol responds that the judge correctly determined that the violation was not S&S. C. Br. at 10. It argues that the judge was correct in considering the rapid extinguishment of the fire because the failure to evacuate after a brief fire did not pose the hazards associated with active fires of greater duration and intensity. *Id.* at 13-14. In addition, Consol contends that the judge addressed all material evidence and that the Secretary is, in effect, requesting that the Commission reweigh the evidence. *Id.* at 9, 20, 24. It asserts that *Buck Creek* is distinguishable from the present case and that the judge did not err in considering the existence of the safety measures in place. *Id.* at 15-16. Accordingly, Consol requests that the Commission affirm the judge's S&S determination. *Id.* at 24-25.

In assessing the reasonable likelihood of injury to miners who had not been evacuated from the mine, the judge considered, among other things, the risk of harm posed by the potential of the extinguished fire to rekindle a new fire along the belt line. The judge concluded that there was no risk of injury because, even if burning embers from the original fire had rekindled a fire further up the belt line, the heat sensors and CO monitors along that belt would have detected the presence of another fire and made its rapid extinguishment likely. 18 FMSHRC at 1233.

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[7] In her petition for discretionary review, the Secretary argues that when a violation causes conditions which have the potential for resulting in catastrophic results for miners, the Secretary's burden for establishing the likelihood of injury should be substantially less. PDR at 10. The Secretary did not address this argument in her brief. Accordingly, because the Secretary abandoned the argument, we need not reach it. *RNS Servs., Inc.*, 18 FMSHRC 523, 526 n.6 (Apr. 1996).

Assuming arguendo that a judge may properly consider a mine's fire detection and fire suppression system as factors mitigating the hazards associated with a mine fire, the judge erred when he relied on the systems here to discount the likelihood of harm from a rekindling fire. In reaching his conclusion the judge ignored evidence that the heat sensor system, which activates the fire suppression system and had been damaged during the fire, had been turned off after the fire and had not been turned on until the midnight shift on March 16. Tr. 68, 378-79, 507, 1010-12. In addition, the judge failed to address testimony that the CO sensor at the regulator had been placed at an incorrect location so that it would have failed to detect any fire between the belt drive area and the regulator inby the belt drive area. Tr. 354, 356, 378, 434-35, 483. The judge also failed to address evidence that there had been a programming error with the CO sensor located at the belt drive so that there may have been no CO monitoring at the belt drive between March 15 and March 23. Tr. 379-81, 387, 424-26, 432-33.

In light of this evidence, it was unreasonable for the judge to conclude that the presence of these systems eliminated the risk of harm from a fire that might rekindle up the belt line. We therefore vacate the judge's S&S determination and remand for the judge to reconsider whether there was a reasonable likelihood that the hazard of rekindling a fire would result in injury.

On remand, the judge shall set forth his findings on the likelihood of rekindling occurring outby the belt drive, where the belt had been damaged (Tr. 297, 746-47, 868-69) and the direction in which the belt had been moving (Tr. 59-61; Gov't Ex. 3, 5; 18 FMSHRC at 1193). In addition, the judge shall not consider evidence of Consol's fire detection and fire suppression systems as factors mitigating the hazard.[8]

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[8] In light of our disposition of this issue, we do not address the Secretary's argument that the court's decision in *Buck Creek*, 52 F.3d at 135, precludes a judge from ever considering evidence of a mine's fire detection, fire suppression, and ventilation systems in making an S&S determination. S. Br. at 17-19. Furthermore, as there was not a majority of Commissioners who either agreed or disagreed with any of the other points of error raised by the Secretary in this appeal, with one minor exception, we do not address them. As to that exception, we conclude that the judge did not err in failing to rely upon evidence of fires at other mines.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Consol's violation of section 75.1101-23(a) was not S&S and remand for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Commissioner Verheggen, dissenting:

I disagree with the result my colleagues reach. Rather than order a remand as they do, I would affirm as supported by substantial evidence the judge's determination that Consol's violation of section 75.1101-23(a) was not S&S. I therefore dissent.

1. Rapid extinguishment of the fire

I disagree with the Secretary's argument that the judge erred in relying upon his finding that the fire was extinguished quickly in making his S&S determination. *See* S. Br. at 11-13; PDR at 12. In *Lion Mining*, the Commission held that "an S&S determination must be based on the particular facts surrounding the violation." 18 FMSHRC 695, 699 (May 1996). Here, the violation at issue was the failure to evacuate miners in accordance with the mine's evacuation plan after the belt entry fire had ignited and been extinguished. Rapid extinguishment of the fire was one of the particular facts surrounding the violation that had an important bearing on the likelihood that injury was reasonably likely to result to miners remaining in the mine.

2. Fire detection, fire suppression, and ventilation systems

Citing the *Buck Creek* decision of the Seventh Circuit (52 F.3d at 135), and Commission cases following it, the Secretary argues that the judge erred in relying upon the presence of fire detection, fire suppression, and ventilation systems as support for his conclusion that the violation was not S&S. S. Br. at 13-19. I find *Buck Creek* and its progeny distinguishable, however, because those decisions involved accumulations where the focus is on whether a confluence of factors exists to create an ignition or explosion in the first instance. *See Buck Creek*, 52 F.3d at 134; *Amax Coal Co.*, 18 FMSHRC 1355, 1359 n.8 (Aug. 1996); *Amax Coal Co.*, 19 FMSHRC 846, 849-50 (May 1997). The focus here, however, where an evacuation violation is at issue, is on the reasonable likelihood of injury to miners who had not been evacuated from the mine after an ignition had occurred and been extinguished. The mine's fire detection, fire suppression, and ventilation systems are clearly relevant to such a determination because they could affect whether a secondary fire would be of a limited nature and readily contained, and whether smoke and fumes would migrate to miners remaining in the mine.

3. Consideration of material evidence

The Secretary also argues that the judge erred by failing to address or by inadequately addressing material evidence that she asserts proved that the violation was S&S. S. Br. at 13-17. Specifically, she points to evidence relating to fires at other mines where miners had not been evacuated, and the hazards of fire intensification, suffocation from smoke and fumes, and fire rekindling. *Id.* I begin by noting that "[i]t would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record." *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993). When reviewing an administrative law judge's factual determinations, the Commission is bound by the

terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989). In this case, I find that, in general, the judge properly weighed the evidence, and that, more importantly, his S&S determination is amply supported by the record.

I agree with my colleagues "that the judge did not err in failing to rely upon evidence of fires at other mines." Slip op. at 6 n.8. Contrary to the Secretary's assertions, the judge considered evidence regarding fires at other mines where miners had not been evacuated. *See* 18 FMSHRC at 1196, 1210-11. Nor did he err in declining to give this evidence any weight when making his S&S determination because the Secretary failed to demonstrate the similarity in circumstances between those fires and the fire here. For instance, MSHA Inspector Raymond Strahin testified that during the fire at the Marianna Mine, the fire suppression devices were not operational and the fire burned out of control. Tr. 50-51, 89-90. In contrast, here there can be no dispute that the fire never approached being out of control. *See* Tr. 981-82 (testimony of Donald Mitchell, Consol's expert, that here, "there was hardly any fire," and what fire there was was of short duration and low intensity). The fire at the Blacksville One mine also differed markedly from the fire at issue here. The Blacksville One fire ignited in a track entry, rather than a belt entry, which would have affected the manner in which smoke migrated to areas where miners remained. Tr. 53-55, 95; *see* C. Br. at 19 n.6.

I also find that the judge did not err by failing to address the Secretary's evidence regarding the possibility of the fire intensifying. Such evidence regarding the potential nature of the fire was irrelevant to the judge's determination in view of his finding that "[t]he fire either was out when the miners on the 16-M and 17-M [sections] were not withdrawn or was extinguished shortly thereafter." 18 FMSHRC at 1233. Nor do I find in error the manner in which the judge addressed evidence regarding the effect of the mine's ventilation on the smoke and fumes resulting from the fire. Contrary to the Secretary's assertions, the judge made direct reference to MSHA Supervisory Engineer Harry Verakis' testimony that smoke and gases could have leaked into adjacent entries. *Id.* at 1212-13. The judge specifically discredited such testimony, however, and credited the testimony of Inspector McDorman and Consol's expert, Donald Mitchell, that the ventilation system would have carried smoke and toxic fumes away from the section and out the return. *Id.* at 1234. In addition, although the judge did not directly refer to MSHA Supervisory Engineer Verakis' testimony that, given the velocity of air at the belt transfer point, the fire in this case had the potential to reverse airflow, allowing smoke to roll back against the flow of ventilation (S. Br. at 15), the judge indirectly referred to such testimony and rejected it in view of Mitchell's contrary testimony that smoke would not have reversed and moved from the belt entry to the face barring a fire of major intensity lasting up to 10 hours. 18 FMSHRC at 1234; Tr. 971-73. The Secretary has provided no basis for overturning the judge's credibility determination. *See Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984) (when judge's finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff'd*, 766 F.2d 469 (11th Cir. 1985).

My colleagues direct the judge "to reconsider whether there was a reasonable likelihood that the hazard of rekindling a fire would result in injury," and to make findings on the likelihood of rekindling occurring outby the belt drive. Slip op. at 6. I have reviewed the record, however, and find that the Secretary failed to establish either that the fire rekindled or that there was any likelihood of the fire rekindling. She did not, for instance, establish the existence of any combination of combustible materials and incendiary materials left from the fire (i.e., an ignition source). Indeed, there is no evidence in the record that any incendiary materials were present in the general vicinity of where the fire occurred after it had been extinguished. Moreover, the belt shut down soon after the fire started (18 FMSHRC at 1204; Tr. 138, 272), and there is no evidence that any incendiary materials were transported outby the area of the fire before the belt stopped.

Even had the fire rekindled, I find no evidence in the record that any persons were outside the area where firefighting took place who could have been endangered. In light of the judge's findings with respect to the mine's ventilation, only persons in entries ventilated with return air outby the area of the fire would have been endangered by rekindling, yet the Secretary introduced no evidence that any miners were in such areas.

I agree with my colleagues that the judge erred by basing his finding regarding rekindling solely on the presence of heat sensors and CO monitors. *See* 18 FMSHRC at 1233; slip op. at 6. This finding is clearly erroneous since the record indicates that neither the heat sensor system nor any CO monitors would have detected rekindling.[1] Slip op. at 6. I find the judge's error harmless, however, in light of the Secretary's failure to adduce any evidence, as noted above, that rekindling could have occurred in the first instance.

Accordingly, I would affirm the judge's finding that Consol's violation of the cited standard was not S&S, and thus dissent from my colleagues' remand order.

Theodore F. Verheggen, Commissioner

[1] The record is unclear, however, as to whether the mine's fire suppression system was also inoperable after the initial fire. *See* Tr. 1011 (describing the mine's sprinkler system as controlled by a type of "sensor that is not too unlike a thermo-tech sensor except it is a far more rapid responding device"); Tr. 280 (Ammon's testimony that he replaced fire sensors on sprinklers after the fire); Tr. 400, 408 (the sprinkler system was fully operational two days after the fire).

Distribution

Robin Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Stephen D. Williams, Esq.
Steptoe and Johnson
P.O. Box 2190
Clarksburg, WV 26302

Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 22, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. EAJ 96-3
CONTRACTORS SAND AND GRAVEL, INC.	:	

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

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

This is a proceeding involving the recovery of attorney's fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (1996) ("EAJA"). Administrative Law Judge August F. Cetti ordered the Secretary of Labor to pay attorney's fees and expenses following an application for fees filed by Contractors Sand and Gravel, Inc. ("CSG"), after CSG prevailed over the Mine Safety and Health Administration ("MSHA") in a proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). 18 FMSHRC 1820 (Oct. 1996) (ALJ). The Secretary filed a petition for discretionary review with the Commission challenging the judge's award and, after the Commission granted the Secretary's petition, CSG filed a motion to dismiss for lack of jurisdiction over the Secretary's appeal.

For the reasons that follow, we reject CSG's contention that the Commission lacks jurisdiction over the Secretary's appeal, reverse the judge's holding that the Secretary's legal position on the merits was not substantially justified, and vacate his award of attorney's fees and expenses.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

CSG operated the Montague Plant, a small portable sand and gravel surface mining operation located near Yreka in north central California. *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 384 (Mar. 1996) (ALJ). The plant employed two workers and produced 10,000 to 15,000 tons of rock annually. *Id.* CSG's general manager, Eric Schoonmaker, oversaw plant operations and was responsible for coordinating equipment maintenance and repair and for ensuring the safety of operations. *Id.* Schoonmaker also oversaw operations at another CSG operation near Yreka, the Scott River Plant. *Id.*

On March 10, 1993, MSHA conducted an inspection at the Montague Plant and issued several citations. *Id.* at 385. MSHA Inspector Ann Frederick observed two electrical motors mounted on a crusher that she believed were improperly grounded because "[t]he frame of the crusher was being used as the grounding conductor." *Id.*; Citation No. 3911909. Inspector Frederick issued a citation to CSG charging a violation of 30 C.F.R. § 56.12025,[1] in which she stated that "[e]ffective equipment grounding conductors have not been installed . . . . Frame grounding has been forbidden for over fifteen years." *Id.* No tests were performed at the time the citation was issued to determine whether the motors were, in fact, grounded. 18 FMSHRC at 386. MSHA subsequently proposed a $7,000 penalty against CSG, and a $6,000 penalty against Schoonmaker pursuant to section 110(c) of the Mine Act.[2] *Id.* at 385, 389. CSG contested the penalty assessments and the case was assigned to Judge Cetti.

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[1] Section 56.12025 provides:

> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

[2] Section 110(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) of this section or section 105(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c).

In July 1994, the judge issued a default order against CSG. Order dated July 21, 1994. Subsequently, CSG requested relief from the Commission, and the case was remanded to the judge to determine whether relief from default was warranted. 16 FMSHRC 1645, 1646 (Aug. 1994). There is no indication that the judge ever made such a determination. Following remand, CSG failed to respond to the judge's September 1, 1994 prehearing order, and he again issued a show cause order. Order dated Nov. 16, 1994. By early December 1994, CSG retained its present counsel who asked for additional time to respond to the prehearing order.

In October 1995, CSG and the Secretary filed cross motions for summary decision, each arguing that there were no material facts in dispute. On March 25, 1996, the judge issued his Summary Decision in which he vacated the citations and penalties against CSG and Schoonmaker. 18 FMSHRC at 389.[3] He explained that the cited standard "plainly and clearly requires that 'metal enclosing . . . electrical circuits shall be grounded,'" and that the standard "does not specify or require that the operator achieve an effective ground in a specific manner." *Id.* at 387. The judge further found that CSG complied with section 56.12025 because, as demonstrated in resistivity tests conducted by CSG, "the motors in question were connected with the ground to make the earth part of the circuit.[4] There is no contrary evidence." *Id.* at 387-88 (footnote added).

The judge rejected the Secretary's argument that frame grounding constitutes a per se violation of section 56.12025, noting that this position amounted to an attempt "through interpretation to expand the regulation beyond its plain meaning." *Id.* at 388. He also reasoned that "a reasonable, prudent person familiar with the mining industry would have recognized that the two motors . . . were 'grounded' and were, thus, in compliance with [section 56.12025]." *Id.* In support of his conclusion, the judge cited decisions of two other Commission judges who had rejected the theory that frame grounding is a per se violation of section 56.12025. *Id.* at 389 (citing *Mulzer Crushed Stone Co.*, 3 FMSHRC 1238 (May 1981) (ALJ), and *McCormick Sand Corp.*, 2 FMSHRC 21 (Jan. 1980) (ALJ)).

B. The EAJA Proceeding

After the judge rendered his decision, CSG timely filed with the Commission an application for fees and expenses pursuant to EAJA. In its application, CSG stated that it was the prevailing party in the Mine Act proceeding, that it had fewer than 500 employees and a net worth under $7 million, and that the position of the Secretary in the underlying proceeding was

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[3] The judge appended his Summary Decision in the Mine Act proceeding to his October 28, 1996 EAJA decision. 18 FMSHRC at 1837.

[4] On September 15, 1992, Schoonmaker conducted resistivity tests on the circuits that indicated that there was an effective path to the ground from both of the motors. 18 FMSHRC at 388.

not substantially justified. CSG sought attorney's fees and expenses totaling $20,715.12. In several amendments to its application, CSG sought an award of $41,155.05.

In response to CSG's application, the Secretary argued that his position was substantially justified because it had a reasonable basis in law and fact. S. Answer at 2-5. The Secretary further argued that CSG's fee request was excessive because CSG sought fees in excess of the maximum rate of $75 per hour set forth in EAJA and because some of the fees sought were not attributable to the defense of the case in which CSG prevailed. *Id.* at 6-7. Finally, the Secretary objected to some of the costs included in the application, including various office expenses and interest on unpaid bills. *Id.* at 7.

The judge granted CSG's application. 18 FMSHRC at 1835. He noted first that it was undisputed that CSG was a prevailing party in the underlying proceeding and that it met the eligibility requirements of EAJA. *Id.* at 1821. On the question of whether the Secretary's position on the merits was substantially justified, the judge noted that he had "clearly indicated" in his decision in the underlying proceeding that "the Secretary's position was unreasonable." *Id.* at 1822. The judge concluded that any interpretation that "ignores the plain meaning of a cited standard, is per se unreasonable," and that "there is no reasonable interpretation of the facts that supports the Secretary's theory that the motors were not effectively grounded." *Id.* at 1822-23. Accordingly, the judge held that the Secretary's position in the underlying proceeding was not substantially justified. *Id.* at 1824.

The judge adopted the apportionment suggested in CSG's application to distinguish between fees and expenses that would be recoverable and those that would not because they were incurred in defending other citations. *Id.* at 1824-27. The judge also held that he had the discretion to increase EAJA's cap on the hourly rate of fees, and that increases in the cost of living justified a retroactive increase in the rate from $75 to $121.50 per hour in the underlying Mine Act proceeding. *Id.* at 1827-30. With regard to expenses, the judge determined that the office expenses of CSG's counsel attributable to the case would ordinarily be billed to clients and, therefore, should be recoverable from the government. *Id.* at 1830-31. As to CSG's request for interest, the judge found it was a reasonable cost of providing legal services and would not have been incurred but for the Secretary's unreasonable enforcement action. 18 FMSHRC at 1831-32. Finally, the judge held the EAJA proceeding was an "adversary adjudication," within the meaning of EAJA, separate and distinct from the underlying merits proceeding. *Id.* at 1834. He consequently determined that, because the EAJA proceeding was an adversary adjudication initiated after the effective date of the EAJA amendments (Mar. 29, 1996), the higher fee rate of $125 per hour in the amendments was applicable. *Id.* at 1835. Therefore, the judge concluded that CSG was "entitled to recover fees and expenses incurred in connection with its EAJA application," and that CSG had "not unduly or unreasonably protracted [the] EAJA proceedings." *Id.* at 1832-35. He ordered the Secretary to pay CSG $41,155.05 in fees and expenses. *Id.* at 1835.

II.

Disposition

A. Jurisdiction

After the Commission granted the Secretary's petition for discretionary review, CSG filed a motion to dismiss the petition. CSG argues in its motion that review of the judge's decision is contrary to the "distinct and noticeable absence of any provision for Commission review in the EAJA." CSG Mot. to Dismiss at 15. To the contrary, according to CSG, the reference in EAJA section 504(a) to "the adjudicative officer" indicates an intent to preclude administrative appeals in EAJA cases. *Id.* at 12-14.

CSG further argues that, by not providing for review of EAJA determinations, Congress intended to encourage agencies to appeal adverse determinations in underlying proceedings pursuant to their enabling statutes, rather than use EAJA proceedings to re-litigate issues on which review was not sought. *Id.* at 15-17. CSG contends that agency review of a judge's EAJA decision undermines the purpose of the statute by allowing delay of the payment of fees and expenses without payment of interest, and that review is not "rational" because the judge's decision is entitled to deference, leading to only marginal benefits on review. *Id.* at 18-19. Finally, CSG asserts that the Commission's EAJA rules preclude the Secretary from appealing an award because those rules only explicitly require a judge to set forth in full the reasons for a *denial* of a fee request. *Id.* at 20-22 (citing 29 C.F.R. § 2704.307).

In response, the Secretary argues that CSG's position is contrary to the language and legislative history of EAJA. S. Br. at 7-8. The Secretary also notes that model agency EAJA rules developed by the Administrative Conference of the United States, upon which the Commission rules were based, provided for such appeals because unreviewable adjudicative officer decisions would be inconsistent with traditional agency practice. *Id.* at 8 n.6.

We find CSG's arguments unpersuasive. The language in the final sentence of EAJA section 504(a)(3), added to EAJA in 1985, plainly states that the "decision of the agency," as distinguished from the "adjudicative officer's decision," will be the "final administrative decision." *See Lion Uniform, Inc. v. NLRB*, 905 F.2d 120, 123 (6th Cir.) ("While the decision on an application for fees is initially made by the adjudicative officer, the final administrative decision is that of the agency."), *cert. denied*, 498 U.S. 992 (1990).[5] Moreover, CSG

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[5] Even if EAJA were silent as to administrative review of judges' decisions, the Commission could establish such review. The Commission has created a right of administrative appeal from judges decisions on applications for temporary reinstatement under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), even though the Act does not provide for such review. *See* 29 C.F.R. § 2700.45(f).

acknowledges that no other court or administrative decision supports its position. CSG Reply Br. at 9.

We also note that the legislative history accompanying the 1985 re-enactment and amendment of EAJA unambiguously supports Commission review of EAJA determinations made by our administrative law judges. The House Committee Report submitted with the legislation (there were no Senate or conference reports) states: "The legislation allows the agency rather than the adjudicative officer to make the final decision on fee award at the agency level." H.R. Rep. No. 99-120, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 135. In the section-by-section analysis, regarding section 504(a)(3) the report further states:

> This provision explicitly adopts the view that the agency makes the final decision in the award of fees in administrative proceedings under section 504. This follows the view adopted by the Administrative Conference and recognizes the fact that decisions in administrative proceedings are generally not final until they have been adopted by the agency.

Id. at 142.

Moreover, we find that policy considerations compel us to reject CSG's arguments. Commission review of EAJA decisions by our judges will lead to the formulation of a uniform body of case law under the statute. Administrative review also provides protection against either arbitrary actions of judges or actions that could be perceived as arbitrary, and also controls and regulates the quality of judicial decision-making. Accordingly, we deny CSG's motion to dismiss.

B. Standard of Review

The Secretary has not addressed the question of which standard of review the Commission should apply in EAJA proceedings. CSG argues, albeit implicitly, that our review of the judge's factual findings is governed by the substantial evidence test and that his legal determinations are reviewed as to whether they are "correct." CSG Resp. Br. at 4-13.

EAJA provides for a substantial evidence standard of review for appellate courts reviewing final agency decisions under the Act. 5 U.S.C. § 504(c)(2). However, EAJA is silent on the appropriate standard of review of an administrative law judge's decision in the course of an internal agency appellate review. In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Supreme Court addressed the standard of review for appellate courts in civil EAJA actions tried in district courts. The Court held that a district court judge's EAJA determination is to be reviewed by a court of appeals using an abuse of discretion standard. *Id.* at 562.

The holding in *Pierce* suggests that, by analogy, the Commission should adopt a similar standard in reviewing the judge's decision here. However, our adoption of the more deferential abuse of discretion standard would lead to the anomalous result of having our decision reviewed on appeal under the less deferential substantial evidence standard required by EAJA.

In *Lion Uniform*, the Sixth Circuit considered and rejected the argument that the abuse of discretion standard approved by the Supreme Court in *Pierce* should apply to review by the National Labor Relations Board ("NLRB") of an administrative law judge's decision, stating:

> The rationale of the opinion in *Pierce* is, of course, sound in the context of the relationship between a court of appeals and a district court, where the EAJA litigation begins in the district court. But, where the EAJA litigation begins before an agency, with appeals contemplated to the courts, a highly deferential review by the Board, followed by a less deferential review by the courts, makes little sense. In the absence of more specific legislative direction, we must assume the more logical scheme applies — that the standard of deference is heightened as the appeal process progresses — de novo review at the agency level, and substantial evidence review before the courts.

905 F.2d at 124. The court found de novo review to be the appropriate standard of review for the NLRB, since making de novo findings of fact is part of the Board's "normal function." *Id.*

We agree with the court's rationale in *Lion Uniform*. Thus, our standard of review of a judge's EAJA determination should not be more deferential than the standard of review employed by an appeals court in reviewing a Commission decision under EAJA. Unlike the NLRB, however, the Commission does not generally make de novo findings of fact. Instead, 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.[6] 30 U.S.C. § 823(d)(2)(A)(ii)(I). We find this test to be the more appropriate standard of review for factual determinations made by our judges in EAJA cases.[7] Applying the substantial evidence test to

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[6] "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[7] In this case, however there are no factual findings to review, as the judge, finding that "[b]oth parties agree that there is no dispute as to any material fact," 18 FMSHRC at 386, ruled

findings of fact, together with de novo review of questions of law, is consistent with the Commission's "normal function" under the Mine Act and ensures that our decision will not be reviewed on appeal under a less deferential standard.

C. Substantial Justification

EAJA provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified. *Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994). The Supreme Court has defined a "substantially justified" position as "justified in substance or in the main" or one that has "a reasonable basis both in law and fact." *Pierce*, 487 U.S. at 565. In *Pierce* the court set forth the test as follows: "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.3. In EAJA proceedings the agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992).

The standard CSG was charged with violating in this case requires that "[a]ll metal enclosing or encasing electrical circuits shall be grounded . . . ." 30 C.F.R. § 56.12025. Electrical grounding is defined elsewhere in Part 56 as "to connect with the ground to make the earth part of the circuit." 30 C.F.R. § 56.2. At issue, therefore, is whether the Secretary's position regarding CSG's compliance with this regulation was substantially justified. For the reasons discussed below, we conclude that the Secretary's position had a reasonable basis in law and fact, and therefore reverse the judge's EAJA determination.

1. The Judge Failed to Independently Evaluate the Secretary's Legal Position

As stated above, the issue in this case is not the success or failure of the Secretary's underlying case on the merits, but instead whether or not the Secretary's position was substantially justified. To determine substantial justification, a judge is required to *independently* ascertain in his or her EAJA decision whether the Secretary's position had a reasonable basis in

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on summary judgment motions. He therefore made no independent findings of material fact in the merits proceeding and did not even reach the question of whether frame grounding is effective. This issue, which was essential to a resolution of the underlying proceeding, was never resolved, and remains in dispute. Thus, the case on the merits was actually not appropriate for summary judgment, and the judge should have resolved this factual disagreement.

Generally, such a lack of factual findings would lead us to remand. *See Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1000 (June 1997). In this EAJA proceeding, however, remand is not necessary since the record (in this case, depositions the parties submitted in support of their motions) compels the conclusion that the Secretary's position had a reasonable basis in fact.

law and fact. In this case, however, the judge based his EAJA decision entirely on his determination of the standard's "plain meaning" in the underlying merits proceeding, finding again that the Secretary's interpretation ignored the plain meaning of the standard and thus was per se unreasonable. 18 FMSHRC at 1822-23. This approach is incorrect as a matter of law. *See F. J. Vollmer Co. v. Magaw*, 102 F.3d 591, 596 (D.C. Cir. 1996) (reviewing court's role in reviewing lower court's EAJA award is to ascertain whether court relied on proper legal standard). The D.C. Circuit has held that "the inquiry into reasonableness for EAJA purposes may not be collapsed into [the] antecedent evaluation of the merits, for EAJA sets forth a 'distinct legal standard.'" *Cooper*, 24 F.3d at 1416 (citation omitted). As the First Circuit has noted, while there may be overlap between the merits determination and the substantial justification determination under EAJA, "[a]n exercise of *independent* judgment is essential to determine whether an EAJA award is warranted; the answer is not 'wedded to the underlying judgment on the merits.' . . . Any other approach would demean the precise language of the [EAJA]." *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 517 (1st Cir. 1987) (emphasis added) (citation omitted). Under an EAJA analysis, "[t]he government's failure to prevail does not raise a presumption that its position was not substantially justified." *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988).

A review of the record in this case indicates that the judge's determination regarding the scope and meaning of section 56.12025 hopelessly tainted his EAJA decision because he simply carried over his analysis from the merits proceeding into the EAJA proceeding.[8] As the judge stated:

> In the *underlying* proceeding, I clearly indicated that the Secretary's position was unreasonable. . . . *I again find* that the Secretary's legal theory was not reasonable and that there was no reasonable connection between the Secretary's legal theory and the undisputed facts.

18 FMSHRC at 1822 (emphasis added).

Of course, in disposing of the citation in the underlying proceeding, the judge did not reach the issue of substantial justification of the Secretary's position, nor should he have. However, the judge's failure to *independently* review the Secretary's position in the EAJA proceeding and apply a distinct analysis under the appropriate EAJA standard was erroneous and, in itself, precludes affirmance of the judge's determination. Indeed, as the D.C. Circuit has noted in the context of EAJA litigation, "[m]echanical jurisprudence will not do." *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986). As we discuss below, an independent examination of the Secretary's legal position, uncoupled from the underlying merits decision, leads to the ineluctable

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[8] In fact, the judge attached his decision on the merits to the EAJA decision. 18 FMSHRC at 1837-42.

conclusion that the Secretary's position was "reasonable in law and fact," and as such substantially justified under EAJA.[9]

2. The Secretary's Position Had a Reasonable Basis in Law

We begin our analysis of whether the Secretary's position was substantially justified by examining whether her position had a reasonable basis in law. For purposes of this case, we need not decide whether MSHA was correct; rather, we must only ascertain whether its view was a reasonable one.

MSHA cited CSG because of the operator's undisputed use of the crusher frame as a ground path. In MSHA's view, frame grounding violated the standard because it was an inherently unreliable system which exposes miners to the risk of electrocution. The Secretary argued that the wiring on the unsheltered equipment at CSG's rock quarry was exposed to the elements and subject to extreme vibration. Therefore, under the Secretary's theory, using the frame to ground the electrical equipment carried a risk that metal-to-metal, metal-to-bolt, and metal-to-wire connections would deteriorate or come loose. S. Cross Mot. for Sum. Dec. at 6; Decl. of Paul Price, Oct. 27, 1995 ("Price Decl.") at 4. The Secretary's litigation position was supported by its expert, Paul Price. Further, according to MSHA's expert, no nationally recognized industry association accepted the use of an equipment structure or frame on an outdoor portable crusher to serve as a grounding conductor. S. Cross Mot. for Sum. Dec. at 10; Price Decl. at 5-6.

The judge determined that the Secretary's legal position (that frame grounding was prohibited under the regulation) was unreasonable because it "expand[ed] the regulation beyond its plain meaning." 18 FMSHRC at 1822 (quoting 18 FMSHRC at 388) (emphasis omitted). According to the judge, "[a]ny interpretation that 'impermissibly' ignores the plain meaning of a cited standard, is *per se* unreasonable." *Id.* at 1822-23. In the judge's view, since the two motors in question "were connected to earth through a series of metal frame and wire connections, [they] *were grounded and were, thus, in compliance with [the] requirement of the cited regulation.*" *Id.* at 1823 (quoting 18 FMSHRC at 388) (emphasis in original).

During the EAJA proceeding, the judge erred in not looking beyond the merits of the underlying case, and in failing to consider whether the Secretary's interpretation was substantially justified and consistent with the Mine Act. He improperly considered the Secretary's position unreasonable because in his merits decision he had found section 56.12025 satisfied so long as the electrical equipment was connected to earth. The judge's approach failed to consider the reasonableness of the Secretary's argument as to the importance of an *effective*

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[9] The D.C. Circuit explained that the "fresh look occasioned by application of the 'substantially justified' standard" is required to honor Congress' intent "not to permit a prevailing party automatically to recover fees" under EAJA. *Rose*, 806 F.2d at 1087 (citation omitted).

grounding connection. In fact, the judge did not discuss the Secretary's theory as to the reliability of the grounding technique employed by CSG, even though GSG conceded that the regulation required an effective path to ground. CSG Mot. for Sum. Dec. at 6 n.6.

From our review of the record, we conclude that MSHA's interpretation of the standard requiring effective grounding had a reasonable basis in law, because restricting the standard to its literal terms could expose individuals to the harm the standard was designed to prevent.[10] *See Arch of Kentucky, Inc.*, 13 FMSHRC 753, 756 (May 1991) (rejecting operator's argument that its procedure fell within the literal terms of the standard because procedure was unsafe and did not comport with the safety goals of the regulation and the Act). In fact, a narrow reading of section 56.12025 could create a situation where an individual could be fatally injured before a problem in the grounding system is detected. This is because under a literal approach, an unreliable system would not violate the standard until the connection with the ground was severed.[11] But as MSHA's expert explained:

> You must have an effective path for the ground fault to flow. It's essentially the lifeline of the guy standing there touching it. The worker's — if that's poor, *he's just going to die*. Just as simple as that.

Deposition of Paul Price, July 25, 1995 ("Price Dep.") at 47 (emphasis added). The protective purpose of the standard is to prevent injury from electrocution caused by a malfunctioning or improper grounding system. The Secretary's interpretation certainly is consistent with this goal.

Historically, the Commission has rejected a narrow, technical interpretation of a regulation that "thwarts the standard's protective purpose and does not serve the safety objectives recognized in the legislative history." *Pyramid Mining Inc.*, 16 FMSHRC 2037, 2040 (Oct. 1994). For example, in *Consolidation Coal Co.*, 15 FMSHRC 1555 (Aug. 1993), the Commission considered whether an escapeway was separated from a belt and trolley haulage entry, because the stopping between the two had a substantial hole. The judge had found that a

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[10] Our dissenting colleagues wrongly assert that we have somehow transformed the issue in this case into whether frame grounding is effective. Slip op. at 20-22. What the dissent overlooks is that the issue before us is whether the Secretary's position was substantially justified and the Secretary's position was that frame grounding was ineffective. *See* S. Cross Mot. for Sum. Dec. at 5 ("[t]o satisfy the standard, the ground path must be effective").

[11] Our dissenting colleagues appear to have also adopted the judge's mistaken theory, finding that the Secretary's interpretation of the regulation is inconsistent with its plain meaning because "[it] simply requires . . . that electrical circuits be grounded." Slip op. at 20. Like the judge, our colleagues' also fail to address the essential question before us: whether the Secretary's position was substantially justified, not whether the Secretary should have prevailed on the merits.

"separation" existed, despite the existence of the hole. In reversing that determination, the Commission concluded that a construction of the standard requiring physical separation but allowing free movement of air current thwarted the standard's purpose of permitting only intake air in escapeways, and could lead to "absurd results," because in the event of a fire, the hole could permit contaminated air to enter the escapeway. *Id.* at 1557. In *Western-Fuels Utah, Inc.*, 19 FMSHRC at 998-1000, the Commission reversed the judge's conclusion that a regulation requiring a conveyor be "equipped with slippage and sequence switches" was not violated as long as the belt contained the requisite switches and that any malfunction of those switches was "irrelevant." The Commission agreed with the Secretary that the standard must be construed to require that the belt be equipped with "functional" slippage and sequence switches. *Id. See also Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (rejecting, *sub silentio*, operator's claim that 30 C.F.R. § 56.14101(a)(1) did not require brakes to be maintained in functional condition); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991) (construing 30 C.F.R. § 77.507 to require that switches be installed with *functioning* lockout devices). The Secretary's interpretation requiring effective grounding is consistent with this line of Commission authority. The judge, by adhering to the analysis of his merits decision, which relied on a literal approach, erred by disregarding Commission precedent holding that if a regulation requires specified equipment, that equipment must be functional, effective, and safe.

In line with this authority, we can only conclude that the Secretary's interpretation of the regulation to require a grounding system "of adequate design so as to be expected to provide the necessary ground path on a *continuing* basis" (Price Decl. ¶ 9 (emphasis added)) had a reasonable basis in law and furthered the safety protective purposes of the Act.

Our dissenting colleagues, citing *Pierce*, seek to rely on "objective indicia"[12] in an attempt to support their view that the Secretary's position was unreasonable. Slip op. at 23. The dissent seizes on the language in *Pierce* which identifies the "views of other courts on the merits" as a factor in determining the reasonableness of the government's position. *Id.* To support its argument the dissent relies on four *unreviewed* administrative law judge decisions that have disagreed with the Secretary's interpretation of section 56.12025. Slip op. at 24.[13]

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[12] In *Pierce*, the court noted that certain "'objective indicia' such as the terms of a settlement agreement, the stage in the proceedings at which the merits were decided, and the views of other courts on the merits" can be relevant to the inquiry of whether the government's position was substantially justified. 487 U.S. at 568.

[13] The two decisions which predate the judge's decision on the merits in this case are distinguishable. In *Mulzer Crushed Stone Co.*, the issue of whether frame grounding was permissible under section 56.1205 was never squarely decided. Rather, the case centered on the fact-based question of whether bolts used to connect the motor frame to the conveyor belt frame were rusted. 3 FMSHRC at 1241. The judge never discussed the regulatory interpretation question at issue here. In addition, *McCormick Sand Corp.* is distinguishable because in that case the judge found that the circuit met the National Electric Code ("NEC") grounding

The dissent's reliance on these cases is misplaced for several reasons. The most obvious one is that, pursuant to Commission Procedural Rule 72, 29 C.F.R. § 2700.72, unreviewed administrative law judge decisions have *no* binding precedential impact. It is, therefore, erroneous to portray these rulings as having any appreciable relevance to the current status of the law regarding the issue of frame grounding. They cannot be found to constitute the type of "string of losses" referred to by the Supreme Court in *Pierce* as bearing on whether an agency's position lacks substantial justification. 487 U.S. at 569.

The *Kali* case underscores this point. In *Kali*, an EAJA case in which the plaintiffs had successfully challenged a government welfare regulation in the merits proceeding, every court that had ruled on the issue (generally federal district courts) had rejected the Secretary's position. 854 F.2d at 334. Nonetheless, the Ninth Circuit found that the district court in the EAJA case had not abused its discretion in finding the government's position substantially justified.

Moreover, when federal courts inquire as to whether the government's position was substantially justified on legal grounds, they generally look to federal court of appeals precedent. *United States v. One 1984 Ford Van*, 873 F.2d 1281, 1282 (9th Cir. 1989) (government did not have a reasonable basis in law because there was no distinction between this case and an earlier Ninth Circuit case); *Fraction v. Bowen*, 859 F.2d 574, 575 (8th Cir. 1988) (government's position was not substantially justified because the government's mistakes were "contrary to clearly established circuit precedent"). Similarly, in the administrative law context, Commission decisions serve as legal precedent, since the role of the Commission as a reviewing body is similar to that of a federal circuit court in the judicial setting. But, as we have discussed, the Commission has never addressed the issue of frame grounding, and therefore no binding precedent exists to establish a meaningful interpretation of section 56.12025.

Our dissenting colleagues also take exception to the Secretary's decision not to appeal any of the aforementioned cases. Slip op. at 25. However, we note that, in *Pierce*, the Supreme Court held that "[t]he unfavorable terms of a settlement agreement, [which the Court also considered as "objective indicia" of whether the government's position was substantially justified] *without inquiry into the reasons* for settlement, cannot conclusively establish the

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requirements. 2 FMSHRC at 24. The two other cases relied on by the dissent (*Tide Creek Rock, Inc.*, 18 FMSHRC 390 (Mar. 1996) (ALJ), and *F. Palumbo Sand & Gravel*, 19 FMSHRC 1440 (Aug. 1997) (ALJ)) were decided after the judge's ruling in the underlying decision on the merits in this case, and therefore are not relevant in determining whether the Secretary's position was substantially justified. As the Supreme Court made clear in *Pierce*, the legal question on an appeal from an attorney's fee award is "not what the law now is, but what the Government was substantially justified in believing it to have been." 487 U.S. at 561. Of course, even now these cases do not represent "what the law . . . is" because they are administrative law judge decisions, which are not legal precedent. *Id.*

weakness of the Government's position." 487 U.S. at 568 (emphasis added). In the same vein, the Commission, as a reviewing body, should likewise be extremely cautious about concluding that the Secretary's position was unreasonable if the support for such a finding would involve second-guessing her decision of whether to appeal a case. This is particularly important because we are not privy to the complex legal, factual, and policy reasons underlying the Secretary's decision not to appeal. Furthermore, to suggest that the Secretary's underlying position in a case was unreasonable based on her decision not to appeal an adverse ruling could result in the filing of needless appeals by the Secretary to avoid the threat of liability for attorney's fees under the EAJA.

3. The Secretary's Position Had a Reasonable Basis in Fact

We now turn to the question of whether the Secretary's position had a reasonable basis in fact. *Pierce*, 487 U.S. at 565. To ascertain the answer, we review the record before us with the understanding that the Secretary need not prove in this EAJA proceeding by a preponderance of the evidence that frame grounding is ineffective. Rather, she need only demonstrate that her position was a reasonable one. Our review of the entire record compels the conclusion that her position that frame grounding is not effective is reasonable in fact.[14]

The purpose of section 56.12025 is to protect individuals from the threat of electrocution. In the event of a fault in the electrical current, such as a broken wire or worn insulation in the cable carrying the electrical power supply to the motor, or excessive moisture, undirected electrical current must be carried by way of a grounding conductor back to the power source. When the system is properly grounded, fault current will pass through a circuit breaker, trip the switch and de-energize the system, and then pass to the ground. S. Cross Mot. for Sum. Dec. at 4; CSG Mot. for Sum. Dec. at 6. If the fault current does not have an effective ground conductor, the breaker may not trip quickly, allowing the equipment frame to become energized. When this occurs, an individual who comes into contact with an energized frame faces the hazard of electrical shock or death by electrocution. S. Cross Mot. for Sum. Dec. at 4.

In asserting that the frame grounding method employed by CSG was so inherently unreliable that it could not provide reasonable assurance that the miners would be protected from electrocution, the Secretary relied on the fact that CSG's frame grounding system depends on the

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[14] Our dissenting colleagues describe the statements made by MSHA safety expert Paul Price in a deposition and declaration as "allegations." Slip op. at 22. This characterization is incorrect, however, since these were not mere allegations by the Secretary but rather statements submitted by both CSG and the Secretary with their summary judgement pleadings. CSG had the opportunity to cross-examine Price about his statements during his deposition and to rebut them through the introduction of competing views submitted in affidavits at the summary judgement stage. Accordingly, the Secretary could appropriately rely on Price's statements in the underlying proceeding to support her position, and we are not precluded from considering them in determining whether the Secretary's position was substantially justified.

integrity of many connections (metal to bolt, metal to metal, metal to wire) to move the fault current to the breaker. *Id.* at 10. MSHA's expert, Paul Price, was emphatic about the hazard posed by such a system:

> Crushers, screens, conveyors and other steel structures vibrate and rust resulting in the loosening of the connections of the frame and thereby increasing the resistance of the grounding path . . . . The connections at the motors and other electrical enclosures depend on bolts which are also subject to rust and vibration. Thus, the use of the crusher and conveyor frames as the grounding conductor, as was attempted here, is extremely unreliable as any increase in resistance anywhere along the ground path (motor to bolt to frame part to adjoining frame part to jumper, etc.) could subject anyone touching any of the metal frames during a ground fault condition to a potentially fatal shock. Accordingly, the frame is wholly unreliable as a conductor and does not provide for an effective path to ground.

Price Decl. at 4-5.

MSHA's expert Price was unshakeable in his conviction that problems with rusty bolts and vibration were insurmountable, and caused this system to be fundamentally flawed. He testified that "it's impossible to maintain them in a low impedance[15] cause you have to grind the rust off every day and it's kind of essentially impossible to maintain them like that." Price Dep. at 22. *See also* Price Dep. at 24 ("[T]he conveyors all vibrate . . . The bolts are . . . all rusty because they're outside . . . . You can't maintain them . . . unless you check them every hour. They're essentially impossible to maintain."); Price Dep. at 55-56 ("The reason we do not accept grounding by frames or conveyors is it's impossible to maintain the thing . . . It can't be done . . . [I]t can vibrate loose within just a few seconds").

The declaration of Gordon Vincent, an electrical contractor who was retained by CSG, in the fall of 1992, to perform grounding and continuity tests, also supports the reasonableness of the Secretary's position. Decl. of Gordon Vincent dated Oct. 26, 1995 ("Vincent Decl.") at 1-2; *see also* Deposition of Eric Schoonmaker, General Manager of CSG Montague plant, dated July 14, 1995 ("Schoonmaker Dep.") at 39. When Vincent arrived at the plant and found only 3-conductor leads without a fourth grounding conductor, he determined that the grounding was inadequate and ended his inspection. Vincent Decl. at 3; Schoonmaker Dep. at 41, 50. He

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[15] CSG concedes that low impedence is critical to an effective grounding system. Reply to S. Cross Mot. for Sum. Dec. at 6.

informed the operator that the plant was not properly grounded, and that he would not certify to MSHA that it was, whereupon CSG terminated his contract. Vincent Decl. at 4.[16]

CSG provided no expert testimony. In the merits case before the ALJ, it based its factual case almost completely on the affidavit and deposition of Eric Schoonmaker. He asserted that when the motors were serviced, they were inspected to ensure that they were securely bolted to the frame and that the bolts were not rusted. Schoonmaker Aff. at 3. He also stated that the grounding system was periodically tested, and that it passed the test in September 1992. *Id.* at 4. The operator relied on the fact that MSHA could not produce test results that showed excessive resistance and that the mandatory testing conducted annually by CSG always indicated a sufficiently low resistance path to ground.[17] CSG's evidence does not undermine the reasonableness of MSHA's position that frame grounding fails to satisfy the standard's grounding requirement. The fact that a feared accident has not yet occurred, or that the system could pass resistance tests on a particular day does not render unreasonable the Secretary's charge that CSG's grounding was ineffective and violative of the standard. *See Ace Drilling Coal Co.*, 2 FMSHRC 790, 791 (Apr. 1980) ("It is not necessary. . . that a condition contribute to an accident before the standard is violated. The Act does not condition the existence of a violation upon the occurrence of an event it is designed to prevent."). *See also Western Fuels*, 19 FMSHRC at 997-1000 (an unexpected malfunction of switches would constitute a violation, notwithstanding the fact that the switches were in proper working order 3 days before the fire that triggered the MSHA inspection at issue, the cause of the malfunction was never determined, and the switches were still functional 2 years afterwards, at the time of the hearing). Finally, even Schoonmaker admitted that a four-wire grounding system (as opposed to frame grounding) would provide "better protection." Schoonmaker Dep. at 53.

Under the approach of the judge and the dissent, MSHA could only cite an ineffective path to ground after it discovers the condition based on results of continuity and resistance tests

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[16] The dissent's dismissive appraisal of Vincent's declaration (slip op. at 22-23) appears to be based on a possible misunderstanding of what kind of evidence is relevant in making a determination that the government's position was substantially justified. His statement represents the views of the operator's own contractor who quickly determined (without even needing to examine the crusher motors) from his review of the starter control box that the absence of a fourth grounding conductor was unacceptable. Vincent Decl. at 3. This is relevant to the question of whether the operator had instituted "effective grounding," which even CSG concedes is required by the regulation. Vincent's views strongly corroborate the Secretary's position, which she long ago arrived at independently and has consistently enforced.

[17] We note that CSG's annual test results may not be an entirely accurate indicator of how well the system usually performs if, prior to such testing, the connections are cleaned and tightened. Commenting on a test administered by MSHA after the citation had been issued, Price stated that "every one of . . . [the bolts] . . . had been cleaned recently. They were still shiny." Price Dep. at 24.

on a particular piece of equipment. MSHA's theory of violation, however, was that a design that was inherently unreliable, such as frame grounding, failed to comply with the standard's grounding requirement, regardless of what test results may show at any particular point in time.[18] Under the facts of this case, this was a reasonable view and one that furthered the safety purposes of the Act.

In conclusion, the record as a whole indicates that the Secretary's position regarding the inherent unreliability of CSG's frame grounding system had a reasonable basis in fact. As we set forth in the preceding section, her position also had a reasonable basis in law. Accordingly, we find that her position was substantially justified, and we therefore vacate the judge's order awarding fees and other expenses to CSG.[19]

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[18] The judge mistakenly relied on post-citation tests for the proposition that the Secretary's position was not substantially justified. *See* 18 FMSHRC at 1824. The Secretary, however, pointed out the distinction between one or more isolated satisfactory test results and an effective grounding design. As MSHA's expert explained, "a faulty design can in fact provide a sufficient ground for an instant in time, but will offer insufficient protection at the next moment." Price Decl. at 5. Thus, the fact that the system passed post-citation resistivity tests is in no way conclusive of whether MSHA's position in the underlying case was reasonable.

[19] To support their position, our dissenting colleagues rely on the Secretary's proposed penalty assessments and the charges of section 110(c) liability in the underlying proceeding. Slip op. at 25-26. These issues were not raised before nor argued to the Commission in this EAJA case. Further, the record evidence on these issues was not fully developed because the case on the merits was decided on summary judgement. Accordingly, we will refrain from reaching these issues, especially since we have before us neither the benefit of argument from the parties nor analysis by the judge.

III.

Conclusion

For the foregoing reasons, we reverse the judge's EAJA decision and vacate the EAJA award.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, dissenting:

This case stands out as an unfortunate example of unreasonable regulatory enforcement, especially when viewed in the context of the Secretary's position on frame grounding over the past 17 years — a long history of regulatory inaction that reveals the Secretary's unwillingness to address an issue that she herself emphatically pronounces to involve a serious safety risk to miners. Viewing the record as a whole in this context, we find that the Secretary's litigation position was not substantially justified. Therefore, although we join with our colleagues in Sections I, II.A, and II.B of their opinion (with the exception of footnote 7, Section II.B), we dissent from their reversal of the judge's award of fees to CSG in Section II.C.

Under EAJA, an eligible party engaged in litigation with a federal agency may, upon prevailing over the agency and filing a timely application, recover attorney's fees and related expenses unless the agency can prove that its position was "substantially justified" or special circumstances would render such an award "unjust." 5 U.S.C. § 504(a)(1). There is no dispute in this case that CSG is a prevailing party eligible for an award under EAJA, and that its application was timely filed. Nor has the Secretary alleged that any special circumstances exist that would render an award unjust. Solely at issue is whether the Secretary has proven that her litigation position was substantially justified and, if not, the propriety of the award made by the judge. *See F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 595 (D.C. Cir. 1996) ("The Government bears the burden of establishing that its position was substantially justified.").

An agency position that is substantially justified has a "reasonable basis both in law and fact" and is "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Here, the Secretary asserts that her position on the citation in the underlying merits proceeding was reasonable in light of industry practice and because it furthered the goal of protecting the health and safety of miners. S. Br. at 9-14. The Secretary also argues that the judge erred by relying in his EAJA decision only on his reasoning for rejecting the Secretary's position in the merits proceeding. *Id.* at 13-16. In response, CSG argues that the judge correctly concluded that the Secretary's position was not substantially justified because the Secretary's interpretation of the cited standard was unreasonable, her litigation position was not supported by the evidence, and a reasonable person familiar with the mining industry would have concluded that the cited motors were effectively grounded. CSG Resp. Br. at 4-17.

We begin our review of this case with the Secretary's interpretation of section 56.12025, which — like the judge — we find to be at odds with the plain meaning of the regulation.[1] The requirements of section 56.12025 are clear and unambiguous. The regulation requires that "[a]ll metal enclosing or encasing electrical circuits . . . be grounded or provided with equivalent protection." It does not contain any requirements for grounding design, nor does it prohibit any

[1] Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

particular method of grounding. The regulation simply requires, in the context of this case, that electrical circuits be grounded. Electrical grounding is defined elsewhere in Part 56 as "to connect with the ground to make the earth part of the circuit." 30 C.F.R. § 56.2. Since the meaning of section 56.12025 is clear and unambiguous, the judge properly refused to grant deference to the Secretary's interpretation of the regulation as constituting a per se prohibition against frame grounding. *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 387-88 (Mar. 1996) (ALJ); *see Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered "*only* when the plain meaning of the rule itself is doubtful or ambiguous") (emphasis in original).

The judge properly noted that, under the plain meaning of section 56.12025, the Secretary failed to establish that CSG violated the regulation. 18 FMSHRC at 387-88. The Secretary offered no evidence to show that the motors in question were not, in fact, grounded as required by the regulation. Indeed, no tests were conducted by MSHA at the time the citation was issued to determine whether the stacker or crusher motors were grounded. *Id.* at 386. CSG's own continuity and resistance test, conducted as required under 30 C.F.R. § 56.12028, indicated the motors were properly grounded 6 months prior to MSHA's investigation. *Id.* at 388. Post-citation tests conducted by MSHA also showed that the motors were grounded, evidence which, as the judge noted, the Secretary chose to ignore. *Id.* Given this singular lack of evidence, we find amply supported by the record the judge's conclusion that the Secretary's position on the merits was unreasonable and without justification.

Our colleagues state that the judge "made no independent findings of material fact in the merits proceeding and did not even reach the question of whether frame grounding is effective," which they characterize as an "issue . . . essential to a resolution of the underlying proceeding" that "remains in dispute." Slip op. at 7-8 n.7. This statement reveals a fundamental misapprehension of the issue before the Commission. Our colleagues go to great lengths to justify the Secretary's position based on the alleged inherent ineffectiveness of frame grounding. Slip op. at 10-17. As explained further below, we view this case differently, and believe that the majority's approach is an invalid exercise of de novo fact finding. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) ("It would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record."); *see also Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 (4th Cir. Dec. 30, 1997) ("'[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence'") (citations omitted).

This case began when MSHA Inspector Ann Frederick alleged that CSG was using "[t]he frame of the crusher . . . as the grounding conductor." 18 FMSHRC at 385 (quoting Citation No. 3911909). She went on to describe the ground in some detail, then stated that "[f]rame grounding has been forbidden for over fifteen years." *Id.* Agreeing that there was no dispute as to any material fact, the parties filed cross motions for summary decision "on the single *legal* issue of whether [CSG's] reliance on the crusher and stacker frames to serve as the path to ground for the electric current violates the provisions of 30 C.F.R. § 56.12025." *Id.* at 386

(emphasis added). In support of their positions, both parties filed extensive discovery documents to be made part of the record. Among the Secretary's submissions were various allegations of Paul Price, contained in a declaration and deposition transcript, regarding the effectiveness — or lack thereof — of frame grounding.

Here, it is important to take note of just what was before the judge. In essence, the parties asked the judge to dispose of the threshold legal question of whether frame grounding was per se prohibited by section 56.12025. This was a central part of the Secretary's theory. The inspector's statement that "[f]rame grounding has been forbidden for over fifteen years" (18 FMSHRC at 385), and her subsequent failure to collect any evidence as to whether the cited ground was, in fact, functioning can only be explained logically in the context of the application of a per se rule. The record reveals that the Secretary was not concerned with proving that the particular equipment in question was not grounded. Instead, she argued that, as a general proposition, frame grounding is inherently ineffective and, therefore, illegal under section 56.12025. S. Cross Mot. for Sum. Dec. at 4-6.

We find it significant that the Secretary did not ask in her cross motion for leave to proceed further to prove a violation under an alternative theory if the judge refused to accept her interpretation of section 56.12025. For example, the Secretary could have attempted to prove that the cited ground was, in fact, ineffective — which would have been an admittedly difficult case for the Secretary to prove given the paucity of evidence she collected on the actual performance of the cited ground. This may explain why she did not style her motion as one for "Partial Summary Decision."

But when the judge rejected the Secretary's interpretation of section 56.12025, the Secretary's case failed *as a matter of law*. The judge was not obliged to go any further. We are thus left with a merits decision made on a minimal factual record[2] — and justifiably so given the dispositive nature of the judge's decision under the circumstances. We also note that the Secretary opted not to appeal the judge's decision to the Commission. She placed all her litigation eggs in the basket of a per se rule that frame grounding violates section 56.12025. And that is the posture in which the Secretary's litigation position arrived before us in this EAJA proceeding.

As mightily as our colleagues try to transform this case into one involving the issue of whether frame grounding is effective, that is simply not the issue before us on review. Instead, we must decide whether the Secretary has proven that her litigation position — that frame grounding is per se illegal under section 56.12025 — was substantially justified. Thus, this case does not require us to determine whether frame grounding is inherently ineffective, a question the judge did not have to reach, and which we thus should not reach. Yet this is precisely what the majority does based on the Secretary's unsubstantiated factual allegations. In so many words,

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[2] On this point, our colleagues go so far as to say "there are no factual findings to review" in this EAJA appeal. Slip op. at 7 n.7.

they conclude that CSG's grounding method was inherently ineffective, based primarily on their acceptance of allegations made by Price, and that, therefore, the Secretary was justified in proceeding against CSG (in this respect, the majority merely follows the Secretary's lead — the Secretary's EAJA pleadings also rest primarily on Price's allegations).

The problem with the majority's reliance on the Secretary's allegations to decide this case is easily illustrated. For example, the majority highlights Price's "unshakeable . . . conviction[3] that problems with rusty bolts and vibration were insurmountable, and caused [CSG's] system to be fundamentally flawed." Slip op. at 15. Yet they fail to mention that Schoonmaker testified that there was no corrosion or rust between the stacker motor and the frame, that a bolt had never "come loose" due to vibration ("Motors are pretty stable. They don't make a lot of noise or bumps."), and that during its 12 years of operation, the motor and frame had always provided a sufficiently low resistance path to ground. Schoonmaker Dep. at 46-49. *The Secretary failed to rebut this testimony.* In fact, Price agreed on cross-examination that the bolts did not affect the grounding path when he tested them after the citation had been issued. Price Dep. at 24.

We note that MSHA requires regular annual testing of *all* types of grounding conductors. *See* 30 C.F.R. § 56.12028. In fact, this is so even where "grounding conductors . . . are exposed or subjected to vibration, flexing or corrosive environments." IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56/57, at 51 (1996). This leads us to question whether lack of continuity and high resistence due to vibration and corrosion may be inherent dangers in virtually any grounding system on heavy machinery or equipment.

The majority also quotes Price's statement that to maintain a ground such as used by CSG, "'you have to grind the rust off every day.'" Slip op. at 15 (quoting Price Dep. at 22). Yet nowhere in the record can we find any data to substantiate this statement. CSG's Montague Plant is located near Yreka, California. 18 FMSHRC at 384. The record is devoid of any evidence regarding Yreka's weather or how machinery maintained outdoors holds up to the elements in Yreka.[4] Based on the record before us, we find it impossible to conclude that conditions in Yreka would require daily de-rusting of outdoor ground connections.

The majority also relies on the declaration of Gordon Vincent to argue in support of the reasonableness of the Secretary's position. Slip op. at 15-16. In his declaration, Vincent opined

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[3] Interestingly, this is just the sort of credibility determination that is within the sole province of an ALJ to make. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) ("Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge.").

[4] Yreka's average annual precipitation is approximately 19 inches — arid in comparison to Crescent City (approximately 100 miles west of Yreka), where the average annual precipitation is approximately 65 inches. *See* http://www.weatherpost.com. In light of these data, we view Price's statement with some skepticism.

that CSG's plant was not properly grounded "[b]ecause the use of 3-conductor leads without a fourth grounding conductor does not meet the requirements of the National Electric Code [NEC]." Vincent Decl. at 3. Vincent stated that he "would not certify to MSHA or anyone else that [CSG's] electrical system was properly grounded." *Id* at 4. There are several problems with Vincent's declaration. First, we note that, as a matter of law, Vincent's opinion is "not an authoritative interpretation of [MSHA's] regulation" on grounding. *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 157 (D.C. Cir. 1986). In addition, the record contains no indication that any MSHA personnel knew of Vincent's inspection at the time Inspector Frederick issued the citation at issue in the underlying proceeding. Vincent's opinion is thus irrelevant to whether the Secretary's decision to cite CSG was reasonable. Insofar as the declaration might be relevant at all to this proceeding — and we do not believe that it is — it is based on an inspection of a "starter control box," not the cited equipment. In fact, there is no indication in the record that Vincent ever looked at the cited crusher motors.

These examples illustrate how unwise it is to accept the Secretary's unsubstantiated allegations on their face, as the majority has done. Had the case proceeded beyond summary decision, the judge could have reached the issue of whether frame grounding is effective, and could have resolved any factual inconsistencies in the record before him. But given the posture of the merits case, he did not have to reach this issue and thus made no factual findings on either the Secretary's or CSG's factual allegations. They remain mere allegations. We thus find the majority's treatment of the Secretary's allegations as if they were record facts inappropriate.[5]

The posture in which this EAJA case arrived at the Commission dictates that we look elsewhere to determine whether the Secretary's position had a reasonable basis in law and fact. We have already found that the judge properly determined that the Secretary's interpretation of section 56.12025 was unreasonable. But there are other "objective indicia" of the unreasonableness of the government's case. *See Pierce*, 487 U.S. at 568 (noting that certain "'objective indicia' such as the terms of a settlement agreement, the stage . . . at which the merits were decided, and the views of other courts on the merits . . . can be relevant" to the inquiry of whether the government's position was substantially justified). In keeping with *Pierce*, we thus look to other relevant "extraneous circumstances" that may have a bearing on the reasonableness of the Secretary's position. *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330, 1331 (9th Cir. 1992); *see also FEC v. Rose,* 806 F.2d 1081, 1090 (D.C. Cir. 1986). As the court in *Oregon Natural Resources Council* stated:

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[5] Although the majority regards the Secretary's submissions in the underlying summary decision proceeding as something more than allegations (slip op. at 14 n.14), until a trier of fact resolves conflicts between the factual allegations made by litigants, the litigants' conflicting submissions remain allegations. *See Wellmore*, 1997 WL 794132 at *3 ("'[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence'") (citations omitted). But more to the point, given the posture of this case and the fact that the Secretary lost the underlying proceeding on a narrow question of law, we find it unnecessary to reach the Secretary's factual allegations at all.

> Examination of the government's litigation position encompasses examination of the position on the merits, then focuses upon "extraneous circumstances bearing upon the reasonableness of the government's decision to take a case to trial." Extraneous circumstances include relevant legal or factual precedents.

980 F.2d at 1331-32 (citations omitted).

The Supreme Court has noted that "a string of losses," while not determinative, "can be indicative" that an agency's position lacks substantial justification. *Pierce*, 487 U.S. at 569. Here, the judge correctly noted in his EAJA decision that "all the other administrative law judges that have considered the Secretary's legal theory have concluded that it is not reasonable." 18 FMSHRC at 1823-24 (citing *Tide Creek Rock, Inc.*, 18 FMSHRC 390 (Mar. 1996) (ALJ); *Mulzer Crushed Stone Co.*, 3 FMSHRC 1238 (May 1981) (ALJ); and *McCormick Sand Corp.*, 2 FMSHRC 21 (Jan. 1980) (ALJ)). These cases illustrate the Secretary's inability to convince any trier of fact that section 56.12025 requires particular types of grounds.[6] It is just the sort of "string of losses" to which the Supreme Court referred in *Pierce*.

The majority's statement that "no binding [Commission] precedent exists to establish a meaningful interpretation of section 56.12025" (slip op. at 13) misses the point. At issue in this EAJA proceeding is not determining authoritatively what section 56.12025 means as applied to CSG's frame grounded crusher motor. Instead, at issue here is the reasonableness of the Secretary's position that such frame grounding was per se prohibited under section 56.12025. Moreover, the absence of any binding Commission decision on this question should not prevent us from considering how Commission judges have ruled on the Secretary's efforts "to require performance which is not specified in [section 56.12025]." *McCormick Sand*, 2 FMSHRC at 23.

Notwithstanding the statement on the face of the citation at issue here that frame grounding had been forbidden for 15 years, it has never been found by any adjudicator to be forbidden under section 56.12025. In fact, as recently as August 1997, well after the judge in this case granted CSG's EAJA application, yet another Commission judge flatly rejected the Secretary's theory that section 56.12025 per se prohibits frame grounding. *F. Palumbo Sand & Gravel*, 19 FMSHRC 1440 (Aug. 1997) (ALJ). In *Palumbo*, Judge David F. Barbour quoted Judge Cetti's suggestion made in the merits decision of the instant case that "'[i]f the Secretary believes frame grounding should be prohibited, the Secretary should initiate appropriate rule making to achieve this goal.'" *Id.* at 1444 (quoting 18 FMSHRC at 388). Judge Barbour concluded: "It is a good suggestion." 19 FMSHRC at 1444. We agree.

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[6] In all three cases we cite, Commission judges rejected the Secretary's attempts to expand the requirements of section 56.12025 and its predecessor, section 56.12-25, well beyond their plain meaning.

We are troubled by the Secretary's apparent indifference to the hazards she forcefully alleges are associated with frame grounding. She has inexplicably failed to seek review of four decisions by Commission judges which have declined to accept her position on frame grounding. Nor has she published an information bulletin or interpretive memorandum setting forth her interpretation of section 56.12025, much less made any effort to engage in rulemaking to clarify the requirements of the standard. The Secretary has simply been unwilling to clarify the scope and meaning of section 56.12025, even though she herself pronounces frame grounding to be a serious safety risk to miners. We find this to be a compelling indicator of the unreasonableness of the Secretary's position. If the consequences of relying on frame grounding are as dire as the Secretary suggests, we find it baffling that the Secretary has so utterly failed to clarify the scope and meaning of section 56.12025 as applied to such grounding. We can take her no more seriously than the fabled boy who cried wolf.

The Secretary's litigation strategy also illustrates the unreasonableness of her litigation position. Regarding cases decided on the pleadings, Congress warned:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim has been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4989-90. Here, the Secretary argued for application of a per se rule that frame grounding violated section 56.12025 *on the pleadings*, without leaving open the possibility of pursuing her case under any alternative theories. The judge rejected her arguments on a narrow and dispositive question of law, in accord with two judges before him. The Secretary then failed to appeal the judge's decision. In the face of two prior losses, we find the Secretary's pursuit of such a strategy unreasonable.[7]

We also find MSHA's proposed penalties in this case ($6,000 against Schoonmaker individually and $7,000 against CSG) to be particularly excessive, given that the alleged violation was based on an interpretation of the regulation that had been rejected twice before by Commission judges at the time the citation was issued. As a standard of comparison, the Secretary has proposed only nominal penalties in other attempts to enforce her, so far, unpersuasive interpretation of section 56.12025. We have determined administratively that in the

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[7] Nor did the Secretary plead in this case any "special circumstances [that] would make an [EAJA] award unjust," 5 U.S.C. § 504(a)(1), among which Congress noted is "advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." H.R. Rep. No. 96-1418, at 11.

1981 *Mulzer Crushed Stone* case, the Secretary proposed a penalty of $67. In the two section 56.12025 cases that have been decided since the instant case, nominal penalties were also proposed: $50 in *Tide Creek Rock* and $81 in *Palumbo*. The excessive increase in penalties proposed in the instant case over an average penalty of $66 proposed in the other section 56.12025 cases is left completely unexplained by the Secretary and unquestioned by the majority. This penalty escalation, coupled with the deliberate personalization of sanctions under section 110(c), leads us to wonder why the Secretary failed to litigate such a "significant" case beyond summary decision.

Finally, we note that, because the burden of showing substantial justification rests with the Secretary, it is incumbent upon her to provide additional support for her position beyond what was argued on the merits. *Oregon Natural Resources Council*, 980 F.2d at 1332. On this question, the judge found:

> The Secretary offered nothing in this [EAJA] proceeding to persuade me that my findings of unreasonableness in the underlying proceeding were incorrect. *The Secretary merely reiterates arguments that I have previously considered and rejected.*

18 FMSHRC at 1823 (emphasis added). And again, on appeal, the Secretary has offered no additional support for her position. She "only reasserts [her] position on the merits, and supplies nothing new to justify [her] position and meet [her] burden." *Oregon Natural Resources Council*, 980 F.2d at 1332. Similarly, the majority collapses their EAJA analysis into an endorsement of the Secretary's allegations made in the merits proceeding.[8] Their primary focus is on the issue of whether frame grounding is effective — an issue not before us.

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[8] We reject the majority's conclusion that the judge incorrectly collapsed his decision on the merits into his evaluation of the reasonableness of the Secretary's position for purposes of the EAJA proceeding. Slip op. at 9-10. The judge's decision clearly indicates he took a fresh look at the record. 18 FMSHRC at 1822-23 ("Having considered both aspects of this argument, I again find . . ."; "Again, on review of the record, I find . . ."). Moreover, given that the Secretary merely reiterated her merits arguments in the EAJA proceeding (*id.* at 1823), with so little to respond to, we find it hard to imagine what more the judge could have done. But even assuming arguendo that the judge inadequately set forth the reasons and bases for his EAJA decision, we believe that the majority is required to remand the case for further development. It is well established that Commission judges must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for their decisions, *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) — which, by the way, we believe the judge did here adequately.

Accordingly, for the foregoing reasons, we find that the judge correctly determined that the Secretary failed to meet her burden of establishing that her position in the underlying proceeding was substantially justified.[9]

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[9] In light of the majority's disposition, we do not reach the issues of whether the judge's award of fees was legally correct and supported by substantial evidence. *See* S. PDR at 11-14 (raising the issue of whether judge erred in increasing the cap on fees above the maximum specified in EAJA); 14 (raising the issue of whether the judge erred in awarding to CSG interest costs incurred on unpaid legal bills).

Distribution

C. Gregory Ruffennach, Esq.
450 East 3rd Avenue
Durango, CO 81301

Cheryl Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge August Cetti
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1244 Speer Blvd., Suite 280
Denver, CO 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 28, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 97-84-R
CONSOLIDATION COAL COMPANY	:	

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

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

This contest 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 the decision by Administrative Law Judge Gary Melick to vacate a section 104(b) withdrawal order, 30 U.S.C. § 814(b), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against Consolidation Coal Company ("Consol") for its failure to abate a violation of the respirable dust standard for underground coal mines set forth in 30 C.F.R. § 70.100(a).[2] 19 FMSHRC 1581, 1587 (Sept. 1997) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's decision. For the reasons that follow, we affirm the judge's decision.

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[1] Commissioner Beatty recused himself in this matter and took no part in its consideration.

[2] Section 70.100(a) states in pertinent part:

> 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.

30 C.F.R. § 70.100(a).

I.

Factual Background

Consol operates the Robinson Run No. 95 Mine, an underground coal mine in Harrison County, West Virginia. Tr. 17. In approximately January 1996, a complaint was filed with MSHA pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 813(g), by Ann Martin, a belt cleaner at the mine. Tr. 53; Ex. C-14 at 2. She alleged the presence of excessive dust at her work position on the 5 North Mains No. 2 belt line. Tr. 53, 56-58. On February 20 and March 5, 1996, MSHA Inspector Scott Springer visited the mine and, on each day, he sampled Martin's work position by placing a dust sampling pump on her. 19 FMSHRC at 1582. The average respirable dust concentration for the two samples was 11.2 milligrams per cubic meter of air ("mg/m^3"), far in excess of the 2.0 mg/m^3 limit set in section 70.100(a). *Id.*

On March 18, 1996, Inspector Springer issued a citation to Consol under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for violating the dust standard at Martin's work position. *Id.* The citation required Consol to take corrective action to abate the violation "and then sample . . . each day until five valid samples" were submitted to MSHA. *Id.* The citation set April 1 as the abatement date. *Id.* at 1584.

From March 20 to April 2, 1996, Consol took five respirable dust samples at Martin's position. *Id.* The average respirable dust concentration was 2.9 mg/m^3, which still exceeded the dust standard. *Id.* On April 16, MSHA Inspectors Charles Thomas and William Ponceroff visited the mine. Tr. 83-85. Inspector Thomas noted that the air velocity had been increased at the 5 North Mains No. 2 belt line tailpiece. 19 FMSHRC at 1584. He observed that the operator had begun to install tamper-proof valves on the sprays used to dampen the belt lines, in order to prevent the sprays from being turned off by unauthorized personnel. *Id.* Inspector Thomas noted that the 5 North Mains No. 2 belt line appeared damp and that Consol had ordered a different type of spray system. *Id.*; Tr. 94.

Consol management told the MSHA inspectors that the new equipment would be installed in time to start sampling on April 22, 1996. Tr. 91. Based on this information, the abatement date was extended to April 30, and Consol was required to take five valid samples, starting on April 22. 19 FMSHRC at 1584; Tr. 144.

On April 17, 1996, Consol contracted dust specialists from Conflow Inc. to help reduce the dust levels at Martin's work position. Tr. 409-10. On May 6, Inspector Thomas returned to the mine and was told by Dave McCullough, a Consol safety specialist, that Consol had attempted to take dust samples at Martin's position between April 22 and May 3 but had experienced problems obtaining valid samples. 19 FMSHRC at 1584; Tr. 95-96; Gov't Ex. 4 at 4. McCullough informed the inspector that the MSHA Pittsburgh laboratory had rejected the April 22 sample because of an invalid occupation code on the sample data card. Tr. 334-35. He also told the inspector that the April 24 sample was invalid because it had been taken when

Martin had not worked her entire shift in the designated area. 19 FMSHRC at 1586; Tr. 336-37. Inspector Thomas examined the mine's sampling log book and recorded that "[f]our (4) of the five (5) required valid samples were submitted for the [belt cleaner] occupation between 4-16-96 and 5-6-96." 19 FMSHRC at 1584. He also noted that some of the samples had been voided, including "4-24-96 cassette number 50-234511 [because the belt cleaner] did not work entire shift at location [and that] . . . the fifth valid sample was submitted but rejected by the computer as invalid code on 4-22-96 and operator became aware [of the rejection on] 5-6-96." *Id.* at 1584-85.

Inspector Thomas extended the abatement date to May 10, 1996, to allow Consol more time to obtain additional samples. Tr. 95-96. From May 3 to May 16, the operator did not take any additional samples because Martin was on sick leave or away on union business. Tr. 345-47. No other miner was assigned to work the 8-hour shift at Martin's work position during the time she was not at the mine. Tr. 346.

On May 10, 1996, MSHA received a letter from Consol's mine superintendent, Walter Scheller, stating that the proposed abatement measures were complete. Gov't Ex. 8 at 3. Also on May 10, MSHA's Pittsburgh laboratory issued a Report of Continuing Noncompliance (the "May 10 report"), showing that Consol had submitted five valid samples with an average dust concentration of 2.2 mg/m^3, which still exceeded the dust standard.[3] 19 FMSHRC at 1586; Gov't Ex. 5 at 2. By May 10, MSHA had corrected the invalid occupation code for the April 22 sample and included it as one of the five valid samples in the May 10 report. Tr. 334-36. The report also included, as one of the five valid samples, the April 24 sample which was taken when Martin did not work her entire shift on the 5 North Mains No. 2 belt line. 19 FMSHRC at 1586.

On May 16, 1996, Inspectors Thomas and Ponceroff returned to the mine and discussed with management what abatement steps had been taken. *Id.* at 1585; Tr. 120-21. After traveling the length of the 5 North Mains No. 2 belt line, the inspectors concluded that Consol had not

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[3] The May 10 report listed the five valid samples as follows:

Cassette No.	Date	MRE Equiv. Concentration
50233806	04-22-96	1.7
50234511	04-24-96	2.2
50234501	05-01-96	2.5
50233800	05-02-96	2.6
50233870	05-03-96	2.0

Avg. Conc. 2.2

Gov't Ex. 5 at 2.

made a good faith effort to abate the violation. Tr. 123-24. Inspector Ponceroff issued a 104(b) order[4] to the operator, in which he noted that "the results of the respirable samples (average) was 2.2 mg/m^3." 19 FMSHRC at 1585.

II.

Procedural Background

A. The Underlying Section 104(a) Citation: Docket No. WEVA 96-165

Both the section 104(a) citation and the subsequent section 104(b) order were initially litigated together in Docket No. WEVA 96-165. On September 10, 1996, the Secretary filed a petition for assessment of civil penalty relating to "each alleged violation set forth in attached Exhibit A." S. Pet. at 1. While the "Type of Action" in the petition was described as "104A — 104B," Exhibit A included a copy of the 104(a) citation but not a copy of the 104(b) order. *Id.* at Ex. A.

The case was assigned to Administrative Law Judge Melick. During a pre-hearing conference on January 7, 1997, the day of the hearing, a question arose as to the validity of the April 22 sample included in the May 10 report. S. Mot. to Withdraw Mot. to Amend Pleadings at 1-2 ("S. Withdrawal Mot."); Letter from Secretary to Consol of 1/23/97 ("S. Letter"). During the hearing later that day, the Secretary filed a motion, at the prompting of the judge, to amend her 104(b) order to state that Consol had not submitted five valid samples for the period April 22 to May 3, 1996. Tr. of Hearing on January 7, 1997, at 3-5. The motion was apparently based on the alleged invalidity of the April 22 sample and did not focus on the voided April 24 sample. S. Withdrawal Mot. at 1-3; S. Letter. The judge granted the Secretary's motion to amend the order and he postponed the hearing. Tr. of Hearing on January 7, 1997, at 5.

In a letter dated January 23, 1997, the Secretary informed Consol that the April 22 sample had been incorrectly classified as a voided sample and that Consol had in fact submitted five valid samples by the abatement date of May 10, 1996. S. Letter. The Secretary did not refer to the April 24 sample. On February 26, 1997, the Secretary moved to withdraw her motion to amend the order, because, she now represented, Consol had submitted five valid samples. S. Withdrawal Mot. at 2-3. Again, the April 24 sample was not mentioned. The judge granted the Secretary's motion to withdraw her motion to amend the order. On March 11, 1997, the judge issued an order that he lacked jurisdiction over the section 104(b) order because it was not attached to the Secretary's petition for assessment of a civil penalty.

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[4] Under section 104(b) of the Mine Act, if an MSHA inspector finds, during a follow-up inspection, that a violation described in a 104(a) citation "has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and . . . that the period of time for the abatement should not be further extended," the inspector shall issue a withdrawal order to the operator. 30 U.S.C. § 814(b).

The hearing on the 104(a) citation was resumed on March 18, 1997, and was concluded on the following day. The judge issued his decision on June 19, 1997, affirming the 104(a) citation that Consol violated the dust standard, based on the February 20 and March 5 samples taken by MSHA. 19 FMSHRC 1174, 1176 (June 1997) (ALJ). In his discussion of the good faith attempt to achieve rapid compliance criterion for penalty assessment purposes, the judge found 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." *Id.*

B. 104(b) Withdrawal Order: Docket No. WEVA 97-84-R

On March 14, 1997, Consol filed a notice of contest with the Commission, challenging the validity of the 104(b) order.[5] Administrative Law Judge Melick was assigned the case. Consol filed its brief on August 15, 1997, arguing that the Secretary did not have a legal basis for issuing the 104(b) order because she did not have the required five valid samples needed to determine if the violation had been abated by the abatement date. C. Post-hearing Br. at 4-6. Consol contended that one of the five samples used by MSHA, the April 24 sample, was invalid because it had been taken outside the designated work area. *Id.* at 4-5. Furthermore, Consol argued that, even if the Secretary had shown that the violation had not been totally abated by the abatement date, its abatement efforts justified a further extension of the abatement period rather than the issuance of a 104(b) order. *Id.* at 11-12.

In a letter dated August 21, 1997, the Secretary informed the judge that the parties had agreed to forgo a hearing and to use the record developed in the underlying 104(a) citation case (Docket No. WEVA 96-165) as the record in the 104(b) order case (Docket No. WEVA 97-84-R). In her brief to the judge filed on August 25, 1997, the Secretary argued that MSHA had a legal basis for issuing the 104(b) order because it had five valid samples which showed that Consol had failed to abate the violation by the abatement date. S. Post-hearing Br. at 10. She asserted that, based on the sample evidence, she had established a prima facie case that Consol did not abate by the abatement date and that Consol had failed to rebut the prima facie case. *Id.* at 10-12. The Secretary did not dispute that the April 24 sample was obtained when the belt cleaner had not worked her entire shift in the designated area. *Id.* at 12-13. However, she argued that Consol could not claim that the sample was invalid because it had failed to inform the MSHA laboratory that the sample was invalid. *Id.* at 12-14. Furthermore, she argued that MSHA properly declined to extend the abatement period for a third time because Consol had failed to take adequate corrective measures. *Id.* at 17-25.

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[5] On March 25, 1997, the Secretary moved to dismiss Consol's notice of contest, claiming it was not filed in a timely manner under 29 C.F.R. § 2700.25. On April 29, 1997, the judge issued an order denying the Secretary's motion on the ground that Consol's failure to timely file was caused by the Secretary's failure to properly include the 104(b) withdrawal order in her September 9, 1996, petition for assessment of a civil penalty.

In his decision of September 15, 1997, the judge concluded that the Secretary failed to show that Consol did not abate the violation by the abatement date. 19 FMSHRC at 1585. He concluded that the April 24 sample was invalid and, as a result, MSHA did not have the required five valid samples to issue the 104(b) order. *Id.* at 1585-86. He also concluded that Consol gave MSHA sufficient notice that the April 24 sample was invalid. *Id.* at 1586.

III.

Disposition

The Secretary contends that the judge erred in vacating the 104(b) order. S. Br. at 8. She asserts that, in order to show the validity of the 104(b) order, she needed to prove that Consol did not totally abate the underlying violation by the abatement date. *Id.* at 7. The Secretary argues that, because Consol failed to obtain five valid samples, she could not determine whether or not the violation had been totally abated. *Id.* at 9. Accordingly, the Secretary asserts that the burden of proof should shift to Consol to prove that it totally abated the violation by the abatement date (the "shift-in-burden theory"). *Id.* at 9-10.

Alternatively, the Secretary argues that she established a prima facie case that Consol did not totally abate the violation by the abatement date and that Consol failed to rebut her prima facie case. *Id.* at 16; S. Reply Br. at 5. Furthermore, she contends that MSHA was correct not to extend the abatement date for a third time because Consol did not make a good faith effort to abate the violation. S. Br. at 17-21. The Secretary requests that the Commission reverse the judge's decision vacating the 104(b) order and remand the case to the judge for assessment of a civil penalty. *Id.* at 22.

Consol argues that the judge correctly vacated the 104(b) order. C. Br. at 12, 17-18. It asserts that the Commission should not consider the Secretary's shift-in-burden theory because it was not argued before the judge. *Id.* at 10-13. Consol also argues that the Secretary has not demonstrated the required preponderance of evidence to support her prima facie case that Consol failed to abate the violation by the abatement date. *Id.* at 17. Consol requests that the Commission affirm the judge's decision vacating the 104(b) order. *Id.* at 18.

In reply, the Secretary contends that the judge was given sufficient notice of her shift-in-burden theory because she argued below that Consol had the burden to inform MSHA of any sampling problems. S. Reply Br. at 7.

The question on review is whether the judge erred in vacating the 104(b) order on the grounds that the Secretary did not have a legal basis for issuing the order as a result of Consol's failure to submit five valid dust samples.

A. Whether the Burden of Proof Shifts to Consol

Under the Mine Act and the Commission's procedural rules, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge ha[s] not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d). *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992) (holding that the Commission is barred from considering the Secretary's theory because it was not raised before the judge); *Union Oil Co. of Cal.*, 11 FMSHRC 289, 300-01 (Mar. 1989) (declining consideration of the Secretary's argument because it was not made before the judge). Upon reviewing the Secretary's post-hearing brief, we find the Secretary did not argue her shift-in-burden theory before the judge.

We do not agree with the Secretary's assertion that, because she argued below that Consol was required to inform MSHA of any problems with dust samples, the judge was given notice of her shift-in-burden theory. S. Reply Br. at 7. The requirement to inform MSHA about sampling problems is not similar to the burden of proving that the violation had been totally abated by the abatement date. In addition, Consol never disputed before the judge that it was required to inform MSHA of sampling problems and the Secretary never raised the issue below of shifting this requirement to another party.

The Secretary has also not shown good cause under section 113(d)(2)(A)(iii) why the Commission should still consider her belatedly-raised theory. 30 U.S.C. § 823(d)(2)(A)(iii). The Secretary had ample opportunity to argue her theory before the judge. When she filed her post-hearing brief, she had notice there was an issue as to whether five valid samples had been obtained. Consol notified Inspector Thomas that the April 24 sample was invalid. 19 FMSHRC at 1586. The Secretary filed a motion to amend the 104(b) order to reflect that five valid samples had not been obtained by Consol between April 22 and May 3, 1996. For reasons never fully explained, she then changed her mind and withdrew the motion to amend. In addition, Consol clearly argued in its post-hearing brief, filed ten days before the Secretary's brief, that it did not obtain five valid samples between April 22 and May 3, 1996. C. Post-hearing Br. at 5-6.

Based on the foregoing, the Commission will not consider the Secretary's shift-in-burden theory because the Secretary failed to raise it before the judge.

B. Whether the Secretary Established a Prima Facie Case that Consol did not Abate the Violation

We also find unpersuasive the Secretary's alternative argument that she had established a prima facie case that Consol failed to abate the violation by the abatement date. S. Br. at 16. When she made this argument to the judge, she based it on her claim that there were five valid samples and their average concentration exceeded the dust standard. S. Post-hearing Br. at 10-17. The Secretary makes a similar prima facie claim on review but she does not explicitly argue

that Consol took five valid samples. S. Br. at 16; S. Reply Br. at 5. We assume that, as with her argument before the judge, the Secretary on review is basing her prima facie claim on the assertion that Consol submitted five valid samples and the average concentration of the samples exceeded the dust standard.

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is undisputed that Martin, the belt cleaner, did not work her entire 8-hour shift in the designated area on the day that the April 24 sample was taken. Tr. 110-11. It is also undisputed that, in order to obtain a valid dust sample, the designated area must be sampled continuously for the entire shift. 30 C.F.R. § 70.201(b). Accordingly, there is substantial evidence to support the judge's conclusion that the April 24 sample was not valid. 19 FMSHRC at 1586. Because the April 24 sample comprised one of the five samples used in the May 10 report, we also find that there is substantial evidence that, contrary to the Secretary's prima facie claim, the Secretary did not have the required five valid samples needed to show that Consol failed to abate the violation by the abatement date.

Our holding is a narrow one. We do not mean to suggest that the failure to take five valid samples is generally a valid defense to a 104(b) order issued for failure to abate a violation of section 70.100(a). On the contrary, proof of failure to take necessary samples required to terminate a dust citation will in most such cases establish the basis for a 104(b) order. Thus, when the Secretary became aware that the April 24 sample was not valid, she had the option, but chose not to use it, of amending the withdrawal order to state that it was issued because Consol failed to obtain five valid samples (a requirement stated in the original 104(a) citation). Even in the absence of a formal amendment, if she had at least litigated this theory before the judge, the Secretary could have defended her withdrawal order on the undisputed basis (C. Post-hearing Br. at 5-6) that Consol did not obtain five valid samples. *See Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997) (holding that where issue is actually litigated, formal amendment of pleadings is unnecessary). It is the Secretary's unexplained decision to eschew this argument that leads us to affirm the judge's dismissal of the 104(b) order.

IV.

Conclusion

For the foregoing reasons, we affirm the judge's decision vacating the 104(b) order.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Marks, dissenting:

The judge's determination in this case amounts to a holding that an operator's failure to produce five valid respirable dust samples, after receiving two extensions to do so, is a defense to issuing a failure to abate order. Because I cannot subscribe to such an illogical result, I dissent.

Section 104(b) of the Mine Act provides:

> 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) of this section 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 . . . to immediately cause all persons . . . to be withdrawn . . . .

30 U.S.C. § 814(b) (emphasis added).

On March 18, 1996, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Consol a respirable dust citation under 30 C.F.R. § 70.100(a) on the grounds that the dust samples showed an average concentration of 11.2 mg/m^3 for a certain occupation and set the time for abatement as April 1. Gov't Ex. 4 at 1. It is undisputed that between March 20 and April 2, the average respirable dust concentration was 2.9 mg/m^3, which still exceeded the dust standard and MSHA extended the time for abatement to April 30. *Id.* at 3. On May 6, Consol reported that it had experienced problems obtaining valid samples and the abatement day was extended to May 10. 19 FMSHRC at 1584; Tr. 95-96; Gov't Ex. 4 at 4. The average of these problem samples was 2.2 mg/m^3. 19 FMSHRC at 1585-86. From May 3 to May 16, *the operator did not take any additional samples*. Tr. 345-47. On May 16, MSHA inspectors returned to the mine and concluded that Consol had not made a good faith effort to abate the violation. 19 FMSHRC at 1584; Tr. 120-21, 123-24.

The inspectors issued the section 104(b) order at issue, reciting in extensive detail that an adequate effort was not made to abate the original March 18, 1996 citation. Gov't Ex. 9. The order stated:

> 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

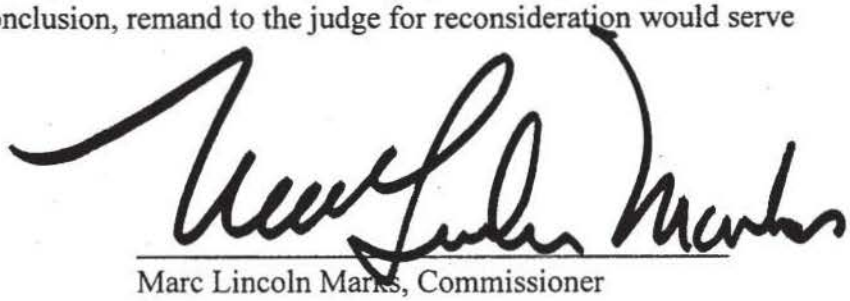
> crosscut, a distance of 2,700 feet. The water spraying system for the 8D beltline did not have a water spray for the top surface of the top belt. The valve to prevent intentional shutdown of the water spraying system was connected to a hose, but not installed in the water system. A citation for float 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.

19 FMSHRC at 1585. The order also stated that the average result of the respirable dust samples was 2.2 mg/m^3. *Id.*

I conclude that, on May 16, 1996, despite the fact that the MSHA inspectors may have incorrectly relied on this 2.2 mg/m^3, it was undisputed that "[a]n adequate effort was not made to abate" the citation. *Id.* As the judge found, MSHA granted the operator a second extension because it was having problems obtaining valid samples. *Id.* at 1584-85. Consol, however, failed to take another sample during the second extension period. Under the plain terms of Mine Act section 104(b), the citation had not been "totally abated." Thus, the MSHA inspectors were well within their discretion to issue the section 104(b) order. *See Energy West Mining Co. v. FMSHRC*, 111 F.3d 900, 902-04 (D.C. Cir. 1997) (holding that inspector's decision to issue section 104(b) order was subject to review for abuse of discretion).

Section 70.201(d) provides: "During the time for abatement fixed in a citation for violation of section 70.100 (Respirable dust standards) . . . , the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken." 30 C.F.R. § 70.201(d). Consol violated the standard's unequivocal requirement that an operator sample each production shift until five valid respirable dust samples are taken. The risk of failing to take valid samples should of course be bourne by the operator. *See Harlan Cumberland Coal Co.*, 19 FMSHRC 1521,1524 (Sept. 1997) ("Any risk that the samples might not reach MSHA properly lies with the operator."). For this reason, I cannot agree with the majority and uphold the dismissal of a withdrawal order that was well within the discretion of the two MSHA inspectors to issue, given the operator's less than rigorous attempt to sample each production shift.

Although the Secretary may have been mistaken in failing to amend the order to allege that Consol had failed in obtaining five valid samples, it is undisputed that Consol failed in that duty. Thus the judge's holding exalts form over substance and produces the absurd result that an operator's failure to comply with the respirable dust standard may serve as a defense to a withdrawal order. Because the record compels the conclusion that Consol failed to adequately abate the respirable dust citation, I would reverse the judge's dismissal of the withdrawal order at issue. *See American Mine Servs., Inc.*, 15 FMSHRC 1830,1834 (Sept. 1993) (holding that where the record can support only one conclusion, remand to the judge for reconsideration would serve no purpose).



Marc Lincoln Marks, Commissioner

Distribution

W. Christian Schumann, Esq.
Yoora Kim, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Elizabeth Chamberlin, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
INTERNATIONAL CHEMICAL WORKERS' UNION COUNCIL	:	Docket No. SE 94-362-RM
v.	:	
ASARCO, INCORPORATED	:	

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

DECISION

BY: Marks, Riley, Verheggen, and Beatty, Commissioners

This is a contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), in which Asarco, Inc. ("Asarco"), challenges a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citation charges Asarco with violating 30 C.F.R. § 57.5001(a), which specifies the exposure limits for airborne contaminants in metal/nonmetal mines, and 30 C.F.R. § 57.5005, which addresses the control of exposure to those airborne contaminants. The proceeding had previously been before the Commission on review after Administrative Law Judge Roy Maurer granted Asarco's motion to dismiss. The Commission vacated the judge's order and remanded the case to the judge for a hearing on the merits of the citation. *Asarco, Inc.*, 17 FMSHRC 1 (Jan. 1995) ("*Asarco I*"). Following the hearing, the judge granted Asarco's contest and vacated the citation. 19 FMSHRC 1097 (June 1997) (ALJ). Asarco filed a petition for discretionary review ("PDR") challenging the judge's determination that MSHA's use of single shift sampling is a permissible method of determining whether silica dust concentrations exceed the limit set forth in section 57.5001(a). The Secretary of Labor and the International Chemical Workers' Union Council (the "Union") filed "conditional" petitions requesting review of the judge's decision in the event the Commission granted Asarco's petition for review. The Commission granted the petitions filed by Asarco, the Secretary and the Union. For the reasons that follow, we vacate the direction for review.

I.

Factual and Procedural Background

MSHA issued the citation in this proceeding after the agency sampled for airborne contaminants at the "skip tender" position at Asarco's Young mine, an underground zinc mine in Tennessee. *Id.* at 1098-99. The citation charged Asarco with violating sections 57.5001(a)[1] and 57.5005.[2] *Id.* at 1097. The citation, based on a single sample taken during an eight-hour shift, alleged that the miner was exposed to 2.3 milligrams of respirable silica-bearing dust per cubic meter of air ("mg/m^3"), which exceeded the permissible level of contaminants. *Asarco I*, 17 FMSHRC at 2-3. The citation further alleged that, although respiratory protective equipment was in use, all feasible engineering controls were not being used to control the employees' exposure to dust, as required by the regulations. *Id.* at 3.

Asarco filed a notice of contest and subsequently moved to vacate the citation based on the Commission's decision in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (Jan. 1994). In *Keystone*, the Commission invalidated MSHA's spot inspection program — under which MSHA would determine whether mine operators violated the standard limiting levels of respirable coal dust in underground coal mines (30 C.F.R. § 70.100) based on a single dust sample taken during an eight hour shift — because the Secretary had failed to engage in notice-and-comment rulemaking in accordance with the Mine Act and the Administrative Procedure Act. *Id.* at 16.

In *Asarco I*, the Commission reversed the judge's dismissal of the citation based on the *Keystone* decision. The Commission concluded that the legal basis for the *Keystone* decision limited its application to air sampling in underground coal mines. *Asarco I*, 17 FMSHRC at 5.

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[1] Section 57.5001(a) provides in relevant part:

> Except as permitted by § 57.5005—
>
> (a) . . . the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conferences's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," . . . .

30 C.F.R. § 57.5001(a).

[2] Section 57.5005 provides in relevant part: "Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air." 30 C.F.R. § 57.5005.

The case was remanded, and a hearing was held on the merits of the citation. The judge upheld the merits of single-shift sampling as consistent with the regulations at issue. 19 FMSHRC at 1132. However, he vacated the citation on the ground that MSHA failed to maintain and adhere to standardized procedures in its laboratory where the dust samples that were the basis for the citation were analyzed. *Id.* at 1139-41. The judge therefore granted Asarco's contest. *Id.* at 1142. The judge also granted a motion for declaratory relief, filed by Asarco during the hearing, in which it sought a declaration that the MSHA Denver laboratory cannot reliably report the amount of silica in any single sample that it analyzes under its current procedures. *Id.*

Notwithstanding the judge's grant of its contest and his issuance of declaratory relief, Asarco petitioned the Commission for discretionary review, challenging the judge's upholding of single-shift sampling in metal/nonmetal mines. Asarco argued, inter alia, that single-shift sampling is inconsistent with the language of the regulations and is not a reasonable means for determining excessive exposure to silica dust. A. PDR at 3-5. In their conditional petitions for discretionary review, the Secretary and the Union challenged the judge's issuance of declaratory relief. S. PDR; U. PDR. Both the Secretary and the Union also opposed Asarco's petition on the ground that Asarco was not a person "adversely affected or aggrieved by a decision of an administrative law judge." S. Opp'n at 3-6 (quoting 30 U.S.C. § 823(d)(2)(A)(i)); U. Opp'n at 1-2.

II.

Disposition

A threshold issue before us is whether a party who has prevailed before an administrative law judge may nevertheless petition the Commission to review determinations made by the judge that are adverse to a position a party has taken during the proceeding.

In her opposition to Asarco's petition, the Secretary argues that, because Asarco received all the relief it sought before the judge — vacating the citation and granting its motion for declaratory relief — Asarco is not aggrieved, and the Commission is without jurisdiction to consider the appeal. S. Opp'n at 3-6; S. Resp. Br. at 1-3. The Secretary asserts that the judge's determination that single-shift sampling is a permissible enforcement strategy is non-binding and, therefore, Asarco can show no injury other than that it may have to relitigate the issue. S. Opp'n at 5-6. The Secretary also contends that the Commission lacks jurisdiction to hear Asarco's request for review of a finding that was unnecessary to the judge's ultimate determination. S. Resp. Br. at 1, 3, 5-8. Finally, the Secretary cautions that recognizing the right of prevailing parties to appeal from portions of decisions with which they are dissatisfied would encourage litigants to file many unnecessary appeals with the Commission. S. Opp'n at 6. In support of the Secretary's position, the Union argues that Asarco is not an aggrieved party and, therefore, lacks standing to challenge the judge's finding regarding single-shift sampling. U. Opp'n at 1-2.

Asarco responds that the judge's finding that single-shift sampling is valid is appealable because it did not prevail on that issue. A. Br. at 15 n.19. Further, Asarco argues that the single-shift testing policy continues to be applied, and the threat of injury to Asarco is real.[3] *Id.* at 16. Asarco states that other cases have been stayed pending a Commission decision regarding single-shift sampling. *Id.* In its reply brief, Asarco disputes the Secretary's suggestion that it received all the relief it sought before the judge. A. Reply Br. at 29. Finally, Asarco asserts that it falls within judicially-created exceptions to the general rule barring appeal by winning parties. *Id.* at 31.

Section 113(d)(2)(A)(i) of the Mine Act provides, in relevant part, that "[a]ny person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision . . . ." 30 U.S.C. § 823(d)(2)(A)(i). "The phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts." *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122, 126 (1995).

The Mine Act further states that review "shall not be a matter of right but of the sound discretion of the Commission." 30 U.S.C. § 823(d)(2)(A)(i); *see* Commission's Rules of Procedure, 29 C.F.R. § 2700.70(a), (b); *see also* S. Rep. No. 181, 95th Cong., at 48 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 636 (1978) (discussing the Commission's broad discretion in deciding whether to grant review). Agencies retain substantial discretion in formulating, interpreting, and applying their own procedural rules. *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 451 (10th Cir. 1983) (citing *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)). However, in exercising its discretion, "an agency receives guidance from the policies that underlie the 'case or controversy' requirement of article III," including "examination of the proper institutional role of an adjudicatory body and a concern for judicial economy." *Id.*

We addressed the "aggrieved person" requirement of section 113(d)(2)(A)(i) in *Mid-Continent Resources, Inc.*, 11 FMSHRC 2399 (Dec. 1989) ("*Mid-Continent I*"). There, we had granted a petition for discretionary review from the American Mining Congress ("AMC"), which was not a party to the proceeding before the judge. In vacating our grant of the AMC's petition, we eschewed a literal approach to application of the aggrieved person requirement of section 113(d)(2). *Id.* at 2401. We were guided by general principles governing appeals in "traditional adversarial litigation" and stated, "we discern no warrant for an interpretation of section 113(d)'s review procedure that is out of line with normal litigation processes or that is likely to complicate or prolong the resolution of disputes under the Act." *Id.* at 2401-02.

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[3] Asarco also seeks a declaration from the Commission that the Secretary can never prove a violation of the respirable dust standard by use of a single-shift sample. A. Br. at 16.

In concluding that the AMC lacked standing to file a review petition, we stated:

> Here, literally speaking, there is not a "case or controversy" involving the AMC under the Mine Act in the context of the present proceeding. Nor has the AMC demonstrated how the judge's *dismissal* of the Secretary's enforcement proceeding has had an adverse impact on it. Instead, the AMC argues that it is "adversely affected or aggrieved" because it has an interest in the legal principles involved in this proceeding . . . . However, *every* Commission proceeding, to some extent, involves an interpretation of the Mine Act, a mandatory standard, or some legal principle affecting the enforcement or meaning of the Mine Act. Under the AMC's position, mining trade associations, mine operators, and miners generally would have a sufficient interest in Commission proceedings to bestow upon them the right to file a petition for review of most administrative law judge decisions. We are confident that Congress, in enacting the Mine Act, did not intend to create such a potential litigation "free-for-all" in review proceedings before the Commission.

Id. at 2403-04 (emphasis in original).

The issue in *Mid-Continent I* involved the right of a non-party to file a review petition where the Secretary had vacated the citation and the judge had dismissed the proceeding.[4] Thus, *Mid-Continent I* is not directly controlling here, where the judge has issued a decision in a party's favor. Nevertheless, much of our reasoning in *Mid-Continent I* applies to this case. Extending the right to petition for review by a prevailing party raises the spectre of the "litigation free-for-all" that we sought to avoid in *Mid-Continent*. If we were to grant the right to challenge adverse factual findings or legal conclusions to a party who has prevailed before an administrative law judge, the scope of the issues that could be appealed would be broadened significantly from our present practice.

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[4] In *Mid-Continent Resources, Inc.*, 12 FMSHRC 949 (May 1990) ("*Mid-Continent II*"), the Commission addressed Mid-Continent's request for declaratory relief in the same proceeding. The Commission concluded that the case was moot, reasoning that, once the Secretary vacated the underlying citation, the enforcement action was extinct. *Id.* at 956. In *Mid-Continent II*, the issue of whether Mid-Continent was an aggrieved person withing the meaning of section 113(d)(2) was not raised or argued to the Commission. Unlike *Mid-Continent II*, in the instant case the administrative law judge issued a decision from which Commission review could be sought by an "aggrieved person." Subsequent to *Mid-Continent I* and *Mid-Continent II*, the Commission held that the Secretary's decision to vacate citations is unreviewable. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996); *RBK Constr., Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993).

Other statutes with standing requirements similar to the Mine Act support our treatment of appeals by prevailing parties under section 113(d)(2). Section 10(f) of the National Labor Relations Act ("NLRA") provides that "[a]ny person aggrieved by a final order of the Board . . . may obtain a review of such order [in an appropriate United States circuit court of appeals] . . . ." 29 U.S.C. § 160(f).[5] In *Boeing Co. v. NLRB*, 89 LRRM 2672 (4th Cir. 1975), the court granted the NLRB's motion to dismiss the petition for review that was filed by Boeing, which had prevailed in the administrative proceeding below and had all unfair labor practice charges against it dismissed. The court held that Boeing could not assert that it was "aggrieved" and that the statute did not allow a victorious party to challenge adverse underlying findings and conclusions. *Id.* at 2674. The court reasoned that the adverse findings would have neither collateral estoppel nor res judicata effect in future proceedings involving Boeing, because "of the general lack of ability of the winning party to obtain as broad a scope of appellate review as is available to the losing party." *Id.*; *see also Deaton Truck Line, Inc. v. NLRB*, 337 F.2d 697, 698 (5th Cir. 1964) (finding that appellant lacked standing to appeal because, as victorious party below, it "is not a party aggrieved by the Board's *order*") (emphasis in original). We find this rationale persuasive, because in the present case the judge's decision has neither res judicata nor collateral effect in future cases in which the issue of single-shift sampling may be raised. *See also* Commission Procedural Rule 72, 29 C.F.R. § 2700.72 ("An unreviewed decision of a Judge is not a precedent binding upon the Commission.").

While the Occupational Safety and Health Review Commission ("OSHRC") has not addressed the situation at issue, it has interpreted in another context the "aggrieved party" requirement of the Occupational Health and Safety Act of 1970 ("OSH Act"). The OSH Act regulation concerning OSHRC's discretionary review also contains language limiting standing before that Commission to parties "adversely affected or aggrieved by the decision." 29 C.F.R. § 2200.91(b). Applying that regulation, OSHRC denied a request for review of a de minimus violation, noting that "[s]ince complainant does not take issue with the Judge's disposition and respondent is not specifically prejudiced thereby, the Commission declines to pass upon, modify, or change the Judge's decision." *Westburne Drilling, Inc.*, 5 OSHC (BNA) 1457, 1457 (No. 15631, 1977).

Finally, we find support for our approach in the law governing appeals in the federal court system. The general rule in federal courts is that parties may not appeal adverse portions of district court judgments in their favor. *See California v. Rooney*, 483 U.S. 307, 311 (1987) ("The Court of Appeal's use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review."); 19 James Wm. Moore, *Moore's Federal Practice* § 205.04[1], at 205-42 to 205-43 (Donald R. Coquilette et al. eds, 3d ed. 1998) (quoting *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326, 334 (1980)). The Fourth Circuit elaborated that "[a]n injury in fact is required for a party to be aggrieved for purposes of being able to appeal; the party's desire for better

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[5] Unlike the Mine Act, the NLRA contains no parallel provision governing appeals from administrative law judge decisions to the Board. *See* 29 U.S.C. § 160(c); 29 C.F.R. § 102.46.

precedent does not by itself confer standing to appeal." *HCA Health Servs. of Virginia v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 124 (4th Cir. 1992).

Some cases on which Asarco relies recognize that, so long as a prevailing party retains a sufficient stake in continued litigation, it may appeal adverse aspects of a decision. *See* A. Reply Br. at 31-33 (citing *R.T. Vanderbilt v. OSHRC*, 728 F.2d 815 (6th Cir. 1984); *Roper*, 445 U.S. at 334; *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939)). While limited exceptions exist to the general rule denying prevailing parties standing to appeal from adverse findings unnecessary to the final adjudication, we find that Asarco's attempt to fit its request within these exceptions is misplaced. None of the cases cited by Asarco stands for the proposition that a party such as Asarco — which has prevailed below, will suffer no collateral effects from our denial of review and which retains no economic interest related to the vacated citation — would have standing in federal court to challenge an adverse finding unnecessary to the final determination.

Both Asarco (A. Reply Br. at 32) and the dissent (slip op. at 11) point to the Sixth Circuit's opinion in *Vanderbilt*, which found that OSHRC's finding that a product sold by Vanderbilt contained asbestos "may have a substantial effect on the behavior of ceramic manufacturers concerned about the safety of the . . . product," thereby supplying the "case or controversy to consider Vanderbilt's appeal." 728 F.2d at 817. Here, by contrast, the judge upheld a sampling technique that has been in use for over 20 years, thereby maintaining the status quo. *See* 19 FMSHRC at 1135 ("[T]he record is devoid of any indication as to why, after more than 20 years of enforcing Section 57.5001(a) by single samples . . . , a multiple sample position has suddenly surfaced."). The judge's decision did not alter the behavior of these litigants or of any third parties. Moreover, Asarco retains the right to challenge the Secretary's single-shift sampling enforcement policy in a future case where determining whether the dust standard was violated necessitates a ruling on the validity of single-shift sampling. Asarco's right to challenge the Secretary's policy is not impaired by our decision today. Thus, we find *Vanderbilt* inapposite.

Likewise, *Roper*, relied upon by Asarco and the dissent, is an example of a limited exception, inapplicable here, to the rule that prevailing parties may not appeal the merits of adverse rulings. The appellants in *Roper* sought review of the judge's denial of their request for class certification, despite the district court's award to the plaintiffs of the maximum individual amount. 445 U.S. at 330, 340. The Supreme Court held that the appellants satisfied the Article III case or controversy requirement by retaining a substantial economic interest in their appeal of a ruling denying them class certification, which would have allowed them to "shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." *Id.* at 336. Asarco has no such economic interest here.

Electrical Fittings also does not support Asarco's request for review. That case involved a defendant-appellant's request for review of the district court's determination that a patent was

valid, despite the district court's dismissal of the case for failure to prove infringement. 307 U.S. at 242. The Supreme Court in *Electrical Fittings* remanded the matter, but explicitly limited the remand to the excision from the district court's decree of the collateral finding that the patent was valid, and specifically declined to review the merits. *Id.* The Court stated that the Second Circuit had jurisdiction "to entertain the appeal, *not for the purpose of passing on the merits*, but to direct the reformation of the decree." *Id.* (emphasis added). The Court stressed that "[a] party may not appeal from a judgment or decree in his favor, for the purpose of obtaining review of findings he deems erroneous which are not necessary to support the decree." *Id.* (citations omitted). By contrast, Asarco seeks review of the merits of single-shift sampling.[6]

Reduced to its essence, the dissent's main contention is that the resources expended by Asarco and the Secretary in litigating this case warrant the Commission's review of the single-shift sampling issue, despite both the Secretary's and the Union's request to dismiss for lack of jurisdiction, and despite Asarco's victory before the judge. Slip op. at 10, 12. But "'the inconvenience of having to initiate more than one suit [is not] a hardship sufficient to justify review' when the issues are not otherwise fit for judicial resolution." *Webb v. Department of Health and Human Servs.*, 696 F.2d 101, 107 (D.C. Cir. 1982) (alteration in original) (quoting *New York Stock Exchange, Inc. v. Bloom*, 562 F.2d 736, 742 (D.C. Cir. 1977)).[7]

Finally, we take little comfort in the dissent's explanation (slip op. at 12) that we would retain discretion to reject petitions for discretionary review from prevailing parties in the future. The necessity of reviewing a flood of appeals from prevailing parties for the purpose of deciding whether to grant review would in and of itself create an administrative burden on the Commission, even if review is ultimately denied. As an application of sound policy, we think it the wiser course to exercise our discretion under the Mine Act to review judges' rulings in accordance with the well-settled law of standing. Accordingly, we vacate our direction for review granting Asarco's petition and the "conditional" petitions of the Secretary and the Union. Pursuant to 30 U.S.C. § 823(d)(2)(A)(i), we deny review of the three petitions.

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[6] We also note that the passage in Moore's Federal Practice cited by the dissent relies on *Roper* and *Electrical Fittings* as the only examples of cases where parties satisfied Article III despite winning below. Slip op. at 10. As we have explained, Asarco's "rights" have not been affected by the judge's single-shift sampling ruling.

[7] Contrary to the dissent's assertion, we did not "clearly remand[]" (slip op. at 10) the issue of single-shift sampling for consideration by the judge. Rather, we "vacate[d] the judge's order dismissing the citation and remand[ed] for further appropriate proceedings consistent with [our remand decision]." 17 FMSHRC at 6. Our remand did not require the judge to pass on the merits of single-shift sampling.

III.

Conclusion

For the foregoing reasons, we vacate the order granting review of Asarco's petition and the order granting review of the "conditional" petitions for discretionary review filed by the Secretary and the Union, and we deny review of the three petitions.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan, dissenting:

This case, which was filed with the Commission in 1994, involved extensive discovery, many expert witnesses, a sixteen day trial in 1996, and a voluminous record totaling over four thousand pages. Although my colleagues vacate the order granting review of Asarco's petition for review, I believe that the Commission should hear the claims raised by Asarco. I therefore respectfully dissent.

Asarco brought this case in large part to challenge the validity of MSHA's silica dust sampling procedures. It came to the Commission five years ago seeking a meaningful, final resolution of this matter. Both Asarco and the Secretary invested substantial time and money to conduct this litigation. After devoting extensive resources to an issue which the Commission had clearly remanded to the judge, *Asarco, Inc.*, 17 FMSHRC 1, 5 (Jan. 1995), and subsequently losing on that issue, which is central to one of MSHA's most important and extensive enforcement mechanisms, Asarco can hardly be characterized as a typical prevailing litigant. On the contrary, it either will now have to continue to operate under a system which it claims produces inaccurate samples, or will have to start from scratch and craft a new litigation challenge, in which both Asarco and the Secretary will undoubtedly expend significant resources to replay what has already been presented to the judge in this case. The judge upheld the sampling policy to which Asarco objected, and unless it can obtain a contrary ruling from a body such as the Commission or a court, Asarco will continue to be subject to citations and penalties on the basis of a sampling system which it claims is inaccurate. Consequently, it stands as a party "adversely affected or aggrieved by a decision of an administrative law judge." 30 U.S.C. § 823(d)(2)(A)(i).

My conclusion that the Commission should review Asarco's appeal is consistent with the legal principle that

> [I]f a litigated issue was adjudicated expressly adversely to the party prevailing on the merits, even though it was immaterial to the final disposition, that party may retain an interest in the matter sufficient to support appellate jurisdiction. . . . A 'stake in the appeal' exists if the collateral ruling affects the prevailing party's rights and if erroneous would work harm to the prevailing party's interest.

19 James Wm. Moore, *Moore's Federal Practice* § 205.04[1], at 205-42 to 205-43 (Donald R. Coquilette et al. eds, 3d ed. 1998) (quoting *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326, 334 (1980)). Clearly the judge's ruling on the single sampling issue was adverse to Asarco, and affected its rights. If the judge is wrong and MSHA's single sample approach is not "'reasonably calculated to prevent excessive exposure to respirable dust'" (19 FMSHRC

at 1135) (quoting *American Mining Congress v. Marshall*, 671 F.2d 1251, 1256 (10th Cir. 1982)), Asarco's (as well as countless miners') interests will be placed severely at risk.

My position is also supported by the Supreme Court's decision in *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326 (1980), which established an exception to the general rule that prevailing parties may not appeal. In that class action against a bank, the district court denied the motion for class certification. *Id.* at 329. The bank subsequently offered each named plaintiff the maximum amount each could have recovered. *Id.* Although the plaintiffs refused the offer, the district court entered judgment in their favor. *Id.* at 329-30. The Supreme Court affirmed the 5th Circuit's holding that the case was not moot, on the ground that the plaintiffs held an economic interest in class certification (because they wanted to shift some of the litigation expenses to other class members). *Id.* at 338-40. This was sufficient, according to the Court, to permit the prevailing party to appeal the adverse collateral ruling, since the party retained "a stake in the appeal satisfying the requirements of Art[icle] III." *Id.* at 334.

My refusal to vacate the order granting review of Asarco's petition is also consistent with *R.T. Vanderbilt Co. v. OSHRC*, 728 F.2d 815 (6th Cir. 1984). In that case, a pottery company was charged with three violations of OSHA's asbestos standard. *Id.* at 816. The Occupational Safety and Health Review Commission vacated the citation, but found that the talc product manufactured by Vanderbilt (which had intervened) and used to make the pottery contained asbestos fibers. *Id.* at 816-17. Relying on *Deposit Guaranty*, the 6th Circuit rejected OSHRC's argument that the court had no jurisdiction over the case and that Vanderbilt could not appeal from OSHRC's decision because it had received all the relief it required (the vacation of the citation against Hull). *Id.* at 817. The 6th Circuit ruled that the Commission's determination that Vanderbilt's talc contained asbestos, although not binding in future cases, could significantly affect the actions of ceramic manufacturers concerned about the safety of the product.[1] *Id.*

Although my colleagues rely primarily on *Mid-Continent Resources, Inc.*, 11 FMSHRC 2399 (Dec. 1989) ("*Mid-Continent I*"), I find it singularly inapposite. As they acknowledge (slip op. at 5), the Commission in that case was focused on the question of whether a non-party could file a petition for review after the Secretary had vacated a citation and the judge had dismissed the proceeding. However, even though the operator had prevailed below, the Commission did not dismiss its petition, but instead, went on to issue a substantive decision on its request for declaratory relief. *Mid-Continent Resources, Inc.*, 12 FMSHRC 949 (May 1990) ("*Mid-Continent II*"). We denied relief on the grounds that the controversy was speculative, that the operator had not proven that similar incidents had occurred at its mines, or that its claim was

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[1] My colleagues' attempt to distinguish *Vanderbilt* (slip op. at 7) is misplaced. The significance of *Vanderbilt* does not turn on the fact that it involved a decision which could motivate "third parties to change their conduct in response to portions of a court's decision." *Id.* Although that was the applicable fact situation in *Vanderbilt*, the Court nowhere intimates that its ruling permitting the appeal should be restricted in this manner.

widespread in the industry. *Id.* at 956-57. This is in stark contrast to Asarco, which will continue to be subject to the Secretary's single sample enforcement process on a daily basis, has asserted that other operators continue to receive single sample citations (A. Reply Br. at 33), and indicates that many similar cases have been stayed pending the outcome of this proceeding. A. Br. at 16. The Commission's admonition in *Mid-Continent II* that declaratory relief was too abstract and that the operator should wait until a concrete case existed does not apply in the instant proceeding. Here, Asarco has demonstrated "a substantial likelihood of recurrence of the claimed enforcement harm or the imminence of repeated injury." *Mid-Continent II*, 12 FMSHRC at 956.

My colleagues speculate that permitting review in this case could create a "litigation free-for-all." Slip op. at 6. Pursuant to our statutory authority, however, the Commission has the unchallenged ability to deny petitions. Hearing this appeal in no way obligates us to grant review of prevailing parties' petitions in subsequent cases. The beauty of the discretionary nature of our review process is that we may use our judgment to select the cases appropriate for Commission adjudication. If we are truly concerned about ensuring the effective use of Commission and party resources we would be well placed to hear this appeal, instead of permitting four years of extensive litigation, and the views of a judge expressed in excruciating detail in a thoroughly written opinion, to be cast aside.

Accordingly, I would not vacate the petition for review, but would decide the case on the merits.

Mary Lu Jordan, Chairman

Distribution

Steven D. Turow, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Randy Vehar, Esq.
Michael Spinker, Esq.
International Chemical Workers Union
1655 West Market Street
Akron, OH 44313

Henry Chajet, Esq.
David Farber, Esq.
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

David Goldman, Esq.
U.S. Steel Workers of America
5 Gateway Center
Pittsburgh, PA 15222

Michael F. Duffy, Esq.
National Mining Association
1130 17th Street, N.W.
Washington, D.C. 20036

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. EAJ 96-4
JAMES M. RAY, employed by LEO JOURNAGAN CONSTRUCTION CO., INC.	:	

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

DECISION

BY: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners:

This proceeding involves the recovery of attorney's fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (1996) ("EAJA"). James "Mike" Ray ("Ray"), who was employed by Leo Journagan Construction Co., Inc. ("Journagan"), prevailed over the Department of Labor's Mine Safety and Health Administration ("MSHA") in the underlying section 110(c) proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 820(c) (1994) ("Mine Act" or "Act"). 18 FMSHRC 892 (June 1996) (ALJ). Thereafter, Ray filed an application for fees and expenses on the basis that the Secretary's position on the two citations at issue was not substantially justified. Administrative Law Judge William Fauver denied the application. 18 FMSHRC 2033 (Nov. 1996) (ALJ). Ray filed a petition for review with the Commission challenging the judge's determination that the Secretary's position was substantially justified. For the reasons that follow, we reverse the judge's determination of substantial justification on the first citation but affirm as to the second.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

Journagan is engaged in the mining and sale of limestone in southwestern Missouri. 18 FMSHRC at 892; Tr. 9. On March 28, 1995, MSHA Inspector Michael Marler conducted an inspection of a portable rock crusher operated by Journagan. 18 FMSRHC at 892. While Marler was present, rocks became stuck in the crusher. *Id.* Ray, Journagan's superintendent, drove Marler to the top of a hill above the crusher. *Id.* at 893. As Marler approached the crusher, he observed Journagan employee Steve Catron working to unjam the crusher. *Id.* Catron was trying to loosen with an iron bar rock that had become wedged in the crusher. *Id.*; Tr. 36-37. Initially, when Catron began working to dislodge the jammed rocks, he and crusher operator Keith Garoutte turned off the crusher controls and locked out the power at the generator trailer. 18 FMSHRC at 893. However, to determine whether the crusher was again operating, Garoutte restored the power. *Id.* After the power was restored, Catron and Garoutte attempted to "jog" the crusher by turning it on and off to dislodge the rock that was wedged in the crusher jaws. Tr. 36-38. Catron pried the rock that was in the crusher jaws with the bar and then moved away, and Garoutte started the crusher. 18 FMSHRC at 893-94.

When Marler saw Catron, he was straddling the gap between the crusher jaws with each of his feet on a metal plate two inches above the crusher jaws. *Id.* at 893. The jaws of the crusher are tapered from a width of approximately 30 to 36 inches at the top and narrowing to 5 inches at the bottom. Tr. 34-35. The crusher jaws are approximately six feet four inches in height, and the jammed rocks extended upward about two feet from the bottom of the crusher. 18 FSMHRC at 893. There were rocks in the feeder chute waiting to enter the crusher just above where Catron was standing. *Id.* at 902. The iron bar that Catron was using to dislodge the rocks was five to six feet in length. *Id* at 893. He was wearing a safety belt that was attached by a lifeline to a catwalk railing above where he was standing. *Id.* Garoutte watched Catron from the doorway of the shed housing the crusher controls that was uphill from the crusher. *Id.* Catron unhooked the lifeline to his safety belt from the catwalk railing and then moved up to the grizzly,[1] which is located on the opposite side of the crusher from the catwalk about 1 ½ feet above the metal plates on which he had been standing. *Id.* & n.2. After Catron moved up to stand on the grizzly, he attached the lifeline to a point above and behind the grizzly. *Id.* at 893-94. Catron then signaled Garoutte, and he went in the shed to start the crusher. *Id.* at 894.

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[1] The grizzly is a flat metal plate with openings designed to separate smaller rock from larger rock before the rocks are fed into the crusher. 18 FMSHRC at 893 n.2; *see* Exs. R-5, R-6, and R-7.

It was an accepted practice at Journagan to dislodge rocks with the crusher energized. *Id.* Some 8 months earlier, Ray had seen Catron attempt to dislodge rocks from the crusher with the equipment energized in the presence of an MSHA inspector. *Id.*

Inspector Marler issued a citation charging Journagan with violating 30 C.F.R. § 56.12016, which states:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

Id. The inspector determined that the violation was significant and substantial ("S&S") under section 104(a) of the Mine Act, 30 U.S.C. § 814(a).[2] As a result of the violation, MSHA proposed a penalty of $4,000 against Journagan and, pursuant to section 110(c) of the Act, 30 U.S.C. § 820(c),[3] proposed a $1,500 penalty against Ray. *Id.*

Inspector Marler also believed that the practice of Catron standing over the crusher while it was energized posed an imminent danger under section 107(a) of the Act, 30 U.S.C. § 817(a). *Id.* Ray disagreed with Marler that Catron's actions were in violation of the standard or that they posed a hazard to Catron. However, Ray immediately deenergized the crusher. *Id.*

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

[3] Section 110(c) provides,

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) of this section or section [105(c)], any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

When Ray returned from deenergizing the crusher, he and inspector Marler climbed up onto the catwalk over the crusher. *Id.* When they reached the top, they observed Catron and Garoutte inside the crusher removing rocks from the jaws. *Id.* at 894-95. About a foot above the miners' heads was the crusher's hopper with more than a truckload of rock, estimated to weigh between 25 and 30 tons. *Id.* & n.3. The rocks, which were loose and unconsolidated, ranged in size from dust particles to rocks that were two feet in diameter.[4] *Id.* at 895. The rock in the crusher hopper was resting on an incline that Ray estimated to be 35 degrees, while Marler estimated it to be on an incline of 45 degrees. *Id.*; Tr. 108. There was no physical barrier between the rocks and the crusher jaws where the men were working to prevent the rock from falling on them, crushing or suffocating them. 18 FMSHRC at 895, 902. Although Ray did not order Catron and Gourette into the crusher, he knew that they would climb into it. *Id.* at 896. It was a common practice at Journagan for employees to climb into the crusher to unjam it while the hopper just above them was filled with rock. *Id.*

Inspector Marler believed that the rocks posed an imminent danger to the miners because of the likelihood that the rocks could slide into the crusher on top of them. Accordingly, Marler issued a section 107(a) imminent danger order. *Id.* at 895. Ray argued that the rock in the hopper was stable, but he complied with the order by welding a piece of steel to the end of the grizzly to prevent the rock from sliding into the crusher. *Id.* Marler issued a citation charging a violation of 30 C.F.R. § 56.16002(a), which provides in pertinent part,

> (a) Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be—
>
> (1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials[] . . . .

Id. Marler determined that the violation was S&S and proposed a penalty of $4,500 against Journagan. 18 FMSHRC at 896. A penalty of $1,500 was proposed against Ray pursuant to section 110(c). *Id.*

Journagan contested the citations and the matter went to hearing.[5] With regard to the citation charging it with failing to deenergize equipment, Journagan argued that its employees

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[4] While the judge found that the maximum size of the rock was 2 inches, the transcript pages to which his decision refers clearly state that the rocks were upwards to 2 feet in diameter. Tr. 55-56. In addition, the pictures in the exhibit file show that most of the rock in the hopper was much larger than 2 inches. *See* Exs. P-2 to P-6.

[5] The imminent danger orders were not contested.

were not performing "mechanical work" within the meaning of the regulation when they were attempting to unjam the rocks in the crusher. *Id.* It further argued that the standard only applied when miners were exposed to the hazard of electrical shock. *Id.* The judge rejected these defenses, construing the term "mechanical work" broadly to reach the work of breaking loose the jammed rocks in the crusher.[6] *Id.* The judge held that it was not relevant to the violation that Catron was tied off with a safety belt, because the standard requires that electrically powered equipment be deenergized regardless of what other precautions are taken. *Id.* at 897. Thus, the judge concluded that Journagan violated the cited regulation. *Id.* The judge vacated the inspector's S&S designation, noting that the safety line would prevent Catron from falling more than 1½ to 2 feet and that his feet could only brush the jaws of the crusher at that level. *Id.* at 898. The judge further concluded that, in the brief time that the safety line was unhooked when Catron was switching positions, it was unlikely that the equipment would be activated due to misunderstandings. *Id.* The judge approved a penalty of $500 instead of the $4,000 penalty proposed by MSHA. *Id.* at 899-901.

In addressing superintendent Ray's section 110(c) liability, the judge noted that the provision imposes civil penalties on a corporate agent when he "knowingly authorized, ordered, or carried out [a] violation." *Id.* at 899. The judge found that Ray clearly had reason to know that employees would be working on the crusher without it being deenergized. *Id.* The judge further found: "The procedure employed by miners on the day of the inspection and implicitly condoned by superintendent Ray was Journagan's normal procedure. It was not a practice initiated by Ray." *Id.* (citation omitted). However, the judge concluded that Ray's conduct was not "aggravated." *Id.* The judge further found that Ray had a reasonable good faith belief that the miners were adequately protected by wearing a safety belt for all but a brief period when they were working above the crusher. *Id.* Therefore, the judge vacated the penalty proposed under section 110(c). *Id.*

In addressing the second citation, the judge stated that the Secretary had to prove that Catron and Garoutte were exposed to entrapment by caving or sliding materials, and held that the fact that the miners were working downhill from a hopper filled with 25 to 30 tons of rock did not establish that the material might slide or cave in on top of them. *Id.* at 901. The judge reasoned that materials tend to move until they obtain a slope at which they will stop moving — referred to as "the angle of repose."[7] *Id.* The judge concluded that the Secretary "has not established that

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[6] The judge refused to follow the holding in *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1192-93 (9th Cir. 1982), in which the court held, in a factual situation highly similar to the one in the instant proceeding, that the lockout requirement of section 56.12016 (then numbered 30 C.F.R. § 55.12-16) was limited to situations involving the danger of electrical shock, rather than the unexpected activation of equipment. 18 FMSHRC at 897.

[7] U.S. Dep't of Interior, *Dictionary of Mining, Mineral, and Related Terms* 19 (2d ed. 1997) defines "angle of repose" as follows: "The maximum slope at which a heap of any loose or

the rocks in the hopper had not reached the angle of repose."[8] *Id.* The judge further noted that Inspector Marler did not measure the angle at which the rocks lay in the hopper, that he credited Ray who testified that the rocks were at an angle of 35 degrees, "a relatively flat slope,"[9] and that the photographs of the hopper that were entered as exhibits which indicated the rocks were at "a fairly steep angle" were not considered because the Secretary did not establish that they accurately depicted the slope. *Id.* at 901-02 & n.5.

The judge noted that the rocks in the hopper were about a foot above the crusher and that Catron's and Garoutte's actions in removing rocks from the crusher and throwing them back into the hopper did not establish that any alterations in the slope of the rocks created a hazard. *Id.* at 902. Finally, the judge noted that it was not Journagan's practice to install a barrier between rocks in a hopper and miners working to unjam the crusher, and it was unclear what industry practice was in regard to barricading rocks. *Id.* The judge dismissed the citation and vacated the penalties against Journagan and Ray. *Id.* at 902-03.

B. The EAJA Proceeding[10]

Ray's counsel submitted an application for attorney's fees of $12,657.50 and expenses of $1,726.59 under EAJA. R. Application at 1. In support of the application, Ray stated that his net worth was below that required for eligibility for an award under EAJA and that the Secretary's position was not substantially justified. *Id.* The application requested that Ray's counsel be reimbursed above the $125 hourly rate specified in EAJA.[11] *Id.* at 2. The Secretary responded that her position in the Mine Act litigation was substantially justified. S. Resp. to Application at 1. She noted in particular that her investigation disclosed that Ray was an agent of Journagan and that he had knowingly authorized violation of the Mine Act. *Id.* at 2. She further stated that the fees and expenses were unreasonable and that many did not relate to the section 110(c)

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fragmented solid material will stand without sliding or come to rest when poured or dumped in a pile or on a slope."

[8] The judge also noted that he credited Ray that the vibration of the feeder pan had "flattened the angle" to one at which the rocks would not move further. 18 FMSHRC at 902.

[9] The judge also noted that a 35 degree slope was "one degree steeper than the slope required by [the Occupational Safety and Health Administration] to protect workers in excavations dug in the least stable type of soil." *Id.*

[10] Judge Amchan presided over the Mine Act proceeding and issued the decision; however, the EAJA application was assigned to Judge Fauver due to Judge Amchan's subsequent departure from the agency.

[11] *See* EAJA Amendments of 1996, Pub. Law No. 104-121, § 301, 110 Stat. 862 (1996) (adjusting statutory cap on fees from $75 per hour to $125 per hour).

proceeding. *Id.* at 1. Finally, the Secretary contended that fees could not exceed the statutory limit of $75 per hour. *Id.*

In her brief to the judge, the Secretary attached affidavits from Marler and special investigator Harold Yount, who had recommended that section 110(c) penalties be assessed against Ray, in which they detailed their investigation of the citations. S. Resp. in Opp'n and Mot. to Dismiss, Attachs. A & B. Ray responded with affidavits from Catron and Garoutte, who asserted that their signed statements given to Marler and Yount during the investigation were incomplete or inaccurate. R. Reply Mem., Exs. 1 & 2.

The judge denied in full Ray's EAJA application. He reviewed Commission case law governing section 110(c) liability and concluded that "[t]he Secretary's investigation of the alleged violation of [section] 56.12016 provided a reasonable basis in law and fact for charging Mike Ray with liability under [section] 110(c) of the Mine Act." 18 FMSHRC at 2040. The judge based his conclusion on record evidence indicating that Ray ignored the requirements of the standard because he thought the procedure followed by the miners was not hazardous. *Id.* Further, Ray had been cited previously for a lockout violation. *Id.* The judge noted that section 56.12016 is "plain and unambiguous" and requires deenergizing power on equipment when performing mechanical work and does not provide for a substitute means of compliance. *Id.* at 2040-41. The judge reasoned that Ray, as superintendent, was accountable for complying with mandatory safety standards, and, in light of his prior violation, his conduct could have been found to be aggravated. *Id.* at 2041. He noted that a judge other than the one who heard the underlying case might have viewed the evidence differently. *Id.*

The judge also concluded that MSHA's investigation of the second alleged violation provided a reasonable basis in fact and law for charging Ray with section 110(c) liability. *Id.* The judge noted that miners were working in the crusher with rocks at chest level that ranged in size from small to very large and which were held in place only by other rocks. *Id.* Inspector Marler found an imminent danger because a small movement or a jolt by another rock could send the pile of rock down on the miners. *Id.* Ray was aware of the practice and had observed it at other times; Ray, however, disagreed with the inspector as to the hazard posed by the practice. *Id.* The judge reasoned that another trier of fact could have given greater weight to the inspector's opinion of imminent danger and concluded that Ray's conduct was aggravated. *Id.* "The fact that the trial judge gave greater weight to Ray's safety opinion does not mean that the Secretary's case was not substantially justified by the inspector's observations and safety opinion." *Id.*

II.

Disposition

Ray's argument in chief is that substantial evidence does not support the judge's decision that the Secretary's position was substantially justified. R. Br. at 5-6. He contends that the government's conduct that gave rise to the litigation as well as the government's litigation

position must be judged under the substantial justification test. *Id.* at 3. Ray further asserts that the legal standard for determining a section 110(c) violation is whether an operator's agent knew that the actions placed employees at risk or that the actions were violative of MSHA standards. *Id.* at 5. Ray argues that his conduct did not constitute more than ordinary negligence and that MSHA's determination that it did was based on several mistaken key facts and did not provide substantial justification for MSHA's assessment of section 110(c) liability. R. Reply Br. at 8. Ray contends that MSHA's notes of the investigation into Ray's conduct establish that there was no reasonable basis in law or fact for a penalty under section 110(c). R. Br. at 8-13. Ray asserts that the judge in the merits proceeding determined that Ray's belief in the safety of the activities cited was reasonable. R. Reply Br. at 1. Ray argues that the judge's reliance on Ray's prior violation for failing to lock out a conveyor was improper because the violation was dissimilar. R. Br. at 14. In evaluating the Secretary's position, Ray contends that the judge failed to consider the entire record and applied an incorrect legal standard under EAJA, violating Ray's procedural due process rights, when he stated that a different trier of fact might have viewed the evidence differently. *Id.* at 14-15

The Secretary argues that her position was substantially justified with regard to the failure to deenergize the crusher because inspector Marler reasonably believed that, if the crusher were started, it posed several hazards to the miner straddling the crusher, including entangling his feet in the crusher jaws, impaling him with the iron bar, and causing the rock in the hopper to slide onto him. S. Br. at 10-11. Similarly, when the miners were standing in the crusher, the loose unconsolidated material was sloping down with no barrier to prevent the material from sliding on them. *Id.* at 11. The Secretary notes that section 110(c) requires only that an individual know or have reason to know of the existence of a violative condition, not that an individual knowingly violated the law. *Id.* at 13-14 & n.7. In response to Ray's argument that he believed that the work practices cited were not dangerous, the Secretary argues that the determinative issue is whether such beliefs were reasonable. *Id.* at 16. The Secretary further argues that the evidence on which Ray relies does not indicate that the Secretary was not substantially justified in asserting that Ray's belief was not reasonable. *Id.* Finally, the Secretary acknowledges that the judge in the merits proceeding credited Ray over Inspector Marler that the work practices in question were not dangerous and, therefore, dismissed the section 110(c) charges; however, the Secretary concludes that adverse credibility resolutions do not establish that the Secretary's position was not substantially justified. *Id.* at 17-18.

Under the EAJA, a prevailing party shall be awarded attorney's fees unless the position of the United States is substantially justified. *Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994). The agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992). Substantially justified means that the Secretary's position is such that it would have been "justified to a degree that could satisfy a reasonable person" and has "a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). "This necessarily requires the court to examine . . . the Government's litigation position and the conduct that led to litigation. After doing so, the court must then reach a judgment independent from that of the merits phase." *FEC v. Rose*, 806 F.2d

1081, 1090 (D.C. Cir. 1986). When reviewing an administrative law judge's EAJA decision, the Commission applies a substantial evidence test for factual issues,[12] and de novo review for legal issues. *Contractors Sand & Gravel, Inc.*, 20 FMSHRC __, slip op. at 7-8, No. EAJ 96-3 (Sept. 22, 1998).

A. Alleged Violation of 30 C.F.R. § 56.12016

We first address the question of whether the Secretary has demonstrated that her decision to charge Ray under section 110(c) for a violation of 30 C.F.R. § 56.12016 was substantially justified. For the reasons that follow, we conclude that the Secretary has not met this burden. We therefore find that her position was not substantially justified.

To establish section 110(c) liability in the case on the merits, the Secretary needed to prove that Ray "knowingly authorized, ordered or carried out [a] violation." 30 U.S.C. § 820(c).[13] In determining that the Secretary's decision to charge Ray under 110(c) was substantially justified, the judge concluded in part that "[s]ection 56.12016 is plain and unambiguous. It requires deenergizing the power circuit on equipment when doing mechanical work. It does not provide or imply that a substitute method may be used . . . ." 18 FMSHRC at 2040. The judge's conclusion goes to the legal underpinnings of the Secretary's position. We do not find, however, that the Secretary's legal position was as clearly supported as the judge maintained. To the contrary, as explained below, we find that the Secretary's case did not have a reasonable basis in law in light of other pertinent regulations and case law, and, thus, find that her position lacked substantial justification. Our conclusion that the Secretary was not substantially justified is based solely on our de novo review of the legal underpinnings of the Secretary's position. As was made clear in *Pierce*, to be substantially justified, the Secretary's position must be reasonable in law as well as fact. 487 U.S. at 565 (stating that an agency position is

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

[13] Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

substantially justified if it has a "reasonable basis *both* in law and fact") (emphasis added). In light of our disposition that the Secretary's position lacked a reasonable basis in law, we do not reach any of the factual bases of the Secretary's case against Ray.

In reaching his conclusion on the legal merits of the Secretary's position, the judge focused solely on the language of section 56.12016. He made no reference to a second standard, 30 C.F.R. § 56.14105, which pertains to "[p]rocedures during repairs or maintenance." Unlike section 56.12016, section 56.14105 does not contain a requirement that power switches be locked out. Instead, it requires that:

> Repairs or maintenance on machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

30 C.F.R. § 56.14105. Prior to the events leading up to this case, the Secretary had charged another operator under section 56.14105 for failure to protect a miner from hazardous motion during testing of a rock crusher following its repair or maintenance. *Walker Stone Co.*, 19 FMSHRC 48, 49-50 (Jan. 1997). We agreed with the Secretary that the cited regulation applied to the breakup and removal of rocks clogging a crusher, and held that the Secretary had proven that the operator violated the standard. *Id.* at 51-53. In a recent decision, the Tenth Circuit agreed with the interpretation of the regulation put forth by the Secretary and the Commission, and affirmed the violation. *Walker Stone Co. v. Secretary of Labor and FMSHRC*, No. 97-9528, 1998 WL 646968 at *7, 9 (10th Cir. Sept. 22, 1998).

Although section 56.12016, standing alone, could be viewed as containing a plain and unambiguous lockout requirement, section 56.14105 and the case law interpreting that standard creates uncertainty regarding the *scope* of that lockout requirement. This is particularly true when, as occurred here, the machinery being repaired is activated for testing or adjustment, thereby subjecting employees to the danger of "hazardous motion" rather than electrocution. The legal basis of the Secretary's case was thus not as well founded as the judge concluded. Indeed, section 56.14105 was clearly relevant to the situation at hand — the need to activate the crusher to determine whether it was still clogged. Given the need to "jog" the crusher as part of unclogging it, we fail to see how Ray could reasonably be expected to know that he was under an obligation to lock out the crusher power switch, rather than simply ensuring that the miners were protected from hazardous motion during the activation.

The Commission's *Walker Stone* decision indicates that the Secretary herself has not always chosen to apply the lockout requirement in situations analogous to this one.[14] The Secretary's decision to cite the operator in *Walker Stone* under section 56.14105 rather than under the lockout requirement in section 56.12016 occurred in June 1993, almost two years before the enforcement action at issue here. *See* 19 FMSHRC at 49-50. In light of this fact, we find that it was unreasonable for the Secretary to evaluate Ray's culpability under section 110(c) based solely on the lockout requirement of section 56.12016, ignoring the fact that section 56.14105 does not contain a lockout requirement.[15]

We also find problematic that the Secretary's decision to prosecute Ray under section 110(c) relied on a legal position in the underlying proceeding directly at odds with the decision of the Ninth Circuit in *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). *Phelps Dodge* involved facts similar to those in the underlying case. The Secretary cited the operator for failing to deenergize and lock out a panfeeder on which employees were standing and attempting to dislodge rocks and stones that had clogged an adjacent drop chute. *Id.* at 1191. Pointing out that the lockout regulation, then numbered 30 C.F.R. § 55.12-16 (1979), was "sandwiched between regulations whose purpose is manifestly to prevent the accidental electrocution of mine workers," the court held that principles of fair warning required the scope of the regulation be limited to situations involving electrical shock. *Id.* at 1192-93. In reaching its conclusion, the court relied on the existence of a separate regulation containing language identical to the current requirements of section 56.14105. *Id.* at 1192 (citing 30 C.F.R. § 55.14-29 (1979), which contained language identical to the present section 56.14105). The court emphasized that, when the goal is to protect against the danger of machinery motion, the relevant regulation requires that the machinery be turned off and "blocked against motion," not "deenergized." *Id.* at 1193.

In the decision on the merits here, the judge rejected Journagan's reliance on *Phelps Dodge* for the proposition that "section 56.12016 cannot be cited in situations where the only hazard is danger of being injured by moving machinery." 18 FMSHRC at 896. Instead, the judge stated that he "decline[d] to follow *Phelps Dodge*," thus implicitly acknowledging that the case was at least relevant. *Id.* at 897. He cited the dissenting opinion in *Phelps Dodge* as "far more compelling," including the dissent's view of the lockout requirement as "clear and unambiguous." *Id.* (citing 681 F.2d at 1193). As discussed above, however, in the context of evaluating the reasonableness of the Secretary's position, section 56.12016 cannot be read in isolation from

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[14] *Walker Stone* involved an employee who was killed while attempting to remove rocks from inside the crusher after the equipment operator had not been alerted to the employee's presence prior to restarting the crusher. 19 FMSHRC at 49.

[15] Because our purpose in this EAJA proceeding is limited to a determination of whether the Secretary was substantially justified in her position, we need not reach the question of whether the Secretary should have applied section 56.14105. Consequently, our dissenting colleague's assertion (slip op. at 20 & n.4) that we have adopted this position is incorrect.

section 56.14105, as the judge in the EAJA proceeding did here, following the lead of the *Phelps Dodge* dissent and the judge in the merits proceeding.

In this EAJA proceeding, we are not presented with the issue of whether the *Phelps Dodge* court correctly limited application of the lockout requirement to situations involving the potential for electrical shock. Nor do we express any view regarding the propriety of the judge's finding that Journagan violated section 56.12016. Instead, we must determine whether the Secretary was substantially justified in charging Ray with a section 110(c) violation of that requirement. The reasonableness of the Secretary's decision to charge Ray with a knowing violation must be viewed in the context of *Phelps Dodge*, a decision of a Court of Appeals directly on point and directly at odds with how the Secretary interprets the underlying regulation.[16]

We recognize that *Phelps Dodge* was not binding precedent in the Circuit in which the underlying proceeding arose, and we do not mean to suggest that the Secretary should refrain from attempting to persuade other Courts of Appeals that *Phelps Dodge* was wrongly decided. But at issue in the underlying proceeding was a charge of a section 110(c) violation of section 56.12016. Whether correctly decided or not, the *Phelps Dodge* opinion is one the Secretary needed to contend with in deciding to charge Ray under section 110(c). There is no indication that this court decision was factored into the Secretary's analysis; indeed, in her posthearing brief, the Secretary chose to ignore the case altogether. *See* S. Posthearing Br. at 5. We fail to see how it was reasonable to bring the 110(c) charge without appearing to even acknowledge the contrary authority of *Phelps Dodge*, in which no less than the Ninth Circuit ruled that circumstances like these are not covered by section 56.12016.[17]

The *Walker Stone* and *Phelps Dodge* cases illustrate why Ray could have reasonably concluded that a lockout requirement did not apply to the activity observed by the inspector, and that his obligation was simply to ensure that the crusher was turned off and the miners were "effectively protected from hazardous motion" during testing. *See* 30 C.F.R. § 56.14105. Indeed, according to the majority in *Phelps Dodge*, such a conclusion is the most reasonable one to be drawn from the regulations. Given all these considerations, we find that it was not reasonable to charge Ray under section 110(c). Accordingly, we conclude that the Secretary's

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[16] Indeed, when viewed in the context of *Phelps Dodge*, the Secretary was incorrect when she argued that "[t]he failure to deenergize electrically powered equipment and to lock out power before any mechanical work is done on the equipment has been consistently held to constitute a violation of mandatory safety standard 56.12016." S. Posthearing Br. at 5.

[17] Contrary to the claim of our dissenting colleague, we do not rely on the Ninth Circuit's *Phelps Dodge* decision in an attempt to relitigate the underlying merits determination (slip op. at 20), but rather only to show that the Secretary's effort to impose section 110(c) liability on Ray for a violation of section 56.12016 did not have a reasonable basis in law, and therefore was not substantially justified.

position was not substantially justified, and remand the case for a determination of the amount of fees and costs to be awarded.

We note that at the present time different proceedings have resulted in rulings that the work of unclogging the crusher falls under two separate regulations. *Compare Phelps Dodge*, 681 F.2d at 1192-93, *with, e.g., Ozark-Mahoning Co.*, 11 FMSHRC 859, 868 (May 1989) (ALJ), *aff'd* 12 FMSHRC 376 (Mar. 1990) (upholding a violation of section 56.12016 under circumstances similar to those here, but without any citation by the judge or Commission to *Phelps Dodge*). But only one regulation has a lockout requirement. There is an urgent need for the Secretary to clarify what precautions are necessary when employees unclog a crusher. In particular, she should clarify whether and to what extent the lockout procedure must remain in place when miners activate a crusher to determine if further work is necessary. The Secretary needs to address whether miners must go through the lockout procedure every time they jog a crusher and whether such a requirement is even feasible. Such a reevaluation is necessary to avoid confusion on this issue and to ensure miner safety in this critical area.

B. Alleged Violation of 30 C.F.R. § 56.16002(a)

The judge in the merits proceeding ruled that the Secretary failed to prove a violation of the second regulation, section 56.16002(a).[18] 18 FMSHRC at 901. Inspector Marler had issued this citation after viewing the miners working inside the crusher jaws with no barrier between them and 25 tons of rock that rested on an incline in the hopper chute. *Id.* at 895, 901. The judge discredited Inspector Marler's testimony that the rocks were at an incline of 45 degrees, and instead credited Ray's testimony that the rock lay on an incline of 35 degrees, which he noted is "a relatively flat slope." *Id.* at 901-02. The judge noted that Marler had not measured the angle of the incline; relied on the Secretary's failure to show that the rock had not reached an "angle of repose;" refused to rely on photographs in evidence because the Secretary had not shown that they were accurate; noted that it had not been shown that the action of Catron and Garoutte in throwing additional material on the pile created a hazard; and noted that it was not Journagan's practice to install a barrier between the pile and men in the crusher. *Id.* & n.5.

The judge in the EAJA proceeding concluded that the Secretary's investigation nonetheless provided a reasonable basis for charging Ray with section 110(c) liability. 18 FMSHRC at 2041. Substantial evidence supports this conclusion. First, the Secretary's position on the underlying violation of the standard was reasonable. At trial, the record evidence presented a close case that turned, in large measure, on the judge discrediting Marler's testimony on the angle of incline because he had not measured it. However, Ray also neglected to measure the angle of incline of the rock or the chute. Instead, he estimated the slope of the rock pile at the

[18] Consequently, the corresponding section 110(c) charge against Ray was also vacated. 18 FMSHRC at 903.

hearing by drawing it on paper and *then* measuring it.[19] Tr. 281. Thus, it would have been difficult for the Secretary to have anticipated that the judge would discredit Marler. Moreover, we believe that the photographs, which show loose rock resting on an inclined metal chute, support the reasonableness of the Secretary's position, notwithstanding the judge's finding that the Secretary failed to show that the pictures were an accurate depiction of the slope of the rocks. 18 FMSHRC at 902 n.5. *Compare* Tr. 108, *with* Tr. 228-31. Further, Catron and Garoutte were placing more rock on the pile which could have caused the rocks to begin sliding down into the crusher on top of them. Thus, even if the rock pile had reached an angle of repose before they entered the crusher, this was not determinative of the absence of a violation.[20] *See Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 371 (Mar. 1993) ("While the judge noted . . . that the west wall had reached an angle of repose, and was stable . . . , he credited testimony of the Secretary's witnesses asserting that material on the west wall had a potential to move . . . ."). As the judge in the EAJA proceeding held, "[t]he fact that the trial judge gave greater weight to Ray's safety opinion does not mean that the Secretary's case was not substantially justified by the inspector's observations and safety opinion." 18 FMSHRC at 2041. *See Europlast, Ltd. v. NLRB*, 33 F.3d 16, 17-18 (7th Cir. 1994) (noting that NLRB had no way of foreseeing that judge would make credibility resolutions in favor of respondent's witnesses and against NLRB's witnesses).

Second, in terms of Ray's section 110(c) liability, the Secretary's investigation clearly indicated that Ray was aware of the presence of Catron and Garoutte in the crusher. Special Investigator Harold Yount stated in an affidavit that, based upon statements of Ray and other witnesses, he concluded that "James Ray knew that two employees were working down in the crusher removing rocks by hand while there was approximately a truck load of rock in the feeder and chute overhead." S. Br., Ex. B ¶ 10(b); *see id.* ¶ 9(a). In his written statement, Catron stated that "Ray was aware that we were down in the crusher with rock in the hopper and chute." R. Br., Ex. 3 at 3. This is corroborated by Ray's testimony at the hearing that, from his position by the generator trailer, he saw Catron and Garoutte climb out of the crusher and walk up the pile of

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[19] Even though at the hearing, a scale drawing of the crusher was presented into evidence, Ray made no effort to draw to scale the slope of the rock pile. Tr. 250; Exs. R-5, R-6. Ray also testified at the hearing that the rock, as it was dumped from the trucks, was never at an angle of more than 45 degrees. Tr. 273, 279. The basis for that statement is not evident from the record.

[20] Crusher operator Keith Garoutte testified that, in joining Catron in the crusher jaws, he came down from the crusher controls walking over the rock pile in the hopper, taking care to only step on the big rocks in order not to disturb the smaller rocks and loose material. Tr. 353-55.

rocks to the control house, and then walk back down to the crusher and remove more rocks.[21] Tr. 270-271.

Accordingly, it was reasonable for the Secretary to conclude that Ray engaged in aggravated conduct by allowing miners to go into the crusher, subjecting them to an imminent danger. *See* 18 FMSHRC at 2041.[22] In these circumstances, the Secretary's position was substantially justified.

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[21] As noted above, Ray relies on the prelitigation statements to support his position that he did not believe the actions cited by MSHA were violative or dangerous, neither of which is determinative of substantive justification in this proceeding. R. Br. in Support of Application, Ex. 2 at 3. *Cf. Inter-Neighborhood Hous. Corp. v. NLRB*, 124 F.3d 115, 121 (2d Cir. 1997) (holding that where there is evidence that raises a fundamental question as to the allegations in a charge, NLRB has the responsibility to conduct a reasonable investigation to resolve any credibility issues before bringing a complaint).

[22] We reject Ray's contention that the judge in the EAJA proceeding did not apply the correct legal test in evaluating the Secretary's position when he stated in his discussion of the first violation that another judge might have viewed the evidence differently. R. Br. at 14-15. The judge also noted in his discussion of the second violation that a trier of facts might have given weight to the inspector's testimony and found Ray's conduct aggravated. 18 FMSHRC at 2041. However, we do not believe that he applied the wrong legal standard. He cited *Pierce* and correctly articulated its legal standard for proving substantial justification. *Id.* at 2039. We interpret his comments acknowledging that "[d]ifferent triers of fact may view conflicting evidence differently" and his finding that this was the case in the underlying proceeding here, as support for his ultimate conclusion that he Secretary's position was reasonable in fact. *Id.* We note, however, that while the potential views of another trier of fact may be instructive in regards to a finding of reasonableness, they are not determinative in an EAJA case, where the *Pierce* standards of reasonableness must always be applied.

III.

Conclusion

For the foregoing reasons, we reverse the judge's EAJA determination denying Ray's application for fees and expenses on the first citation but affirm the judge's determination as to the second. We remand this proceeding to the Chief Administrative Judge for assignment to a judge in order to allocate from the total amount of fees and expenses originally applied for those attributable to Ray's defense of section 110(c) liability arising from the first citation.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting in part:

Although I join in my colleagues' affirmance of the judge's EAJA determination denying Ray's application for fees and expenses arising from the second section 110(c) citation based on a violation of 30 C.F.R. § 56.16002, I would also affirm the judge's denial of Ray's EAJA application with respect to the first citation, that alleged a section 110(c) violation against Ray for the violation of 30 C.F.R. § 56.12016. Therefore, I dissent as to the first citation.

After reviewing the Secretary's pleadings and other record material with respect to the first citation, it is apparent to me that the Secretary's position was substantially justified so that awarding fees under EAJA to Mr. Ray would not be appropriate. Substantial justification for an agency's position exists when "'there is a reasonable basis in truth for the facts alleged in the pleadings; . . . there exists a reasonable basis in law for the theory it propounds; and . . . the facts alleged will reasonably support the legal theory advanced.'" *Smith v. N.T.S.B.*, 992 F.2d 849, 852 (8th Cir. 1993) (citations omitted). In *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988), the Supreme Court explained the EAJA substantial justification test as follows: "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Under an EAJA analysis, "[t]he government's failure to prevail does not raise a presumption that its position was not substantially justified." *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988).

To establish section 110(c) liability, the Secretary needed to prove that Ray "knowingly authorized, ordered, or carried out" the violation of section 56.12016. 30 U.S.C.§ 820(c). Although the Secretary did not ultimately prevail on this violation, it is beyond a doubt that the Secretary's position had a reasonable basis in law and fact, particulary in light of the information revealed in her special investigation that culminated in the issuance of the section 110(c) penalties. As part of that investigation, Ray submitted an affidavit stating that "I had instructed the employees that they should follow the lockout procedures *anytime they were going to be working on something where they would be in danger if the equipment were to be started inadvertently.*" (emphasis added). R. Br. in Support of Application, Ex. 2 at 3. This statement shows that Ray had clearly communicated instructions to the employees that he condoned actions that were in violation of the standard, which requires deenergization whenever mechanical work is performed.

Moreover, in his affidavit attached to the Secretary's brief to the judge, Inspector Marler stated that Ray knew that miners were working in the crusher without locking it out (S. Resp. in Opp'n and Mot. to Dismiss, Attach. A at 3) and that several miners had informed him that "Ray had observed them on several occasions working on the crusher, and down in the crusher, and said nothing to indicate that it was not appropriate." *Id.* During his testimony at trial, Marler stated that when he arrived at the crusher, Ray was at the rear of the truck observing the employees work (Tr. 96) and that the crusher was not locked out. Tr. 36.

The special investigator also submitted an affidavit, asserting that based upon the statements of Ray and other witnesses, he concluded that Ray knew that an employee was working near the opening to the crusher without it being locked out, and that Ray had instructed workers in lock out procedures. S. Resp. in Opp'n and Mot. to Dismiss, Attach. B at 2-4. These statements also indicated to the special investigator that Ray knew that an employee was in the crusher while a large amount of rock remained in the feeder and chute overhead. *Id.* at 3. The judge also noted that Ray had been cited earlier for a similar violation. 18 FMSHRC at 2040. In light of these facts, as did the judge in the EAJA proceeding, I have no difficulty concluding that the Secretary's investigation provided a reasonable basis for charging Ray with liability under section 110(c).

Much of Ray's argument that the Secretary's investigation did not provide a basis for section 110(c) liability is premised on his incorrect interpretation of section 110(c). Ray argues that there is no basis for section 110(c) liability if Ray did not know if the cited action was a violation of the standard or was hazardous. R. Br. at 5. However, Commission case law does not support that interpretation of section 110(c). *E.g.*, *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1050-52 (May 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). The proper legal inquiry for determining liability under section 110(c) is whether a corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1141 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)); *Deshetty*, 16 FMSHRC at 1051. 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. Thus, under established Commission precedent, the Secretary was entitled to bring an action against Mr. Ray because she had information that Ray knew or had reason to know that miners worked on the crusher without using proper lock out procedures. Although the judge ultimately "gave greater weight to Ray's safety opinion," the fact that Secretary did not prevail did not mean that the Secretary's case was not substantially justified, just as the judge properly concluded. 18 FMSHRC at 2041.

The majority finds that the Secretary's decision to bring a section 110(c) action was unreasonable based, for the most part, on the fact that another regulation, which does not require lock out procedures, could also have applied. In doing so, the majority impermissibly revisits the underlying merits determination. *See Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994) ("[T]he inquiry into reasonableness for EAJA purposes may not be collapsed into [the] antecedent evaluation of the merits, for EAJA sets forth a 'distinct legal standard.'") (citation omitted). In the merits proceeding, the judge concluded that Journagan, Ray's employer, violated section 56.12016, when Catron stood over the crusher with an iron bar trying to dislodge rock jammed in the jaws of the crusher while the equipment was energized.

18 FMSHRC at 896-97. The judge ruled that the section 56.12016 unambiguously applied to the instant case. *Id.* at 897. This holding was not appealed and has become the law of the case.

The majority, in overturning the judge's determination that the Secretary was substantially justified in bringing a section 110(c) action against Ray based on the section 56.12016 violation, has impermissibly exceeded the scope of review that they assert they are following.[1] The majority has not merely addressed whether the Secretary was for the most part correct in her litigation position; the majority has gone so far as to *sub silentio* overrule the judge's merits determination that the operator violated the cited standard. I find the majority's conclusion that the Secretary was not substantially justified to be even the more remarkable because in *Ozark-Mahoning Co.*, 12 FMSHRC 376 (Mar. 1990), the Commission concluded that the cited regulation applied under similar facts. There, the Commission ruled that "electrically powered equipment be first deenergized before mechanical work is done on such equipment." 12 FMSHRC at 379. *Ozark-Mahoning* is binding Commission precedent. *Contractors*, 20 FMSHRC __, slip op. at 13 (unreviewed Commission decisions serve as legal precedent). Accordingly, the Secretary was justified in relying on it.[2]

In reaching its conclusion that the Secretary was not substantially justified, the majority also faults the Secretary for taking a position directly at odds with *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). However, the judge in the merits determination addressed *Phelps Dodge* and declined to follow it, noting that the Commission had never acceded to the decision. 18 FMSHRC at 897. The judge rejected the operator's argument, which was based on *Phelps Dodge*, that section 56.12016 could not be cited in situations where the only hazard is danger of being injured by moving machinery. *Id.* The judge found more compelling the dissenting opinion of Circuit Judge Boochever in *Phelps Dodge*, which found that the plain language of the standard was clear and unambiguous. *Id.* (citing 681 F.2d at 1193). Like Judge

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[1] When reviewing a judge's factual determinations in an EAJA case, the Commission applies the substantial evidence standard of review. *Contractors Sand & Gravel, Inc.*, 20 FMSHRC ____, slip op. at 7-8 (Sept. 22, 1998). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the judge's legal determination of substantial justification, the Commission applies the de novo standard of review. *Contractors*, 20 FMSHRC __, slip op. at 8.

[2] The majority rests its entire decision to reverse the judge on its de novo review authority over legal questions. In this case, de novo review goes only to the judge's substantial justification determination that the Secretary's legal theory was reasonable. The majority may not substitute its judgment for the underlying merits. As the judge found that the regulation plainly applied to the facts in the merits proceeding, I do not see how the majority can now in the EAJA proceeding state that the Secretary was not at least reasonable in relying on that regulation to charge Mr. Ray under section 110(c).

Boochever, the judge in the merits proceeding saw no reason to qualify the standard's application on account of the title of the subpart in which the regulation was placed. The judge also ruled that "the Commission should defer to an agency interpretation of the standard which appears to better effectuate the purposes of the Act, than one limiting its reach to situations in which there is a danger of electrical shock." *Id.* Thus, not only did the judge determine that the Secretary's position was substantially justified, the judge ruled particularly in the Secretary's favor with respect to *Phelps Dodge*. The majority's reliance on *Phelps Dodge* (slip op. at 11-12) is nothing more than an improper attempt to relitigate the merits determination.[3]

I find particularly troubling the majority's attempts to revisit the judge's merits determination on the ground that a standard *that provides less protection to miners and does not require lock out when mechanical work is being performed* could also have applied. By effectively overruling the judge's determination that section 56.12016 applied on these facts, the majority's holding today will inevitably lead to less protection for miners. In *Walker Stone Co.*, 19 FMSHRC 48 (Jan. 1997), on which the majority relies for the proposition that the Secretary should have cited this operator under 30 C.F.R. § 56.14105, a miner was killed in a crusher.[4] Although the cited regulation was not at issue there, perhaps a fatality would have been avoided if the operator had taken the time to implement lock out procedures in that case.

The majority's attempt to second guess the Secretary's choice of the citing regulation is not only inappropriate because of the confines of the substantial justification test, but is contrary to Commission case law. As was recognized in *Fluor Daniel, Inc.*, 18 FMSHRC 1143 (July 1996), "[a] hazardous condition may violate more than one standard and the fact that MSHA determines not to issue citations under all applicable sections does not render invalid the citations it does issue." *Id.* at 1146 (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993)). Applying that reasoning here, the fact that the Secretary could have prosecuted under another regulation is simply no basis for discounting the Secretary's choice to issue a citation under the regulation at issue, which the judge found plainly applied to the facts of this case.

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[3] The majority finds the Secretary's legal position "problematic" because of *Phelps Dodge*. Slip op. at 11. However, the proper legal test on review is not whether the Secretary's case had some problems, but whether the Secretary was substantially justified under *Pierce*, 487 U.S. at 565.

[4] On appeal, the Tenth Circuit in *Walker Stone Co. v. Secretary of Labor and FMSHRC*, No. 97-9528, 1998 WL 646968, at *5 (10th Cir. Sept. 22, 1998), recently held that the removal of rocks from a crusher was *not* plainly and unambiguously covered by section 56.14105, although that was a permissible interpretation of the standard. (The court of appeals disagreed with the Commission that section 56.14105, on its face, applied to the removal of rocks from a crusher. *Id.*). This finding of ambiguity by the Tenth Circuit undercuts the majority's assertion that the Secretary was not substantially justified because she should have applied section 56.14105 to the facts of this case.

Because I have concluded that the Secretary's decision to pursue Ray under section 110(c) for knowingly authorizing, ordering, or carrying out the violation of section 56.12016 was substantially justified, I would affirm the judge with respect to the citation at issue.

Marc Lincoln Marks, Commissioner

Distribution

Eric D. Martin, Esq.
Peper, Martin, Jensen, Maichel & Hetlage
720 Olive Street, 24th Floor
St. Louis, MO 63101

W. Christian Schumann, Esq.
Cheryl Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

SEP 9 1998

NEWMONT GOLD COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 98-58-RM
v.	:	Citation No. 7951941; 12/9/97
	:	
SECRETARY OF LABOR,	:	Mine ID 26-02271
MINE SAFETY AND HEALTH	:	Carlin East
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Mark N. Savit, Esq., Rodney A. Grandon, Esq., Patton Boggs, L.L.P., Washington, D.C., for Contestant; Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Newmont Gold Co. with the violation of the mandatory safety standard 30 C.F.R. § 57.3360. This safety standard provides, in pertinent part, that when "ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks." The regulation in entirety reads as follows:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for

ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

Newmont Gold Company (Newmont) denies any violation of the cited safety standard.

STIPULATIONS

At the hearing, the parties entered into the record stipulations as follows:

1. The Carlin East Mine is a gold mine located near Carlin, Nevada, and is under the jurisdiction of the Mine Safety and Health Act.

2. There was a ground fall in the 5655 roadheader stope area on December 6, 1997.

3. The only issues are (1) Did Newmont violate 30 C.F.R. § 57.3360? and (2) If there was a violation, was it caused by the Operator's unwarrantable failure to comply?

4. Mr. Terry Hoch, Mr. Michael Evanto, Mr. David West and Mr. John Abel are able to testify in this proceeding as expert witnesses; "however, their credibility as experts will be subject to attack on cross-examination."

5. The five deposition transcripts are received into evidence as joint exhibits 3, 4, 5, 6 and 7 in lieu of the testimony of the following five individuals:

Scott Robertson	- Joint Exhibit 3
Craig Kerby	- Joint Exhibit 4
Larry Johns	- Joint Exhibit 5
Dennis Stone	- Joint Exhibit 6
Sam Lamb	- Joint Exhibit 7

The Ground Fall

On December 6, 1997, at about 2:30 p.m. at the Carlin East mine there was a large ground fall in the 5655 roadheader stope and stope access drift. There were no injuries nor equipment damage. The fall measured 20 feet wide, 22 feet high, 60 feet long and was estimated to be about 2,000 tons. The fall of ground was above the anchorage zone of the 12-foot rebar resin bolts and 8-foot split set stabilizers which along with metal chain link fencing were used in the roof support system in the area where ground fell.

On December 12, 1997, Inspector Bob Caples issued the citation in question charging mine management with unwarrantable failure to implement effective ground support measures to properly control ground conditions "associated with the current mining practices." The citation

refers to the undisputed fact that there had been previous falls of ground at the mine which had been cited. The citation also refers to the fact that the company accident report dated December 6, 1997, the date of the ground fall, "indicates that the 21 to 23 foot-wide stope access drift as a "probable factor related to the most recent fall." The company accident report referred to in the citation was written by Mr. Robertson, one of the mine's underground supervisors.

Mr. Robertson, called by MSHA, as its witness testified that Inspector Caples misunderstood his report. Mr. Robertson testified that in his report he was not referring to the width of the stope access drift. He was not referring to the roof span in the access drift between the top of the backfill on one side and the top of the backfill on the other side. He was referring to the overall span of the stope where the coal had been mined out and the empty area backfilled with rock and concrete. Mr. Robertson freely admitted that he was not an expert in mine design. I credit Mr. Roberton's testimony that he was not an expert on mine design.

With respect to the prior ground falls, Newmont presented credible evidence that the previous ground fall at the mine occurred in ground conditions substantially different from those encountered in the 5655 roadheader stope and that Newmont had appropriately responded to each previous fall by evaluating, modifying and improving the mine's ground support.

Newmont first took over the mining operations at the Carlin East mine in May 1995. Prior to that time, the mine was developed first by a company called Small Mine Development. That company opened the ground and installed ground support that consisted primarily of 6-foot split set rock bolts. Newmont upon taking over the mine in 1995, brought in a highly qualified mining engineer, John Abel, as a consultant and Newmont continuously implemented and improved the mines ground support system based on Dr. Abel's comprehensive recommendations.

MSHA, based upon the opinion of its well-qualified expert witness Mr. Terry Hoch, contends that the primary cause of the ground fall was that the 5655 roadheader access drift was too wide for the ground support system, designed, installed and maintained in that area.

Respondents, based upon the opinions of its highly qualified expert witnesses, Dr. John Abel and Mr. David West, contend that the primary cause of the ground fall was a variable and unpredictable ground fault called the "Leaky Fault" and not on the width of the 5655 roadheader access drift.

ESTABLISHED LAW

Newmont is correct in its assertion that the fact that there has been a ground fall does not mean there has been any violation of regulatory requirements. Underground mining is an inherently dangerous activity. Conditions sometimes are such that despite the operator's best efforts, roofs fall. It has been stated many times that "even a good roof can fall without

warning." Consolidated Coal Co., 6 FMSHRC 34, 37 (Jan. 1984). When roofs fall, tragedies can occur. Fortunately, in this case, no one was injured and no equipment damaged.

Liability for an alleged violation of a broad safety standard, such as that involved in this case, is resolved by reference to an objective standard of what action a reasonably prudent person, familiar with the facts and the protective purpose of the standard would have taken to provide the protection intended by the standard. "Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." Canon Coal Co., 9 FMSHRC 667 (1987).

"The Mine Act imposes on the Secretary the burden of proving the violation the Secretary alleges by a preponderance of the evidence." Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2152-53 (1989) (citations omitted). Thus, with respect to this violation, MSHA must present evidence that convinces or at least persuades this Court that the fact that a violation occurred is more likely true than not true. See e.g., Hopkins v. Price Waterhouse, 737 F. Supp. 1202 (D.D.C. 1990), aff'd, 920 F.2d 967 (D.C. Cir. 1990). Accord Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 124 L.Ed.2d 539, 563 (1993) (citation omitted). To prove by a preponderance means that the evidence supporting the violation must be "more convincing than the evidence which is offered in opposition to it." St. Paul Fire & Marine Ins. Co. v. United States, 6 F.3d 763, 769 (Fed. Cir. 1993). Where the evidence is equally balanced "or if it cannot be said upon which side it weighs more heavily, plaintiff has not met his or her burden of proof." Smith v. United States, 557 F. Supp. 42, 52.

MSHA Inspector Joel Tankersley's October Inspection

MSHA Inspector Joel Tankersley conducted a regular complete inspection of the Carlin East Mine in October 1997. He inspected the 5655 roadheader stope and testified he was in the 5655 roadheader stope area "quite awhile because we had a ventilation issue in that area." Inspector Tankersley inspected the drift spans in the 5655 roadheader area and concluded that the spans that he observed were probably 20 feet in width, measured from the top of the backfill on the left side of the access drift to the top of the backfill on the right side of the access drift. At the time of his inspection in October 1997 Inspector Tankersley concluded that the ground support in the 5655 roadheader stope area was in compliance with applicable MSHA regulations. Inspector Tankersley's testimony was credible.

On review of the record, I find the evidence presented by the government that the width of the drift was excessive is primarily conjectural. It consisted largely of inference from defective and presumptive evidence. It was not persuasive.

After the ground fault, Dr. Abel analyzed the available data and concluded that the mining plan and ground support he had recommended was more than adequate to support the span of the 5655 roadheader access drift. His analysis of the data demonstrates that a variable unpredictable geological feature called the "Leaky Fault" caused the ground fall. Based on Dr. Abel's testimony and report, I find this subtle, variable and unpredictable geological feature, the Leaky Fault, interfered with the planned transfer of stress as calculated by Dr. Abel. The Leaky Fault interference with the calculated arch load stress transfer was the primary cause of the ground fall. There is no evidence in the record to suggest that, prior to the ground fall, Newmont had any reason to believe that the Leaky Fault posed any threat to the integrity of the ground.

I credit the testimony of Mr. West, Mr. Robinson, Mr. Cross, Mr. Pentony and Dr. John Able. Based on their testimony and the reports of Dr. Able, received into evidence, I find the preponderance of the evidence fails to establish that the ground support in the 5655 roadheader stope was not properly designed, installed and maintained based on known ground conditions and Newmont's mining experience in similar ground conditions as required by 30 C.F.R. § 57.3360.

It is only with hindsight that one can contend that the time, energy and money Newmont devoted to securing and controlling the underground roof was insufficient to prevent the December 6th ground fall.

Upon review and consideration of all the evidence, I find and conclude that the preponderance of the probative evidence does not, in this case, establish that Newmont did not provide what a reasonable prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.

The evidence and findings that support this conclusion are set forth in greater detail below under the heading Findings and Conclusions.

FINDINGS AND CONCLUSIONS

1. Newmont Gold Company ("Newmont") the owner and the operator of the Carlin East Gold Mine ("Carlin East"), located near Carlin, Nevada is subject to the jurisdiction of the Federal Mine and Safety Health Act of 1977, 30 U.S.C. § 801, *et seq*.

2. A large ground fall occurred in Carlin East on December 6, 1997, in the 5655 roadheader stope.

3. Citation No. 7951941 (the "Citation") alleging a violation of 30 C.F.R. § 57.3360 was issued by MSHA on December 9, 1997, by MSHA Inspector Bobby Caples.

4. The Citation alleged, in part, that "management has not implemented effective ground support measures to properly control the ground conditions associated with the current mining practices to ensure the safety of miners. This is an unwarrantable failure."

5. Carlin East was first developed in 1993 by an independent contractor called Small Mine Development ("SMD"). At the time SMD began developing Carlin East, SMD was responsible for all aspects of the mining operation, including the design, installation and maintenance of ground support The ground support installed by SMD in Carlin East consisted primarily of 6-foot splitset rock bolts.

6. In May 1995 Newmont assumed the mining operations at Carlin East. At the time Newmont took over the mining operations of Carlin East it also assumed complete responsibility for the ground support installed in the mine.

7. One method used to excavate the area is undercut drift-and-fill mining. Drifts are mined out, then filled with a "backfill" made of cement and aggregate. The backfill is "jammed" into the mined out drift as tightly as possible using a specially modified tool. Once all of the cuts are mined and backfilled on a level, access is then driven to the next level below the prior level until the ore body is mined out.

8. Newmont engages in two types of drift-and-fill operations. The primary method involves blasting the drifts, after which the loosened material is mucked out. The other type of drift-and-fill operation employed by Newmont is the use of the roadheader.

9. Newmont introduced the roadheader into Carlin East in June 1997. Unlike traditional blasting methods the roadheader shears rock from an ore face in 12 to 15 foot advances. As the roadheader advances, the loosened material is mucked out and removed to the surface. After the cut is complete, the roadheader is moved to another ore face to cut while the roof of the prior cut is bolted.

10. Ground conditions vary considerably throughout Carlin East. The primary rock is a silty limestone, divided into two geotech units known as "Stls 1" and "Stls 2."

11. Geologic faults, many of which are undetectable until they are mined through, are present throughout Carlin East.

12. After Newmont took over the mining of Carlin East from SMD in 1995 it significantly strengthened the ground support that had previously been installed by SMD.

13. In 1995 Newmont experienced three ground falls in the areas that had been developed and the ground support designed and installed by SMD. One of these ground falls occurred at the 6090 level of Carlin East.

14. The ground fall in the 6090 area of Carlin East occurred on July 12, 1995, approximately two months after Newmont assumed operational control of Carlin East from SMD. It occurred in an area that was being mined using blasting methods. Newmont was not employing a mining sequence in the 6090 area. The back in the 6090 area was supported primarily by 6-foot splitset bolts.

15. As a result of the 6090 ground fall. Newmont hired the highly qualified expert Dr. John Abel to begin advising them on the ground support requirements for Carlin East.

16. In 1995 Dr. Abel recommended that Newmont install longer bolts in Carlin East and also recommended using dywidag bolts in addition to the splitset bolts in all open areas of the mine.

17. In order to execute Dr. Abel's recommendations, Newmont shut down the Carlin East Mine for a period of several days in 1996 for the sole purpose of enhancing the ground support in various locations throughout the mine including resupporting all the intersections with 12-foot resin bolts.

18. The ground support in Carlin East was continually improved by Newmont since it began operations in Carlin East in 1995.

19. Before beginning the roadheader mining activity in Carlin East in June 1997, Newmont engaged Dr. Abel to develop a mining plan and design for the roadheader mining activity.

20. Newmont provided the best available data regarding ground conditions in the 5655 roadheader area to Dr. Abel to use to develop a ground support plan, including percent core recovery data; rock quality designation (RQD) core recovery data; and underground rock mass ratings ("URMR").

21. In a report dated May 23, 1997, Dr. Abel recommended sequencing the headings off the main access drift in order to produce what is known as a yield pillar in order to shift the weight of the ground in all directions from the area being mined. Dr. Abel's report also recommended a detailed ground support plan, employing what Dr. Abel testified was "belt and suspenders" approach to ground support.

22. Dr. Abel's May 23 report noted that the "back and rib side ground conditions should actually be improved by mechanical roadheader excavation, which would eliminate blast damage." MSHA's expert, Mr. Hoch, also acknowledged that the roadheader would provide an advantage over blasting in terms of ground support because blasting "would probably fracture the roof or ribs a little more."

23. According to Dr. Abel, based on the data provided by Newmont relating to the ground conditions in the 5655 roadheader area, "rock bolt back support would be necessary and should be effective" in the 5655 roadheader stope.

24. The ground support recommended by Dr. Abel for the 5655 roadheader stope involved the use of one-inch diameter dywidag threadbar tensioned bolts at specified intervals. The length and spacing of the dywidag bolts was dependent upon the drift span to be supported. Dr. Abel also recommended the use of splitset bolts at equal intervals between the dywidag bolts.

25. The dywidag bolts recommended by Dr. Abel provide tensioned ground support. The dywidag bolt is inserted into a hole wherein it contacts polyester resin that has previously been inserted into the hole. The resin "provides an anchorage connection between the bolt and the rock." Once the resin sets, the bolt is torqued to get "tension top to bottom"

26. The tensioned dywidag bolt squeezes rock layers together between the two ends of the bolt "to build a beam." The beam is designed to pull the layers of rock together to provide support.

27. The May 23 report also recommended the use of "mesh support between bolts . . . and supplementary intermediate splitset bolt support between point-anchored bolts. Consistent with his May 23 report, every bolt pattern recommended by Dr. Abel "was designed to support the full height--the maximum height of the arches. [Dr. Abel] estimated it as a fourth of the span, plus to allow 2 feet of anchorage beyond the top of the arch."

28. Dr. Abel's May 23rd report includes a diagram labeled "Figure 4" which contains a bolting pattern and bolt lengths for various drift spans ranging in width from 14 feet to 28 feet. Referring to the 28-foot span depicted in Figure 4, Dr. Abel recommends the use of 9-foot dywidag bolts on a 6-foot pattern. Dr. Abel noted in his May 23 report that "[9]-foot long bolts should provide a minimum anchorage length of 2 feet at the maximum reasonable 7-foot height of the tension zone underlying the maximum 28 feet wide planned roadheader drift." Dr. Abel's May 23 report recommends the use of intermediate support between the tensioned bolts for the planned 28-foot span in the form of 6-foot splitset bolts combined with a wire mesh membrane.

29. In a June 5, 1997, letter to James Pentony, Carlin East's underground mining engineer, Dr. Abel clarified the basis for his recommendations, explaining that "the bolt lengths are based on providing bolt anchorage 2 feet beyond the maximum height of the rock arch potentially loosened above the flat back openings cut by the roadheader commonly referred to as the tension zone." Dr. Abel further noted "the design height of potentially loosened rock is a function of the width of the underlying drift, conservatively assumed to be 1/4 the drift width." By way of example, Dr. Abel recommended using 9-foot dywidag point-anchor bolts to support a 28 foot span: 7 feet of the bolt were required to push through the tension zone, allowing 2 feet of the 9-foot bolt to solidly anchor in stable rock.

30. Dr. Abel advised Newmont that by calculating 1/4 of the drift span plus 2 feet, Newmont could calculate the proper bolts lengths necessary to support wider or narrower drift spans than the examples included in his May 23 and June 5 reports. (Con. Ex. 2, pp. 1 and 5; and Tr. 254-3 through 6 and Tr. 970-23 through 971-8).

31. The ground support design for the 5655 roadheader area recommended by Dr. Abel was conservative; that is, the recommended ground support design provided greater support than the existing ground conditions otherwise warranted. The mining design and ground support recommended by Dr. Abel for the 5655 roadheader area reflects the application of widely accepted procedures and methodology used by rock mechanics and mining engineers.

32. Dr. Abel's May 23 report and his June 5 report include diagrams reflecting drift spans no greater than 28 feet across. Dr. Abel testified that the diagrams were not meant to reflect maximum recommended spans, but rather, were intended to demonstrate the application of the rule that "the design height of potentially loosened rock is a function of the width of the underlying drift, conservatively assumed to be 1/4 the drift width." (Con. Ex. 2, p. 11; and Tr. 245-15 through 20). Based on that, he testified that given the ground conditions in the 5655 roadheader stope, if Newmont used 12-foot bolts to support the back Newmont could support a drift span in excess of 28 feet.

33. James Pentony, is the underground geotechnical engineer for Carlin East. He was involved with the design, installation and maintenance of the ground support in the 5655 roadheader area, including the implementation of Dr. Abel's design and plan for the 5655 roadheader area. Newmont followed the ground support methodology detailed in Dr. Abel's May 23 (Con. Ex. 1) and June 5 (Con. Ex. 2) reports. (Tr. 963 through 13).

34. For drifts in the 5655 roadheader area with planned widths of 14 - 28 feet (Con. Ex. 1, p. 9) Newmont installed 12-foot dywidag bolts at 6-foot intervals and 8-foot splitset bolts at 3-foot intervals between the dywidag bolts, and covered the entire back with wire mesh. The bolts installed by Newmont were longer than those recommended by Dr. Abel. (Tr. 969-8 through 16). The bolting patterns installed by Newmont resulted in overlapping bolting patterns at the intersection of the access drift and the left and right headings. (Tr. 263-8 through 13; 963 through 13; 1051-16 through 1052-9).

35. Newmont complied with Dr. Abel's mining sequence for the area. (Tr. 963-14 through 969-4). "The purpose for using the mining sequence is to basically control the method and the timing of distribution of the load transferring to the abutment pillars. In conjunction with the backfill, you get your backfill sequence and mining sequence all incorporated into one."

36. The backfill used by Newmont in the 5655 roadheader drift-and-fill mining is "a cement and rock fill which . . . exceeds the strength of the actual rock itself because it does not have many joints in it."

37. The parties stipulated to the admission of the deposition transcript of Inspector Joel Tankersley in lieu of his testimony. In October 1997 MSHA Inspector Joel Tankersley conducted an inspection of the Carlin East Mine. (Tankersley Deposition, 5-23 through 24).

38. As part of Mr. Tankersley's October 1997 inspection he inspected the 5655 roadheader stope area "quite awhile because we had a ventilation issue in that area."

39. At the time Mr. Tankersley conducted his inspection, headings had been mined and backfilled off the left and right side of the main access drift. (Tankersley Deposition 13-7 through 10). Mr. Tankersley inspected the drift spans in the 5655 roadheader area. Mr. Tankersley concluded that the spans that he observed were probably 20 feet in width, measured from the top of the backfill on the left side of the access drift to the top of the backfill on the right side of the access drift. (Tankersley Deposition, 13-17 through 14-3). At the time of Mr. Tankersley's inspection in October 1997 he concluded that the ground support in the 5655 roadheader stope area was in compliance with applicable MSHA regulations. (Tankersley Deposition, 15-18 through 25).

40. Prior to the December 6 ground fall in the 5655 roadheader stope, Mr. Pentony inspected the progress of the mining in that area approximately once a week. (Tr. 975-24 through 976-6). Based on his inspections Mr. Pentony concluded that the bolting pattern, the mining sequence, the type of bolts, the length of bolts, and the type of backfill procedures used were all proper and in accordance with Dr. Abel's ground support recommendations.

41. Mr. Pentony concluded as a result of his inspections of the 5655 roadheader stope that the spans in both the access drift and the headings to the left and right of the access drift were properly supported. (Tr. 980-23 through 982-4).

42. Mr. Pentony has observed wider spans in similar ground conditions in other parts of Carlin East. These spans are supported using a bolt system less than or equal to that in the 5655 roadheader stope. These spans have been opened and remained stable for periods in excess of two years. (Tr. 986-7 through 987-15).

43. In approximately August or September 1997, Mr. Pentony measured the rock strength in the 5655 roadheader stope by taking Rock Mass Ratings. Based on these measurements, and applying the Laubscher System, Mr. Pentony concluded that the ground conditions and the rock strength in the 5655 roadheader area in both the Stsl 1 and Stsl 2 geotech units were stable. These measurements were provided to Dr. Abel as data for his post-mortem on the December 6 ground fall. (Joint Exhibit 2; and Tr. 987-19 through 997-23).

44. Scott Robertson is a supervisor at the Carlin East Mine. He has held this position since November 1996. (Tr. 526-22 through 527-10). He and Craig Kerby were the "shift bosses" responsible for the miners working in the 5655 level on December 6, 1997, at the time the ground fall occurred.

45. The miners performed a workplace inspection of the 5655 roadheader stope. As part of the workplace inspection Dennis Stone observed a small pile of rocks on the ground which, according to Mr. Stone, was not totally abnormal. Neither observed any conditions that indicated that the ground was unstable. (Stone Deposition, 10-13 through 11-9).

46. While in the 5655 roadheader stope at approximately 8:30 a.m. on December 6, 1997, Mr. Robertson made a good visual inspection of the back (Tr. 567-4 through 7). He did not observe any bolts that appeared to be counter sunk (Tr. 567-8 through 10), he did not observe any baskets that had formed around the bolts (Tr. 567-11 through 13), in fact, he did not see any indication that the area was taking weight (Tr. 567-14 through 16). Mr. Robertson testified that he was not aware of any hazardous ground conditions prior to the December 6 ground fall in the 5655 roadheader area. (Tr 533-15 through 534-2).

47. Mr. Robertson returned to the 5655 roadheader area at approximately 12:00 p.m. on December 6. At that time there were no indications that the ground was taking weight. Nor did the miners report any unusual conditions. (Tr. 536-15 through 20; 568-15 through 569-4).

48. At approximately 1:00 p.m. on December 6, 1997, one of the shift bosses, Craig Kerby showed up at heading R8 in the 5655 roadheader area and spoke with Dennis Stone. While he was in the area a small stone fell through the wire and landed on Mr. Kerby's tractor. At that point both Mr. Kerby and Mr. Stone noticed that other small rocks were coming down and hitting the vent line at the top of the drift. (Stone Deposition, 15-20 through 16-6).

49. In response to the rock noises, at approximately 1:00 p.m. the decision was made to contact the shift boss, Scott Robertson. Mr. Robertson returned to Heading R8 in the 5655 roadheader stope. (Stone Deposition 16-15 through 23). Messrs. Robertson, Kerby, Johns, and Stone conducted a thorough inspection of the area. The group observed that the bolts were taking weight (the "bolts . . . were starting to recede slightly into the rock . . . and they weren't rusty anymore"). It was decided at that point that it would be a good idea to pull out the equipment from the 5655 roadheader area. (Tr. 536-21 through 538-6). Messrs. Robertson, Kerby, Stone, and Johns reached a general consensus to remove the roadheader from the R8 area to the main access drift of the 5655 roadheader area. (Stone Deposition, 10-18 through 11-3; Tr. 538-2 through 14; Tr. 539-12 through 15).

50. Messrs. Robertson and Kerby worked with the two miners to back the roadheader out of the R8 area and into the main access drift. It took approximately 20 minutes to back out the machine. It was approximately 2:00 p.m. when they finished backing out the roadheader. (Tr. 539-16 through 23; 541-16 through 20). After the roadheader was backed out, the crew planned to bring in the bolter to reinforce the back. (Tr 538-2 through 14; 542-19 through 543-19).

51. After the roadheader was backed out of the area and all personnel had been removed from the area, the access drift was roped off. Even after the roadheader was pulled out of the 5655 roadheader access drift, it still was not clear that a ground fall was likely to occur. (Stone

Deposition, 18-1 through 7; and Tr. 543-1 through 5; 544-6 through 8; and 593-8 through 594-17).

52. The ground fall on December 6, 1997, occurred at approximately 2:30 to 2:45 p.m.

53. After the ground fall, Messrs. Robertson and Kerby "decided that [they] should pull everybody out of the mine working on [the 5655] level or below . . . ." (Tr. 549-9 through 13).

54. The shift preceding the December 6 ground fall began approximately 6:30 p.m. on December 5 and continued until approximately 5:00 a.m. December 6. (Tr. 520-18 through 22). During that prior shift, the miners in the 5655 roadheader stope were Mitch Woods and Rick McBride. Larry Cross was one of the shift bosses.

55. The workplace inspection form prepared by Mr. Woods on behalf of both himself and Mr. McBride for the December 5 - 6 shift did not report the presence of any hazards in the 5655 roadheader area, even though the form specifically contains blocks relating to hazardous conditions. Nothing unusual was noted on this form. (Con. Ex. 7; and Tr. 491-7 through 494-7; 846-4 through 847-13).

56. At the end of the shift on December 6, 1997, Mr. McBride completed a form used to monitor the roadheader cutting activity. Mr. McBride made numerous detailed entries on this form in his own handwriting. Mr. McBride, however, did not make any comments on the form that he was delayed during the shift by reason of investigating ground conditions in the 5655 roadheader stope. Mr. McBride did not make any comments on the form relating to ground conditions in the 5655 roadheader area even though the form contains an area reserved for such remarks, if applicable.

57. On December 5, 1997, Mr. Cross issued a three-day disciplinary layoff to Mr. McBride because of his second unexcused absence which occurred on December 4, 1997. (Con. Ex. 10; and Tr. 498-2 through 499-16).

58. Mr. McBride stated to Mr. Carrico that he thought that Larry Cross was "out to get him." (Tr. 896-18 through 24). Mr. McBride also told Mr. Carrico (referring to Mr Cross): "Larry, I hate that mother f----- and I don't mind telling anybody."

59. Mr. Hoch, MSHA's expert, acknowledged that the faults running through Carlin East were subtle and variable. (Tr. 159-2 through 160-18).

60. The conclusions reached by Messrs. Hoch and Evanto were based, in part, on their assumption that the Cavity Monitoring System (the "CMS") used to measure the length, width, and depth of the December 6 ground fall also reflected the width of the 5655 access drift. This assumption was not correct. (Gov. Ex. 8, p. 4; and Tr. 63-14 through 64-11; Tr. 147-22 through 148-2).

61. The Leaky Fault caused the ground fall in the 5655 roadheader access drift by interfering with the transfer of stress in all directions as had been planned by Dr. Abel in his May 23, 1997, design.

62. Dr. Abel reached the following conclusions regarding the December 6 ground fall:

> The planned 5655 Level overcut extraction sequence would have functioned as planned in the absence of the Leaky Fault for the following reasons:
>
> 1. The 5655 AXS drift remained stable during advance and retreat when temporary L8 pillar yielded because of the solid unmined waste to the south, west and north sides.
>
> 2. The ground fall was anomalous in that it occurred in the more competent Stls 2 geotech unit in the south end of 5655 AXS.
>
> 3. The modifications to the initial extraction sequence increased the R9 yield pillar factor of safety which should have increased overcut back stability.
>
> 4. The Leaky Fault dipped away from the 5655 Stope presenting a low strength weakness that did not provide a path for arch load transfer to the south.

63. David West testified as an expert witness on behalf of Newmont. Mr. West took issue with the analysis, findings, and conclusions set forth in the Hoch/Evanto report. Mr. West noted that the Hoch/Evanto Report analysis failed to consider the material strengths of the beam created by Dr. Abel's ground support design. Whether that beam fails is a function of how much stress the material will sustain. Using the example of the single sheet of paper, Mr. West noted:

> If a stronger piece of paper, in this case, a piece of the card, which is more rigid, and as I increase the span, the bending or the deflection of the beam is not as great . . . .

64. Mr. West reviewed Dr. Abel's May 23 report and concluded that "it was based on sound engineering and rock mechanic principles that are accepted throughout the industry.

65. Mr. West recognized that Dr. Abel's May 23 report presented "a conservative design" for the 5655 roadheader stope. (Tr. 346-11 through 12).

66. Mr. West reviewed Dr. Abel's post-mortem reports of the December 6 ground fall. Mr. West agreed with the analysis and conclusions reached by Dr. Abel. (Tr. 355-21 through 356-20).

67. Mr. West testified that his independent observations of the Leaky Fault in the Carlin East Mine "indicate a high degree of variability and unpredictability." (Tr. 365-21 through 24).

68. Because of the variability and unpredictability of the Leaky Fault, "the detection and prediction of the fault [is] extremely difficult." (Tr. 366-23 through 367-1).

69. Mr. Sutich was Newmont's Mine Superintendent for Carlin East. Mr. Sutich testified that after each ground fall in the Carlin East Mine, Newmont conducted an evaluation of the circumstances that led to the ground fall situation and Newmont modified its mining techniques and strengthened ground support in order to ensure that ground falls based on similar circumstances would not occur in the future. I credit Mr. Sutich's testimony.

70. The increased ground support measures taken by Newmont included using longer bolts (Tr. 917-5 through 14); using an increased number of bolts and using different types of bolts (Tr. 917-5 through 10); bringing in an expert, Dr. Abel, to provide design recommendations on mining methods and ground support (Tr. 916-13 through 21); and even shutting down all production activities in the mine in order to install additional ground support at various sites throughout the mine, regardless of whether the site was showing signs that the existing ground support was not adequate.

CONCLUSION

The Petitioner failed to demonstrate by a preponderance of the evidence that Respondent did not provide what a reasonable person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard. Thus the record, as a whole, does not establish a violation of the cited safety standard 30 C.F.R. § 57.3360. The citation should be vacated.

ORDER

Citation No. 7951941 and its related proposed penalty are **VACATED**.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

Mark Savit, Esq., Rodney A. Grandon, Esq., PATTON BOGGS, L.L.P., 2550 M Street, NW, Washington, DC 20037 (Certified Mail)

Marshall Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105 (Certified Mail)

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 23 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-292
Petitioner	:	A.C. No. 15-17715-03504
v.	:	
	:	Bubba Branch
DIAMOND MAY MINING,	:	
Respondent	:	

DECISION

Appearances: Susan Foster, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C. , Lexington, Kentucky, for the Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration ("MSHA"), against Diamond May Mining ("Diamond May"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, ("the Act"), 30 U.S.C. §815. The petition seeks a civil penalty of $1,855.00 for an alleged violation of section 77.1006(a), 30 U.S.C. §77.1006(a).

A hearing was held in Prestonsburg, Kentucky. The parties' post-hearing briefs are of record. For all the reasons set forth below, the citation shall be AFFIRMED.

I. Stipulations

The parties stipulated to the following facts:

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977.

2. Respondent and its Bubba Branch Mine have an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.

3. Respondent and its Bubba Branch Mine are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and, thus, the administrative law judge has the authority to hear this case and issue a decision.

4. Mine size is as stated on the proposed assessment dated July 1, 1997; *i.e.*, 676,242 production tons per year for respondent and 411,574 production tons per year for the subject mine.

5. Payment of a reasonable penalty will not have an adverse effect on the ability of the respondent to continue in business.

6. Order No. 4472213 and Citation No. 4472214 were served properly on Respondent.

7. There is no procedural defect in this case which affects the validity of this proceeding.

8. Respondent's history of prior violations for its Bubba Branch Mine is as indicated on the R-17, Assessed Violation History Report. The parties agree that the R-17 may be admitted into evidence without objection.

II. Factual Background

On March 18, 1997, MSHA Inspector Denver Ritchie, unaccompanied by a representative of the operator or the union, visited Diamond May's Bubba Branch, a surface coal mine, in order to conduct a spot inspection of its haulage roads and a Triple A inspection of its contract highwall mining operation (Tr. 14-15). Upon arriving at the No. 7 coal pit, the inspector observed a 992C Caterpillar front-end loader loading out blasted overburden material into Caterpillar rock trucks, in a manner that he concluded posed an imminent danger to the operator (Tr. 15-19). Accordingly, pursuant to section 107(a) of the Act, Inspector Ritchie immediately issued Imminent Danger Order No. 4472213 at 9:05 a.m., to mine superintendent Roger Pigman, who removed the front-end loader and the operator from the site (Tr. 42-43). Order No. 4472213 describes the dangerous condition as follows:

> Safe work procedures and practices were not being followed in the No. 7 coal pit where a 992C Caterpillar front end loader was in the process of trying to shack [sic] down a loose, fractured over hanging high wall approximately 65 foot [sic] in height which had been drilled, blasted and was in the process of being loaded out in order to uncover the coal bed. The underlying cause is that management failed to safely break down the materials for safe loading. 30 CFR. 70-1006a. Citation No. 4472214 will be issued under 30 CFR 1006a for this practice

(Gov't Ex. 3). Inspector Ritchie also issued section 104(a) Citation No. 4472214 at the same time, alleging a significant and substantial violation of 30 C.F.R. §77.1006(a), describing the condition as follows:

A safe work area was not provided for the operator of the 992C Caterpillar front end loader which was observed trying to breack [sic] down a loose, fractured over hanging high wall which had been blasted and was in the process of being loaded out in order to uncover the No. 7 coal seam. The highwall was approximately 65 foot [sic] in height. This condition and practice was the factor that constituted the issuance of Imminent Danger Order No. 4472213 dated 3-28-97 there for [sic] no abatement time was set

(Gov't Ex. 4). Later that day, a dozer was placed on top of the pile, and the material was pushed down to form a more gradual slope and a toe, from which a front-end loader could remove the material (Tr. 47-48, 116, 154).

III. Findings of Fact and Conclusions of Law

A. Order No. 4472213

It is undisputed that Diamond May did not file a notice of contest respecting Imminent Danger Order No 4472213. The Secretary takes the position that failure to timely contest the order under section 107(e)(1) of the Act, 30 U.S.C. § 817(e)(1), and section 2700.22 of the Regulations, 29 C.F.R. § 2700.22, renders the order final and, therefore, not at issue in this proceeding (Tr. 6-7; Sec. Br. at 10-12). Diamond May takes the contrary view that the validity of the order is properly before me, based on inconsistency between the wording of the Act and the Regulation, and because Diamond May included contest of the order in its contest of the civil penalty associated with the 104(a) citation (Tr. 7-9; Resp. Br. at 6). I am not persuaded by Diamond May's rationale, and for the reasons set forth below, I find that Imminent Danger Order No. 4472213 is FINAL.

Section 107(a) of the Act, 30 U.S.C. § 817(a), authorizes an inspector to issue an order requiring the operator to remove all affected persons from an area whenever, in the inspector's judgment, the condition in the area poses an imminent danger. Section 107(e)(1) of the Act, 30 U.S.C. § 817(e)(1), in pertinent part, sets forth the requirements for contesting an imminent danger order as follows:

Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order.

Similarly, section 2700.22(a) of the Regulations provides the following:

A notice of contest of a withdrawal order issued under section 107 of the Act, 30 U.S.C. 817, or any modification or termination of the order, shall be filed with the Commission by the

> contesting party within 30 days of receipt of the order or any modification or termination of the order.

Turning to the facts of this case, 30 days from the March 18, 1997, issuance of the order, was April 17, 1997. Diamond May's Answer to the Secretary's Petition for Assessment of Penalty contests the validity of the citation and order, but was filed on September 22, 1997, some five months in excess of the statutory and regulatory requirement. It is noted that Diamond May has provided no precedent for the proposition that filing within 30 days is not a mandatory requirement and, indeed, has conceded that it is subject to the requirements of the Act. *See ICI Explosives USA, Inc. v. Secretary of Labor*, 16 FMSHRC 1794 (August 1992) (Chief ALJ's dismissal of imminent danger contest, analogizing an application for review under section 107(e) to a notice of contest under 105(d), which the Commission has long required be filed within the statutorily prescribed period of 30 days). Diamond May has misread section 107(e) of the Act, however, by interpreting use of the word "may" to relate to when a contest must be filed. In the context of this section, it is clear that "may" references whether an operator desires to contest an imminent danger order, not when or how a contest is filed. Diamond May's reading implies no time limitation on filing and, therefore, would render that portion of the provision meaningless. Consequently, Diamond May's failure to timely contest the imminent danger order precludes review in this proceeding.

B. Citation No. 4472214

1. Fact of Violation

This citation charges a "significant and substantial" ('S&S") violation of 30 C.F.R. § 77.1006(a), which provides as follows:

> Men, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks.

In resolving whether a violation of the standard had occurred, the parties contend that an initial determination must be made as to whether the cited area constituted a highwall.[1] The Secretary argues that the blasted/fractured sandstone cited constituted a highwall (Tr. 19-20, 25, 60; Sec. Br. at 12-13). Diamond May, on the other hand, contends that a highwall can only consist of solid, unblasted material and, therefore, argues that the cited condition was "blasted

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[1]Highwall. The unexcavated face of exposed overburden and coal or ore in an open cast mine or the face or bank on the uphill side of a contour strip mine excavation. U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 543 (1968).

overburden" (Tr. 107, 166-167; Resp. Br. at 7-8).[2] While neither the Act nor the Regulations define the term, I need not decide whether the cited condition constituted a "fractured highwall," since the plain, unambiguous language of the standard encompasses "banks," as well. The mining industry uses the term "bank" in a number of instances, including "a usually steeply sloping mass of any earthy or rock material rising above the digging level from which the soil or rock is to be dug from its natural or blasted position in an open-pit mine or quarry." U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 77 (1968). Based on this definition, I conclude that the blasted overburden, cited by the inspector as the violative condition, comes within the ambit of the standard. Having so concluded, the next determination to be made is whether the condition was dangerous.

Inspector Ritchie testified that the overburden in the No. 7 coal pit consisted of fractured sandstone in stacked, loose components that ranged from granular size to eight-by-eight foot pieces, weighing between eight and ten tons (Tr. 20-21). He estimated the pile to reach 65 feet in height, 50 or 60 feet in depth, and with the toe removed where the end-loader was operating, to constitute a vertical wall of approximately 90 degrees (Tr. 20, 22-24, 61-63, 78-79, 81-82, 89-90, 98; Gov't Ex. 5). According to Inspector Ritchie, a crack of one to two feet in width, located eight feet back from the face and extending from top to bottom, separated the blasted overburden into two sections (Tr. 34-35, 67-69). He described a large, flat piece of sandstone or chimney-like structure on the top of the pile, which he estimated to be six to eight feet wide, extending beyond the rest of the loosely stacked material by five to six feet (Tr. 25-28, 74-76; Gov't Ex. 5). This chimney-like structure, Inspector Ritchie testified, was loose and difficult to get down, and from his standing position on the No. 7 coal seam, approximately 100 feet away from the wall, he observed the operator backing up and ramming the wall with the bucket of the front-end loader, in the inspector's opinion, to shake down the blasted material for loading (Tr.16, 28, 32, 65). According to the inspector, "every time he would hit the wall, due to this crack that's in it and separations, the front part of the chimney portion of the wall would move back and forth" (Tr. 33-34, 36-37). Inspector Ritchie stated that, in his judgment, based on the movement of the wall that he had observed over the course of the few minutes it took to reach the front-end loader, the wall could collapse at any moment (Tr. 35-36, 42). Inspector Ritchie also testified that material falling at an angle some 40 feet above the loader could invade the windshield, irrespective of whether it is glass or Plexiglas, and cause fatal injury to the operator (Tr. 32, 40-42, 71-73, 91-92). Furthermore, the inspector testified that approximately one hour after the instant order and citation had been issued, on or about 10:00 a.m., he observed the top two blocks, eight to ten feet in size, fall onto the area where the front-end loader had previously been operating, without anyone being around or on the area (Tr. 43-45, 69-70, 91-92).

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[2]Overburden. Used by geologists and engineers in several different senses. By some, it is used to designate material of any nature, consolidated or unconsolidated, that overlies a deposit of useful materials, ores, or coal, especially those deposits that are mined from the surface by open cuts. *Id.* at 780.

According to Inspector Ritchie, the highwall miner operator also saw the collapse of the top portion of the wall (Tr. 70).

Diamond May disputes that the vertical face of the fractured overburden was as steep as 90 degrees, and postulates that unconsolidated material standing at a 90 degree angle would defy gravity and nature (Resp. Br. at 8-9). Dirk Smith, engineering assistant to Diamond May's president, testified to being unsure of whether he had checked the No. 7 coal pit prior to Inspector Ritchie's 9:00 inspection on the morning of March 18th, but that when he did inspect the site considerably later, around lunchtime, the face of the pile had not been vertical, but "would appear to be steep due to the angle of repose of this material" (Tr. 106-109, 125-127, 133, 135-136, 145-146). Mr. Smith acknowledged that he had not actually surveyed or diagramed the cited condition during this inspection, but that the angle of repose of shot material is sometimes steep; he estimated the face of the pile to lay back at an angle of 80 degrees (Tr. 109-110, 114, 126, 130, 140-141).[3] Mr. Smith also testified that he was not in the pit during operation of the front-end loader, that he did not observe any overhanging chimney-like structure on the top of the pile, and that he did not recollect the top having failed, as alleged by Inspector Ritchie (Tr. 112, 120-121, 128, 130).

Joseph Jacobs, Diamond May's director of risk management, acknowledged that he "did not see the area that was cited until after the condition that he alleged had been there had allegedly been rectified," and that he had not heard of the "big rock up on top" until Inspector Ritchie referenced it in his testimony during the hearing (Tr. 169-170).

Diamond May largely presented evidence on the typical loading geometry for the Hazard No. 7 seam surface mining operation, rather than on the particulars of the overburden cited in this case (See Resp. Exs. 1, 2; Tr. 114, 121-125). Inspector Ritchie's assessment of the condition which he cited remains unrebutted, since Diamond May has produced no witnesses that observed the condition during the relevant timeframe, and has conceded that, although improbable, a vertical wall is possible (Tr. 136). While neither Inspector Ritchie nor Dirk Smith actually surveyed the cited wall, it is clear from their estimates of the slope that it was steep. Moreover, Diamond May has produced no evidence contradicting Inspector's Ritchie testimony that he observed the top of the wall wobbling when the operator rammed it with the bucket of the front-end loader. That the top of the wall collapsed by itself an hour after the condition had been cited, a fact also unrebutted by Diamond May, removes any doubt that the slope of the wall, in and of itself, posed a very dangerous condition, compounded by the ramming of the front-end loader. I am not persuaded by any suggestion that the distance between the cab of the front end-loader and the wall provided adequate protection to the operator, given the circumstances under which the

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[3]Angle of repose. The maximum slope at which a heap of any loose or fragmented solid material will stand without sliding or come to rest when poured or dumped in a pile or on a slope. *Id.* at 39. *See also* Tr. 22, 103-104 (the normal angle of response for unconsolidated material is approximately 35 degrees).

equipment was being operated. Accordingly, the Secretary having established that a miner had been working near or under a dangerous bank, the evidence is clearly sufficient to sustain the violation.

2. Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

Inspector Ritchie found the violation to be S&S. He testified that, based on the separation in the wall and the back and forth movement of the chimney-like portion when the bucket rammed it, he had determined it very likely that continued ramming would eventually knock the top down, and that the falling material could slide off the arms of the bucket into the windshield, resulting in serious injury to the operator, even death (Tr. 33-37). The evidence, evaluated in terms of continued mining operations, proves the inspector's judgment to be sound, since the size of the sandstone blocks that fell in the area from which the operator and the front-end loader had been removed an hour previously, was roughly eight-by-eight feet, weighing eight to ten tons. I find, based on the evidence, that there was a reasonable likelihood that collapse of the top, which hazard was contributed to by the steep angle of the wall and ramming by the front-end loader, would result in an injury of a very serious nature. Therefore, I conclude that the violation was, indeed, "significant and substantial."

3. Penalty

While the Secretary has proposed a civil penalty of $1,855.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. §820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-292 (March 1993), *aff'd* 763 F.2d 1147 (7th Cir. 1984).

Diamond May is a medium-sized operator, with a history of no prior violations of the standard at issue and an overall record that is not an aggravating factor in assessing an appropriate penalty (Gov't Ex. 1). As stipulated, the proposed civil penalty will not affect Diamond May's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of Diamond May in causing it. I find the gravity of the violation to be serious, since the potential for grave injuries to miners, ranging from cuts and broken bones to head injuries and death, caused by large blocks of sandstone falling into the operators' cab, is substantiated by the record. Consideration of the operator's aggravating conduct, i. e., ramming an already steep wall of unconsolidated material with the bucket of the front-end loader, so as to shake down the top, leads me to ascribe high negligence to Diamond May. Therefore, having considered Diamond May's medium size, insignificant history of prior violations, seriousness of the violation, high degree of negligence, good faith abatement and no other mitigating factors, I find that the $1,855. 00 penalty proposed by the Secretary is appropriate.

ORDER

Accordingly, Order No. 4472213 is **FINAL**, Citation No. 4472214 is **AFFIRMED**, and Diamond May is **ORDERED TO PAY** a civil penalty of **$1,855.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Susan Foster, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215 (Certified Mail)

Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, PSC, 841 Corporate Drive, Suite 101, Lexington, KY 40503 (Certified Mail)

/mh

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

SEP 24 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-645-M A.C. No. 02-00152-05503 WJ6
v.	:	
DYNATEC MINING CORPORATION, Respondent	:	Magma/Superior Mine

DECISION

Appearances: Edward H. Fitch, IV, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
C. Gregory Ruffennach, Esq., Durango, 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 Dynatec Mining Corporation ("Dynatec") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petition alleges 14 violations of the Secretary's safety standards. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I. FINDINGS OF FACT

A. Background

The citation and orders contested in this proceeding were issued by MSHA following a fatal accident at the Magma/Superior Mine on August 10, 1993. This mine was an underground copper mine in Gila County, Arizona. The mine is no longer in operation. The accident occurred when a wooden structure that had been constructed inside the 865 Raise collapsed killing four miners who were in the raise. The mine operator was Magma Copper Company ("Magma Copper") and Dynatec was the independent contractor who constructed the raise and the wooden structure within the raise. The Secretary issued citations against both Magma

Copper and Dynatec. This proceeding involves one section 104(d)(1) citation and 13 section 104(d)(1) orders of withdrawal. The Secretary proposed a civil penalty of $700,000 for the alleged violations.

In 1996, an indirect subsidiary of Broken Hill Proprietary Company Limited merged into Magma Copper. As a result of this merger, Magma Copper became BHP Copper, Inc. ("BHP Copper"). On July 17, 1998, BHP Copper, the United States Attorney for the District of Arizona, the Secretary of Labor, and the State of Arizona executed a Global Settlement Agreement (the "Global Settlement"), which resolved all of the issues between the parties related to the investigation of the accident by the United States and the State of Arizona. Under the Global Settlement, BHP Copper agreed to plead guilty to two misdemeanor counts under section 110(d) of the Act and to pay criminal penalties for these counts. BHP Copper agreed to pay civil penalties under section 110(a) of the Act in the amount of $800,000. BHP Copper also agreed to pay certain sums to the State of Arizona. On July 17, 1998, a United States Magistrate Judge of the U. S. District Court for the District of Arizona approved the settlement of the criminal matters. By order dated July 23, 1998, I approved the settlement of the civil proceedings brought against Magma Copper under section 110(a) of the Mine Act.

B. The Raise

A raise is a vertical or inclined opening driven upward from a level in a mine to connect with one or more levels above. *A Dictionary of Mining, Mineral, and Related Terms,* 893 (1968). The 865 Raise (the "raise") was about 364 feet high and connected the 4000 track level with the 3763, 3700, and 3636 levels. The raise was about 10 degrees from the vertical and was angled towards the footwall.[1] The excavation for the raise was constructed to provide an opening of at least 10 feet by 20 feet. The raise was designed to serve several functions. First, it was to be an ore pass through which blasted ore-bearing rock (generally called "muck") would be dumped. This muck would be dumped down the raise to the 4000 track level for transportation to the mill. Second, the raise was to serve as a secondary escapeway. This escapeway (generally called the "manway") could be used to evacuate miners in the event of an emergency and could also be used to gain access to various parts of the raise. A drawing of the raise from Joint Exhibit A is attached to this decision as Illustration No. 1.

In order for the raise to serve as an ore pass and a manway, Magma Copper designed a rectangular wooden structure to be installed in the raise. This wooden structure contained two compartments, which were framed with ten by ten inch timber and were separated by armored cribbing. The ore pass compartment had inside dimensions of about six by eight feet. The manway compartment was about six by six feet and contained water and air lines, a ventilation pipe, a timber slide, and a series of ladders with landings. Two drawings showing the support timber of the wooden structure from Joint Exhibit B are attached to this decision as Illustration Nos. 2 and 3.

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[1] A "footwall" is that part of the country rock which is below the ore deposit.

The wooden structure within the raise (the "raise structure") was designed by engineers employed by Magma Copper. The timbers used to construct the raise structure were precut by Magma Copper. Dynatec drilled and blasted the raise and built the raise structure in one operation. That is, as drilling proceeded upward from the 4000 level, the raise structure was built to within a few feet of the face to provide a work platform upon which to drill the next round.

The raise structure was built in segments. Each segment is rectangular in shape and the support structure consists of side-by-side interconnected sets constructed with ten- by ten-inch timber cut to Magma's specifications. The support structure is shown in Illustrations 2 and 3 attached to this decision. In essence, the outside of the structure is framed with the ten by ten timber and the inside is lined with timber. The ore pass compartment was lined with 6- by 8-inch armored cribs. These cribs were armored with angle iron plates to contain the broken muck within the ore pass. The manway compartment was enclosed with 3-inch wooden lagging nailed outside the timber framework.

Nails, screws, and mechanical fasteners were not used to secure the framework for the raise structure. Instead, daps and tenons were present at the joints of the framework. Magma Copper relied on gravity and blocking between the framework and the rock walls of the raise to keep the structure together. Magma Copper believed that the host rock in the raise would tend to squeeze the raise structure thereby keeping it in place. The lagging along the outside of the framework for the manway was nailed into place. The cribbing used for the ore pass compartment was installed using a "birdcage" design. Vertical steel channels were nailed to the framework on all four sides of the ore pass. The flanges on these steel channels were one-half inch deep. As the raise structure was constructed, 6- by 8-inch armored cribs were slid into the channels, one on top of another, until that section was full. The next horizontal timber frame was then placed above the last crib. The process was then repeated as the next segment was constructed on top of the previous segment. A drawing showing the construction of a birdcage from Joint Exhibit A is attached to this decision as Illustration No. 4.

As the raise structure was built, blocking was installed at each segment where the vertical and horizontal members of the framework were joined. The raise structure was framed at intervals of seven feet four inches and each frame is called a set. The sets are consecutively numbered from the bottom to the top. This blocking at each set prevented the raise structure from moving outward horizontally and kept the vertical posts in line. Rectangular 12-inch wooden blocks were placed against timber joints and wedges were used between the host rock and the blocks to tighten the blocking into place. The blocking was designed to help support the walls of the raise and to prevent these walls from crushing the raise structure in the event of movement. The number of blocks used depended upon the space between the framework and the host rock.

As each segment of the raise structure was built, the raise itself was drilled and blasted. Boards placed on top of the most recently constructed segment provided a work platform for the next round of drilling and blasting. Rock from each blast would fall between the framework of the raise structure and the host rock. This material is generally referred to as backfill.

The raise structure was not anchored into the rock wall of the raise at any location between the 4000 track level and the 3763 level, except at the feeder immediately above the track level. Such anchors are generally called bearing sets and are designed to transfer the weight of the raise structure above the bearing set to the surrounding host rock. There were no bearing sets for a distance of about 200 feet. Approximately 28 segments of the raise structure were constructed between the feeder and the 3763 level without bearing sets.

C. A Brief History of the Raise

Magma Copper solicited bids to construct the raise, the raise structure, and other facilities in December 1992. Four independent contractors, including Dynatec, submitted proposals. The scope of the work was set out in drawings and specifications developed by personnel at Magma Copper. Dynatec was awarded the contract later that month. The contract stated that Magma Copper would provide all construction materials and consumable supplies, utilities, technical and surveying services, and other services and facilities. Dynatec was to provide all labor and supervision, tools and equipment, and a safety and training program for its employees. Magma Copper supplied the drawings and specifications for the project. Dynatec proposed alternative methods of constructing the raise structure. Magma Copper rejected Dynatec's proposed alternatives and the raise structure was constructed in accordance with Magma Copper's design specifications.

In June 1993, Dynatec completed construction of the raise from the 4000 level up to the 3763 level. Starting in late June, Magma Copper began dumping muck from the 3763 level down the ore pass. Dynatec continued to drive the raise from the 3736 level up to the 3636 and also used the ore pass. In June and July, Magma Copper pulled ore from the bottom of the ore pass about once a shift. In late June and early July, material would sometimes become hung up near the feeder chute at the 4000 level. Explosives were sometimes used to free the hangup. Between, July 11 and July 28, there were apparently no hangups in the ore pass. This case involves that portion of the raise between the 4000 and 3763 levels.

On July 29, 1993, a Magma Copper loader operator dumped 30 to 50 loads of sandfill down the ore pass. Sandfill is a slurry consisting of cement and sand. Ore was not pulled from the ore pass during that shift. Starting on July 30, the ore pass was blasted to clear hangups on a regular basis. Magma Copper personnel determined that the sandfill had hardened near set 11 in the ore pass and that this hardened sandfill was responsible for the continuing hangups the raise was experiencing.

On August 3, Magma Copper made a concerted effort to blast the cemented sandfill out of the ore pass. This area of the ore pass was blasted about four times on the B shift on August 3. After the area was blasted, Magma Copper employees discovered that the ten- inch timber between the ore pass and the manway (the "divider plate") was broken at set 8.

Two Dynatec employees, including Project Superintendent Mark Spaulding, inspected the raise and found two cribs missing between the ore pass and the manway at set 20, muck in the

manway at that location, and a cracked divider at set 8. They determined that the raise structure had settled about eight to ten inches from its original installation. The settlement was not uniform across the raise structure. Magma Copper's Team Leader for the raise project, Matthew Kannegaard, was notified. He told the Dynatec employees that some settlement was to be expected.

As a result of the damage, Magma Copper closed the raise on August 4. Magma Copper provided Dynatec with a list of nine items that needed to be repaired. These items included: removing the sandfill from the ore pass, cleaning down the manway, stabilizing the broken divider plate at set No. 8, repairing all broken ladders in the manway, spraying shotcrete in sets 20 and 21, and installing spreaders on all short manway wall plates. (Joint Ex. 115).

On August 6, at a going away breakfast for Dynatec supervisor Ronald Spry, Spaulding told Kannegaard that it was important that Magma Copper stop blasting and overloading the raise. (Tr. 728). Mr. Spaulding suggested that Dynatec install a sand grout backfill between the raise structure and the country rock to stabilize the structure. Spaulding understood that Magma Copper would no longer blast hangups in the raise except when absolutely necessary. Air lances and sledge hammers would be used to free hangups whenever possible.

Dynatec employees entered the raise structure from the 3763 level and used explosives to remove the sandfill material that was blocking the ore pass. Dynatec then completed most of the repairs set forth in Mr. Kannegaard's memo. On the evening shift of August 9, Magma Copper began using the ore pass for production.

On the evening shift on August 10, muck was pulled from the bottom of the raise. A hangup was reported at set No. 8. Magma Copper employees attempted to use an air lance to free the hangup. When that was not successful, Magma Copper employees prepared to blast the hangup. The ore pass was blasted, but it became hung up again a short time later. Preparations were made to blast the ore pass a second time. Bill Wilson, the Dynatec raise superintendent that replaced Mr. Spry, removed all Dynatec employees from the raise structure at that point because he did not believe that such blasting was safe. (Tr. 739). Four Magma Copper miners entered the raise from the 4000 level to set up the blast and the raise structure failed at about 9:45 p.m.

D. <u>The Accident</u>

The exact sequence of events that occurred on the night of August 10, 1993, is not known. It appears that a dividing wall between the manway and the ore pass in the 865 raise gave way allowing muck that was in the ore pass to fall down the manway. Magma Copper employees dumped a considerable amount of muck into the ore pass on August 10 with the result that it was full of ore at the time of the accident. No muck was pulled from the ore pass during the day shift on August 10. Muck was pulled during the evening shift for only a short period because of the presence of the hangup at about set 8. Allowing an ore pass to fill up with muck contributes to the formation of hangups. The weight of muck that accumulates in an ore pass puts a significant amount of stress on the raise structure.

It is clear that the dividing wall separating the ore pass and the manway failed. In all likelihood the armored cribbing dislodged from the birdcages in one or more sets. The failure of the dividing wall allowed muck in the ore pass to spill down the manway. The falling muck, cribbing, and other dislodged material from the raise structure killed the four Magma Copper miners who were in the manway.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

A. Summary of the Parties' Positions

1. Secretary of Labor

MSHA's accident investigation team determined that Magma Copper failed to use prudent engineering practices in the design of the raise for a number of reasons. MSHA determined that the raise structure was inappropriate and inadequate for the ground in which it was built because Magma Copper failed to conduct a structural analysis of the design of the raise structure. Magma Copper failed to incorporate an adequate number of bearing sets to support the foreseeable loads on the raise structure. MSHA also believes that Magma Copper should have incorporated mechanical fasteners in the raise structure to prevent joint separation. The Secretary contends that these and other design failures contributed to the collapse of the raise structure.

MSHA also determined that Magma Copper misused the raise structure by allowing the ore pass to become completely full of muck before pulling the muck at the track level. It believes that this repetitive loading and unloading loosened the blocking behind the raise structure, allowing outward movement of the vertical timbers. MSHA also believes that the raise structure was damaged from improper hang-up blasting, which accelerated the collapse of the settled structure.

MSHA believes that the raise structure was in a state of imminent danger from August 3 until its failure on August 10. On August 3, various individuals observed that the raise structure had settled at least eight inches, that timbers had moved, and that cribbing between the ore pass and the manway had become dislodged from the birdcages. MSHA believes that blocking behind the raise structure was loose and that some blocks had fallen, which allowed the raise structure to spread outward. Because the cribbing was secured solely by the birdcages, outward movement of the timbers in the raise structure would allow cribbing to become loose and unable to hold back the weight of the muck in the ore pass.

The Secretary contends that Dynatec is also responsible for the failure of the raise structure. She argues Dynatec failed to use prudent engineering practices when it constructed the raise. She contends that Dynatec failed to determine whether the blocking and backfilling that it installed was adequate to control the ground and stabilize the structure. The Secretary maintains that, after the raise structure settled, Dynatec failed to adequately address the problem. It also failed to adequately inspect and evaluate the condition of the raise on August 3 and 4 to ensure

that all structural problems were addressed. MSHA believes that the repairs completed by Dynatec were superficial and did not address the structural problems.

The Secretary charged Dynatec with violating four mandatory safety standards. She contends that the evidence developed during MSHA's investigation and presented at the hearing demonstrates that Dynatec failed to achieve compliance with all four mandatory standards. The Secretary argues that Dynatec continued to direct its employees to work on the raise after August 3 on cosmetic and inadequate repairs so that the raise could be put back into production. She maintains that Dynatec chose to ignore the substantive structural defects that it knew existed in the raise. She states that whenever Dynatec presented Magma Copper with alternative construction or repair methods, it demonstrated its awareness of the structural problems with the raise. As a consequence, she argues that Dynatec cannot escape liability on the basis that it merely did what it was told to do by Magma Copper. The Secretary maintains that Dynatec had an independent duty to ensure that the raise was safe and to comply with the Secretary's safety standards. The Secretary believes that Dynatec's on-site supervisors were aware that the raise structure was on the verge of collapse after August 3, and that Magma Copper was misusing the raise, yet they continued to direct Dynatec's employees to work on the raise.

The Secretary contends that the failure of Magma Copper and Dynatec to address the settlement of the raise before allowing the raise to be used for production resulted in the failure of the raise structure a day after it was put back into use and only 43 days after Magma Copper began to dump muck into the ore pass. Given the condition of the raise and the way in which it was used, there was no question that the raise structure would fail; it was only a matter of time.

2. Dynatec Mining Corporation

Dynatec argues that the raise structure was not on the verge of collapse after August 3. It contends that the materials handling crew of Magma Copper, which cumulatively had less than four years of mining experience, allowed muck to accumulate in the ore pass thereby creating hangups. This same crew then used explosives in an attempt to remove the hangup. Dynatec contends that Magma Copper employees seriously misused the raise in the month preceding the accident and this misuse caused the failure of the raise structure.

Dynatec also points to the conclusions drawn by MSHA's technical support personnel and MSHA's independent consulting structural engineer. The consulting engineer concluded that the "accident occurred as the result of an improper and incomplete structural design" of the raise structure. (Joint Ex. 140 at 3). Dynatec argues that Magma Copper's design was not strong enough for the use to which it was actually put. Magma Copper used the raise beyond its design capacity. When Dynatec suggested that the raise structure be constructed using a different method to include bearing sets to make it stronger, Magma Copper rejected all of Dynatec's suggestions.

When the raise settled in early August, Dynatec states that it suggested to Magma Copper management that the raise structure be strengthened and improved. These suggestions were not

implemented by Magma Copper. It argues that these suggested repairs would have improved the raise structure's design capacity. When Magma Copper returned the raise to service prior to the completion of the permanent repairs suggested by Dynatec, Dynatec recommended limitations on use that, if followed, would have prevented the raise from being used beyond its design capacity. Magma Copper assigned inexperienced miners to work in the raise and the miners allowed the ore pass to be filled to capacity. Dynatec employees advised Magma Copper management on a number of occasions that in so doing it was misusing the raise. Dynatec also advised Magma Copper that it should not use explosives to free the resulting hangups.

Dynatec contends that the Secretary's attempt to penalize Dynatec for the four fatalities is unreasonable. Dynatec maintains that the Secretary failed to prove that it violated any of the four cited safety standards. Dynatec argues that its evidence establishes that it was not responsible for the accident and that the Secretary's decision to proceed against it is unwarranted.

B. General Considerations

Two fundamental concepts must be kept in mind when analyzing the issues in this case. First, the Commission and the courts have uniformly held that the Mine Act is a strict liability statute. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

On the other hand, the fact that a fatal accident occurs at a mine does not establish that the mine operator violated a safety standard. Conditions in a mine are dynamic and can quickly change. An accident may occur despite the fact that an operator is taking all reasonable precautions to prevent accidents and is complying with all of the Secretary's safety and health standards. In order to establish a violation of a safety standard, the Secretary cannot rely solely on the fact that an accident occurred, but must prove that the operator did not comply with the requirements of the safety standard.

C. General Discussion of the Events Leading up to the Accident

At the hearing and in their briefs, the parties devoted much of their attention to the events that preceded the accident, likely causes of the accident, and Dynatec's actions during this period. The parties focused less on the individual citation and orders than is typical in a civil penalty proceeding. I have analyzed these issues and enter findings of fact on these issues as set forth below. My focus is on the events that transpired on and after August 3, 1993, the date that Dynatec discovered that the raise had settled. My findings on these issues bear directly on my findings with respect to the citation and orders. I incorporate my findings below into the specific findings I made for each alleged violation.

I credit the evidence presented by the Secretary and Dynatec that the raise structure was not designed to withstand the loads and pressures to which it was subjected during its operation. The ore pass was blasted on numerous occasions to remove hangups and the sandfill, and the ore pass was repeatedly filled and emptied of muck. This use of the raise structure precipitated the settlement and damage that was observed on August 3-4. If the ore pass had simply been used to transport muck in such a way that muck was loaded onto trains immediately after it was dumped down the ore pass, it is unlikely that the raise structure would have settled or failed. But the raise was not used solely as a transportation device. Magma Copper frequently used the ore pass to store the muck until it could be transported out of the mine. It was not unusual for the production crew to dump muck down the ore pass at a faster rate than the train crew could load it onto trains. The raise structure was not capable of sustaining these loads, especially when a hangup developed. Hangups were more common if fresh muck was dumped on top of muck that was already in the ore pass. If muck is subsequently drawn from the bottom, a suspended load remains in the ore pass that places tremendous lateral and vertical pressure on the raise structure. As stated above, Magma Copper frequently used explosives to remove hangups. Such blasting, if not properly done, could also place great pressure on the raise structure.

It is important to understand that this raise, including the raise structure, was built based on conceptual drawings. There were no engineering studies or calculations performed to assure that the raise structure was capable of withstanding the loads and pressures that would be placed upon it. It is frequently the practice in the metal mining industry for structures to be built without the kind of engineering studies that would be required for a public building or a bridge, for example. Because this raise structure was unique in its size and height, I find that a reasonably prudent mine operator would have put more thought and effort into determining if the design would hold up to the task. Based on the evidence presented at the hearing, I find that the raise structure was not properly designed to be used as an ore pass and manway as it was actually used by Magma Copper. I credit the testimony and report of James Van Liere, a consulting engineer retained by the Department of Labor, in this regard. He concluded that "procedures and methods employing the standards of care, judgment, expertise, and experience normally associated with the design of major structures [were not] used in the design of this structure." (Joint Ex. 140 p. 3).

The experts retained by Dynatec reached similar conclusions. For example, Peter J. Stork, a structural engineer retained by Dynatec, stated in his report that "the design of the 865 raise was deficient, in that the design vertical load capacity of the timber structure was inadequate to support the gravity loads that would be imposed on the ore compartment walls under hang-up conditions, muck storage conditions, or even the dead load of the empty raise alone." (Joint Ex. D p. 7).

I find that Dynatec constructed the raise and raise structure in accordance with the plans submitted by Magma Copper. I find that Dynatec's method of constructing the raise and the condition of the raise, including the raise structure, conformed to Magma Copper's designs in all material respects. I find that up until the time that the raise settled in early August, Dynatec's performance did not violate the safety standards cited by the Secretary or the spirit of the Mine

Act. I reject the Secretary's argument that Dynatec failed to use prudent engineering practices when it constructed the raise.[2] The remainder of my decision focuses on the events that occurred after Dynatec determined that the raise structure had settled eight to ten inches.

On August 3 and 4, Dynatec recognized that the raise had settled and was in need of repair. Ronald Spry, Dynatec's raise superintendent, testified that he first saw the settlement on August 3. (Tr. 623). He calculated that the raise had settled about eight to ten inches based on gaps he saw at various sets. The ore pass side of the manway had settled relative to the opposite end. That is, the ore pass settled and the end wall on the manway side stayed in approximately the same position. (Tr. 312, 750). Mr. Spry has extensive experience building raises and he testified that he had "never seen a raise take that much settlement without breaking something." (Tr. 624). He also testified that this raise was the largest that he had ever worked on in terms of the size of the excavation. (Tr. 672). Mr. Spry knew that the raise was distressed.

John C. Folinsbee, a consulting mining engineer who testified on behalf of Dynatec, was experienced in the construction and use of raises. He testified that he had never worked in such a large raise or a raise with the same design. (Tr. 957). He had never seen a raise that used birdcages to secure cribbing around an ore pass, but he believes that it was a "reasonable concept." (Tr. 958). He testified that the raise was under stress after it settled on or about August 3. He further testified that the raise structure was "compromised" by the settlement and "there was no way that minor repairs would take it back to the condition that it was used -- as it was intended from the beginning." (Tr. 943). He went on to state that after this settlement, it was "obvious to everyone and should have been obvious to everyone right up to the top of Magma's management that some *extraordinary steps* should have been taken at that time." (Tr. 981) (emphasis added).

Dynatec inspected the raise several times as did Mr. Kannegaard on behalf of Magma Copper. As discussed above, it was determined that the raise should be closed. Magma Copper provided Dynatec with a of list of items that it wanted corrected before the raise was put back into production. The items were described orally and a formal memorandum was drafted. (Joint Ex. 115). It is not disputed that these items did not address the settlement problem. For example, Mr. Spry testified the repair items on the list would not fix the problems created by the settlement and that the settlement problems could only be addressed by rebuilding the raise structure. (Tr. 665). Mr. Stork testified that the listed repairs did not address the basic design deficiency of the raise structure. (Tr. 821; Joint Ex. D p. 9). Mr. Folinsbee stated that the repairs were inadequate to restore the raise to full use. (Tr. 980).

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[2] For example, the Secretary presented evidence that Dynatec should have used hardwood instead of Douglas Fir for wedges when blocking the raise or that it should have made sure that there were no open spaces between the lagging of the raise structure and the walls of the raise. The Secretary's safety standards do not contain such requirements and are not standard practice at western metal mines. Moreover, such issues are largely irrelevant to the issues raised by the citations and orders.

The Secretary contends that the raise structure was in the state of "imminent danger" between August 3 and August 10 as a result of the settlement and that no miners should have been in the raise except those specified in section 107(a) of the Mine Act. I disagree with the Secretary's analysis. The imminent danger provisions of section 107(a) only come into play when an MSHA inspector issues an imminent danger order. Neither Magma Copper nor Dynatec was required to comply with the requirements of sections 107(a) or 104(c). In addition, I credit the testimony of Dynatec's witnesses that it was reasonably safe to go into the raise from the top to remove the hangup and, once it was removed, to be in the raise to perform the minor tasks set forth on Magma Copper's list of repairs. Many of the items were necessary prerequisites to rebuilding or refurbishing the raise structure in any event, such as cleaning down the manway and repairing the ladders. Miners working in the raise structure were placed in danger only after the raise was returned to production.

I credit the testimony of Mr. Van Liere that the raise was "on the verge of failure" after the settlement of August 3. (Tr. 269). This concept is different from imminent danger. Mr. Van Liere testified that until the settlement, the blocking that had been installed was probably effective in keeping the raise structure together. (Tr. 267). The blocking should have been able to withstand some expected settlement, but the settlement that occurred on or about August 3 was substantial. Because lagging was present along the outside walls of the manway, the blocking could not be observed. As a consequence, Dynatec did not know whether the blocking was still intact or whether some of the blocking had fallen away or was otherwise rendered ineffective. (Tr. 268). If the blocking was loose at the center posts, the cribbing in the birdcages might also become loose as the center posts moved outward. It is important to remember that the only lateral force keeping the framework of the raise structure together was provided by the blocking. If the blocking failed, the raise structure could reasonably be expected to fail because the "restraint provided by the birdcages at the hanging wall" would be decreased. *Id.* I find Mr. Van Liere's testimony particularly persuasive as to possible events that could have occurred after the August 3 settlement to cause the raise structure to fail.

Mr. Van Liere stated that no one knows how many sets of blocking were still in contact with the center posts[3] but that he believes that they were probably still "reasonably intact." (Tr. 269). He stated that the raise structure was on the verge of failure because it would not have taken much to precipitate a failure. (Tr. 269-70, 295). If an event caused the blocking restraining the center post to fall out at a particular set, the center post could kick out, the cribbing could come loose from the birdcages, and any muck in the ore pass would cascade down the manway. (Tr. 270). Reloading the ore pass with muck was an event that could trigger a failure of the raise structure. (Tr. 318). Thus, the raise structure was reasonably stable on the days following August 3, but a single ordinary event, such as loading the ore pass, could cause the structure to fail. Mr. Folinsbee's testimony is not inconsistent with Mr. Van Liere's analysis. (Tr. 988).

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[3] The center posts are the vertical posts that frame the center of the raise structure and are often referred to as the divider posts.

It is Dynatec's position that it was reasonable for it to perform the minor repairs set forth in Kannegaard's memo and then release the raise back to Magma Copper for what it terms "limited service." It believes that as long as the ore pass was not loaded with muck and blasting was not performed, it was safe to return the raise to production after the Kannegaard repairs were completed. I disagree. As stated above, I credit Mr. Van Liere's testimony that the raise was on the verge of failure and that the structure could fail as a result of a seemingly ordinary event once it was returned to production. More importantly, I find that it was highly unreasonable for Dynatec management to believe that the raise could be used in the manner that Dynatec expected. It was virtually impossible for anyone to ensure that the ore pass would not become loaded with muck. Mr. Folinsbee testified that it was his understanding that it would take about two to three hours for the production crew to fill the ore pass from set 8 to the 3763 intermediate level. (Tr. 940). Thus, if the production crew was working and, for one reason or another, the crew running the trains at the track level could not keep up with the production crew, it would not take long for the ore pass to become full or nearly full again. Indeed, Mr. Spaulding stated that this is exactly what happened. The production crew was filling the raise with muck and the "trammers weren't keeping up with the mucker." (Tr. 741). "Muck built up in the raise to where they had another blockage." *Id.* I find that this was a reasonably foreseeable event. The Secretary labels Dynatec's limited service concept a "fantasy." (S. Br. 23). I agree.

Dynatec's concept of limited service is illogical in the context of a producing mine and is inconsistent with Magma Copper's previous use of the raise. Magma Copper officials made clear their impatience to return the raise to production as soon as possible. It was unrealistic to think that they would limit their use of the raise in the manner argued by Dynatec. In addition, even if such an attempt were made, it was likely that the train crew would get behind and the ore pass would become full enough to pose a hazard. To summarize, it was foreseeable that the raise would be loaded in the near future, that a hangup would develop and, given the inexperience of the Magma Copper crew, that attempts would be made to blast in the ore pass.

Dynatec contends that because the mine and the raise were owned by Magma Copper, it had no choice but to allow Magma Copper to use the raise and it had to rely upon Magma Copper's statements that it would not fill the ore pass or blast in the ore pass until a more permanent solution to the settlement problem was completed.[4] I agree that Magma Copper owned and controlled the ore pass and it agreed in informal discussions that it would not, as Mr. Spaulding put it, "misuse" the raise. (Tr. 728). Dynatec, however, was an expert in the construction of raises. Its local managers knew that the raise had been damaged and that the repairs mandated by Magma Copper did not correct the fundamental problems. It also appears that they did not hold the skill and ability of Mr. Kannegaard, Magma Copper's manager for this

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[4] Magma Copper indicated that they would allow Dynatec to place a sand grout backfill between the raise structure and the rock walls of the raise to stabilize the structure. This work was to be done on the weekends at some undetermined time in the future and, if completed, would have allowed full use of the raise without further settlement or failure.

project, in high regard.[5] (Tr. 768). Based on the record developed in this case, I find that Dynatec's managers knew or should have known that loading the raise or blasting in the raise had the potential to result in a failure of a significant part of the raise structure and that such an event would be life threatening to workers in the manway.

Although Dynatec's managers expressed their general concerns to Magma Copper's managers at a luncheon for Mr. Spry, Dynatec did not communicate to the mine manager or anyone else that human life was at risk if the ore pass were loaded again. Dynatec's concerns about the raise were cast in terms of the longevity of the raise. (Tr. 727). Thus, it appears that the discussions between Magma Copper and Dynatec focused on making the raise structure last longer rather than ensuring that the lives of miners were not put at risk. It appears that Kannegaard did not fully comprehend the risks posed by the raise structure after it settled. (*See for example*, Joint Exs. 68 and 115).

D. Alleged Violations of 30 C.F.R. § 57.3360

On May 10, 1994, MSHA inspector Tyrone Goodspeed issued Citation No. 4410466 and Order No. 4410467 alleging violations of 30 C.F.R. § 57.3360. The safety standard provides, in pertinent part:

> When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber used for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

I find that the raise was a ground support structure. Because the ground at the mine was generally thought to be squeezing ground, a support structure was needed to keep the raise open and available for use. The timbers of the raise structure were designed to perform this support function. Accordingly, the provisions of this safety standard applied to the raise structure through the application of the first sentence of section 57.3360.

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[5] Mr. Spaulding testified that Mr. Kannegaard did not consider the settlement of eight to ten inches to be significant. Kannegaard apparently told Spaulding that the settlement was not "too bad" and that the raise structure could settle by a full set, seven and one-half feet, before any problems would arise. (Tr. 720, 767; Joint Ex. 112, 8/3).

1. Order No. 4410467

This order alleges, in pertinent part:

> Necessary ground support in the area of the 865 Raise was not installed to control the ground in places where miners work or travel. During the period 3/93 - 8/93, management failed to determine that support, such as backfilling and blocking, was adequate to control the ground and ground support structure which contributed to the lateral movement of structure members. Movement of these structural members caused armored cribbing to be dislodged between the manway and ore pass compartment allowing ore and armored cribbing pieces to fall into the manway compartment. This violation contributed to the failure of the raise on 8/10/93 which resulted in the death of four miners.

a. Arguments

The Secretary argues that, by agreeing to construct the raise, Dynatec assumed responsibility to install the ground support structure in such a way as to control the ground in the raise to protect miners in the raise from falling ground and from the structure itself. She argues that its duties under this standard are separate and independent from its contractual obligations to Magma Copper. The Secretary believes that it is not critical that the "ground" that fell was muck inside the ore pass, as opposed to ground from the host rock. She states that the order is based on the fact that the raise structure failed and, as determined by MSHA during its investigation, that the installation of this structure was inadequate under the requirements of section 57.3360. Specifically, Dynatec failed to determine, at the time it constructed the raise, whether the backfill and blocking were adequate to control the ground and stabilize the raise structure.

The Secretary contends that the backfill used behind the raise structure was totally inadequate. Dynatec used flyrock from blasting. She maintains that backfill was missing from large areas behind the raise structure and was not uniform in its placement. The Secretary believes that Dynatec did not take any precautions to ensure that the flyrock was adequate to serve as backfill. The Secretary also contends that blocking was inadequate and sloppily installed. The Secretary believes that the backfill and blocking problems were exacerbated by the overbreak caused by inadequately planned and executed blasting performed by Dynatec miners when developing the raise. Simply put, the raise was too large for the raise structure with the result that extensive blocking was required. The Secretary believes that the quantity of flyrock was inadequate to fill the large space between the raise and raise structure. The Secretary contends that Dynatec failed to design and use a professional drill blast plan with the result that the excavation was too large to accommodate the precut timbers.

Dynatec contends that the raise structure controlled the ground. It points to the fact that there is no evidence that the ground outside the raise structure failed, fell, or contributed in any

way to the accident. The ground never breached the lagging of the raise structure. Dynatec contends that the Secretary is attempting to stretch the safety standard beyond its intended meaning to include the muck in the ore pass. It argues that such a construction is contrary to the plain language of the safety standard. The standard requires the control of ground. The material transported through the ore pass was "muck" not "ground." Second, it contends that the Secretary's interpretation in this case is inconsistent with her interpretation in other cases. The failure of a ground support structure is not the same as the failure of the ground. Moreover, Dynatec contends that MSHA's interpretation of section 57.3360 does not provide mine operators with fair notice of what is required.

Dynatec also maintains that the Secretary failed to establish a violation, even if MSHA's interpretation is adopted. Dynatec contends that raise structure controlled the muck inside the ore pass until Magma Copper used the ore pass beyond its capacity and then further damaged the structure with the improper use of explosives. As a consequence, the Secretary's unfounded allegations concerning construction defects of the raise structure are irrelevant. The failure of the raise structure is directly attributable to the damage caused by Magma Copper's poor mining practices, not Dynatec's installation. In addition, the Secretary's allegations regarding the construction of the raise are not relevant because, as the Secretary argues, the safety standard is a "performance-oriented" standard. That is, the method of achieving compliance is immaterial. Finally, the Secretary failed to prove that the raise was inadequate as constructed. Dynatec argues that its evidence established that the blocking and backfill were consistent with good raise practice.

b. Discussion and Analysis

This case presents unique issues that have never been considered before. In a typical case under this safety standard there is a fall of ground, usually the roof, or conditions are present that convince an MSHA inspector that the ground will fall if it is not supported. In such cases, the issue is whether the mine operator had in place a ground control system to control the ground. In this case, a nearly vertical raise is involved. There is no evidence that the rock walls of the raise failed or were ready to fail, rather it appears that there was an internal failure within the raise structure itself. Dynatec contends that because the ground did not fail and was not ready to fail, there can be no violation.

I reject the Secretary's argument that the muck within the ore pass was "ground" and that Dynatec violated the standard because the raise structure failed to control such ground. Muck is ore-bearing rock that has been mined; muck is not ground as that term is used in the safety standard. Muck is "rock or ore broken in the process of mining." *A Dictionary of Mining, Mineral, and Related Terms,* 732 (1968). The term "ground" in the safety standard is directed towards the rock that remains in the earth after an area has been excavated. Ground is "any specific part of a mineral deposit, or the rock in which a mineral deposit occurs." *Id.* at 514. The standard is designed to protect miners from rock that has *not* been mined. I find that broken rock that is being transported from one place in the mine to another is not "ground" and is not covered

by the plain language of the standard. I credit the testimony presented by Dynatec on this issue. (See, for example, Tr. 628, 741-42, 951).

I also find that the Secretary's interpretation is not entitled to the deference that is usually accorded to the Secretary's interpretation of her safety standards. The legislative history of the Mine Act states that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *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 637 (1978). The Secretary's interpretation "serves a permissible regulatory function" in that the Secretary has the authority to protect miners from the hazards presented by mined ore. *General Electric Co. V EPA*, 53 F.3d 1324, 1327 (D.C. Cir 1995)(citations omitted); *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 234 (February 1997). The Secretary's interpretation, however, is not "logically consistent with the language of the regulation." *Id.*

Finally, I find that the Secretary did not provide mine operators with sufficient notice of the requirements of the standard. Safety standards must afford reasonable notice of what is required. In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. V. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). In this instance, I find that a reasonably prudent person would not have recognized that section 57.3360 applies to muck contained in an ore pass within a raise.

It is important to understand that the raise structure served several important functions. First, as stated above, it acted as ground support for the raise. Second, it functioned as a transportation system for the ore-bearing rock. Third, it was used by Magma Copper to temporarily hold or store the ore-bearing rock. Finally, it functioned as a manway. As discussed below, the Secretary established that the raise structure was poorly designed to serve all four

of these functions. That is, many of the design components were inadequate given the four functions it was to serve. The divider wall between the manway and ore pass was particularly inadequate given the fact that the ore pass was often full of muck and blasting was used to remove hangups. The differential settlement of the structure allowed the cribbing between the manway and ore pass to break loose from the birdcages. Although it is possible that some of the blocking fell away as the structure settled and that some areas between the structure and the rock walls of the raise were not filled with fly rock, these facts do not establish that the rock walls of the raise were not being controlled. The Secretary did not establish that the ground, rock walls of the raise, posed a hazard to miners, either at the time the raise was constructed or after the raise structure settled on or about August 3.

Magma Copper anticipated that the raise would be subject to squeezing ground. The raise structure was designed to withstand these forces and elements of its design took these forces into consideration. Some witnesses contend that, in fact, the raise structure was not subjected to squeezing ground and that this fact played a part in the failure of the raise. Whether that is true or not, the Secretary did not establish that the raise structure as installed by Dynatec failed to adequately support the rock walls of the raise. For the reasons set forth above, Order No. 4410467 is **VACATED**.

2. Citation No. 4410466

This citation alleges, in pertinent part:

> Ground support in the area of the 865 raise was not maintained to control the ground in places where miners work or travel. Management failed to properly repair or replace the cribbing and timber in the raise which was progressively damaged, loosened, or dislodged as a result of poor mining practices. This violation contributed to the failure of the raise on 8/10/93....

a. Arguments

In this citation, the Secretary charges that Dynatec violated the maintenance requirements of the safety standard. The Secretary contends that Dynatec's repeated practice of working on the raise structure after it settled on August 3 to make repairs that were not related to the structural integrity of the raise structure constituted a violation of the maintenance requirements of section 57.3360. She contends that the raise structure was in a state of imminent danger after August 3, 1993, and repairs not related to eliminating the imminent danger should not have been made. Dynatec's Spry and Spaulding measured about eight inches of settlement in the raise structure and believed that the timber joints had been crushed. The fact that Dynatec managers discussed the safety of the raise structure with Magma Copper managers and suggested that the structure be rebuilt or substantially modified demonstrates that Dynatec knew that the raise structure was in danger of collapse. The Secretary contends that Dynatec completed the cosmetic repairs as directed by Magma Copper because Magma Copper wanted to return the raise to

production as quickly as possible. The Secretary argues that the cosmetic repairs performed by Dynatec between August 3 and 9 were insufficient to restore the raise to a suitable condition to be put back into full operation.

Dynatec makes many of the same arguments here as it did with respect to Order No. 4410467, above. After Dynatec repaired the ore pass, the ore pass performed without incident until it was used beyond its as-repaired capacity and was subjected to blasting by Magma Copper, in contradiction of recommendations made by Dynatec. In the alternative, it contends that it did not violate the third sentence of the standard because its employees did not work in the raise except to make repairs and it is not properly charged with the alleged inadequacies of the repairs. Dynatec further maintains that the cribbing and timber in the divider wall were not used for ground support but were used to separate the ore pass from the manway. Finally, it contends that the Secretary did not establish that the repairs it made failed to eliminate hazards to persons. Dynatec believes that the citation should be vacated.

b. Discussion and Analysis

Although this citation is similar to Order No. 4410467, discussed above, a separate analysis is required. This citation specifically relates to Dynatec's conduct after the raise structure settled. This citation concerns the maintenance of the raise structure after Magma Copper attempted to remove the sandfill from the ore pass with explosives as opposed to the construction and use of the raise up until that time. In addition, the citation requires an analysis of the requirements of the third sentence of the safety standard, as well as the second sentence. The third sentence requires that damaged, loosened, or dislodged timber used for ground support be repaired or replaced if it creates a hazard to persons. I conclude that it is appropriate to read the second and third sentences of the standard together because the citation concerns maintenance of the raise structure after the settlement. When read together, these sentences make clear that a mine operator is not only required to provide ground support in areas where it is necessary, but it must repair or replace ground support timber if it becomes damaged, loosened, or dislodged so that the ground support system itself does not present a hazard to miners.

As I stated above, I find that the muck in the ore pass was not "ground" as that term is used in the safety standard and a failure of a mine operator to adequately control the muck in a raise would not constitute a violation of section 57.3360. In addition, I find that the Secretary failed to establish that the rock walls of the raise were not being controlled by the raise structure after the raise structure settled. The Secretary's witnesses make clear that the failure of the raise structure may well have been precipitated by the dislocation of blocking at one location. The dislocation of blocking at one or two locations in the raise would not necessarily have any significant impact on the ability of the raise structure to support the rock walls of the raise itself. Thus, it was not proven that the raise structure failed to support or control the rock walls of the raise. Due to the nature of the accident, it is not known whether blocking was dislocated or the extent of any dislocation as a result of the settlement. The same is true of the backfill. There is simply no way to determine whether there were large voids behind the raise structure or whether

the presence of any voids undermined the raise structure's ability to control the rock walls of the raise. The Secretary bears the burden of proof on this issue.

Nevertheless, the standard also requires an operator to repair or replace ground support timber if it becomes damaged, loosened, or dislodged so that the ground support structure does not present a hazard to miners. I find that the Secretary established a violation. As discussed above, after the raise structure settled on or about August 3, the structure was on the verge of failure. Any normal event such as loading the raise with muck had the potential to cause a massive failure within the structure. I find that the Secretary established that the repairs made by Dynatec did not address the structural problems in the raise structure.

I reject Dynatec's argument that the standard does not apply because its employees were only in the raise to perform the repairs. Magma Copper made the determination to complete only limited repairs in the raise structure before it was returned to production. Nevertheless, Dynatec had expertise in raise construction and its managers knew or should have known that the repairs that were made did not address the structural problems of the raise. Dynatec did not advise Magma Copper that returning the raise to production before the raise structure was rehabilitated created a significant hazard to miners working in the area. Instead, Dynatec informally discussed the raise structure with Magma Copper managers at a luncheon and the discussion was framed in terms of longevity of the raise structure not the significant hazards presented by the structure. It is important to note that it was the perception of Dynatec managers that the lead raise manager at Magma Copper, Mr. Kannegaard, did not believe that settlement of the raise structure presented a problem unless it settled seven feet or more. When Mr. Spaulding told Steve Lautenschlaeger, the mine manager for Magma Copper, that the raise structure needed extensive rehabilitation, Mr. Lautenschlaeger responded that he had spent enough money on the raise. (Tr. 727; Joint Ex. 147). Mr. Spaulding did not suggest to Mr. Lautenschlaeger that the raise was unsafe to use. (Tr. 727).

It was incumbent on Dynatec, the raise construction expert, to take all reasonable steps to ensure that the raise structure was safe because Magma Copper's managers did not possess the skill or knowledge to assess the danger. It is clear that Magma Copper perceived Dynatec's concerns in economic terms rather than in safety terms. Dynatec knew that "extraordinary steps" were required but it did not take these steps or advise Magma Copper that these steps were necessary for the safety of miners. As stated above, it was foreseeable that the raise would become loaded with muck within a relatively short period of time and Dynatec knew that loading the raise would put the structure at risk for failure.

It is also important to understand that there was no real agreement that the raise structure would be rehabilitated in the near future. There had been some preliminary discussions that Dynatec would be asked to pour a sand grout compound between the structure and the walls of the raise over several weekends at an undetermined time in the future. While this repair would have stabilized the raise structure, there was no agreement between Dynatec and Magma Copper that this would be done. Thus, on August 9 Dynatec did not know how or when more permanent repairs would be made.

I do not accept the argument of Dynatec that I should parse the various components of the raise structure and determine that the cribbing and timber in the divider wall between the manway and ore pass were not part of the ground support structure. The entire raise structure served the multiple functions described above. The component parts of the divider wall played a part in the ground support structure.

c. Significant and Substantial Allegation

An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

In order to establish that a violation is S&S, the Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to health, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Consolidation Coal Co.*, 8 FMSHRC 890, 897 (June 1986).

I find that the Secretary established all four elements of the Commission's S&S test. There was a violation of the standard and the violation contributed to a discrete safety hazard. Under the third element, the Secretary must establish that it is reasonably likely that the hazard contributed to by the violation will result in an injury, but is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). I find that an injury was reasonably likely given the facts described above. The raise structure was inadequate and it had been seriously compromised. It was reasonably likely that without rehabilitating the raise structure, a substantial failure of the structure would occur resulting in an injury of a reasonably serious nature.

d. Unwarrantable Failure Allegation

The Commission held that 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 stated 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).

Dynatec argues that this violation was not a result of its unwarrantable failure to comply with the standard because it was "reasonable for [it] to rely on its extensive mining experience in examining the 865 raise after Magma had misused and damaged it." (Dyn. Br. 67). Dynatec maintains that "[a]lthough the repairs were temporary and stopgap in nature, the repairs were reasonable in that they eliminated the possibility of divider wall failure, readied the 865 raise for permanent repair, and made the 865 raise safe for the transfer of ore." *Id.* at 68.

As stated above, the repairs made by Dynatec did not address the structural and settlement problems in the raise structure. It knew that the raise structure presented a serious safety hazard to miners in the raise if the ore pass was loaded or blasting occurred in the raise. It failed to warn Magma Copper managers of the severity of this hazard. Magma Copper's managers apparently did not understand the implications of the events of August 3 and 4 and allowed the raise to be returned to production following minor repairs. Dynatec did not take appropriate actions to ensure that extraordinary steps were taken to rehabilitate the raise before it was returned to production and miners were allowed to work in the raise. I find that Dynatec's conduct demonstrates a serious lack of reasonable care. Dynatec's efforts to eliminate the violative condition were insufficient and it knew that greater efforts were necessary to ensure the safety of miners under the standard. The violation was the result of Dynatec's unwarrantable failure to comply with the safety standard.

E. Alleged Violation of 30 C.F.R. § 57.11001

On May 10, 1994, MSHA inspector Tyrone Goodspeed issued Order No. 4410468 alleging violations of 30 C.F.R. § 57.11001. The safety standard provides:

> Safe means of access shall be provided and maintained to all working places.

This order alleges, in pertinent part:

> A safe means of access was not provided and maintained to working places between the 3700 and 4000 levels in the 865 raise during the period 8/4-10/93. This violation contributed to the severity of the accident involving the failure of the raise on 8/10/93 which resulted in the death of four miners.
>
> Management engaged in aggravated conduct constituting more than ordinary negligence in that: (1) structural conditions in the raise were hazardous; (2) ladders had not been secured; (3) timber, blocking, and cribbing had shifted; (4) armored cribbing was

dislodged and damaged in at least two areas between the ore pass and manway compartment; and (5) ore and armored cribbing pieces had fallen into the manway compartment.

Miners regularly traveled the manway compartment during this period to perform structural repairs and for access to other mine levels. Management allowed these safe access hazards to exist and permitted the continued use of the manway during this period.

1. Arguments

The Secretary contends that Dynatec allowed its miners to work and travel in the manway to complete the repairs authorized by Magma Copper in violation of the safety standard. It knew that the raise structure was badly damaged and yet allowed its miners to work on matters unrelated to the root causes of the settlement of the structure. Dynatec failed to provide safe access for its employees in the raise between August 3 and August 10.

Dynatec states that the Secretary did not establish that the conditions set forth in the order made it unsafe to work or travel in the manway. Dynatec's evidence established that the repairs were performed in a manner that provided safe access. The manway was cleaned of spilled ore prior to any other work being performed. Dynatec reinforced the timber along the divider wall at set 8. Although the load that had hung up in the ore pass presented a hazard, there was no imminent danger. Timbers were not moving and the load had been substantially reduced. Dynatec removed the hazard by removing the hangup over the sandfill on August 4 and removing the sand fill on August 6. In addition, Dynatec contends that the other repairs improved the integrity of the structure. It also repaired the ladders that were damaged during the settlement. Dynatec further argues that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not recognize that the cited safety standard prohibits the abatement of hazardous conditions.

2. Discussion and Analysis

I agree with Dynatec that the Secretary failed to establish that an imminent danger existed after the raise structure settled. First, the term "imminent danger" is a legal concept that gives rise to certain obligations when an MSHA inspector issues an order under section 107(a) of the Mine Act. Second, imminent danger is defined as a condition in a mine "which could reasonably be expected to cause death or serious physical harm before such condition ... can be abated." I find that the Secretary failed to establish that an imminent danger existed on August 3-8, 1993. I credit the evidence presented by Dynatec in this regard.

As stated above, I find that the raise structure was on the verge of failure after the settlement because, if the raise was returned to production, a normal event such as the loading of the ore pass with muck presented a significant risk of failure. I find that Dynatec performed the

repairs in a safe manner and a safe means of access was provided and maintained to the working places within the manway. For example, cleaning down the manway, repairing the ladders, and repairing damaged timber did not present a hazard to Dynatec employees. Many of the tasks were a prerequisite to the rehabilitation of the raise structure.

Dynatec employees continued to use the manway, however, after the raise was returned to production. The manway did not provide safe access to working places after Magma Copper began dumping muck into the ore pass. Dynatec's management was aware of the hazards but did not warn its employees to keep out of the ore pass. As the expert in raise construction, Dynatec failed to adequately warn Magma Copper that the manway did not provide safe access after August 9 when the raise was returned to production. On the evening of August 10, Dynatec supervisor William G. Wilson ordered all Dynatec employees from the manway because he was concerned about the hangup blasting that Magma Copper employees were about to perform. This act saved the lives of Dynatec employees. It also illustrates that Dynatec knew of the hazards. Dynatec knew that the manway did not provide safe access to the working places in the raise structure after the ore pass became hung up with muck, especially if blasting was planned.

Based on the evidence presented in this case, I find that the Secretary established a violation of the safety standard during August 9 and 10. The manway did not provide safe access to working places once the raise was returned to production. Dynatec's failure to remove its employees during this period and provide sufficient warning to Magma Copper constitutes a violation. Much of the language in the order describing the violation relates to the Secretary's contention that Dynatec violated the standard when it was making the repairs to the raise structure between August 4 and August 8. Nevertheless, the order also covers Dynatec's conduct in permitting the continued use of the manway after the repairs were made.

3. Significant and Substantial Allegation

I find that the violation was S&S. As discussed above, the Secretary established the first two elements of the Commission's S&S test. I find that an injury was reasonably likely given the facts described above. The raise structure was on the verge of failure and once the raise was returned to production it was reasonably likely that part of the raise would fail thereby killing or seriously injuring any miners in the manway. As stated with respect to the previous citation, it was reasonably likely that without rehabilitating the raise structure, a substantial failure of the structure would occur resulting in an injury of a reasonably serious nature.

4. Unwarrantable Failure Allegation

I find that the violation was the result of Dynatec's unwarrantable failure. Dynatec's conduct after the hangup developed demonstrates a serious lack of reasonable care. Although Dynatec removed its own employees from the manway after Magma Copper employees began blasting the ore pass on the evening of August 10, it had allowed its miners to work in the raise structure earlier that day after the hangup developed. It also failed to suitably warn Magma

Copper's inexperienced employees that they were endangering their lives by continuing to work in the raise structure below the hangup.

F. Alleged Violations of 30 C.F.R. § 57.3401

On May 10, 1994, MSHA inspector Tyrone Goodspeed issued six orders under section 104(d)(1) of the Mine Act alleging violations of 30 C.F.R. § 57.3401. The safety standard provides:

> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways ... shall be examined weekly or more often if changing ground conditions warrant.

The six orders, Nos. 4410469 through 4410474, allege identical violations. Each order covers a different shift between August 6 and August 10. For example, Order No. 4410469 alleges, in pertinent part:

> Miners were allowed to work in the 865 raise on the "B" shift, 8/6/93, even though management failed to adequately examine ground conditions in the area prior to work commencing, after blasting and as ground conditions warranted. This violation is part of a practice of a failure to conduct adequate examinations that contributed to the failure of the raise on 8/10/93....
>
> An adequate examination of the ground conditions and the raise support structure would have determined that: (1) raise timbers were shifting and progressively deteriorating; (2) raise timbers were separating from posts, dividers, wall plates, and cribbing; (3) support blocking was sheared and no longer functional; (4) sections of armored cribbing were dislodged which allowed ore and armored cribbing pieces to fall into the manway compartment; (5) the raise support structure had been subjected to water infiltration and frequent development and hangup blasting; (6) non-uniform placement of backfilling around the timber framework was contributing to framework separation; and (7) swelling or squeezing ground conditions were not encountered during raise construction and use preventing the raise support structure from developing the proper structural integrity.

Adequate ground condition examinations of the raise were warranted to protect miners regularly required to work in the area. The above noted conditions were visibly obvious and established that the ground support structure was failing to maintain its structural integrity.

1. Arguments

The Secretary argues that Dynatec's obligation under this examination standard is to ensure that adverse ground conditions do not exist and that the support structure is achieving its purpose. She contends that once the raise structure settled, the integrity of the joints and the dividing wall was dependent on the blocking installed during construction. As a consequence, Dynatec had the obligation under this standard to examine the blocking outside the immediately visible area. Dynatec failed to examine the area around the raise structure to see if the blocking was still performing its function. Dynatec employees should have cut holes in the lagging around the manway at strategic locations so that the blocking could be examined. The Secretary states that the orders cover the period after the Spry luncheon because the evidence establishes that, from at least that date, Dynatec knew that the raise structure needed to be rebuilt. She also argues that there was a reasonably detectable hazard before the failure of the raise structure.

The Secretary contends that Dynatec was required to examine the ground and the structural integrity, blocking, and backfill of the ground support structure prior to work commencing and after blasting. She argues that a reasonably prudent mine operator would have cut holes in the side lagging to look at the blocking and joint integrity.

Dynatec argues that the safety standard is not applicable because there were no "ground conditions" in the "areas where work [was] being performed." (D. Br. 53). Dynatec was performing work inside the manway and the lagging around the manway isolated its employees from the ground conditions that existed in the excavation. There was no threat of a ground fall and, because there was no exposure to ground conditions, there was no requirement to examine or test the ground. In any event, Dynatec employees performed examinations that were sufficient to determine that the ground support structure was achieving its purpose. There was no indication that the raise structure was under stress from the ground. A reasonably prudent person would not interpret the standard to require the removal of the protective lagging to examine ground outside the raise structure under such conditions.

Dynatec maintains that the Secretary's attempt to extend the safety standard to require an examination of the ground support structure is unreasonable. The Secretary was not concerned about Dynatec's examination of the rock walls of the raise, but with its examination of the raise structure. The safety standard does not require an examination of ground support structures. In addition, Dynatec believes that it extensively examined the raise structure. Its examinations of the structure established that the blocking and backfill were still functioning. It also examined some of the blocking through cracks in the manway lagging. Cutting into the lagging posed a risk that rock or backfill would fall into the manway. It could also compromise the structural

integrity of the raise structure. Dynatec contends that it "identified every condition identified in the orders during its extensive examinations of the support structure." (D. Br. 57). Based on these examinations, Dynatec "correctly determined that extensive, permanent repairs were necessary before the 865 raise could withstand another hang-up and blasting." *Id.*

2. Discussion and Analysis

I find that the Secretary established a violation. As discussed above, the raise structure served several important functions at the mine. Because one of those functions was to support the ground, the raise structure was a ground support structure. As I stated above, I find that the entire structure was a ground support structure and I decline Dynatec's invitation to hold that certain parts of the structure did not serve a ground support function. The safety standard required mine operators to examine ground conditions in areas where work is performed. I find that an examination under this standard includes an examination of any structures installed to support the ground. For example, in a timbered entry in a mine subject to this safety standard, the examiner would be required to examine the support timbers as well as the ground itself. Examining only the ground in an area where supports have been installed would not mean much. An examiner would be required to note that timber posts and cross beams were falling down in an area, even if the roof looked stable. An operator could not argue that a proper examination had been conducted if the examiner failed to examine roof support. The posts and cross beams had been installed to support the roof and they were no longer performing their function. In addition, the posts and beams themselves would pose a hazard to miners working in the area.

In this instance, the support structure had settled up to ten inches and by August 6, Dynatec knew or should have known that this structure would be in danger of failing if the ore pass became loaded with muck. The purpose of examinations under section 57.3401 is to ensure that the ground and any ground support does not pose a hazard to miners. On August 6, Dynatec knew that the structure was compromised, but it did not know what members of the structure had failed. Without performing an adequate examination of the ground and support structure, Dynatec would not know whether the rock walls of the raise were contributing to the problems or whether the manway was otherwise unsafe for miners. It examined the inside of the manway prior to each shift and was able to draw some conclusions, but its examinations were not complete.

Ordinarily, an examiner would not be required to cut holes in the lagging to look at blocking. In this instance, Dynatec recognized that "extraordinary steps" were required and it did not take these steps. It peered at the blocking through cracks in the lagging in a few locations where there happened to be cracks. It did not develop a systematic approach. It knew or should have known that blocking could have been compromised by the settlement. It also knew that adequate blocking of the raise structure was a key component in the design and construction of the structure. A failure of blocking in one or more locations at a critical location could contribute to a failure of the structure. It would not have been difficult to cut small holes in the lagging to examine the blocking. I am not holding that Dynatec was required to cut such holes to examine

each set of blocks, but that it was required to develop and implement a plan for examining blocking at strategic locations.

Dynatec believes that its examinations showed that the blocking was intact. First, it points to the fact that divider posts had not kicked out along the manway. I find that such a fact does not establish the integrity of the blocking. Blocking could have fallen away at a particular set and the timbers could have remained in place until the lateral force of a hangup pushed it out. Second, Dynatec points to the fact that further settlement was not occurring. The fact that the raise structure was not settling at that time establishes that, as a general matter, the structure was stable and that the blocking was helping to support the structure. But it does not establish that sufficient blocking was present to prevent failure once the raise was returned to use and the raise structure was subject to normal operating forces, such as the forces that occur during a hangup.

A complete examination would have indicated whether all of the seven problems listed in the orders of withdrawal were present. Although it appears that the ground was stable, Dynatec did not really know this for a fact on August 6 because it did not attempt to examine the ground. Dynatec failed to make a complete examination as required by the safety standard. The safety standard requires an examination that is appropriate given the conditions present at the mine. Examinations that were adequate before the raise structure settled were no longer adequate after the structure settled. As the expert in raise construction, Dynatec was in position to know that a more thorough examination was required under the standard.

Dynatec admits that it knew that the raise structure was under great stress and argues that, because it already had that knowledge, a thorough examination was not required. I disagree. If a mine operator knows that a particular entry at its mine has roof problems, it cannot decide that an examination is unnecessary because it already knows that the roof is bad. The examination is designed to pinpoint the problems so that they can be fixed *before miners are exposed to the hazards*. Because Dynatec did not perform a complete examination of the raise structure and the ground, the nature and magnitude of the problems were not entirely known. The examinations may have been able to identify areas where blocking had shifted, for example. Dynatec may have been able to use a written report of such an examination to convince Magma Copper to shut down the raise until permanent repairs were completed.

I do not base my holding on the fact that the raise structure subsequently failed nor am I holding that the failure established a *prima facie* case for the Secretary. *See Asarco, Inc.*, 14 FMSHRC 941, 946 (June 1992). Rather, I am holding that the examinations performed by Dynatec were not comprehensive enough under the safety standard given the fact that the raise structure settled eight to ten inches and Dynatec knew that this settlement posed a significant safety hazard. Extensive examinations were required under section 57.3401 to pinpoint the safety hazards, to help Dynatec decide whether the raise structure was safe to return to use, and, if not, to provide specific information to Magma Copper so that it would be able to make an informed decision as to the future use of the raise.

3. Significant and Substantial Allegation

I find that the violations were S&S. The Secretary established the first two elements of the Commission's S&S test. I find that an injury was reasonably likely given the facts described above. The raise structure was on the verge of failure and once the raise was returned to production it was reasonably likely that part of the raise would fail thereby killing or seriously injuring any miners in the manway. As stated with respect to the previous orders, it was reasonably likely that without rehabilitating the raise structure, a substantial failure of the structure would occur resulting in an injury of a reasonably serious nature. The examinations would have allowed Dynatec to more accurately identify problems in the raise structure so that they could be corrected before miners were exposed to the hazards. Dynatec and Magma Copper discussed the problems created by the settlement in terms of the longevity of the raise. A complete examination may have been instrumental in highlighting the safety hazards.

4. Unwarrantable Failure Allegation

I find that the violations were the result of Dynatec's unwarrantable failure. The examinations conducted by Dynatec after its luncheon discussions with Magma Copper demonstrates a serious lack of reasonable care. It knew that extensive, permanent repairs were necessary before the raise could withstand another hangup and blasting. It allowed its miners to work in the manway despite the fact that it had not conducted examinations to check the integrity of the blocking. If it had conducted such examinations and the examinations showed that blocking was missing or crushed in a number of locations, the raise may have been closed before the accident occurred. As stated above, Magma Copper's miners assigned to the raise were inexperienced and Magma Copper's manager responsible for the raise was not fully aware of hazards presented by the settlement. A thorough examination required by the standard may have alerted Magma Copper to the hazards presented.

G. Alleged Violations of 30 C.F.R. § 57.18002(a)

On May 10, 1994, MSHA inspector Jimmie Jones issued five orders under section 104(d)(1) of the Mine Act alleging violations of 30 C.F.R. § 57.18002(a). The safety standard provides:

> A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

The five orders, Nos. 4410475 through 4410479, allege identical violations. Each order covers a different shift between August 6 and August 9. For example, Order No. 4410475 alleges, in pertinent part:

> Adequate workplace examinations were not conducted in the 865 raise on "B" shift, 8/6/93, in that conditions which adversely affected the ... safety of the miners were not detected or corrected. This violation is part of a practice of a failure to conduct adequate examinations that contributed to the failure of the raise on 8/10/93....
>
> An adequate examination of the 865 raise workplaces and support structure would have determined that: (1) structural conditions in the raise were hazardous; (2) ladders had not been secured; (3) timber, blocking, and cribbing had shifted; (4) armored cribbing was dislodged and damaged in at least two areas between the ore pass and manway compartment; and (5) ore and armored cribbing pieces had fallen into the manway compartment.
>
> During this period miners were regularly required to travel to work places in the manway compartment for structural repairs and for access to other levels.

1. Arguments

The Secretary states that the purpose for this safety standard is to ensure that conditions which may adversely affect safety of miners are detected by a competent miner and are corrected promptly. The Secretary labels the examination obligation as a fiduciary duty the operator has for the safety of miners. She contends that Dynatec violated its obligation to find and correct the hazardous settlement conditions which adversely affected the safety of miners assigned to work in the raise.

The Secretary maintains that because of the unique nature of the raise structure, Dynatec's examiners were not competent to examine the raise without the benefit of a "structural engineering analysis of the raise." (S. Br. 66). She argues that Dynatec's managers continued to allow and direct its employees to work in the raise despite their knowledge that the raise structure was severely damaged and the repairs directed by Magma Copper were ineffective. The Secretary states that the Dynatec examiners were "in over their heads." *Id.* "Without the benefit of a structural engineering analysis, none of Dynatec's agents had the ability, knowledge, and experience necessary to be fully qualified to competently examine the unique work places in the 865 raise for conditions which adversely affected the health and safety of the miners...." (S. Br. 66-67).

Dynatec argues that its examiners were fully competent to conduct the required examinations. They had extensive experience in raise construction. Although the raise was unusually large, it incorporated features that were common to other raises. For example, birdcages had been used in other raises at the Magma Mine. Dynatec also contends that it adequately examined the working places and the support structure. The quality of the

examinations exceeded industry practice. MSHA's Program Policy Manual states that the safety standard requires a visual inspection for hazards that are readily apparent. Dynatec contends that its examinations exceeded the standard's requirements.

The quality of Dynatec's examinations is demonstrated by the fact that it identified all of the hazardous conditions that existed in the 865 workplaces. The fact that the Secretary disagrees with the conclusions it drew from its examinations is irrelevant. Dynatec's conclusion that it was safe to perform the repair work until Magma Copper employees began blasting in the ore pass is supported by the evidence. Dynatec also contends that a structural engineering analysis was not required. First, the safety standard does not require an engineering analysis. Second, the standard requires an examination of working places not support structures.

Finally, Dynatec contends that it did not violate the second sentence of the standard. Dynatec employees were in the raise for one purpose: to repair the raise. Muck had been removed from the manway and the hangup had been removed before August 6. The missing cribbing had been replaced so additional muck would not spill into the manway. In addition, it argues that Magma Copper had the obligation to permanently repair the raise structure because it was the owner of the mine. Dynatec could not permanently repair the raise structure without Magma Copper's consent.

2. Discussion and Analysis

The Secretary's approach in her brief is not consistent with the allegations contained in the orders. She stresses her argument that the Dynatec's examiners were not competent to conduct the required examinations. She also argues that the safety standard required Dynatec to conduct a "structural engineering analysis of the raise." The orders at issue, however, alleged that the examinations were not adequate. The competence of the examiners and the need for an engineering analysis are not mentioned in the orders of withdrawal.

I find that the Secretary failed to establish that Dynatec's examiners were not "competent persons" as that term is used in the safety standard. The examiners had many years of experience. I agree with Dynatec that, although the raise structure was unusually large, its features were not that unusual. The testimony of Messrs. Spry and Spaulding establish that Dynatec's examiners were competent persons under section 57.18002(a). In *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1629 (September 1989), the Commission held that a competent person within the meaning of sections 57.18002(a) and 57.2 is "a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in view of a reasonably prudent person familiar with the mining industry." Dynatec's examiners were capable of recognizing hazards that were presented by the raise after it had settled.

I also find that the safety standard did not require Dynatec to conduct a structural engineering analysis of the raise. Such an analysis is not within the scope of the examinations required by the standard. That part of the Secretary's Program Policy Manual that discusses this

standard states that the "word 'examine,' as used in the standard, means a visual inspection for hazards that are readily apparent." As stated above in my discussion of the violations of section 57.3401, the requirements of examination standards are not fixed. The examinations required before the raise structure settled would be less rigorous than examinations required after the settlement. Nevertheless, the standard does not require a structural engineering analysis under any circumstance. The Secretary's interpretation of section 57.18002(a) to require such an analysis is beyond the plain meaning of the standard and the Secretary's own written interpretation. I find that the Secretary's interpretation is unreasonable and that it is not entitled to deference.

Notwithstanding the above, I find that the Secretary established that Dynatec failed to conduct adequate examinations of the raise structure. Under the facts of this case, adequate examinations conducted under this standard would have revealed that the raise structure was in danger of falling if the ore pass was loaded with muck. Although Dynatec conducted examinations, they were not adequate to pinpoint the problems in the raise structure so that the problems could be corrected *before miners were exposed to the hazards.*

In this particular instance, the examinations under this standard would have been the same as the examinations required under section 57.3401. The five enumerated items contained in the orders issued under section 57.18002(a) are included in the seven items listed in the orders issued under section 57.3401. An adequate examination under either standard would have revealed the same hazards and the scope of the examinations would have been the same. For example, after the raise structure settled, Dynatec was required to examine blocking for the raise structure under section 57.18002(a) as well as under section 57.3401 to determine whether such blocking was intact and performing its function of keeping the raise structure together. Missing or dislodged blocking is a condition which would adversely affect the safety of miners. As under section 57.3401, the present standard required Dynatec to examine at least a representative sample of the blocking at strategic locations.

The only enumerated item in the orders issued under section 57.18002(a) that is not specifically mentioned in the previous orders is item number two concerning the condition of the ladders in the manway. I find that Dynatec had noted the condition of the ladders and was in the process of repairing them at the time of the accident. (*See for example* Joint Exs. 112 and 126). In the orders issued under section 57.3401, I found that the entire raise structure was required to be examined under that section because it functioned as a ground support structure. Thus, an examination of the ladders was required under section 57.3401, and the orders issued under that standard included allegations involving the failure to examine the ladders.

The orders issued under section 57.18002(a) cover the same shifts as the orders issued under section 57.1403, except that no section 57.18002(a) order was issued for the "B" shift on August 10. Given my construction of the requirements of these standards and the orders issued thereunder, I find that the orders issued under section 57.18002(a) are duplicative. Citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). As applied in

this case, I find that the two standards imposed identical duties on Dynatec. An adequate examination under one standard would have revealed the same unsafe conditions as an adequate examination under the other standard. The examination duties were the same. The Commission has recognized that standards may be duplicative as applied to particular facts at a mine. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1004-04 (June 1997). I am not holding that these two standards would always duplicate each other but that under the facts of this case, the duty to examine was the same.

Accordingly, the five orders issued under section 57.18002(a) are **VACATED**. If I had found that the six orders issued under section 57.1403 were invalid, I would affirm the five orders issued under section 57.18002(a) and hold that the orders were S&S and the result of Dynatec's unwarrantable failure. Because the safety hazards were the same and the required examinations were the same, my analysis would be the same under either standard.

H. Dynatec's Responsibility for Conditions in the Raise

Dynatec contends that it was inappropriately cited for Magma Copper's conduct. Dynatec maintains that it did not own or control the raise and, as a consequence, it cannot be held responsible for the failure to maintain and examine the raise structure. It argues that only Magma Copper had the authority to determine what repairs were made and whether the raise would be returned to service before the raise structure was rehabilitated. I agree that the final authority rested with Magma Copper, but Dynatec was the expert in raise construction and it had the obligation to impress upon Magma Copper the need to address the structural problems in the raise structure before the ore pass was returned to production. Dynatec made suggestions at the luncheon for Mr. Spry, but it did not advise Magma Copper how grave the situation was. As Mr. Folinsbee stated, it was "obvious" that "extraordinary steps should have been taken at that time." (Tr. 981) Dynatec did not take these extraordinary steps, which were particularly necessary because Mr. Kannegaard apparently did not understand the inherent danger. In settling its cases, BHP Copper paid civil penalties of $800,000 for 46 citations and orders that were issued by MSHA following the accident. The four safety standards cited in the present case were included in the case against BHP Copper. I find that the Secretary did not abuse her discretion when she cited both Magma Copper and Dynatec.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The parties stipulated that "Dynatec has a favorable history of previous violations." (Stip. No. 11 submitted 2/10/98) . It appears that in the two years preceding the accident, Dynatec had a history of 13 violations throughout the country. (Joint Ex. 150). Dynatec is a mid-sized independent contractor that worked about 61,960 man-hours at all mines in the year preceding the civil penalty assessment. (Stip. No. 12). Dynatec exercised good faith in abating the violative conditions by participating in the accident investigation and in attempting to determine how to prevent a re-occurrence of the violations. (Stip. No. 9). I find

that the penalties assessed in this decision will have no effect on Dynatec's ability to continue in business. (Joint Ex. 150; Stip. No. 12). Each citation and order that was affirmed was serious and caused by Dynatec's high negligence.

Dynatec violated section 57.3360 as set forth in Citation No. 4410466. The Secretary proposed a penalty of $50,000 under 30 C.F.R. § 100.5. I assess a penalty of $40,000 for this violation. As stated above, I believe that Dynatec was highly negligent for not taking all reasonable steps to ensure that the raise structure was safe before it was returned to production. Nevertheless, I find its negligence was not as great as that asserted by the Secretary. Magma Copper was resistant to Dynatec's suggestions for improving the safety of the raise and Magma Copper's managers informally stated that hangups would not be blasted except as a last resort. Dynatec believed that a permanent rehabilitation of the raise structure would commence later in August. As stated above, it was unreasonable for Dynatec to rely on the informal assurances of Magma Copper managers because they did not have the knowledge or skill to assess the danger and it should have been reasonably foreseeable that Magma Copper would continue to fill the ore pass and blast hangups. I have taken these facts into consideration in assessing the penalty.

Dynatec violated section 57.1101 as set forth in Order No. 4410468. The Secretary proposed a penalty of $50,000 under 30 C.F.R. § 100.5. I assess a penalty of $20,000 for this violation. I rejected the Secretary's contention that the raise structure presented an imminent danger after it settled on or about August 3. I found that it was safe for Dynatec to make the repairs set forth in Kannegaard's memorandum of August 5. (Joint Ex. 115). I found that safe access was not provided to the raise structure after it was returned to production on August 9. Dynatec removed its employees from the raise structure once it became clear that Magma Copper was blasting in the ore pass. As a consequence, I significantly narrowed the scope of the order. These factors reduced the gravity of the violation and Dynatec's negligence. I have taken these facts into consideration in assessing the penalty.

Dynatec violated section 57.3401 as set forth in order Nos. 4410469 through 4410474. The Secretary proposed a penalty of $50,000 for each of the six violations under 30 C.F.R. § 100.5. I assess a penalty of $5,000 for each violation. Dynatec conducted examinations of the conditions inside the manway. Based on these examinations it reached conclusions as to what needed to be done to rehabilitate the raise structure. It did not believe that the rock walls of the raise were contributing to the stress placed on the raise structure. As stated above, these examinations were not adequate to identify with certainty the specific hazards presented by the raise structure. These factors reduce the gravity of the violations and Dynatec's negligence.

IV. ORDER

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

Citation/Order No.	30 C.F.R. §	Penalty
4410466	57.3360	$40,000.00
4410467	57.3360	Vacated
4410468	57.11001	20,000.00
4410469	57.3410	5,000.00
4410470	57.3410	5,000.00
4410471	57.3410	5,000.00
4410472	57.3410	5,000.00
4410473	57.3410	5,000.00
4410474	57.3410	5,000.00
4410475	57.18002(a)	Vacated
4410476	57.18002(a)	Vacated
4410477	57.18002(a)	Vacated
4410478	57.18002(a)	Vacated
4410479	57.18002(a)	Vacated
	Total Penalty	$90,000.00

Accordingly, the citation and orders listed above are hereby **VACATED** or **AFFIRMED**, as set forth above, and Dynatec Mining Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of $90,000.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

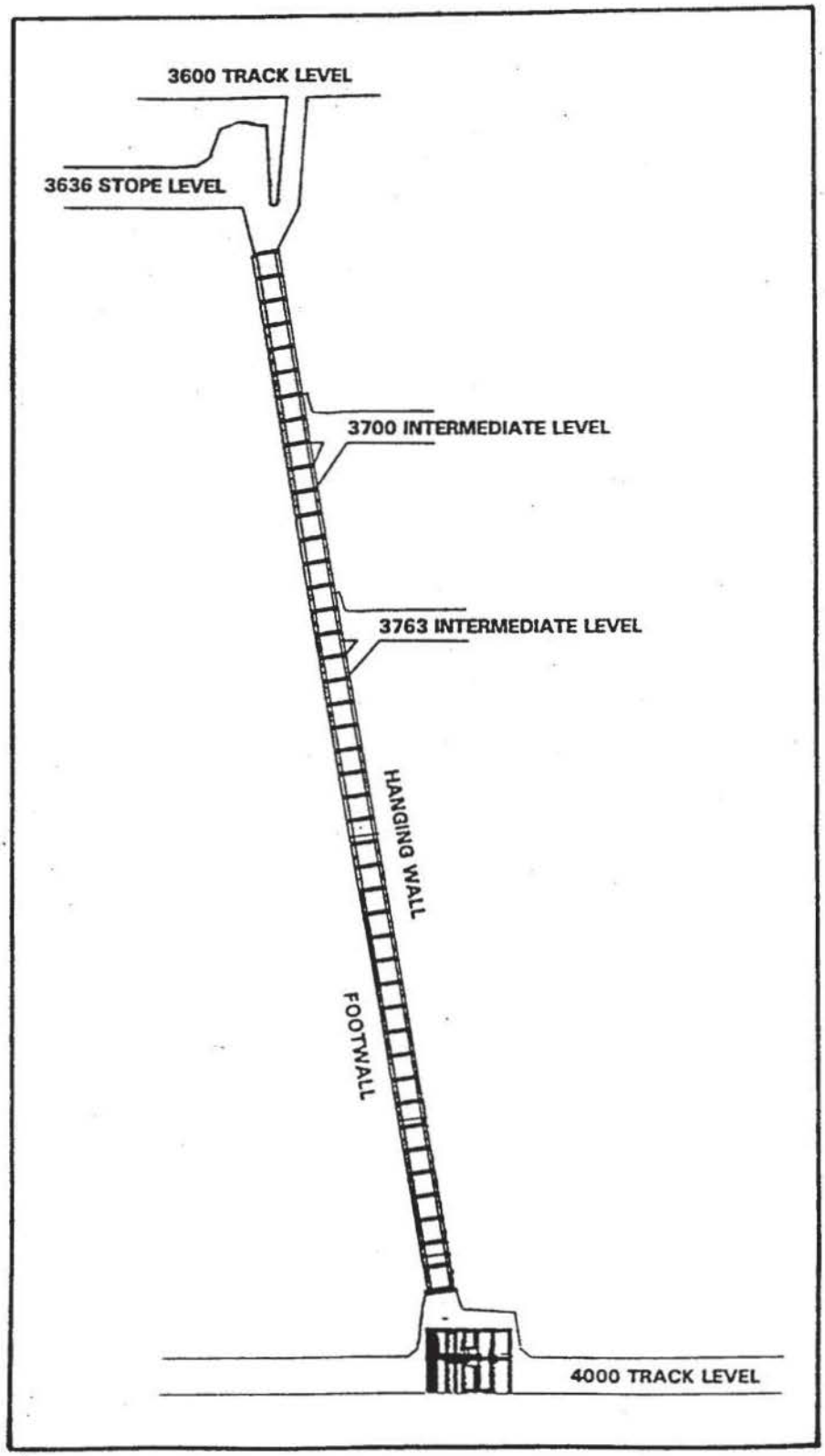
Distribution:

Edward H. Fitch, IV, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203-1954 (Certified Mail)

C. Gregory Ruffennach, Esq., 450 East 3rd Avenue, Durango, CO 81301 (Certified Mail)

RWM

Illustration No. 1



The 865 Raise

Illustration No. 2

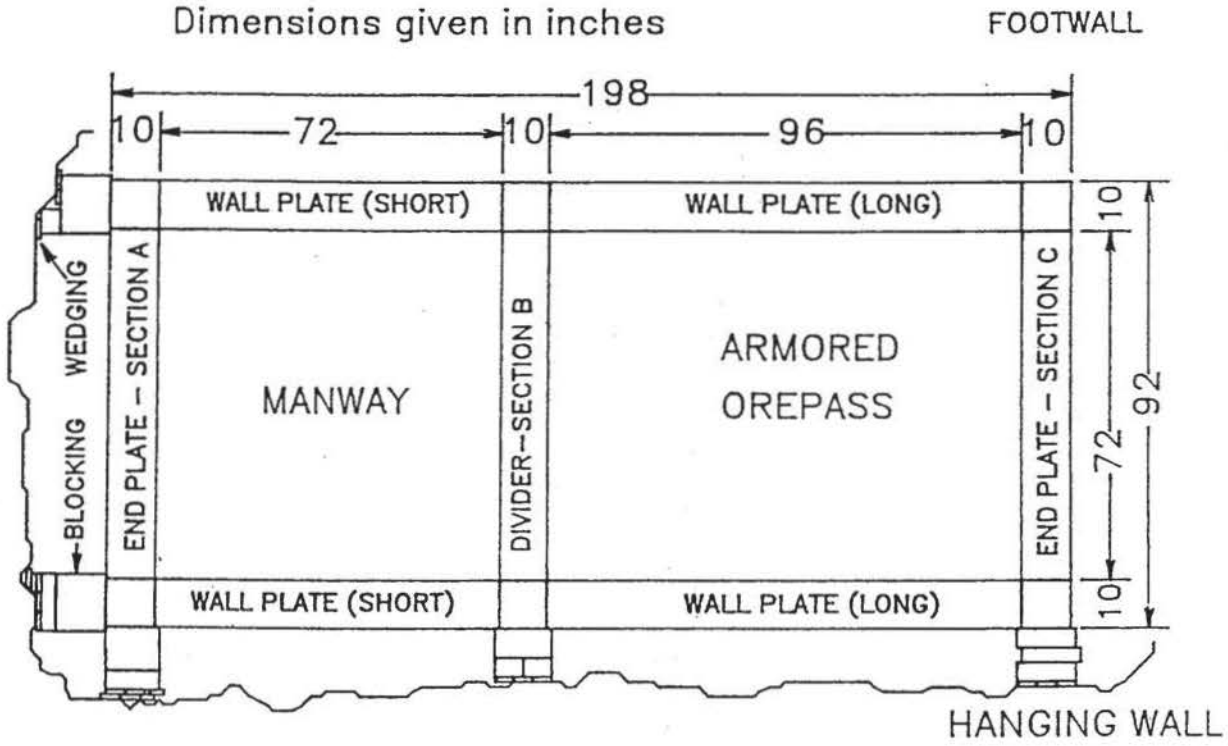


FIGURE 10.– TIMBER FRAME, TOP VIEW
AFTER MAGMA DRAWING 53–1–33B REV. 10

Illustration No. 3

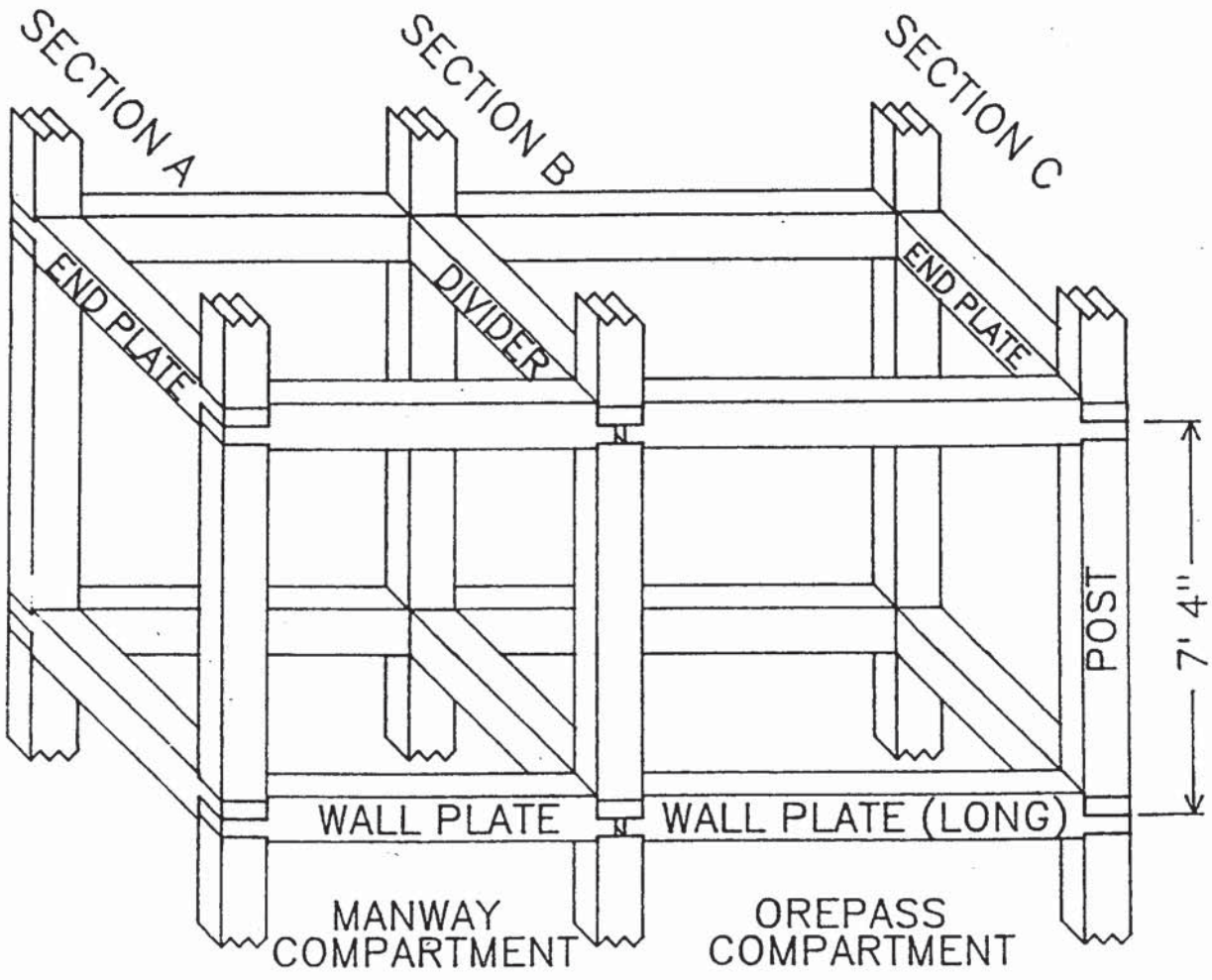
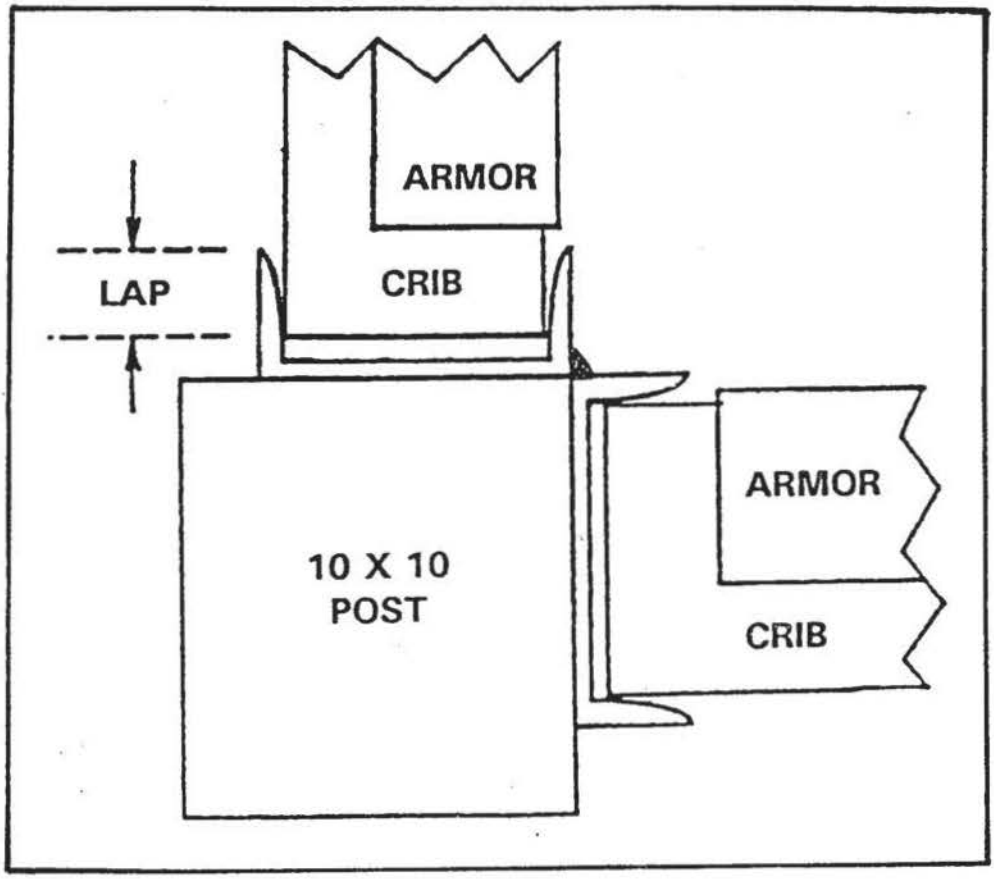


FIGURE 11.– TIMBER FRAME, ORTHOGRAPHIC VIEW
AFTER MAGMA DRAWING 53–1–33B REV. 10

Illustration No. 4



Bird Cage and Divider Wall Detail

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

SEP 25 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 97-192-M A.C. No. 39-00993-05517
v.	:	Screener Plant No. 1
HIGMAN SAND & GRAVEL, INC., Respondent	:	

DECISION

Appearances: Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, 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 Higman Sand and Gravel, Inc. ("Higman"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petition alleges one violation of the Secretary's safety standards. A hearing was held in Sioux City, Iowa.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Screener Plant No. 1 (the "plant") is in Union County, South Dakota. It is a small operation that typically employees two individuals. One employee operates the pay loader. The other employee, Mark Rasmussen, operates the screening plant. Higman uses a portable generator as the source of electricity for the plant. This generator was purchased by Higman during the 1980s and it has been used at this plant since the late 1980s. The generator is in a covered trailer to protect it from the elements. This trailer is of the type that is attached to a tractor for the transportation of goods over highways. The trailer has two sets of doors. The door on the side of the trailer is equipped with stairs for access to the trailer and the controls for the generator inside the trailer. The doors at the back of the trailer are opened to provide ventilation for the generator when it is operating. The generator's large cooling fan exhausts out the back of the trailer.

The generator sits near the center of the trailer from side-to-side but is closer to the back of the trailer than the front. The controls for the generator are at the end of the generator that is near the front of the trailer. The control box for the plant is also in the front of the trailer. The only person who regularly enters the generator trailer is Mr. Rasmussen, who enters the trailer to start the plant at the beginning of the shift, to shut down the plant at the end of the shift, and to shut down the conveyors or the power in the event that major repairs are required.

On May 22, 1997, MSHA Inspector John R. King inspected the plant. During this inspection he issued Citation No. 4644726 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R.§ 56.14107(a). The condition or practice section of the citation states as follows, in pertinent part:

> The V-belt drives on the Caterpillar generator set ... in the power generation van were not guarded. The unguarded belts were approximately three feet from the throttle and three feet off the deck. A trip, fall, or loose clothing could cause an employee to come into contact with the unguarded pinch points on the V-belts.

Section 56.14107(a) provides, in pertinent part, that "[m]oving machine parts shall be guarded to protect persons from contacting gears, ... drive, head, tail, and takeup pulleys, flywheels, ... and similar moving parts that can cause injury." Inspector King determined that the violation was serious and of a significant and substantial nature ("S&S"). He also determined that Higman's negligence was moderate with respect to this citation. The Secretary proposes a civil penalty of $128 for the alleged violation.

A. Fact of violation

I find that the Secretary established a violation of section 56.14107(a) in this case. The belt drives at issue were the type of moving machine parts that are covered by the safety standard. Unguarded V-belt drives can cause injury to an employee working in the area. Loose clothing can get caught between the belt and the drive and the employee can be pulled into the pinch point. Higman contends that employees do not travel to the back of the trailer where the belt drives are located while the generator is operating. I find that the floor of the generator trailer is a "walking or working surface," as these terms are used in section 56.14107(b). While it may not be the practice of Mr. Rasmussen to travel near the belt drives while the generator is operating, the area is open to travel. It is likely that Mr. Rasmussen or another employee walked near these belt drives while they were turning on at least one occasion. The drives are within seven feet of a walking or working surface and the exception set forth in section 56.14107(b) does not apply.

The most logical construction of a guarding standard "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (September 1984). The construction of safety standards that involve a miner's behavior "cannot ignore the vagaries of human conduct." *Id.* In finding a

violation, I have considered the "accessibility of the machine parts, work areas, ingress and egress, [and employee] work duties." *Id.*

Finally, the Mine Act imposes strict liability on a mine operator. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products Co., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

B. Significant and Substantial Nature of the Violation

An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

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

I find that the Secretary established the first two elements of this test. There was a violation of the standard and a measure of danger to safety contributed to by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation will result in an injury. I find that the Secretary did not establish that an injury was reasonably likely in this instance.

In reaching the conclusion that an injury was not reasonably likely, I rely on a number of factors. First, the only employee who regularly enters the trailer is Mr. Rasmussen. He enters the trailer in the morning to start the generator and the conveyors and in the late afternoon to shut down the conveyors and the generator. He estimates that he is in the trailer about ten minutes per day. Occasionally, he enters the trailer in the middle of the day to shut down the conveyors and the generator if the plant is shut down for repairs. He also enters the trailer on occasion to get oil or grease that are stored at the front of the trailer. The generator is at the opposite end of the trailer near the back. He enters and exits the trailer by walking up the metal steps at the door on the side of the trailer. He does not enter the trailer through the back doors because the deck of the trailer is four to five feet above the ground. The controls for the generator and the plant are near the side door. The control box for the plant is about 15 feet from the belt drives and the control panel for the generator is 10 to 12 feet from the belt drives. (Tr. 47, 71, 111). These controls are not along the side of the generator adjacent to the belt drives.

When starting the generator Mr. Rasmussen checks to see if the throttle is properly adjusted before he starts the generator. The throttle is within a few feet of the unguarded V-belt drives. After he starts the generator, he turns on the conveyors and exits the trailer. There is no need for Mr. Rasmussen or anyone else to walk to the back of the trailer while it is operating. One cannot easily exit the trailer through the back doors. In addition, the noise of the generator and the wind produced by the cooling fan make the back of the trailer an unpleasant place to exit. Maintenance to the generator is performed while it is shut down. For example, the fuel filter, which is near the belt drives, cannot be changed except when the generator is off. There are no grease fittings near the V-belt drives. There are no stumbling hazards near the belt drives except a set of small wooden blocks or wedges under the generator that stick out a little. Although it would be possible for someone to trip over these blocks, I find that it is unlikely that anyone's body or clothing would come in contact with the belt drives in such an event.

The Secretary disputes Mr. Rasmussen's testimony that he does not travel within seven feet of the belt drives while the generator is running. Inspector King testified that Rasmussen told him during the inspection that the belt drives should be guarded. (Tr. 136; Ex. G-1). The inspector also testified that Rasmussen told him that he sometimes adjusts the throttle after he has started the generator. (Tr. 53, 137-38). At the hearing, Mr. Rasmussen testified that he never adjusts the throttle while the generator is running.

I find that Mr. Rasmussen has adjusted the throttle after starting the generator, but that this is a rare event. The proper operating procedure for this generator is to set the throttle before it is started. (Tr. 72-73). Mr. Higman testified that the person starting the generator "would not want to touch the throttle when it's running." (Tr. 74). Mr. Rasmussen stated that he has been running this generator for Higman since it was "brand new" and he knows from that experience "exactly where to set the throttle" before he starts the generator. (Tr. 119). I credit this statement. Rasmussen does not readjust the throttle while the generator is operating except in extraordinary circumstances. Thus, his exposure to the moving belt drives was not very significant. The control panel is at one end of the generator, the belt drives are near the opposite end, and the throttle is close to the belt drives in between. It is unlikely that his clothing or body

would come into contact with the pinch points if he stumbled. The Secretary argues that because the doors to the trailer were open, the floor could be wet and present a slipping hazard. I find that the floor would not usually be wet because the ventilation produced by the fan would quickly dry out the trailer. In addition, the floor was grooved, which would tend to make the floor less slippery.

As a general matter, I believe that unguarded moving machine parts present a significant and substantial hazard to employees. In this case, however, I find that an injury was not reasonably likely. Although I find that the floor throughout the trailer was open for travel and constituted a walking or working surface, the floor near the belt drives was not generally used as a travelway or a working surface while the generator was operating. I recognize that Rasmussen may have occasionally traveled near the belt drives while the generator was operating. I find, however, that his exposure was insignificant and that an injury was highly unlikely, taking into consideration continued normal mining operations and the unpredictable nature of human conduct. Inspector King stated that a guarding violation may not be S&S if "an individual is seldom, if ever, in the particular area." (Tr. 26). Mr. Rasmussen was the only person who entered the trailer on a regular basis, he was only in the trailer about ten minutes a day, and he rarely walked within ten feet of the unguarded belt drives while the drives were operating.

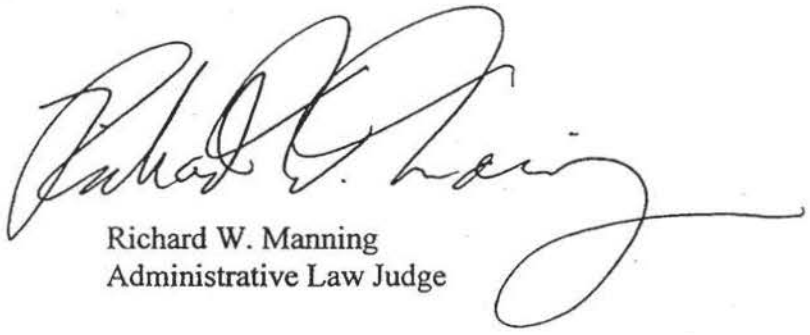
I find that the Secretary established the fourth element of the *Mathies* test because if an injury were to occur, the injury would be of a reasonably serious nature. Accordingly, I hold that the violation was not S&S because the hazard contributed to by the violation was not reasonably likely to result in an injury.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that eleven citations were issued at the Screener Plant No. 1 between May 1995 and May 1997. (Ex. G-5). The plant is a small facility that employed two miners and worked 3,602 man-hours in 1997. Higman is a small operator that worked 9,510 man-hours in 1997. The violation was rapidly abated. The penalty assessed in this decision will not have an adverse effect on Higman's ability to continue in business. Although the violation was not S&S, I find that it created a moderately serious safety hazard. Higman's negligence was moderate. Although the generator had been inspected by MSHA on a number of occasions and the belt drives had never been cited, Higman had received three citations for unguarded moving machine parts in the two years preceding the date of the citation at issue. (Ex. G-5; *Higman Sand and Gravel, Inc.*, 18 FMSHRC 951 (June 1996)(ALJ)). Thus, Higman was on notice that guarding was required for moving machine parts. Based on the penalty criteria, I find that a penalty of $100.00 is appropriate for this violation.

III. ORDER

Accordingly, Citation No. 4644726 is **AFFIRMED** as modified above and Higman Sand and Gravel, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $100.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

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

Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, P.O. Box 717, Sioux City, IA 51102 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 30 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-23
Petitioner	:	A.C. No. 36-04566-03980
v.	:	
	:	Emerald No. 1
CYPRUS EMERALD RESOURCES, INC.,	:	
Respondent	:	

DECISION ON REMAND APPROVING SETTLEMENT

Before: Judge Hodgdon

On August 24, 1998, the Commission issued a decision in this case vacating the judge's conclusion as to Order No. 3658698 "that Emerald violated section 77.1608(b) in December 1992," and remanded it "for reanalysis [*sic*] and, if necessary, S&S and unwarrantable determinations." *Cyprus Emerald Resources Corp.*, Docket No. PENN 94-23, slip op. at 31 (August 24, 1998).[1] The Secretary, by counsel, has filed a motion to approve a settlement agreement with regard to the order.

Modification of Order No. 3658698 from a 104(d)(1) order, 30 U.S.C. § 814(d)(1), to a 104(a) citation, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designation and a reduction in penalty from $8,200.00 to $6,000.00 are proposed. Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i).

Accordingly, the motion for approval of settlement is **GRANTED**, Order No. 3658698 is **MODIFIED** as indicated and the Respondent is **ORDERED TO PAY** a penalty of **$6,000.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

[1] Forthcoming as *Cyprus Emerald Resources Corp.*, 20 FMSHRC 790 (August 1998).

Distribution:

Myrna A. Butkovitz, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

September 30, 1998

PAMELA BRIDGE PERO,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 97-154-D
v.	:	DENV CD 96-21
	:	
CYPRUS PLATEAU MINING CORP.,	:	Star Point No. 2
Respondent	:	Mine ID 42-00171

DECISION

Appearances: L. Zane Gill, Esq., Salt Lake City, Utah,
for Complainant;
Matthew McNulty, Esq., Mara Brown, Esq.,
Salt Lake City, Utah,
for Respondent.

Before: Judge Cetti

This proceeding was initiated by a complaint filed by Pamela Bridge Pero (hereinafter "Pero") under the provisions of Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 *et seq.*, the "Act," [1]

---

[1] Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under the related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or

Pero initially filed her complaint with the Mine Safety and Health Administration (MSHA) at its Price, Utah, field office on September 12, 1996. In this first complaint Pero stated she was employed as a "Human Resource Assistant" and she listed the person responsible for the discriminatory action as Louis Grako, Human Relations Manager, and Keith Seiber, a previous vice-president and general manager of Cyprus Plateau Mining Corp. Pero's allegation of the discriminatory action in her complaint filed with MSHA reads as follows:

> My employment was terminated on September 11, 1996. I feel this was done because over the course of the past 2-3 months, I have expressed to mine management personnel, the fact that dishonest acts have been executed by Mr. Grako (under the direction of Mr. Seiber for the past 1 ½ years.) I feel this was retaliation for "whistle blowing."

MSHA conducted an investigation of Ms. Pero's complaint and by letter dated March 18, 1997, advised her that on the basis of the information gathered during the course of its investigation, a violation of Section 105(c) of the Act had not occurred. The letter in pertinent part reads as follows:

> Re: Results of Discrimination Investigation
> Case Number DENV-CD-96-21
>
> Dear Ms. Pero:
>
> Your complaint of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 has been investigated by a special investigator of the Mine Safety and Health Administration (MSHA).

---

health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this 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 of any statutory right afforded by this Act.

A review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that a violation of Section 105(c) of the Act has not occurred.

If you should disagree with MSHA's determination, you have the right to pursue your action and file a complaint on your own behalf with the Federal Mine Safety and Health Review Commission.

Ms. Pero disagreed with MSHA's determination and on May 30, 1997, filed a complaint on her own behalf with the Commission under §105(c)(3) of the Act..

I

Stipulations

I accept the following stipulations that the parties entered into the record.

1. Cyprus owns and operates the underground coal mine known as Star Point No. 2

2. Ms. Pero was an employee of Cyprus at the time she was terminated.

3. Ms. Pero was terminated effective September 11, 1996.

4. Ms. Pero's rate of compensation at the time she was terminated are not in dispute.

II

Applicable Law

It is well settled law that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of proof that he engaged in protected activity and that the adverse action complained of was motivated in any part by that protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on grounds, sub nom. *Consolidation Coal Co., v. Marshall*, 663 F2d 1211 (3rd Cir.1981); and *Secretary on behalf of Robinette v. United Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc.*

Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction* Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

III

Ms. Pero was employed by Plateau Mining Corporation in the Human Resources Department during all relevant times. She started as a receptionist and then started working half a day in Human Resources Department (H.R.) and later commenced working there full-time with typing and other secretarial and clerical duties.

The Human Resources Department consisted of four people. Pero testified that the people in the Human Relations Department took "over some of the clerical side of safety." They also did typing for the engineers and "ran the switchboard." Pero in addition to running the switchboard helped with "the filing and typing of forms" for on the job injuries and worker's compensation claims. Pero states "all the forms had to be sent to the state of Utah and "only a few had to be sent to MSHA." Pero testified her clerical duties included typing worker's compensation forms and typing of some of the MSHA 7000-1 forms. She states that her immediate supervisor, Louis Grako, instructed her to contact employees injured on the job to see if it was possible to get the miner to come back to work without loss time so as to avoid having to report a lost time injury. The miners got a bond each month if they had no loss time injuries during that month. Ms. Pero testified that as she talked to her brother who was the safety director at a rival or "competing mine" and talked to other safety people, she started "to get a feel that some of the things that had been past practice weren't right." She stated she didn't feel comfortable with the practice of permitting or encouraging injured employees to take a "doctors day off" because there were medical facilities for them to go to. On further reading on the matter and talking to her brother who was the safety director at a competing mine, she determined that the employees injured on the job should not be taking "a doctors day off."

From the time she was hired until she was terminated (11 years) Pero received only satisfactory or better performance reviews and never received any form of discipline prior to May 1996. However, she did receive a demotion from Human Resources Assistant II to Human Resources Assistant I. Pero attributes that demotion to the fact that she filed a sexual harassment complaint against her supervisor, Keith Seiber, who was Respondents vice-president and general manager (VPGM) at the time. Her sexual harassment lawsuit was dismissed by the Federal District Court in early 1995. It is claimant's contention that management's attitude towards her turned negative as a result of her unsuccessful harassment complaint. (Tr. 79, 83, 84, Complainant's Brief p. 5). This was also the perception of her co-worker Ms. Tucker who testified to the same effect. Asked by her counsel on direct examination to give some specifics, Pero testified as follows:

If (Keith Seiber) wanted me to do something, he told someone else to have me do it. He directed, I feel, Mr. Grako, to put me back on the switchboard, take my work away and not give me raises. That all came into it there. Any little thing I did, Lou was writing it down. He was making a big deal out of it, and I felt that came from Keith.

Q. What was your mind between Mr. Grako and Mr. Seiber?

A. They were bed partners from the beginning. I felt Mr. Seiber hired Mr. Grako to go in and clean house or do whatever with anybody he wanted to get rid of. Everyone around the mine felt like he was the hatchet man. That's my perception; that's really strongly what I felt.

Q. So you perceived what you believed to have what actions taken against you to try to take away your job responsibilities?

A. Yes.

Q. To freeze your salary?

A. Yes.

Q. Did you understand why that was happening?

A. No. I just felt like — you had to be part of their team up there. There were people that were and people that weren't, and I wasn't.

Q. Okay. When did you first start becoming concerned about safety issues, things that were being done that you thought were either illegal or against regulations? When did you first start becoming concerned about that?

A. I think it took me a while. I didn't have any training on the job. I didn't have anybody tell me what was legal and what wasn't legal. I was told to go in and look at the forms, see how Gayle had done them, and do them the same way. And I think it took me months to realize and start researching everything that I needed to know before I felt comfortable with what people had marked on the claims on the workers' accident reports.

But as I talked to the safety people and as I called Rhys Llewelyn who wrote the book and as I talked to my brother, I started to get a feel that some of the things we were doing that had been past practice weren't right. (Tr. 84-85).

Pero discussed her views about the proper way to fill out the worker's compensation claims, related forms and reports for on the job injuries with her supervisor, Mr. Grako. She testified that sometimes Mr. Grako agreed with her and sometimes he did not. At other times he told her he would have to check further with others and then get back to her. (Tr. 91). Pero also attempted to convey her concerns about these and other matters with Mr. Grako's boss, Allen Childs, who was the Respondent's new vice-president and general manager at the time. Mr. Childs testified that Pero talked about alleged illegal reporting but never mentioned MSHA's 7000-1 form or 7000-1 reporting. (Tr. 472-479).

Asked as to the "scope of her complaints" on direct examination by her counsel Pero testified as follows:

Q. What was the scope of the things that you were complaining about?

A. The lack of trust in the department, the way we were treated by Mr. Grako. If we did the least little thing wrong, that was blown into a big, major thing. We were reprimanded for things that we didn't think we had even done. All of us were feeling that way.

There were sexual harassment problems, there was a big list of things. ... .

Q. Did you at some point sense that you were getting in trouble for your complaints?

A. Yes, I did.

Q. When did you first sense that?

A. I think it started happening in April, and I think what happened was, when we talked to — well, can I give you an example of one?

Q. Certainly.

A. One problem I had was with the way we hired our summer

students. I had been approached by all the people, saying, "This is no longer a program for everybody's kids. It's just the salaried employees' kids."

So, in passing one day, I mentioned it to Mr. Childs. So, he asked me to come into his office and we discussed it. And, I said, "It has become the salary students' program. We don't have any hourly people's children working."

He said, "Would you please get me some numbers?

I got the numbers together, and it was like four to one. And, I said, "You know, to be fair to all of our employees, we need to make this 50/50."

He said, "I agree." And he talked to Mr. Grako.

I think when he started talking to Mr. Grako about my complaints, Lou (Grako) knew we were talking. Then, he talked about Kim's complaints, and he would go talk to Lou. He (Grako) knew — he started knowing that we were going above him to the VPMG with our problems. That's when I felt him change. He got quiet with me; he got very secretive.

All of us girls noticed him listening outside the door, and he would stand and stare at us if we talked when he thought we were talking about something. We got really scared; we all got really scared.

So, what happened was, we all quit talking because we could see that he was going to come back on us for what we said.

And that continued for a month or two period until I left for my surgery. But I told Alan repeatedly that I was scared.

Q. So your first contact with Alan Childs about your concerns was probably early April of 1996?

A. Yes. He quit involving me in all of the discussions about Worker's Comp. (Tr. 135-137).

IV

Respondent's Three-Step Disciplinary Procedure

It was undisputed that Cyprus at all relevant times had in place a progressive employee disciplinary policy. This procedure is set forth in their employees handbook given to every employee. Under this policy there is a well established three-step disciplinary procedure. (Tr. 139). The evidence presented established that Pero was disciplined and eventually discharged when she exhausted the Cyprus progressive three-step disciplinary procedure.

Step 1 discipline resulted when Pero signed (forged) the name of her supervisor Louis Grako on two dinner certificates, one for herself and one for her husband. The one for herself may have been given to her but not the one for her husband. This written Step one reminder given to Pero in May 1996 states in part:

> At the conclusion of our meeting, I advised you that you were to take the next day off with pay, April 30th, and come back the next day with a written action plan and commitment of how you can build trust and credibility with me and within our department. This is essential in any human resources organization.
>
> Regardless of the possibility that I may have given you one dinner certificate, the other certificate was unauthorized and you signed my name to both certificates without authorization. I'm requesting that you bring in all the certificates you have for my review and approval. Dishonesty, including falsifying of my name and theft of Company property is a serious violation of our Guidelines for Appropriate Conduct.
>
> As we discussed in our meeting, because of your serious misconduct I'm giving you this documented Veral Reminder, Step 1 and placing it in your personnel file.
>
> Pam, you must take immediate measures to improve your attitude and trust toward the Company and myself. The Company will not tolerate this type of behavior on your part or on the part of any employee. The Action Plan you provided me did not address the trust issue but totally evaded the real issue, I'm directing you to revise your commitment. I would like your commitment by Monday, May 6, 1996.
>
> This letter should make it abundantly clear to you that if you fail to live up to your commitment and abide by company rules, you will

subject yourself to further disciplinary action up to and including termination ...

On July 25, 1996, Pero was given a Step 2 written reminder which in pertinent part states:

> On May 6, 1996, you were issued a Verbal Reminder following a conversation concerning dishonesty, which involved using my name without authority. At that time you had assured me that you would stop distrustful behavior and be a team player.
>
> Unfortunately, we had another recent incident where you failed to properly inform me that you were going to have surgery and possibly be away from work for an extended period of time. In our telephone conversation on June 12th I had to make assumptions to figure out that you were going to be gone from work. I asked you in that same telephone conversation why you did not let me know ahead of time that you would be away from work. Your response was that you wrote me a note and you thought I would not be back from Denver until Friday, June 14th. In our meeting on June 14th you told me that the reason you wrote me a letter, dated June 10, 1996 is that I was not available for you to talk to. I stressed my dissatisfaction with the way you handled the whole process.
>
> On June 26th, after you returned to work we had another discussion concerning the above mentioned incident and your failure to use the interview rating sheets, as I instructed you to do so in the past. Further, we discussed other work performance problems such as your failure to change the shot-term (sic) disability forms, etc. You explained that you had let Allen know that you were going to have surgery two months ago and as far as the interview sheets and short-term disability forms were concerned you said you did not have time to complete the interview sheets or make changes in the STD forms. I explained that I was available all during the week of June 3rd and was at work all day Friday, June 7th and I'm available to you on a regular basis. At the conclusion of our meeting, I advised you that because of the seriousness of your behavior in failing to give proper notice of your absence from work and your recent unacceptable work performance I'm giving you this Written Reminder, Step 2 of our Corrective Action Policy. Pam, I want to make it abundantly clear that I will not tolerate this type of behavior by you or any other employee. Further, as I explained to you Human Resources employees are held to a high standard of honesty and integrity. You must take immediate measures to

significantly improve your work performance and your attitude toward me, because I am responsible for your performance and conduct. If you are going to be away from work for any period of time which includes qualified Short-Term or Long-Term Disability you need to follow those policy guidelines, which include informing me on a regular basis of your progress. This includes periodic medical reports from your doctor. This is something you have not done in the past. Should you fail to immediately improve your conduct and performance, you will subject yourself to further disciplinary action up to and including termination. I will no longer accept your excuses. Also, it's unfortunate you can not make a commitment to change. I encourage you to make a change and I'm here to help.

The third and final disciplinary step which resulted in termination On September 11, 1996, was a letter signed by Allen P. Childs, Vice-President, General Manager as follows:

RE: Notice of termination of Employment

Dear Mrs. Pero,

As you are aware your employment with Cyprus Plateau Mining Company ("Cyprus") was terminated effective September 11, 1996. Further, since May 1996 you have been disciplined for violation of company rules, and have been given both verbal and written warnings regarding those violations. Copies of the written warnings were earlier provided to you. However, as you requested on September 11, 1996, copies of the warnings are enclosed with this letter.

The decision to move you to the final step of the disciplinary process and terminate your employment at Cyprus is based upon several factors, including, without limitation, the following:

1. In May 1996 you were sent to Denver to be trained in the new Health and Safety Reporting System ("HSRS"). You were given very specific instructions regarding implementation of this program at Cyprus, and you were instructed to inform Jack Trackemas about how the system should operate. You were trained for several days at significant expense to Cyprus in airfare, meals, lodging and incidentals.

Unfortunately, you failed to carry out your instructions to assist in program implementation. In early July, Mr. Michael R. Peelish determined that you had not done any work on the HSRS, nor had you followed up with Mr.

Trackemas. Consequently, the Cyprus program was delayed for approximately seven weeks. This type of neglect did not occur at any other facility.

2. Cyprus has also recently learned of unsatisfactory work performance by you in connection with the completion of I9 immigration forms. On or about September 4, 1996, during an OFCCP site audit, the auditor reviewed the I9 file maintained by you. The auditor discovered that a very significant percentage of the I9s were filled out incompletely and/or improperly. This could result in substantial fines to Cyprus, and has already required work time to remedy these numerous mistakes.

As an experienced human resources representative, you should be totally familiar with the I9 form, which is relatively simple to fill out. It was part of your responsibility in new employee orientation to insure that these forms were completely and accurately filled out. You were specifically informed by Mr. Grako prior to the OFCCP audit to review the I9 forms and insure they were in proper order. Prior to taking leave you evidently enlisted the aid of a co-employee in order to secure information necessary to complete certain of these forms. It appears, however, that these forms were in such disorder that they could not be corrected prior to the OFCCP audit. You were directly responsible for this matter.

3. Cyprus has recently learned that you have made verbal representations to various individuals, both employees and non-employees of Cyprus, that your supervisor, Lou Grako and Cyprus have committed illegal acts in the handling of the workers compensation claims of Clifford Snow and Alvin Rogers. You did not, however, make a written report to this effect nor did you report such acts to your supervisors. Nevertheless, an investigation was undertaken both internally and outside the company. Cyprus interviewed outside personnel involved in the administration of its workers compensation claims, including the claims adjuster and branch manager of Scott Wetzel Services and outside legal counsel responsible for handling workers compensation matters. Cyprus has determined that the claims process employed in the above-referenced claims was not only consistent with Utah Law, but in fact one of the claims was approved by an Administrative Law Judge of the Utah Industrial Commission.

Since your duties at Cyprus include claims processing, your apparent misunderstanding of processing and your wrongful accusation of mishandling of claims is particularly troublesome. More importantly, Cyprus confirmed during this investigatory process that you made disparaging remarks about Lou Grako's handling of workers compensation claims to co-workers and directly to non-employees of Cyprus, including Scott Wetzell's branch manager. Your baseless and wrongful accusations of misconduct on the part of Mr. Grako appear to be

personally motivated, and your defamatory remarks to non-employees was completely inappropriate. Further, your baseless accusations resulted in a costly, time consuming and totally unnecessary investigation.

It is also clear that you are unable and/or unwilling to work harmoniously with your supervisor, Mr. Lou Grako. You do not communicate effectively with Mr. Grako, you have made a concerted effort to undermine his authority with co-workers and other employees of Cyprus, and you are desirous of having Mr. Grako terminated or transferred. While you are certainly free to register complaints about your supervisor directly to him or, pursuant to company policy, to the mine manager or others, you evidently have not been content with the response to complaints and have continued to disrupt the effective operations of the human resources department.

In an effort to preserve your employment, Cyprus attempted approximately two months ago to find another position for you within the company. That effort was unsuccessful, due largely to the unwillingness of other supervisors to accept you as an employee in their departments. Since that time, Cyprus has received further information that compels this decision to terminate rather than transfer your employment.

You are hereby advised that pursuant to company policy, you have the right to arbitrate this decision. A copy of the relevant portions of Cyprus' policy manual are attached hereto for your review.

Moreover, under the open door policy of Cyprus, you may respond to these allegations by contacting me or as otherwise indicated by company policy. I have also attached hereto a copy of the open door policy as it relates to this situation.

A separate notice will be provided to you regarding the treatment of benefits upon termination of employment. If you have any other questions or concerns, please contact me at your convenience.

Very truly yours,

/s/
Allen P. Childs
Vice President, General Manager

cc: Mr. Lou Grako
Mr. Don Eckstein
enclosures

Mr. Childs testified the termination notice was prepared in the corporate office in Denver. Mr. Childs agreed with it and signed it. The notice was prepared by Mr. Baron who heads the Human Relations department in the corporate office and Mr. Eckstein who went to the mine in question to do an evaluation and investigation of the allegations. (Tr. 457). On the basis of the evidence before me I find that none of Pero's complaints in anyway involved her own safety. Certainly in her original complaint filed with MSHA there is no mention of any safety concerns for herself or anyone else. It only suggests a strong desire to "blow the whistle" on her supervisor, Lou Grako, whom she disliked and described in her testimony as a "hatchet man" who made her and all the employees fear for their jobs. At the hearing Pero did make a self serving statement of her concern for the safety of men injured on the job coming to work to take advantage of the benefit of the so called "doctors day-off" practice and continuing to receive full pay for less than a full days of light or restricted work. On the record before me I am unable to credit the sincerity or reasonableness of her safety concerns. Nevertheless, I am assuming arguendo that Pero engaged in protected activity. I find that the preponderance of the evidence established that Pero was discharged for her unprotected activity alone. The reasons for her discharge stated in the Notice of Termination of Employment are not a pretext and are supported by the record.

In *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-2519 (November 1981), rev's on other grounds sub nom. the Commission stated:

> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. *Youngstown Mines Corp.*, 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views of "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, (1st Cir. 1979). ... . The question, however, is not whether such a justification comports with judge's or our sense of fairness or enlightened business practices. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that the operator to have disciplined the miner. Cf. R-W Service System Inc. 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

DISCUSSION AND CONCLUSION

The issue in this case is not whether the adverse action was just or wise or comported with my sense of fairness or enlightened business practice.

The record clearly demonstrates that the reasons given by the employer for the adverse action were not "plainly incredible or implausible." I conclude and find that the stated reasons for the adverse action taken by Cyprus were not pretextual.

While it is assumed for purposes of this decision that Pero engaged in protected activity, I find that Cyprus in terminating Pero's employment was motivated by Pero's unprotected activity and would have taken the adverse action in any event on the basis of Pero's unprotected activity alone. I therefore find that discharge of Pero was not in violation of Section 105(c) of the Act.

The record, as a whole, satisfactorily demonstrates a business justification for Ms. Pero's discharge.

CONCLUSION OF LAW

1. Cyprus did not violate Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c) in discharging Pero in September 1996.

2. Any protected activity that Ms. Pero engaged in did not in any part motivate her discharge.

3. Even if the discharge of Ms. Pero were motivated in any part by the fact that she engaged in protected activity, she would have been discharged for unprotected activity alone.

ORDER

This case is **DISMISSED**.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

L. Zane Gill, Esq., L. ZANE GILL, P.C., 1926 East 3900 South, Salt Lake City, UT 84124-3262 (Certified Mail)

Matthew F. McNulty, III, Esq., VAN COTT, BAGLEY, CORNWALL & McCARTHY, 50 South Main St., Suite 1600, Salt Lake City, UT 84145 (Certified Mail)

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