

SEPTEMBER 2000

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SEPTEMBER 2000

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

Secretary of Labor, MSHA v. Lopke Quarries, Inc., Docket No. VA 99-17-M.
(Judge Hodgdon, July 28, 2000)

Secretary of Labor on behalf of Leonard Bernardyn v. Reading Anthracite Company,
Docket No. PENN 99-129-D, 99-158-D. (Judge Weisberger, August 1, 2000)

Secretary of Labor, MSHA v. Shelly Materials, Inc., Docket No. LAKE 2000-64-M.
(Chief Judge Barbour, unpublished Default Order issued August 7, 2000)

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

Secretary of Labor, MSHA v. Eighty-Four Mining Company, Docket No.
PENN 99-218. (Judge Weisberger, August 4, 2000)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. LAKE 96-45-RM
	:	LAKE 96-65-RM
AKZO NOBEL SALT, INC.	:	LAKE 96-66-RM
	:	LAKE 96-80-RM

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

ORDER

BY: THE COMMISSION

In this consolidated civil penalty and contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), the Commission reversed the decision of Administrative Law Judge George Koutras to vacate a citation issued to Akzo Nobel Salt, Inc. ("Akzo"), charging a violation of the two-escapeway requirement of 30 C.F.R. § 57.11050(a): 21 FMSHRC 846 (Aug. 1999). A Commission majority held that the operator, by failing to provide two escapeways at all times when miners were underground, had violated the plain terms of the regulation. *Id.* at 853 (Chairman Jordan and Commissioner Riley), 864 (Commissioner Marks). Commissioners Verheggen and Beatty, dissenting in separate opinions, disagreed that the regulation had the plain meaning ascribed to it by the majority. *Id.* at 865-69 (Commissioner Verheggen), 870-74 (Commissioner Beatty).

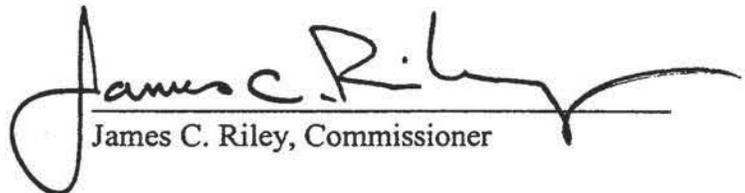
In *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301 (D.C. Cir. 2000), the D.C. Circuit overturned the Commission majority's decision, holding that the regulation does not unambiguously require that two escapeways be functional at all times when miners are underground. *Id.* at 1303. The Court remanded the case so that the Commission could secure from the Secretary an "authoritative interpretation" of section 57.11050 and apply standard deference principles to that interpretation. *Id.* at 1305.

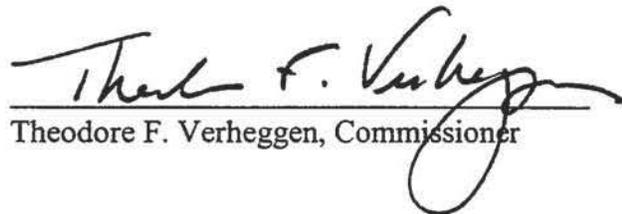
After issuance of the court's mandate, the Secretary vacated the underlying citation and on July 26, 2000, filed a motion to dismiss this case as moot. Akzo did not file an opposition to

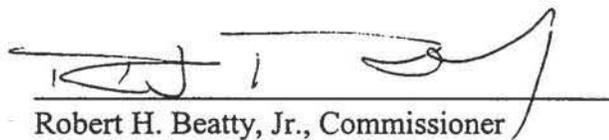
the motion. In her motion, the Secretary stated that the "authoritative interpretation" the court required of her was contained in Program Policy Letter No. P00-IV-2, which took effect July 31, 2000. Mot. at 2.

In light of the foregoing, the Secretary's motion is granted and this case is dismissed.


Mary Lu Jordan, Chairman


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 11, 2000

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

v.

JOHN RICHARDS CONSTRUCTION

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Docket No. WEST 2000-470-M
A.C. No. 24-02070-05504

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 30, 2000, the Commission received from John Richards Construction ("Richards") 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 Richards.

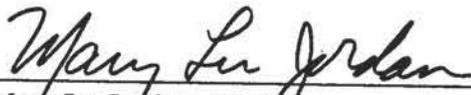
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

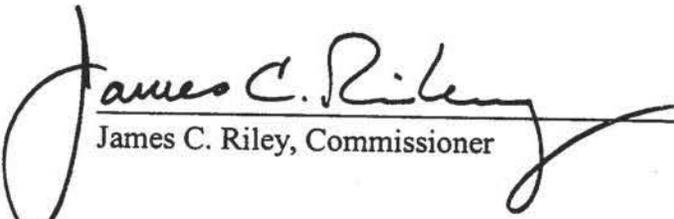
In his request, Richards asserts that he never received a copy of the proposed assessment. Mot. at 1-2. Richards states that he was not aware of the proposed penalty and would have appealed it along with all other penalties he has appealed. *Id.* at 2. Richards requests an opportunity for a hearing on this penalty assessment. *Id.*

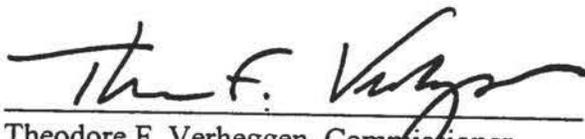
We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, eg., Kenamerican Resources, Inc.*, 20 FMSHRC 199, 201 (March 1998); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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,

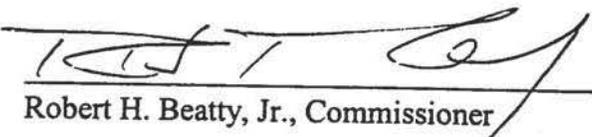
1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater 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 Richards' position. While Richards claims that he did not receive the proposed penalty assessment, the reasons for, and circumstances surrounding that alleged non-receipt are not clear from the record. In the interest of justice, we remand the matter for assignment to a judge to determine whether Richards has met the criteria for relief under Rule 60(b). *See, e.g., Bauman Landscape, Inc.*, 22 FMSHRC 289, 290 (Mar. 2000) (remanding where operator claimed it did not receive penalty assessment and that the return receipt was not signed by him); *Warrior Investment Co., Inc.*, 21 FMSHRC 971, 973 (Sept. 1999) (remanding where operator did not provide any explanation for alleged non-receipt of proposed penalty assessment); *Harvey Trucking*, 21 FMSHRC 567 (June 1999) (remanding to a judge where the operator did not receive the proposed penalty assessment because delivery was unsuccessful for no known reason). 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


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 15, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. SE 99-101-RM
	:	SE 99-102-RM
v.	:	SE 99-103-RM
	:	SE 99-104-RM
NOLICHUCKEY SAND	:	SE 99-105-RM
COMPANY, INC.	:	SE 99-106-RM

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). At issue is the decision of Administrative Law Judge Avram Weisberger to affirm six citations issued to Nolichuckey Sand Company (“Nolichuckey”) alleging violations of 30 C.F.R. § 56.14109(a).¹ 21 FMSHRC 681 (June 1999) (ALJ). The Commission granted Nolichuckey’s petition for discretionary review challenging the decision. For the reasons that follow, we vacate the judge’s decision and remand for further consideration.

¹ 30 C.F.R. § 56.14109, entitled “Unguarded conveyors with adjacent travelways,” provides in pertinent part:

Unguarded conveyors next to the travelways shall be equipped with — (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor; or (b) Railings which — (1) Are positioned to prevent persons from falling on or against the conveyor; . . . and (3) Are constructed and maintained so that they will not create a hazard.

I.

Factual and Procedural Background

Nolichuckey operates a sand and gravel pit in Greenville, Tennessee. Notice of Contest; Tr. 15-17. At Nolichuckey's pit, loaders mine sand and gravel, which is then transported by haul trucks to a crusher. Tr. 16-17. The material is then processed and transported along a series of belts throughout the facility. Tr. 17. Platforms are located alongside all the belts and are traveled by miners when they conduct routine inspections and maintenance of the belts. Tr. 45, 48-49, 134-36. Some of Nolichuckey's belts are supported by structures called trusses, which measure 24-inches above the adjacent platform. Tr. 39-40, 141; Ex. C-1. These conveyors are equipped with handrails situated between the belts and the adjacent maintenance platforms. Ex. C-1. The handrails on these belts measure 42 inches above the platforms and extend higher than the belts. Ex. C-1; Tr. 155-56. Other belts at Nolichuckey's pit are supported by trusses measuring 42-inches above the adjacent platforms. Tr. 39, 43, 140; Ex. C-1. These higher belts are between 50 to 54 inches above the maintenance platforms, and extend between 8 and 12 inches above the tops of the trusses. Gov't Exs. 1-12; Ex. C-1. Unlike the belts supported by 24-inch trusses, the higher belts have no separate railing along the platforms. Gov't Exs. 1-12; Ex. C-1.

On January 19, 1999, Elton Hobbs, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected Nolichuckey's pit. 21 FMSHRC at 682; Tr. 20. He observed that the conveyor belts supported by 42-inch high trusses did not have either stop cords or railings, and he discussed these conditions with foreman Jerry Knight and Thomas Anthony Bewley, Nolichuckey's president. 21 FMSHRC at 682; Tr. 21. Bewley told Inspector Hobbs that MSHA had previously informed him that if conveyors were supported by 42-inch structures, such as the higher belts at Nolichuckey's pit, they did not need to have railings or stop cords. 21 FMSHRC at 682; Tr. 22, 24-27. Hobbs then spoke with his supervisor, Larry Nichols, who instructed him to allow Nolichuckey to come into compliance, and not to issue any citations. 21 FMSHRC at 682; Tr. 24. Bewley did not agree to install stop cords or railings on the higher belts. 21 FMSHRC at 682; Tr. 27. When Hobbs returned on January 28, he discovered that Nolichuckey had not provided railings or stop cords. 21 FMSHRC at 682; Tr. 27-28, 49-50. Consequently, he issued six citations based on the lack of stop cords or railings on the higher belts. Tr. 27-28. Nolichuckey contested the citations, and the matter proceeded to hearing before Judge Weisberger.

In affirming all six citations, the judge concluded that the platforms in question were "travelways" because they were "regularly used" by miners to inspect and maintain the belts, and therefore the belts alongside them were required to have guards. 21 FMSHRC at 683-84. He rejected Nolichuckey's contention that MSHA's prior enforcement position permitting the cited conditions to exist without citation estopped it from issuing the instant citations. *Id.* at 684. The judge also stated that the belt structure itself did not constitute a guard and therefore did not place Nolichuckey in compliance with the standard. *Id.* at 685. Finally, the judge found that the

operator's diminution of safety argument was not available because it had not fulfilled the prerequisite of filing a petition for modification. *Id.*

II.

Disposition

Nolichuckey points to conflicting testimony among the Secretary's witnesses regarding the minimum belt height above which no guards or stop cords are required, and argues that there is no "published MSHA policy to inform mine operators of their responsibilities by providing specific measurement guidance." Amended PDR at 3. The operator claims that the cited maintenance platforms are not "travelways" because they are not regularly used to go from one place to another, and that section 56.14109 is therefore inapplicable. PDR at 1; Amended PDR at 4-6. Nolichuckey further maintains that the judge's interpretation of section 56.14109 is erroneous because it goes beyond the plain meaning of the regulation. Amended PDR at 7. The operator submits that it lacked notice that MSHA's interpretation of the standard covered maintenance platforms next to conveyors. Amended PDR at 4, 6-7. Nolichuckey also argues that the Secretary should be estopped from requiring compliance because her newly articulated policy is contrary to her longstanding enforcement policy. *Id.* at 8. Finally, Nolichuckey claims that the judge erred in refusing to consider its argument that compliance with section 56.14109 would have diminished safety. PDR at 1; Amended PDR at 6.

The Secretary responds that "the evidence in this case supports and indeed compels the conclusion that 42-inch structures are 'unguarded.'" S. Br. at 14. The Secretary also argues that the judge properly interpreted the term "travelway" to include the cited catwalks. *Id.* at 8-18. The Secretary maintains that Nolichuckey had adequate notice of her interpretation of section 56.14109. *Id.* at 18-23. Finally, the Secretary submits that Nolichuckey's argument that compliance with section 56.14109 would create a greater hazard should be rejected because the operator did not first file a petition for modification. *Id.* at 23-28.

A. Threshold Requirements of Section 56.14109

On its face, section 56.14109 contains two threshold requirements which must be satisfied before the regulation's specific requirements apply. First, the cited conveyor belt must be next to a "travelway." Second, the conveyor belt must be "unguarded."

1. Meaning of "Travelway"

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd

results. *See id.*; *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face."), quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984).

We have held that the meaning of a broadly-worded regulation may be determined from its plain language. For instance, in *Austin Power, Inc.*, the Commission held that "[a] plain reading of [30 C.F.R. §] 77.1607(g)² reveals that it does not limit the protection it affords to any particular class of persons Rather the standard protects all persons within the potential zone of danger from all reasonably foreseeable hazards resulting from the starting or moving of the equipment." 9 FMSHRC 2015, 2019 (Dec. 1987). In *Inland Steel Coal Co.*, we held that the plain language of a regulation which provides that "each operator of an underground coal mine shall . . . provide bathing facilities . . . for the use of the miners at the mine" extended not only to miners working underground, but also to miners working on the surface at underground mines. 4 FMSHRC 1218, 1221-22 (July 1982).

The judge's decision upholding MSHA's treatment of the maintenance platforms as "travelways" under section 56.14109 is consistent with a plain meaning application of that term. As applied in 30 C.F.R. Part 56, Subpart M, "travelway" is defined as "[a] passage, walk, or way regularly used or designated for persons to go from one place to another." 30 C.F.R. § 56.14000. Nolichuckey does not dispute that the cited maintenance platforms were located adjacent to conveyors, that each platform constituted "a passage, walk, or way," or that the platforms were regularly used by miners to inspect and maintain the belts. Tr. 135-36. Moreover, despite Nolichuckey's insistence that the cited maintenance platforms do not go from one place to another, the plain language of the regulation does not limit the definition of the word "place" to another section of the mine. In this regard, the Commission has looked to the ordinary meaning of terms not defined by statute or regulation. *See Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996) (applying dictionary definition of term not defined in statute), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table). "Place" is broadly defined as "a particular portion of a surface." *Webster's Third New Int'l Dictionary* 1727 (1993). Because the end of the platform is a particular portion of the platform, and also a particular portion of the mine, we believe that the end of a maintenance platform may properly be treated as a "place" under the ordinary meaning of that broad term. Therefore, the platforms fit squarely within the definition of travelways. Furthermore, given the explicit aim of section 56.14109 to prevent injury to miners working near conveyors, we see no indication that the rulemakers intended to implicitly exclude conveyors adjacent to maintenance platforms from the regulation's coverage merely because there are no

² 30 C.F.R. § 77.1607(g) provides, in pertinent part: "Equipment operators shall be certain . . . that all persons are clear before starting or moving equipment."

exits on the other ends of the platforms. This is particularly so where, as here, miners have to traverse the platforms and then make a return trip, thereby doubling their exposure to the conveyor hazards section 56.14109 is expressly designed to prevent.³

Courts have held that an agency's interpretation may be permissible but nevertheless fail to provide the notice required to support imposition of a civil penalty. *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). Where the imposition of a civil penalty is at issue, considerations of due process "prevent[] . . . deference [to an agency's interpretation] from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted).

We find no merit in Nolicheckey's assertion that it lacked notice that its platforms were "travelways" under the Secretary's regulation. The Commission has held that, where "the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements." *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998); *see also Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that adequate notice provided by unambiguous regulation). Accordingly, because the meaning of "travelway" as defined in section 56.14000 and as applied to Nolicheckey's maintenance platforms by section 56.14109 is clear from the plain language of the regulations, it follows that the standard itself provided Nolicheckey with notice of its meaning.⁴

2. Meaning of "Unguarded"

In this case, the Secretary issued citations alleging violations of section 56.14109 because she determined that the conveyors supported by 42-inch trusses were unguarded. Tr. 44 (Hobbs

³ In support of its claim that the cited maintenance platforms are not "travelways" within the definition set forth in section 56.14000, Nolicheckey cites several unreviewed administrative law judge decisions. Amended PDR at 5. Commission Procedural Rule 72, 29 C.F.R. § 2700.72, provides that unreviewed administrative law judge decisions are not precedent binding upon the Commission. *See Capitol Aggregates*, 2 FMSHRC 1040, 1041 n.1 (May 1980). In any event, the cases Nolicheckey relies on are readily distinguishable from the instant matter. *See Magma Copper Co.*, 1 FMSHRC 837, 857 (July 1979) (holding that the cited area did not constitute a "travelway" because it was not regularly used); *Consolidation Coal Co.*, 8 FMSHRC 1946, 1958 (Dec. 1986) (same); *Tide Creek Rock, Inc.*, 18 FMSHRC 390, 410 (Mar. 1996) (holding that work platform was not a walkway because it was an employee work station and was not used to go from one place to another or to gain access to equipment).

⁴ Commissioner Riley believes that the term "travelway" is ambiguous, but would affirm the judge's treatment of the cited platforms as travelways based on his belief that the Secretary's interpretation is reasonable. However, he has concerns about whether Nolicheckey was on notice of the Secretary's interpretation.

testifying that he determined that the cited conveyors were unguarded). However, we are unable to discern the basis for this determination.

The term “unguarded” is not defined in 30 C.F.R. Part 56, Subpart M. Moreover, nothing in the legislative history of section 56.14109 provides guidance in determining whether the cited conveyors should be considered unguarded. In the course of defending the instant citation, the Secretary offered several explanations for how she decided whether a conveyor was unguarded. In describing the circumstances under which they would not issue citations for violations of section 56.14109, the Secretary’s witnesses failed to present a coherent interpretation of when a belt is considered “guarded.”

For instance, Inspector Hobbs testified that “if a conveyor is high enough to where it doesn’t create a hazard, then a railing or stop cord does not have to be provided.” Tr. 70. Furthermore, the Secretary stipulated that previous inspectors had treated all of Nolicheckey’s belts as complying with the standard because the belts were equipped with 42-inch trusses. Tr. 22, 24-26. The Secretary’s *Program Policy Manual*, however, states that the conveyor installation or framework cannot be considered an allowable guard even though it may conform to the standard railing height of 42 inches. IV MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 56/57, at 55a-55b (1991). Is a higher framework an allowable guard? Testimony from the Secretary’s witnesses seemed to indicate it could be. Hobbs estimated that a conveyor located seven feet above a walkway would not require stop cords or guarding. Tr. 70-71. Nichols stated that “[a]nything above head high then we’d have a possibility it wouldn’t be a violation.” Tr. 125. He admitted, however, that a problem with a head-high exception is that it implicitly requires different belt heights depending on the height of the individual on the platform. Tr. 126-27.

The D.C. Circuit has stated that, when interpreting an ambiguous regulation, deference is normally owed to the Secretary’s litigation position before the Commission. *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000). The Supreme Court has upheld the government’s interpretation of a regulation, even where it had articulated a prior inconsistent interpretation. See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515-18 (1994). However, courts defer to agency interpretations of ambiguous regulations first put forward in the course of litigation only where they “reflect the agency’s fair and considered judgment on the matter in question.” *Auer v. Robbins*, 519 U.S. 452, 462 (1997); accord *Akzo*, 212 F.3d at 1304.

The Secretary’s failure to advance any consistent interpretation of “unguarded” suggests that she has in fact never grappled with — and thus never exercised considered judgment over — the regulation’s ambiguity. Therefore, we do not pass on the permissibility of any of the interpretations advanced at the hearing. Instead, we remand for the judge to secure from the Secretary an “authoritative interpretation” of what constitutes an unguarded conveyor within the meaning of section 56.14109. See *Akzo*, 212 F.3d at 1305. Upon obtaining the Secretary’s interpretation, we direct the judge to apply traditional principles of regulatory interpretation to determine if the Secretary’s interpretation is reasonable and entitled to deference. See *Secretary*

of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation of its own regulation is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’” (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. at 414) (other citations omitted)).⁵

Separate from the question of whether to accord deference to the Secretary’s interpretation of an unguarded conveyor is whether the operator was on notice of the regulation’s requirements. However, because we do not know what the Secretary’s interpretation of the regulation is or what it requires, we cannot address at this juncture the issue of whether Nolichecky was afforded notice that its maintenance platforms were unguarded within the meaning of section 56.14109. After obtaining the Secretary’s interpretation, the judge on remand must decide whether the operator was on notice of the regulation’s requirements. In addressing the notice issue, the judge must also reconcile the Secretary’s claim that Inspector Hobbs provided actual notice to the operator, with her claim that it is unreasonable for operators to rely on the oral assertions of MSHA inspectors when applicable regulations and government manuals provide notice of the operator’s obligations. S. Br. at 21-22.

B. Stop Cord or Railing Requirements

If the initial conditions of section 56.14109 are present, the plain terms of the regulation require the installation of either guard railings *or* stop cords. The standard, which states that conveyors falling under the standard must be equipped with “(a) [e]mergency stop devices . . . or (b) [r]ailings” is plainly disjunctive. In his analysis, the judge focused solely on the guard rail requirement of the standard. While he discussed in the fact section of his opinion the possibility of compliance through installation of stop cords, he failed to address in his analysis the possibility that compliance could be achieved through installation of stop cords. *See* 21 FMSHRC 684-85. We also observe that the operator nowhere claims that installation of stop cords, if required by the regulation, would pose a safety hazard. If on remand the judge finds that the threshold requirements of section 56.14109 existed, he must examine both the stop cord and railing compliance options set forth in subsections (a) and (b) of the standard.

C. Estoppel

The Commission has held that the estoppel defense is not ordinarily available against the government. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981). Furthermore, the Commission has held that an inconsistent enforcement pattern by its inspectors does not estop MSHA from proceeding under an interpretation of the standard that it concludes is correct. *U.S.*

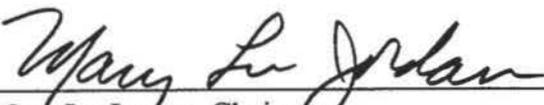
⁵ Commissioner Verheggen believes that, for the reasons set forth in his dissent in *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722, 737-38 (July 1999), the relevant question here and on remand is whether “we will accord special weight to the Secretary’s view of the [Mine] Act and the standards and regulations [she] adopts under them” (quoting *Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979)).

Steel Mining Co., 15 FMSHRC 1541, 1546-47 (Aug. 1993) (“[T]he fact that U.S. Steel was not cited prior to July 1990 for failing to conduct weekly examinations of the items cited . . . is not a viable defense to liability.”); *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1142 (Sept. 1988); *Bulk Transp. Servs.*, 13 FMSHRC 1354, 1361 n.3 (Sept. 1991). Consistent with our prior approach to estoppel claims against the government, we hold that previous inspectors’ representations about the requirements of section 56.14109 did not estop MSHA from issuing the instant citations against Nolichuckey.

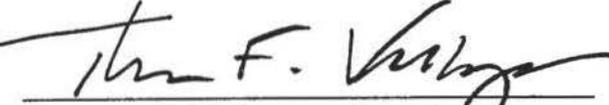
III.

Conclusion

For the foregoing reasons, we vacate the judge’s determination that Nolichuckey violated section 56.14109 and remand with instructions that the judge obtain from the Secretary a definitive interpretation of what constitutes an unguarded conveyor, and for further consideration consistent with this decision.


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Theodore F. Verheggen, Commissioner


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Commission granted the Secretary's petition for discretionary review challenging the judge's decision. For the reasons that follow, we reverse the judge's decision.

I.

Factual and Procedural Background

The background facts in this proceeding are fully set forth in the Commission's initial decision in this case, *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722 (July 1999) ("*Cumberland I*"), and are summarized here. Cyprus operates the Cumberland Mine, an underground bituminous coal mine near Waynesburg, Pennsylvania. *Id.* at 723. The mine receives four regular AAA inspections,³ which are conducted quarterly beginning on October 1 of each year. *Id.* MSHA assigns two inspectors on a full-time basis to conduct each quarterly inspection, which usually takes the full quarter to complete. *Id.* The assigned inspectors are assisted by other inspectors. *Id.* As a result, there is essentially a continuous presence at the mine of at least two inspectors. *Id.*

On June 18, 1997, during the third quarterly inspection, MSHA Inspector Thomas McCort, assigned to conduct the regular inspection, issued to Cyprus a section 104(d)(1) order for a significant and substantial ("S&S") and unwarrantable violation of a preshift examination standard.⁴ *Id.* On September 24, during the fourth quarter, Inspector Victor Patterson, who was assigned to conduct the regular inspection, issued a section 104(a) citation for a violation of a roof control standard, 30 C.F.R. § 75.202. *Id.* at 724. The next day, on September 25, Inspector Patterson issued a section 104(d)(2) withdrawal order alleging an S&S and unwarrantable violation of the same roof control regulation when he discovered that the hydraulic jack, which had been used to abate the cited condition, had been removed, and there were indications that miners had worked under an area of unsupported roof. *Id.* The fourth quarterly regular inspection concluded on the next day, September 26, when the 60 West Mains haulage was inspected. *Id.*

The 60 West Mains haulage is approximately 4,200 feet long and has been the primary route of travel into and out of the mine since 1983. *Id.* Between June 18 and September 25,

³ A regular AAA inspection is a "[s]afety and [h]ealth [i]nspection of an entire mine." MSHA, U.S. Dep't of Labor, MSHA Handbook Series, *Coal General Inspection Procedures*, at 8-1 (Sept. 1995).

⁴ The S&S terminology is taken from section 104(d)(1) of the Act, 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." 30 U.S.C. § 814(d)(1). The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." *Id.*

inspectors traveled through the area “many times,” or approximately 60 or more round trips. *Id.* The inspectors traveled on the tracks by closed mantrips, which travel approximately 15 to 20 miles per hour (“mph”), and by open jeeps, or “crickets,” which travel approximately 10 to 12 mph. *Id.*

Cyprus challenged the section 104(d)(2) order and the matter proceeded to hearing before Judge Feldman. During the hearing, Cyprus stipulated that it had violated the roof control standard on September 25, and that the violation was S&S and had been caused by its unwarrantable failure. *Id.* The parties also stipulated that the issue before the judge was whether an inspection disclosing no similar violations, i.e., an intervening “clean inspection” of the mine, had occurred between the time that the section 104(d)(1) order was issued on June 18, and the section 104(d)(2) order was issued on September 26. *Id.* They agreed that if the Secretary failed to prove the absence of an intervening clean inspection, the disputed section 104(d)(2) withdrawal order should be modified. *Id.*

In his initial decision, the judge concluded that there had been an intervening clean inspection between the issuance of the 104(d)(1) and 104(d)(2) orders. 20 FMSHRC 285, 294 (Mar. 1998). The judge reasoned that the purpose of an intervening inspection is to disclose whether additional violations caused by unwarrantable failure exist, and that such violations are generally more readily detectible. *Id.* He noted that, between the time that the 104(d)(1) and 104(d)(2) orders were issued, all areas of the mine had been inspected as part of a regular inspection except for the 60 West Mains haulage. *Id.* at 287. The judge determined that MSHA inspectors’ repeated trips through the 60 West Mains haulage in addition to the regular inspection that had occurred prior to September 25 constituted a clean inspection within the meaning of the Act. *Id.* at 294. Accordingly, the judge modified the section 104(d)(2) order to a section 104(d)(1) citation. *Id.* at 295.

On review, a Commission majority vacated the judge’s decision and remanded the case. 21 FMSHRC at 728. The Commission concluded that the judge erred by relying on the inspectors’ travel through the haulageway rather than examining any evidence of inspection activity to determine whether the 60 West Mains haulage had been inspected. *Id.* at 727. The Commission rejected the judge’s reasoning that the MSHA inspectors’ frequent travel through the haulage constituted an inspection because it would disclose unwarrantable violations, which he considered more detectible. The majority found this was inconsistent with Commission precedent holding that a clean inspection must be thorough and complete, rather than designed to disclose only obvious violations. *Id.* The Commission also disagreed with the judge’s underlying premise, reasoning that unwarrantable violations may not be more immediately apparent. *Id.* Consequently, the Commission remanded the case to the judge to determine whether the Secretary met her burden of proving the absence of an intervening clean inspection by examining evidence regarding any inspection activity in the haulage area during the relevant time period. *Id.* at 728. The Commission specifically instructed the judge to examine a log

maintained by Cyprus depicting all inspection activity at the mine, and to weigh it against other evidence. *Id.*⁵

On remand, the judge held that the Secretary failed to demonstrate that a clean inspection had not occurred. 21 FMSHRC at 1118. He found that the Secretary correctly asserted there were no entries in the log reflecting a regular or spot inspection of the 60 West Mains haulage. *Id.* at 1114. The judge also noted that Cyprus did not contend that the log contained any entries reflecting regular or spot inspections in that area, although it did state that the log showed that the inspectors were in the 60 West Mains haulage area. *Id.* The judge also found that the evidence was “equivocal” as to whether any inspector disembarked from a vehicle in the haulage during the relevant time. *Id.* at 1116. The judge then applied the “reasonable person test,” and held that it was unreasonable to conclude that mine inspectors who are familiar with the hazards of mining would repeatedly travel through the haulage without ensuring that rib, roof, track and ventilation conditions were safe. *Id.* at 1116-17. Accordingly, the judge reinstated his modification of the section 104(d)(2) order to a section 104(d)(1) citation. *Id.* at 1118.

On review, the Secretary argues that the judge erred in finding that the Secretary conducted a clean inspection of the mine during the relevant time period. S. PDR at 2.⁶ She contends the judge failed to follow the Commission’s holding in *Cumberland I* that a clean inspection must encompass a thorough and complete inspection, not simply one that reveals obvious violations. *Id.* at 10. In addition, she argues that the judge’s “reasonable person” approach is inconsistent with the Commission’s prior holding. *Id.* at 14-15.

Cyprus responds that the Secretary failed to meet her burden of proving that a clean inspection did not occur between the issuance of the section 104(d)(1) order and the section 104(d)(2) order. C. Br. at 9. It maintains that the Secretary adduced no evidence of the specific activities of nine of the ten inspectors who inspected the mine, and that Cyprus’ inspection log only indicates the ultimate inspection destination of inspectors and does not show that the inspectors did not inspect the 60 West Mains haulage. *Id.* at 10. Cyprus also contends that the judge properly applied the “reasonable person” standard in evaluating the credibility of the Secretary’s witnesses who testified there was no clean inspection, and that it would be improper to overturn such credibility determinations. *Id.* at 14-18.

⁵ Commissioner Marks, concurring and dissenting in part, stated that he would have reversed the judge because, although he agreed that the judge had erred in concluding that an inspector’s traveling through a haulageway constituted an inspection, he believed that the record supported only the conclusion that, under applicable court and Commission precedent, no clean inspection of the mine had occurred. *Id.* at 730. In his dissenting opinion, Commissioner Verheggen would have affirmed the judge in result because he believed the Secretary failed to meet her burden of proof. *Id.* at 735-37.

⁶ The Secretary designated her petition for discretionary review as her brief.

II.

Disposition

A. General Principles

Section 104(d) creates a “chain” of increasingly severe sanctions that serve as an incentive for operator compliance. *See Naaco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). Under section 104(d)(1), if an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is S&S and that it is also caused by unwarrantable failure, he or she issues a citation under section 104(d)(1). That citation is commonly referred to as a “section 104(d)(1) citation” or a “predicate citation.” *See Greenwich Collieries, Div. of Pa. Mines Corp.*, 12 FMSHRC 940, 945 (May 1990). If, during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply with a standard, he or she issues a withdrawal order under section 104(d)(1), sometimes referred to as a “predicate order.” *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1622 n.7 (Aug. 1994). If an inspector “finds upon any subsequent inspection” a violation caused by unwarrantable failure, he or she issues a withdrawal order for the violation under section 104(d)(2). 30 U.S.C. § 814(d)(2). The issuance of withdrawal orders under section 104(d)(2) does not cease and an operator remains on probation “until such time as an inspection of such mine discloses no similar violations.” *Id.*; *see Naaco*, 9 FMSHRC at 1545.

Before the judge, the Secretary was required to prove the absence of a clean inspection by a preponderance of the evidence. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989). In describing the preponderance of the evidence standard, the Commission has stated: “[t]he burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998), *quoting Concrete Pipe and Prod. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993).

The Commission has determined that, in order to prove the absence of a clean inspection, the Secretary need not prove a negative. *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984), *aff’d sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985). Instead, we have suggested that the Secretary may prove that an area remains to be inspected during the relevant time period by presenting records of all inspections at the mine and the extent of those inspections. *Id.*

Contrary to Cyprus’ assertion, in meeting her burden of proving the absence of a clean inspection, the Secretary was not required to submit “evidence from *all* of the inspectors who traveled the haulage” that they did not inspect the 60 West Mains haulage. C. Br. at 11

(emphasis added). Although in *Cumberland I* we noted that the Secretary may rely upon inspectors' direct or hearsay testimony in attempting to meet her burden of proving the absence of a clean inspection, we did not suggest that the Secretary must prove her case by producing the testimony of every inspector in the mine. 21 FMSHRC at 728 n.7. Rather, we explicitly stated that the Secretary may rely upon a log depicting all inspection activity at the mine, such as that admitted by Cyprus, and instructed the judge to consider Cyprus's log as the central piece of evidence in considering whether the Secretary met her burden.⁷ *Id.* at 728. Thus, the Secretary's burden was to persuade the judge that it was more likely than not that a clean inspection did not occur in the 60 West Mains through a combination of direct and circumstantial evidence.

B. Whether the Judge Erred in Finding that a Clean Inspection Had Occurred

Although the Commission instructed the judge on remand to consider all the record evidence regarding inspections in the haulage including Cyprus' log, and determine whether the Secretary met her burden of proving the absence of an intervening clean inspection, the judge failed to do so. Rather, the judge applied the "reasonable person test" to hold that, because the inspectors traveled through the haulage numerous times, they must have made sure that certain hazards did not exist. 21 FMSHRC at 1116. We reject this approach, which is inconsistent with the Commission's remand instructions.

The judge's analysis in his remand decision is almost identical to his reasoning in the initial decision, which the Commission did not accept. In his first decision he noted that "MSHA inspectors had an opportunity to observe the rib and roof conditions and experience the track conditions in the 60 West Mains haulage on a daily basis hundreds of times." 20 FMSHRC at 294. Although the Commission made clear in *Cumberland I* that the judge erred by failing to examine evidence of inspection activity in the haulage, and that an intervening clean inspection must be "thorough and complete" (21 FMSHRC at 727), on remand the judge again neglected to weigh all of the pertinent record evidence, and simply surmised that "it is unreasonable to conclude that MSHA mine inspectors . . . would repeatedly travel an entry without ensuring there are no hazardous rib, roof, or track conditions." 21 FMSHRC at 1116.

⁷ As the Commission indicated in *Kitt Energy*, the Secretary maintains records of all mine inspections in order to fulfill her statutory duties. 6 FMSHRC at 1600. Indeed, in *Kitt* the Commission emphasized that "proper administration of the Mine Act requires that the Secretary maintain a workable mine inspection record keeping system." *Id.* at 1601. Although the Secretary "[c]uriously" did not submit such records into evidence (*see Cumberland I*, 21 FMSHRC at 728 n.7), Cyprus introduced its own log, which, fortuitously for the Secretary, in this case serves the same evidentiary purpose. *See* 29 Am Jur 2d Evidence § 158 at 185 (1994) ("[A] party may be relieved of its burden of production if the necessary proof is introduced by his adversary, and if such proof is sufficiently convincing and uncontroverted, the burden of persuasion as well.").

Cyprus incorrectly asserts that the judge applied the “reasonable person” standard in evaluating the credibility of the Secretary’s witnesses, and that the Secretary is effectively requesting the Commission to overturn credibility findings by the judge. C. Br. at 17. The judge made no credibility findings regarding the statements of the ten inspectors and their supervisor, nor could he, as most of the inspectors did not testify. *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586, at 578 (2d ed. 1995) (“At a trial without a jury it is for the trial judge to determine the credibility of the *oral* testimony given by the witnesses and the weight to be accorded it” (emphasis added)).

Cyprus more accurately characterizes as an inference the judge’s conclusion that the haulage was inspected. C. Br. at 15. As noted by Cyprus, in order to establish an inference there must be a “rational connection between the evidentiary facts and the ultimate fact inferred,” and the evidence must be evaluated for the reasonableness of the inference. *Garden Creek Pocahontas*, 11 FMSHRC at 2152-53; *Midwest Minerals, Inc.*, 12 FMSHRC 1375, 1378-79 (July 1990); C. Br. at 15. However, the judge’s inference that the inspectors’ frequent travel through the haulage must have resulted in a clean inspection is not reasonable because it finds no support in the record.

The judge simply theorized that “inspectors *could* have left their vehicles at any time if they had observed any conditions that caused concern,” but points to no evidence that they actually did so. 21 FMSHRC at 1116. Cyprus also fails to cite evidentiary support for the judge’s conclusion. C. Br. at 14-16.

As we noted in *Cumberland I*, a thorough and complete inspection consists of several components which the judge did not find were covered by the inspectors during their numerous trips down the haulageway. For example, the Commission recognized that in order to inspect the haulage, inspectors must examine, inter alia, any electrical installations in the area, cables, wiring, switches, fire-fighting equipment, and manholes. 21 FMSHRC at 727 n.6. Furthermore, in affirming the Commission’s *Kitt Energy* decision, the D.C. Circuit held that to find an intervening clean inspection had occurred, all areas of a mine must have been thoroughly inspected for violations, obvious or otherwise, and of any kind. 768 F.2d at 1480. In support, the court keenly observed that:

many, if not most, safety hazards in a mine are neither obvious nor even visible.

To cite some examples: To determine whether a mine is complying with its roof control plan, an inspector generally must consult a copy of that plan - merely walking through the mine tells him nothing. To determine whether there are unsafe concentrations of gases or dust an inspector must employ special monitoring equipment. Likewise, an electrical inspector may notice a mechanical violation that

is out in the open, but an inspector examining a mine's roof support system is unlikely to open an electrical junction box to see whether the wiring inside is safe.

Id. at 1479-80.

Consistent with the D.C. Circuit's reasoning, we emphasize that mere travel through an area of a mine, without evidence of a thorough and complete inspection, does not suffice to support a finding that a clean inspection occurred. Thus, an inspector's frequent travel through an area may not be used as the sole basis to support an inference that he or she concluded that no hazards existed and that, consequently, a clean inspection took place. Instead, evidence of inspection activity in the haulage area during the relevant time period must be considered. Our review of the record demonstrates that substantial evidence does not support the judge's finding that the haulage had been inspected.⁸ Of special significance is the judge's finding, which is undisputed on review, that the log entries do not indicate that any regular or spot inspections took place in the 60 West Mains. 21 FMSHRC at 1114; C. Br. at 10-12. Thus, this case comes to us in a different stance than when it was first before the Commission, as the record now contains this material finding that the Commission had requested the judge to make.

The relevance of this finding is apparent from the function of the log. In *Cumberland I*, the Commission stated that Cyprus' log "depict[ed] all inspection activity at the mine, including both state and federal inspections." 21 FMSHRC at 728 (emphasis added). That conclusion is supported by the testimony of Robert Bohach, Cyprus safety manager, that the log provides "a day-to-day running total of the number of inspectors. Basically what area of the mine or the operations they have inspected." Tr. 774-75. He stated that the log would show the inspector visits from June 2, 1997 through September 29, 1997. Tr. 775. When asked what the "area inspected" category on the log signified, Bohach replied that "[i]t's just a brief generalization as to what area of the mine the inspection party traveled to and did some portion of their inspection." Tr. 781-82. In light of this testimony, we disagree with Cyprus' later assertion, in its brief on appeal, not supported by any citation to the record, that the log "only indicates the ultimate inspection destination of inspectors on particular days . . . [and] cannot be read to show that the inspectors who traveled through the haulage did not inspect it." C. Br. at 10-11.

⁸ 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)). 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 (January 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Supporting the judge's finding regarding Cyprus' log, Inspector McCort made clear that he had not inspected the haulage while traveling through it (Tr. 476), and that he did not inspect the haulage after the May 5 third quarterly inspection. Tr. 501. Furthermore, although the judge relied on the statement of Inspector Patterson that "it's possible" he left his vehicle for closer observation (21 FMSHRC at 1116), it is important to consider that testimony in context. Patterson testified that before September 25, he had not conducted an inspection of the haulage area. Tr. 287. Furthermore, when questioned about the difference between traveling through the haulage and inspecting it, he stated "I didn't stop and I didn't do the things necessary to inspect the haulage. I just traveled across it." Tr. 288. When asked why the haulage was inspected on September 26, he replied "[i]t's what was left to do . . . It hadn't been done yet." Tr. 294-95. Subsequently, the following interchange occurred on cross-examination:

Q: And all your trips into --- along the 60 west main's haulage in July, August and September, did you ever stop them to inquire about any conditions that you saw as you came in?

A. I can't remember doing that, sir.

Q. You might have done that?

A. It's possible.

Tr. 301. Considered in its totality, the testimony of Inspector Patterson refutes the judge's conclusion that a clean inspection took place.⁹

Finally, we disagree with Cyprus' assertion that the Secretary "cannot prevail because the evidence does not preponderate in her favor; instead it is 'equivocal'" as to whether any MSHA inspector disembarked from a cricket or mantrip in the 60 West Mains haulage during the time in question." C. Br. at 13. Although the judge found that evidence regarding whether the inspectors disembarked from their vehicles was equivocal (21 FMSHRC at 1116), this statement is not the same as a finding that the totality of the Secretary's evidence regarding the absence of a clean inspection was equivocal. In any event, even if the evidence showed that an inspector disembarked, this by itself would be insufficient to rebut the Secretary's claim that no complete and thorough inspection had occurred. See *UMWA v. FMSHRC*, 768 F.2d at 1479-80 (inspector's mere physical presence does not qualify as a "clean inspection.").

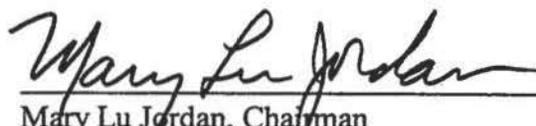
⁹ In this regard, this case is distinguishable from *U.S. Steel Corp.*, 6 FMSHRC 1908 (Aug. 1984), in which the Commission reversed the judge's decision finding the absence of an intervening clean inspection. In that case, the inspector offered testimony which the judge acknowledged was "possibly conflicting," including the statement that "I have covered the entire facility, yes." *Id.* at 1914.

Taking into account Cyprus' log and the inspectors' testimony, we hold that substantial evidence does not support the judge's finding that the 60 West Mains haulage was inspected between June 18 and September 25.

III.

Conclusion

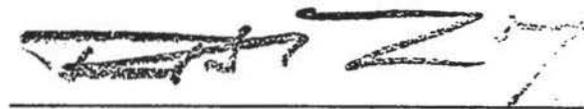
For the foregoing reasons, we reverse the judge's decision and reinstate the section 104(d)(2) order.



Mary Lu Jordan, Chairman



James C. Riley, Commissioner



Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting:

In my dissent in *Cyprus Cumberland Resources Corp.*, I concluded that “the Secretary failed to meet her burden of proof,” and I affirmed in result the judge’s finding of no violation. 21 FMSHRC 722, 735 (July 1999) (“*Cumberland I*”). I find nothing has changed now that this case has returned to the Commission after being remanded to the judge. Nevertheless, my colleagues have decided to reverse the judge. I disagree with their decision, and therefore dissent.

I based my dissent in *Cumberland I* on the fact that the Secretary failed to adduce “proof that an intervening clean inspection [had] not occurred” in the 60 West Mains, as required by *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984), *aff’d sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985). As I stated before, “under *Kitt*, the Secretary is required to maintain detailed records of inspections, and to adduce these records in some fashion when defending the validity of a section 104(d)(2) order.” 21 FMSHRC at 735. Never in these proceedings has the Secretary adduced any such records. *See id.*, majority opinion at 728 n.7 (“Curiously, the Secretary failed to admit any records depicting how much of the Cumberland Mine had been subject to inspections, other than regular inspections, since issuance of the section 104(d)(1) order on June 18.”).

In reversing the judge, my colleagues seize on the judge’s finding that entries made in an inspection log maintained by Cyprus “do not indicate that any regular or spot inspections took place in the 60 West Mains.” Slip op. at 8, citing 21 FMSHRC at 1114. I find, however, that the Cyprus log is irrelevant to the issue of whether an inspection occurred along the 60 West Mains. As I stated in my dissent in *Cumberland I*:

After examining this log, and in light of statements made by Cyprus’ counsel at oral argument, it is abundantly clear to me, however, that no inferences can be drawn from the log that the 60 West Mains were not inspected. All the log shows is the areas to where inspectors traveled to conduct inspections. *It does not indicate what any inspectors did in transit.* Given the extensive amount of travel in the 60 West Mains, I find that it was incumbent upon the Secretary to establish that none of her inspectors examined the track haulage for hazards, a point on which Cyprus’ log is silent.

21 FMSHRC at 736 (emphasis added). My colleagues’ statement that the Cyprus log, “fortuitously for the Secretary, in this case serves the same evidentiary purpose” as any records of inspections kept by the Secretary (slip op. at 6 n.7) is just plain wrong. The log simply did not serve as a record of inspections. As Mr. Bohach, the Cyprus safety manager, testified, the log shows “the area of the mine the inspection party traveled to and did some portion of their

inspection” (Tr. 782) — no more and no less. The log does not show whether inspections occurred in the areas through which inspectors traveled. The log is thus no substitute for the “clear, unequivocal evidence that the track haulage ‘remained to be inspected’” (21 FMSHRC at 735) which, under *Kitt*, the Secretary was obligated to adduce at the hearing.

My colleagues’ claim that “this case comes to us in a different stance than when it was first before the Commission, as the record now contains this material finding” (slip op. at 8), i.e., the judge’s observation that the log did not indicate that the 60 West Mains were inspected. There is a significant difference, however, between the judge’s observation and the majority’s conclusion that no regular or spot inspections took place in that area.

In this regard, try as they might to obfuscate their holding, the majority does in fact conclude that the 60 West Mains were not inspected. My colleagues state that “substantial evidence does not support the judge’s finding that the 60 West Mains haulage had been inspected” in the relevant time period. Slip op. at 8. They then set forth their reading of the evidence and conclude by reversing the judge. *Id.* at 8-10. In effect, my colleagues have concluded, without explicitly saying so, that the record compels the conclusion that the haulage had not been inspected. I do not, however, find that the record in this case compels *any* conclusion, one way or the other.

Indeed, the judge concluded that “[t]he evidence is equivocal as to whether any MSHA inspector disembarked from a cricket or mantrip in the 60 West Mains haulage during the time in question.” 21 FMSHRC at 1116. I find that this conclusion is supported by substantial evidence,¹ including Inspector Patterson’s testimony in which he admitted that it was “possible” that he might have stopped in the 60 West Mains “to inquire about any conditions that he saw as [he] came in” (Tr. 301), testimony which casts doubt on his other testimony that he did not inspect the haulage entry.² Notably, Patterson was but one of many inspectors to travel the haulageway — all but two of whom the Secretary did not bother to have testify. The Secretary

¹ 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)).

² The majority infers that “in its totality, the testimony of Inspector Patterson refutes the judge’s conclusion that a clean inspection took place.” Slip op. at 9. Given its equivocal nature, and the fact that it involves but one of many inspectors who traveled the haulage entry, I find that Patterson’s testimony can support neither the majority’s conclusion nor the judge’s conclusion that the 60 West Mains were inspected. Nevertheless, I am able to conclude from this record that the Secretary failed to prove that the haulage entry remained to be inspected.

failed to account for the actions of its other inspectors, an evidentiary gap at odds with *Kitt* which I find fatal to the Secretary's case.

The majority errs in my view by basing their reversal of the judge on the inference they in effect draw from the record that the 60 West Mains were not inspected, an inference which was within the province of the judge to draw, but which he refused to draw because he found the evidence "equivocal" (21 FMSHRC at 1116). In substituting its judgment for that of the judge on this matter, the majority has crossed the line from appellate review to de novo factfinding, contrary to settled principles of law. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) ("It would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record."); *Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 (4th Cir. Dec. 30, 1997) ("[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence") (citations omitted), *cert. denied*, 119 S. Ct. 600 (1998).

Accordingly, as I stated in *Cumberland I*, "I find that the Secretary failed to establish a prima facie case, see *U.S. Steel Corp.*, 6 FMSHRC 1908, 1914 (Aug. 1984) (Secretary failed to meet burden of proving validity of section 104(d)(2) order where evidence was 'entirely too vague and uncertain'), and on this ground alone, I affirm the judge's decision in result." 21 FMSHRC at 736.


Theodore F. Verheggen, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 13, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	
ALAN LEE GOOD, an individual doing business as GOOD CONSTRUCTION, Respondent	:	Docket No. WEST 2000-44-M A. C. No. 45-03086-05512
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Good Portable Crusher
v.	:	
GOOD CONSTRUCTION, Respondent	:	Docket No. WEST 2000-149-M A. C. No. 45-03086-05513
	:	
	:	Good Portable Crusher

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, on behalf of Petitioner;
James A. Nelson, Esq., Toledo, Washington, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. the "Act" charging Alan Lee Good doing business as Good Construction (Good) with 10 violations of mandatory standards and seeking civil penalties of \$854.00 for those violations. The general issue before me is whether Good violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under section 110(i) of the Act.

Alleged Violations of 30 C.F.R § 56.14107(a)

This standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys, fly wheels,

couplings, shafts, fan blades and similar moving parts that can cause injury.” This standard is alleged to have been violated in Citations No. 7974337, 7974340, 7974341, 7974342 and 7974343.

Respondent maintains in its post hearing brief that all of the cited areas had been inspected “many, many times before by a fairly large and representative number of MSHA inspectors over a period of 18 years or more and they had all considered these areas to be adequately guarded”. Respondent argues that therefore the citing inspector herein was either “out of line” or the cited standard is unconstitutionally vague. Respondent raises questions that seem to arise with some frequency with a change of MSHA inspectors. Moreover Respondent could very well have prevailed in it's argument if any of those inspectors had offered credible testimony at trial that he had inspected the precise areas now cited and found those areas adequately guarded. Without such testimony however I find the allegations to be without necessary factual support.

In these cases the credible testimony of the citing inspector, who, it may be inferred is a reasonably prudent person familiar with the mining industry and protective purposes of the standard, is sufficient to meet the criteria set forth in *Ideal Cement Co.* 12 FMSHRC 2409, 241 (November 1990); and *BHP Minerals Int'l Inc.*, 18 FMSHRC 13342 (August 1996). The standard as applied here has not therefore been shown to be unconstitutionally vague.

Citation No. 7974337 charges as follows:

The unguarded rollers on the roll crusher exposed workers to the hazard of moving machine parts. The rollers could be contacted by a worker standing on the work platform beside the rollers. The rollers where a worker could contact them were five (5) feet off the floor of the platform and the roll crusher was mounted on and within arms reach of this inspector. The foreman stated the moving machine parts of the crusher had passed previous MSHA inspections. Moving machine parts shall be guarded to protect persons from contacting the moving machine parts and causing injury.

Inspector Terry Miller of the Department of Labor’s Mine Safety and Health Administration (MSHA) was performing a regular inspection at the Brown Road Quarry on June 29, 1999. According to Miller the cited roll crusher was located on a portable flat bed trailer with exposed roll crushers only two feet from where he was standing. The crusher was used to size rock as it passed through the rollers. Miller testified that he could reach and touch the moving parts while standing next to it, located 5 to 6 feet off of the platform. He noted that there was a handrail in front of the cited area but there was nothing to prevent him from touching the rollers. He discussed the violation with foreman Ken Gates who accompanied him on this inspection and according to Miller, Gates agreed that Miller was able to reach and touch the rollers. According to Miller, Gates responded only that the area had been inspected previously. Miller assessed the gravity of the violation as “unlikely” based upon representations that the

machinery was turned off to perform maintenance and servicing. According to Miller, there would be no other reason for persons to be on the platform and subject to exposure to the hazard unless there was a breakdown or the machinery was out of adjustment. Miller's conclusions that the violation was, in effect, of low gravity are not disputed.

Miller also found that the violation was the result of "moderate" negligence based on his belief that there were "no mitigating circumstances". He accepted Gates's explanation that based on previous inspections, Gates thought the roller had been satisfactorily protected. Gates testified that the areas here cited had been previously inspected twice a year for the previous eight years and had never previously been cited. Within this framework I conclude that Gates could therefore have entertained a good faith and reasonable (but mistaken) belief that he was not in violation as charged herein and that therefore the operator is chargeable with but little negligence.

Citation No. 7974740 charges as follows:

The guarded 'V' belt drive for the cone crusher created a hazard for workers in the plant area. The 'V' belt drive was located under the trailer/platform the cone crusher was mounted on. The hazard was located approximately five (5) feet off ground level. A worker could access the hazard by ducking under the edge of the platform the crusher was mounted on and walking over to the 'V' belt drive pulley. The side of the platform where a worker could duck under to access the hazardous condition was approximately five (5) feet off ground level. Moving machine parts shall be guarded to protect persons from contacting them and causing an injury.

Inspector Miller observed that the cited cone crusher was located on a separate trailer from the roll crusher and there was no guard on the bottom of the V-belt drive. He observed that the cited area lay beneath the trailer where persons might be exposed if they checked a damaged belt. The V-belt drive was about 1 foot wide and passed 1 foot beneath the trailer bed. Miller asked Gates why there was no guard at that location and Gates purportedly responded that it had been guarded before. Miller acknowledged that the gravity was low and considered an injury "unlikely". He observed that very few people would be present in the cited area but that if an accident would occur it could result in permanently disabling injuries. Miller's findings of low gravity are undisputed and I therefore accept those findings. For the reasons previously stated with respect to Citation No. 7974337, I conclude that the violation was also the result of little negligence.

Citation No. 7974341 charges as follows:

The unguarded tail pulley on the belt under screen for the cone crusher created a hazard to workers. The self cleaning tail pulley was six (6) feet off ground level. The tail pulley was located in the middle of the platform/trailer and was accessible

by ducking under the side of the platform and walking over to the tail pulley. The side of the platform where a worker could duck under and access the tail pulley was five (5) feet high. Workers perform scheduled maintenance on the plant daily. The foreman stated all the equipment is turned off before and any work is performed on the equipment. Moving machine parts shall be guarded to protect persons from contacting them and causing injury.

According to Inspector Miller the cone crusher also had an unguarded tail pulley i.e., the idler pulley, which was located 4 feet to 5 feet off the ground and beneath the platform. The pulley was 3 feet wide and 2 feet within the platform. Miller found that injury was "unlikely" because the area was not ordinarily accessed while the equipment was operating. Under the circumstances, a finding of low gravity is warranted. For the reasons previously stated with respect to Citation No. 7974337 I also find operator negligence to be low.

Citation No. 7974342 charges as follows:

The inadequate guard on the tail pulley exiting the double deck screen exposed workers to the hazard of moving machine parts. The tail pulley was three (3) feet off ground level. The top of the pulley was well guarded. The lower back side of the pulley and the bottom of the pulley were exposed. The sides of the pulley could also have been accessed by a worker. Scheduled maintenance is performed on the plant daily. The foreman stated no work is performed on the equipment until the equipment is turned off. Moving machine parts shall be guarded to protect persons from contacting them and causing injury.

According to Inspector Miller, the double deck screen, which is used for sorting and sizing rock, had a deficient guard on its tail pulley so that a person could reach beneath the guard. He observed that the pulley was three feet above ground level and protruded beyond the machinery. Miller concluded that any injury was "unlikely" and that the only exposure to the hazard would be while servicing, inspecting or shoveling around the equipment. The violation was accordingly of low gravity. For the reasons previously stated with respect to Citation No. 7974337 I also find the operator chargeable with only low negligence.

Citation No. 7974343 charges as follows:

The inside of the flywheel for the jaw crusher was unguarded. The unguarded part of the flywheel was two (2) feet out of the walkway used by the crusher operator to access the crusher control booth. The flywheel went between two (2) and (7) seven feet high where a worker could slip/trip and possibly contact the moving machine parts and be injured. The flywheel was usually running when the crusher operator accessed the walkway to enter/exit the control booth. Moving machine parts shall be guarded to protect persons from contacting them and causing injury.

Inspector Miller testified that the cited jaw crusher was a separate piece of mobile equipment. Miller opined that the fly wheel had an ineffective guard and the exposed area was adjacent to a walkway access ladder. The flywheel was about five feet in diameter and one foot wide. According to Miller, employees would pass this area on the way to the work station on the second level and it was as close as two feet from the walkway to the exposed flywheel area. I accept Miller's testimony as credible and, under the circumstances, I conclude that the violation is proven as charged.

The Secretary also alleges that the violation was "significant and substantial". A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In this regard Inspector Miller testified that since the equipment operator passed this area several times a day he was thereby frequently exposed to the hazard. In addition he noted that the crusher operator would check the conveyor periodically and there was no other means of access to the operator's compartment other than to pass the area of exposure. Miller concluded that fatal injuries "might" occur should the operator get caught in the flywheel. According to Miller his whole body would likely be pulled into the flywheel and crushed. Based on this testimony it may be inferred that it would be reasonably likely that reasonably serious injuries would occur. I find this evidence to be credible and I indeed conclude by inference that the violation was "significant and substantial" and of high gravity. For the reasons previously stated

with respect to Citation No. 7974337 I find the operator chargeable with low negligence.

Citation No. 7974336 alleges a violation of the standard at 30 C.F.R. § 56.14101(a)(3) and charges as follows:

The inoperative park brake on the 88 Model Ford super duty shop truck exposed the operator and other persons in the pit to the hazard of possibly being struck by unintentional movement of the truck. The truck was parked in the parking area next to the highwall above the pit where the crusher was located. The keys were in the truck, and the truck was ready for use. The foreman stated he did not know how long the park brake had been inoperative. The foreman also stated he did not know the last time the truck was used or when the truck would be used again. Braking systems installed on mobile equipment shall be maintained in a functional condition.

The cited standard 30 C.F.R. § 56.1401(a)(3), provides that “[a]ll braking systems installed on the equipment shall be maintained in functional condition.”

Respondent does not deny that the cited parking brake was indeed inoperative on the 1988 model Ford Super Duty shop truck or that the keys were in the truck and that the truck could be used but argues that only equipment to be operated during a shift needs to be inspected on any given day. In support of its argument Respondent cites certain qualifying language in a different regulatory standard from that cited herein. Since the standard at issue herein, 30 C.F.R. § 56.14101(a)(3), does not contain any such qualifying language Respondent's argument is without merit. The cited standard requires proof only that a braking system on the truck was not maintained in a functional condition. Under the circumstances the violation is proven as charged. The Secretary's allegations that an injury or illness was unlikely and that the violation was a result of moderate negligence is undisputed and supported by the record. Gravity is therefore low.

Citation No. 7974338 alleges a violation of the standard at 30 C.F.R. § 56.11002 and charges as follows:

No Handrails on the elevated platform where the roll crusher was mounted exposed workers to the hazard of possibly falling from the platform and being injured. The platform was six (6) feet off ground level. The ground under the platform where a worker would fall to was level and covered with pit run material. One worker accessed the platform daily to perform scheduled maintenance on the roll crusher. Elevated working and travel areas shall be provided with handrails and maintained in good condition.

The cited standard, 30 C.F.R. § 56.11002, provides as relevant hereto that “crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition.”

Respondent argues that there was no violation at this location because the cited area was an elevated platform and not a travelway. The Secretary in her post-hearing brief did not respond to this argument so the Secretary's position in this regard is not known. It may reasonably be inferred however, from the testimony of the citing inspector, that the cited area although described as a "platform" was of sufficient size to permit actual "walking". Accordingly I conclude that the elevated platform cited in this case was indeed an "elevated walkway" within the meaning of the cited standard. Respondent's argument herein is accordingly rejected. The violation is proven as charged. The Secretary's findings that an injury or illness was unlikely is not disputed. Accordingly I find gravity to be low. In light of the evidence that this operation had been inspected many times over a number of years without prior citation leads me to accept Respondent's argument that it therefore, in essence, had a reasonable and good faith belief that it was not in violation of the standard at this location. Accordingly I find only low operator negligence.

Citation No. 7974339 alleges a violation of the standard at 30 C.F.R. § 56.11002 and charges as follows:

No handrails on the elevated platform where the Ell-Jay cone crusher was mounted exposed workers to the hazard of possibly falling from the platform and being injured. The platform was six (6) feet off ground level. The ground under the platform where a worker would fall to was level and covered with pit run material. One worker accessed the platform daily to perform scheduled maintenance on the cone crusher. Elevated working and travel areas shall be provided with handrails and maintained in good condition.

Respondent again argues that the cited area was a "platform" and not a "travelway" and that it therefore does not come within the terms of the cited standard. It may reasonably be inferred from the testimony of the inspector that the elevated platform cited in this case was of sufficient size to permit walking and that accordingly it may be considered to be an "elevated of walkway" within the meaning of the cited standard. Accordingly Respondent's argument is again rejected. There is no dispute with the Secretary's findings of low gravity. I also find that the operator chargeable with low negligence in light of his apparent good faith and reasonable belief that there was no violation at the cited location based on the absence of any citation over many previous inspections.

Citation No. 7974344 alleges a violation of the standard at 30 C.F.R. § 56.14100(b) and charges as follows:

The operative brake lights on the Michigan L-190 F.E.L. S/N 828A00073S could create a hazardous condition for persons in the pit/plant area. The operator stated he performed his pre-operational check before operating the F.E.L. But did not notice the brake lights being inoperative. An off road haul truck and another F.E.L. operated regularly in the pit/plant area as well as a third F.E.L. used occasionally. Customer and mine operator highway trucks also entered the mine

area and were loaded by one (1) of the F.E.L.'s. The inoperative brake lights could cause another mobile equipment operator in the pit to misjudge the movement of the F.E.L. and possibly cause an accident resulting in injury to a worker.

The cited standard, 30 C.F.R. § 56.14100(b), provides that “defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.”

Respondent argues that even assuming that the inoperative brake lights affected safety, those brake lights had been found to be working during a pre-operational check of the cited equipment by Kenneth Gates on the morning of the inspection. It is not disputed that the defect was caused by a short in the brake light wire adjacent to the light. The Secretary does not appear to dispute the testimony of Gates and argues only that the brake lights were not working at the time of the inspection. Under the circumstances I conclude that the Secretary has failed to sustain her burden of proving that the defect was not corrected in a timely manner within the meaning of the cited standard. Accordingly the Secretary failed to sustain her burden of proving a violation herein and the citation must be vacated.

Citation No. 7974345 alleges a violation of the standard 30 C.F.R. § 56.18002(a) and charges as follows:

An effective work place examination, checking each working place at least once each shift, for conditions which could adversely affect health or safety, was not being performed at this operation. This was evidenced by the nine (9) citations issued during the regular inspection. five (5) citations for missing or inadequate guards, two (2) citations for missing handrails, one (1) citation for inoperative brake lights on mobile equipment, and one (1) citation for an inoperative park brake on mobile equipment. All of these conditions could have went [sic] undetected and uncorrected if not for the regular MSHA inspection. Any one of the uncorrected conditions could have resulted in injury to a worker.

The cited standard, 30 C.F.R. § 56.18002(a), provides as follows:

A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

The testimony of Kenneth Gates is undisputed that he indeed performed the examinations required by the cited standard and indeed produced a copy of his examination performed on the date of the citation, i.e. July 1, 1999 (Exhibit R-7). Gates described the procedures he followed in making his inspections as follows:

I inspect all things on the list here personally myself around the pit area and on individual time cards that are wrote [sic] by each employee at the mine site, they state on theirs on each day, they have a check list for their safety inspection for each piece of equipment which they operate, and if there's any problems with it, it's reported to me and then we usually right underneath this if it needs to be fixed or if can be fixed in that shift. If it can be fixed on that shift, it is fixed and it's not stated, but it is still on theirs, and if it is not fixed, I put it on, whether it be hazardous, it would be red tagged or shut down. (Tr. 89).

The citing inspector in this case acknowledged that indeed the required examinations were being conducted but it was his opinion that, because of the number of violations he found, the examinations were not effective.

While I cannot conclude, because of the lack of credible evidence, that any MSHA inspector had previously actually approved of the conditions cited in the instant case, I nevertheless conclude that, based on MSHA's prior failure to have cited these conditions, the operator had a reasonable and good faith belief that the conditions were not violative. Under these circumstances the failure of Mr. Gates to have noted these same conditions as hazardous in his examinations under the cited standard is not surprising. I cannot therefore conclude that Mr. Gates' workplace examinations were not effective. Under all the circumstances I conclude that the Secretary has not sustained her burden of proving a violation as charged in the instant citation and that citation must accordingly be vacated.

Civil Penalties

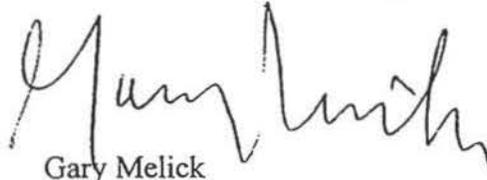
Under section 110(i) of the Act the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In this case the gravity and the negligence of the operator has been discussed with respect to each violation. The evidence regarding the remaining criteria are common to all of the violations. It has been stipulated that Respondent had a history at the subject mine of three assessed violations during three inspection days in the approximate 24 month period before the violations at issue. Accordingly Respondent has a low history of violations. It has been also stipulated that the subject mine and its controlling entity had reported 11,857 hours worked in the calendar year prior to the violation at issue. Accordingly the subject operator is small in size. The Secretary acknowledges that each of the violations was corrected and abated within the time set forth in the citations. Accordingly this operator is entitled to full credit for its abatement efforts. There is no claim and no evidence that the penalties herein would have any affect on the operator's ability to continue in business. In the absence of such evidence there is a presumption

that indeed the penalties would have no effect on the operator's ability to continue in business.

ORDER

Citations No. 7974344 and 7974345 are hereby vacated. The remaining citations are affirmed and Good Construction is directed to pay the following civil penalties within 40 days of the date of this decision: Citation No. 7974336 - \$55, Citation No. 7974337 - \$55, Citation No. 7974338 - \$55, Citation No. 7974339 - \$55, Citation No. 7974340 - \$55, Citation No. 7974342 - \$55, Citation No. 7974343 - \$200.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 20, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-65
Petitioner	:	A. C. No. 34-01787-03557
v.	:	
	:	Docket No. CENT 2000-80
GEORGES COLLIERS, INC.,	:	A. C. No. 34-01787-03558
Respondent	:	
	:	Pollyanna No. 8 Mine

DECISION

Appearances: Janice Mountford, Esq. and Ernest A. Burford, Esq.,
Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
on behalf of Petitioner;
Elizabeth M. Christian, Esq., Oklahoma City, Oklahoma,
on behalf of Respondent.

Before: Judge Melick

These consolidated cases are before me upon the Petitions for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the “Act” charging Georges Colliers Inc. (Georges Colliers) with 29 violations of mandatory standards and proposing civil penalties of \$6,151.00, for those violations.¹ At hearings on April 13, 2000, Georges Colliers admitted the violations as alleged and the parties stated that they had reached stipulations as to each of the civil penalty criteria under Section 110(i) of the Act, except for consideration of the effect of the penalties upon the operator’s ability to continue in business. The parties were nevertheless unable to submit such stipulations for five more months. In the interim Georges Colliers ceased to own or operate the subject mine.

The general issue before me is the appropriate civil penalty to be assessed for each of the 29 violations considering the criteria under Section 110(i) of the Act. Under that section the Commission and its judges are required to consider (1) the operator’s history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator

¹ The Secretary effectively amended her Petitions in these cases in the “Joint Stipulations of Fact” filed September 13, 2000. She now is seeking only \$3,767.00 in civil penalties.

charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The parties reached stipulations regarding the gravity and negligence criteria for each of the 29 violations at issue. Those stipulations are set forth in the attached Appendix and, in conjunction with the findings on the face of the charging documents, have been accepted in determining the appropriate civil penalties in these cases. The four remaining criteria under Section 110(i) are common to all of the charging documents:

Operator's History of Previous Violations

The record discloses, and the parties have now stipulated, that Georges Colliers had a history of 218 paid violations dating back to February 4, 1997. Seventy-three of those violations were designated as "significant and substantial". This is a serious history and is a factor warranting significant consideration in the assessment of a civil penalty.

Appropriateness of the Penalty to the Size of the Business of the Operator

The record shows, and it has now been stipulated, that Georges Colliers had an annual production of 334,912 tons of coal and 246,544 hours worked. This would place the operator in a medium size category.

The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

It appears to be undisputed that the operator demonstrated good faith in attempting to achieve rapid compliance with respect to all violations except Citation No. 7599671 for which a "failure-to-abate" order was issued. Those factors have been considered in assessing civil penalties herein.

The Effect on the Operator's Ability to Continue in Business

The mine operator has the burden of proving that a particular civil penalty would effect its ability to remain in business. *Broken Hill Mining Co.*, 19 FMSHRC 673 (April 1997). At hearings on April 13, 2000, Georges Colliers submitted numerous financial records and extensive unrebutted factual and expert testimony from financial consultant and accountant, Paul Matlock. However since the opinions rendered by Matlock regarding the effect of the proposed penalties on Respondent's ability to remain in business were premised on the original proposed penalties of \$6,151.00, and not on the amended proposed penalties of \$3,713.00, his opinions in this regard are no longer relevant. In addition, because the parties have delayed more than five months in reaching stipulations, the financial data, submitted at hearings in April, are clearly now out of date. The fact that Respondent no longer owns or operates the Pollyanna No. 8 Mine is, of course, also an important factor not considered by Matlock. Under all the circumstances I do not

find that the Respondent has met his burden of proving that the amended proposed penalties, which are nearly 50% less than the original proposed penalties, would effect its ability to remain in business. *Broken Hill Mining Co.*, 19 FMSHRC 673 (April 1997); *Sellersburg Stone Co.*, 5 FMSHRC 287 (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). Nevertheless, to minimize the financial impact of the penalty assessment herein, I am directing that payments be made under an amortized plan.

ORDER

The admitted violations herein are affirmed and Georges Colliers, Inc., is directed to pay the following civil penalties totaling \$3,713.00 commencing with a payment of \$113.00 on November 1, 2000 and continuing thereafter with equal payments of \$150.00 on the first day of each month for the succeeding 24 months:

<u>Citation Number</u>	<u>Penalty</u>
07599671	\$453.00
07599672	\$ 55.00
07600017	\$ 55.00
07600018	\$ 55.00
07600019	\$ 55.00
07600020	\$ 55.00
07600021	\$ 55.00
07600022	\$ 55.00
07600023	\$ 55.00
07600024	\$ 55.00
07600025	\$399.00
07600027	\$ 55.00
07600028	\$ 55.00
07600030	\$ 55.00
07600031	\$ 55.00
07600032	\$399.00
07600035	\$399.00
07600036	\$ 55.00
07600039	\$399.00
07600040	\$399.00
07600041	\$ 55.00
07600042	\$ 55.00
04366679	\$ 55.00
04367257	\$ 55.00
04367535	\$ 55.00
04367536	\$ 55.00
04367537	\$ 55.00

03558900	\$ 55.00
<u>04367258</u>	<u>\$ 55.00</u>
Total	\$3,713.00



Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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APPENDIX

UNITED STATES OF AMERICA

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

ALEXIS M. HERMAN, Secretary of Labor, United States Department of Labor,)	CIVIL PENALTY PROCEEDING
)	
)	
)	Docket No. CENT 2000-65
Petitioner,)	A. C. No. 34-01787-03557
)	
v.)	Docket No. CENT 2000-80
)	A. C. No. 34-01787003558
GEORGES COLLIERS, INC.)	
)	
)	
Respondent.)	Mine: Pollyanna No. 8 Mine

JOINT STIPULATIONS OF FACT

Pursuant to the court's order dated June 11, 2000, the Secretary and the Respondent submit the following joint stipulations of fact:

1. For both Docket No. CENT 2000-65 and CENT 2000-80 the history of previous violations is stipulated to be 218. The revised penalty calculations based on this stipulated history is \$2819.00 in total penalties for Docket No. CENT 2000-65 and \$948.00 for Docket No. CENT 2000-80.
2. The Respondent no longer owns or operates the mine for abatement purposes.
3. For both Docket No. CENT 2000-65 and CENT 2000-80 the size of the mine operator, based on mine tonnage or hours worked, is stipulated to be 246,544 hours worked and 334,912 tons.
4. Good faith- In Docket No. CENT 2000-65 credit for good faith was given on citations 7600025, 7600032, 7600035, and 7600039 but not given on 7599671; the remainder were single penalty assessments. In Docket No. CENT 2000-80 credit for good faith was given only on citation 7600040; the remainder were single penalty assessments.

Docket No. CENT 2000-65

Citation No. 7599671

5. The mine operator had an unauthorized field modification on the Lee Norse roof bolter Serial #21033, model TD1.1.31.13E, approval #2G2777A-0.

6. This roof bolter was observed in the number 6 entry on the 1st right section. The AR100 Ocenco, Inc., tri-plane area light housing X/P 3190-0 and push button enclosures were found not acceptable under the 2G2777A-0 drawings. These lights had not been approved for use on this model of roof bolter by MSHA as required by the standard.

7. Section violated is 30 C.F.R. §75.503.

GRAVITY

8. Injury or illness due to this violation is unlikely because the lights were explosion proof, just not approved for use on this roof bolter.

9. Injury or illness could reasonably be expected to result in no lost workdays because explosion was unlikely to occur.

10. This violation was not significant and substantial because of a low likelihood of accident.

NEGLIGENCE

11. The level of negligence exhibited in this violation was moderate because the mine operator knows that lights must be approved or else he or she must file a field modification with MSHA and the mine operator failed to do so.

Citation No. 7599672

12. The mine operator had unauthorized field modification on the Lee Norse roof bolter serial #20921, model TD1.1.31.13E, approval #2G2777A-0.

13. This roof bolter was observed in the number 2 entry on the first right section. The Long Airdox, Inc., tri-plane area light housing X/P 3190-0 and push button enclosures were found not acceptable under the 2G2777A-0 drawings.

14. This is a violation of 30 C.F.R. § 75.503.

GRAVITY

15. Injury or illness as a result of this violation is unlikely because the lights were explosion proof, just not approved for use on this roof bolter.

16. Injury or illness could reasonably be expected to result in no lost workdays because explosion was unlikely to occur.

17. This violation was not significant and substantial because of a low likelihood of accident.

NEGLIGENCE

18. The level of negligence exhibited in this violation was moderate because the mine operator knows that lights must be approved or else he or she must file a field modification with MSHA and the mine operator failed to do so.

Citation No. 7600017

19. The mine operator failed to maintain the ventilation stopping at #3 cross cut on the number 3 intake enter on the mains.

20. The stopping was missing a block measuring approximately ten inches by eight inches.

21. The perimeter of the stopping was also leaking air into the belt entry where the plaster had fallen loose in several places.

22. This was a violation of 30 C.F.R. §75.370(a)(1).

GRAVITY

23. Injury or illness as a result of this violation is unlikely because this violation would only result in injury in case of a fire.

24. Injury or illness could reasonably be expected to result in lost workdays or restricted duty based on the fact that this could have resulted in health air contamination(carbon monoxide) in case of a fire.

25. This violation was not significant and substantial because no fire had occurred.

NEGLIGENCE

26. The level of negligence exhibited in this violation was moderate because it had lasted for several weeks and the fireboss should have picked it up on pre-shift inspection and corrected it.

Citation No. 7600018

27. The mine operator allowed accumulations of loose coal and other combustible materials to exist in the electrical transformer station. The combustible materials consisted of wooden crib blocks and loose coal piled together with rock and other materials from a roof fall.

28. The area measured approximately 40 feet by 20 feet and the combustible material was piled to a depth of a few inches to 4-5 feet in depth.

29. The accumulations were located in the power center station at cross cut number five on the number four intake entry on the mains.

30. This condition was a violation of 30 C.F.R. §75.400.

GRAVITY

31. Injury or illness as a result of this violation is unlikely because these large pieces of coal and wood blocks are not as incendiary as other materials such as coal dust.

32. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries in the case of a fire (i.e. tripping due to loss of visibility due to smoke, smoke inhalation, burns, etc.).

33. This violation was not significant and substantial because danger of fire was not high.

NEGLIGENCE

34. The level of negligence exhibited in this violation was moderate because this condition should have been noted in the pre-shift inspection and corrected.

Citation No. 7600019

35. The mine operator failed to control the top above the T-3 transformer located in cross cut #5 on the #4 intake entry on the mains.

36. The top had fallen loose from two fully grouted resin roof bolts allowing a void between the bearing plates and the top.

37. Approximately six inches of top was missing due to air slaking.

38. This condition was a violation of 30 C.F.R. §75.202(a).

GRAVITY

39. Injury or illness as a result of this violation is unlikely since the resin grouted bolt still had some supporting effect and because there was not a lot of foot traffic in this area.

40. Injury or illness could reasonably be expected to result in lost workdays or restricted duty because of being struck by the roof top rock(i.e. bone fractures, concussions, etc.).

41. This violation was not significant and substantial because the likelihood of material falling was not great.

NEGLIGENCE

42. The level of negligence exhibited in this violation was moderate because this condition should have been noted in the pre-shift inspection and corrected.

Citation No. 7600020

43. The mine power cable was not protected from damage. The 2/0 AWG, 3/C GGC, 8 kv cable supplying 480 volts to the power distribution center on the first right section had a damaged spot on the outer insulated jacket revealing the copper shielding material.

44. The damaged spot measured approximately two inches in length and one inch in width.

45. The power cable is located at cross cut #5 on the fourth intake entry on the mains.

46. This condition was a violation of 30 C.F.R. §75.517.

GRAVITY

47. Injury or illness as a result of this violation is unlikely since the cable was shielded and the other safety components were still functioning.

48. Injury or illness could reasonably be expected to result in no lost workdays because the circuit breaker was still working.

49. This violation was not significant and substantial because the four safety components at the circuit breaker and the inner phase conductors were still intact.

NEGLIGENCE

50. The level of negligence exhibited in this violation was moderate because the operator should check the condition of this power cable on a weekly basis and should correct any damage.

Citation No. 7600021

51. The mine operator failed to perform a preshift examination on the underground electrical installations, as referred to in 75.340(a), at the T-3 electrical transformer installation located at cross cut #5 on the #4 intake entry on the mains.

52. The last inspection date and initials indicated was 05/05/99 by RG.

53. This condition was a violation of 30 C.F.R. §75.360(b)(9).

GRAVITY

54. Injury or illness as a result of this violation is unlikely because the transformers were next on the list to be inspected, according to the superintendent.

55. Injury or illness could reasonably be expected to result in lost workdays or restricted duty because of electric shock.

56. This violation was not significant and substantial because no imminent danger existed as a result of this violation.

NEGLIGENCE

57. The level of negligence exhibited in this violation was moderate because this area should be inspected every 8 hours on a pre-shift examination.

Citation No. 7600022

58. The mine operator failed to provide roof support at cross cut #42 on the intake entry #4 on the 1st left mains.

59. The roof bolt has a void between the top and the bearing plate which measures approximately three inches.

60. Material had fallen loose which allowed a void to exist.

61. This condition was a violation of 30 C.F.R. §75.202(a).

GRAVITY

62. Injury or illness as a result of this violation is unlikely because the fully grouted resin roof bolts still retained some supporting quality.

63. Injury or illness could reasonably be expected to result in lost workdays or restricted duty because of injury due to being struck by falling rock(i.e. bone fractures, concussion, etc.).

64. This violation was not significant and substantial because the likelihood of material falling was not great.

NEGLIGENCE

65. The level of negligence exhibited in this violation was moderate since the condition had likely existed for several months and should have been corrected much earlier.

Citation No. 7600023

66. The mine operator failed to provide roof support at cross cut #55 on the intake entry #4 on the 1st left mains.

67. The roof bolt has a void between the top and the bearing plate which measures approximately three inches.

68. The material had fallen loose allowing the void. The roof bolt was located on the corner of the rib.

69. This condition was a violation of 30 C.F.R. §75.202(a).

GRAVITY

70. Injury or illness as a result of this violation is unlikely because the fully grouted resin roof bolts still retained some supporting quality.

71. Injury or illness could reasonably be expected to result in lost workdays or restricted duty because of injuries caused by falling rock (bruises, lacerations, concussion, etc.).

72. This violation was not significant and substantial because the likelihood of material falling was not great.

NEGLIGENCE

73. The level of negligence exhibited in this violation was moderate because this condition should have been noted during the pre-shift inspection and corrected.

Citation No. 7600024

74. The mine operator failed to provide roof support at cross cut #56 on the intake entry #4 on the 1st left mains.

75. The roof bolt has a void between the top and the bearing plate which measures approximately three inches.

76. The material had fallen loose allowing the void. The roof bolt was located in the middle of the entry.

77. This condition was a violation of 30 C.F.R. §75.202(a).

GRAVITY

78. Injury or illness as a result of this violation is unlikely because the fully grouted resin roof bolts still retained some supporting quality.

79. Injury or illness could reasonably be expected to result in lost workdays or restricted duty because of injuries caused by falling rock (bruises, lacerations, concussion, etc.).

80. This violation was not significant and substantial because the likelihood of material falling was not great.

NEGLIGENCE

81. The level of negligence exhibited in this violation was moderate because this condition should have been noted during the pre-shift inspection and corrected.

Citation No. 7600025

82. The mine operator failed to block the Wanger LST-5 Scoop from accidental movement.

83. The scoop was located in #6 intake entry, in the last open on the third left working section.

84. The scoop was idling with the bucket in the raised position. The operator of the scoop was located in the cross cut adjacent to the scoop gathering materials.

85. The mine has a history of accidental movement of equipment which caused an accident to occur to miners.

86. This condition was a violation of 30 C.F.R. §75.1403.

GRAVITY

87. Injury or illness as a result of this violation is reasonably likely because the mine has sloping roadways and a history of accidents involving moving machinery.

88. Injury or illness could reasonably be expected to result in permanent disability due to severe injuries from being struck or run over by moving machinery(i.e. severe blunt trauma, extensive bone fractures, paralysis or death).

89. This violation was significant and substantial because of the imminent danger of catastrophic injury.

NEGLIGENCE

90. The level of negligence exhibited in this violation was moderate because the miners were aware of the regulation regarding these safeguards and they should have taken corrective action.

Citation No. 7600027

91. The mine operator failed to provide guarding where miners regularly work and pass under the high voltage power cable.

92. The 4160 volt power cable located adjacent to the sectional power center was not guarded.

93. The cable was located on the third left working section.

94. This condition was a violation of 30 C.F.R. §75.807.

GRAVITY

95. Injury or illness as a result of this violation is unlikely since the relay was functional and no damaged spots were noted in the insulation.

96. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries from electric shock (second and third degree burns).

97. This violation was not significant and substantial because the other safety components on were functioning properly.

NEGLIGENCE

98. The level of negligence exhibited in this violation was moderate because this condition should have been noted in the pre-shift inspection and corrected.

Citation No. 7600028

99. The mine operator failed to maintain the ground monitor on circuit #4 on the sectional transformer on the third left working section.

100. The monitor unit had three bolts missing and would not pick up the under voltage release unit on the circuit breaker when tested.

101. This circuit was not tagged out of service to indicate a defective circuit.

102. This condition was a violation of 30 C.F.R. §75.900.

GRAVITY

103. Injury or illness as a result of this violation is unlikely since the UVR on the breaker will not allow the breaker to close without the monitor working.

104. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries from electric shock (second and third degree burns).

105. This violation was not significant and substantial because no equipment was hooked up to this circuit.

NEGLIGENCE

106. The level of negligence exhibited in this violation was moderate because a qualified electrician should have noted this condition during the weekly inspection and tagged it out as out of service.

Citation No. 7600030

107. The mine operator did not maintain the female receptacle on the #5 coupler unit.

108. The housing which is constructed to ensure that the ground check conductor is broken first and the ground conductor is broken last was damaged under the latching alignment pin where the cat head receptacle enters into the female receptacle allowing removal of the cat head nip without breaking the ground check wire first.

109. The transformer is located on the third left working section.

110. This circuit was energized with the roof bolter machine at time of observation.

111. This condition was a violation of 30 C.F.R. §75.902.

GRAVITY

112. Injury or illness as a result of this violation is unlikely since it is unlikely a miner would pull out the cat head in such a way as to be shocked (flash or arc unlikely to occur unless there was a short in the machine).

113. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries from electric shock (second and third degree burns and shock).

114. This violation was not significant and substantial because the likelihood of injury was unlikely.

NEGLIGENCE

115. The level of negligence exhibited in this violation was moderate because a qualified electrician should have noted this condition during the weekly inspection and tagged it out as out of service.

Citation No. 7600031

116. The mine operator failed to maintain the female receptacle on circuit #6 on the transformer on the third left working section.

117. The copper pilot pin (female) was broken and observed on the transformer beneath the circuit breaker.

118. The circuit was not tagged out of service.

119. This condition was a violation of 30 C.F.R. §75.900.

GRAVITY

120. Injury or illness as a result of this violation is unlikely since the missing pilot pin would not allow the UVR to pick up and this would not allow the breaker to close.

121. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries from electric shock (second and third degree burns and shock).

122. This violation was not significant and substantial because the likelihood of injury was low.

NEGLIGENCE

123. The level of negligence exhibited in this violation was moderate because a qualified electrician should have noted this condition during the weekly inspection and tagged it out as out of service.

Citation No. 7600032

124. The mine operator failed to adequately perform the examination on the low and medium voltage alternating current circuits in the mine.

125. The grounding resistor wire was broken and had oxidation and discoloration.

126. Circuit #10 on the same transformer was missing components to the circuit.

127. These conditions indicate that, at best, an inadequate examination was conducted.

128. This condition was a violation of 30 C.F.R. §75.900-3.

GRAVITY

129. Injury or illness as a result of this violation is reasonably likely because of the extremely poor state of repair of the circuit and because of the number of violations associated with this circuit there was a greater likelihood that at least one of them would result in injury.

130. Injury or illness due to this violation could reasonably be expected to result in permanent disability due to injuries from electric shock(second and third degree burns and shock) or electrocution.

131. This violation was significant and substantial because of violation of 104(d)(2) of the Act cited by order #7600026 for open grounding resistors on 480V circuits which would allow anyone on the equipment to be energized to 277V.

NEGLIGENCE

132. The level of negligence exhibited in this violation was moderate because a qualified electrician should have noted this condition during the weekly inspection and tagged it out as out of service.

Citation No. 7600035

133. The mine operator failed to follow the approved roof control plan. The mine operator did not take appropriate action to support the roof by using additional roof support materials to support the adverse geological roof conditions observed on the third left working section located at cross cut #3 on the #4 intake entry.

134. The top conditions observed indicate that the slick side geological formation exists in the caved area where a horse back exists.

135. The void created by the fallen material has resulted in a large crack which is approximately 20 feet long and one half inch wide in the middle of the horse back formation.

136. The middle of the top has two fully grouted resin roof bolts which have voids between the top and the bearing plates.

137. The mine has a history of roof falls due to the slick sided rock formations encountered in the mining process. The face boss has endangered the area until additional support material arrives.

138. This condition was a violation of 30 C.F.R. §75.220(a)(1).

GRAVITY

139. Injury or illness as a result of this violation is reasonably likely due to the unstable geological conditions and the mine's history of roof falls in this area.

140. Injury or illness due to this violation could reasonably be expected to result in permanent disability due to injuries from large scale rock falls (i.e. extensive broken bones, nerve and tissue damage from crushing impact and possible death).

141. This violation was significant and substantial because of the imminent danger of large-scale roof rock falls.

NEGLIGENCE

142. The level of negligence exhibited in this violation was moderate because the mine operator knew this condition existed and failed to correct it.

Citation No. 7600036

143. The mine operator failed to provide adequate supplemental roof support material on the third left working section. The mine operator had no cribbing material and no timbers.

144. This condition was a violation of 30 C.F.R. §75.214(a).

GRAVITY

145. Injury or illness as a result of this violation is unlikely unless roof conditions were unstable.

146. Injury or illness due to this violation could reasonably be expected to result in lost workdays or restricted duty due to injuries from large scale rock falls (i.e. extensive broken bones, nerve and tissue damage from crushing impact and possible death).

147. This violation was not significant and substantial because lack of supplemental support materials did not cause roof instability.

NEGLIGENCE

148. The level of negligence exhibited in this violation was moderate because the mine operator knew of the regulation but failed to take action.

Citation No. 7600039

149. The mine operator allowed accumulations of black colored coal dust to exist in dangerous amounts inside the electrical enclosures on the Hydcaloader crusher unit.

150. The fine black colored coal dust existed in all six electrical enclosures and covered electrical components inside the enclosures.

151. The dust measured approximately one inch in depth. The crusher is located on the surface adjacent to the main shop. The voltage inside the enclosure is 480 volts alternating current.

152. This condition was a violation of 30 C.F.R. §77.202.

GRAVITY

153. Injury or illness as a result of this violation is reasonably likely due to the high accumulation of dust in an area of possible ignition (arcing was noted inside the lectrical enclosures).

154. Injury or illness due to this violation could reasonably be expected to result in permanent disability due to injuries from a fire or possible explosion (i.e. smoke inhalation, burns, injuries from flying pieces of metal or possible death).

155. This violation was significant and substantial because of the high likelihood of ignition and the extremely violent nature of coal dust explosions (higher kinetic energy per square inch than TNT).

NEGLIGENCE

156. The level of negligence exhibited in this violation was moderate because a qualified electrician should have noted this condition during the weekly inspection and tagged it out as out of service.

Docket No. CENT 2000-80

Citation No. 7600040

157. The mine operator failed to maintain the five electrical starter enclosures in good condition. The boxes are rusted out to the point that coal dust freely enters into the enclosures, creating a dangerous condition.

158. The enclosures are mounted on the Hydcaloader crusher unit located in the coal yard.

159. This condition was a violation of 30 C.F.R. §77.502.

GRAVITY

160. Injury or illness as a result of this violation is reasonably likely due to the high accumulation of dust in an area of possible ignition (arcing was noted inside the lectrical enclosures).

161. Injury or illness due to this violation could reasonably be expected to result in permanent disability due to injuries from a fire or possible explosion (i.e. smoke inhalation, burns, injuries from flying pieces of metal, or possible death).

162. This violation was significant and substantial because of the high likelihood of ignition and the extremely violent nature of coal dust explosions (higher kinetic energy per square inch than TNT).

NEGLIGENCE

163. The level of negligence exhibited in this violation was moderate because a qualified electrician should have noted this condition during the weekly inspection and tagged it out as out of service.

Citation No. 7600041

164. The mine operator has failed to maintain the following items on the wash plant in safe condition: 1. A broken, one inch rigid metallic conduit has a coupler which has broken into the conduit, located under the main feeder hopper; 2. Three bolts missing from the lighting fixture located under the hopper.

165. This condition was a violation of 30 C.F.R. §77.502.

GRAVITY

166. Injury or illness as a result of this violation is unlikely because the short circuit protection device would cause the breaker to open.

167. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries from electrical shock (second and third degree burns).

168. This violation was not significant and substantial because none of these conditions would likely cause injury.

NEGLIGENCE

169. The level of negligence exhibited in this violation was moderate because a qualified electrician should have noted this condition during the weekly inspection and tagged it out as out of service.

Citation No. 7600042

170. The mine operator allowed accumulations of black colored coal dust to exist on the rock-dusted surfaces of the ribs, mine floor and adjacent cross cuts from the belt portal to the #1 tail drive. The belt entry was extremely black in color.

171. This condition was a violation of 30 C.F.R. §75.400.

GRAVITY

172. Injury or illness as a result of this violation is unlikely because no ignition source near.

173. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries from fire or explosion (smoke inhalation, burns or death).

174. This violation was not significant and substantial because fire or explosion less likely.

NEGLIGENCE

175. The level of negligence exhibited in this violation was moderate because the mine operator knew of this condition and took no action to correct it.

Citation No. 04366679

176. The permanent stoppings between the intake air course and the belt line were not maintained at cross cuts 38, 40, 41 and 42 on the first left mains. Parts of the cinder blocks had been removed from each of the stoppings allowing the intake air to enter the belt flight.

177. The air from this intake air course is used to provide air to active workings.

178. This condition was a violation of 30 C.F.R. §75.333(b)(3).

GRAVITY

179. Injury or illness as a result of this violation is unlikely because this violation would only result in injury in case of a fire.

180. Injury or illness could reasonably be expected to result in lost workdays or restricted duty based on the fact that this could have resulted in health air contamination(carbon monoxide) in case of a fire.

181. This violation was not significant and substantial because no fire had occurred.

NEGLIGENCE

182. The level of negligence exhibited in this violation was moderate because it had lasted for several weeks and the fireboss should have picked it up on pre-shift inspection and corrected it.

Citation No. 4367257

183. The mine operator failed to provide sufficient fire hose to cover the length of the belt. There was only 100 feet of fire hose at the No. 3 section belt drive. The drive was pulling 6 crosscuts of belt, which is equivalent to about 360 feet.

184. This condition was a violation of 30 C.F.R. §75.1100(2)(b).

GRAVITY

185. Injury or illness as a result of this violation is unlikely because there was some fire hose, just not enough.

186. Injury or illness could reasonably be expected to result in no lost workdays because fire was unlikely.

187. This violation was not significant and substantial because fire was unlikely.

NEGLIGENCE

188. The level of negligence exhibited in this violation was moderate because the mine operator knew of the regulation but took no action to comply with it.

Citation No. 4367535

189. The mine operator failed to maintain the automatic fire warning device in operational condition. The automatic fire warning device would not give a warning when a fire would occur on or near a belt. The system showed an open line, which would be detrimental to its proper operational condition.

190. This condition was a violation of 30 C.F.R. §75.1103.

GRAVITY

191. Injury or illness as a result of this violation is unlikely because fire was unlikely to occur here.

192. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries due to smoke inhalation.

193. This violation was not significant and substantial because fire was unlikely.

NEGLIGENCE

194. The level of negligence exhibited in this violation was moderate because the mine operator should have noted this condition during weekly inspection and corrected it.

Citation No. 4367536

195. The Wagoner diesel powered scoop #1 was left unattended with the engine running in the #4 entry of 001 section which is the first right off of the first left.

196. This condition was a violation of 30 C.F.R. §75.1916(e).

GRAVITY

197. Injury or illness as a result of this violation is unlikely because there was enough ambient air to dilute the engine exhaust.

198. Injury or illness could reasonably be expected to result in no lost workdays because of injuries due to exhaust inhalation(i.e. dizziness, headaches, loss of balance, shortness of breath).

199. This violation was not significant and substantial because severe injury was unlikely.

NEGLIGENCE

200. The level of negligence exhibited in this violation was moderate because the mine operator knew of this condition and did not attempt to abate it.

Citation No. 4367537

201. The mine operator was not complying with the roof control plan in that a supply of roof support material was not provided on the working section or within four crosscuts of the working section as required on page 4, item 14A of plan.

202. This condition was a violation of 30 C.F.R. §75.220(a)(1).

GRAVITY

203. Injury or illness as a result of this violation is unlikely unless roof conditions were unstable.

204. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries from large scale rock falls (i.e. extensive broken bones, nerve and tissue damage from crushing impact and possible death).

205. This violation was not significant and substantial because lack of supplemental support materials did not cause roof instability.

NEGLIGENCE

206. The level of negligence exhibited in this violation was moderate because the mine operator knew of the regulation but failed to take action.

Citation No. 3558900

207. Coal dust, including float coal dust, and loose coal had accumulated on the entire top surface of the Long Airdox CM728HH continuous miner, serial #60-1045.

208. The thickness of the accumulations ranged from one quarter inch to three inches.

209. The continuous miner was located in crosscut 5 between entries 3 and 4 of first right submains.

210. This condition was a violation of 30 C.F.R. §75.400.

GRAVITY

211. Injury or illness as a result of this violation is unlikely because there was no electrical equipment or ignition source nearby.

212. Injury or illness could reasonably be expected to result in lost workdays or restricted duty due to injuries from fire(i.e. burns and smoke inhalation).

213. This violation was not significant and substantial because there was no ignition source nearby.

NEGLIGENCE

214. The level of negligence exhibited in this violation was moderate because the mine operator should have cleaned the area after the shift inspection.

Citation No. 4367258

215. The transformer for the bridges in the 001 section was not being properly maintained.

216. The upper bolt on a side panel was loose and the lower bolt was missing, which allowed the enclosure panel to swing out at the bottom a measured six inches. This gap became progressively narrower for 18 inches upward until, at the top, it was touching.

217. The panel was not properly protecting the inside of the enclosure.

218. This condition was a violation of 30 C.F.R. §75.512.

GRAVITY

219. Injury or illness as a result of this violation is unlikely due to the size of the opening.

220. Injury or illness could reasonably be expected to result in no lost workdays because injury was unlikely.

221. This violation was not significant and substantial because injury was unlikely.

NEGLIGENCE

222. The level of negligence exhibited in this violation was moderate because a qualified electrician should have noted this condition during the weekly inspection and tagged it out as out of service.

CONCLUSION

The Secretary and counsel for Respondent respectfully submit these Joint Stipuations of Fact and respectfully request that these joint stipulations be entered in the record as findings of fact.

HENRY L. SOLANO
Solicitor of Labor

WILLIAM E. EVERHEART
Regional Solicitor

GEORGES COLLIERS

By:

By:

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Attorney for Respondent

Attorneys for Complainant.

Signed this 11th
day of Sept. 2000.

Signed this 11th
day of Sept. 2000.

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

September 21, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-38-M
Petitioner	:	A.C. No. 35-03345-05512
	:	
v.	:	Docket No. WEST 99-53-M
	:	A.C. No. 35-03345-05513
	:	
HARNEY ROCK & PAVING CO.,	:	
Respondent	:	Crusher No. 1

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Troy Hooker, Hines, Oregon, for Respondent.

Before: Judge Cetti

These consolidated civil penalty cases are before me upon Petitions for Assessment of Civil Penalty, filed by the Secretary of Labor (Secretary) seeking the imposition of civil penalties against Harney Rock and Paving Co. (Harney Rock) based upon eight citations alleging violations of mandatory standards which are set forth in Title 30 of the Code of Federal Regulations. Respondent filed a timely answer and, pursuant to notice, the cases were heard in Boise, Idaho. At the hearing the parties presented testimony and documentary evidence which I have carefully considered in reaching this decision.

Each of these consolidated civil penalty proceedings arise out of an inspection conducted of the Respondent's mine facility known as Crusher No. 1, located in the vicinity of North Powder, Oregon. The inspection was conducted by Brian T. Yesko, a Mine Safety and Health Inspector of the Mine Safety and Health Administration, U.S. Department of Labor. As a result of the inspection, Inspector Yesko issued the eight citations of violations of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 *et seq.*) (hereinafter the Mine Act) at issue in these proceedings. A proposed assessment of penalty for such violations was thereafter issued to and contested by the Respondent.

The parties state they discussed the possible resolution of this matter, short of formal hearing, but were unable to resolve this matter.

Inspector Yesko was the sole MSHA witness at the hearing. His testimony describes the factual conditions and practices which he observed during the inspection. His testimony includes the factual detail underlying each of the violations. The factual detail is set forth in each of the citations issued to the Respondent.

Respondent presented the testimony of Lester Watkins, Superintendent for Crusher No. 1 operations and Troy Hooker, Vice-President of Respondent Harney Rock.

Stipulations

At the hearing, the parties entered into the record the following stipulations:

1. Harney Rock & Paving Co., is a corporation with the main home office and mailing address Post Office Box 800, Hines, Oregon 97738.
2. Crusher No. 1 at the time of the inspection was located at the site in the vicinity of North Powder, Oregon.
3. Respondent is under the jurisdiction of the Mine Act at its Crusher No. 1 mine facility.
4. Respondent, in the 24 months prior to the violations at issue, has a history of having received 16 assessed violations during the course of 12 inspection days (see Govt. Ex. 1 which is a printout from the Mine Safety and Health Administration that's been certified by an official with the Civil Penalty Collection Office setting forth the history of violations at this mine).

The Inspection and Citations

Federal Mine Inspector Brian Yesko during his September 1, 1998, inspection of the mine site located in the vicinity of Power, Oregon, was accompanied by Respondent's Superintendent Lester Watkins. The inspector volunteered that Superintendent Watkins was cooperative during his three- day inspection of the mine site.

Citation No. 7710199

The inspector accompanied by Watkins first inspected the GMC fuel truck at the site. The fuel tank extended over the top of the truck and obstructed the view to the rear as well as the view through the rear view mirror. The truck was equipped with side view mirrors but the view to the rear was very limited. Any person or object within the area immediately behind the truck would not be visible. The truck was not equipped with a backup alarm. The inspector observed the truck in use and testified that no observer or spotter was used to signal when it was safe to

back up. I credit Inspector Yesko's testimony that the truck had an obstructed view to the rear and had no backup alarm. Respondent did not contest the assertion that no spotter was used.

The Respondent, by way of mitigation, presented evidence that the crusher operator was the only person who drove the fuel truck. The truck is backed up only once a week and that is when the crusher operator backs up the fuel truck to fuel the crusher. The operator does this weekly fueling of the crusher at the end of the shift when there is hardly anyone around. (Tr. 100).

Significant and Substantial

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

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

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

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

We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Tell Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

I find the testimony of Inspector Yesko established the four elements of the *Mathies* formula for designating the violation S&S. There is a reasonable likelihood that the hazard

contributed to will result in an injury and a reasonable likelihood that the injury in question will be of a reasonably serious nature.

I agree with the inspector's finding that gravity was relatively high and negligence was moderate. The S&S violation of the cited standard was established.

Citation No. 7710200

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.14101(a)(2) which reads as follows:

(a) *Minimum requirements.* (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

(2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

Mr. Yesko presented credible testimony that established the parking brake on the GMC fuel truck CO#3-33 would not hold when tested on a slight grade. The ground is not level in the area where the truck is used. The truck could strike an employee. I agree with the inspector that injury was reasonably likely; the gravity was high; and the negligence was moderate. The evidence presented establishes an S&S, 104(a) violation of the cited standard. The citation is affirmed as written.

Citation No. 7720207

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.11002 which in relevant part reads as follows:

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition.

Inspector Yesko presented credible testimony that during his inspection of the site he observed the hand rails around the rolls unit elevated walkway which is 8½ feet high are in poor condition; one corner post is broken off and hanging below the walkway by the cables used for hand rails; several other posts were cracked or broken near the point where they are welded to the walkway. Mr. Yesko observed employees using this walkway.

I agree with Inspector Yesko's finding that the violation was S&S. His testimony established all four factors of the *Mathies* formula. I find the operator's negligence was moderate. The citation is affirmed as written.

Citation No. 7720208

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.1101 which reads as follows:

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

During his inspection, Inspector Yesko observed and concluded that a safe means of access was not provided to the 8½ foot high elevated walkway around the rolls unit. The ladder to access this area was unsecured and an opening in the hand railing for access to the walkway was not provided. Employees were observed going up the ladder and over the top rail of the hand rail to gain access to this elevated walkway which was a working place.

I credit Inspector Yesko's testimony. I agree with the Inspector's findings set forth in this citation that serious injury was reasonably likely; that negligence was moderate; and the violation was S&S. The citation is affirmed as written.

Citation No. 7720209

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.9300(b) which reads as follows:

(b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

Inspector Yesko testified he observed some large 50-ton haul trucks backing up a long ramp that formed into the five-foot high stockpile. The berms along the five-foot high D-ballast stockpile measured 26 inches at the highest point. Mid-axle height on the Cat 769C haul truck backing up and dumping material on the stockpile measures 37 inches. The inspector testified adequate warning would not be given to the driver by this under sized berm in the event of overtravel. Asked as to what type of accident might happen, the inspector testified the truck could rollover on its side, but he did not believe it could rollover on its top. Asked as to his determination of likelihood of such an accident, he replied it would be "reasonably likely." The operators of the trucks were wearing their seat belts but if a truck were to rollover on its side, it could result in a whiplash injury. I agree with the inspector that the violation was S&S and the operator's negligence was moderate. MSHA Form 1000-179 which is part of the record shows a proposed penalty of \$104.00. I believe a penalty of only \$104.00 is appropriate since there was a

berm composed of sound substance even though it was not the required mid-axle height. The under sized berm was composed of crushed basalt that packs down and is quite solid. It was undisputed, while backing up, the trucks travel only three to five miles per hour. (Tr. 123).

Citation Nos. 7720210

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.14132(b)(1) that when the operator of mobile equipment has an obstructed view to the rear, requires a backup alarm or an observer to signal when it's safe to backup.

Inspector Yesko testified that he observed the Kenworth Water Truck CO#3-11 had a large water tank on the rear of the truck which obstructed the view to the rear. The truck was used to wet down the road throughout the mine site. The truck did not have a backup alarm and there was no observer or spotter to signal the driver when it was safe to backup. This is a serious violation of 30 C.F.R. § 56.14132(a). I agree with Inspector Yesko who found the violation to be an S&S violation and evaluated the operator's negligence to be moderate. The preponderance of the evidence established the four elements of the *Mathies* formula. The gravity of the violation was high. I affirm the citation as written.

Citation No. 7720213

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.14132(a) which reads as follows:

(a) Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

Inspector Yesko testified that the backup alarm and horn on the Cat 992A front end loader CO #7-146 used to load the rail cars would not work at the time of inspection. He observed the loader going forward and also backing up. The loader did not have a complete clear view to the rear. There was no one serving as a spotter or assisting as to when it was safe to backup. There was a hazard of an accident with other mobile equipment in use in the area which could result in a serious or fatal injury. Thus, the gravity was high.

A violation of the cited standard was established. I agree with Inspector Yesko that negligence was moderate and injury was reasonably likely. I affirm the citation as written.

Docket No. WEST 99-53-M

Citation No. 7720211

This citation charges the operator with an S&S unwarrantable failure violation of 30 C.F.R. § 56.14130(g) for the failure of one of the dozer operators to wear the seat belt provided by the operator. The citation written by Inspector Yesko reads as follows:

The operator of the Fiat Allis HD-31 S/N84MO1340 dozer was observed operating the dozer with the doors and windows open and without wearing the seat belt provided while pushing material over the approx. 45 to 50 feet high, high wall. The seat belt was tucked in down below the seat and the operator refused to put the seat belts on when I requested him to do so. The company does have a seat belt policy. Spot checks of seat belt usage have not been conducted.

Violation is an unwarrantable failure.

The inspector described the dozer as being an 18-foot long Caterpillar tracked vehicle. He observed the dozer pushing material off the high wall. The inspector entered the cab of the dozer and saw the seat belt tucked down below the seat. The driver refused the inspector's request to put the seat belt on, stating that he knew people who "got killed" wearing a seat belt when pushing material over a high wall. Inspector Yesko told the driver of several cases where people survived going over high walls in a dozer wearing seat belts. The inspector said the driver still declined to put the seat belt on.

No one else was in the cab of the dozer during the discussion between the inspector and the driver. Superintendent Watkins was not present as he was standing on the ground below the dozer where the conversation could not be heard.

The inspector, after instructing the driver not to operate the dozer, left the cab and talked to Superintendent Watkins who then entered the cab. Watkins talked to the driver who then put on and fastened his seat belt. Watkins came down from the cab and reported to the inspector that the driver was wearing his seat belt. Thereafter, the dozer driver continued to wear his seat belt. Obviously, the driver was concerned with his safety and felt he could escape injury if he jumped off the bulldozer, if it should start to turn over or start to go over the high wall, and that he could do so more easily if he were not wearing a seat belt, cf. *Walker Stone Co. Inc.*, 21 FMSHRC (October 1999).

Inspector Yesko testified that Respondent Harney Rock has a written policy requiring the use of seat belts by drivers of mobile equipment. The inspector read the policy. The operator requires each newly hired employee to read and sign the seat belt policy. Although the operator was unable to find a written seat belt policy signed by the driver in question, the operator insisted the driver signed one or he would not be working for Harney Rock. The operator's Employee

Handbook specifically requires each driver of mobile equipment to wear the seat belt. The foreman spot checks drivers to make sure all drivers are wearing their seat belts. (Tr. 122).

The evidence presented clearly established a serious violation of the cited belt standard. The gravity was high. I also find the inspector properly designated the violation S&S. The evidence presented established all four elements of the *Mathies* formula. I affirm the inspector's S&S finding but on the basis of the evidence presented, I do not find the violation resulted from aggravated conduct on the part of the operator and, thus, find that the violation was not a result of the operator's unwarrantable failure.

Unwarrantable Failure

Unwarrantable failure" is aggravated conduct consisting of more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a serious lack of reasonable care. *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

The Commission in its decisions has discussed, among the factors to be considered, in determining whether a violation resulted from aggravated conduct on the part of the operator 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 more than a "knew or should have known" test. *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993). Upon consideration of all these factors, I find that the violation of the cited standard was not a result of the operator's aggravated conduct. The warrantable failure designation in the citation should be deleted and the finding, as to negligence, should be amended to moderate negligence.

I place no evidentiary weight on the vague statements overheard by the inspector in the lunchroom, where employees were eating, as there was no identification as to the identity of the two employees making the statements and only speculation as to the identity of the employee they were talking about.

Evidence was also presented that it is difficult for a person standing on level ground to see whether a bulldozer operator is wearing his seat belt.

Although the conduct of the driver of the dozer operator may have been aggravating, the driver was not an agent of the mine operator. *REB Enterprises, Inc.*, 20 FMSHRC 203, 211-12 (Mar. 1998) *Wayne Supply Co.*, 19 FMSHRC 447 (Mar. 1997). The Commission has held that "[t]he conduct of a rank-and-file miner is not imputable to the operator to establish unwarrantable failure violation or the penalty. *Fertilizer-Cullor, Inc.* 17 FMSHRC 1112, 1116

(July 1995). I credit the evidence presented by Respondent that it enforces its seat belt policy with spot inspections. The fact remains that the driver in question violated the policy and the standard. The evidence presented established a serious S&S violation of the cited seat belt standard.

Appropriate Civil Penalties

I am required by Commission Rule 30, 29 C.F.R. § 2700.30, as well as by the Mine Act itself, to consider the statutory criteria set forth in § 110(i)¹ of the Mine Act in determining the appropriate civil penalty for each violation.

Size of Business of the Operator and History of Previous Violations

The operator's business is small and it does not have a history of excessive previous violations.

The parties stipulated at the hearing that Respondent, in the 24 months prior to the violations at issue, has a history of having received 16 assessed violations during the course of 12 inspection days (see Govt. Ex. 1, which is a printout from the Mine Safety and Health Administration that has been certified by an official with the Civil Penalty Collection Office setting forth the history of violations at this mine).

Govt. Ex. 2 shows Respondent has approximately 10 employees and sets forth the number of production hours worked each quarter from 1996 through October 1998.

In my assessment of each of the penalties, I have placed considerable weight on the fact that the operator's business is small and the operator does not have a history of excessive previous violations and demonstrated good faith in rapid compliance.

¹Section 110(i) provides in relevant part:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Operator's Ability to Continue in Business

The parties presented no evidence on the effect of the proposed penalties on the operator's ability to continue in business. I, therefore, presume that the proposed penalties would not affect the operator's ability to continue in business. The validity of this presumption in the absence of contrary evidence is well established. See *Sellersburg*, 5 FMSHRC at 294.

Negligence

In my separate discussion of each citation, I found the operator's negligence was moderate. This means I found the Respondent failed to exhibit the ordinary care that was required by the circumstances.

Gravity

The Commission stated that the gravity penalty criterion contained in § 110(i) of the Mine Act requires an evaluation of the seriousness of the violations and that the focus of the gravity criterion is on, "the effect of the hazard if it occurs" (*Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000) (quoting *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996)). Fortunately, in these cases, none of the hazards cited resulted in any injury whatsoever but the likely effect of each hazard cited, if it occurred, would have been a serious injury or death. Consequently, I find the degree of gravity in all eight violations is relatively high. I agree with the inspector that all violations were significant and substantial.

Good Faith in Rapid Compliance

I find the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation with respect to each of the violations. All violations were timely abated.

On the basis of my foregoing findings and conclusions and my *de novo* consideration of the civil penalty assessment criteria found in § 110(i) of the Act, I conclude and find that the following penalty assessments are reasonable and appropriate for the violations that have been affirmed in these proceedings.

<u>Citation No.</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
7710199	56.14132(1)	\$ 200.00
7710200	56.14101(a)(2)	200.00
7710207	56.11002	200.00
7710208	56.11001	200.00
7710209	56.9300(b)	104.00
7710210	56.14132(b)(1)	300.00

7710213	56.14132(a)	300.00
7720211	56.14130(g)	<u>400.00</u>
	TOTAL	\$1,904.00

ORDER

Accordingly, it is **ORDERED THAT HARNEY ROCK & PAVING CO., PAY** a civil penalty of \$1,904.00 to the Secretary of Labor within 30 days of the date of this decision. Within the same 30 days, the Secretary shall modify Citation No. 7720211 to delete the unwarrantable failure finding and change the degree of negligence to "moderate." Upon receipt of full payment of the penalties, these proceedings are dismissed.


August F. Cetti
Administrative Law Judge

Distribution:

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Mr. Troy Hooker, Vice President, HARNEY ROCK & PAVING CO., P.O. Box 800, Hines, OR 97738 (Certified Mail)

/sh

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 22, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-39-M
Petitioner	:	A. C. No. 30-02851-05504
v.	:	
	:	Seymour Road Pit
DOUGLAS R. RUSHFORD TRUCKING,	:	
Respondent	:	

DECISION

Appearances: Suzanne Demitrio, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
Thomas M. Murnane, Esq., Stafford, Trombley, Owens & Curtin, PC, Plattsburgh, New York for Respondent.

Before: Judge Melick

This civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," is before me upon remand by the Commission for reconsideration of the \$3,000.00 civil penalty imposed on Douglas R. Rushford Trucking (Rushford) for its violation of the standard at 30 C.F.R. § 56.14104(b)(2). Pursuant to the remand, hearings were held on August 24, 2000, to take supplemental evidence on issues not previously litigated.

Background

Rushford operates the Seymour Road Pit in Clinton County, New York. On August 28, 1998, when Rushford employee Nile Arnold attempted to inflate a tire on a fuel truck, the wheel rim exploded and struck Arnold in the head. At the time, Arnold was not using a stand-off inflation device nor was there such a device available on the mine site. On August 30, 1998, Arnold died as a result of the injuries he sustained. After conducting an investigation, the Department of Labor's Mine Safety and Health Administration (MSHA) charged Rushford with violating 30 C.F.R. § 56.14104(b)(2). That standard requires that stand-off inflation devices be used "to prevent injuries from wheel rims during tire inflation." Following hearings the violation was sustained as well as the associated "significant and substantial" and "unwarrantable failure" findings and Rushford was ordered to pay a civil penalty of \$3,000.00.

On review before the Commission the Secretary presented a new theory not previously raised in her pleadings or at trial, that she failed to conduct inspections at the subject mine during relevant times because of Rushford's failure to file quarterly reports and that therefore Rushford's lack of a history of violations could not properly be considered as a mitigating factor in the penalty assessment. The Commission accepted review of the Secretary's new theory and remanded the issue for further proceedings. But See Section 113(d)(2)(A)(iii) of the Act; Commission Rule 70(d), 29 C.F.R. § 2700.70(d); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300 (August 1992). Within the constraints of the Commission's directive however, the record was accordingly reopened and additional evidentiary hearings held to enable the Secretary to produce evidence on this issue not previously litigated. The Commission also requested further explanation regarding application of the "Section 110(i)" criteria.

Evaluation of the Civil Penalty Criteria

Section 110(i) of the Act requires that "in assessing civil monetary penalties, the Commission shall consider" the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. Analysis of the evidence in this case relevant to the above criteria follows hereafter:

Operators' History of Previous Violations

At the initial hearings, the Secretary introduced into evidence a document entitled "R-17-Assessed Violation History Report-Detailed Violation Listing" (Gov't Exh. No. 6). That report was offered by the Secretary to represent Rushford's history of violations for the period August 28, 1996, through August 27, 1998, and reflected that no violations had been committed during the stated period. The Secretary acknowledges that, because of its age, a July 2, 1988, 11 year-old violation (Gov't Exh. No. 12) should not be considered as part of Rushford's history for purposes of these proceedings. At no time, either in her pleadings, at hearings or in her post-hearing brief did the Secretary even suggest that her evidence in this regard was not credible or should be given less than full weight. In the initial decision in this case, significant reliance and weight was accordingly placed upon the Secretary's own uncontradicted evidence showing the absence of any history of violations.

On review before this Commission, the Secretary, for the first time argued, and the Commission agreed, that her own evidence of Rushford's lack of a history of violations could not properly be considered as a mitigating factor for a penalty assessment if that lack of history was due to the company's failure to meet a reporting requirement. While the legal authority for this argument has never been disclosed it presumably arises under the doctrine of equitable estoppel. On review the Secretary argued that since Rushford admittedly did not file quarterly reports with

MSHA between 1993 and 1998, as required under 30 C.F.R. § 50.30, she was not aware that Rushford's mine was active during this period.

In her initial brief following remand the Secretary argued that if a mine that is categorized as "closed" by MSHA, files a quarterly report the mine is recategorized as an "open" or "active" mine in MSHA's database. According to the Secretary, when that database is thus amended the mine is returned to the list of "active" mines required to be inspected by MSHA.

The credible evidence shows however that the facts are different from those argued before this Commission. The credible evidence shows that MSHA had incorrectly through its own fault listed the Seymour Road Pit in its records as "closed." It is undisputed that on May 13, 1993, Rushford provided to MSHA inspector Phil Freese, at that inspector's request, a written notice that the subject mine was "open" (Gov't Exh. No. 9). According to the credible testimony of Rushford bookkeeper Mary Pelke, Inspector Freese told her that MSHA had "closed" the Seymour Road Pit on their records in error and that Freese asked her to prepare the notice so that he could correct MSHA's records and confirm that the mine was "open" and continuing to operate. MSHA Field Office supervisor, Carl Onder, testified at the hearings on remand that this notice was sufficient to inform MSHA that the Seymour Road Pit was indeed an "open" mine. It is indeed undisputed that the mine had in fact continued to be "open" and operating during the entire period 1993 through 1998. It is clear therefore that MSHA's failure to have classified this mine as "open" was its own error and not Rushford's.

MSHA supervisor Onder testified that the MSHA Denver Office maintains a "mine reference list" of all mines that are "open." According to Onder, the source of this information is the mine operator himself (Tr. 32-33). The mine operator notifies the MSHA field office which notifies the MSHA District office which, in turn, notifies the Denver office (Tr. 33). The Denver office maintains the master list for the entire country. Each quarter, mines that are listed as "open" on the MSHA master list are sent Quarterly Mine Employment and Coal Production Report (quarterly report) forms (Gov't Remand Exh. No. 1). In this way each "open" mine is reminded by MSHA each quarter of the need to file its quarterly report.

In this case then, since Rushford did properly report itself as "open" and indeed had never reported itself as "closed," it should have continued to receive the quarterly report forms from MSHA, thereby notifying Rushford of the need to file its quarterly reports. It was therefore also MSHA's error that caused MSHA's cessation of mailing quarterly report forms to Rushford. Indeed Rushford bookkeeper Mary Pelke testified that when she stopped receiving those blank quarterly report forms from MSHA, she assumed it was not necessary to file such reports.

However, in spite of MSHA's own negligence, according to the undisputed evidence, if Rushford had continued to file the required quarterly reports whether it was listed as "open" or "closed" on the Denver office master list, eventually the MSHA field office would have been notified of the need to conduct an inspection. Thus, regardless of the lack of intent or serious negligence on the part of Rushford in failing to file the quarterly reports, according to the

Commission's holding, Rushford's lack of a history of violations cannot be considered as a mitigating factor in the assessment of a penalty. The increase in penalty herein reflects that holding.

It should also be noted that the Secretary acknowledges that her allegations that Rushford committed at least 20 paperwork violations for failing to file quarterly reports should not be considered as part of Rushford's prior history. Those alleged violations have never been cited nor litigated. The Secretary is correct in acknowledging that such allegations should not be considered herein in determining a history of "violations."

The Appropriateness of the Penalty to the Size of the Business of the Operator Charged

It is generally accepted that within the framework of this criterion and with the other criteria being equal, a small size mine operator should not pay as large a penalty as a medium or large size operator. In other words the penalty should be proportionate to the size of the operator. It has been stipulated that indeed this operator is small in size.

The credible record shows that Rushford typically had only three employees working in the mine only one day a week in mining activity. The record also shows that Rushford and, its employees performed significant non-mining activity such as pipe laying, asphalt paving and hauling -- activities that were subject to OSHA not MSHA jurisdiction. The Secretary acknowledges that such non-mining activity should not be considered when evaluating the size of a mine operator. I find that the operator was therefore very small in size with intermittent mining activity. Significant weight has been placed upon this factor in assessing the civil penalty in this proceeding.¹

Whether the Operator was Negligent

The findings below that the instant violation was the result of high negligence and gross negligence are not disputed by the Secretary. While these findings are warranted under the facts of this case I have also noted that such negligence was the result of Douglas Rushford's self-imposed ignorance of the requirements of the cited standard rather than any intentional non-compliance. It is therefore at least arguable that the violation was in fact not the result of unwarrantable failure. I have also noted that although Rushford's facilities had previously been inspected by MSHA there is no evidence that Rushford had previously been cited for failure to comply with the instant standard or with comparable OSHA standards. While these factors certainly do not excuse the violation they nevertheless warrant, and were given, due consideration in determining the appropriate civil penalty herein.

¹ It should also be noted, to clarify a suggestion made in her brief on remand, that the Secretary acknowledges that an operator's size should not be measured by its "gross profits."

The Effect on the Operator's Ability to Continue in Business

Rushford acknowledges in its brief on remand that even a penalty as large as that proposed by the Secretary, i.e., \$25,000.00, would not cause it to cease operations - - but only claims that it would create hardship to its operation. It contends that the imposition of a "greater penalty" would affect its "ability to operate." In light of these admissions and the absence of specific proof that the penalties herein would indeed affect its ability to continue in business, it is presumed that there would be no such adverse affect . See *Sellersburg Stone Co.*, 5 FMSHRC 287 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

The Gravity of the Violation

It was stated in this regard in the decision below as follows:

The failure to use a wheel cage or other restraining device or a stand-off inflation device under the circumstances of this case resulted in Arnold's fatal injuries. There can be no question on the facts of this case that the violation was therefore "significant and substantial."

The violation herein was therefore one that not only was reasonably likely to cause reasonably serious injuries but in fact was found to have caused fatal injuries. The question, in effect, raised by the Commission on remand is whether such a violation causing a fatality should be characterized as of "low," "medium," or "high" gravity. As suggested by the Commission, without such a finding, a decision lacks the precision necessary for appellate review. Accordingly my finding is that the violation herein, which admittedly caused the death of Nile Arnold, was of high gravity.

The Demonstrated Good Faith of the Person Charged in Attempting to Achieve Rapid Compliance after Notification of a Violation

The Secretary has acknowledged that the operator demonstrated good faith in achieving rapid compliance after notification of the violation herein (Tr. 412, 418). The record shows that the citation at issue was terminated on September 24, 1998, after the operator obtained a stand-off inflation device and posted signs at the shop and pit requiring employees to use the device when inflating tires. (Gov't Exh. No. 5). These factors were given considerable weight in assessing the civil penalty herein.

The Secretary's Proposed Penalty

The Commission has held that a judge's assessment of a penalty may not "substantially diverge" from the penalty proposed by the Secretary without sufficient explanation for that divergence. See *Unique Electric*, 20 FMSHRC 119, 1123 n.4 (October 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (March 1983). This holding necessarily presumes however that the

Secretary's penalty proposal was itself based on a reasoned analysis of the statutory criteria and was not arbitrary and capricious.

In this regard it is significant to note that a penalty in this case calculated under the Secretary's objective and uniform criteria set forth in 30 C.F.R. § 100.3, would have resulted in a proposed penalty of \$317.10. In particular, Rushford would have been chargeable with no penalty points for its size and history of violations, possibly the maximum 25 penalty points for negligence, 10 penalty points for "severity," and one penalty point for "persons potentially affected." In addition, under 30 C.F.R. § 100.3(f) a 30% reduction would have been given for good faith abatement.

In this case, of course, the Secretary elected to waive her uniform and objective analysis under Section 100.3 and applied a subjective "special assessment" for which there is little or no considered analysis. Indeed, the pleading entitled "Narrative for Special Assessment" is basically a form letter used in special assessment cases in which bald assertions are anonymously made that:

MSHA has carefully evaluated the conditions cited, the inspector's relevant information and evaluation, and the information obtained from the Report of Investigation. The proposed penalty reflects the results of an objective and fair appraisal of all the facts presented.

The Secretary was unable to furnish any information underlying her purported penalty analysis in this case. There is indeed no explanation for the extreme divergence between the Secretary's objective standard civil penalty of \$317.10 calculated under her Section 100.3 formula and her subjective inadequately substantiated proposal of \$25,000.00, in this case. Without an adequate explanation for such a divergence, the credibility of her "special assessment" is indeed jeopardized by the appearance of arbitrariness and should not properly be considered as a benchmark or guideline for an appropriate *de novo* penalty assessment by the Commission and its judges.

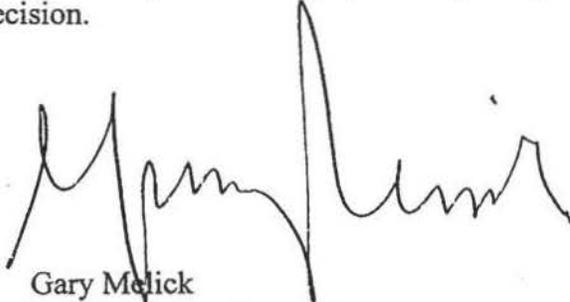
In her brief on remand the Secretary also argued that the penalty should be of an amount sufficient to make it more economical for an operator to comply with the Act's requirements than it would be to pay the penalties assessed and continue to operate while not in compliance (Brief p. 2). While this argument is outside the scope of the civil penalty criteria considered for the penalty herein it is nevertheless addressed. It is not disputed that the cost of the standoff inflation device which Rushford purchased to abate the citation at issue was no more than \$60.00. A penalty of \$4,000.00 is more than 66 times this amount and is clearly sufficient to address the Secretary's concerns in this regard. A penalty of \$25,000.00 as proposed by the Secretary is over 400 times the cost of a standoff inflation device and is clearly disproportionate.

In any event it is apparent that the Secretary's proposed penalty of \$25,000.00, is without adequate analytical support and is disproportionate to an appropriate consideration of the penalty

criteria as discussed herein. Accordingly such a proposed penalty is not credible and should not be utilized as any benchmark or guideline for evaluating an appropriate *de novo* penalty assessed by the Commission or its judges.

ORDER

Douglas R. Rushford Trucking is hereby directed to pay a civil penalty of \$4,000.00 within 40 days of the date of this decision.

A handwritten signature in black ink, appearing to read 'Gary Melick', is written over the typed name and title.

Gary Melick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 6, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-31-D
ON BEHALF OF MICHAEL JENKINS	:	HOPE CD 99-10
AND MICHAEL MAHON,	:	
Complainants	:	Mine No. 1
v.	:	Mine ID 46-08102
	:	
DURBIN COAL, INC.,	:	
Respondent	:	

ORDER DENYING, IN PART, RESPONDENT'S MOTION TO COMPEL

This case is before me on a complaint by the Secretary of Labor on behalf of two miners, Michael Jenkins and Michael Mahon, alleging that they had been discriminated against in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, ("the Act"), 30 U.S.C. § 815(c)(1). Respondent, Durbin Coal, Inc., has moved to compel production of documents requested in discovery that the Secretary contends are protected from disclosure on grounds of privilege.

The thirteen documents at issue are described in a "privilege log", an amended version of which was appended to the Secretary's opposition to the motion to compel. They consist of the notes of the investigator, four witness statements and various internal Department of Labor (DOL) memoranda, including the report of the investigation. The Secretary has claimed the work product privilege as to all of the documents and also asserted, variously, the informant's, deliberative process and law enforcement privileges. Statements obtained from Jenkins and Mahon have been produced to Respondent. The Secretary has also produced several statements obtained from management representatives and individuals associated with management's position in the litigation.¹

¹ Respondent asserts that all such statements must be produced upon request by its counsel, who also represents the individuals. Counsel for the Secretary has confirmed that none of the witness statements at issue were made by individuals represented by Respondent's counsel.

I find that the documents at issue are materials prepared in anticipation of litigation and fall within the work product privilege. I also find that Respondent has not, at this time, met its burden of showing substantial need for the materials and undue hardship. However, further information is needed before a final decision can be made on those issues as to some of the documents, portions of which would also be protected by the informant's privilege. Respondent's motion to compel is, therefore, denied, in part, at this time. The witness statements and, possibly, portions of the investigator's notes will be reviewed *in camera* and a further order will issue with respect to those documents.

The Work Product Privilege

The most instructive discussion by the Commission of the work product privilege, as applied to materials similar to those sought here, is found in *ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990).² The following portion of the *ASARCO* decision, at pp. 2557-59, addresses the controlling legal principles in a similar factual context.

The work product rule has its modern origins in the case of *Hickman v. Taylor*, 329 U.S. 495 (1947), and in Rule 26(b)(3) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P"). Unlike the attorney-client privilege * * * the work product rule does not solely protect confidential communications between attorney and client and is best described as a qualified immunity against discovery. In order to be protected by this immunity under Fed. R. Civ. P. 26(b)(3) the material sought in discovery must be:

1. "documents and tangible things;"
2. "prepared in anticipation of litigation or for trial;" and
3. "by or for another party or by or for that party's representative."

It is not required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

² The work-product privilege applies in this context only to documents or tangible things, not to factual information contained therein. The identities of persons with knowledge of relevant facts and other factual information obtained in the course of MSHA's investigation are available to Respondent through properly framed interrogatories and depositions. *See, gen.*, 6 Moore's Federal Practice, § 26.70[2][a] (Matthew Bender 3^d ed.). The Secretary has indicated that the identities of witnesses have been disclosed in response to an interrogatory requesting the identities of persons with knowledge of relevant facts.

Fed. R. Civ. P. 26(b)(3). If the court orders that the materials be produced because the required showing has been made, the court is then required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*

Commission Procedural Rule [56(b)], 29 C.F.R. § 2700.[56(b)], provides, as pertinent here, that parties may obtain discovery of any relevant matter that is not privileged. The Commission is guided, "so far as practicable" and as is "appropriate," by the Federal Rules of Civil Procedure on procedural questions not regulated by the Mine Act or its rules. 29 C.F.R. § 2700.1(b). In applying Fed. R. Civ. P. 26(b)(3) to the contested passage of Exhibit K, the material in dispute is clearly a document. In addition it was prepared by a party to this litigation or by its representative, MSHA Special Investigator R.L. Everett. As stated above, it is not necessary that the document be prepared by or for an attorney.

The key issue is whether Exhibit K was prepared in anticipation of litigation. If, in light of the nature of a document and the factual situation in the particular case, the document can fairly be said to have been prepared because of the prospect of litigation, then the document is covered by the privilege. If, on the other hand, litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purposes of litigation, it is not protected. In addition, particular litigation must be contemplated at the time the document is prepared in order for the document to be protected. Finally, documents prepared for one case have the same protection in a second case, if the two cases are closely related.

The record appears to us to reveal that the disputed portions of the special investigator's notes were prepared in anticipation of litigation. A major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) or (d) of the Mine Act. 30 U.S.C. § 820(c) & (d). A special investigator does not know at the outset of his investigation whether charges will be filed in that particular case. Nevertheless, the purpose of his investigation is to allow the Secretary to determine whether a case should be filed. (footnote omitted) (citations omitted)

See, also, Consolidation Coal Co., 19 FMSHRC 1239, 1242-44 (July 1997).

As in *ASARCO*, the key question here is whether the materials sought were prepared in anticipation of litigation. The materials in dispute were prepared by the Secretary's Mine Safety and Health Administration (MSHA) in the course of investigating a complaint filed by Jenkins and Mahon pursuant to § 105(c)(2) of the Act. The complaint, a copy of which was appended to the complaint filed with the Commission, was filed on March 3, 1999, and alleged that Jenkins

and Mahon had been unlawfully discharged on March 2, 1999. It identified the responsible person as Forrest Newsome, Superintendent of the mine, and described the unlawful action and relief requested as follows:

We feel that we have been discriminated against in that we were falsely accused of reporting safety violations to inspectors and for stealing. These charges have resulted in our being discharged.

We request as our relief to have our records cleared, our jobs restored and back pay for all lost pay, wages, etc.

MSHA promptly initiated an investigation, in the course of which it interviewed numerous miners and management personnel, reducing many of those conversations to writing, including formal signed witness statements. A report of the investigation was ultimately prepared and typically would consist of a compilation of the factual information gathered in the investigation and a recommendation on whether or not to initiate litigation on behalf of the complaining miners.

The facts of this particular case present a more compelling justification than those in *ASARCO* for concluding that the documents generated in the course of the investigation were prepared "in anticipation of litigation." The determination of whether litigation should be commenced is virtually the sole purpose of an investigation of discrimination complaints pursuant to § 105(c) of the Act. Moreover, the complaint filed by Jenkins and Mahon stated the essence of a claim actionable under § 105(c) of the Act, including a specific claim for relief. Consequently, the prospect of litigation here was more concrete than presented in *ASARCO*, especially considering that Jenkins and Mahon could initiate litigation even if the Secretary ultimately determined not to proceed.

Durbin attempts to distinguish *ASARCO* by arguing that the disputed materials there involved an inspector's notes "*concerning the inspector's conversation with an attorney from the Secretary's Solicitor's Office regarding the case.*"³ Durbin's argument reflects the erroneous focus of the parties in *ASARCO*. While the underlying purpose of the work product privilege was protection of the mental impressions of an attorney, under the federal rules the privilege is considerably broader and does not depend upon involvement by an attorney. The factual distinction noted by Respondent was not pertinent to, or mentioned in, the Commission's rationale for determining that the materials were prepared in anticipation of litigation. Respondent also argues that in the absence of at least a preliminary determination that the complaint had merit, the prospect of litigation was far from certain and the documents should be viewed as having been generated in the mandatory regular course of business of MSHA. However, the "regular course of business" concept can be misleading when applied to a government investigation. As

³ Durbin Coal, Inc.'s Reply to the Secretary's Response to Durbin's Expedited Motion to Compel Production of Documents, at p. 5. (emphasis in original).

observed in *ASARCO*, “a major function” of the special investigation there was to determine whether litigation should be brought. Here, neither party has identified any other potential purpose of the investigation initiated in response to the discrimination complaint. The materials at issue here can be said to have been generated in “the ordinary course of business” only because the anticipation of litigation was MSHA’s “business” in investigating the complaint filed by Jenkins and Mahon.⁴

On the facts of this case, the documents sought by Respondent here were generated in anticipation of litigation and are protected by the work product privilege.

This conclusion is reinforced by the fairly well-settled proposition, that the initiation of an investigation by a government agency is sufficient to satisfy the “anticipation of litigation” requirement. *Maertín v. Armstrong World Industries, Inc.*, 172 F.R.D. 143 (D.N.J. 1997); *Vermont Gas Systems, Inc. v. United States Fidelity & Guaranty Co.*, 151 F.R.D. 268, 275-76 (D.Vt. 1993); *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 513 (D.N.H. 1996); and, *see gen.*, 6 Moore’s Federal Practice § 26.70[3][d] (Matthew Bender 3^d ed.). If Durbin had conducted its own investigation upon being notified by MSHA of Jenkins’ and Mahon’s complaint, and it may well have done so, materials generated in the course of that investigation would likely fall within the work product privilege and Durbin could assert that privilege in response to any discovery requests by the Secretary.

Substantial Need - Undue Hardship

As noted above, Respondent can overcome the privilege by establishing that it has a substantial need for the materials and is unable to obtain the substantial equivalent of the materials without undue hardship. Respondent asserts two arguments in an attempt to overcome the privilege. It posits that the witness statements and similar materials are unique in that they were prepared within days or weeks of the alleged act of discrimination and, consequently, are likely to more accurately reflect the witness’ observations of events and cannot be duplicated through a deposition. Respondent also argues that the materials would be useful for impeachment, although it offers no evidence that there are likely to be discrepancies between the statements and any other similar materials, e.g. a deposition of the witness, or anticipated testimony.

⁴ See, *Kent Corp. v. NLRB*, 530 F.2d 612, 623 (5th Cir.), *cert. denied*. 429 U.S. 920 (1976); *People by Vacco v. Mid Hudson Medical Group, P.C.*, 877 F. Supp. 143, 150-51 (S.D.N.Y. 1995).

The Commission observed in *Consolidation Coal Co.*, *supra*. 19 FMSHRC 1243-44, that “[a] number of courts * * * have concluded that, by itself, the desire to determine through discovery whether potential impeachment material exists within protected work product does not constitute a “substantial need” for purposes of the work-product privilege.” (Footnote omitted) Respondent’s “more contemporaneous” argument has more substance. The witness statements were taken on March 5, 11, 15, 1999 and April 12, 1999, relatively close to the March 2, 1999, termination of the Complainants. The other materials were generated from March 3 through April 29, 1999. Respondent relies on *Smith v. Black Diamond Offshore Drilling, Inc.*, 168 F.R.D. 582, 584-85 (S.D.Tex. 1996) in which production of witness statements taken immediately following an accident was ordered.

Facts relevant to allegations of unlawful discrimination under § 105(c) of the Act, typically occur over a considerably longer time span than those pertinent to an accident.⁵ In this particular case, however, the pertinent time frame may be relatively short. Discovery responses submitted in conjunction with another pending motion to compel indicate that the disputed “stealing” incident likely occurred on March 2, 1999, the date of the alleged terminations. Complainants here do not allege engagement in protected activity over a lengthy period. Rather they argue that Respondent suspected that they had engaged in protected activity and terminated them for that reason. The factual predicate for this allegation is presently unknown to the undersigned. It is possible that the four witness statements contain information so contemporaneous with occurrences critical to the issues in this case, that Respondent would have substantial need of it to prepare its defense and could not duplicate it through other means, e.g. interviews or depositions of persons identified as having relevant knowledge or information. Similar considerations apply to portions of the special investigator’s notes, if any, that reflect communications from other witnesses whose statements have not already been provided to Respondent. Other factors suggest that those materials are unlikely to contain contemporaneous information satisfying the substantial need - undue hardship tests. Respondent’s discovery responses indicate that there were five witnesses to the “stealing” incident and subsequent alleged terminations and it has been provided statements from all of them. The other portions of the notes and the internal memoranda are not likely to contain such information.

Without knowing the identities of the four witnesses who provided statements, or the content of the statements, Respondent claims that there is little more that it can advance in support of its argument. In the absence of more information about the four witness statements and any similar portions of the investigator’s notes, an informed decision on Respondent’s need and hardship arguments cannot be made. While it is Respondent’s burden to establish need and hardship, it is the Administrative Law Judge’s responsibility to make informed decisions on

⁵ An operator’s knowledge or suspicion of protected activity and its attitude toward such activity may be established by facts that occurred days, weeks or even months before the alleged adverse action.

discovery issues.⁶ Rather than direct the Secretary to provide detailed descriptions of the materials, it would be much more efficient to review them *in camera*. Accordingly, the Secretary will be directed to submit for *in camera* review copies of the four witness statements, and portions of the investigator's notes, if any, reflecting communications by any other persons whose statements have not been provided to Respondent. The statements and excerpts from the notes should be marked so as to indicate proposed redactions to protect the identities of informant's and any deliberative process material.⁷

The Informant's Privilege

The Secretary claimed the informant's privilege as to the four witness statements, the investigator's notes and some of the internal memoranda. The Commission has recognized the importance of the informant's privilege in effectuating the purposes of the Act. *Secretary obo Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (Nov. 1984). It is the identity of the informant that is protected by the privilege, not the contents of a statement, except for those portions of the content that would tend to identify an informant. *ASARCO, supra.*, 12 FMSHRC at 2553-54. It is the Secretary's burden to establish that the privilege applies. *Id.* Because the privilege is qualified, a party may seek to overcome it by demonstrating that the information is necessary for a fair determination of the case and that its need for the information outweighs the Secretary's need to maintain the privilege.

The Secretary has not presented factual evidence from which application of the privilege can be determined, aside from information directly identifying an informant, e.g. name, address, etc. Information, such as, job title and duties and responsibilities may be privileged if unique to the informant, or to such a small group of persons that the informant would tend to be identified. Without competent evidence establishing that the entire statement consists of such information and that it would disclose an informant's identity, however, the Secretary clearly has not satisfied her burden as to the entirety of the witness statements, or to those portions of the investigator's notes, if any, described above.

⁶ As the Commission observed in *ASARCO, Inc.*, 14 FMSHRC 1323, 1329 (August 1992) (*ASARCO II*):

It is the judge, not the Secretary, who must determine whether the privilege obtains with respect to a particular document or group of documents and he must be provided with evidence sufficient to make such a determination.

⁷ Noted on the Secretary's privilege log is an assertion of the law enforcement privilege with respect to the investigator's notes. In opposition to the motion, however, the applicability of that privilege is not explained and the Secretary has clearly failed to sustain her burden on that issue.

As noted above, a final determination on whether Respondent has met its burden of establishing substantial need and undue hardship as to the witness statements and portions of the investigator's notes will be made after a review of those materials. If the redactions proposed by the Secretary go beyond a straightforward application of the legal principles and privileges discussed herein, the Secretary may also provide evidence that such portions of the witness statements and portions of the investigator's notes are covered by the privilege by submitting for *in camera* review an affidavit by a person with knowledge of the facts relied upon. See, *ASARCO II*, 14 FMSHRC at 1330, 1333.

The Deliberative Process Privilege

The deliberative process privilege was first discussed by the Commission in *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 990-93 (June 1992). Following a brief review of the origin of the privilege the Commission observed:

The breadth of the privilege is described by the court in *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753 [772] (D.C. Cir. 1978):

This privilege protects the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated' (citations omitted). The privilege attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.

To be covered by the privilege, the material must be both "pre-decisional" and "deliberative." *Id.* Purely factual material that does not expose an agency's decision making process is not covered by the privilege, unless it is so inextricably intertwined with deliberative material that its disclosure would compromise the confidentiality of the deliberative information that is entitled to protection. It is the Secretary's burden to prove that the privilege applies to material it seeks to protect from disclosure. *Id.* 14 FMSHRC at p. 993. *Consolidation Coal Co., supra*, 19 FMSHRC at 1246-47. A party seeking to overcome the privilege has the burden of demonstrating that its need for the information outweighs the governmental interest in protecting it from disclosure.

The deliberative process privilege is not truly at issue here. While Respondent argues that the privilege has not been properly invoked, it also has made clear that it does not seek portions of the documents that would be protected by the privilege. In its reply to the Secretary's opposition to the motion, at p. 9, Respondent made clear that "the deliberative process privilege does *not* apply to the *factual* portions of these documents, which are all that Durbin seeks." (emphasis in original) Factual information, with limited exception, is not protected by either the informant's or deliberative process privilege. If, on review of the documents described above, it

is determined that they should be produced under the work-product analysis, only those portions of the documents that contain information that does not identify an informant or reflect the pre-decisional, deliberative processes of the Secretary will be ordered produced.

Conclusion and Order

Respondent is generally entitled to relevant factual information in possession of the Secretary that has properly been requested through discovery. The work-product privilege applies to the materials generated in the course of MSHA's investigation. However, Respondent may have a substantial need for, and be unable to obtain by other means without undue hardship, the four witness statements and any similar portions of the investigator's notes. Even if not protected from disclosure by the work-product privilege, information that identifies or tends to identify a person who has provided information to the Secretary would be protected by the informant's privilege. The Secretary's pre-decisional deliberations, information that is of marginal, if any, relevance and unlikely to be factual in nature, has not been requested and is unlikely to be contained in the materials that have been ordered produced for *in camera* inspection.

The motion to compel is denied, except as to the four witness statements and portions of the special investigator's notes reflecting communications by other individuals whose statements have not already been provided to Respondent. On or before Wednesday, September 13, 2000, the Secretary is directed to provide for *in camera* review, copies of those materials with proposed redactions to protect the identity of informants and the Secretary's pre-decisional deliberations. The Secretary may also submit evidence establishing the applicability of the informant's privilege to those portions of the documents to which its application may not be obvious. Upon review of the documents and consideration of any such evidence, a further order will be issued.



Michael E. Zielinski
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

September 8, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2000-38-M
Petitioner	:	A.C. No. 37-00002-05516
v.	:	
	:	Cranston Quarry
TILCON CAPALDI INC.	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS

This case is before me on a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(d). Respondent has moved to dismiss the petition because it was not filed timely. For the reasons set forth below, the motion is denied.

Facts

MSHA conducted inspections of Respondent's mine in August and October, 1999. Eleven citations were issued in August and an additional six citations were issued in October. On September 9, 1999, Respondent initiated Contest Proceedings as to each of the August citations. Commission Docket No.'s YORK 99-69 through 99-79. On October 15, 1999, the Secretary, with Respondent's consent, moved to late file answers to the contest proceedings and to stay proceedings pending the assessment of civil penalties for the eleven citations. By Order dated, October 19, 1999, the motion to stay was granted. On October 15, 1999, MSHA assessed civil penalties for eight of those citations, and a petition to assess civil penalties was filed on December 23, 1999, Docket No. YORK 2000-12-M. By Order dated February 15, 2000, proceedings in that case were stayed pending the filing of a petition for civil penalties in the remaining three August 1999 citations.

Penalties were assessed by MSHA for the remaining three August citations on January 27, 2000. However, included in the assessment were the six citations issued during the October, 1999, inspection. Respondent contested that assessment on February 25, 2000, and requested that the three August citations be consolidated with the other pending cases and that the six October citations be referred to the Alternative Case Resolution Initiative (ACRI). The Solicitor attempted to accommodate that request.

Meanwhile, in the absence of any definitive commitment by the Secretary as to when penalty proceedings would be filed with respect to the remaining three August citations, the undersigned, by Order dated May 3, 2000, lifted the stay of proceedings on the eleven contest cases and the related

penalty docket, and scheduled a hearing in those cases for September 27, 2000.¹ The notice indicated an intention to also hear the penalty proceedings for the remaining three citations in the event that they were filed prior to the hearing date.

In response, the Secretary initiated penalty proceedings for the citations included in the January 27, 2000 assessment. The Secretary attempted to split those citations into two groups, the August and October citations, by filing a petition for only the six October 1999 citations in this assigned docket number, intending to file a separate petition for the three August 1999 citations under the pending penalty proceeding docket number. When informed by Commission staff that that could not be done, a petition as to all nine of the citations concluded in the January 27, 2000 assessment was filed. The filings occurred on May 15 and 17, 2000, respectively.

Respondent moved to dismiss the petition asserting that its filing was untimely by over a month and that it had suffered prejudice as a result.² Petitioner opposed the motion arguing that there was adequate cause for the untimely filing and that no prejudice was demonstrated by Respondent. Petitioner relies upon an affidavit by counsel describing the circumstances under which the petition was filed late.

Applicable Law

The Commission has made clear that the time limits for filing a penalty petition are not to be lightly regarded by the Secretary and that adequate cause must be shown to justify a late filing. Even if adequate cause is shown, a motion to dismiss may be granted if the delay has resulted in prejudice to Respondent. *Rhone-Polenc of Wyoming Co.*, 15 FMSHRC 2089 (October 1993); *Salt Lake Co. Road Dept.*, 3 FMSHRC 1714 (July 1981). In *Salt Lake*, the Commission was critical of the Secretary's reliance on high case loads and limited clerical help as a justification for untimely filing and also admonished the Secretary to proceed with a timely motion to extend time when extra time is legitimately needed.³

¹ The Order stated, in pertinent part: "Three citations at issue in the contest proceedings apparently have yet to be made the subject of a petition for civil penalties. Six months should have been adequate time to allow the filing of civil penalty proceedings with respect to all of the citations at issue and there is no compelling justification for extending the stay further. If civil penalty proceedings are filed with respect to those three citations, they will be consolidated for purposes of the hearing."

² Respondent's contest of the proposed assessments was hand delivered on February 25, 2000. Commission Rule 28(a), 29 C.F.R. § 2700.28(a), specifies that a petition for assessment of civil penalties shall be filed within 45 days of receipt of a timely contest, i.e., here, by April 10, 2000.

³ There, as here, the Secretary had not filed a motion for extension of time prior to the expiration of the time limit, as required by Commission Rule 9(a), 29 C.F.R. § 2700.9(a).

Nevertheless, the Commission reversed the dismissal that had been entered in that case, holding that “effectuation of the Mine Act’s substantive scheme, in furtherance of the public interest” precluded automatic dismissal of an untimely filed petition. *Id.* at 1716. It established the “adequate cause” test for justifying a late filing and recognized that “procedural fairness” could dictate dismissal where an operator could establish that it had suffered prejudice as a result of any delay. The Commission concluded its analysis with the following language: “Allowing * * * an objection [based on prejudice] comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute’s purpose, are not to be overturned because of a procedural error, absent a showing of prejudice.” (citations omitted). *Id.*

On the facts of this case, I find that the Secretary has fulfilled, but just barely, her burden of showing adequate cause for the delay. Because Respondent makes no showing of prejudice attributable to the delay, merely noting that more time will have elapsed between issuance of the citations and resolution of the penalty cases, the motion to dismiss will be denied.

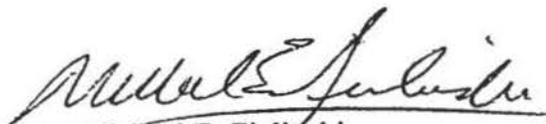
For reasons unknown to at least Respondent and the undersigned, MSHA determined to split the assessment of penalties for the eleven citations issued during the August 1999 inspection. Eight were done in due course and a petition for assessment of penalties was timely filed, Docket No. YORK 2000-12-M. Assessment of the remaining three citations did not occur until January 27, 2000, which probably would not have had any detrimental consequences, except that MSHA also included in that assessment the six, essentially unrelated, citations issued during the October 1999 inspection. In contesting the proposed assessments, Respondent requested, quite reasonably, that the three August citations be consolidated with the remaining August citations and that the October citations be diverted into the ACRI program. The Secretary agreed with that proposal and attempted to effectuate it, ultimately finding that it was difficult to do.

The Secretary’s explanation of the difficulty, however, is somewhat “thin”. While the opposition and affidavit list numerous questions that needed to be answered, there is precious little detail as to particular actions required to obtain answers and when (or even if) those actions were taken. The delay as to the August citations ended, for all practical purposes, on May 3, 2000, when the stay on the contest proceedings and the penalty proceedings on the other eight August citations was lifted and a hearing date was set. It is somewhat ironic that the Secretary should benefit from this action because it was born partially out of frustration with the delay in assessment of penalties for the three outstanding citations and the inability to obtain meaningful information about the processing of the assessments despite a requirement for periodic status reports incorporated into the stay order.

On the whole, however, the complication of the combined assessments and what appear to be good faith efforts to accommodate the reasonable request of Respondent for diversion of the October citations to the ACRI program rise, but just barely, to the level of adequate cause even though Respondent bears no responsibility for that initial assessment processing anomaly. It is also relevant that Respondent assented to the initial stay of the contest proceedings, and noted no objection to the extension of the stay to Docket No. YORK 2000-12. If Respondent had a strong

interest in more expeditions litigation of the August citations, it could have taken steps to achieve that objective. The finding of adequate cause does not excuse the conduct of the Solicitor's office. While the attempts to deal with the complications resulted in delay, there is no excuse for failing to monitor the approach of the filing deadline or for disregarding the admonition of the Commission in *Salt Lake*, to "proceed by timely extension motion when extra time is legitimately needed."

The October citations stand on a slightly different footing. There were no previous cases filed with the Commission as to those citations and the lifting of the stay in the other cases did not end the delay as to them. Considered alone, the motion as to those citations presents a more straightforward argument for dismissal based upon delay in filing. However, the original complicating factor that prompted the delay as to the August citations had the same impact on the October citations. On the whole, I also find adequate cause for the delay in filing as to the October citations. If the parties still desire to attempt to resolve those citations through the ACRI program, a stay of proceedings as to those citations could be requested.


Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 15, 2000

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, on behalf of	:	
GARY DEAN MUNSON	:	Docket No. WEVA 2000-40-D
Complainant	:	MORG-CD-2000-01
	:	
v.	:	
	:	Federal No. 2
EASTERN ASSOCIATED COAL CORP.	:	Mine ID 46-01456
Respondent	:	

ORDER NOTING WITHDRAWAL OF MOTION

On July 6, 2000, Respondent filed a "Motion to Stay 'Economic' Reinstatement."¹ On July 20, 2000, Complainant filed a response.² Respondent ultimately determined to withdraw its motion and, on August 14, 2000, filed a paper entitled: "Withdrawal of Respondent Eastern Associated Coal Corporation's Motion to Stay 'Economic' Reinstatement." While titled, in part, "withdrawal" the text stated that Respondent "moves this Court to withdraw" its motion and requested "that its withdrawal of said Motion be granted." The Secretary did not file a response.

Respondent's "withdrawal" is framed somewhat inconsistently with its position voiced during a telephonic conference after the "stay" motion had been filed. There, Respondent took the position that I no longer had jurisdiction in the Temporary Reinstatement Proceeding. The Secretary took the opposite position in her response to the original motion.

¹ On March 10, 2000, following a hearing, I had ordered that Complainant be temporarily reinstated pending resolution of a discrimination complaint likely to be filed by the Secretary on his behalf. The parties subsequently agreed to economic reinstatement. I was not notified of the agreement and no request was made to amend the Order of Temporary Reinstatement. Complainant later decided that he would rather return to work and by letter dated June 21, 2000, his counsel requested that he be "immediately return[ed] to his former job." Respondent declined the request. When the dispute was brought to my attention, I initially placed the burden on Respondent to seek modification of the temporary reinstatement order. I later reconsidered that decision.

² The response erroneously carried the caption of the subsequently filed discrimination case, rather than the temporary reinstatement proceeding.

Respondent's "withdrawal" obviates the need to resolve the jurisdictional issue. While there is some authority for the proposition that a motion may not be withdrawn without leave of court, the general and, in my opinion, more preferred rule is that, in the absence of prejudice to the opposing party, no such permission is required and withdrawal of a motion leaves the record as it stood prior to the filing of the motion. *See, gen. 56 Am. Jur. 2^d, Motions, Rules and Orders, § 22.*

Respondent's motion has been effectively withdrawn. The record on the temporary reinstatement proceeding stands as it was prior to the filing of the motion.



Michael E. Zielinski
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

September 15, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-31-D
ON BEHALF OF MICHAEL JENKINS	:	HOPE CD 99-10
AND MICHAEL MAHON,	:	
Complainants	:	
	:	
v.	:	Mine No. 1
	:	Mine ID 46-08102
DURBIN COAL, INC.,	:	
Respondent	:	

ORDER DENYING, IN PART, AND GRANTING, IN PART,
THE SECRETARY'S MOTION TO DETERMINE SUFFICIENCY OF
RESPONSES TO REQUESTS FOR ADMISSIONS
AND TO COMPEL ANSWERS TO INTERROGATORIES

This case is before me on a complaint by the Secretary of Labor on behalf of two miners, Michael Jenkins and Michael Mahon, alleging that they had been discriminated against in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, ("the Act"), 30 U.S.C. § 815(c)(1). The Secretary served Requests for Admissions and Interrogatories on Respondent on April 7, 2000. Dissatisfied with the responses, the Secretary presented its concerns to Respondent by letter. Respondent replied to the letter, submitted amended responses to three of the requests and declined to supplement or amend its other responses. The Secretary has moved to determine the sufficiency of Durbin Coal's responses to twenty requests for admissions¹ and to compel responses to six interrogatories. For the reasons set forth below, the motion is granted in part and denied in part.

¹ The Secretary included a discussion of three other responses in her motion, but noted that Respondent had amended those responses and does not seek relief as to them.

Requests for Admissions

Requests for admissions in Commission proceedings are governed by Commission Rule 58(b), 29 C.F.R. § 2700.58(b), and through § 2700.1(b), Rule 36, Fed. R. Civ. Proc., which provides, in pertinent part:

* * * *

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within [25 days of service, unless the party making the request agrees to a longer time]² the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. * * * *

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial.
* * *

Proper use of requests for admissions can expedite and streamline litigation by establishing matters not truly in dispute and avoiding the expenditure of time and effort required by other discovery devices. *See gen.*, 7 Moore's Federal Practice, § 36.02[1] (Matthew Bender 3^d ed.). However, in order to achieve that desired result both parties must fulfill their obligations under the rule. "Parties may not view requests for admissions as a mere procedural exercise requiring minimally acceptable conduct. They should focus on the goal of the Rules, full and efficient discovery, not evasion and word play." *Marchand v. Mercy Medical Center*, 22 F.3d 933, 936 (9th Cir. 1994)(citations omitted).

² The inserted language is from Commission Rule 58(b).

Parties should endeavor to propound requests that are “direct, simple and limited to singular relevant facts so that [they] can be admitted or denied without explanation.” *Herrera v. Scully*, 143 F.R.D. 545, 549 (S.D.N.Y. 1992)(citations omitted). “[I]t is entirely within the discretion of the court as to what level of expression and detail should be tolerated for each individual case.” *Diederich v. Dept. Of the Army*, 132 F.R.D. 614, 619 (S.D.N.Y. 1990). Parties responding to requests, as the rule specifically states, should exercise good faith by admitting or denying parts of requests, and qualifying responses, where appropriate, rather than noting blanket objections.

Where it is evident that multiple, interdependent issues are contained in one request, defendant may deny the entire statement if one fact, on which the remainder of the request is premised, is denied; plaintiff drafts complex requests at his peril. Compound requests that are capable of separation into distinct components and that follow a logical or chronological order, however, should be denied or admitted in sequence with appropriate designation or qualification by defendant in its response.

Diederich, supra, 132 F.R.D. at 621.

As noted in the rule, the party propounding the requests may file a motion challenging the sufficiency of responses. The party opposing such a motion has the burden of persuasion to show that objections to a request are warranted or that the answers are sufficient. Moore’s Federal Practice, *supra*, § 36.12[1]

Neither party has fulfilled its obligations here. As a result, rather than expediting resolution of the issues, considerable effort of both the parties and the judge has been diverted to litigating discovery disputes spawned by poor drafting of requests and responses that appear to be motivated more by evasion than good faith.

The requests for admissions propounded to Respondent, at least those addressed in the motion, suffer from two recurring flaws that opened the door to uncomplimentary responses -- compound questions and inclusion of an element that was known to be disputed. Some requests were compound and so far reaching that sufficient responses were virtually impossible. Request numbered 16, for example, reads:

Admit that Forest Newsome or other persons in mine management had actual or constructive knowledge, at some point in time between February 25, 1999 and March 3, 1999, that someone had written “Rat” on Complainant Mahon’s belt.

This request is addressed to the actual knowledge of a number of persons as well as to information not directly known by them but that was so widely known in their respective spheres of operation that they could be legally charged with knowledge. It cannot, even with the most

charitable of constructions, be characterized as “direct, simple and limited to a singular relevant fact.”

Despite the unwieldy wording of the request, however, it provided an opportunity for Respondent to exhibit good faith by responding to those parts that were capable of succinct reply. For example, it could have responded as to Forest Newsome’s actual knowledge and the actual knowledge of other specified individuals in mine management, and objected to the more ambiguous parts of the request. Respondent declined the opportunity. It noted an objection to the compound nature of the request and claimed such uncertainty as to its meaning that it was unable to answer. It also added to its response the following sentence: “To the extent that Durbin cannot respond to this request, it should be deemed denied.”

The extent of this qualified denial is unclear. On the one hand, Durbin claims an inability to respond to the entire request based upon lack of understanding. The denial could, therefore, be viewed as applying to the entire request, a sufficient response under the rule. However, the request must be fairly read to address at least Forest Newsome’s actual knowledge. By its terms, the denial does not include parts of the request that could or should have been understood.

Many of the requests included a reference to the alleged termination of Complainants’ employment, a fact that Durbin has consistently denied.³ This problem could have been avoided by more thoughtful drafting of the requests, for example, by referring instead to a date and time, or, an undisputed description of the event, e.g. when complainants ceased working at the mine. Respondent frequently objected to such requests, even when the “termination” part was not interdependent on other parts of the request.

Further problems with the parties’ approach to discovery in this case are evidenced by three requests as to jurisdictional matters that are described in the motion, but which are no longer part of this dispute. Illustrative is the Secretary’s request no. 7 which asked Durbin to:

Admit that during Complainant’s employment at Durbin, and at all relevant times herein, they were miners as defined by Section 3(g) of the Federal Mine Safety and Health Act of 1977 (hereinafter the “Mine Act”).

It is unclear why the Secretary propounded this request. In its answer to the complaint Durbin had admitted “that Complainants William Jenkins and Michael Mahon were employed at Durbin’s Mine No. 1 and that they were miners as defined in § 3(g) of the Federal Mine Safety

³ Respondent’s version of the events of March 2, 1999, includes an explanation that Complainants specifically asked whether they were fired, were told that they weren’t, but that they, nevertheless, left the job site and did not return. See, Durbin Coal Inc.’s Response to the Secretary’s First Set of Interrogatories, interrogatory number 1.

and Health Act of 1977 (“Act”), 30 U.S.C. § 802(g).”⁴ Rather than simply admitting the request, however, which Durbin later effectively did after an exchange of correspondence with the Secretary, the following response was made:

Durbin objects to this Request on the ground that it is vague and ambiguous, and, therefore, unanswerable. Durbin cannot ascertain from the phrase “at all relevant times herein” the time period to which the Secretary refers. In addition, the term “they” is vague and undefined. Further, this request calls for a legal conclusion. Durbin cannot, therefore, answer this Request. To the extent that Durbin cannot respond to this Request, it should be deemed denied.

It would take a more than charitable characterization to describe this response in terms other than evasion and word play in disregard of Respondent’s obligations under the Rule.

The Secretary moves that the disputed requests be taken as admitted. The Rule provides other, less drastic, and here more appropriate alternatives i.e. directing that supplemental or amended responses be filed, or deferring final resolution of disputed responses until a later time in the litigation.

Durbin will be directed to submit amended responses to requests numbered 3, 5, 18, 19, 30, 32, 33 and 34. Objections noted to those requests are overruled. The responses were evasive and insufficient. It may qualify its amended responses as appropriate under the standards discussed above.

The motion as to requests numbered 15, 16, 17, 21, 22, 23, 24, 25, 26, 27, 28 and 29 is denied. Durbin’s responses to those requests were sufficient in that the objections noted are sustained (requests numbered 16 and 17) or, despite objections invalid at least in part, the answers were sufficient (Requests numbered 22, 23, 27, 28 and 29). As to others, while objections interposed cannot be sustained, particularly the objections as to relevance, information responsive to the request has been supplied either in the response itself or in binding responses to other discovery requests (requests numbered 15, 21, 24, 25 and 26).

Interrogatories

The Secretary has moved to compel responses to six interrogatories. The criticisms of the parties’ approach to discovery with respect to the requests for admissions are largely applicable here, except that for the most part the questions are better drafted and the precise wording of an interrogatory is not nearly as critical as in the case of requests for admissions. The Secretary’s primary concern appears to be objections interposed by Respondent. However, in many instances, Respondent also provided an answer. The Secretary does not address the propriety of the answers provided. The interrogatories, objections and answers will not be discussed in detail.

⁴ Durbin Coal, Inc.’s Answer, ¶ 2.

Interrogatory numbered 1 requested the basis for any denial or qualification of Respondent's responses to the Secretary's requests for admissions. While the objections noted in response to this inquiry are of questionable validity, the information provided, as a whole was reasonably responsive. In light of the disposition of the motion with respect to the requests for admissions, the Secretary is entitled to no further relief and the motion as to this interrogatory is denied.

Interrogatory numbered 5 requested information as to any discipline that was or would have been imposed for legitimate, non-discriminatory reasons. The interrogatory, fairly read, refers to Complainants' alleged termination. Respondent interposed multiple objections, none of which have merit, and referred to other discovery responses. The Secretary complains that "Respondent seeks to preserve the availability of this defense while refusing to give the Secretary any meaningful information about the facts that purportedly support such a defense." Motion at p. 18. Respondent's objections are overruled. However, the answer provided despite the objections may well be complete. The Secretary has not presented any evidence that there is additional information responsive to this question that Respondent has refused to disclose. Respondent will be bound by its answer, and the Secretary need not be concerned about confronting new facts in support of any such defense. If, in light of this disposition, Respondent determines to amend or supplement its answer to this interrogatory it must do so on or before September 29, 2000.

Interrogatory numbered 6 requested information regarding communications about the subject matter of Complainants' termination or disciplinary action. Respondent objected to the question as "overbroad and burdensome" and referred to its other discovery responses. Respondents' objections are not well founded and are overruled. Again, however, there is no direct evidence to indicate that the answer provided was incomplete, though the question is not confined to communications that occurred on March 2, 1999. The motion as to this interrogatory will be granted. Respondent must disclose communications and discussions known to it that occurred on March 2, 1999 and thereafter, with the exception of privileged communications.

Interrogatory numbered 7 requested information regarding disciplinary procedures in effect at the mine. Respondent objected on numerous grounds and referred to other discovery responses. The objections as to relevance, and overbreadth have some merit because the request was not limited in time or to procedures that might have been applicable to Complainants. Respondent's objections are sustained, except as to disciplinary procedures, written or *de facto*, applicable to Complainants from March 2, 1998 through March 2, 1999 and any changes to those procedures subsequent to the alleged terminations. Respondent must answer the interrogatory as so limited. On or before September 29, 2000, Respondent must supplement its answer or certify that its original answer was complete.

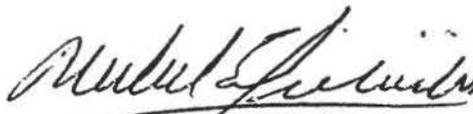
Interrogatory numbered 8 requested information as to disciplinary actions taken against Complainants. Respondent objected on numerous grounds and referred to other discovery responses. Respondent's objections are overruled. On or before September 29, 2000, Respondent must supplement its answer or certify that its original answer was complete.

Interrogatory numbered 9 requested information about changes in responsibilities and duties of Forest Newsome subsequent to the alleged terminations. Respondent objected on grounds of relevance and stated that the information could be "better provided" by Mr. Newsome. Respondent also proceeded to describe a change in Mr. Newsome's responsibilities. However, no documents associated with the change were identified and there was no reference to documents produced in discovery. Respondent's objections are overruled. On or before September 29, 2000, Respondent must supplement its answer or certify that its original answer was complete.

ORDER

The Secretary's motion is granted in part and denied in part. As to requests for admissions numbered 15, 16, 17, 21, 22, 23, 24, 25, 26, 27, 28 and 29, and, as to interrogatory numbered 1, the motion is denied.

The motion is granted as to requests for admissions numbered 3, 5, 18, 19, 30, 32, 33 and 34. On or before September 29, 2000, Respondent shall submit amended responses to those requests, complying fully with the requirements discussed above. The motion is also granted as to interrogatories numbered 5, 6, 7, 8 and 9. On or before September 29, 2000, Respondent shall supplement its answers to interrogatories numbered 6, 7, 8 and 9, or certify that its original answers to those interrogatories were complete.


Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 22, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-31-D
ON BEHALF OF MICHAEL JENKINS	:	HOPE CD 99-10
AND MICHAEL MAHON,	:	
Complainants	:	Mine No. 1
v.	:	Mine ID 46-08102
	:	
DURBIN COAL, INC.,	:	
Respondent	:	

SUPPLEMENTAL ORDER DENYING RESPONDENT'S MOTION TO COMPEL

By Order dated September 6, 2000, Respondent's motion to compel production of documents was denied, in part. The Secretary was ordered to produce, for *in camera* inspection, four witness statements and any similar portions of the special investigator's notes. Review of those materials *in camera* was determined to be the most efficient means of determining whether Respondent had a substantial need for the documents and would be unable to obtain the substantial equivalent of them without undue hardship.

The Secretary was directed to submit the documents by September 13, 2000. An extension of that deadline, to September 20, 2000, was requested, without opposition by Respondent. On that date, the Secretary advised that an "unforeseen staff shortage" would delay submission of the documents until the following day. The documents were hand delivered on September 21, 2000, along with a "Response" to the order consisting of further argument on the substantial need — undue hardship issues.¹ The Secretary did not request leave to submit further argument on these issues and further argument was not contemplated in the Order. I have not considered the Secretary's further argument.

¹ While the Secretary's response to the Order (without enclosures, of course) was hand delivered to the Commission, it was mailed to counsel for Respondent. On the morning of September 22, 2000, counsel for the Secretary was, by phone, directed to transmit a copy of the response to Respondent by facsimile.

The documents submitted consist of four witness statements, three of which were properly identified on the privilege log. The fourth statement, however, is a statement by Franklin Runyon, which is already in Respondent's possession and does not match any of the descriptions of the four witness statements on the log.² Also submitted is a document identified on the privilege log as a "memo to file", dated March 10, 1999. It reflects the substance of a conversation that the investigator had with a witness, wherein the witness described a phone conversation with an individual in mine management. No other materials were identified as responsive to the Order.³

None of the documents submitted match the description of the fourth witness statement identified on the privilege log as being dated March 5, 1999. Upon inquiry, Complainant's counsel advised that there is no such statement in the file and speculated that the statement of Franklin Runyon may have been erroneously described on the log. Counsel expressed an intent to submit a corrected privilege log and confirmed that no privilege is asserted with respect to the Runyon statement.

As noted in the Order, I determined to review the documents *in camera* because it was possible that they might "contain information so contemporaneous with occurrences critical to the issues in this case, that Respondent would have substantial need of it to prepare its defense and could not duplicate it through other means, e.g. interviews or depositions of persons identified as having relevant knowledge or information." It was also observed that the facts of this case suggested that the presence of such information was unlikely.

A review of the documents has established that they do not contain information so contemporaneous with critical events that Respondent could have a substantial need for the documents in preparation of its case. None of the individuals witnessed the "search" incident or the discussion with the Complainant's that followed. There is also no reason to believe that Respondent could not obtain the equivalent of the information contained in the statements by other means. The individuals have been identified as persons with knowledge of relevant facts and are, presumably, available for interview or deposition. There is no reason to believe that they would not disclose all relevant information known to them. In any event, Respondent has not established that any person with knowledge of relevant facts is unavailable or has claimed such failed recollection that relevant information is effectively unavailable to it. *See, Varuzza by Zarrillo v. Bulk Materials, Inc.*, 169 F.R.D. 254 (N.D.N.Y. 1996); *Ehrlich v. Howe*, 848 F. Supp. 482, 492-94 (S.D.N.Y. 1994).

² Handwritten versions of the witness statements, as initially taken by the investigator, were also produced.

³ Copies of the materials with proposed redactions were also submitted. The disposition of the motion makes it unnecessary to review the propriety of the proposed redactions.

Conclusion and Order

Respondent's motion to compel is denied as to the witness statements and memorandum. The materials submitted by the Secretary will be filed under seal, and will be available in the event they are needed for further review.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 Skyline, Suite 1000

5203 Leesburg Pike

Falls Church, Virginia 22041

September 28, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-75-DM
ON BEHALF OF JOHN NOAKES,	:	MSHA Case No. MD 99-03
Complainant	:	
	:	
v.	:	
	:	Mine ID No. 23-02064
GABEL STONE COMPANY, INC.,	:	Gable Quarry
Respondent	:	

DECISION

Appearances: Jennifer A. Casey, Esq., and Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Donald W. Jones, Esq., and Jason N. Shaffer, Esq., Hulston, Jones, Gammon & Marsh, Springfield, Missouri, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of John Noakes, against Gabel Stone Company, Inc.,¹ pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Springfield, Missouri. For the reasons set forth below, I find that the Complainant was discharged by Gabel Stone because he engaged in activities protected under the Act.

Background

Gabel Stone Company, Inc., operates the Gabel Quarry in Howell County, Missouri. The company is owned by Gary and Joyce Gabel and is a small mining operation involving the mining, crushing, sizing and stockpiling of stone for commercial sale. Stone is obtained by blasting it from the quarry wall. It is then carried by front-end loader to the crusher, where it is reduced into smaller rocks. From there it is carried by conveyor belt to a scalper, roll crusher and

¹ The complaint was originally filed against Gary Gabel d/b/a Gable Stone Company because that was what the legal identity card on file with MSHA indicated. After the Respondent pointed out that the company was incorporated, the Secretary's motion to amend the caption was granted at the hearing. (Tr. 13-14.)

screen to be further sized and separated. The company employs five to six employees including the Gabels. The normal workweek is 45 hours.

John Noakes was hired by Gary Gabel as a loader operator on March 10, 1998. As loader operator, he moved stone from the areas where it was deposited by the conveyor belts to the area where it was stockpiled by size, loaded customer trucks and shoveled rock from underneath the conveyor belts, as needed. He also performed other duties, such as maintenance and welding, as required.

On November 10, 1998, Noakes filed a 103(g), 30 U.S.C. § 813(g), confidential hazard, complaint with the local MSHA office.² As a result of the complaint, MSHA Inspectors Allan Studenski and Stanley Sturgill arrived at the mine on November 17 to conduct an inspection. After a two day inspection, eight citations were issued, some of which related to allegations Noakes made in his complaint.

On November 30, 1998, Noakes was reassigned to the maintenance shop to perform welding and maintenance tasks. On December 3, 1998, Noakes was advised that there was no work available for him at the quarry, but that he should continue to call in to check on the availability of assignments. He never worked at the quarry again.

Noakes filed a discrimination complaint with MSHA on December 14, 1998. In it he alleged that he was "harassed, removed from my usual work-place and my hours were cut down and finally cut off" because he had filed a 103(g) complaint.³

Evidentiary Ruling

After the hearing, counsel for the Respondent filed a Motion to Supplement Record with a copy of the conviction of Michael Shoeman, a witness for the Complainant, for Failure to Pay Controlled Substance Tax, a felony in the state of Wisconsin, as Respondent's Exhibit 76. This conviction was in connection with a misdemeanor conviction for possession of marijuana. The Secretary's objection to the admission of the marijuana conviction was sustained at trial. (Tr. 371.) Not surprisingly, the Secretary also objects to the admission of this conviction pointing out, among other things, that the Wisconsin statute giving rise to the conviction was declared unconstitutional by the Supreme Court of Wisconsin in 1997. *State v. Hall*, 207 Wis. 2d 54 (1997).

² Section 103(g) provides, in pertinent part, that: "Whenever . . . a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

³ The body of the complaint is set out in its totality as an Appendix to this decision.

While the proffer of this evidence raises a lot of interesting issues for discussion in a law review article, resolution of those issues is not necessary to the disposition of this case. Without considering the convictions to which I sustained objections at the hearing, or the one proffered now, I did not find Shoeman to be a credible witness and I did not consider his testimony at all in arriving at a decision in this case. Accordingly, the Secretary's objection to the admission of Respondent's Exhibit 76 is sustained.

Motion to Dismiss

The Respondent argues that the case should be dismissed because "the complaint was not furnished to the Respondent [as required by the Act], since Respondent only received Respondent's Exhibit 24 without factual allegations." (Resp. Br. at 74.) The company alleges that the Secretary violated the requirement in section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), which states that: "Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the Respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint"

The company asserts that since it was only shown the first paragraph of the complaint, and not the 12 paragraphs of factual details following that paragraph, when the investigator came to investigate the complaint, it did not have sufficient information on which to defend itself. It also complains that the investigation was not begun within 15 days of receipt of the complaint. Neither of these claims has merit.

The Respondent cites no law to support the motion. With regard to the sufficiency of the information contained in the complaint, as shown to the Respondent during the investigation, there do not appear to be any cases on the issue. Nonetheless, since the paragraph furnished to the Respondent included the Complainant's name, the protected activity that he claimed to have engaged in and a description of the adverse action he claimed resulted from the activity, I find that the company was provided with adequate information to participate in the investigation. Therefore, it was furnished with a copy of the complaint.

Turning to the timeliness issue, even accepting the Respondent's calculations, the investigation was commenced on the 22nd day after receipt of the complaint by MSHA. And that assumes that an investigation is not *commenced* until the investigator goes to the mine. It is well settled that the time limits set out in section 105(c) are not jurisdictional and that a discrimination complaint is only subject to dismissal "if the operator demonstrates material legal prejudice attributable to the delay." *Secretary on behalf of Hale v. 4-A Coal Co., Inc.*, 6 FMSHRC 905, 908 (June 1996). Here, the delay was at most seven days; not a serious delay. Furthermore, between MSHA's receipt of the complaint and the investigator's arrival at the mine, the Christmas and New Year's holidays intervened. Finally, the Respondent has not alleged any prejudice at all resulting from the delay.

Accordingly, the request that the case be dismissed on procedural grounds is **DENIED**.

Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he “has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;” (2) he “is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;” (3) he “has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;” or, (4) he has exercised “on behalf of himself or others . . . any statutory right afforded by this Act.”

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

There is no dispute that by filing a 103(g) compliant, Noakes engaged in protected activity or that he was discharged by Gabel Stone shortly thereafter. The issue is, then, whether Noakes' discharge was the result of his engaging in protected activity or whether he was terminated for a reason unconnected to the complaint, or, if it was associated with the complaint, whether he would have been fired for the non-protected activity alone. I find that the Complainant was discharged because of the complaint he filed, and that he is, therefore, entitled to relief under the Act.

Most of the pertinent facts are undisputed. On November 10, 1998, without discussing the matter with his boss, Noakes filed a 103(g) complaint with MSHA. He listed the following

hazards as needing to be addressed: (1) Lack of safety or first-aid meetings; (2) "Poorly guarded head and tail pulleys;" (3) "Working boulders in a running Jaw Crusher at least once a day, usually more often than that;" (4) "Exposed radiator fan and head pulley drive belts on roll crusher plant;" (5) "No ladder or hand rails on roll plant to get to where we start motor or engage clutch;" (6) "No ladder on little screening plant and exposed belts on screen drive motor and we do climb up there when running occasionally;" (7) "Only one fire extinguisher and it is on the fuel tank, none in the loaders;" and (8) "Loose boulders on down ramp into the quarry ready to fall at any time on wall side of ramp." (Comp. Ex. 4 at 3.)

As a consequence, on November 17, 1998, MSHA Inspectors Allan Studenski and Stanley Sturgill went to the mine to conduct an inspection based on the complaint. They presented Gary Gabel with a sanitized copy of the complaint which contained only a listing of the eight allegations set out above. (Comp. Ex. 5.) After Gabel read the summarized complaint, he was "really aggravated" and knew who had made the complaint. (Tr. 659.) He asked the inspectors for the name of the complainant and said that he was going to get rid of him.

Gabel then shut down operations at the mine and had all of the miners come up to the shop. He then went with the inspectors to inspect the mine. As they walked past the employees, Gable "handed [the complaint] to Johnny [Noakes] and I said, here, this might be yours" (Tr. 663.) Gabel and the two inspectors went down into the mine and began the inspection. During the inspection, Gabel said to the inspectors:

I want to know the name of the man that done [*sic*] this, and [Studenski] said, well, I can't do that, and I said, well, I think that I'm entitled by law — and I didn't really know anything about the law, but I said, I'm entitled — I should be entitled by law to have the man's name, and he said, what are you going to do, and I said, I'm going to fire him, and he just, no, no, don't do that, Gary, don't do that, so by then we had gone back up to the office then and I asked him again for the name

. . . .

And he said, you have miners' rights and he has the right to do this, and before you do anything drastic, you call Charles Sisk, and he went to his car and got the number. He brought this little yellow book in with miners' rights, and he said, read this; don't do that; do not fire anybody

(Tr. 664.)

Gabel called Charles Sisk, the supervisor of the MSHA District Office in Dallas, Texas, and Sisk advised him that if he fired Noakes for making a safety complaint, that under the Mine

Act Noakes could file a discrimination complaint against him. When the inspectors returned on November 18, Gabel told them that he had talked to Sisk and read the Miners' Rights handbook and knew that he could not terminate Noakes for filing the complaint. However, according to Inspector Sturgill, he also said, "that the guy was going to lose his job. He might have to wait awhile, a week or two, but, you know, that he was going to get rid of him." (Tr. 261.)

The week after the inspection was Thanksgiving week. On the Wednesday before Thanksgiving, Gabel told all his employees, except Noakes, that working on the Friday after Thanksgiving was optional. He did not give that option to Noakes, but instead told him:

that he ought to take the weekend, talk to his family, discuss it. I said, it's obvious you're not happy here; you need to discuss it with your family and decide what you want to do; if you want to stay here, we're going to have to make some changes. If you don't want to be here, I'll understand that you need to pursue something else

(Tr. 683.) When Noakes returned for work the following Monday, November 30, he and Gabel had a discussion in the shop. At the end of the discussion, Gabel told Noakes: "I'm going to give you some work up here in the shop, but I think it would be a good idea if you could look for another job" (Tr. 698.)

Noakes worked in the shop through Thursday afternoon, December 3. He left at 2:30 p.m. Gabel told him that since it looked like rain on Friday, he should call in to see if they were going to work. It did rain Friday and no work was done. On Sunday, December 6, when Noakes called him, Gabel told him: "I've made up my mind, just go ahead and bring in your uniforms in the morning and Joyce will have your check, and I said, give her an hour or so in the morning, you know, to get there and do the payroll, and I said, we need to just be done with it." (Tr. 703.)

Sometime later in December, or early January, Gable had a safety and health conference with Charles Sisk concerning the citations issued during the inspection that resulted from Noakes' complaint. During the conference they also discussed Noakes. Gabel informed Sisk that Noakes had quit his job. (Tr. 280, 745-46.)

The Respondent argues that Noakes' discharge was in no part motivated by his protected activity but rather by the manner that he performed his job in the shop and further, that if Noakes' protected activity did enter into the motivation for firing him, the Respondent had reasons to terminate him which were not protected and which occurred prior to, and after, the protected activity and would have resulted in his discharge as soon as a state highway department contract had been completed, whether the protected activity occurred or not. (Resp. Br. at 74, 77.)

Clearly, the reason for Noakes' termination rests with Gabel's intent or motivation at the time Noakes was fired. However, it is very hard to discern what a person is thinking. Since the very first discrimination cases it considered, the Commission has recognized this problem and has set out guidelines for determining motivation. Thus, it recently stated:

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.*

Secretary on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (September 1999).

The Complainant has clearly established a *prima facie* case of discrimination. That he engaged in protected activity is undisputed. That he was discharged is undisputed. Nor is it disputed that Gary Gabel had knowledge of the protected activity, he admitted that he knew Noakes had made the complaint, that Gary Gabel expressed hostility toward the protected activity, he admitted that he said to the inspectors that he would fire the person who made the complaint, or that there was a coincidence in time, less than three weeks, between the Gabel's learning of the complaint, November 17, and Noakes' discharge, December 7. The Respondent has failed to rebut the case by showing that Noakes was terminated solely for his unprotected activity and it has also failed to affirmatively establish that even though the protected activity provided some motivation for discharging Noakes, it would have discharged him anyway for his unprotected activity.

The company presented evidence, mainly through the testimony of Gary and Joyce Gabel, but also somewhat corroborated by Gabel Stone employees, Tommy Havens and David Cancel, that Noakes was on medical leave during the month of September 1998 and that when he returned on October 5, his attitude had changed and he became a poor employee. Some of the examples of his poor attitude given were his refusal to work on Saturdays, his failing to properly

weld a plate on the back of a bin to keep material from leaking out, his failure to check the battery terminals on his loader before complaining that it would not start, his leaving work early to babysit while his wife went to a medical appointment, his failure to properly build guards on the equipment associated with the new scalper, occasional lateness for work, his failure to complete assigned jobs and his generally acting sullen.

The Respondent asserted that it had determined to terminate Noakes prior to the November 17 inspection but had not done so because of a contract for chip rock awarded it by the state highway department. The contract was awarded sometime prior to November 4 and was canceled "the end of November, first of December." (Tr. 573.) The operator claimed that he wanted to fulfill the contract before letting Noakes go.

On its face, this argument is somewhat compelling. The problem is, however, that the facts suggest that this reason for Noakes' discharge was arrived at after the fact, when the company learned that Noakes had filed a discrimination complaint. By Gabel's own admission, other than asking Noakes if anything was wrong a few times and getting a negative response, he never counseled Noakes concerning his bad attitude or his poor work performance. He never took any disciplinary action for Noakes' alleged failures. He never had it indicated on the time cards that Noakes had been late for work. Furthermore some of these alleged failures turned out not to be failures at all. For instance, Noakes advised Gabel *prior* to the Saturdays he did not work of the reasons he would not be working and was excused.

Additionally, in early November the company shut down to put guards on the conveyors servicing the new scalper. Gabel assigned Noakes to perform this task because he considered him the best man he had for building guards. He had him perform this task essentially unsupervised. Between the time the guards were built and the inspection, Gabel apparently never inspected them or informed Noakes that they needed work. This assignment and trust are certainly inconsistent with the portrayal of Noakes as a poor performer.

Further, Noakes only worked in the shop for four days. By his own admission, he failed to complete one of the tasks assigned him. However, once again Gabel never so much as advised Noakes that he had not finished a job, let alone counseled or disciplined him for the failure. Even when he terminated Noakes, he did not tell him that it was because of his poor performance.

In addition to these reasons, there are several other factors which indicate that the company's professed reason for discharging Noakes is pretextual. The first is Gabel's anger and undisputed statement that he would fire the person who made the safety complaint. The second is his statement to the inspectors, even after he had been advised by both them and their supervisor that he could not fire someone who had made a safety complaint, that he would wait a

few weeks and then get rid of Noakes.⁴ A third is that Gabel encouraged Noakes to quit several times between the inspection and Noakes termination in an apparent attempt to avoid the consequences of firing him. A fourth factor is that Gabel did not assert at the hearing that the reason he fired Noakes was because the state contract had been canceled so he could finally take the action he had planned to all along.⁵ Finally, the fifth, and most significant, reason, is Gabel's statement to Sisk during the conference on the citations that Noakes had quit. This undoubtedly indicates guilty knowledge on Gabel's part that he should not have discharged Noakes for filing the safety complaint and was obviously an attempt to withhold that information from the man who had told him not to.

In conclusion, the Complainant has made out a very strong case that he was discriminated against, and the Respondent has failed both to rebut it or affirmatively defend against it. Consequently, I conclude that Noakes was discharged on or after December 3, 1998, in violation of section 105(c) of the Act and is, therefore, entitled to the remedies prescribed by that section.

Order

Having determined that Noakes was discharged unlawfully, it follows that he is entitled to the relief sought in his complaint. He is not seeking reinstatement, but he is entitled to back pay, reimbursement of any other reasonable and related economic losses or expenses incurred as a result of his discharge and to the expungement from his personnel file and company records of his discharge and all references to the circumstances involved in it. He may also be entitled to other damages. In addition, the company is liable for a civil penalty.

Accordingly, the parties are **ORDERED** to confer within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that the Respondent will undertake to carry out as remedies necessary to restore Noakes to the situation he would have occupied but for the discrimination, as well as the amount of civil penalty the Respondent will pay.⁶ If an agreement is reached, it shall be submitted within **30 days** of the date of this decision.

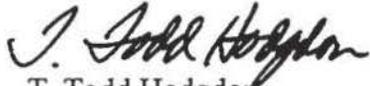
⁴ Gabel denied having made this statement. However, there is no reason not to believe Inspector Sturgill. He has no stake in the case, he did not investigate the complaint and he does not even work in that area of the country anymore. No evidence was presented that Sturgill was unworthy of belief. Indeed, when discussing credibility issues in its brief, the company does not even address this statement.

⁵ It is not clear from the evidence whether the contract had even been canceled at the time Noakes was discharged.

⁶ Such an agreement will not preclude either party from appealing this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief.⁷ With regard to disagreement concerning a civil penalty, the parties should propose an appropriate civil penalty based on the civil penalty criteria set out in Section 110(i) of the Act, 30 U.S.C. § 820(i), with a discussion of how the criteria apply in this case. *Secretary on behalf of Johnson v. Jim Walters Resources, Inc.*, 18 FMSHRC 552, 556-60 (April 1996). If a further hearing is required on the remedial aspects of this case, the parties should initiate a telephone conference call to set forth their reasons for such a request and to discuss setting a hearing date.

The judge retains jurisdiction in this matter until the specific remedies Mr. Noakes is entitled to are resolved and finalized. Consequently, **this decision will not become final** until an order granting specific relief, awarding monetary damages and assessing a civil penalty has been entered.


T. Todd Hodgdon
Administrative Law Judge

⁷ The proper method of calculating interest on back pay is: *Amount of interest=The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x the short-term federal underpayment rate. Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (December 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (November 1988). The applicable interest rates and daily interest factors may be obtained on the Internet at: www.nlr.gov/ommemo/ommemo.html.

Discrimination Complaint of (name(s))
John Noakes

Case Number

Summary of Discriminatory Action

I John Noakes am filing this discrimination complaint in pursuance to title 30 section 105(c) of the Federal Mine Safety And Health Act of 1977. In this complaint I will document the events which I believe were brought upon me as A result of my filing a complaint under title 30 section 103(g) of the Act. I sent the complaint to Mr. Feeney, the supervisor of the Rolla office. I described what I thought to be safety violations that needed immediate attention. As a result I was harassed, removed from my usual work-place and my hours were cut down and finally cut off. Gary Gabel has not yet told me if I was laid off, fired or suspended. The following is a chronological record of events which occurred after M.S. H.A. inspectors arrived at Gabel Stone Company on Nov. 17th, 1998.

Nov 17, 1998.

On Nov 17 my co-workers and myself were crushing rock when our drill operator Came down and told us to shut down and go to the shop. We waited at the shop for quite some time not knowing what was going on. Finally Gary Gabel (Owner/Operator) came out of his office, he looked very upset. He walked by all of us as he was headed to the hole and handed me the complaint form and said "is this yours." I did not reply. My co-workers and I stayed at the shop discussing the matter while Gary Gabel went with the inspectors down into the hole to Inspect. While we were eating lunch the inspectors drove by and said they would be back tomorrow to watch us work for awhile. A few minutes later Gary Gabel came from his office and told us there was nothing wrong in the quarry. He also said that none of the allegations were true. And that we could run, and if someone did not feel safe at this time they could leave now.

Nov 19, 1998.

On Nov 19 we started up as usual. As we were letting the engines warm up, Gary Gabel called all of us over to talk to us. He explained that he had nothing to hide and that we were to run like we normally do with the exception of me. He explained that I was to only load trucks and stockpile. He said that I was not to be on or around the other equipment. My job was to start the generator and bring it up to running voltage, start the screening plants and most of the time the roll crusher. Later that day A coworker mentioned that I should be careful that Gary Gabel was going to fire me for any reason.

Nov 20, 1998.

On Nov 20th at lunch period Gary Gabel came out of his office and explained to us that we would quit at two-thirty and since that we had quit at two-thirty on Thursday that would be forty hours. He then explained that we would no longer work forty-five hour weeks, because this inspection cost him quite a bit. He said we would no longer get to work overtime.

Signature(s) of Complainant(s)
Date

Nov 23, 1998.

On Nov 23d I was in the hole working on guards to cover some tail pulleys. Later that morning Gary Gabel came down to see how far along I was. He asked how I was getting along, then walked around like he was doing some serious thinking. He then started to describe to me how costly this inspection was and how it really kept the truck drivers from wanting to come to his quarry. He then gave me an example that included A good customer Steve Abby and how he was afraid to come back until the inspectors left. Later a co-worker said that Gary Gabel was telling the truck drivers that they did not have to come back that day if they did not want to. Later that day Gary Gabel again explained to everyone how costly this inspection was and how much business was scared off.

Nov 25, 1998.

On Nov 25th I found out what I believe to be the reason for the events on Nov 23rd. I discovered that Gary Gabel had said that he was going to sue me for malicious intent to do harm to his business. I also heard that Gary Gabel said he was going to approach me and offer me a chance to pay him five thousand dollars to let this go and if I didn't he was going to take everything I had and he wanted to see my family go hungry. I also heard that Gary Gabel called the Texas M.S.H.A. office and that he knew that it was me by what was said in the complaint. Toward the end of this day Gary Gabel called everybody together to talk to us. He explained that was absolutely sure that this was a deliberate attempt to hurt his business. He said he knew this because nothing was discussed with him before or after the inspection. He also said that he had left us to guard the devices in any way we thought necessary. This is not true he gave specific instructions on how he wanted these devices guarded and that we were NOT to even start guarding the surge bin head-pulley unless we had time to finish it. He continued to say that there was to much tension and that this business could not operate like this because everyone has had to watch there backs. He then made it clear that today would be the end of it. He then told Everyone who he had talked to earlier to come in Friday to work. I found later that this was everyone but me.

Gary Gabel then told me that he wanted to speak to me alone. We walked over to my loader to close up the doors. As we approached the loader Gary Gabel said that he wanted me to take the next two days, go home and discuss with my wife about what we really wanted to do about this. He said that he didn't like the tension and that he knew that I didn't like the tension. He repeated that I should really go home and talk things over with my wife. He then said that I could come in Monday morning and that Joyce Gabel would be there around 9:00 and that she could have my check ready and that I could drop my uniforms off. He said that if I wanted to work somewhere else that would be fine with him. And that if I wanted to stay there that things would have to change.

Nov 30, 1998

On Nov. 30th I arrived at the quarry, waited by the shop for a few minutes then went to the hole to fuel my loader. Gary Gabel drove down into the hole and talked to some co-workers, then drove out never saying a word to me. I decided to go to the shop and see what he had planned for the day. I asked what he wanted me to do today, he said he wanted me to talk to him. We went into the shop and sat down. Gary Gabel started the conversation by asking me what I was doing here today. I asked why wouldn't I be here? He said he really didn't expect me to show up today. He then said don't you feel the tension? I replied yes, but I came in with this complaint anonymously. You instantly assumed it was me and stirred things up. We then debated whether or not this was over safety matters or not. I explained that it was not just the safety violations but the safety attitude. I reminded him about him saying that he was going to take the guards off and that only a dumbass would get caught in a tail-pulley. I then said so you think I'm a dumbass because I was injured? He said yes John you are, you are a dumbass. He then explained that he'd been in the business so many years and never been injured. He asked me if I didn't feel safe in the hole? I explained that when I was running from plant to plant, crawling into a moving jaw, and shoveling under tail-pulleys that no I didn't feel safe. He then tried to convince me that I had been doing a poor job since Oct 12th. I asked him to explain why. He brought up the how I messed up the screening plant putting screens in wrong. This is not true, you can look at these screens how and there still wrong even after two other guys worked half a day on it, the screen deck has dropped to low, not my fault. He tried with a couple of more examples but they were not true. He then said so were stuck with each other. I said yes. He then told me not to go in the hole that he'd find me something to do up here in the shop.

Dec 01, 1998

On Dec 1st Gary Gabel told me to take off at 4:00 I was not finished with the loader bucket yet and to my knowledge everyone else worked until 5:00. Before leaving I asked Gary Gabel if he knew where my uniforms were, I had forgot to get them Monday. He replied that he had them and was going to keep them because this was probably my last week, that this was not going to work. I asked him what would happen on Friday, he said that he didn't know. He said he was going to give me some time to find another job. He said that if I didn't come with something that he might be able to find something for next week.

Dec 3, 1998

On Dec 3rd I worked on a dozer. When done I went to the office and asked Joyce Gabel if she would call down to tell Gary Gabel that I was done with the dozer and ask what he would like for me to do next? He called back saying that he did not have anything else for me to do and to just go ahead and go home. He also said he didn't know what tomorrow was gonna be like with the rain, for me to call in around 8:00 am and see what was going on. I left at 2:30 pm.

Dec 4, 1998

On Dec 4th I called Gary Gabel at the quarry to ask if he had anything for me to do. He replied that he didn't and that he didn't foresee anything next week, but to call him Monday or even Sunday evening and see if things had changed.

Dec 6, 1998

On Dec 6th I called Gary Gabel at his house to see what was planned for Monday. He said that there was nothing for me to do but I could get my check and bring the rest of my uniforms in.

Dec 7, 1998

On Dec 7th I went to the quarry around 11:30 to pick up my check and return the one uniform I had found. While Joyce Gabel was finding out how much my missing uniforms would cost Gary Gabel asked me into his office. He asked if I had found another job, told me he had seen some ads for work in the paper we then just talked normally for awhile. I eventually asked him what the deal was, if he was just cutting me off from work or firing me or what? He then said that he had nothing for me to do because I said that I didn't feel safe in the hole doing my job. I told him that I didn't say that, I was referring to before the safety matters were addressed, and since he limited me to the loader only I was fine with that. He repeated that he could no longer have me working in the quarry because I didn't feel safe. Gary Gabel then said that he remembered my saying that my friends turned their back on me at twin bridges sand and gravel, and now there were three men outside that didn't want anything to do with me and that two of them wanted to "beat your ass". He continued with asking if I had ever thought that the problem was me. I thought for a second then replied yeah it could be me, because I don't go for that sociological bullshit attitude of oh well that's just how it is, or just suck it up and drive on. Or maybe because I don't crawl into the back of someone's pocket just because they have money. I then said if your done with me I take my check and leave. He then said what Im about to say is for your benefit, I hope that after this that things are done between me and you. I replied no, I don't think so. He seemed to get upset and stood up. He then asked me when I thought I was going to get my settlement from my hand, I replied that it would be six months before I go back to the doctor, why? He said he was just curious, he then asked how much I thought I was gonna get, I replied not very much, but you'll not get it. I then asked for a receipt for my uniforms and left. I called back Tuesday the 8th and Wednesday the 9th he told me that he did not see anything for me for the rest of the week.

I am seeking backpay from the time I was discriminated against to until I find an equal paying job.

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