

## SEPTEMBER 1999

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## SEPTEMBER 1999

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

Secretary of Labor, MSHA, on behalf of Walter Jackson v. Mountain Top Trucking Company, et al., Docket No. KENT 95-613-D. [lead Docket No. is Kent 95-604-D] (Judge Feldman, August 18, 1999)

Review was denied in the following case during the month of September:

Louis W. Dykhoff, Jr. v. U.S. Borax Incorporated, Docket No. WEST 99-26-DM. (Judge Feldman, July 7, 1999)



COMMISSION DECISIONS AND ORDERS





for Stay of Judge's Decision Dissolving Order of Temporary Reinstatement." The Secretary submits that the judge's order dissolving the order of temporary reinstatement is legally invalid. Mot. at 5. She explains that the judge did not have authority under the Mine Act to issue such an order because there has not yet been a final determination by the Commission on the merits of Bernardyn's complaint. *Id.* at 5-8. Alternatively, the Secretary argues that, under criteria the Commission has established, a stay of the judge's order dissolving the order of temporary reinstatement pending the Commission's review of the underlying discrimination complaint is appropriate. *Id.* at 8-16.

On August 26, 1999, Reading filed an opposition to the Secretary's motion for relief from the judge's dissolution order. Reading asserts that, to the extent the Secretary's motion should be construed as the equivalent of a request for an order granting or denying temporary reinstatement, such a request is time-barred under Commission Procedural Rule 45(f). R. Reply at 2. Reading also submits that none of the Commission's criteria for evaluating stay requests supports the Secretary's motion to stay the judge's order dissolving the temporary reinstatement order. *Id.* at 7-8. The operator also argues that the result should not be harsher for Reading under the present circumstances than it would be when a temporary reinstatement order is dissolved pursuant to Commission Procedural Rule 45(g) due to the Secretary's decision not to proceed with a complaint. *Id.* at 5. Reading also filed an opposition to the Secretary's petition for discretionary review. R. Br. in Resp. to PDR. The Commission granted review of the judge's decision on August 27, 1999.

Section 113(d)(2)(A) specifies that review of a judge's decision may be obtained by filing a petition for discretionary review, which must set forth the issues being appealed. 30 U.S.C. § 823(d)(2)(A). We note at the outset that the Secretary's motion to vacate or stay the judge's dissolution order was filed on the same day as the petition for discretionary review of the judge's determination on the merits of the discrimination complaint. Furthermore, the motion makes explicit reference to the petition. Mot. at 4, 9. Thus, since the Secretary's motion challenges that portion of the judge's decision dissolving his temporary reinstatement order, we treat it as part of the Secretary's granted petition for discretionary review.<sup>1</sup> See *Walter Kuhl & Son*, 16 FMSHRC 1405 (July 1994) (construing motion filed by Secretary as petition for discretionary review). Accordingly, the issue of the dissolution of the temporary reinstatement order is properly before us. See *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998) (broadly construing petition for discretionary review), *aff'd in part on other grounds*, 170 F.3d 148 (2d Cir. 1998); *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 & n.4 (Sept. 1997) (same).

Regarding Reading's suggestion that the Secretary's challenge to the judge's dissolution order should be rejected as untimely under Commission Procedural Rule 45(f), 29 C.F.R.

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<sup>1</sup> The decision issued by the judge which is the subject of the Secretary's PDR affected both the temporary reinstatement previously granted by the judge in Docket No. PENN 99-129-D and the underlying discrimination issue in Docket No. PENN 99-158-D; effectively consolidating those dockets.

§ 2700.45(f),<sup>2</sup> we note that Rule 45(f) covers only Commission review of a judge’s initial grant or denial of a temporary reinstatement application. By contrast, in the instant matter, the temporary reinstatement application was already granted by order dated March 19. The issue presently before us is the Secretary’s challenge to the judge’s dissolution of his previously issued reinstatement order, a subject not covered by Rule 45(f). The current matter falls outside the scope of Rule 45(f), and we therefore reject Reading’s timeliness argument.

Section 105(c)(2) of the Mine Act states that, once it has been determined that an application for temporary reinstatement has not been frivolously brought, the Commission, “shall order the immediate reinstatement of the [complaining] miner *pending final order on the complaint.*” 30 U.S.C. § 815(c)(2) (emphasis added). Section 113(d)(1) of the Act states: “The decision of the administrative law judge . . . shall become the final decision of the Commission 40 days after its issuance *unless* within such period the Commission has directed that such decision shall be reviewed . . . .” 30 U.S.C. § 824(d)(1) (emphasis added). Therefore, the language of the Mine Act requires that a temporary reinstatement order remain in effect while the Commission reviews the judge’s decision.

In the instant matter, when the judge purportedly dissolved the temporary reinstatement order, the time had not yet passed for the Commission to review the judge’s decision on the merits of Bernardyn’s discrimination complaint. Accordingly, the judge’s decision had not yet become a final Commission decision. 30 U.S.C. § 824(d)(1). Thus, the judge lacked statutory authority to dissolve the temporary reinstatement order concurrently with his discrimination decision or at any time before we could direct review. Since we have granted the Secretary’s petition for review of the judge’s determination on the merits, the judge’s dismissal of the complaint will not become a final decision under section 113(d)(1) of the Act until we review and issue a decision upon that matter. Accordingly, the judge’s purported dissolution of the temporary reinstatement order is legally invalid.

We also find unpersuasive Reading’s suggestion that it would be inequitable to reinstate Bernardyn following the judge’s dissolution order, when Commission Procedural Rule 45(g), 29 C.F.R. § 2700.45(g)<sup>3</sup>, permits dissolution of a temporary reinstatement order upon the Secretary’s decision not to proceed on the complaint. Rule 45(g) provides for the judge’s dissolution of a temporary reinstatement order if the Secretary determines that no discrimination occurred. 29

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<sup>2</sup> Commission Procedural Rule 45(f) provides that “[r]eview by the Commission of a Judge’s written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition for review with supporting arguments within 5 days following receipt of the Judge’s written order.” 29 C.F.R. § 2700.45(f).

<sup>3</sup> Commission Procedural Rule 45(g) provides, in pertinent part: “If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement.” 29 C.F.R. § 2700.45(g).

C.F.R. § 2700.45(g). This is a “gap filling” provision designed to deal with a situation not addressed by the statute — the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c). In the instant matter, the Secretary determined that discrimination had occurred and filed a complaint on behalf of Bernardyn. Under these circumstances, the statutory language of section 105(c)(2), which provides for maintenance of the temporary reinstatement order pending final determination on the merits of the complaint, must be followed.<sup>4</sup>

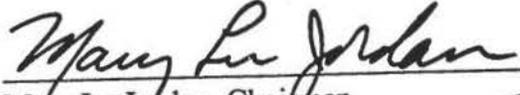
We find the facts and circumstances that led the Secretary to move for the dissolution or stay of the judge’s order unusual. Indeed, the issue of the propriety of such an order is one of first impression. Unlike an appeal of a temporary reinstatement order taken when the order is first issued, *see* 29 C.F.R. § 2700.45(f), at issue in this case is the ultimate fate of such a temporary reinstatement order at the close of proceedings before one of our judges. Although we dispose of this issue in our ruling today, we recognize that Bernardyn’s reinstatement imposes additional obligations on the parties. Therefore, we will order expedited briefing in this case according to the following schedule: the Secretary’s brief shall be filed no later than September 21, 1999. Reading’s response brief shall be filed no later than 25 days after service of the Secretary’s brief. The Secretary may file a reply brief within 5 days of service of Reading’s response brief. All briefs shall be filed and served by facsimile.<sup>5</sup>

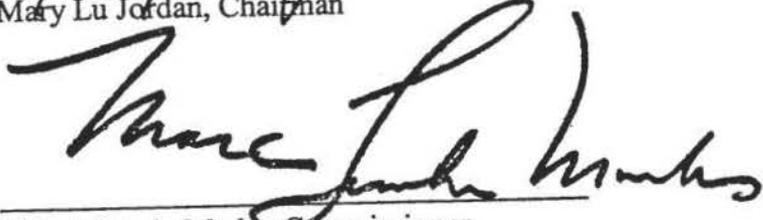
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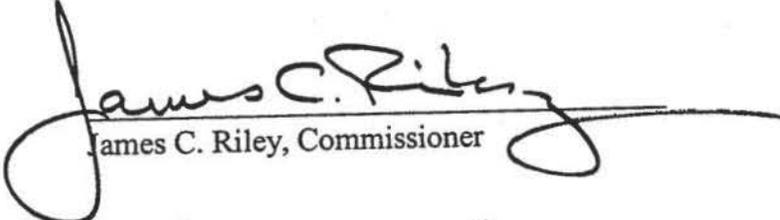
<sup>4</sup> In light of our disposition based on the statutory language of sections 105(c)(2) and 113(d)(1), we need not address the Secretary’s alternative argument requesting a stay of the judge’s order.

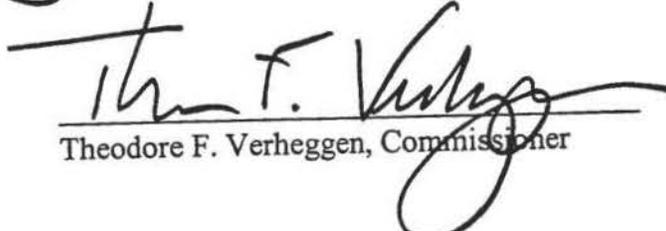
<sup>5</sup> Commissioner Beatty agrees in principle with his colleagues regarding the need to expedite briefing in this case. He would, however, expand this principle to direct expedited briefing on review of a judge’s decision on the merits before the Commission in all cases in which there is an underlying temporary reinstatement order. He also believes that the Commission should issue its ruling no later than 60 days after the close of briefing in such cases.

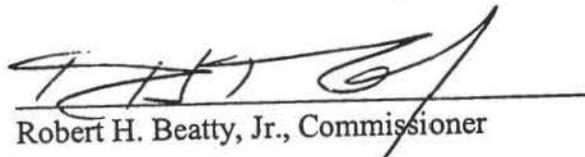
For the foregoing reasons, we vacate the judge's order dissolving his previously issued temporary reinstatement order of Bernardyn, and order the immediate temporary reinstatement of the complainant pending a final Commission decision on the complaint.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

  
Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 13, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of CLAY BAIER	:	
	:	
	:	
v.	:	WEST 97-96-DM
	:	
DURANGO GRAVEL	:	

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

DECISION

BY THE COMMISSION:

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”), Administrative Law Judge Richard W. Manning concluded that Durango Gravel (“Durango”) violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), when it terminated employee Clay Baier on August 1, 1996. 20 FMSHRC 59, 60, 71 (Jan. 1998) (ALJ). The Commission granted Durango’s petition for discretionary review challenging the judge’s determination. For the reasons that follow, we affirm the judge.

I.

Factual and Procedural Background

Durango owns and operates the J & J pit, a sand and gravel pit in La Plata County, Colorado. 20 FMSHRC at 59; Tr. 25. Durango is owned by James Helmericks and his family, and generally employs two individuals in addition to Helmericks. 20 FMSHRC at 59; Tr. 248. All Durango employees perform a variety of tasks, as directed by Helmericks. 20 FMSHRC at 60. The mine facility consists of a pit and a crusher. *Id.* at 59.

In April 1996, Baier began working for Durango as a truck driver. *Id.* at 60. Among other duties, Baier operated the loader and repaired equipment, including the crusher. *Id.* Also in April, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) received a

complaint from William Elvidge, a former employee at the J & J pit, concerning hazardous conditions at the mine, including the operator's alleged undercutting of the highwall by removing material from the "toe"<sup>1</sup> of the highwall. 20 FMSHRC at 60, 64.<sup>2</sup> On or about July 17, 1996, MSHA inspectors Royal Williams and George Renton inspected the mine in response to Elvidge's complaint. *Id.* at 60; Tr. 314. During the inspection, Baier informed Inspector Williams that he had been cutting into the toe of the highwall to get material. Tr. 19-20, 215. The inspectors talked with Helmericks and Baier about the dangers of mining the toe of the highwall. 20 FMSHRC at 60. Inspector Williams told Baier not to dig into the face of the highwall because the highwall could fail and seriously injure or kill him. *Id.* Williams also advised Baier that if rock was needed to feed the crusher, material should be pushed down from the top of the highwall and scooped up with the loader. *Id.*

The parties dispute the circumstances surrounding Baier's discharge. *Id.* Baier testified that, in the weeks between the mid-July inspection and the August 1 discharge, he pushed material down from the top of the highwall with the loader, but that Helmericks told him not to go on top of the highwall. *Id.*; Tr. 17. Baier added that, on the Monday before the termination, Helmericks observed him pushing material off the top of the highwall, and that Helmericks berated him for doing so. 20 FMSHRC at 60; Tr. 65. Baier testified that, on Thursday, August 1, he arrived at work at 7:00 a.m. 20 FMSHRC at 60; Tr. 70. He stated that he had started all of the equipment in preparation for operations, and that the crusher was not down for repairs. Tr. 38, 41-42. Baier said that Helmericks and his son ("Jim, Jr.") arrived soon after, and that Helmericks fired Baier immediately. 20 FMSHRC at 60. Baier testified that Helmericks then verbally berated him, but that Helmericks did not give him a reason for the termination. *Id.*; Tr. 23.

Helmericks, however, testified that he did not observe Baier on the highwall during the two weeks preceding the August 1 termination. Tr. 273. Helmericks testified that he told Baier that only Helmericks was permitted to push material from the top of the highwall. Tr. 264, 267. Helmericks also testified that, upon his arrival at the property on August 1, he assigned Baier and Jim, Jr. to repair the crusher, which was inoperative. 20 FMSHRC at 60. Helmericks stated that he left the property and traveled to Farmington, New Mexico, to get parts and that, upon his return at approximately 10:30 or 11:00 a.m., Baier was on the highwall pushing material down with the loader. *Id.*; Tr. 250. Helmericks testified that he terminated Baier for disobeying two

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<sup>1</sup> The "toe" is the bottom part of the highwall face, and does not include the loose fallen material deposited near the highwall. 20 FMSHRC at 67 & n.1 (judge distinguishing between digging at toe and scooping loose material); Tr. 16-17, 19, 166-67; *see also* American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 576 (2d ed. 1997) (defining "toe" as the "lowest part of a slope or cliff").

<sup>2</sup> In 1993, MSHA issued Durango an imminent danger order because an inspector observed an employee digging at the toe of a highwall with a loader. 20 FMSHRC 60; Ex. P-3.

direct orders: assist Jim, Jr. with the crusher repairs and refrain from pushing material down from the top of the highwall with the loader. 20 FMSHRC at 60-61.

On March 5, 1997, the Secretary of Labor filed a complaint with the Commission on Baier's behalf alleging that Baier's termination constituted discrimination under section 105(c) of the Mine Act.<sup>3</sup> Compl. at 1. On October 8, the matter proceeded to hearing before Judge Manning.

The judge found that Baier's conversation with MSHA inspectors and his refusal to dig into the toe of the highwall constituted protected activity. 20 FMSHRC at 62, 65. He concluded that the Secretary established her prima facie case of discrimination. *Id.* at 66. The judge found that Helmericks knew that Baier had discussed safety issues with an MSHA inspector, and that Helmericks disapproved of the fact that Baier raised these issues with the inspector. *Id.* The judge further found that Helmericks expressed animus towards MSHA in general. *Id.* The judge observed that the termination occurred two weeks after the July 1996 inspection. *Id.* The judge acknowledged that Baier's action of pushing material off the highwall was not protected but recognized that "it was related to the safety concerns Baier raised with Inspector Williams." *Id.* He found that Durango did not rebut the Secretary's prima facie case. *Id.* at 66, 71. The judge further concluded that Durango did not prove its affirmative defense, because it "did not establish that it would have terminated Baier for being on top of the highwall on August 1 if his activities did not spring from his safety complaints to MSHA." *Id.* at 69.

The judge subsequently issued a supplemental decision awarding Baier \$1,634 in back pay. 20 FMSHRC 268, 270, 272 (Mar. 1998) (ALJ). After considering the section 110(i) civil penalty criteria — particularly Durango's very small size and its ability to continue in business — the judge reduced the \$2,500 civil penalty proposed by the Secretary to \$100. *Id.* at 271-72.

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<sup>3</sup> Section 105(c)(2) provides, in pertinent part:

Any miner . . . who believes that he has been discharged . . . in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . 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 . . . .

30 U.S.C. § 815(c)(2).

## II.

### Disposition

Durango challenges the judge's conclusion that Baier's termination was motivated in part by his conversation with an MSHA inspector, and the reasoning upon which this conclusion is based. PDR at 1.<sup>4</sup> Durango argues that the period of time between Baier's conversations with MSHA and his termination is too long to establish a coincidence in time, especially considering the judge's finding that Helmericks was not the type of individual to wait to take adverse action against an employee. *Id.* Durango also denies having harbored any hostility towards MSHA prior to MSHA's investigation of Baier's complaint of discrimination. *Id.* at 1-2. Durango further contends that the judge erred in analyzing this case as one involving work refusal because Baier could not reasonably and in good faith have believed that he was required to dig into the toe of the highwall to get material on August 1. *Id.* at 2, 4. The operator asserts that Baier's insubordination on August 1 constitutes a legitimate reason for his termination. *Id.* at 3. Durango also maintains that, following prior incidents that led it to regard Baier's work record as unsatisfactory, his insubordinate action on August 1 constituted the "straw that broke the camel's back." *Id.*

The Secretary argues that substantial evidence supports the judge's finding that Baier's termination was motivated at least in part by his protected activities. S. Br. at 7-13, 20. She contends that the 11 business days which passed between the July 17 inspection and the August 1 termination provide the requisite temporal relationship to permit a reasonable inference of improper motivation through circumstantial evidence. *Id.* at 8. She also maintains that the record contains evidence supporting the judge's finding that Helmericks harbored hostility towards MSHA in general as well as towards Baier's protected activity, and that such hostility played a part in Helmericks' decision to terminate Baier. *Id.* at 8-12. The Secretary submits that the judge correctly found that Baier's refusal to dig into the highwall was protected and that his August 1 activity was closely related to his earlier refusals and his discussions with the inspector and Helmericks about his concerns regarding mining the toe of the highwall. *Id.* at 12-13. The Secretary asserts that none of the grounds given by Durango to support its assertion that it would have terminated Baier for his unprotected activities alone provides a basis for reversing the judge's finding that the operator failed to establish an affirmative defense. *Id.* at 13-17.<sup>5</sup>

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<sup>4</sup> Durango is represented on appeal, as it was below, by Helmericks. PDR at 5; 20 FMSHRC at 69. Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), Durango designated its PDR as its brief.

<sup>5</sup> The parties focus partly on whether the judge properly analyzed the case as one presenting a work refusal and whether he correctly determined that Baier's termination was discriminatory based on Baier's work refusal. PDR at 2, 4; S. Br. at 12-13. However, the judge found that the Secretary established a prima facie case of discrimination with respect to Baier's safety complaint without reference to his alleged work refusal, and determined that "Durango

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act. A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987).

#### A. Prima Facie Case

We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.* We also have held that an "operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case" and that "knowledge . . . can be proved by circumstantial evidence and reasonable inferences." *Id.*

The judge found that "Helmericks knew that Clay Baier had discussed safety issues with MSHA inspectors." 20 FMSHRC at 66. On review, Durango does not appear to dispute the judge's finding that Helmericks knew Baier's discussion with Inspector Williams was safety-related. PDR at 1. However, to the extent Durango's challenge to "the reasoning upon which the

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Gravel did not establish that it would have terminated Baier for being on top of the highwall on August 1 if his activities did not spring from his safety complaints to MSHA." 20 FMSHRC at 66, 69. Because the judge relied on Baier's complaint to MSHA as a factor motivating his termination, and because we find that substantial evidence supports the judge's conclusion that Durango violated section 105(c) based on his protected conversations with the MSHA inspector, we need not reach the work refusal issue.

[judge's] conclusion [that the Secretary established a prima facie case of discrimination] is based" (PDR at 1) can be construed to raise the issue of knowledge, we address it. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (pro se complainant's pleadings held to less stringent standards than pleadings drafted by attorneys). In finding that Helmericks knew of Baier's safety-related discussion with Inspector Williams, the judge implicitly rejected Helmericks' claim at the hearing that he did not understand this discussion to be safety-related. Tr. 320-22, 444. The judge's finding of knowledge is supported by Helmericks' knowledge that the discussion involved an MSHA safety inspector, that Inspector Williams suggested to Baier a method of mining the highwall, and that the discussion coincided with an MSHA inspection of the mine site. Tr. 212, 320-22. We see no reason to disturb the judge's implicit rejection of Helmericks' claim that he was unaware that Baier's discussion with Inspector Williams was safety-related. *See, e.g., Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (finding no circumstances warranting overturning judge's implicit credibility determinations). Accordingly, we find that substantial evidence<sup>6</sup> in the record supports the judge's finding that Helmericks knew that Baier's discussion with Inspector Williams related to safety.

We previously have found improper motivation where the complainant proved that the operator knew of the protected activities and that only a short period of time elapsed between the protected activity and the discharge. *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982 (June 1982). The Commission applies no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing whether an illegal motive can be inferred. *See Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Surrounding factors and circumstances may influence the effect to be given to such coincidence in time. *Id.* In *Chacon*, for example, complaints ranging from four days to one and one-half months before the adverse action were deemed sufficiently coincidental in time to establish illegal motive. *Chacon*, 3 FMSHRC at 2511. In *Donovan on behalf of Anderson v. Stafford Constr. Co.*, 732 F.2d 954 (D.C. Cir. 1984), the court, noting that two weeks had elapsed between the alleged protected activity and the miner's dismissal, held that "[t]he fact that the Company's adverse action against [the miner] so closely followed the protected activity is itself evidence of an illicit motive." *Id.* at 960.

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<sup>6</sup> When reviewing an administrative law judge's factual determinations, we are 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)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (citation omitted).

Helmericks' discharge of Baier occurred approximately two weeks after Baier's discussion with Inspector Williams. 20 FMSHRC at 60; Tr. 314. The proximity in time between these events supports the judge's finding of a discriminatory motive on the part of Helmericks. See *Donovan*, 732 F.2d at 960. Moreover, the close relationship between Baier's discussion with Inspector Williams, concerning a safe method of mining the highwall, and the action which prompted Baier's termination also supports the judge's finding of improper motive by Helmericks.<sup>7</sup> The judge's conclusion of unlawful motivation is further supported by evidence that none of Baier's alleged insubordinate or disrespectful unprotected activities occurring prior to his complaint to MSHA — including damaging a loader, taunting Helmericks in front of his wife, being rude to female customers, disobeying Helmericks by bringing his dog to work, and the destruction of equipment at the mine by Baier's dog (20 FMSHRC at 69-70; Tr. 134-35, 140, 160-62, 182, 246-47, 372) — resulted in any discipline for Baier.

Additionally, we note that the judge found that Helmericks was hostile towards MSHA in general, as well as Baier's conversation with Inspector Williams. 20 FMSHRC at 66. Substantial evidence in the record supports the judge's finding of hostility. Helmericks appears to have viewed MSHA's decision on July 17 to talk to Baier rather than his son as an unwelcome threat to his authority over the mine. *Id.* at 62, 69; Tr. 129-30, 360-63. Furthermore, Baier testified that Helmericks told him that MSHA inspectors "don't know what they are talking about" and that MSHA inspectors "give [him] a hard time and want [his] money." Tr. 17. Finally, Helmericks' hostility towards safety complaints is evidenced by Elvidge's testimony that, when he expressed to Helmericks his safety concerns and took photographs of what he considered dangerous conditions, Helmericks told him to "shut up and get off his property and if [Elvidge] ever came back [he] would be arrested." Tr. 169, 173. At the hearing, Helmericks expressed hostility towards Elvidge for taking these photographs. Tr. 323. Accordingly, we find that substantial evidence supports the judge's finding that Helmericks harbored animus towards Baier's safety-related conversation with MSHA.

In sum, based on the factors enunciated in *Chacon*, substantial evidence in the record supports the judge's conclusion that Baier's protected conversation with an MSHA inspector contributed to Durango's decision to terminate Baier's employment.

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<sup>7</sup> We are not persuaded by Durango's argument that the two-week period between MSHA's inspection and the termination is too long to establish a coincidence in time in light of the judge's finding that Helmericks was not the kind of person to wait to take adverse action against an employee. PDR at 1. The judge found that Baier's unprotected activity was closely intertwined with his protected discussion with MSHA during the inspection. 20 FMSHRC at 69. According to Helmericks' version of events, the day Helmericks terminated Baier was the first time Helmericks had observed Baier on the highwall since the MSHA inspection. Tr. 273, 319. Helmericks fired Baier immediately thereafter. 20 FMSHRC at 65. Accordingly, the two-week period between the inspection and the termination supports the judge's finding that the termination was motivated in part by the MSHA inspection, and is not inconsistent with his finding that Helmericks was "volatile." *Id.*

## B. Affirmative Defense

The raising of an affirmative defense necessitates an inquiry into whether the proffered business justification was reason “enough to have legitimately moved that operator to have disciplined the miner.” *Chacon*, 3 FMSHRC at 2517. We have explained that this affirmative defense should not be “examined superficially or be approved automatically once offered.” *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must “determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Id.* (citation omitted). In *Bradley*, 4 FMSHRC 982, we enunciated several indicia of non-discriminatory reasons for an employer’s adverse actions. *Id.* at 993. These include evidence of past discipline consistent with that meted out to the complainant, the miner’s unsatisfactory past work record, prior warnings to the miner, and personnel rules or practices forbidding the conduct in question. *Id.* We also have stated: “It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it.” *Pasula*, 2 FMSHRC at 2800.

The judge found that Durango had a personnel rule forbidding employees other than Helmericks from mining from the highwall. 20 FMSHRC at 65.<sup>8</sup> However, Helmericks did not discipline Baier following his prior violations of the highwall rule or warn him that any adverse action, let alone termination, would result from a violation of the highwall rule. Tr. 60, 63, 65-66, 273, 319. To the extent the operator argues that the violation of a work rule warrants immediate termination (PDR at 3-4), such an argument is inconsistent with Durango’s treatment of Baier following his previous violations of the highwall rule. While the judge made no findings related to Durango’s discipline of its employees, Durango’s treatment of Baier is inconsistent with nearly all the record evidence of its prior treatment of allegedly insubordinate employees.<sup>9</sup> Moreover, the

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<sup>8</sup> Although Durango introduced no evidence of any written work rules or personnel handbook of any kind, it is uncontroverted that, prior to August 1, Helmericks told Baier that no one but Helmericks was permitted to operate equipment on top of the highwall. 20 FMSHRC at 65; Tr. 60.

<sup>9</sup> The evidence presented by Durango regarding James Johnson and William Elvidge does not support a claim of consistent past discipline. In Durango’s answer to the complaint of discrimination, Helmericks stated that he “discharged” Johnson for refusing to accept a pay reduction after violating the no-smoking rule and for failing to complete repairs, but admits that Johnson walked off the job prior to the “discharge.” Ex. P-5 at 3. Furthermore, Durango’s admission that it did not terminate Johnson for his failure to obey an order to repair equipment or for his violation of a work rule undermines any claim of consistent past discipline. *Id.* In Durango’s answer to the complaint of discrimination, the operator also claimed that it terminated Elvidge for “not return[ing] to work as ordered because he had to ride home with James Johnson” on the day Johnson was terminated. *Id.* Not only is this asserted reason for the termination

scant record evidence of past discipline (Tr. 171, 378) claimed to be consistent with that meted out to the complainant involved the violation of a different work rule and therefore is insufficient to warrant a remand to the judge. *See Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2106 (Oct. 1993) (holding that judge's error in failing to comment on evidence was harmless where such evidence would not have altered judge's determination).

Durango alleges that Baier's prior unsatisfactory work record rendered his insubordination on August 1 the "straw that broke the camel's back" justifying his termination. PDR at 3. The judge made no findings regarding whether the alleged previous incidents occurred but, after considering the evidence, he found that "[u]ntil Baier raised safety concerns following MSHA's inspection, . . . none of the alleged insubordinate and disrespectful actions Helmericks refers to caused him to terminate Baier's employment with Durango Gravel." 20 FMSHRC at 70.

Durango's "straw that broke the camel's back" argument was presented before the judge and implicitly rejected. *Id.* at 69-70; *see Fort Scott*, 19 FMSHRC at 1516. The complete absence of prior warnings and discipline for Baier's alleged prior bad behavior supports the judge's finding that Durango failed to establish that the cumulative effect of Baier's prior work record rendered his unprotected activity on August 1 the fatal "straw." Contrary to Durango's suggestion, we do not read the judge's decision as an indication that he considered the alleged incidents of poor workplace behavior in isolation. Rather, his analysis reflects a reading of the entire record, and complies with Commission Procedural Rule 69(a), 29 C.F.R. § 700.69(a),<sup>10</sup> and Commission precedent. *See Bradley*, 4 FMSHRC at 993 (affirming judge's finding that operator failed to establish affirmative defense, despite the fact that operator presented "some reasonable arguments"). We find nothing in the record warranting reversal of the judge's rejection of Durango's argument. Accordingly, we find that substantial evidence supports the judge's conclusion that Durango failed to carry its burden of establishing that it would have terminated Baier's employment for unprotected reasons alone.

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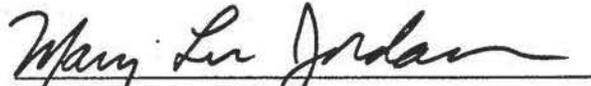
unrelated to insubordination, but, at the hearing, Helmericks equivocated and testified that he terminated Elvidge for violating Durango's no-smoking rule. Tr. 171, 378. We also note that Elvidge testified that he quit because of safety concerns. Tr. 168-70, 173, 193.

<sup>10</sup> Commission Procedural Rule 69(a) states, in pertinent part, that "[t]he [judge's] decision shall be in writing and shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a).

III.

Conclusion

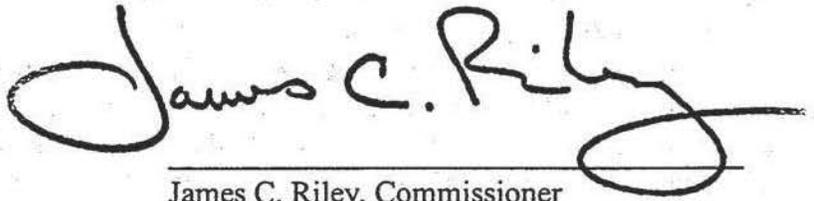
For the foregoing reasons, we affirm the judge's finding that Durango Gravel's termination of Baier violated section 105(c) of the Mine Act.



Mary Lu Jordan, Chairman



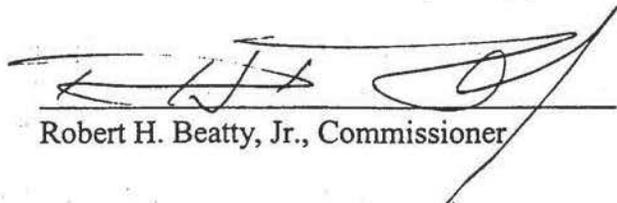
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James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 21, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. CENT 97-164-R
	:	CENT 97-165-R
ASSOCIATED ELECTRIC	:	
COOPERATIVE, INC.	:	

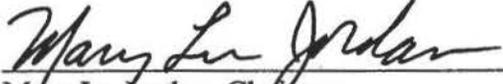
BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

Pending before the Commission is a joint motion filed by Associated Electric Cooperative, Inc. ("Associated Electric") and the Department of Labor's Mine Safety and Health Administration ("MSHA") to dismiss as moot the petition for discretionary review filed in this matter. The parties argue that the petition is moot because, on August 30, 1999, MSHA issued a notice vacating the citation and order at issue in the case. *Jt. Mot.* at 1. The parties explain that MSHA issued the notice because, in *Herman v. Associated Electric Cooperative, Inc.*, 172 F.3d 1078 (8th Cir. 1999), the United States Court of Appeals for the Eighth Circuit determined that the area which is the subject of the citation and order in question in this case is not a "mine" within the meaning of section 3(h)(i) of the Mine Act, 30 U.S.C. § 802(h)(i). *Id.* The parties further state that the Secretary does not intend to appeal the decision of the Eighth Circuit. *Id.* at 1-2. The Secretary and Associated Electric specify that each party will bear its own costs, fees, and expenses in this case before the Commission. *Id.* at 2.

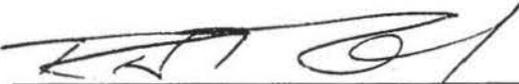
Upon consideration of the joint motion by the Secretary and Associated Electric for voluntary dismissal, we grant the parties' motion. Accordingly, the Commission's direction for review in this matter is vacated and Associated Electric's appeal is dismissed.

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

  
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Marc Lincoln Marks, Commissioner

  
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James C. Riley, Commissioner

  
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Theodore F. Verheggen, Commissioner

  
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Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 24, 1999

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
on behalf of LONNIE BOWLING, :  
EVERETT DARRELL BALL, :  
and WALTER JACKSON :

v. :

Docket Nos. KENT 95-604-D  
KENT 95-605-D  
KENT 95-613-D

MOUNTAIN TOP TRUCKING :  
COMPANY, INC., ELMO MAYES, :  
WILLIAM DAVID RILEY, ANTHONY :  
CURTIS MAYES, and MAYES :  
TRUCKING COMPANY, INC. :

ORDER

On August 18, 1999, Administrative Law Judge Jerold Feldman issued his decision on remand in this matter. In his decision, he ordered the respondents, Mountain Top Trucking Company, Inc., Elmo Mayes, William David Riley, Anthony Curtis Mayes, and Mayes Trucking Company, Inc. (collectively referred to as "Mountain Top"), to pay back wages to the complainants, Walter Jackson, Lonnie Bowling, and Everett Darrell Ball. 21 FMSHRC \_\_\_, slip op. at 6-7, Nos. KENT 95-604-D, et al. (Aug. 18, 1999).

On August 30, 1999, Mountain Top filed a pleading titled "Motion for Relief from the Final 'Order of Decision on Remand' Issued by the Administrative Law Judge in this Action on August 18, 1999." The motion seeks relief from the award of backpay to Jackson in Docket No. KENT 95-613-D. We construe this motion for relief as a timely filed petition for discretionary review ("PDR"). Mountain Top also filed a separate PDR on September 17, 1999. This PDR challenges the finding in Docket Nos. KENT 95-604-D and KENT 95-605-D that Mountain Top unlawfully discriminated against Bowling and Ball. The Secretary of Labor and the complainants filed responses in opposition to both submissions and the Secretary moved to sever the Jackson docket. The Commission today has granted the August 30 PDR involving Jackson's backpay, and denied the September 17 PDR involving discrimination claims of Bowling and Ball.<sup>1</sup>

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<sup>1</sup> This PDR also requested review of aspects of the judge's decision involving Jackson's claims. Review of these claims was also denied.

The claims of Bowling and Ball have been fully tried, and the Commission has ruled that Bowling and Ball were constructively discharged. 21 FMSHRC 265 (Mar. 1999). The judge's August 18, 1999 decision on remand sets forth the amount of backpay owed these two complainants. We have declined to review that decision. The effect of our denial of the September 17 PDR is a final adjudication of Bowling's and Ball's claims of discrimination before the Commission. Accordingly, nothing remains to be litigated before the Commission between Mountain Top and Bowling and Ball. On the other hand, pursuant to our direction for review in Docket No. KENT 95-613-D, no final determination in the Jackson case has been achieved. Thus, the claims between some but not all of the parties have been finally resolved.

The Commission has applied Rule 54(b) of the Federal Rules of Civil Procedure to adjudications such as this one, involving multiple parties.<sup>2</sup> See, e.g., *Emery Mining Corp.*, 11 FMSHRC 1, 2 (Jan. 1989). Rule 54(b) states in part:

Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

We conclude that there is no just reason for delay in entering a final judgment with respect to Bowling and Ball. The decided issues in this case (the liability of Mountain Top for discrimination against Bowling and Ball, and damages owed to them) bear no significant factual relationship to the remaining claim (backpay owed to Jackson). See *Fitigues, Inc. v. Varat Enters., Inc.*, 813 F.Supp. 1336, 1338-39 (N.D. Ill. 1992) (granting motion for entry of final judgement under Rule 54(b) where there was little factual overlap between the issues). Even Jackson's underlying liability claim is factually distinct from those of Bowling and Ball, as the judge recognized.<sup>3</sup> In addition, providing timely and complete relief to miners who are the victims of discrimination is a central goal of the Mine Act. See, e.g. 30 U.S.C. § 815(c)(2) ("Proceedings under this section shall be expedited by the Secretary and the Commission"); *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2049 (Dec. 1983) ("[T]he full measure of relief should be granted to [an improperly] discharged employee") (citations omitted).

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<sup>2</sup> Rule 1(b) of the Commission's Procedural Rules provides that the Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules. 29 C.F.R. § 2700.1(b).

<sup>3</sup> The judge noted that "[t]he the discrimination complaints of Bowling and Ball are factually similar and involve contemporaneous events. The alleged discrimination suffered by Jackson occurred at a different time and involves circumstances and issues that are distinguishable from the Bowling and Ball cases." 19 FMSHRC 166, 169 (Jan. 1997) (ALJ).

The acts of discrimination against Bowling and Ball occurred in March 1995. 21 FMSHRC at 271, 281. Litigation has been ongoing since July 1995, when the Secretary filed her complaint. Given that the Commission has ruled that Bowling and Ball are entitled to backpay, it would contravene the goals of the Mine Act to further delay provision of that relief to them in this matter. In sum, we determine that there is no just reason for delay.

For the foregoing reasons, we direct entry of final judgement under Rule 54(b) in favor of Bowling and Ball in Docket Nos. KENT 95-604-D and KENT 95-605-D, and we grant the Secretary's motion to sever Docket No. KENT 95-613-D.



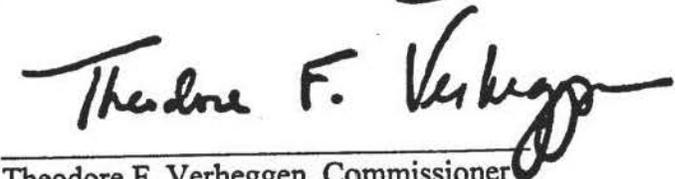
Mary Lu Jordan, Chairman



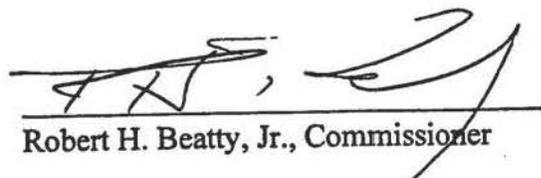
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James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. SE 99-220
	:	A.C. No. 01-03002-03515
WARRIOR INVESTMENT CO., INC.	:	

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

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

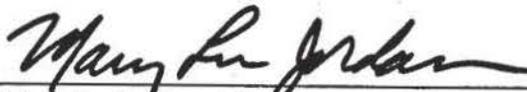
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On July 12, 1999, the Commission received from Warrior Investment a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of 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 Warrior Investment.

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).

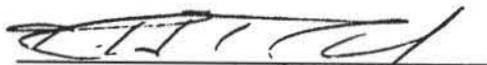
In its request, Warrior Investment asserts that it did not receive a copy of the original proposed penalty assessment. Mot. Warrior Investment states that it was first informed of the proposed penalty on June 28, 1999, when the Department of Labor’s Mine Safety and Health Administration (“MSHA”) informed it that the payment of the penalty assessment in the amount of \$12,166 was past due. *Id.* It is unclear from the record why service upon Warrior Investment was unsuccessful, and why the operator did not receive the proposed penalty assessment. Warrior Investment requests the Commission to reopen this matter.

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., Harvey Trucking*, 21 FMSHRC 567 (June 1999) (remanding where two notices sent to operator at its address were returned undeliverable to MSHA and operator claimed that it never received notice of the proposed penalty assessment); *Gary Klinefelter*, 19 FMSHRC 827, 828 (May 1997) (remanding for determination of whether relief from final order warranted where unclear why subject of section 110(c) investigation did not receive proposed penalty); *Waste Coal Management, Inc.*, 14 FMSHRC 423, 423-24 (Mar. 1992) (remanding where default order sent by certified mail may not have been received by operator). We have also 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 have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Warrior Investment's position.<sup>1</sup> In the interest of justice, we remand the matter for assignment to a judge to determine whether Warrior Investment 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

  
James C. Riley, Commissioner

  
Robert H. Beatty, Jr., Commissioner

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<sup>1</sup> Unlike our dissenting colleagues (slip op. at 4), we find this case to be distinguishable from *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998). See *Harvey Trucking*, 21 FMSHRC 567, 569 n.1 (June 1999) (distinguishing *Roger Richardson*). In *Richardson*, the Commission concluded that an individual did not "receive" the Secretary's penalty proposal within the meaning of section 105(a) of the Act under circumstances in which the penalty proposal was sent to Richardson's former address and Richardson was not required to inform the Department of Labor, Mine Safety and Health Administration ("MSHA"), of his change of address under 30 C.F.R. § 41.12. *Id.* at 1260. In contrast, Warrior Investment is required to inform MSHA of any change of address under section 41.12. The Commission has previously denied an operator's request to reopen a final order where the operator failed in that responsibility. *Pit*, 16 FMSHRC 2033, 2034 (Oct. 1994). Here, we are unable to evaluate from the record whether Warrior Investment maintained its correct address with MSHA or whether MSHA mailed the Secretary's penalty proposal to the address submitted by Warrior Investment pursuant to section 41.12.

Commissioners Marks and Verheggen, dissenting:

Warrior Investment Co. has alleged that it “did not receive a copy of the original assessment for the violations.” Motion at 1. The Secretary has not disputed any of the facts set forth in Warrior Investment’s motion, and, in fact, does not oppose the motion.

We conclude that Warrior Investment did not “receive” the Secretary’s penalty proposal within the meaning of section 105(a) of the Mine Act and the Commission’s Procedural Rules before he received the final order. *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998). Under these circumstances, remanding this matter to the judge for considering whether Warrior Investment has met the criteria for relief under Rule 60(b) is not necessary. We would reopen the matter, and remand it for assignment to a judge so that the case could proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R., Part 2700.



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Marc Lincoln Marks, Commissioner



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Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 1999

LOUIS W. DYKHOFF, JR., :  
 :  
 v. : Docket No. WEST 99-26-DM  
 :  
 U.S. BORAX INCORPORATED :

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

ORDER

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

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 16, 1999, the Commission's Office of Administrative Law Judges received from Louis W. Dykhoff, Jr. a petition for discretionary review of a decision issued by Administrative Law Judge Jerold Feldman on July 7, 1999. In his decision, Judge Feldman dismissed a discrimination complaint brought by Dykhoff under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). 21 FMSHRC 791 (July 1999) (ALJ). Dykhoff's petition was forwarded and received by the Commission's Docket Office on August 17.

The judge's jurisdiction over these cases terminated when his decision was issued on July 7, 1999. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Dykhoff's petition was received by the Commission's Office of Administrative Law Judge's on the fortieth day, August 16, past the 30-day deadline. Because the Commission did not sua sponte direct review of the case, Judge Feldman's decision became a final order of the Commission.

The Commission has entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g., De Atley Co.*, 18 FMSHRC 491, 492 (Apr. 1996) (excusing late filing of petition for discretionary review where operator's predecessor failed to inform operator of unconsummated settlement agreement). Typically, in such cases, a default order has been entered against a party, depriving the party of any opportunity to defend against the enforcement action taken by the Secretary. Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable

neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply “so far as practicable” in the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *see Green Coal Co.*, 18 FMSHRC 1594, 1595 (Sept. 1996).

Here, Dykhoff has availed himself of the opportunity to bring his case before a judge. Dykhoff offers no explanation for his failure to timely submit a petition for discretionary review.<sup>1</sup> Thus, Dykhoff has failed to set forth grounds establishing that Fed. R. Civ. P. 60(b) relief is appropriate. *See Knock’s Building Supplies*, 21 FMSHRC 483, 484 (May 1999) (denying motion to reopen when no explanation for late filing of petition for discretionary review offered); *Jim Walter Resources, Inc.*, 9 FMSHRC 388 (March 1987) (dismissing petition for discretionary review where no explanation for late filing offered).

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<sup>1</sup> We are unwilling to speculate that Dykhoff “appears to have thought that he had 40, not 30, days in which to file his petition for discretionary review.” Slip op. at 4. Dykhoff attached to his petition for discretionary review a copy of section 113(d)(2) of the Mine Act, 30 U.S.C. § 823(d)(2), which sets forth the 30-day deadline for filing a petition for discretionary review. We also note that Dykhoff was represented by counsel at one point in these proceedings. 21 FMSHRC at 791 (noting “Neil M. Herring, Esq., on the brief . . . for the Complainant”). Under these circumstances, and because no possibility of default exists, we conclude that the Commission need not invite Dykhoff to provide an explanation for the late-filing.

For the foregoing reasons, Dykhoff's petition for discretionary review is denied as untimely filed.

  
Mary Lu Jordan, Chairman

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

Commissioners Marks and Beatty, dissenting:

Commissioners Marks and Beatty dissent from the majority's order dismissing Dykhoff's petition for discretionary review on timeliness grounds. Dykhoff is an unrepresented, pro se miner who appears to have thought that he had 40, not 30, days in which to file his petition for discretionary review. Because Dykhoff was apparently not aware that his petition was untimely, he did not submit a separate motion for permission to excuse the late filing or provide any explanation of the circumstances surrounding the filing of his petition.<sup>2</sup> Under these circumstances, we would issue an order directing Dykhoff to provide a justification for his late filing, and allowing the parties an opportunity to address whether this case should be reopened. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (affording parties opportunity to address whether petition for discretionary review was timely filed and whether case should be reopened where petition was filed two days late and not treated as a PDR by Commission's docket office).



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Marc Lincoln Marks, Commissioner



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Robert H. Beatty, Jr., Commissioner

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<sup>2</sup> The majority's approach has a serious impact on this pro se miner. *Compare Boone v. Rebel Coal Co.*, 4 FMSHRC 1232 (July 1982) (proceeding opened when counsel for operator delayed filing petition nearly four months). It is clear that Dykhoff is not represented at this stage of the proceedings. Accordingly, we believe that he should at least be afforded the opportunity to explain the reason for his minimal delay. *See* 29 C.F.R. § 2700.1(c); Commission Procedural Rule 1(c) ("These Rules shall be construed to . . . encourage the participation of miners.").

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 1999

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

v. :

Docket No. CENT 99-329-M

EAST ARKANSAS CONTRACTORS, INC. :

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

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 7, 1999, the Commission received from East Arkansas Contractors, Inc. ("EAC") 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). The Secretary of Labor does not oppose the motion for relief filed by EAC.

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 the request, James Norman, president of EAC, asserts that EAC's failure to file a hearing request to contest the proposed penalty assessment was due to a change in personnel, resulting in mishandling of the notice of proposed penalty assessment. Mot. at 1. Norman submits that after EAC received the notice on July 10, 1999, it gave the notice to a technician from Environmental Data Services, a company which handles such matters for EAC. *Id.* Norman explains that the technician was terminated a few days later, and that EAC never recovered the original notice of proposed penalty assessment. *Id.* Norman further states that he called Harry Verdier, presumably, an MSHA official, explained the mishandling of the document to him, and was advised to request "proper documents" from the Civil Penalties Office with the Department

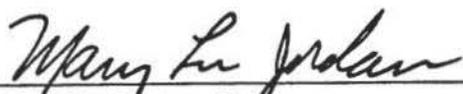
of Labor's Mine Safety and Health Administration ("MSHA"). *Id.* He claims he sent such a request to MSHA via facsimile on August 19, mailing a hard copy by registered mail.<sup>1</sup> *Id.* Norman requests that EAC be permitted to contest the violations in this case.

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). *Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *see also Rocky Hollow Coal Co., Inc.*, 16 FMSHRC 1931, 1932 (September 1994) (remanding to an administrative law judge where counsel for operator failed to timely submit notice of contest due to his misplacement of the file). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Del Rio, Inc.*, 19 FMSHRC 467, 467-68 (March 1997) (remanding for judge's consideration of operator's request to reopen penalty assessment after green card was misfiled in accounts payable file); *Eastern Associated Coal Corp.*, 19 FMSHRC 494, 494-95 (March 1997) (remanding operator's request to reopen final order when substitute mailroom employee failed to refer proposed assessment to legal department); *RB Coal Co., Inc.*, 17 FMSHRC 1110, 1110-11 (July 1995) (remanding for judge's consideration of operator's request to reopen penalty assessment after green card was misplaced among other penalty assessments that operator intended to pay).

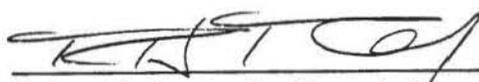
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<sup>1</sup> Although Norman states that he enclosed a copy of his August 19 request to MSHA, no such copy was included with EAC's request to reopen.

On the basis of the present record, we are unable to evaluate the merits of EAC's position.<sup>2</sup> In the interest of justice, we remand the matter for assignment to a judge to determine whether EAC 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.

  
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Mary Lu Jordan, Chairman

  
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James C. Riley, Commissioner

  
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Robert H. Beatty, Jr., Commissioner

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<sup>2</sup> In view of the fact that the Secretary does not oppose EAC's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of DONALD E. ZECCO	:	
	:	
	:	
v.	:	Docket No. WEVA 97-82-D
	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners<sup>1</sup>

DECISION

BY: Jordan, Chairman; Riley and Verheggen, 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”), Administrative Law Judge Gary Melick determined that Consolidation Coal Company (“Consol”) did not violate section 105(c) of the Act,<sup>2</sup> 30 U.S.C. § 815(c), when it reassigned Donald Zecco from a production section where he operated a continuous miner to a construction project where he did general inside laborer duties. 20 FMSHRC 497 (May 1998) (ALJ). The Commission granted the Secretary of Labor’s petition for discretionary review filed on behalf of Zecco challenging the judge’s decision. For the reasons that follow, we affirm the judge in result.

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<sup>1</sup> Commissioner Beatty recused himself in this matter and took no part in its consideration.

<sup>2</sup> Section 105(c)(1) provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners . . . because of the exercise by such miner, [or] representative of miners . . . of any statutory right afforded by this Act.

## I.

### Factual and Procedural Background

Zecco worked for Consol at its Robinson Run No. 95 Mine in Marion County, West Virginia, and had 15 years experience as a continuous miner operator. 20 FMSHRC at 498; Tr. 26; Am. Compl. at 2. In October 1995, he was assigned as a continuous miner operator to the midnight shift on the 6D section. 20 FMSHRC at 498. The mining conditions on the 6D section were unfavorable due to high levels of methane, sulfur in the coal seam, water, and roof problems. *Id.* The methane level was so high that the 1 percent warning light on Zecco's continuous miner came on almost every time he started cutting coal. *Id.*; Tr. 33. When this occurred, he was required by 30 C.F.R. § 75.323(b)<sup>3</sup> to deenergize the miner and check the methane level until it fell below 1 percent. 20 FMSHRC at 498. The sulfur in the seam caused sparks to fly off the barrel of the continuous miner, damaging cutting bits and, at times, causing a ring of fire at the head of the miner. *Id.*

According to Zecco, the combination of high methane levels, sparks caused by the sulfur, and dusty conditions created a serious risk of an explosion. *Id.*; Tr. 34-35. From October to mid-December 1995, he and his crew took additional safety measures to reduce the risk, including testing for methane with a handheld monitor more frequently than required by Department of Labor Mine Safety and Health Administration ("MSHA") safety standards (*see* 30 C.F.R. § 75.362(d)(1)(iii)); doing frequent ventilation tubing checks; hanging additional ventilation curtain to improve the air at the face; stopping to rock dust more frequently than required by MSHA safety standards (*see* 30 C.F.R. § 75.402); and washing down the continuous miner to minimize float coal dust. 20 FMSHRC at 498; Tr. 35-37, 599.

Zecco claimed that these additional safety precautions, and the maintenance delays caused by sulfur damage to the bits, slowed down the mining cycle. 20 FMSHRC at 498. The three shifts on the 6D section produced an average of 46.3 feet per shift in October 1995, while the 7D and 8D sections produced an average of 72.4 and 69.4 feet per shift, respectively. *Id.* at 498-99. During October through December 1995, Zecco's midnight shift on the 6D section produced an average of from 3.4 to 10 feet less per shift than the day or afternoon shifts working in the same location and using the same equipment. *Id.* at 499; Poland Tr. 39, 122; Tr. 354.

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<sup>3</sup> Section 75.323(b) provides in pertinent part:

(b) *Working places and intake air courses.* (1) When 1.0 percent or more methane is present in a working place . . . electrically powered equipment in the affected area shall be deenergized, and other mechanized equipment shall be shut off . . . [and n]o other work shall be permitted in the affected area until the methane concentration is less than 1.0 percent.

In early October 1995, Zecco checked the auxiliary fan in the 6D section because he believed it was not pulling enough air into the section. 20 FMSHRC at 499. He found that it was rated at 40 horsepower, whereas the other sections had 50 horsepower fans. *Id.* Zecco complained 10 to 12 times to mine management, including to assistant mine superintendent Rodney Poland, about the inadequate fan as well as methane and sulfur conditions on the 6D section. *Id.* at 499-500; Tr. 66.<sup>4</sup> In mid-November, he told Poland that, as required by law, he would not run the continuous miner when the methane warning light was activated. 20 FMSHRC at 499.

In mid-December, there was a major workforce reduction and “realignment” at the mine due to the completion of a conveyor belt haulage system. *Id.* at 501. From a total of 450 miners, 75 were laid off and approximately 125 were reassigned to different shifts, portal assignments, and job classifications. *Id.* The portal assignment of many miners was changed from the Oakdale Portal to the Robinson Run Portal or vice versa. *Id.* Around this time, a construction project (the “seal construction project”) was started to seal off parts of the mine. *Id.*

At the same time, Consol decided to set up a longwall in the 6D section and needed to maximize mining progress in the section in order to begin installing the longwall on schedule. *Id.* at 502. Poland also wanted to improve production on the midnight shift on the 6D section. *Id.* At the time, Zecco, Rick Garcia, Jennings O’Dell, and John Belcastro were the continuous miner operators on the midnight shift at the mine. Poland Tr. 55. According to Poland, Garcia was an excellent continuous miner operator and he decided to replace Zecco and his crew on the midnight shift in the 6D section with Garcia and his crew in order to improve production. 20 FMSHRC at 502; Poland Tr. 67-68.

In December 1995, the mine was using two kinds of continuous miners at the Oakdale Portal: 12CM miners in the 6D section and 14CM satellite miners in the 7D and 8D sections. 20 FMSHRC at 502; Poland Tr. 39-40. The satellite miners were larger and harder to operate than the 12 CM miners, and it was difficult to move them between sections. 20 FMSHRC at 502. O’Dell, considered to be the best available satellite miner operator, was retained as the 7D section satellite miner operator. *Id.*; Tr. 602. Belcastro was reassigned from the Robinson Run Portal to the Oakdale Portal as the 8D section satellite miner operator because, according to Consol, he was a better satellite miner operator than Zecco. 20 FMSHRC at 500, 502. Zecco was reassigned to the seal construction project at the Robinson Run Portal as a continuous miner operator. *Id.* at 500.

Belcastro was the least senior and Zecco was the most senior continuous miner operator on the midnight shift. *Id.* On December 16, Zecco protested his reassignment to Poland. *Id.*

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<sup>4</sup> The fan was upgraded to 50 horsepower in January 1996, after Zecco had been transferred off the section, and 70 horsepower fans were later installed on all the sections. 20 FMSHRC at 500.

When his reassignment was not canceled, Zecco filed a grievance pursuant to Article 23(c) of the National Bituminous Coal Wage Agreement of 1993 (the "Contract"). 20 FMSHRC at 500, 502. Zecco claimed that he was being improperly reassigned because he had a seniority right under the Contract to remain as a continuous miner operator on an active production section. *Id.*; Tr. 105, 116, 128-29. After Zecco filed his grievance, Poland told him that he was reassigned because of his low productivity. Tr. 103-04.

Although Zecco was transferred to the Robinson Run Portal as a continuous miner operator, he did not operate a miner during his time there. 20 FMSHRC at 500-01; Tr. 129. Instead, he performed general inside laborer duties, including building cribs, shoveling belt spillage, carrying belt structure, dragging and setting posts, shoveling snow out of the mine entrance, and pumping water out of the seals. 20 FMSHRC at 500; Tr. 129-32. Zecco described this work as "a lot more physical" than his work at the Oakdale Portal and testified that it sometimes required bending and walking under low top for up to four miles, crawling and working in areas under two feet high, and working while standing in water. Tr. 129-32.

On January 11, 1996, Zecco filed the instant discrimination complaint with MSHA, claiming that he was reassigned to the Robinson Run Portal because he made protected safety complaints to Consol and because he shut down his continuous miner when the methane warning light was activated. 20 FMSHRC at 503; Am. Compl., Attach. A. In February 1996, when Consol realized it lacked enough miners at the Oakdale Portal to move the longwall to the 6D section, it transferred the seal construction project crews, including Zecco and his continuous miner crew, back to the Oakdale Portal to help with the move. 20 FMSHRC at 503; Poland Tr. 44. From February 20, 1996, when he returned to the Oakdale Portal, until October 1996, Zecco worked as a floater, substituting for other continuous miner operators, building cribs, helping with the longwall move, and operating other mining equipment. 20 FMSHRC at 501; Tr. 133. Zecco's grievance was resolved in October 1996 when he was assigned full-time to a continuous miner and was paid for 75 hours of overtime lost as a result of not working exclusively on continuous miners. 20 FMSHRC at 501. Zecco's discrimination claim subsequently proceeded to hearing before Judge Melick.

The judge found that Consol did not discriminate against Zecco in violation of section 105(c) of the Mine Act. *Id.* at 507. Although he found that Consol knew about Zecco's protected safety complaints and assumed that adverse action (the transfer to the seal construction project) had occurred, *id.* at 503-04, he found that the Secretary had failed to show that the adverse action was motivated in any part by Zecco's protected activity. *Id.* at 504. The judge held that no inference of improper motive could be drawn because there was a rational, objective, non-protected business rationale for Zecco's transfer (his crew's low productivity and his inadequate operation of the satellite miner). *Id.* at 506. He also determined that Zecco did not suffer disparate treatment when he was transferred because Consol planned to use him as a continuous miner operator on the seal construction project and because other continuous miner operators were also transferred to the project. *Id.* Alternatively, the judge found that, even if Consol was motivated in part by Zecco's protected activity, Consol could have defended

affirmatively because it would have transferred Zecco based solely on his unprotected activity (his lower production and inadequate operation of the satellite miner). 20 FMSHRC at 507.

## II.

### Disposition

The Secretary argues that the judge erred in holding that Consol proved that it relied on rational, objective business reasons for Zecco's transfer. S. Br. at 32-34. She contends that the judge's finding that Zecco was a less capable satellite miner operator than Belcastro is not supported by substantial evidence. *Id.* at 33-38. She also argues that, because Zecco's lower production resulted directly from his protected safety measures, the judge should not have viewed Zecco's lower production as an objective business reason for the reassignment. *Id.* at 32-33.

Consol claims that substantial evidence supports the judge's finding that Zecco was not transferred in retaliation for his protected activities. C. Resp. Br. at 18-23. It argues that he was transferred because he was less able to operate the satellite miner than Belcastro, and because his crew had the lowest productivity of the three shifts on the 6D section. *Id.* at 23-26.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

It is undisputed that Zecco engaged in protected activity and that the transfer to the seal construction project subjected Zecco to more physically demanding work which was performed under harsher conditions. Assuming this transfer constituted adverse action sufficient to prevail

under section 105(c),<sup>5</sup> the only issue raised in this case is whether Zecco's transfer was motivated in any part by his protected activity, or whether instead it was due to legitimate business reasons. The judge found that the transfer was not motivated by Zecco's protected activity because his complaints were not the kind to typically elicit hostility and retaliation from management. 20 FMSHRC at 505. The judge also noted that Consol replaced the 40 horsepower fan with a 50 horsepower fan after Zecco was transferred, and subsequently replaced all the 50 horsepower fans with 70 horsepower fans. *Id.* In addition, he took into account the fact that other miners complained about the fan and suffered no adverse action. *Id.* at 505-06. The judge also concluded that "even assuming, *arguendo*, that Zecco's transfer was motivated in part by his protected activity, . . . Consol would nevertheless have successfully defended affirmatively by proving that it would have transferred Zecco in any event, based on his unprotected activity (lower productivity and inadequacy in operating the satellite miner) alone." *Id.* at 507. Although we agree with the Secretary that the judge should have considered whether Consol's productivity defense was intertwined with Zecco's protected activity, our review of the entire record leads us to agree with the judge that there was no illegal motivation, and to affirm the judge's decision in result.

A. Zecco's relative lack of skill on the satellite miner

In reviewing the Secretary's claim of illegal motivation, we turn first to her assertion that substantial evidence does not support the judge's finding that Consol transferred Zecco in part for the legitimate, non-discriminatory business reason that he was a less able satellite miner operator than Belcastro.<sup>6</sup> Although several miners testified that Zecco was a very good satellite miner

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<sup>5</sup> Adverse action "is not simply any operator action that a miner does not like." *Secretary of Labor on behalf of Price & Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1533 (Aug. 1990). The judge did not directly discuss adverse action but implied in his decision that Zecco's transfer to the seal construction project met that element of the Secretary's case. *See* 20 FMSHRC at 503-04. In addition, Consol did not dispute that Zecco's transfer constituted adverse action.

<sup>6</sup> The judge correctly declined to address the issue of whether the Contract precluded Consol from reassigning Zecco, despite his seniority, to the seal construction project because he was less experienced with the satellite miner than Belcastro. 20 FMSHRC 503 n.4. We have held that "[t]he Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Even if the Secretary could demonstrate that Consol violated the Contract when it transferred Zecco, that in itself would not show that it discriminated against Zecco because Consol may apply the same contractual interpretation to all similar miner transfers. Indeed, as the judge noted, Consol claims to have a general right under

operator or at least as good as Belcastro (Tr. 431-32, 480-81, 569, 906-07), the judge accepted Poland's testimony that "the general consensus of mine management [was] that Zecco had struggled with the satellite miner and Belcastro had performed well on the satellite miner." 20 FMSHRC at 502. The judge also noted that "Zecco's own witness, Albert Titus, recognized that Zecco was not as good at running the satellite miner as" Belcastro. *Id.*; Tr. 606. Even Zecco testified that, at the time of his reassignment, Belcastro was "[p]robably a little more" experienced than he at operating satellite miners. Tr. 227. We find that there is substantial evidence in the record to support the judge's conclusion that Zecco was a less able satellite miner operator than Belcastro, and that Consol in part based its decision to transfer him on this legitimate, non-discriminatory business reason.

B. Zecco's lower productivity

The Secretary also asserts that Consol's decision to transfer Zecco was motivated in part by the fact that he took certain safety measures which resulted in reduced production. S. Br. at 17-18. There is no dispute that Consol transferred Zecco out of the 6D section, at least in part, because of his lower productivity compared to the other shifts. 20 FMSHRC at 502, 505; Poland Tr. 58, 187-88. The Secretary contends that the judge erred in treating Zecco's low productivity as a neutral business justification because the low productivity resulted from Zecco's protected activity. S. Br. at 32-33.

The Commission has held that the Secretary may establish unlawful motivation through evidence that the operator took action based on an ostensibly neutral factor which was itself inextricably linked with the protected activity. *See Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535-36 (Sept. 1997). In *Glover*, the Commission ruled that Consol could not rebut the prima facie case with evidence that its transfer of complainants to a more dangerous job assignment was based on their absences, when the absences were themselves the direct result of the complainants' exercise of their protected activities (their walkaround rights). *Id.* at 1537. The Commission noted that Senate legislative history states that a finding of discrimination should be made whenever protected activities contribute "in any manner" to adverse action. *Id.* at 1535-36. We agree with the Secretary, therefore, that productivity loses its status as an objective business rationale if it is inextricably linked with protected activity. We must therefore determine if the record could reasonably allow one to conclude that such a link existed in this case.

The protected activity allegedly related to Zecco's productivity falls into two categories: (1) Zecco's refusal to operate the continuous miner while the methane warning light was on and (2) additional safety precautions taken by Zecco and his crew, which were over and above those required by MSHA's regulations. We address each of these categories separately.

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the Contract to transfer miners to different mine locations, irrespective of seniority. 20 FMSHRC at 506 n.5; Poland Tr. 50-51.

1. Continuous Miner Shutdown

Section 75.323(b) requires deenergizing electrically powered equipment and shutting down other mechanized equipment when 1.0 percent or more methane is present. Zecco made it clear to mine management, including Poland, that he would not mine with the methane warning light activated.<sup>7</sup> 20 FMSHRC at 499. The Secretary argues correctly that such refusal is protected. S. Br. at 14-15. Heeding the command of a mandatory safety standard promulgated pursuant to the Mine Act is clearly the exercise of a protected right. An operator may not retaliate against a miner for invoking such a right (and in fact, Consol does not argue otherwise). If Zecco had demonstrated that his shift's lower productivity was a result of his compliance with the mandate of § 75.323(b), we agree with the Secretary that Consol could not rely on productivity levels to rebut the Secretary's prima facie case. In such circumstances, productivity would no longer be viewed as a legitimate business justification for Zecco's transfer.

We recognize that the judge did not utilize this analytical framework when he pronounced Zecco's low productivity to be a "rational, objective, non-protected business reason for Zecco's transfer . . . ." 20 FMSHRC at 506. While we would normally remand in such a case, our review of the record leads us to conclude that there is no need to do so here.

In order for Zecco to prove that his compliance with section 75.323(b) was the reason productivity suffered on the midnight shift, he had to either prove that more methane was emitted on his shift, and that therefore more shutdowns were necessary, or he had to prove that the miners on the other shifts were not always deenergizing their machines when the methane warning light was activated.

Zecco did not even allege, much less prove that the miners on the other shifts were failing to deenergize equipment as required by the regulation. Indeed when questioned on this point, Zecco asserted that he had no reason to believe that the miners on the other shifts were failing to deenergize the equipment as required. Tr. 261-62. Zecco attempted instead to prove that more methane was emitted on the midnight shift because of lower barometric pressure. 20 FMSHRC at 507. The judge considered this argument but concluded that the evidence failed to support it. "While Complainant maintains that lower productivity on the midnight shift may have been the result of lower barometric pressure there is no evidence that the actual barometric pressures were lower nor of the actual correlation between such pressure and methane emissions on the 6D Section." *Id.* We see nothing in the record that causes us to disturb the judge's findings on this issue.

Given the fact, therefore, that the record contains no evidence that methane levels for the 6D Section were different on any of the three shifts, and given the fact that the miners on all three

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<sup>7</sup> We note that Poland agreed that if the warning light came on, Zecco was to stop the miner. Poland Tr. 125-27.

shifts were presumably deenergizing their equipment when the methane warning light came on, our review of the record compels the conclusion that Zecco failed to demonstrate that his low productivity was inextricably linked to his protected refusal to operate equipment when the methane levels exceeded 1 percent.

## 2. Additional Safety Measures

Zecco also contends that the conditions in 6D necessitated his taking additional safety precautions and that these measures adversely affected production on the midnight shift. Tr. 32-37, 72-73, 120. These safety measures included: testing for methane with a hand held monitor every 10 minutes rather than every 20 minutes as required by MSHA, doing frequent ventilation tubing checks, hanging additional ventilation curtains to improve air at the face, stopping to rock dust every 20 feet rather than every 40 feet as required by MSHA standards, and washing down the continuous miner to minimize float coal dust. 20 FMSHRC at 498; Tr. 35-37, 599.

The question of whether these actions constitute protected activity is complicated by the fact that some of these additional safety measures involved precautions that were beyond the requirements of MSHA's regulations. For example, Zecco and his crew tested for methane and stopped to rock dust more frequently than required under MSHA standards. We recognize that at some point there is a line beyond which additional precautions over and above the regulations cease to be protected. Just where this line is drawn depends on the particular facts and circumstances of each case. The general principle, however, is that extra precautions should be protected when, like a protected work refusal, they are based on a miner's "good faith, reasonable belief" that such precautions are needed, and when the precautions themselves are reasonable. *Cf. Robinette*, 3 FMSHRC at 812 (enunciating the Commission's work refusal standard).

It would appear that the precautions taken by Zecco and his crew were conceded by Consol to be reasonable in light of the extremely hazardous conditions present in 6D. Zecco does not allege that Consol ever instructed him to cease taking these precautions. Indeed, as the judge observed, "management was well aware of the sulfur and methane problems on the 6D Section causing a recognized slowdown of production." 20 FMSHRC at 505. The judge also noted that "neither Zecco's foreman Albert Titus, who he called as his own witness, nor Zecco himself, ever testified that anyone ever suggested they mine unsafely or with the warning light activated." *Id.* Accordingly, we treat these activities as protected.

Even if these precautions are deemed protected, however, Zecco has failed to submit evidence from which one could conclude that these precautions were inextricably linked to his shift's relatively lower productivity. As is the case with his protected shutdowns, discussed above, Zecco does not allege that his coworkers on the other shifts in 6D were failing to take similar additional precautions over and above what might be required by MSHA's regulations.

Consol's witnesses attributed the lower production levels on the midnight shift to poor management by the section foreman. *Id.* at 502; Tr. 860-61. One witness explained that Poland

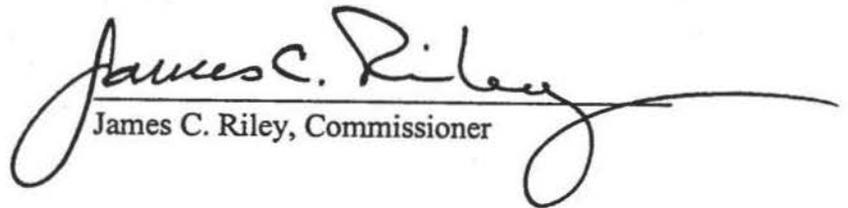
“thought the midnight crew could bring its productivity up to the level of the other shifts on the 6D Section by such things as staggering lunch breaks and not permitting the crew to stay in the dinner hole too long.” 20 FMSHRC at 505. Zecco’s witness, mechanic Michael Smith, confirmed this and “noted the efforts by Zecco’s foreman to increase productivity took such forms as prompting the crew to get to the dinner hole earlier.” *Id.* In sum, we find that the judge was correct in finding that no inference of an illegal motive could be drawn in the face of the reduced productivity, which constituted a legitimate business motivation.

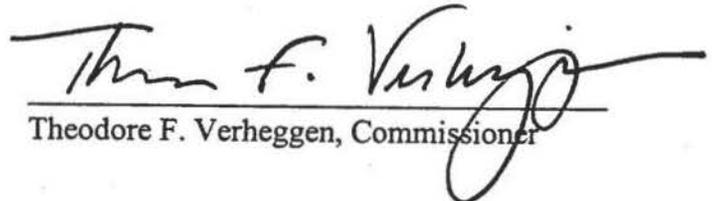
III.

Conclusion

For the foregoing reasons, we affirm the judge in result.

  
Mary Lu Jordan, Chairman

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

Commissioner Marks, dissenting:

I would vacate the judge's determination that Consol did not discriminate against Zecco and remand so that the judge, who is the proper fact-finder, can apply the analytical framework announced by the Commission in its opinion. Therefore, I dissent.

While I agree with the Commission that "productivity loses its status as an objective business rationale if it is inextricably linked with protected activity" (slip op. at 7), and that Zecco's shutdown of the continuous miner and additional safety precautions were protected activities under the Mine Act (slip op. at 7-10), I strongly believe that the judge should have the first opportunity to pass on whether Zecco's protected activities diminished his productivity such that his productivity could not be used as a legitimate affirmative defense by Consol. The judge never even considered the Secretary's contention that Zecco's refusals to operate the continuous miner in unsafe conditions and the additional safety measures he performed constituted protected activity. 20 FMSHRC 497, 498 n.2. Here, the majority properly determines that the contention should have been considered, but instead of remanding for the judge to apply the analysis to the record, the majority improperly performs the analysis itself.

What makes the majority's error even more untenable is that the majority relies on slim record support to incorrectly conclude that Zecco's protected activity was not tied to his lower productivity. See *Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535-36 (Sept. 1997) (noting that a finding of discrimination should be made whenever protected activities contribute "in any manner" to adverse action). For example, the majority makes assumptions about the other shifts, such as "the miners on all three shifts were presumably deenergizing their equipment when the methane warning light came on" (slip op. at 8-9). This is pure imagination on the majority's part. The judge simply did not make this finding. The majority also overlooks evidence that supports Zecco's contention that he was a highly productive miner prior to encountering the very dangerous conditions on the 6D section midnight shift. Tr. 342, 413-14. The evidence should have been parsed by the judge, not the Commission.

For these reasons, I believe that the majority is wrong in affirming the judge and would instead vacate and remand.

A handwritten signature in black ink, reading "Marc Lincoln Marks". The signature is written in a cursive, flowing style with a horizontal line underneath the name.

Marc Lincoln Marks, Commissioner

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September 30, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 97-95
	:	
WINDSOR COAL COMPANY	:	

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

DECISION

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

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). At issue is whether substantial evidence supports Administrative Law Judge George A. Koutras’ determination that a violation by Windsor Coal Company (“Windsor”) of 30 C.F.R. § 75.400<sup>1</sup> was not the result of its unwarrantable failure to comply with the standard. 19 FMSHRC 1694, 1726-28 (Oct. 1997) (ALJ). The Commission granted the Secretary of Labor’s petition for discretionary review challenging the judge’s determination of no unwarrantable failure. For the reasons that follow, we vacate the judge’s unwarrantable failure determination and remand for further consideration.

I.

Factual and Procedural Background

Windsor operates the Windsor Mine, an underground coal mine near Wheeling, West Virginia. *Id.* at 1695; W. Post-Hearing Br. at 2-3. On September 19, 1996, Inspectors Lyle Tipton and James Jeffers of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) completed a four day inspection of 12 of Windsor Mine’s 14 belts, which measure a

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<sup>1</sup> Section 75.400 provides, in pertinent part: “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings . . . .” 30 C.F.R. § 75.400.

total of approximately 14 miles. 19 FMSHRC at 1724-25. Prior to the inspection, Inspector Tipton reviewed the September 18 to September 19 preshift and onshift reports for the mine's main No. 10 belt. *Id.* at 1698, 1725. He observed entries describing accumulations that were noted as reported and uncorrected. *Id.* at 1698. Inspector Tipton then inspected the No. 10 belt beginning at the belt's conveyor belt drive, and walked towards the No. 11 belt. *Id.* Company representative Jim Fodor and United Mine Workers of America safety committeeman Bill Cox accompanied Tipton on his inspection. *Id.* Tipton observed an "accumulation of combustible material consisting of float coal dust, . . . loose coal spillage, spillage of fine dry loose coal and coal dust in contact with the conveyor belt and bottom roller structure[.]" *Id.* at 1697. Tipton's order states that the "total distance of this 6,000 foot entry containing float coal dust was 3,600 feet" and that spillage of "coal and fine dry loose coal was present under the majority of the bottom belt and in contact with the bottom rollers." *Id.* The order indicates that Inspector Tipton observed accumulations of float coal dust from the belt drive (227 crosscut) to the 260 crosscut; accumulations of loose coal beneath the majority of the bottom belt and in contact with the bottom rollers; spillage in contact with rollers and visual signs that a roller had heated up at the 254 stopping; an 80-foot long, 1-foot wide, and 1-foot deep spillage at the 248 stopping; a 50-foot long, 1-foot wide, and 1-foot deep spillage at the 268 stopping; a 20-foot long, 3-foot wide, and 2-foot deep spillage at the 275 stopping; and a 10-foot long, 3-foot wide, and 2-foot deep spillage at the 276 stopping.<sup>2</sup> Ex. P-3 at 2. He concluded that the cited conditions "for the most part were being carried as reported in the mine record books and would have taken days to accumulate to the degree described in this action." 19 FMSHRC at 1698. The ensuing abatement effort took between 15 and 20 miners approximately 10 hours to complete. *Id.* at 1724; Tr. 209, 311.

Based on his observations of the spillages and accumulations along the No. 10 belt and his review of the preshift and onshift record books, Tipton issued Order Number 3501233 under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a significant and substantial ("S&S")<sup>3</sup> violation of 30 C.F.R. § 75.400, and that the violation resulted from Windsor's unwarrantable failure to comply with the standard. 19 FMSHRC at 1699; Ex. P-3 at 1. Windsor contested the order and the matter proceeded to hearing before Judge Koutras.

The judge concluded that Windsor's uncontested violation of section 75.400 was S&S, but that it did not result from the operator's unwarrantable failure to comply with the standard. 19 FMSHRC at 1716, 1727-28. He found that the "cited coal accumulations . . . covered a rather

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<sup>2</sup> Inspector Tipton observed and cited two types of accumulations: several individual areas of coal spillage, and float coal dust accumulations beneath the belt, which he termed coal "fines." Ex. P-3 at 1; Tr. 26-28. Fines accumulate when wet coal particles stick to the belt and subsequently dry and fall beneath the belt. Tr. 143.

<sup>3</sup> The S&S terminology is taken from section 104(d)(1) of the Mine 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."

extensive area of the No. 10 belt line.” *Id.* at 1724. However, he also stated that, “[g]iven the large scope of this mining operation,” which he viewed as a mitigating circumstance, he could not conclude “that the respondent’s compliance record of ninety-eight section 75.400[] violations over a previous 24-month period[], is indicative of a ‘special accumulations problem.’” *Id.* The judge further stated that he was “not totally convinced that Inspector Tipton actually knew how long the cited coal spillage conditions had existed” and that he was not convinced that the inspector “knew with any degree [of] reasonable certainty that the preshift entries that he reviewed prior to his inspection described the same spillage conditions at the same location that he observed during his inspection.” *Id.* at 1725. Finally, the judge found that, “while it may be true that *all* of the cited coal accumulations may not have been cleaned up at the time of the September 19, 1996, inspection, . . . some of the conditions were corrected, and work was in progress to correct the remaining conditions.” *Id.* at 1727 (emphasis in original). He assessed a penalty of \$1,000. *Id.* at 1729.

## II.

### Disposition

The Secretary asserts that the total coal accumulation — loose coal spillage at the stopping locations noted in the order and coal dust and float coal dust covering over half of the length of the No. 10 belt — was extensive, and that this violation’s extensiveness alone is sufficient to support an unwarrantable failure finding. PDR at 8-10.<sup>4</sup> She also contends that a review of Windsor’s preshift and onshift reports shows that accumulations were present for at least an entire shift, and that the violation thus existed for a significant period of time. *Id.* at 10-13. She submits that the conditions reported in the preshift and onshift reports and Windsor’s 98 section 75.400 violations in the preceding 2 years put the operator on notice of an accumulations problem at the mine. *Id.* at 13, 16-17. The Secretary maintains that the judge’s reasons for discounting Windsor’s history of previous accumulation violations lack merit and are inconsistent with Commission case law. *Id.* at 13-16. She argues that Windsor’s failure to clean up a dangerous condition exhibits “aggravated conduct.” *Id.* at 17-19. Finally, the Secretary asserts that Windsor’s efforts to correct the violative condition were incomplete and ineffective. *Id.* at 19-21.

Windsor responds that the judge’s determination that the section 75.400 violation was not the result of Windsor’s unwarrantable failure is supported by substantial evidence. W. Br. at 17.<sup>5</sup> The operator argues that the judge correctly considered all relevant factors, rather than making the extensiveness of the violation determinative. *Id.* at 8. The operator further contends that a

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<sup>4</sup> Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary designated her PDR as her brief.

<sup>5</sup> Windsor does not contest the judge’s S&S designation. W. Br. at 1; 19 FMSHRC at 1716, 1728.

failure to entirely eliminate a reported condition within a shift does not mandate an unwarrantable failure finding and that, in any event, not all the violative conditions had existed for a full shift before the inspector arrived. *Id.* at 9-10. Windsor submits that its efforts to comply with section 75.400, undertaken despite two roof falls which hindered its ability to abate, and its assignment of six miners to clean and rock dust along the No. 10 belt prior to the inspector's arrival, show that it did not ignore the belt conditions. *Id.* at 10-13. Windsor also asserts that the relatively large size of the Windsor mine; its recall of approximately 25 miners in 1996; the decrease in number of accumulation violations in the months prior to the instant order's issuance; and the fact that the Secretary designated only two of the 98 accumulation violations over the previous two years as unwarrantable, all support the judge's conclusion that Windsor was not on notice of a special accumulations problem. *Id.* at 13-15. The operator also maintains that, even if it was on notice of an accumulations problem, it took measures to correct that problem. *Id.* at 15. Finally, the operator contends that it did not fail to address a dangerous condition, and that the existence of a dangerous condition alone does not establish unwarrantable failure. *Id.* at 15-16.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission also considers whether the violative condition is obvious, or poses a high degree of danger. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

A. Extensiveness

Windsor does not dispute that the cited accumulations were extensive (W. Br. at 7-8), and we affirm the judge's finding in this regard. Although the extensiveness of these accumulations merits significant consideration, we decline the Secretary's invitation to reverse the judge's finding of no unwarrantable failure based solely on the extensiveness of the violation. PDR at 10. The Seventh Circuit's decision in *Buck Creek*, 52 F.3d 133, relied on by the Secretary, does not stand for the proposition that an unwarrantable failure finding can be based solely on a finding that the violation was extensive. In affirming an administrative law judge's unwarrantable failure finding, the *Buck Creek* court found that, in addition to the accumulation's extensiveness, the violation had existed for at least one shift, the operator had undertaken no abatement efforts during the 90 minutes after the accumulation appeared in the preshift book on the day of the order, and the operator had received nine section 75.400 citations in the same month, including one citation for the cited area. *Id.* at 136. The court stated that, "contrary to Buck Creek's suggestion, the extent of accumulation was not the sole basis for the ALJ's decision." *Id.* Therefore, although we affirm the judge's finding that the violation was extensive, a determination of whether Windsor's violation was unwarrantable requires analysis of the other pertinent factors enunciated in Commission precedent. *See, e.g., Mullins*, 16 FMSHRC at 195.

B. Duration

The judge rendered no explicit determination regarding the duration of the cited accumulations. *See* 19 FMSHRC at 1725. Nonetheless, the preshift and onshift reports compel a finding that at least two of the cited accumulations had existed for at least one shift. The preshift reports identify accumulations that needed cleaning or dusting by the crosscut where each accumulation was located. Ex. P-1. The preshift report for the September 19 midnight shift reflects that the area between crosscuts 227 and 253 needed dusting and that the area between crosscuts 230 and 257, under the rollers, needed cleaning. *Id.* The September 19 midnight shift onshift report does not indicate that these reported accumulations had been cleaned or dusted. *Id.* Belt coordinator Wayne Porter testified that an onshift report which shows no correction of an accumulation indicates that the accumulation was not abated. Tr. 313, 334. Windsor's work assignment sheets indicate that the accumulation between crosscuts 227 and 253 was worked on, but not finished. Ex. R-17. The September 19 day shift preshift report states that the same areas noted on the midnight shift preshift report still needed cleaning or dusting, although the notation on the day shift preshift report does not specify whether the accumulation between crosscuts 230 and 257 was under the rollers or on the side of the belt. Ex. P-1. While Windsor observes that the length of the cited accumulation beneath the belt is somewhat greater than the distance of the same accumulations reflected in the preshift books (W. Br. at 10 n.4), the operator does not dispute that the accumulation between crosscuts 227 and 253 had been present for at least one shift. *Id.* at Attach. A (stating that the shift report notation that "253 to drive -- needs dusted [sic] . . . **first** appears in the preshift examiner's report for the midnight shift on September 19, 1996") (boldface in original). Windsor explains that it gave a work assignment for the

September 19 midnight shift to dust between crosscuts 227 and 253, which was not finished. *Id.* at 10 & Attach. A (citing Ex. R-17).

The record also compels a finding that the spillage on the left side of stopping 276 existed for longer than one shift. The September 19 midnight preshift report lists an accumulation on both sides of stopping 276 which needed cleaning. Ex. P-1. While the September 19 midnight onshift report states that the right side of stopping 276 was cleaned, the left side of stopping 276 still needed cleaning by the time the day preshift report was written. *Id.* Windsor does not dispute that this spillage had existed for longer than one shift. W. Br. at Attach. A at No. 4 (“The first entry specifically referencing the walkway at cross-cut 276 is in the preshift exam for the midnight shift on September 19 . . .”). While the order does not specify at which side of stopping 276 Tipton observed the cited spillage, the shift reports demonstrate that an accumulation on the left side of stopping 276 existed for one shift prior to the order’s entry.

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)).<sup>6</sup> The evidence discussed above establishes that an accumulation and a spillage of coal existed for longer than one shift and “fairly detracts” from the judge’s negative unwarrantable failure finding. *Id.*; see also *Buck Creek*, 52 F.3d at 136 (finding unwarrantable failure where cited accumulation must have been present since at least previous shift); *Old Ben Coal Co.*, 1 FMSHRC 1954, 1959 (Dec. 1979) (finding unwarrantable failure where accumulation had existed for less than one shift). Because the record compels a finding that these two accumulations existed for more than one shift, we need not remand the issue of the duration of these accumulations to the judge. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand unnecessary where judge’s reconsideration of issue would serve no purpose).

In addition to this type of direct evidence, the Commission has permitted duration to be established through the use of circumstantial evidence. See, e.g., *Enlow Fork Mining Co.*, 19 FMSHRC 5, 16 (Jan. 1997) (affirming judge’s duration finding, which was based on judge’s “credit[ing of] the inspector’s testimony that the accumulations had existed for more than one shift”); *Mullins*, 16 FMSHRC at 196 (determining that cited accumulation had existed for at least two days based, inter alia, on the inspector’s testimony as to the “quantity and nature of the accumulations”); *Peabody*, 14 FMSHRC at 1261-62 (affirming judge’s duration finding which was based on inspector’s observation of cited area). Here, Inspector Tipton asserted that, based

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<sup>6</sup> When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

on his experience and observations, all the cited accumulations took days to accumulate. Tr. 45, 52, 108, 116-17; Ex. P-3. Tipton also testified that the shift books supported his opinion that the cited accumulations had been present for several days (Tr. 108-09, 117), and that it was not possible that the accumulations he observed had amassed in one shift. Tr. 45. It is not evident from the judge's decision whether he analyzed this testimony of Inspector Tipton regarding duration.<sup>7</sup> In accordance with Commission precedent, he should do so explicitly on remand.

The dissent claims that the judge's statement that he was not convinced "Inspector Tipton *actually knew* how long the cited coal spillage conditions had existed" (19 FMSHRC at 1725 (emphasis added)) served to discredit Inspector Tipton's testimony as to duration. Slip op. at 16. In fact, Inspector Tipton never testified that he "actually knew" the duration of the violation, nor was such testimony necessary because the Commission does not require an inspector to possess "actual knowledge" of the duration of a violation. *See, e.g., Mullins*, 16 FMSHRC at 196. It is not clear to us what the judge meant when he ruled that he was "not totally convinced . . . Inspector Tipton *actually knew* how long the cited coal spillage conditions had existed." 20 FMSHRC at 1725 (emphasis added). We therefore remand for a more complete explanation of the analysis of the circumstantial evidence regarding duration, including a clearer evaluation of the inspector's testimony, in a manner consistent with Commission precedent. *See Enlow Fork*, 19 FMSHRC at 16; *Mullins*, 16 FMSHRC at 196; *Peabody*, 14 FMSHRC at 1261-62.

Furthermore, the judge should have analyzed the testimony of Cox and longwall helper Jimmy Welch, both of whom corroborated Tipton's opinion as to the duration of the accumulation. Tr. 144, 178-79, 187. Cox testified that the fines accumulated "[o]ver a period of shifts," (Tr. 141) and Welch stated that the accumulation would have developed over "a few shifts." Tr. 187. Also, while the judge paraphrased the testimony of Porter that accumulations under the belt can occur in a short period of time (Tr. 345-46), and quoted Welch's opinion that the accumulations under the belt occurred "just coming back on the take-up; coming back on the bottom rollers" (Tr. 184), he did not credit or discredit this testimony, nor did he reconcile Porter's testimony with the contrary assertions of Tipton, Cox, and Welch. *See* 20 FMSHRC at 1725; Tr. 45, 141, 187, 313. Finally, the judge should have analyzed Tipton's testimony that he observed rock dust beneath some of the cited accumulations. Tr. 31, 219. Tipton testified that

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<sup>7</sup> Commission Procedural Rule 69(a) requires that a Commission judge's decision "include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). *See also Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). As the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform its review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). The Commission thus has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his decision. *See Mid-Continent Resources*, 16 FMSHRC at 1222.

the presence of rock dust beneath accumulations is evidence that the coal spillage was not recent. Tr. 218. The judge should have analyzed the abundant circumstantial evidence that the cited accumulations had existed for longer than one shift.

In sum, we conclude that the record compels the conclusion that the accumulation from crosscut 227 to 257 and the spillage at crosscut 276 existed for longer than one shift, and we remand for consideration and analysis of evidence relevant to a determination of how long the other cited accumulations existed, and whether the duration of these accumulations, together with the other unwarrantable factors, is sufficient to support an unwarrantable failure finding.

C. Notice of Need for Greater Efforts For Compliance

The judge's finding that Windsor was not on notice that greater efforts were necessary for compliance with section 75.400 is not supported by substantial evidence because it fails to account for annotations in the preshift books for the No. 10 belt reflecting that coal accumulated along the belt, and that some of the reported accumulations remained for several shifts without abatement. For example, the preshift reports for the September 16 midnight shift through the September 18 day shift establish that the No. 10 belt between crosscuts 241-249 and between crosscuts 257-278 needed cleaning and dusting over a span of at least five shifts. Ex. P-1. Also, an accumulation between crosscuts 274 and 287 which was noted in the September 17 midnight preshift report was worked on once during the September 17 day shift, but was not corrected until the September 18 day shift. *Id.* As we have previously held, shift book reports of accumulations are "relevant in demonstrating that [the operator] had prior notice that a problem with coal . . . accumulations in the cited area, and that greater efforts were necessary to assure compliance with section 75.400." *Peabody*, 14 FMSHRC at 1262. Accordingly, we remand for an evaluation of this evidence relevant to whether Windsor was on notice.

In addition, we are troubled by the judge's suggestion that 98 section 75.400 citations in a 2-year period was not enough to place Windsor on notice of a greater need for compliance. The problem with this conclusion, however, is that it appears to assume that *all* 14 miles of the belt lines were either being constantly monitored, or being inspected by MSHA each week, facts that are not in evidence here. We are concerned by the reliance of the judge solely on the length of the belt lines to conclude that such a high number of violations during this time period did not put Windsor on notice of an accumulations problem. On remand, we direct that all the record evidence concerning accumulation problems at the Windsor mine be considered to determine whether Windsor was on notice that it had a recurring safety problem in need of correction. *See Peabody*, 14 FMSHRC at 1263-64 ("A history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction.")<sup>8</sup>

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<sup>8</sup> Commissioner Marks concludes that the 98 section 75.400 violations that Windsor incurred in the 2-year period preceding the subject order placed Windsor on notice, as a matter of law, that it had a problem with accumulations at its mine. It is beyond doubt that this extremely

D. Efforts to Eliminate the Violative Conditions

The judge described various efforts undertaken by Windsor to correct belt conditions on the No. 8, 9, and 10 belts between September 3 and the September 19 inspection of the No. 10 belt. 19 FMSHRC at 1726-27. Some evidence in the record supports the judge's factual findings.

The shift reports for the days preceding the September 19 order reflect that Windsor corrected reported accumulations between crosscuts 274 and 287, 269 and 272, 262 and 270, 238 and 271, and 260 and 282, at crosscuts 276 and 278, and the belt tail, as well as a spillage at the belt drive. Ex. P-1. Windsor superintendent Joseph Matkovich testified that during "the three days previous to the [19th], nine of our belt lines were walked by Mr. Tipton and Mr. Jeffers, and any of the items that they found . . . , we had to direct people in those directions and follow up on everything that was pointed out to us there." Tr. 250. Windsor also introduced evidence of two roof falls which hindered abatement efforts, and required belt employees to work to repair the roof. Tr. 249-50, 257, 260-62, 296-99, 300. The record further shows that six miners were assigned to correct various conditions along the No. 10 belt during the September 18 day shift and the September 19 midnight shift — although those assignments are listed on the work assignment sheet as incomplete. Tr. 321-22; Exs. R-16, R-17. Thus, the record contains evidence of Windsor's abatement efforts on the No. 10 belt and elsewhere in the mine prior to the order's issuance.

We nevertheless conclude that the judge erred in failing to determine whether Windsor's abatement efforts were adequate in light of the extensive accumulations that existed prior to the inspection. *Id.* In *Peabody*, we held that the operator did not take adequate measures to remedy the spilling problems where the cited accumulation was extensive. *Peabody*, 14 FMSHRC at 1261, 1263-64; *see also Jim Walter Resources, Inc.*, 19 FMSHRC 480, 489 (Mar. 1997) (stating that the operator's abatement efforts "were inadequate because extensive combustible materials were still allowed to accumulate").<sup>9</sup> Here, the evidence is undisputed that an extensive area of accumulation was present in the areas cited by Tipton. *See* 19 FMSHRC at 1724.

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large number of section 75.400 violations put Windsor on notice that it had a recurring safety problem in need of correction. *See Peabody*, 14 FMSHRC at 1263-64.

<sup>9</sup> Contrary to the dissent's suggestion, our holding here does not imply that any efforts to comply by an operator are irrelevant if a violation ultimately is found. Slip op. at 17 n.7. Rather, in addressing the question of compliance efforts, we ask simply whether the operator's efforts to comply with safety standards and to correct conditions that could lead to violations were taken with sufficient care under the circumstances, even if ultimately unsuccessful in completely preventing a violative condition. *See Utah Power & Light Co.*, 11 FMSHRC 1926, 1933 (Oct. 1989).

Porter testified that Windsor employs four belt workers per shift on each of the mine's two sides, and assigned six miners to clean accumulations along the belt for the two shifts prior to the order's issuance. Tr. 315; Exs. R-16, R-17. Charles Kellam, Windsor's human resources manager, testified that Windsor employed approximately 140 workers underground. Tr. 221, 224. The judge should have discussed whether, considering the accumulations along the No. 10 belt, Windsor placed sufficient priority on abating the condition by assigning four or six miners per shift to the No. 10 belt.

The judge also failed to address Tipton's testimony regarding the four miners he observed rock dusting on top of the accumulations. Tipton testified that manually spreading stripes of rock dust several feet apart on top of accumulations — as the four miners he observed during his inspection were doing — is not an effective method of abatement. Tr. 40-41. Tipton elaborated that effective abatement would require the operator to shovel the accumulations away from the rollers before the area is rock dusted. Tr. 41. In *Mullins*, we held that rock dusting is not an alternative method of complying with the clean-up requirements of section 75.400. 16 FMSHRC at 197. Thus, the judge's consideration of miners rock dusting on top of accumulations as abating the operator's accumulation violation contravenes our precedent and constitutes error.

In sum, we remand for consideration of evidence concerning whether Windsor's abatement efforts were adequate under the circumstances. See *Peabody*, 14 FMSHRC at 1263-64.

#### E. Danger and Obviousness

The Commission has relied upon the obviousness of, and the high degree of danger posed by, a violation to support an unwarrantable failure finding. See *Jim Walter Resources, Inc.*, 19 FMSHRC 1377, 1379 (Aug. 1997) (in remanding whether accumulation violation resulted from unwarrantable failure, Commission directed judge to consider, inter alia, whether the condition posed a high degree of danger); *Jim Walter*, 19 FMSHRC at 486-89 (obviousness of accumulation supports unwarrantable finding); *Drummond Co.*, 13 FMSHRC 1362, 1365, 1368-69 (Sept. 1991) (visible nature of accumulations and evidence of belt running in accumulations relevant to unwarrantable failure determination).

There is record evidence in this case that indicates the accumulations here were dangerously high. While the operator introduced testimony that there were no hazardous conditions along the No. 10 belt (Tr. 267, 326, 331), several witnesses testified to observing coal in contact with rollers on the No. 10 belt on September 19. Tipton testified that “[t]he fines under the belt were in contact with the bottom rollers . . . . The spillage along the belt would be in contact with the ends of the bottom rollers.” Tr. 30. Tipton further testified that “some of this spillage had been ground up by the bottom rollers” (Tr. 27) and that “[with r]egular maintenance, you would have had those [accumulations] shoveled away from there long before they had built up to where they were in contact with the bottom belt and bottom rollers.” Tr. 46. Cox testified

that rollers “were frozen from fine coal being packed around them[.]” Tr. 142. Welch also testified that accumulations under the belt were in contact with the bottom rollers. Tr. 184, 186.

Belts or rollers running in a coal accumulation present an ignition source. *Amax Coal Co.*, 19 FMSHRC 846, 849, 851 (May 1997); Tr. 38 (Tipton testifying that there was enough accumulated coal on the No. 10 belt to propagate a fire). We have recognized that “ignitions and explosions are major causes of death and injury to miners.” *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985). Moreover, two weeks prior to the inspection, Kellam and Cox observed evidence of a coal fire caused by a roller rolling in coal accumulations beneath the No. 10 belt. Tr. 140, 175, 239. On remand, we direct the judge to determine whether any of the cited accumulations were in contact with belt rollers and, if so, whether this supports an unwarrantability finding.

In addition, the Secretary asserts that the extensive accumulations were in conspicuous locations. S. Br. at 10 n.9. The judge should also have addressed whether the accumulations were obvious. See *Jim Walter*, 19 FMSHRC at 486; *Quinland*, 10 FMSHRC at 709. On remand, we direct that this factor be analyzed as well.<sup>10</sup>

In sum, we remand for consideration of the possible danger presented by the coal accumulations in contact with rollers as well as the obviousness of the accumulations at issue.<sup>11</sup>

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<sup>10</sup> Our dissenting colleague’s contention that our approach is inconsistent with our decision in *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1145-48 (Oct. 1998) misses the mark on two counts. First, in *Lafarge*, rather than upholding an unwarrantability finding on the sole basis of the danger factor, as the dissent claims (slip op. at 17), we acknowledged that the judge’s decision also reflected his view that the violation was obvious. 20 FMSHRC at 1147. In addition, we found that the operator’s failure to recognize the danger presented by loose overhead rock and its failure to undertake adequate safety measures reflected a serious lack of reasonable care and supported an unwarrantability finding. *Id.* at 1146-47. Second, our substantial evidence analysis here does not resemble “heightened scrutiny,” as the dissent claims (slip op. at 18), but rather is faithful to our holding in *LaFarge* that “only those factors that are relevant to the facts of this case” should be applied. *Lafarge*, 20 FMSHRC at 1147. Thus, while our analysis in *Lafarge* focused substantially on the danger element because that element was highly salient under the facts of that case, our analysis in the present matter focuses on extent, duration, notice, abatement, danger and obviousness because these factors are relevant to the facts of this case.

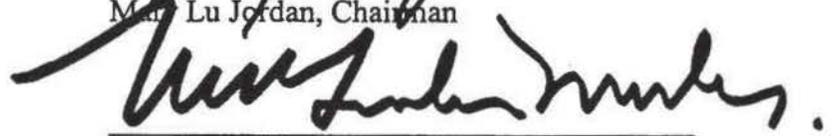
<sup>11</sup> Commissioner Beatty notes that Commissioner Verheggen also argues, citing *Lafarge Construction and Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999), *petition for review docketed*, No. 99-2264 (4th Cir. Sept. 23, 1999), that the majority has “failed to consider exculpatory evidence . . . that was clearly relevant to determining the operator’s degree of negligence.” Slip op. at 18. Commissioner Beatty believes that this statement is flawed for two reasons. First, he notes that in *Lafarge* the Commission reaffirmed its well-established case law concerning the factors that are relevant in determining whether a particular violation is the result

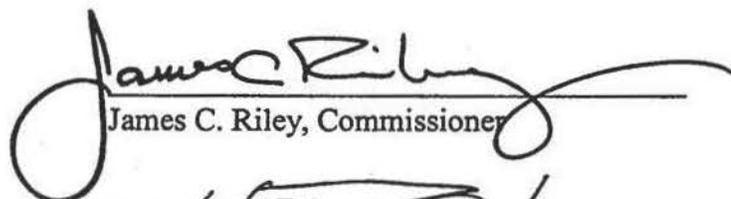
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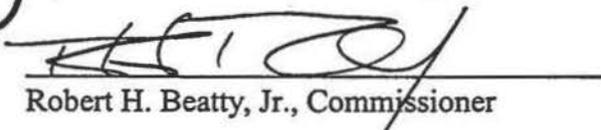
Conclusion

For the foregoing reasons, we vacate the judge's determination that Windsor's violation of section 75.400 was not the result of its unwarrantable failure, and remand to the Chief Administrative Law Judge for reassignment,<sup>12</sup> further analysis consistent with this opinion, and reassessment of the civil penalty, if appropriate.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Robert H. Beatty, Jr., Commissioner

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of unwarrantable failure on the part of the operator. Second, Commissioner Beatty notes that in *Capitol Cement*, the only evidence that the majority arguably "failed to consider" was that concerning safety training previously provided to miners which the operator attempted to introduce into the unwarrantable failure analysis through application of the *Nacco* defense. In *Capitol Cement*, the Commission specifically affirmed its established precedent that the extensiveness of the violative condition, which would include the number of persons exposed to resulting harm or injury, is relevant and entitled to consideration in determining whether a violation is the result of an operator's unwarrantable failure. 21 FMSHRC at 891. While respecting Commissioner Verheggen's position on these matters, Commissioner Beatty takes issue with his colleague's suggestion that we "pick and choose among the facts of a case for what might be relevant to upholding a certain view." Slip op. at 18. To the contrary, he firmly believes that the rulings of the Commission majority in these cases are the product of a well-reasoned analysis predicated entirely on existing Commission case law with respect to the factors to be utilized and the evidence that is *relevant* in the unwarrantable failure analysis.

<sup>12</sup> Judge Koutras has retired.

Commissioner Verheggen, dissenting:

I find that substantial evidence supports the judge's finding that Windsor's violation of section 75.400 was not the result of its unwarrantable failure. I would affirm his decision, and therefore respectfully dissent.

The record contains ample evidence, much of which the majority acknowledges, to support the judge's decision.<sup>1</sup> In his consideration of the various factors analyzed to determine whether an operator's conduct is unwarrantable, the judge made key findings that Windsor was not on notice that greater efforts were necessary for compliance, and that the company had undertaken extensive measures to eliminate the violative condition. These key findings led the judge to conclude that Windsor's conduct was not aggravated.<sup>2</sup> 19 FMSHRC at 1724-1727. Both findings are supported by substantial evidence.

The judge found that, given the mine's extensive 14-mile belt system, Windsor's 98 section 75.400 violations in the prior 24-month period were not sufficient to place Windsor on notice of any greater need for compliance. *Id.* at 1724-25. The majority expresses concern over "the reliance of the judge . . . solely on the length of the belt lines to conclude that [Windsor's accumulations] violations during [the relevant] time period did not put Windsor on notice of an accumulations problem." Slip op. at 8. The length of the belt lines is not, however, the *sole* piece of record evidence that supports the judge's conclusion. The majority fails to mention Windsor's improved compliance with section 75.400 in the months prior to the issuance of the citations, which I find further supports the judge's conclusion that Windsor was not on notice that greater compliance efforts were needed. MSHA's Assessed Violation History Report for the Windsor Mine reflects a marked improvement in compliance with section 75.400 for July through September 1996. *See* Ex. P-12. That report shows that Windsor was received only five section 75.400 violations in that period, a quarterly number comparable to that of a nearby mine that MSHA Inspector Tipton testified had "one of our best compliance records on 75.400 of any of our local mines." Tr. 351; *see* Tr. 347, 350; Ex. P-12.

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<sup>1</sup> The Commission is statutorily bound to apply the substantial evidence test when reviewing a judge's findings of fact. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994). When reciting this test, the Commission customarily states merely that "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *See, e.g., Jim Walter Resources, Inc.*, 19 FMSHRC 1761, 1767 n.8 (Nov. 1997) (citations omitted). But in practice, the test involves more than this simple formulation conveys. It means that the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

<sup>2</sup> The judge also found that the cited accumulations were extensive. 19 FMSHRC at 1724. The judge noted he was "not totally convinced" by the Secretary's evidence on the duration of the accumulations. *Id.* at 1725.

Windsor's improvement in compliance is analogous to that of the operator's compliance with the dust standard involved in *Peabody Coal Co.*, 18 FMSHRC 494 (Apr. 1996). In *Peabody*, the Commission noted that the operator had been in compliance with the applicable dust standard for the several months preceding issuance of the citation at issue, and concluded that the operator's "remedial measures clearly demonstrate a good faith, reasonable belief that it was taking the steps necessary to solve its dust problems." *Id.* at 499. Here, the significant decrease in the incidence of section 75.400 violations at the Windsor Mine shows that the company had substantially alleviated the extent of the accumulation problems it may previously have had along its belts, and further supports the judge's finding that the operator was not on notice of a special accumulations problem necessitating greater efforts for compliance with section 75.400.

Regarding abatement efforts, the judge describes at some length Windsor's efforts to address belt conditions at the mine prior to the September 19 inspection of the No. 10 belt, findings which are amply supported by the record. On September 3, 1996, a union "safety run" was performed on the No. 8, 9, and 10 belts in response to the safety committee's letter concerning the condition of these belts. 19 FMSHRC at 1703-04, 1708; Tr. 148, 197-98; Ex. P-10. After that, Windsor employees Matkovich and Cox met daily to discuss work that needed to be finished on the belts up until the day the order was issued. 19 FMSHRC at 1704, 1709-10, 1726; Tr. 151, 203-04. The meetings specifically addressed the No. 10 belt, resulting in corrective action, including cleaning and rock dusting, that continued up until September 19. 19 FMSHRC at 1726; Tr. 151-152; Ex. P-10. The letter which prompted the safety run was later rescinded. 19 FMSHRC at 1726; Tr. 197. As my colleagues themselves acknowledge:

The shift reports for the days preceding the September 19 order reflect that Windsor corrected reported accumulations between crosscuts 274 and 287, 269 and 272, 262 and 270, 238 and 271, and 260 and 282, at crosscuts 276 and 278, and the belt tail, as well as a spillage at the belt drive. Ex. P-1. Windsor superintendent Joseph Matkovich testified that during "the three days previous to the [19th], nine of our belt lines were walked by Mr. Tipton and Mr. Jeffers, and any of the items that they found along those belt lines, we had to direct people in those directions and follow up on everything that was pointed out to us there." Tr. 250. Windsor also introduced evidence of two roof falls which hindered abatement efforts, and required belt employees to work to repair the roof. Tr. 249-50, 260-62, 257, 296-99, 300.

Slip op. at 9 (alteration in original).

My colleagues further acknowledge that six miners were assigned to correct various conditions along the No. 10 belt during the afternoon shift on September 18 and the midnight shift on September 19. *Id.* The record also shows that four miners were spreading rock dust manually at the time the inspector arrived. Tr. 35, 321-22; Exs. R-16, R-17. Finally, as the judge noted, a

bulk duster assigned to dust along the No. 10 belt never arrived due to its derailment. 19 FMSHRC at 1727; Tr. 278-79, 318; Ex. R-19.<sup>3</sup> Thus, the record contains abundant evidence supportive of the judge's finding and shows that Windsor undertook a variety of abatement efforts on the No. 10 belt and elsewhere in the mine.

Based on the judge's findings as to Windsor's lack of notice and their abatement efforts, both of which have ample record support, I find that a reasonable trier of fact could conclude that the Secretary failed to meet her burden in proving Windsor engaged in aggravated conduct.<sup>4</sup> Put another way, given Windsor's continuing improvement in compliance with section 75.400 and the company's considerable and ongoing corrective action, it was not unreasonable for the judge to conclude that Windsor did not exhibit reckless disregard, indifference, or a serious lack of reasonable care<sup>5</sup> with respect to the accumulations on the No. 10 belt.

My colleagues, however, subject the judge's opinion to the most exacting and detailed scrutiny, then ascribe to him a variety of errors. Their exercise in faultfinding is without merit. First, my colleagues criticize the judge for failing to "analyze" various pieces of evidence in the record, evidence that both tends to support and contradict the judge's decision. *See, e.g.*, slip op. at 7-8, 10. In general, I believe this criticism is misplaced. I agree with my colleagues that a judge must render "a decision that constitutes [a] final disposition of the proceedings," and that his or her decision must be "in writing" and must include "all findings of fact and conclusions of law, and the reasons or bases for them, on all material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a); *see* slip op. at 7 n.7. But it does not follow from this that a judge must discuss each and every bit of evidence — in a case such as this, the judge need not make an explicit finding in his opinion with respect to every piece of evidence or every aspect

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<sup>3</sup> Additional evidence cited by the judge in support of Windsor's efforts include a report prepared by Windsor based on work assignment sheets and foremen's reports showing additional cleaning and dusting of a number of areas along the No. 10 belt line between September 10 and the midnight shift on September 19. Ex. R-4; *see* Tr. 234-35.

<sup>4</sup> I believe this to be the case notwithstanding the extensiveness of the accumulations or the fact, as my colleagues maintain, that certain of the accumulations may have existed for longer than one shift. Slip op. at 5-8. The standard is not whether the judge could have reached a different conclusion under these facts, but whether there is sufficient evidence in the record to support the judge's conclusion. *See Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at \*3 (4th Cir. Dec. 30, 1997) ("[T]he Commission's review [is] statutorily limited to whether the ALJ's findings of fact [are] supported by substantial evidence. The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" (citation omitted)).

<sup>5</sup> Unwarrantable failure is characterized by such conduct as "reckless disregard," "indifference," or a "serious lack of reasonable care." *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991).

of the testimony of every witness. He need only make findings necessary to support his decision, and explain his reasons therefor. Here, the judge has done so.

More importantly, the judge did in fact analyze much of the contrary evidence the majority claims he ignored. For example, although the majority states that it is not clear whether the judge analyzed circumstantial evidence regarding the duration of the accumulation<sup>6</sup> (slip op. at 7), in fact, he did consider this evidence — and essentially discredited the Secretary's key witness, Tipton. 19 FMSHRC at 1725; *see also id.* at 1698-1702, 1704, 1706, 1719-21 (points in judge's decision where he discusses at some length the evidence adduced by the Secretary on the duration of the accumulation). The judge specifically found that he was not convinced that "Inspector Tipton actually knew how long the cited coal spillage conditions had existed." 19 FMSHRC at 1725. This is as close as a judge can get to discrediting a witness's testimony without being explicit, and we have found implied credibility determinations where judges have said far less. *See Fort Scott Fertilizer—Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (recognizing implicit credibility finding of judge); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 261, 265, 267 (Feb. 1997) (same).

The majority also concludes that "the judge erred in failing to determine whether Windsor's abatement efforts were adequate in light of the extensive accumulations that existed prior to the inspection." Slip op. at 9. I regard this statement as something of a legal non sequitur. Of course Windsor's efforts were not "adequate" — had they been, there would have been no violation. The question is rather whether Windsor's efforts were *so* inadequate that the company's conduct rose to a reckless, aggravated level of negligence. The judge concluded they were not, and substantial evidence supports this conclusion.

Moreover, contrary to the majority's assertion that the judge failed "to determine whether Windsor's abatement efforts were adequate" (slip op. at 9), the judge did, in fact, analyze the operator's efforts. Any fair reading of the judge's opinion, given his extensive description of Windsor's efforts to address and correct the cited conditions, followed immediately by his conclusion that Windsor's conduct was not aggravated (19 FMSHRC at 1726-1727), leads to the conclusion that he found Windsor's efforts not so inadequate that the company's conduct rose to a reckless, aggravated level of negligence:

On the facts of the case at hand, while it may be true that *all* of the cited coal accumulations may not have been cleaned up at the time of the September 19, 1996, inspection, the respondent's credible evidence establishes that the belt conditions were not ignored and that the men were assigned to take corrective action, men were

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<sup>6</sup> Even if certain accumulations existed for longer than one shift, Windsor offered evidence explaining why it was unable to complete all of its intended corrective actions. *See, e.g.*, Tr. 249-50, 257, 260-62, 278-79, 296-99, 300, 318 (testimony regarding a roof fall and rock duster derailment that interfered with Windsor's corrective actions).

working rock-dusting the belt, some of the conditions were corrected, and work was in progress to correct the remaining conditions. Under all of these circumstances, I . . . cannot conclude that the petitioner has established a case of aggravated conduct supporting the inspector's unwarrantable failure finding.

*Id.* at 1727-28 (emphasis in original). Rather than explicitly find Windsor's efforts "adequate," he more appropriately found that, given Windsor's efforts, the Secretary failed to prove Windsor conduct was aggravated.<sup>7</sup>

My colleagues also fault the judge for failing to consider the high degree of danger and obviousness of the accumulations in reaching his unwarrantable failure determination.<sup>8</sup> While the Commission generally considers a variety of factors in determining whether an operator's conduct is aggravated, including danger and obviousness, explicit consideration of all the factors is not required. *Jim Walter Resources, Inc.*, 19 FMSHRC 1377, 1379 (Aug. 1997) ("[t]he judge is to consider these accumulations . . . in light of the other factors that the Commission *may* examine in determining whether a violation is unwarrantable," emphasis added); *Lafarge Construction Materials*, 20 FMSHRC 1140, 1147 (Oct. 1998).

The majority's numerous findings of various purported errors in the judge's decision in this case stands in stark contrast to the Commission's majority decision in *Lafarge*, from which I also dissented. In *Lafarge*, the judge's finding of unwarrantable failure was based upon his consideration of but a single factor which he treated as dispositive — danger. A majority of my colleagues affirmed this finding despite the fact that the record contained substantial probative evidence relating to other factors, including potentially exculpatory evidence. But where the *Lafarge* majority affirmed a judge's finding of unwarrantable failure based on but a single factor,

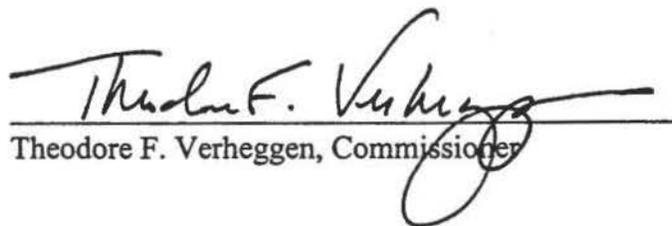
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<sup>7</sup> In support of their conclusion that the judge needed to determine the adequacy of Windsor's abatement efforts, the majority cites *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 489 (Mar. 1997). Slip op. at 9. In that case, however, the judge made no finding whatsoever with regard to abatement efforts, and the Commission explicitly declined to reach the issue: "[The operator] asserts that it took appropriate steps to prevent accumulations because one or two miners were assigned to clean up the area. The judge makes no finding on this issue, *nor do we.*" 19 FMSHRC at 489 (citations omitted, emphasis added). The passage the majority relies upon is thus dicta. See slip op. at 9 (quoting from the following passage, 19 FMSHRC at 489: "even if [the operator] had assigned miners to the area, the record established that such efforts were inadequate because extensive combustible materials were still permitted to accumulate"). I find this dicta troubling, since it appears to suggest that no matter what efforts are undertaken to avoid a violation, any such efforts are irrelevant for purposes of determining unwarrantable failure if a violation is ultimately found to have existed.

<sup>8</sup> In fact, the judge amply considered the danger posed by the cited conditions in concluding that the violation was S&S. 19 FMSHRC at 1714-1716.

here, a similar majority subjects a finding of no unwarrantable failure to heightened scrutiny. They find fault where a judge has failed, in their view, to do what the judge clearly failed to do in *Lafarge*. Here, my colleagues state that their decision “is faithful to our holding in *Lafarge* that ‘only those factors that are relevant to the facts of this case’ should be applied.” Slip op. at 11 n.10. But as I point out, one of the problems in *Lafarge* was that the judge and the majority ignored evidence relevant to determining the operator’s negligence. See 20 FMSHRC at 1155-58 (Comm’r Verheggen, dissenting). This was also the problem in the recent case *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999), *petition for review docketed*, No. 99-2264 (4th Cir. Sept. 23, 1999), a case in which I also dissented. There, the majority failed to consider exculpatory evidence introduced by the operator, evidence that was clearly relevant to determining the operator’s degree of negligence. 21 FMSHRC at 899-900 (Comm’r Verheggen, dissenting) (“the operator introduced exculpatory evidence as to (1) the extent of the violative condition by alleging that [a supervisor’s violative] actions placed no one else in harm’s way, and (2) Capitol’s good faith efforts to be in constant compliance and to avoid the sort of accident that occurred here, as evidenced by what the judge found to be their ‘responsible training program,’ as well as the company’s work rules and measures taken to discipline [the supervisor]”). There, too, the majority cited *Lafarge* for the proposition that we may pick and choose among the facts of a case for what might be relevant to upholding a certain view, as opposed to weighing all the facts and circumstances relevant to the particular issue at hand. *Id.* at 893 n.13. I reject the former proposition because it represents a double standard, the net effect of which is to make it more difficult for operators to prove their innocence, an approach that is inconsistent with the established allocation of the burden of proof. *Peabody*, 18 FMSHRC at 499 (“Commission precedent has established that the Secretary bears the burden of proving that an operator’s conduct, as it relates to a violation, is unwarrantable.”).

For the foregoing reasons, I would affirm the judge’s finding that Windsor’s violation was not unwarrantable.<sup>9</sup>

  
Theodore F. Verheggen, Commissioner

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<sup>9</sup> I also note that, given the retirement of Judge Koutras, a new judge must be appointed to consider the majority’s remand order. Assignment of a new judge raises two problems: first, if no new trial is called, the new judge must make factual findings solely on the basis of a cold record with no opportunity to acquaint him or herself with the demeanor of the witnesses on whose testimony he or she must base his or her findings; and second, if a new trial is held, witnesses will be forced to recollect events that occurred three years ago. I find both of these scenarios unfair to both parties.

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U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
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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**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

September 3, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-73
Petitioner	:	A.C. No. 36-01555-03507
v.	:	
	:	Stiteler Strip
ROSTOSKY COAL COMPANY,	:	
Respondent	:	
	:	

**DECISION**

Appearances: Donald K. Neely, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Respondent;  
Mr. Joseph Rostosky, Rostosky Coal Company, Monongahela, Pennsylvania, *pro se*.

Before: Judge Bulluck

This proceeding is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Rostosky Coal Company ("Rostosky Coal"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815.

A hearing was held in Washington, Pennsylvania in which Joseph Rostosky represented himself, assisted by his son, Peter Rostosky, who is co-owner. The Secretary's post-hearing brief is of record. For the reasons set forth below, the citation and order at issue shall be AFFIRMED.

I. Stipulations

The parties stipulated to the following facts:

1. Stiteler Strip is leased and operated by the Respondent in this case, Rostosky Coal Company.

2. Stiteler Strip is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over the proceedings, pursuant to section 105 of the Act.

4. The citations and terminations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date and place stated therein and may be admitted into evidence for the purpose of establishing their issuance.

5. The parties stipulate to the authenticity of their exhibits, but not to the relevance or the truth of the matters asserted therein.

6. The operator had one (1) assessed violation for the twenty-four month period prior to issuance of the subject citation.

7. The imposition of the proposed civil penalty will have no effect on the Respondent's ability to remain in business.

8. Rostosky Coal Company produces approximately 17,628 tons of coal annually in all of its operations.

9. Stiteler Strip produces 17,628 tons of coal annually.

## II. Factual Background

Rostosky Coal operates and leases the Stiteler Strip, a surface coal mine, in which father and son co-owners, Joseph and Peter Rostosky, are the primary working employees, with some aspects of the mining process, such as blasting and "gopher" duties, subcontracted to other individuals (Tr. 85, 183, 190, 195-98, 203-04, 211).

The record establishes that MSHA Inspector Randy Myers, assigned to the Kittanning Field Office, was "lent" to the Waynesburg Field Office to inspect the Stiteler Strip, in order for Waynesburg to complete mandatory inspections of the mines under its jurisdiction by March 31, 1998 (Tr. 23-25, 46, 49, 62-63).

On March 17, 1998, Inspector Myers arrived at the Stiteler Strip at 6:00 a.m. to conduct a Triple A inspection of the mine, including noise and dust sampling (Tr. 23-31). When the Rostoskys arrived some forty minutes later, Peter Rostosky remained in the truck while his father opened up the mine (Tr. 26-28). When Inspector Myers approached Joseph Rostosky at the mine entrance, identifying himself and his mission, Rostosky became visibly agitated and argumentative and, joined by his son who, in like fashion but lesser in degree, supported his father's position,

denied the inspector entry to the mine (Tr. 28-31). It is undisputed that the Rostoskys did not ask to see Myers' credentials and believed him to be an MSHA inspector, despite the fact that they had never met him before (Tr. 141-42). Consequently, without issuing a citation or order, Myers left the mine at approximately 7:00 a.m. (Tr. 32).

Inspector Myers proceeded to the Washington Field Office, reported the incident to Supervisory Inspector Robert Newhouse, and was instructed by Newhouse to return to Kittanning to write his field notes and a memorandum of what had transpired that morning (Tr. 33; Exs. G-1, G-2).

On instructions from MSHA District Manager Joseph Garcia, Inspector Newhouse, accompanied by Inspector William Wilson, arrived at the Stiteler Strip around 9:15 the same morning, for the purpose of investigating the earlier incident and proceeding with an inspection by Wilson, operator permitting (Tr. 121-23). Upon entering the pit, the inspectors were met by Joseph Rostosky, very angry to the point of screaming and poking Inspector Newhouse in his chest, who asserted, among other things, that MSHA should have assigned an inspector, known to the Rostoskys, from the neighboring Washington Field Office (Tr. 76-78, 86-87, 127-28, 187-90). As a consequence of being denied access to inspect the mine, Inspector Wilson issued 104 (a) Citation No. 3681379 to Joseph Rostosky, alleging a non-significant and substantial violation of section 103(a) of the Act, describing the conduct as follows:

On Tuesday, March 17, 1998, Joseph Rostosky, operator, refused to allow Randy Myers, an authorized representative of the Secretary, entry into the Stiteler Strip Mine for the purpose of conducting an inspection of the mine, pursuant to Section 103(a) of the Act. Mr. Rostosky stated that the Federal Inspector could not enter the mine to conduct his inspection

(Tr. 79-81; Ex. G-4). Joseph Rostosky, in turn, tore up the citation and threw it to the ground (Tr. 82). Peter Rostosky then called District Manager Garcia from the pit, and despite Garcia's explanation to him that MSHA was shorthanded and that the Rostoskys were required by law to permit inspection, irrespective of their level of comfort with MSHA's choice of inspector, the Rostoskys remained steadfast in their refusal to allow the inspectors access to the mine (Tr. 92-93, 202-03). After retreating from the property to their government vehicle and allowing the Rostoskys thirty minutes to cool off and reconsider their position, Inspectors Newhouse and Wilson returned to the pit and renewed their request to conduct an inspection (Tr. 93). Upon the Rostoskys' continued refusal, Inspector Wilson issued 104 (b) Order No. 3681380, for failure to abate the citation, describing the conduct in the following manner:

Joseph Rostosky, operator, continued to deny an authorized representative of the Secretary the right of entry into the Stiteler Strip for the purpose of conducting an inspection of the mine in accordance with the requirements of section 103(a) of the Act on 3/17/98, after a reasonable time allowed for Mr. Rostosky to comply

(Ex. G-5; Tr. 94-99). Thereafter, Inspectors Newhouse and Wilson left the mine.

Subsequently, on March 24, 1998, pursuant to civil injunction, Inspector Myers, accompanied by another inspector, inspected the Stiteler Strip Mine and terminated the order (Ex. G-3; Tr. 37-39).

### III. Findings of Fact and Conclusions of Law

#### A. Fact of Violation

The instant citation and order charge a non-significant and substantial violation of section 103(a) of the Act, which provides in pertinent part:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any persons . . . . In carrying out the requirements . . . of this subsection, the Secretary shall make inspections of each . . . surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary . . . with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary . . . shall have the right of entry to, upon, or through any coal or other mine.

It is well settled that Congress intended section 103(a) of the Act to give "a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under" the Act. S. Rep. No. 95-181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 27 (1977), *reprinted in* Legislative History of the Federal Mine Safety and Health Act of 1977, at 615 (1978). Furthermore, the Secretary's broad right-of-entry under this standard, including the prohibition of advance notice to operators prior to inspection, has passed constitutional muster. *Donovan v. Dewey*, 452 U.S. 594, 598-608 (1981). Consistent with *Dewey*, the Commission has held that the failure of an operator to permit entry for inspection constitutes a violation of section 103(a). *Waukesha Lime and Stone Co., Inc.*, 3 FMSHRC 1702, 1703-04 (July 1981); *United States Steel Corp.*, 6 FMSHRC 1423, 1430-31 (June 1984). In so holding, the Commission has rejected the argument that injunctive relief under section 108(a)(1) is the sole remedy available to the Secretary. *Waukesha*, 3 FMSHRC at 1704. Moreover, the Commission has emphasized that

denial of access is at the operator's legal peril and "is an action not to be taken lightly." *Tracey and Partners, Randy Rothermel, Tracey Partners*, 11 FMSHRC 1457, 1464 (August 1989).

The Commission has directly spoken to the circumstances surrounding the instant matter in *Calvin Black Enterprises*, 7 FMSHRC 1151 (August 1985). In that case, the Commission found that, upon arrival at the mines, the inspectors properly identifying themselves, informed management of their purpose and the inspection requirements of the Act and, thereafter, were told that they were trespassing and needed the operator's written permission before inspecting. In affirming a violation of section 103(a), the Commission concluded that "MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect." *Id.* at 1157.

I credit Inspector Myers' testimony that he properly identified himself, explained his purpose for coming to the Stiteler Strip and discussed with the Rostoskys MSHA's responsibility to conduct two inspections annually. Indeed, the Rostoskys' rendition of the incident is essentially the same. I find Inspector Myers' premature departure from the mine reasonable, given his apprehension that conducting the inspection could possibly result in an altercation, given the Rostoskys' display of animus toward MSHA in general, and their antagonism toward him, in particular. I also credit the testimony of Inspectors Newhouse and Wilson that Joseph Rostosky displayed extremely aggressive, threatening behavior, including screaming, poking his finger in Newhouse's chest, and tearing up and throwing away the citation. I also credit the inspectors' assertions that they made numerous attempts to reason with the Rostoskys and persuade them to permit an inspection. Moreover, in the telephone conversation between Peter Rostosky and District Manager Garcia, the Rostoskys were given an explanation for the inspection and assignment of Myers by higher authority, warned that they were in serious violation of the law, and urged to permit inspection by the Wilson-Newhouse team.

The Rostoskys simply chose not to believe that MSHA was shorthanded. Their cumulative testimony amounted to discomfort with inspectors that "didn't know their job operation," and displeasure that they had been denied advance notice. Furthermore, the Rostoskys expressed their opinion that MSHA is harassing them by conducting inspections, since the Act does not apply to a two-man operation, and since their surface operation, as opposed to an underground mine, does not come under the definition of "mine." While I find the Rostoskys to be sincere, although incorrect, in their beliefs, I also find them totally lacking in deference to MSHA's authority and, therefore, closed to all suggestion of conduct that would have brought them into compliance with the law. Moreover, the Act does not exempt Rostosky Coal from inspection, or entitle the company to advance notice or "inspector shopping."

There was no confusion by the Rostoskys that Myers, Newhouse and Wilson were MSHA inspectors. They were given a full explanation, repeatedly, as to why inspection was required, as well as why Myers had been assigned to their operation. They were provided a copy of section 103(a) of the Act, explained the consequences of non-compliance, and referred to the district manager, who explained the mission of all three inspectors and advised the Rostoskys of their

duty to comply with the law. I credit the testimony of Newhouse and Wilson that the Rostoskys were put on notice that they had one-half hour to calm down and reconsider their position before the failure to abate order was issued, primarily because this rendition of events is consistent with the overall evidence of the inspectors' efforts to resolve any problems that may have existed and accomplish inspection. Moreover, the Rostoskys' testimony, that they would have permitted Newhouse and Wilson to inspect had they been asked, suggests a spirit of cooperation that the weight of the evidence does not support. In any event, it is evident that Joseph's Rostosky's level of and hostility and aggression, together with his son's lesser but, nevertheless, antagonistic posture, required the course that the inspectors ultimately took--abandoning the mission and accomplishing inspection at a later date through civil injunctive relief. It is also abundantly clear that the Rostoskys are lacking in understanding of the protective purposes of the Act and the duties required of them as mine operators, thereunder. Accordingly, based on the totality of the evidence, I find that the Rostoskys denied the inspectors access to the Stiteler Strip Mine and, therefore, violated section 103(a) of the Act, as alleged.

#### B. Penalty

While the Secretary has proposed a civil penalty of \$3, 000.00, 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, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7<sup>th</sup> Cir. 1984).

Rostosky Coal is a very small operator, with only one assessed violation for the twenty-four month period prior to the issuance of the subject citation, not for the standard at issue in this case (Ex. G-7). As stipulated by the parties, the proposed penalty will not affect Rostosky Coal's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of Rostosky Coal in causing it. I find the gravity to be very serious. Lack of regard for the Secretary's authority to inspect the mines without interference and intimidation, if tolerated, would undercut the very purpose of the Act, by disabling the mechanism by which it is enforced. Considering that, multiple times, the Rostoskys disregarded warnings by Inspectors Myers, Newhouse, Wilson and Garcia that denial of access by federal inspectors to conduct inspections is an egregious violation of the Act, and unreasonably continued to deny access in a hostile and intimidating manner until the court's intervention, I find this conduct intentional and tantamount to an aggravated lack of care that is more than ordinary negligence. Consequently, I ascribe high negligence to Rostosky Coal. It is also my finding that the Rostoskys' hostile, combative behavior is rooted in misconceptions of the Act, and that good faith communication between the Rostoskys and MSHA, intended to foster a professional working relationship, is necessary. Having duly considered Rostosky Coal's very small size, good history of prior violations, seriousness of the violation, high degree of negligence, failure to abate in good faith and no other mitigating factors, I find that a penalty of \$2,000.00 is appropriate for a company the

size of Rostosky Coal, with the caveat that any future violation of this nature would suggest an unconscionable disregard for the Act and MSHA's enforcement authority that may result in significant escalation in penalty.

**ORDER**

Accordingly, it is **ORDERED** that Citation No. 3681379 and Order No. 3681380 are **AFFIRMED**, and Rostosky Coal Company is **ORDERED** to pay a civil penalty of \$2,000.00 within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

Donald K. Neely, Esq., Office of the Solicitor, U.S. Department of Labor, 14480 Gateway Bldg.,  
3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Joseph Rostosky, Owner, Rostosky Coal Company, R.D. #3, Box 112, Monongahela, PA 15063  
(Certified Mail)

/nt

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

September 9, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-313
Petitioner	:	A. C. No. 15-03178-03894
v.	:	
	:	Ohio No. 11 Mine
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;  
Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Bulluck

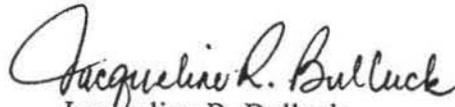
This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Island Creek Coal Company ("Island Creek"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. §815. The Petition seeks a civil penalty of \$8,000.00 for an alleged violation of section 75.220(a)(1), 30 U.S.C. §75.220(a)(1).

A hearing on the merits was convened on July 28, 1999, in Henderson, Kentucky, during which MSHA Inspector Archie Coburn testified. Based on conclusions drawn from the inspector's testimony, the Parties entered into a discussion and negotiated a settlement, whereby Petitioner agreed to modify 104(d)(1) Citation No. 4274887 to a 104(a) citation, to reduce the level of gravity to "unlikely," and to delete the "significant and substantial" designation, and Respondent agreed to pay a reduced penalty of \$3,000.00. The settlement was approved at hearing, and that determination is hereby confirmed.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

**ORDER**

The settlement is appropriate and in the public interest. **WHEREFORE**, the approval of settlement is **GRANTED**, and it is ordered that the Secretary modify Citation No. 4274887 to a 104(a) citation, reduce the level of gravity to “unlikely,” and delete the “significant and substantial” designation, and that Respondent pay a penalty of \$3,000.00 with thirty (30) days of this Decision. Upon receipt of payment, this case is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

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

Elizabeth S. Chamberlin, Esq., Consol Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

/nt

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
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FALLS CHURCH, VIRGINIA 22041

September 14, 1999

UNITED MINE WORKERS OF AMERICA:	COMPENSATION PROCEEDING
LOCAL 1571, on behalf of miners,	:
Applicant	:
	:
v.	:
	:
LEHIGH COAL & NAVIGATION CO.,	Springdale, Greenwood & Little Italy
Respondent	:
	Mine ID 36-01761

**DECISION**

Appearances: James P. Lamont, United Mine Workers of America,  
Washington, D.C., for Applicant;  
W. Atlee Davis III, Esq., Lehigh Coal and Navigation Company,  
Pottsville, Pennsylvania, for Respondent.

Before: Judge Bulluck

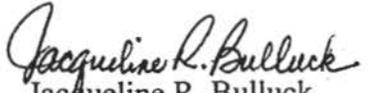
This Compensation Proceeding is before me pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et. seq.* ("the Act"), upon application filed by the United Mine Workers of America, Local 1571 ("UMWA"), against Lehigh Coal and Navigation Company ("Lehigh"). The UMWA seeks compensation for 25 of its members employed at Lehigh's No.14 Preparation Plant, who were allegedly idled by a withdrawal order issued by the Secretary of Labor, pursuant to section 107(a) of the Act.

A hearing on the merits was convened on August 19, 1999, in Reading, Pennsylvania. At the hearing, the parties negotiated and entered into a settlement agreement, whereby Lehigh agreed to pay compensation to the members of UMWA Local 1571, laid-off from the No. 14 Preparation Plant during the period November 19 through 23, 1998, at their usual rate of pay for 1998. The settlement was approved at hearing, and that determination is hereby confirmed.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

**ORDER**

The settlement is appropriate and in the public interest. **WHEREFORE**, the approval of settlement is **GRANTED**, and it is ordered that Respondent pay compensation to the affected UMWA members, in accordance with the terms of the settlement agreement, within 30 days of this Decision. Upon full payment of compensation, this case is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

James P. Lamont, Esq., United Mine Workers of America, Legal Department, 900 15<sup>th</sup> Street, N.W., Washington, DC 20005 (Certified Mail)

W. Atlee Davis III, Esq., Lehigh Coal and Navigation Company, 101 N. Centre Street, P.O. Box 1040, Pottsville, PA 17901 (Certified Mail)

/nt

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 22, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. CENT 98-199-M
	:	A. C. No. 41-01477-05533
v.	:	
	:	Beck Quarry
VALLEY CALICHE PRODUCTS, INC., Respondent	:	

## DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U. S. Department of Labor,  
Dallas, Texas, for the Secretary;  
Hector J. Torres, Esq., Atlas & Hall, L.L.P., McAllen, Texas, for the Respondent.

Before: Judge Weisberger

### Statement of the Case

This case is before me based on a Petition for Assessment of penalty filed by the Secretary of Labor ("Secretary") alleging that Valley Caliche Products, Inc. ("Valley Caliche") violated 30 C.F.R. §§ 56.14107(a), and 56.20003(a).

Subsequent to a notice, this matter was set for hearing, and was heard on March 23-25, 1999. Subsequent to the hearing, the Parties engaged in extensive discussions regarding settlement. On September 15, 1999, pursuant to a previously issued order, the Secretary filed a statement indicating that the parties had not reached an agreement resolving all of the issues in the case, but agree that ". . . the only factual and legal issues remaining in dispute concern the amount and the special assessment of the penalty and the degree of negligence assigned to each citation." Accordingly, based upon the Parties' agreement, and the evidence of record, I find that Valley Caliche did violate 30 C.F.R. §§ 56.14107(a) and 56.2003(a), and that these violations were significant and substantial.

## Penalty

### Citation No. 4447248

Subsequent to an investigation of a fatality that had occurred at Valley Caliche's Beck Quarry on March 24, 1997, MSHA Inspector Ronald M. Mesa issued Citation No. 4447248 alleging a violation of 30 C.F.R. § 56.14107(a) in that, in essence, the guard that was in place on the east side of the tail pulley for the No. 38 conveyor belt was not adequate to prevent access to the pinch point.

It is not contested that the violation was significant and substantial. Further, the violative condition could have led to contact with a hazardous pinch point. Also, a fatality did occur. I conclude that the gravity of the violation was relatively high.

The unguarded area at issue, located along the east side of the conveyor belt No. 38, was more than 5 feet above the ground. According to Robert H. Thompson, Valley Caliche's president and general manager, and Samuel Bazan, Valley Caliche's foreman, the area between the west side of conveyor No. 35, and the east side of conveyor No. 38 is not used as a travelway. Further, although the conveyor belt at issue has to be adjusted regularly to keep its alignment straight, and to prevent material from falling off the belt, it may be properly aligned by adjusting either the screw located on the west side of the belt, or the screw located on the east side of the belt. Hence, it is not necessary to go to the east side of belt No. 38 in order to align the belt. Further, the adjustment screw on the east side is located outside the guarded area. Moreover, although the equipment at issue had been installed, according to Thompson, in late 1986 or early 1987, no citations for the violative condition were issued in an MSHA inspection 5 weeks prior to the accident at issue. Within this context, I find that the level of Valley Caliche's negligence to have been low. Considering the remaining factors set forth in section 110(i) of the Federal Mine Safety and Health Act of 1997("the Act"), I find that a penalty of \$5,000.00 is appropriate for this violation.

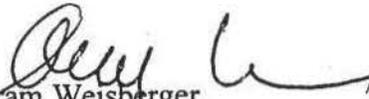
### Citation No. 4447249

Mesa also issued Citation No. 4447249 alleging that material had accumulated in the area between conveyor Nos. 35 and 38 in violation of section 56.20003(a), supra. Taking into account that it is not contested that the violation was significant and substantial, I find that the level of gravity of this violation was relatively high. According to Sergio Verastegui, and Jose Facundo, Valley Caliche's belt cleaners, the belt at issue goes out of alignment three to four times a day which causes spillage of material that they have to clean up to two to three times a day. However, according to Bazan, material can fall on the floor within minutes if the belt is not in proper alignment. Additionally, there is no evidence in the record as to how long the accumulated material at issue had been in existence prior to the accident. In this connection, Thompson testified that, based on interviews, the pile was not in existence at 8:45 a.m., when the area was inspected the morning of the accident. Within this context, I conclude that the level of Valley

Caliche's negligence was low. Taking into account the remaining factors set forth in section 110(i) of the Act, I conclude that a penalty of \$2,000.00 is appropriate for this violation.

**ORDER**

It is **ORDERED** that Citation Nos. 4447248 and 4447249 be **AFFIRMED**. It is **FURTHER ORDERED** that, within 30 days of this Decision, Valley Caliche shall pay a total civil penalty of \$7,000.00.

  
Avram Weisberger  
Administrative Law Judge  
703-756-6215

Distribution:

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Hector J. Torres, Esq., Atlas & Hall, L.L.P., 818 Pecan, McAllen, TX 78501 (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 23, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 97-170
Petitioner	:	A. C. No. 36-06873-03656
v.	:	
	:	Docket No. PENN 97-190
TARGET INDUSTRIES , INC.,	:	A. C. No. 36-06873-03657
Respondent	:	
	:	Docket No. PENN 97-194
	:	A. C. No. 36-06873-03658
	:	
	:	Docket No. PENN 98-8
	:	A. C. No. 36-06873-03660
	:	
	:	Target No. 1 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 98-98
Petitioner	:	A. C. No. 36-06873-03664 A
v.	:	
	:	Target No. 1 Mine
PHILLIP K. PETERSON, employed by	:	
TARGET INDUSTRIES, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MHSA)	:	Docket No. PENN 98-104
Petitioner	:	A. C. No. 36-06873-03665 A
v.	:	
	:	Target No. 1 Mine
GREGORY L. GOLDEN, employed by	:	
TARGET INDUSTRIES, INC.,	:	
Respondent	:	

## DECISION

Appearances: Richard T. Buchanan, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;  
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania for Respondent.

Before: Judge Barbour

These consolidated contest and civil penalty cases arise under sections 105(d) and 110(c) of the Federal Miner Safety and Health Act of 1977 (30 U.S.C. §§ 815(c), 820(c)) (Mine Act or Act). The Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) seeks the assessment of civil penalties against Target Industries, Inc. (Target or the company), Phillip K. Peterson, and Gregory L. Golden for violations of mandatory safety standards that allegedly occurred at Target's No. 1 Mine. In addition, the Secretary alleges certain of the violations were significant and substantial contributions to mine safety hazards (S&S), were the result of the company's unwarrantable failure to comply, and were the result of "knowing" actions by the individuals.

The company and the individuals respond by challenging the legal and factual basis of the Secretary's allegations. They also argue that even if the violations occurred, the penalties proposed by the Secretary are excessive.

The matters were consolidated for hearing and decision, and the cases were tried in Morgantown, West Virginia. At the hearing, counsels advised me that three of the contested violations had been settled (see Tr. 21). The settlements were read into the record (Tr. 412-421). I will approve them at the end of the decision. Subsequent to the hearing counsels submitted very helpful briefs.

## THE ISSUES

The issues are the existence of the violations, their S&S and unwarrantable natures, whether Peterson and Golden knowingly violated the cited standards, and the amounts of any civil penalties that must be assessed against the company and the individuals, taking into consideration the statutory civil penalty criteria set forth in section 110(i) of the Act (30 U.S.C. §820(i)).

## STIPULATIONS

At the hearing and on brief the parties stipulated as follows:

1. The Target No. 1 Mine is owned and operated by Target Industries, Inc.

2. Target is subject to the jurisdiction of the Mine Act, and the Commission has jurisdiction over the proceedings.

3. Target is a corporation chartered under the laws of the Commonwealth of Pennsylvania.

4. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of Target at the date, time, and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements asserted therein.

5. The documents offered as evidence are authentic, but the parties do not agree as to their relevance, or to the truth of the matters asserted therein.

6. The applicable history of previous violations of Target is reflected in Government Exhibit 32 .

7. The allegations of Citations No. 7013512 and No. 7013513 are at issue only if the No. 2 and the No. 3 fans are found to be "main mine fans" as that term is used in 30 C.F.R. Part 75.

8. Should the Judge find either Phillip Peterson or Gregory Golden liable under section 110(c) of the Act, they will be able to pay the penalties assessed by the Secretary provided the payments are made in installments over a period of time (See Tr. 17; Sec. Br. 2-3; Additional Stipulations of the Parties 1-2).

### **THE CENTRAL CONTROVERSY**

The central controversy involves two bleeder fans at the mine, the No. 2 fan and the No. 3 fan .<sup>1</sup> The fundamental question is whether the fans were "main mine fans" as that term is used in Subpart B of 30 C.F.R. Part 75 (Mandatory Safety Standards — Underground Coal Mines).

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<sup>1</sup>Bleeder fans are surface fans which pull air from the bleeder entries, over the gob, and up and out of the mine. "Bleeder entries " are defined as "Panel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways" (American Geological Institute Dictionary of Mining, Mineral, and Related Terms 55 (2<sup>nd</sup> ed. 1997)).

## THE MINE AND ITS VENTILATION SYSTEM

The Target No. 1 Mine is an underground bituminous coal mine, located in Greene County, Pennsylvania. At the mine, the extraction of coal is conducted using the room and pillar method. Continuous mining machines drive the entries and remove the coal. Then, the coal is transported to the surface.

The mine is ventilated by three surface fans, the largest of which is the No. 1 fan. The No. 1 fan exhausts air from the active workings via the return entries. On the mine map (Gov. Exh. 25) the No. 1 fan bears the designation "main mine fan". The No. 1 fan has the capacity to pull approximately 120,000 cubic feet of air per minute (cfm). The air travels up and through a borehole and out of the mine (Tr. 187). The diameter of the borehole is approximately 89 inches (Tr. 116).

The mine also is ventilated by the two bleeder fans. The No. 2 fan and the No. 3 fan exhaust air from the bleeder entries and the gob. On the mine map the No. 2 fan bears the designation "Ventilation Borehole #2" (Gov. Exh. 25). It ventilates the three-left gob (Tr. 32, 39). It pulls approximately 4,000 to 5,000 cfm of air. The air travels through the bleeder entries, over the gob, up a borehole, and out of the mine. The diameter of the borehole is approximately 12 inches (Tr. 111, 116).

On the mine map the No. 3 fan bears the designation "Ventilation Borehole #3" (Gov. Exh. 25). The fan ventilates the four-left gob (Tr. 32). It pulls approximately the same quantity of air as the No. 2 fan through the bleeder entries, over the gob, and up a similarly bore hole (Tr. 111, 116).<sup>2</sup>

All of the fans are equipped with pressure charts (also known as pressure gauges). The charts record the operation, or the lack of operation, of the fans over seven consecutive days by constantly recording the pressure of the air the fans are pulling (Tr. 44). If a fan ceases to function, its chart indicates that no pressure is being produced. Likewise, if a fan slows and draws less air, its chart records a diminution of pressure.

At the time the subject violations were issued, between 35 and 38 persons were employed at the mine (Tr. 387). As a general rule, they worked on three shifts — two production shifts and one maintenance shift. Thus miners usually were underground around-the-clock. The entire mine was inspected by MSHA once every three months (Tr. 104).

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<sup>2</sup>The mine liberates approximately 55,000 cfm of methane every 24 hours (Tr. 133). The parties do not dispute that air in the bleeder entries and the gobs contains methane and that ventilation of the bleeder entries and gobs reduces methane in the mine.

## THE INSPECTIONS OF MARCH 3 AND MARCH 4, 1997

Ronald Hixson is a MSHA inspector and ventilation specialist. He is assigned to MSHA's Rough Creek Field Office. The office is located in southwestern Pennsylvania and is responsible for the administration of the Mine Act in the region. Hixson has worked in the office since 1989. He has been a ventilation specialist since 1993. (Tr. 23-24). As a ventilation specialist, he reviews and investigates new ventilation plans, existing plans submitted for reapproval, and addendums to existing plans. The plans are submitted to MSHA by mine operators (Tr. 24).<sup>3</sup>

In early 1977, the Target No. 1 Mine was operating under a MSHA approved ventilation plan when Target proposed moving a bleeder evaluation point (BEP). (Tr. 304-305; Gov. Exh. 22)<sup>4</sup> The move required Target to amend its plan, and on March 3, Hixson went to the mine to evaluate the proposal (Tr. 41).

Upon arriving at the mine, Hixson met Phillip Peterson. Peterson had worked at the mine since March 1996. Prior to that, he owned his own surveying company. Peterson was responsible for drafting the mine's ventilation plan and its addenda and for submitting the proposals to MSHA. Peterson had a thorough understanding of the mine's ventilation system (Tr. 304).

Peterson also had another responsibility. In 1996, Peterson was told to conduct daily examinations of the No. 2 and No. 3 bleeder fans (Tr. 305-307). A mine foreman told Peterson to examine the fans after the foreman spoke with a state mine inspector and after the state inspector advised the foreman the fans had to be examined daily. Because the foreman's directive followed the conversation with the state inspector, Peterson testified he understood the examinations had to be made in compliance with state, rather than with federal requirements (Tr. 306, 311-313).

After meeting Peterson, Hixson explained why he was at the mine and told Peterson that he (Hixson) needed to take air readings underground at the four-left gob and on the surface at the No. 3 fan (Tr. 41). The men decided to visit the surface installation first, and they drove Peterson's Jeep to the fan.

The fan was located in a fan house — a metal building measuring approximately 10 feet by 10 feet. The fan house was surrounded by a locked fence. As Hixson and Peterson stopped at

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<sup>3</sup>Mandatory safety standard 30 C.F.R. §75.370 requires a mine operator to develop and follow a ventilation plan approved by the MSHA district manager.

<sup>4</sup>Hixson described a BEP as a point where an operator can evaluate the direction and content of the air in a bleeder (Tr. 40).

the fan house, Hixson could not hear the fan (Tr. 42). A production crew was underground. The crew had entered the mine around 7:00 a.m. (Tr. 310).

The men got out of the Jeep, and Peterson unlocked the gate. Hixson and Peterson went into the fan house and found that the fan was not operating. Peterson restarted it by pressing the fan's restart buttons. Meanwhile, Hixson looked at the fan's pressure chart (Tr. 42-43; Gov. Exh. 26). Hixson saw that at approximately 2:00 p.m., on Thursday, February 27, the fan began to record "no pressure", and that it continued to record a lack of pressure until Peterson restarted the fan on March 3 (Tr. 41-45; Gov. Exh. 26). (An indication of "no pressure" meant that the fan was not operating.)

Hixson knew that Peterson was supposed to examine the fan on a daily basis. Therefore, Hixson asked Peterson if he had conducted an examination of the fan on February 28, the first full day the fan would have had to be examined after it shut down (Tr. 46-47). According to Hixson, Peterson replied that he did not have a key to the fan house gate on February 28, but that he had seen and heard indications from outside the gate that the fan was running (Tr. 47-48).

Hixson also knew that Target had contracted with an off-site security firm, Commonwealth Security Company (Commonwealth), to maintain an alarm system to monitor the mine's fans. When a fan's pressure gauge showed a significant drop in air pressure, the firm received a signal from the fan. Commonwealth then was supposed immediately to contact the mine, which meant that a Commonwealth representative usually called either Junior Golden, the company's president, or Gregory Golden, its maintenance foreman, to report the problem (Tr. 48-49, 76-77). This system of reporting fan slowdowns and outages was accepted by MSHA while Target was in the process of installing a direct line from the fans to the mine office in order to provide an immediate signal to the office when the fans slowed or stopped (Tr. 89-90, 189, 194, 224).<sup>5</sup>

Because Hixson was aware of the procedures involving Commonwealth, he asked Peterson if the company had received an indication from Commonwealth that the No. 3 fan had stopped, and Peterson told him that it had not (Tr. 49).

Hixson and Peterson then left the fan house and traveled back to the mine office, where Hixson reviewed the mine examination books (Tr. 49). In particular, Hixson looked at a book entitled Daily and Monthly Examination of Ventilation Equipment (Gov. Exh. 15; Tr. 119).

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<sup>5</sup>According to MSHA Inspector James Dickie, the system Target/Commonwealth was accepted even though the Secretary's regulations required a signal "at the mine when the fan slowed or stopped" (30 C.F.R. § 75.310(a)(3)). The system was allowed to continue while Target completed technological changes at activate a signal to the mine (Tr. 186-187). (As of the date of the hearing, a direct signal system was not yet in place for the No. 2 and the No. 3 fans and MSHA was still accepting the arrangement (Tr. 192-193).)

Hixson noted that on February 28, at 6:40 a.m., Peterson signed the book and recorded the pressure gauge at the No. 3 fan as registering 8.6 inches (Tr. 52-53; Gov. Exh. 15 at 3). Hixson was surprised, since he had read the gauge as registering zero not 8.6 inches, and since a reading of 8.6 inches indicated the fan was in fact operating.

Hixson left the mine and returned to his office, where he discussed the situation involving Peterson and the fan with his supervisor. Hixson returned to the mine the next day, March 4, accompanied by his supervisor and by MSHA electrical inspector, Gene Kelly. The men wanted to investigate further the status of the No. 3 fan (Tr. 65). To do so, they intended to test the Target/Commonwealth signal system. They also wanted to speak again with Peterson.

Upon arriving at the mine, Hixson met Peterson and the men traveled to the No. 3 fan. They entered the fan house, and they pulled the lines from the pressure gauge to the fan chart. When the lines were pulled, the air pressure fell to zero, and a signal was sent immediately to Commonwealth. In turn, Commonwealth called the mine office and reported the No. 3 fan had sent a signal indicating it was "down" (Tr. 66).

Peterson and Hixson went back to the office, and Hixson again reviewed the ventilation equipment examination books. He repeated his questions to Peterson about whether Peterson had examined the No. 3 fan on February 28, and this time Peterson told Hixson "he did not want to lie", that actually he had not made the examination on February 28, even though he indicated in the examination book that he had (Tr. 67). He meant to do the examination, but he "just forgot" (Tr. 314). He entered 8.6 inches of pressure in the book because that was the pressure the chart usually recorded. He feared if he did not make an entry in the book, he would "get in trouble" (Tr. 313, see also Tr. 315).

Meanwhile, Kelly who also looked at the examination books, found that Peterson had not conducted an examination of the No. 2 fan on February 28, March 1, or March 2, 1997. He based his finding upon the fact the examination book for the No. 2 fan was blank for those dates (Tr. 70-71).

As a result of the inspections on March 3 and March 4, and the discussions with Peterson, Hixson and Kelly issued several citations and an order to Target, charging the company with various violations of the standards relating to main mine fans.

#### **THE EVENTS OF APRIL 7, APRIL 8, AND APRIL 9, 1997**

Due to the events in March, Target and Commonwealth agreed in writing to certain additional procedures to be followed when Commonwealth received a signal that a fan at the mine had slowed or stopped. The agreement stated that fan failure signals were not to be disregarded, that when Commonwealth received a signal it would find and notify the mine site. If it could not reach anyone at the mine, it would notify Gregory Golden. If it could not reach Gregory Golden, it would find and notify Junior Golden (Gov. Exh. 23). MSHA did not consider the agreement to

be part of the mine ventilation plan, but MSHA accepted the agreement until such time as Target completed work on fully complying with section 75.310(a)(3) (Tr. 194).

In addition to the agreement, Target, through Gregory Golden, hired several new employees to monitor the fans' operations. The new miners were stationed around-the-clock at the No. 2 and No. 3 fans (Tr. 322-323). One of the employees was Donte Soucy, who described his job as "check[ing] periodically and listen[ing] consistently . . . [to] the [No. 3] fan" (Tr. 237). He worked from 3:00 p.m. to 11:00 p.m. According to Gregory Golden, if the fan ceased to operate Soucy's responsibility was to restart it. If he was unsuccessful, Soucy was to call Gregory Golden's office at the mine to tell Golden, or someone else, that the fan was not operating (Tr. 401).

On April 7, 1997, Soucy was at the No. 3 fan when he heard it slow down. Soucy tried to determine what was wrong, but the fan "picked back up" and resumed working properly (Tr. 235). Then, at 9:40 p.m., the fan completely stopped. Soucy could not restart it. Soucy claimed that he tried to call the mine office several times to report that the fan was "down", but he was unable to get through. He also claimed that while the fan was stopped no one called him (Tr. 236).

The Secretary offered into evidence the logs and a transcript of the conversations between the Commonwealth representative and the Goldenes regarding the No. 3 fan. They revealed that at 9:45 p.m., the Commonwealth representative called Gregory Golden, reported the fan was down and told Golden that she (the representative) would try to restart it (*Id.*, Gov. Exh. 18 at 29-1, Tr. 169, 173). At 9:47 p.m., the representative called Junior Golden and notified him about the fan about the fact that she had called Gregory (Gov. Exh. 17 at 21-32, Gov. Exh. 18 at 29-2; Tr. 169-170, 172-175). The representative asked Junior Golden if he wanted to be called back when the fan was restarted, and he responded "No, call Greg" (Gov. Exh. 18 at 29-2). At 10:35 p.m. the representative again called Gregory Golden to report the fan had not been restarted. At 10:51 p.m., the representative made a final call to Gregory Golden stating that she could not restart the fan. She added, "Someone there needs to check the fan to make sure there is not some kind of equipment malfunction with the fan", and Gregory Golden replied, "Okay. I'll have somebody up there in the morning" (Gov. Exh. 18 at 29-3 - 29-4; Tr. 173-174).

Immediately after the representative first notified Gregory Golden, Gregory Golden called Junior Golden to tell him the fan was not working. Gregory Golden maintained that Junior Golden told him to "take care of it. To take care of the call" (Tr. 164). Junior Golden, claimed he told his son more, that he also told Gregory if he could not contact the mine, he should go to the mine (Tr. 295-98, 391, 394). Gregory Golden believed that it would have taken him 30 to 40 minutes to reach the mine from his home (Tr. 402).

There were three separate telephone lines into the mine office and a separate line to each of the borehole fans. Gregory Golden testified that he tried to call the mine office on all three of its telephone lines. In addition, he tried to call his cellular telephone, which he had left at the

mine. One line was busy. No one answered the other lines (Tr. 399-400, 407-408). He also maintained that he tried to call the No. 3 fan, that the telephone rang, and that no one answered (Tr. 400, 405, 408).

Gregory Golden understood that if miners were working underground when a main mine fan shut down, they had to be withdrawn from the mine beginning at least 15 minutes after the fan shut down. He further understood that he was responsible for insuring the miners were withdrawn, and that he was responsible for notifying the mine if the fan shut down (Tr. 406-407). Despite this, Gregory Golden did not travel to the mine when he could not reach anyone by telephone (Tr. 408). When asked why he did not go to the mine, he testified "I hired . . . [Donte Soucy] to be there to watch the fans and report to the mine site or to call me if something happened to it " and "I assumed that the fan was running, that . . . [Soucy] was there and everything was all right" (Tr. 400-410, 409).

When the fan shut down at 9:40 p.m. on April 7, a production crew was working underground. It would have taken between 30 and 45 minutes for all of the miners to leave the mine. If the crew had left within 15 minutes of the fan ceasing to function, it would have been out of the mine before its normal quitting time. As it was, the crew left at its normal time and therefore was underground for slightly more than an hour while the fan was not running (Tr. 163-163, 177, 410). Gregory Golden knew that the crew was in the mine. He also knew that another shift was scheduled to enter the mine at 11:00 p.m. (Tr. 410).

On April 8, MSHA Inspector Dickie traveled to the mine to check on Target's progress in developing information about the mine's fans, information that would be incorporated into the mine's ventilation plan (Tr. 154, see also Tr. 155). When Dickie reached the mine office he spoke with Peterson who told him the mine telephone system was out of order due to a transformer problem (Tr. 155). State mine inspector Larry Miller also was in the office. Miller told Dickie that when he, Miller, arrived at the mine at approximately 7:30 a.m. that morning, all of the miners were above ground because the No. 3 fan was not operating (Tr. 156).

Dickie then looked at the mine fan examination book and saw a notation indicating the No. 3 fan was "down" (Tr. 158; Gov. Exh. 27 at 32). Subsequently, Dickie also looked at the fan's pressure chart (Gov. Exh. 13). The chart revealed that around 7:30 p.m. on Monday, April 7, the fan went off, then came back on. Later that evening it stopped for good (Tr. 161-162).

Dickie spoke with Carl Betchey, the foreman of the crew that was underground when the fan ceased operating (Tr. 163). Betchey told Dickie that the miners had come out of the mine at 10:50 p.m. (Tr. 163). This was the time the second shift crew normally left the mine.

Dickie also spoke with Gregory Golden. Dickie asked him what he had done as a result of the calls from Commonwealth, and Gregory Golden replied, "I didn't do anything" (Tr. 165). Dickie then asked Gregory Golden if he notified anyone at the mine that the fan was off or that the fan had a problem and needed to be checked, and Gregory Golden replied that he had not.

Finally, he asked Gregory Golden if he "traveled to the mine to find out for [himself] if there was a problem with the fan", and Golden stated he did not (Id.; see also Tr. 166).

On April 9, Dickie returned to the mine where he spoke with Junior Golden about management's response to the shut down of the No. 3 fan. According to Dickie, Junior Golden told him that he, Golden, was "tired of people not doing what they were supposed to do" (Tr. 181). Dickie asked Golden if he was referring to anyone in particular, and Golden said he was referring to Gregory Golden (Id.). No one else was present during this conversation (Tr. 182), and at the hearing Junior Golden denied he stated that he was referring to his son. Rather, he was indicating his unhappiness with the new employees whom Target hired to monitor the operating status of the borehole fans (Tr. 391-392).

### **WERE THE NO. 2 FAN AND THE NO. 3 FAN "MAIN MINE FANS"**

A definition of the term "main mine fan" is found neither in the Act nor in the regulations, even though sections 75.310, 75.311, 75.312, and 75.313 apply only to such fans and even though the regulations repeatedly use the term. Lacking a statutory or a regulatory definition, I must consider whether the Secretary elsewhere has set forth and made available to operators what she believes the term to mean and/or whether the meaning of the term is clear from the context within which it is used.

The Secretary's Program Policy Manual (PPM) is a publication authored by the Secretary to explain to miners, operators, and the interested public the Secretary's interpretation and application of her regulations. Like the Act and the regulations, the PPM lacks a definition or explanation of the term "main mine fan" (see V PPM Part 75 at 33-34). However, the PPM is not the sole repository of the Secretary's interpretations. MSHA makes available other publications that explain how the agency views her regulations (see e.g. Department of Labor: MSHA MSHA'S Equipment Guide for Metal and Nonmetal Mining (1992)).

Denis Swentosky, an MSHA ventilation supervisor, identified a passage from a booklet entitled Ventilation [--] Questions and Answers (Tr. 266-267; Gov. Exh. 20). The booklet, in which information is presented in the form of questions and answers, was published in 1996. It states that on May 15, 1992, MSHA amended the standards for the ventilation of underground coal mines, that prior to final promulgation of the amended standards, training sessions in the standards were held for MSHA's inspectors, and that public informational meetings also were held "to introduce the new standards to the industry and labor organizations" (Gov. Exh. 20 at 2). The questions and answers in the publication are described as a compilation based on the sessions, meetings, and subsequent discussions (Id.). The publication's purpose is described as providing "guidance and assistance to the mining community applying the new standards in the specific cases represented by the questions." While the booklet states that it is "not a policy document and cannot be enforced as such," it also states that its "questions and answers should be considered an educational tool and an additional source of information" (Id. at 2). According to Swentosky the booklet was "made available to operators of coal mines" (Tr. 298).

The booklet makes clear that the Secretary considers the status of a "main mine fan" to be determined by the impact of the fan on a mine's overall ventilation system. At page 6 of the booklet, under questions regarding section 75.310, the following exchange appears:

- Q. Is a small, surface bleeder fan (i.e., 50,000 cfm) considered a "main mine fan"?
- A. The determination of what is a main fan depends on the impact a shutdown of the fan would have on the overall ventilation system. If the impact of a shutdown on mine or section ventilation is immediate and perceptible, the fan is a main mine fan (Gov. Exh. 20 at 6).

The emphasis upon an "immediate and perceptible" impact on the mine's overall ventilation system is consistent with the purpose of the regulations, as implied from the regulations themselves. The inescapable conclusion drawn from Sections 75.310, 75.311, 75.312, and 75.313 is that main mine fans serve dual and overlapping purposes. They are the primary mechanisms which ventilate a mine, and through that ventilation they eliminate explosive and toxic gases.

In her regulatory comments, the Secretary emphasized these purposes. She characterized the fans regulated by sections 75.310, 75.311, 75.312 and 75.313 as "controlling the ventilation at the [mine] and help[ing] assure that the miners have uncontaminated air at all times" (61 Fed. Reg. 9765 (1996)). The Secretary also spoke of them as "providing ventilation to prevent methane accumulations and possible explosions as well as providing miners with a healthful working environment" (*Id.* at 9767). In addition, she noted that a main mine fan "provides the pressure that causes air to move through the mine to dilute and carry away explosive and toxic gases, dusts and fumes" (*Id.* at 9769). Thus, in the Secretary's view, a main mine fan was "critical to mine ventilation and the prevention of methane accumulations and possible methane explosions" (*Id.* at 9770), and the hazard of such a fan stopping was that it could "result in the existence of unventilated areas and . . . highly hazardous methane accumulations" (*Id.* at 9773).

The testimony confirms the No. 2 and No. 3 fans in fact played an important roll in "controlling the ventilation at the [mine] and help[ed] assure that miners [had] uncontaminated air at all times" and that they "provid[ed] ventilation to prevent methane accumulations and possible explosions" (61 Fed. Reg. 9765 (1996)). In other words, the testimony confirms the No. 2 and No. 3 fans had an "immediate and perceptible" impact on the mine's overall ventilation system (Gov. Exh. 20 at 6).

Hixson emphasized that the fans pulled air and gases from the bleeder entries, across the gob, and out of the mine (Tr. 55). Without the fans, the gobs would not have been sufficiently ventilated (Tr. 112). There would not have been enough pressure to force sufficient air from the mine and prevent methane from accumulating in the gobs. As a result, the ventilation system

could have reversed, and methane could have seeped into active areas where men worked (Tr. 114-115, 134-135).

Dickie's testimony mirrored Hixson's but was more detailed. Dickie essentially confirmed that Hixson's understanding of the fans' roll in the mine's overall ventilation system was correct. Dickie persuasively described the No. 3 fan as pulling air that traveled over the four-left gob. In addition, because the three-left and four-left gobs were not totally separated, he explained how some of the air from three-left gob also was pulled over the four-left gob by the No. 3 fan (Tr. 205, 209-211). If the No. 3 fan failed there would be a "dead air space over . . . [the four-left] gob" (Tr. 211). Methane and carbon dioxide could accumulate and migrate back to the working section (Tr. 212, 215). His testimony that the four left gob was producing approximately eight cfm of methane per minute was not disputed (Tr. 212) nor was his testimony that when the fan was operating the area stayed "fairly clear" (Tr. 212). However, if the fan was not running, the gas would build until the volume got to the point where methane would migrate toward the bleeder entries and, if the stoppings had cracks, or the floor heaved, or if man doors were left open, the methane could travel to the working sections (Tr. 212, 215).

Further, John Urosek, chief of the ventilation division of MSHA's Safety and Health Technologies Center, amplified on what could happen if the fans failed in that methane which accumulated in the gob areas could be ignited by various potential ignition sources (Tr. 353-354). Any resulting explosion could damage the ventilation controls, and potentially lethal gases could endanger all of those in the active working sections (Tr. 354-355, 358-359, see also Tr. 361).<sup>6</sup>

Based upon this testimony, I am persuaded the No. 2 and No. 3 fans were "main mine fans". Because they had an immediate and perceptible impact on the mine's overall ventilation system they were subject to the main mine fan regulations.

#### **NOTICE**

Target contends that if this was so, the subject citations and orders nevertheless should be vacated because the company was deprived of adequate notice of the meaning of term (Tar. Br. 18-21). According to Target, it was not until March 3 and 4, 1997, the dates when the first of the subject citations and orders were issued, that MSHA viewed the fans as main mine fans. Prior to that, MSHA inspectors did not serve Target with any citations or orders for violations of the main mine fan regulations. Target especially notes that although Swentosky visited the mine on June 21, 1996, and although the No. 2 fan and the No. 3 fan then did not comply in several ways with the regulations governing main mine fans, Swentosky did not cite the fans (Tar. Br. 19-20). Target asserts that "[t]he only conclusion that can be drawn from this is that MSHA did not consider the fans to be main mine fans" and that "[a] reasonably prudent person would not have

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<sup>6</sup>While Urosek's focused his testimony on the hazards of methane, he noted as well that if the fans ceased, the level of oxygen in the mine would start to decrease and carbon dioxide would increase (Tr. 366-367).

believe, after . . . Swentosky's visit[,] . . . that MSHA considered the fans as main mine fans" (Id. 20).

I disagree. In my view, a reasonably prudent person familiar with the mining industry and with the ventilation system at the mine would have known from the Secretary's regulatory comments and from the purpose of the main mine fan regulations, that the fans were subject to the sections 75.310 through 75.313.

Moreover, and contrary to Target's assertion, the record supports the conclusion that MSHA advised Target that MSHA considered the fans to be main mine fans. I credit Swentosky's testimony that around April 1996, he spoke over the telephone with Junior Golden about MSHA's requirements for the No. 2 and No. 3 fans and told Junior Golden that the fans would have to meet the main mine fan requirements mandating the installation of explosion and automatic closing doors and requiring a 15 feet offset (Tr. 260).<sup>7</sup> Further, I credit his testimony that on June 21, 1996, he followed up on the conversations by going to the mine and by speaking with Junior Golden. The two discussed work Golden had started to install an explosion door for one of the fans and whether there was enough room to offset a fan from the mine opening by at least 15 feet (Tr.264, see also Tr. 285-286). Swentosky testified that during this visit he also told Junior Golden that the fans were main mine fans (Tr. 392). Junior Golden could not recall the latter conversation, but he did not deny that it occurred, and since the purpose of Swentosky's visit was to check on specific things that are required for main mine fans, Swentosky's recollection of what he told Golden rings true.

It is a fact that at the time of Swentosky's visit, the fans were not in compliance with many of the main mine fan requirements and that Swentosky issued no citations (See Tr. 271). When asked why, Swentosky stated that Junior Golden complained the previous owner of the mine had not been made to comply with the requirements and that Golden took exception to Target being made "suddenly" to "upgrade the fans" (Tr. 287). Swentosky candidly testified he believed Golden had a "legitimate beef" and that MSHA decided to work with Golden to, in effect, "phase in" compliance with the regulations (Tr. 287).

The problem is that the Act and the regulations do not provide for a gradual approach to compliance with regard to sections 75.310 through 75. 313. If there are violations of the regulations, either MSHA must cite the operator, or the operator must apply for a modification of the applicable standard or standards (30 U.S.C. §§814(a), 811(c)). This is not to say that MSHA's decision to "go slow" on mandating compliance was wrong. There are many considerations that come into play when administering the Act. However, the fact that MSHA decided to forego enforcement of the main mine fan regulations, while not reflecting a lack of notice, may impact on the company's negligence and hence upon any penalties assessed should I

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<sup>7</sup>Section 75.310(a)(5) requires main mine fans to be protected by weak walls or explosion doors, and section 75.310(a)(6) requires main mine fans to be "offset by at least 15 feet from the nearest side of the mine opening".

find the company failed to comply.

**CONTESTED CITATIONS**  
**DOCKET NO. PENN 97-170**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013405	3/3/97	75.310(a)(3)	\$235
7013408	3/4/97	75.310(a)(3)	\$204

Citation No. 7013405 states in part:

The fan signal device installed on the No. 3 borehole fan . . . did not function as designed. [Commonwealth] either did not get the required signal that the fan was not running or failed to communicate to the person on duty at the mine that the fan was not operating. This allowed men to be working underground with the #3 borehole fan not operating. The system installed does not give an audible or visual signal at the mine (Gov. Exh. 3).

The following day, the citation was modified to allege "the system failed to give a proper signal that the fan was not operating from [2:00 p.m.] on 2/27/97 till 3/3/97 at [8:00 a.m.]. . . . The fan also does not have a signal system installed that reports to a surface location at the mine" (Gov. Exh. 3).

Citation No. 7013408 states in part:

The No. 2 borehole fan on the surface . . . is not equipped with a signaling device that will give a signal at the mine when the fan either slows or stops. The signaling device that is currently installed is monitored at a location away from the mine. Any signal is received by [Commonwealth] and they in turn phone the mine site and alert them of the problem (Gov. Exh. 4).

The citations also allege that the violations were S&S.

Section 75.310(a)(3) requires in part that each main mine fan shall be "[e]quipped with an automatic device that gives a signal at the mine when the fan either slows or stops[, and that a] responsible person designated by the operator shall always be at a surface location at the mine where the signal can be seen or heard while anyone is underground." Hixson maintained he issued the citation regarding the No. 3 fan because "the company did not get a signal" and therefore was "not alerted to the fact that the fan was down" (Tr. 76), and that he issued the citation regarding the No. 2 fan because the "fan signaling system [did] not give an alarm at the mine" (Tr. 101).

There is no dispute that each fan lacked "an automatic device that gives a signal at the mine when the fan either slows or stops" (section 75.310(a)(3)). Rather than an automatic device, Target relied on Commonwealth to act as a "middle man" by receiving the signal and by then alerting Target officials. This system did not comply with the mandate of the standard that each fan be equipped with a device that gives a signal "at the mine". Therefore, I find that in each instance Target violated the standard.

A violation is significant and substantial, if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 18, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that in order to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard — that is, a measure of danger to safety contributed to by the violations; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonable serious nature.

I conclude both violations posed a safety hazard that was reasonably likely to result in injuries or death. First, there are few situations in mining more potentially dangerous than those which can develop if a main mine fan slows or stops. As the Secretary's witnesses repeatedly explained, in a mine that liberates methane, the gas can begin to build as soon as the fan malfunctions and an explosion and fire can result. Indeed, the need to protect miners from the hazard is the driving force behind the main mine fan regulations. ("The main mine fans serve a vital role in providing ventilation to prevent methane accumulations and possible explosions" (61 Fed. Reg 9767 (1996).)

Without a signal to the mine, there is a greatly diminished possibility a person in authority at the mine will know if a main mine fan is defective and will take corrective action, including ordering miners to leave if the fan cannot timely be repaired. In fact, the circumstances surrounding Citation No. 7013405 exemplify the hazard inherent in these violations. The No. 3 fan was off, yet miners repeatedly were underground between February 27 and March 3, despite the fact the mine was liberating approximately 55,000 cfm of methane and was without the capacity fully to exhaust the accumulating methane (Tr. 133).<sup>8</sup> Even without defective equipment

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<sup>8</sup>Hixson described the miners who worked underground while the No. 3 fan was off. On Thursday, February 27, when the fan ceased to function, the day shift, a shift that mined coal from 7:00 a.m. to 3:00 p.m., was in the mine. The day shift was followed by the afternoon shift (another production shift) which worked from 3:00 p.m. to 11:00 p.m. Then, the midnight shift, a maintenance shift, entered the mine, and the midnight shift worked until 7:00 a.m. on February 28. The midnight shift was followed by the day shift and an afternoon shift on February 28. Then, on  
(continued...)

underground that could serve as an ignition source, methane that has built to explosive levels still could be ignited by a roof fall or by current produced by lightening (Tr. 353-354). I therefore conclude the violations were S&S.

In addition, because the violations created the possibility that an entire work crew would be injured or killed, the violations were very serious.

Finally, I conclude that the violations were the result of less than ordinary negligence on Target's part. The testimony of Swentosky and Dickey makes clear that MSHA was "going along" with the Target/Commonwealth system of notification until such time as a signal at the mine could be installed (Tr. 271,197). While an operator exercising reasonable care would have been in compliance or would have sought a modification of the standard, I believe that MSHA made it appear to Target that the agency -- to some extent at least -- was willing to acquiesce in the violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F. R. §</u>	<u>Proposed Penalty</u>
7013512	3/4/97	75.312(c)	\$50
7013513	3/4/97	75.312(c)	\$50

Citation No. 7013512 states "The No. 2 . . . fan was not stopped for testing of the automatic fan signal device as required by . . . [section] 75.312(c)", and Citation No. 7013513 alleges the No. 3 fan similarly was in violation (Gov. Exh. 5, Gov. Exh. 6).

The citations also allege that the violations were S&S.

The parties stipulated that the facts alleged in the violations are true and that the existence of the violations depends upon whether the fans were "main mine fans" (Stip. 4). Having found that Fan No. 2 and Fan No. 3 were "main mine fans", I further find the violations existed as charged.

I also find that the violations were S&S and very serious. The standard requires an automatic fan signal device to be tested "[a]t least every 31 days". A functioning, automatic signal device is a nearly certain way to alert an operator if a main mine fan falters or fails. Testing the device assures the operator the device is working as it should. Without a properly working device, the chance of repairing a defective or failed fan or of removing miners from the hazards attending such a fan are greatly lessened. When, as here, the mine liberates 55,000 cfm of methane a day and the cited fans are among those removing that methane from the mine, it is

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<sup>8</sup>(...continued)

Saturday, March 1, a rock-dusting crew was in the mine. On Sunday, March 2, a midnight shift entered at 11:00 p.m. and the midnight shift stayed until the day shift entered on Monday morning, March 3 (Tr. 62-63).

reasonably likely the failure to test the signal devices can lead to the serious injury or death of miners who are underground.

As with Citation No. 703450 and Citation No. 7013408, I find that the violations were due to Target's low negligence. The company could hardly test a system it did not have, and it did not have the required system because MSHA chose not to press the issue.<sup>9</sup>

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013514	3/4/97	75.312(a)	\$690

Citation No. 7013514 states:

The operator was unable to provide any evidence that the daily examination had been conducted at the No. 2 bleeder fan on [February 28, 1997, March 1, 1997, or March 2, 1997.] Miners were working underground on [February 28, 1997 and March 1, 1997]. A mine examiner entered the underground workings to conduct the preshift examination on [March 2, 1997] without the No. 2 bleeder fan having been examined prior to his entrance (Gov. Exh. 10).

The citation also alleges that the violation was S&S.

Section 75. 312(a) requires in pertinent part that "each main mine fan and its associated components. . . shall be examined for proper operation by a trained person designated by the operator[,] . . . at least once each day that the fan operates" except "when no one . . . goes underground".

Hixson, who discussed the citation with Kelly, testified that Citation No. 7013514 was based upon an inspection of the fan examination books at the mine. The inspection revealed "no entry or no record" indicating the examinations had been made (Tr. 71). Inspector Kelly inferred from this that the examinations had not been made (Id.). Target offered no evidence to counter the inference. Moreover, the record is clear that on February 28, March 1, and March 2, miners were underground (See n. 8 *infra*). I find, therefore, that the violation existed as charged.

In addition, I find that it was S&S. As Hixson explained, the reason the law requires the daily examination of main mine fans when miners are underground is "to insure that [the fans] . . . are running properly" (Tr. 71). The ventilation "pulls . . . the bad air out [of] the entries to the returns and to the surface and get[s] rid of it and keeps it off the miners" (Id.). Without the examination, the safety of miners underground cannot be assured because, as the experience with

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<sup>9</sup>Although this finding departs from the inspector's (Gov. Exh. 6), the parties stipulated to the facts stated on the citations, not to the inspector's evaluation of the facts.

the No. 3 fan revealed, the fan may slow and/or stop and miners may be left underground despite the fact that methane continues to accumulate. Serious injury or death is reasonably likely to follow.

Further, the violation was very serious. It created the potential for multiple fatalities in that it endangered up to a full production crew of miners.

I also find that Target was negligent in allowing the violation to exist because the violation was caused by the company's failure to exercise the care required to insure the examinations were made. I believe the company knew the Secretary considered the fans to be main mine fans. I have credited Swentosky's testimony concerning his April 1996 discussion with Junior Golden and his June 21, 1996 visit to the mine. It is clear that during the discussion and visit, the men conferred about explosion door and offset requirements (Tr. 260-264). It is inconceivable to me that Junior Golden did not understand that these were regulatory requirements for main mine fans. Knowing the No. 2 fan was a main mine fan, the company should have made sure it was examined as required. Target delegated the duty of examining the fans to Peterson (Tr. 51-53), but there is nothing in the record to indicate Target took any steps to make certain Peterson fulfilled his duty.

**DOCKET NO. PENN 97-194**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013407	3/3/7	75.312(a)	\$1800

Citation No. 7013407 states in part:

The No. 3 borehole fan was examined on Monday, March 3, 1997. At the time of the exam the fan was found to be not running. The pressure recording chart in the fan building indicated the fan stopped at approximately . . . [2:00 p.m.] on Thursday, February 27, 1997. The No. 3 borehole fan was not examined daily as required on February 28, March 1, and March 2, 1997. However, the men worked underground on those days. Citations No. 7013403 and 7013405 were issued in conjunction with this citation. A proper daily exam of the fan and the pressure recording chart would have shown the fan not operating and the signaling device not working (Gov. Exh. 2).

On March 4, 1997, Hixson modified the citation by adding February 27, 1997, and March 3, 1997, as days when men worked underground due to the cited condition (Gov. Exh. 2 at 2). On March 5, 1997, Hixson again modified the citation to state:

The record book located on the surface at the mine office for

February 28, 1997 indicated that the fan was operating properly at 8.6 [inches] of pressure . . . The evidence indicated that the fan was not operating during that time period (Gov. Exh. 2 at 3).

The citation also alleges that the violation was S&S and the result of Target's unwarrantable failure.

Section 75.312(a) requires in part that "[E]ach main mine fan and its associated components, including devices for measuring or recording the ventilation pressure, shall be examined for proper operation by a trained person designated by the operator." Section 75.312(f)(1) requires persons making the required examinations to certify that the examinations have been made.

There is no doubt the violation occurred. The company did not challenge Hixson's assertion that the fan was not examined as required (Tr. 45; Gov. Exh. 26). I fully credit Hixson's testimony, based on his conversation with Peterson, that Peterson he did not examine the fan on February 28 and that the entry Peterson made in the examination book purposefully was misleading (Tr. 67). While Peterson may indeed have believed he would "get in trouble" if he did not indicate he examined the fan, his fear is no excuse for failing to comply with the standard (Tr. 313, see also Tr. 315). Indeed, his false certification of an examination, no matter what its motivation, was as much of a violation of section 75.312 (albeit of a different subsection of the standard) as was his failure to conduct an examination.

I also conclude the violation was S&S and extremely serious. As the standard states, the reason the law requires a main mine fan to be examined daily is to assure the electrical and mechanical reliability of the fan. Without the examination, the fan can falter or fail and the operator can be unaware of the defect. As a result, miners may continue to work underground while methane builds to a hazardous level.

When, as in the case of the Target No. 1 Mine, a mine is liberating approximately 55,000 cfm of methane every 24 hours and the No. 3 fan is one of the instruments that draw the methane from the mine, the failure to examine the fan is reasonably likely to result in the serious injury or deaths of miners who are working underground. Because proper operation of a main mine fan is critical to the effective functioning of the mine's ventilation system, the violation can be a significant factor in creating the potential for a full blown mine disaster.

The Commission has defined unwarrantable failure as aggravated conduct constituting more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987)). The Commission also has stated that unwarrantable failure is conduct that is characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care (Emery, 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991)).

The Commission has identified several factors to be considered in analyzing whether a violation resulted from unwarrantable failure: among these are "the extensiveness of the violation, the length of time the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance" (Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994)). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a "knew or should have known" test (Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993)).

Peterson was responsible for the daily inspection of the fans. He had been assigned the task by Target. He acted for Target. Not only did he fail to inspect the fan on February 28, he purposefully falsified the examination book to indicate the examination was made. Peterson's belief that he would "get in trouble" if he did not indicate he examined the fan suggests Peterson knew full well the No. 3 fan had to be examined daily (Tr. 313, see also Tr. 315), and whether or not he believed the examinations were required by state or federal authority is beside the point. Therefore, I find that Peterson either purposefully failed to examine the fan or was recklessly indifferent to his duty to do so, and I conclude that Peterson, and through Peterson, Target, exhibited a serious lack of reasonable care and unwarrantably failed to comply with the standard.

In making this finding, I am mindful that the Commission previously has considered a high degree of danger presented by the violation as a relevant consideration when determining the existence of unwarrantable failure (see e.g., Midwest Material Co., 19 FMSHRC 30, 34-35 (January 1997)), and in my view, the violation was a critical factor in subjecting miners underground to a situation that was potentially very hazardous.

I also believe the company was highly negligent. Peterson's lack of action in examining the fan and his action in misleading others by making it appear otherwise are attributable to Target.

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013403	3/3/7	75.311(a)	\$2000

Order No. 7013403 states in part:

The No. 3 borehole fan located on the surface of Target No. 1 Mine was not continuously operated while men were underground. When we arrived at the [No.] 3 fan[,] the fan was not running. The pressure recording chart showed the fan went down at approximately 2 PM on Thursday[,] February 27, 1997. The fan was restarted by Phil Peterson at approximately [8:00 a.m.] on March 3, 1997. The mine operator was instructed that due to the signal system's failure to signal that the fan was down a fan attendant would have to monitor the fan until the system could be

checked out and verified to be working properly (Gov. Exh. 1).

The order originally was issued as a citation. The next day it was modified to an order issued pursuant to section 104(d)(1) of the Act (30 U.S.C. § 814(d)(1)). As modified, the order noted that men were working underground from the time the fan went down until it was restarted. The order also alleged that the violation was S&S and the result of Target's unwarrantable failure (Gov. Exh. 1 at 2).

Section 75.311(a) requires the continuous operation of each main mine fan, except as otherwise approved in the ventilation plan or when the fan is being tested or when it is being repaired underground. There is no dispute that the No. 3 fan was not continuously operated during the periods asserted, that its stoppage was not approved in the ventilation plan, and that it was not being tested or repaired. Therefore, the Secretary established the violation.

Because the fan was not operating, methane was not being removed from the bleeder entries and from the gob as contemplated under the mine's ventilation plan. In addition, miners were working underground while the methane was accumulating. On February 28, at least, the methane was building while some of the miners were extracting coal, and the extraction of coal involves the use of many potential ignition sources. Moreover, even without an electrical malfunction of mining equipment to serve as an ignition source, accumulated methane could have been ignited by other sources (Tr. 353-354). Given these factors, I find the violation was reasonably likely to have result in the injury or death of those underground. Accordingly, I find that the violation was S&S.

Also, because of the gravity of the hazard engendered by the violation and the number of miners endangered, I find that the violation was very serious.

As stated, I believe Peterson understood he was supposed to examine the fan. He was the agent to whom Target assigned the task. He failed in this regard, and he purposefully falsified the examination book to indicate he acted otherwise. It is reasonable to infer that if he had made the examination, the fact that the fan was not working would have been detected and corrected. I therefore find the violation was due to Peterson's reckless indifference to the requirements of Section 75. 311(a) and to his serious lack of reasonable care. Since Peterson was acting for Target, I conclude that Target unwarrantably failed to comply as charged.

I also conclude that Target, through Peterson, was highly negligent in allowing the violation.

**DOCKET NO. PENN 98-8**

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074002	4/8/97	75.313(c)(1)	\$3,000

Order No. 7074002 states in part:

The No. 3 Bleeder Fan, which is a main mine fan, began to experience mechanical problems and initially shut down at approximately 7:30 p.m. on 4/7/97. Men were in the mine producing coal on the 4 left section . . . Commonwealth Security, which is contracted to monitor the fan operation, contacted the Mine Operator by phone, and informed him that they received a signal that the No. 3 fan was not operational. The operator, Junior Golden, talked to his son, Greg Golden about the signal received by Commonwealth . . . Discussion with Greg [Golden] revealed that he decided not to travel to the mine or contact anyone at the mine to inform them of these findings. No action was taken as a result (Gov. Exh. 28).[<sup>10</sup>]

The order also alleges that the violation was S&S and the result of Target's unwarrantable failure.

Section 75. 313(c)(1) requires that miners be withdrawn from the mine "[i]f ventilation is not restored within 15 minutes after a main mine fan stops". On April 7, miners were not withdrawn within 15 minutes of 9:40 p.m. In fact, the 10 miners who were underground were not withdrawn at all in response to the fan's failure. Rather, they left the mine because their shift ended. They left almost an hour after they should have started to leave when ventilation was not restored. (Tr. 162-163, 177, 410). Therefore, I find that the violation existed as charged.

The failure to begin the withdraw the miners after 15 minutes when the No. 3 fan was not restarted, subjected the miners to those obvious hazards attending accumulating methane, hazards which can culminate in an explosion or fire. The failure to withdraw the miners meant that such consequences were reasonably likely to occur, given the propensity of the mine to liberate

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<sup>10</sup>In further explaining the order, Dickie testified that on April 7, the No. 3 fan started to experience problems at 7:30 p.m. and "went down around 9:30, 9:45 [p.m.]". The parties stipulated that, in fact, the fan shut down at 9:40 p.m. and that at 9:45 p.m. a representative of Commonwealth spoke with Gregory Golden (Tr. 169). Because there is no disagreement about the fact that the fan shut down for good at 9:40 p.m., the Secretary's motion to amend Order No. 7074002 and Order No. 7074003 (discussed below) to reflect this fact is granted (see Sec. Br. 16 n.1)

methane. It can not be argued seriously that this particular violation at this particular mine was not S&S.

In addition, given the number of miners subjected to the hazard and the gravity of the hazard (serious injury or death from an explosion and/or fire) the violation was extremely serious.

The violation also was the result of the unwarrantable failure of Target to comply with the standard. Gregory Golden was a foreman and an agent of Target. He was alerted within 5 minutes after the fan ceased to function (Tr. 169). He was the person Target designated as the first to be contacted in the event the fan shut down (Gov. Exh. 23). Commonwealth understood this, Target understood this, and MSHA understood this (Tr. 194, 318-319). The arrangement was agreed to in order to prevent a repetition of the events of February 27 through March 3, when miners had been left underground after the fan failed. While Target hired employees, including Soucy, to monitor the bleeder fans around-the-clock, the Golden's, especially Gregory, bore the ultimate responsibility to insure compliance.

I believe that Junior Golden told Gregory to go to the mine if he could not reach anyone there by telephone (Tr. 295-98, 391, 394). I also believe that although Gregory Golden tried to telephone the mine about the fan's failure, he deliberately chose not to go to the mine when he could not get through by telephone. He attempted to shift the responsibility to Soucy, because Soucy was hired "to be there to watch the fans and report to the mine site or to call . . . if something happened to [the fan]", but, as stated, Golden, not Soucy, was responsible (Tr. 400-401).

As a result of Gregory Golden's decision to forego a trip to the mine, the miners remained underground after they should otherwise have started to leave. While Golden estimated it would have taken him 30 to 40 minutes to reach the mine from his home, even if it had taken him 40 minutes, he would have been at the mine before the miners left of their own accord at the end of the shift.

Given the fact Gregory Golden knew miners were underground when the fan failed and that he also knew another crew of miners would enter the mine when the present crew left, his failure to insure that miners were exiting the mine can be attributed to his, and thus to Target's, reckless indifference to the requirements of the standard.

I also conclude the company, through Golden, was highly negligent in allowing the violation to exist.

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074003	4/9/97	75.311(d)	\$3,000

Order No. 7074003 states in part:

Commonwealth Security, the company which is contracted to monitor the [b]leeder [f]ans operation of this mine, received a signal at approximately 7:30 P.M. on 4/7/97, that the No. 3 Bleeder Fan, which is a main mine fan, was not operational. At this time Commonwealth Security contracted the Mine Operator, by phone, and informed him that they received the signal of the problem with the fan.

Discussion with Greg Golden . . . revealed that he decided not to travel to the mine or contact anyone at the mine to inform them of this information received from Commonwealth Security. No action was taken as a result.

The mine operator failed to notify the [m]ine [f]oreman at the mine, of the problem with the fan. Men were working in the mine producing coal at this time (Gov. Exh. 29).

The order also alleges that the violation was S&S and the result of Target's unwarrantable failure.

Section 75.311(d), requires in part : "If an unusual variance in the mine ventilation pressure is observed, or if an electrical or mechanical deficiency of a main mine fan is detected, the mine foreman or equivalent mine official . . . shall be notified immediately, and appropriate action or repairs shall be instituted promptly."

Dickie testified without dispute that on April 7, Carl Betchey was acting as the mine foreman when the fan stopped and that Betchey was not notified immediately (Tr. 183). Further, repairs of the fan were not instituted promptly (Tr. 184). On the basis of Dickie's uncontradicted testimony, I find that the violation existed as charged.

The purpose of the notification requirement is, as the standard states, that "appropriate action or repairs . . . be instituted promptly" (30 C.F.R. §75.311(d)). The goal is to minimize to the greatest extent possible the amount of time a fan is malfunctioning. Failure to notify the foreman or others means that in all likelihood timely repairs will not be initiated. (Foremen and other mine officials are not clairvoyant and they cannot act in response to a situation of which they are ignorant.) In turn, this means that miners will be subjected to rising levels of methane and the previously discussed hazards attending such a situation.

In view of the methane liberated by this mine, in view of the fact the fan's failure diminished the capacity of the mine's ventilation system to remove the methane, in view of the fact miners were working underground when the foreman was not notified, and in view of the fact

another crew shortly was scheduled to replace those underground, I find that the failure to notify the foreman or other equivalent official meant that it was reasonably likely miners would continue to work in the presence of the accumulating methane, and that the miners were subjected to the reasonable possibility of a mine explosion or fire. The violation was S&S.

Also, and for the same reasons as stated regarding Order No. 7074002, the violation was extremely serious.

Further, the violation was the result of Target's unwarrantable failure to comply with the standard. The record does not contain the slightest indication that anyone acting on Target's behalf tried immediately to notify Betchey or an "equivalent mine official". While Gregory Golden testified he attempted to telephone Soucy, Soucy certainly did not hold a position of authority. Rather, as Dickie correctly stated, Gregory Golden "was the person that had the information to affect [the withdrawal of miners] . . . and he chose not to do anything about it" (Tr 184-185). Golden's inaction was attributable to Target. Therefore, I conclude that Target was recklessly indifferent to its notification responsibilities as well as to its concomitant responsibility to promptly institute remedial measures. In making this finding, I also have considered the high degree of danger to which Target's lack of action subjected its miners.

Finally, I conclude that Target, through Golden, was highly negligent in allowing the violation to exist.

### **SECTION 110(C) CASES** **THE LAW**

Section 110(c) of the Act provides for the assessment of a civil penalty when an agent of a corporation "knowingly [has] authorized, ordered, or carried out" a violation of a mandatory health or safety standard (30 U.S.C. §820(c)). In order to sustained her allegations, the Secretary must prove that Target is a corporation, Peterson and Gregory Golden were Target's agents, and that they "knowingly" violated the standards.

The parties have stipulated that Target is a Pennsylvania corporation (Stip. 3), and the record supports the conclusion that Peterson and Golden were its agents. Peterson acknowledged that he was responsible for "drawing up the mine's ventilation plan and submitting . . . [the plan] to . . . [MSHA]" (Tr. 304). He also agreed that he reviewed the plan to assure it was in compliance with MSHA's requirements as he understood them (Tr. 305). Further, from the fall of 1996, he was responsible for the daily examination of the No. 2 and No. 3 fans at the mine (Tr. 306).

Target argues that Peterson could not have been its agent because he was "not directed to make fan examinations to satisfy federal requirements" (Target Br. 25). I do not agree. Rather, as the testimony shows, Peterson's function at the mine was that which "involved a level of responsibility normally delegated to management personnel" (Ambrosia Coal & Construction Co.,

18 FMSHRC 1552, 1560 (September 1996) (quoting U.S. Coal, Inc. 17 FMSHRC 1684, 1688 (October 1995)) Peterson's understanding as to which authority required the examinations is irrelevant to whether he acted at such a level.

As for Gregory Golden, who was the maintenance foreman at the mine (Tr. 318), and who had authority to hire other employees (Tr. 294-295), he too was an agent.

The questions then are whether the agents knowingly ordered, authorized, or carried out violations of section 75.312(a), section 75.313(c)(1), and section 75.311(d).

The Commission has approved the description of "knowingly" found in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (W.D.S.C. 1950), wherein the court stated that the word:

does not have any meaning of bad faith or evil purpose or of criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence (92 F. Supp. At 780).

The Commission has found that this interpretation "is consistent with both the statutory language and the remedial intent of the . . . Act" (Kenny Richardson, 3 FMSHRC 8, 16 (January 1981) (aff'd on other grounds, 689 F.2d 623 (6<sup>th</sup> Cir. 1982), cert denied, 461 U.S. 928 (1983)). The Commission has explained:

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

In addition, the Commission has held that to violate section 110(c), the person's conduct must be "aggravated", i.e., it must involve more than ordinary negligence (Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992)).

**DOCKET NO. PENN 98-98**

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>
7013407	3/3/97	75.312(a)	\$500

The Secretary alleges that Peterson knowingly violated section 75.312(a) when he failed

to examine the No. 3 fan on February 28, March 1, and March 2. I have found that the violation occurred. I also find that Peterson acted knowingly. Target again argues that Peterson did not understand the examination was required by federal regulation (Target Br. 25), but even if this was so, ignorance of a standard is not a valid defense. Rather, as the Secretary correctly points out, "[T]he Secretary must prove . . . that an individual knowingly acted, not that the individual knowingly violated the law (Warren Steen Construction, Inc., 14 FMSHRC 1125, 1131 (July 1992)).

For section 110(c) purposes a violative omission is equivalent to a violative commission. Peterson did not conduct the daily examination of the No. 3 fan as charged, and I conclude his attempt to conceal his failure of February 28 permits the inference that Peterson realized he failed to act as he should (Tr. 313, see also Tr. 315).

**DOCKET NO. PENN 98-104**

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074002	4/9/97	75.313(c)(1)	\$500
7074003	4/9/97	75.311(d)	\$1,000

The Secretary alleges that Gregory Golden knowingly violated section 75.313(c)(1) when he failed to go to the mine upon being notified by Commonwealth that the No. 3 fan had ceased to function and that he knowingly violated section 75.311(d) when he failed to notify Betchey (or a designated person acting for Betchey) that the No. 3 fan had ceased to function.

I have found both violations occurred, and I conclude that the Secretary has established that they were knowing. Gregory Golden was alerted within 5 minutes after the fan stopped (Tr. 169). He was the person designated the primary official to be contacted in the event a fan shut down (Gov. Exh. 23). I have credited the fact that Junior Golden told his son if a fan failed he should go to the mine provided he could not reach the mine by telephone (Tr. 295-98, 391, 394). Gregory Golden's own testimony is that he tried to call the mine and that no one answered. Gregory Golden knew miners were underground, yet when he could not reach the mine he deliberately chose to stay home. He was, to paraphrase the Commission, a person in a position to protect employee safety who failed to act on the basis of information that gave him reason to know of the existence of a violative condition (see Kenny Richardson, 3 FMSHRC 8,16 (January 1981), aff'd 689 F.2d 632 (6th Cir. 1982, cert. denied, 461 U.S. 928 (1983)).

In addition, although Gregory Golden knew the fan had stopped, he did not know if Betchey or another designated person had been notified. Just as with the violation of section 75.313(c)(1), I conclude the violation of section 75.311(d) was the result of Gregory Golden's deliberate decision to stay home. Had he gone to the mine, Betchey or someone else in authority, would have been alerted to the condition of the fan. In the face of what he knew, Gregory Golden knowingly violated section 75.311(d).

### CIVIL PENALTY ASSESSMENTS

In assessing a civil penalties for the violations, the Act mandates that I consider all of the criteria enumerated in section 110(i) (30 U.S.C. §820(i)). I have made findings regarding the gravity and negligence of the violations. I also find that Target had an applicable history of 84 violations at its No. 1 Mine (Tr. 17; Gov. Exh. 32). The Secretary did not characterize this previous history, but in proposing penalties the Secretary, through her penalty point system, indicated that she regarded the number as moderate. Further, the Secretary indicated that Target is of a medium size. For its part, Target does not maintain that the size of any penalty assessment will effect its ability to continue in business, and the parties have stipulated that Peterson and Gregory Golden will be able to pay any penalties assessed, provided such payments are made over time (Additional Stipulations 2).

#### DOCKET NO. PENN 97-170

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013450	3/3/97	75.310(a)(3)	\$235
7013408	3/4/97	75.310(a)(3)	\$204

I have found the violations were very serious. I also have found they were the result of less than ordinary negligence on Target's part. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violations, I conclude an assessments of \$100 is appropriate for each violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013512	3/4/97	75.312(c)	\$50
7013513	3/4/97	75.312(c)	\$50

I have found the violations were very serious. I also have found they were the result of less than ordinary negligence on Target's part. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violations, I conclude an assessment of \$100 is appropriate for each violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013514	3/4/97	75.312(a)	\$690

I have found the violation was very serious. I also have found it was due to Target's ordinary negligence. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violation, I find an assessment of \$200 is appropriate for the violation.

**DOCKET NO. PENN 97-194**

<u>Citation/Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013407	3/3/7	75.312(a)	\$1800
7013403	3/3/7	75.311(a)	\$2,000

I have found the violations were extremely serious. I also have found they were due to Target's reckless disregard of the standards. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violations, I find an assessment of \$1,500 is appropriate for each violation.

**DOCKET NO. PENN 98-8**

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074002	4/8/97	75.313(c)(1)	\$3,000
7074003	4/9/97	75.311(d)	\$3,000

I have found the violations were extremely serious. I also have found they were due to Target's reckless disregard of the standard. Given these factors, the medium size of the company, its moderate history of previous violations, and its rapid abatement of the violations, I find an assessment of \$1,500 is appropriate for each violation.

**DOCKET NO. PENN 98-98**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7013407	3/3/97	75.312(a)	\$500

I have found the violation was extremely serious violation and that Peterson exhibited more than ordinary negligence in violating the standard. The violation was abated in good faith. There is no indication that Peterson has a past history of violating the standards. Further, the parties agree Peterson is able to pay a civil penalty, provided payments are ordered on a structured basis. I find that an assessment of \$300 is appropriate for the violation.

**DOCKET NO. PENN 98-104**

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
7074002	4/9/97	75.313(c)(1)	\$500
7074003	4/9/97	75.311(d)	\$1,000

I have found that the violations were extremely serious and that Gregory Golden exhibited more than ordinary negligence in violating the standards. The violations were abated in good faith. There is no indication that Gregory Golden has a past history of violating the standards.

Further, the parties agree Golden is able to pay a civil penalty, provided payments are ordered on a structured basis. As a foreman at the mine, Gregory Golden's duty of care was more than Peterson's, and I find an assessment of \$500 is appropriate for each violation.

**SETTLED VIOLATIONS**

**DOCKET NO. PENN 97-190**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>	<u>Settlement</u>
7013386	3/7/97	75.361(a)	\$900	\$630
7013388	3/7/97	75.370(a)(1)	\$600	\$420

**DOCKET NO. PENN 97-194**

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>	<u>Settlement</u>
7013384	3/7/97	75.400	\$1,000	\$700

These settlements were explained on the record and they are **APPROVED** (Tr. 412-421).

**ORDER**

**DOCKET NO. PENN 97-170**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7013450	3/3/97	75.310(a)(3)	\$100
7013408	3/4/97	75.310(a)(3)	\$100
7013512	3/4/97	75.312(c)	\$100
7013513	3/4/97	75.312(c)	\$100
7013514	3/4/97	75.312(a)	\$200

Target **IS ORDERED** to pay a civil penalty of \$600 within 30 days of the date of this decision.

**DOCKET NO. PENN 97-190**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Settlement</u>
7013386	3/7/97	75.361(a)	\$630
7013388	3/7/97	75.370(a)(1)	\$420

Target **IS ORDERED** to pay a civil penalty of \$1,050 within 30 days of the date of this decision.

**DOCKET NO. PENN 97-194**

<u>Citation/Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7013407	3/3/7	75.312(a)	\$1,500
7013403	3/3/7	75.311(a)	\$1,500
<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Settlement</u>
7013384	3/7/97	75.400	\$700

Target **IS ORDERED** to pay a civil penalty of \$3,700 within 30 days of the date of this decision.

**DOCKET NO. PENN 98-8**

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7074002	4/8/97	75.313(c)(1)	\$1,500
7074003	4/9/97	75.311(d)	\$1,500

Target **IS ORDERED** to pay a civil penalty of \$3,000 within 30 days of the date of this decision.

**DOCKET NO. PENN 98-98**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7013407	3/3/97	75.312(a)	\$300

Peterson **IS ORDERED** to pay a civil penalty of \$300 by paying \$75.00 on November 1, 1999; \$75.00 on December 1, 2000; \$75.00 on January 2, 2000; and \$75.00 on February 1, 2000.

**DOCKET NO. PENN 98-104**

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
7074002	4/9/97	75.313(c)(1)	\$500
7074003	4/9/97	75.311(d)	\$500

Gregory Golden **IS ORDERED** to pay a civil penalty of \$1,000 by paying \$250 on November 1, 1999; \$250 on December 1, 1999; \$250 on January 2, 2000; and \$250 on February 1, 2000.

All payments shall be made to MSHA and upon receipt of full payment for each case, each case will be **DISMISSED**.



David Barbour  
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 24, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. LAKE 99-88-DM
of STEVEN SHAFFER,	:	NC MD 98-04
Complainant	:	
v.	:	Portable No. 2
	:	Mine ID 11-03204
SPROULE CONSTRUCTION CO.,	:	
Respondent	:	

## DECISION

Appearances: Denise C. Hockley-Cann, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Complainant;  
Richard P. Reichstein, Esq., Chicago, Illinois for Respondent.

Before: Judge Bulluck

This case concerns a discrimination proceeding filed pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3). The Secretary, on behalf of Steven Shaffer, alleges that Shaffer was unlawfully discharged on May 29, 1998, and seeks reinstatement of Shaffer with back pay, interest and benefits, and expungement of Shaffer's personnel record of all references to the incidents surrounding the protected activity. Additionally, the Secretary seeks orders directing Sproule to cease and desist discriminatory activities directed at all miners, posting of a notice of violation, and imposition of a \$1,500.00 civil penalty.

A hearing on the merits was convened on August 3, 1999, in Dubuque, Iowa, during which MSHA Inspector Stephen Field testified. Based on information gleaned from the inspector's testimony, the Parties entered into a discussion and negotiated a settlement. Under the terms of the agreement, Sproule is required to take the following action:

1. pay to the Secretary, for the benefit of Steven Shaffer, the sum of \$2,000.00;
2. expunge Steven Shaffer's personnel file of any and all references to the incidents giving rise to his May 29, 1998 discharge;

3. post a "Notice to all Employees" affirming its commitment to section 105(c) of the Mine Act, and setting forth miners' rights under section 105(c); and
4. pay a civil money penalty in the amount of \$750.00 for the discrimination violation.

The settlement was approved at hearing, and that determination is hereby confirmed.

**ORDER**

The settlement is appropriate and is in the public interest . **WHEREFORE**, the approval of settlement is **GRANTED**, and it is ordered that Sproule comply with the terms of the settlement agreement, as set forth above, and pay a civil penalty of \$750.00 within 30 days of the date of this decision. Upon Sproule's compliance with all terms of settlement, this proceeding is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge  
(703) 756-6210

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-253-M
Petitioner	:	A. C. No. 20-01579-05513
v.	:	
	:	Millington Pit & Mill
MILLINGTON GRAVEL COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner;  
Fred S. Ward, owner, *pro se*, Millington Gravel Company, Millington, Michigan.

Before: Judge Barbour

This civil penalty proceeding arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815(d)) (Mine Act or Act). The Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a civil penalty against Millington Gravel Company (Millington or the company) for an alleged violation of 30 C.F.R. § 56.11001, a mandatory safety standard for surface metal and nonmetal mines requiring that "a safe means of access shall be provided and maintained to all working places." The Secretary alleges the violation occurred at the company's Millington Pit and Mill, a gravel and stone extraction and processing facility located in Tuscola County, Michigan. The Secretary also alleges that the violation was due to Millington's high negligence. She proposes the company be assessed a civil penalty of \$500.

Millington denies that it violated the standard and alternatively argues that the proposed penalty is excessive.

The case was heard in Saginaw, Michigan. At the conclusion of the hearing the parties waived the submission of briefs (Tr. 54).

## THE CONTROVERSY

The dispute is the result of MSHA's inspection of a mine facility that is used to screen sand and stone. The facility is large and multileveled. The material is sorted according to size.

On its upper level (upper deck) are walkways around its outer perimeter. Near the end of the north walkway the inspector found a hole in the walkway floor. The parties are at odds over whether the damaged walkway violated the cited standard.

### THE EVIDENCE

Ronald J. Baril, Sr. is a MSHA inspector who works in the agency's Lansing, Michigan office. Baril has inspected mines for the past 23 years. On June 3, 1998, he went to the Millington Pit and Mill.

Sand and stone is extracted at the mine. It is moved by front end loader to a hopper. From the hopper, a series of conveyor belts carry the material to processing equipment where it is washed and sized. The processed material then is stockpiled and sold (Tr. 13, 35).

The mine was described by Baril as a "very small" facility (Tr. 13). Baril believed that the no more than two miners were employed there (Tr. 13).

After arriving at the mine, Baril went to the mine office where he met Frederick Ward, Millington's owner. Baril and Ward began a pre-inspection conference. As a part of the conference Baril was required to check various records that are maintained by the company. Baril found that the records were in order (Tr. 11).

Baril then joining Robin Dege, a mine employee who described himself as the plant superintendent. Baril and Dege walked to the area of the mine where sand and stone are processed (Tr. 13, 34-35). The men stopped at the screening facility.

At the upper level of the facility, material is dropped by conveyor belt onto the top screens where it is shaken and where it starts the process of falling through other screens with increasingly smaller grids. Baril and Dege first viewed the screening facility from ground level. Then, they proceeded up a ladder leading to the upper deck (Tr. 14). Once on the top, Baril inspected the walkway around the perimeter of the deck. The walkway was constructed of metal grating, and it provided access to the top screens and to the facility's upper mechanical parts.

Baril noticed that the walkway was completely railed along all of its sides and was well maintained on its west side. However, when he traveled to the north side, he observed that at the eastern end of the walkway, a section of the floor had separated from the rest of the grating. The floor was bent at a 45 degree angle toward the ground. The result was an opening in the floor that measured two feet wide by four feet long (Tr. 16, 18; see Exh. P-1).

Dege told Baril the walkway had been damaged by a rock, and that the hole had existed for "over a year" (Tr. 16, 17). Baril asked Dege if miners often traveled in the damaged area of the walkway, and Dege said that they did not (Tr. 17). As Baril recalled, Dege maintained that the only miners who went to the area were those who "had to go up there to change screens"

(Id.). Baril also questioned Dege as to the distance between the walkway and the ground below. According to Baril, Dege estimated that it was "about 20 feet" (Tr. 18). Finally, Baril noted that there were no barricades across the walkway to block access to the damaged area (Tr. 20).

As a result of what he saw and what he learned from Dege, Baril cited Millington for a violation of section 56.11001. He believed the condition of the walkway floor indicated that there was no safe access to an area where miners occasionally had to work changing the screens (Tr. 19). However, because miners were on the upper deck on "very rare occasions", he also believed it was unlikely that there would be an accident due to the condition of the walkway (Tr. 24).

Baril further found that Millington was highly negligent in allowing the violation to exist. He based the finding on the fact that Dege told him the walkway floor had been damaged for at least a year (Tr. 23). Despite the finding, Baril believed the company honestly did not realize the condition of the walkway was a violation of the regulation. Rather, in view of the infrequent visits of miners to the walkway, the company simply did not feel that it was important to repair the damage (Tr. 24).

Baril gave the company two days to correct the condition. Millington's response was more rapid. It corrected the situation the same day by railing-off the damaged area (Tr. 25, see Gov. Exh. P-1).

Dege also was called as a witness by the Secretary. Dege was asked how often the upper deck screens were changed. He testified that they were replaced every two years, depending on how much the mine was operated (Tr. 36). Later, he appeared to qualify this testimony when he maintained they were changed every year and a half to two years (Tr. 39).<sup>1</sup> In addition, he testified that although another miner worked at the mine, he, Dege, was the person who usually went to the upper deck (Id.).

Dege agreed that there was a hole in the walkway. He further agreed that Baril accurately described its location and its size, and that access to the damaged area of the walkway was not barred (Tr.37, 41). He stated that the distance from the walkway to the ground was between 15 and 20 feet (Tr. 37). Dege was asked why the walkway was not repaired, and he replied, "Neglect I guess. We didn't go up there that often . . . [s]o I didn't figure it was that important to fix it" (Tr. 37).

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<sup>1</sup>Although Ward, who also testified, asserted the upper deck screens changed "maybe once or twice" in 30 years (Tr. 44), I regard his testimony as hyperbole. Dege was the person to whom Ward assigned the on-site management of the operation, Dege had acted in that roll for 13 years, and Dege knew how the mine functioned (Tr. 35).

### THE CITATION

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
4106469	6/3/98	56.11001	\$500

The citation states:

The roller screen deck along the north walkway at the N.E. end of this deck, a 4 foot length of 2 feet wide metal floor was found bent down on a 45 degree angle.

Although this section is beyond where servicing may be performed on an infrequent basis, an employee could trip & fall 20 feet to the ground below. The company stated that this condition existed for about one year (Gov. Exh. P-2).

### THE VIOLATION

To prove a violation of section 56.11001, the Secretary must establish the area involved was a "means of access" to a "working place" and that the means of access was not "safe". To demonstrate the cited area was a "means of access", the Secretary show that there was a reasonable possibility a miner would use the area involved as a way to reach or to leave a working place (see Homestake Mining Co., 4 FMSRHC 146, 151 (February 1982); The Hanna Mining Co., 3 FMSHRC 2045, 2046 (September 1981)). To show the means of access was not "safe", the Secretary must prove that a reasonably prudent person familiar with industry standards, and the factual circumstances surrounding the allegedly unsafe condition, would have recognized a hazard warranting correction (See, e.g., Alabama By-Products Corporation, 4 FMSHRC 2128, 2129 (applying the "reasonably prudent person test" to a standard requiring machinery and equipment to be maintained in "safe operating condition" (30 C.F.R. §75.1725(a)). Finally, the Secretary's proof also must meet the regulatory definition of "working place"; in other words, it must lead to the conclusion that the damaged part of the walkway was "a place in or about a mine where work is being performed" (30 C.F.R. §56.2).

There can be no question that the cited walkway area was unsafe. The opening was large enough to allow a miner to fall through. If a miner fell, there was nothing to prevent him or her from dropping straight to the ground below. Dege testified the drop would have been between 15 and 20 feet. (Tr. 37). At either distance, the result could have been a serious injury.

The critical question is whether the Secretary established that there was a reasonable possibility a miner would use the area involved as a way to reach or to leave a working place -- that is as a way to reach or to leave a place where work is or would be performed. I conclude that she did. As Dege's testimony established, although the screens were changed infrequently, at

intervals of between 18 to 24 months, Dege had to go "up there" to do the work (Tr. 37, 39).<sup>2</sup> Dege's testimony is consistent with Baril's version of what Dege told him -- that "the only time people would have to go up there is to change the screen" (Tr. 17). The fact that the cited portion of the walkway was used rarely does not detract from the fact that on those occasions when the screens were changed, it served as a means to reach or to leave a working place.<sup>3</sup>

### **GRAVITY AND NEGLIGENCE**

The gravity of a violation is determined by focusing on the effect of the hazard if it occurred (Cf. Consolidation Coal Co., 18 FMSHRC 1541, 1550 (September 1996)). Here, there was primarily one miner (Dege) who was in danger of inadvertently falling through the hole in the walkway when he used the walkway while changing the screens. Should he have lost his balance or have slipped and fallen through the hole, Dege easily could have been seriously injured. Accordingly, I find the violation was serious.

### **NEGLIGENCE**

I also find that the violation was result of minimal negligence on Millington's part. The chance that Dege, or that anyone else, would have fallen through the hole was remote at best. Dege was aware of the hole and of its location, which means that on those very few occasions when he would have been in the damaged area, he would have been forewarned about the hazard. In addition, the damaged area visually was obvious, which would have served as an additional reminder of the hazard.

It is true that for at least a year the company knew about the violation and did nothing to correct it (Tr. 37). Its failure, as Dege recognized, showed a lack of care (Tr. 37). However, given the very remote chance the hazard would have resulted in an actual accident, I conclude the company's lack of care was minimal.

### **OTHER CIVIL PENALTY CRITERIA**

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<sup>2</sup>The totality of Dege's testimony made clear that the rate at which the screens were changed depended on the length of time the screening facility operated. Operations at the mine varied with the seasons and the weather, I therefore find that his testimony the changes occurred at rates of between a year and a half to two years to be more credible than his testimony that the screens were changed every two years (See Tr. 36).

<sup>3</sup>While the citation itself states that the damaged area was "beyond where servicing may be performed on an infrequent basis", the word "servicing" refers to routine maintenance of the facility's mechanisms — something that did not require use of the damaged area — rather than to the changing of the facility's screens.

The company is very small (Tr. 13), and it has a moderate history of previous violations (Tr 31; Gov. Exh. P-3 (indicating 9 citations issued between June 3 1996 and June 3, 1998)). In addition, the company abated the violation in half the time given by the inspector.

Finally, I note that although Ward stated payment of the proposed penalty would put the company out of business, he offered no proof in this regard, and I find that the size of penalty assessed will have not affect adversely the company's continuing operation.

### PENALTY ASSESSMENT

I conclude that despite the serious nature of the violation, the company's minimal negligence, its small size, its moderate previous history, and its expedited abatement of the violation warrant the assessment of a civil penalty of \$50.

### ORDER

Within 30 days of the date of this decision, Millington will pay the Secretary \$50 for its violation of section 56.11001 as set forth in Citation No. 4106469, and upon payment of the assessed penalty this proceeding is **DISMISSED**.

*David F. Barbour*

David F. Barbour  
Administrative Law Judge

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