

## SEPTEMBER 2003

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**SEPTEMBER 2003**

No cases were filed in which review was granted during the month of September:

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



COMMISSION DECISIONS AND ORDERS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 5, 2003

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

v.

COUGAR COAL COMPANY, INC. and  
LESLIE B. COMBS, employed by  
COUGAR COAL COMPANY, INC.

Docket Nos. KENT 2000-133  
KENT 2000-277

BEFORE: Duffy, Chairman; Beatty and Suboleski, Commissioners<sup>1</sup>

DECISION

BY: Duffy, Chairman; Suboleski, Commissioner:

In this civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (the "Mine Act" or "Act"), Administrative Law Judge Avram Weisberger determined that a violation of 30 C.F.R. § 77.501<sup>2</sup> by Cougar Coal Company ("Cougar") was not a result of its unwarrantable failure nor was general mine manager Leslie B.

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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been delegated to exercise the powers of the Commission. Commissioners Mary Lu Jordan and Michael G. Young assumed office after this case had been considered and decided. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioners Jordan and Young have elected not to participate in this matter.

<sup>2</sup> Section 77.501 provides in pertinent part: "No electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person."

Combs liable under Mine Act section 110(c), 30 U.S.C. § 820(c),<sup>3</sup> for the violation. 24 FMSHRC 176, 178-81 (Feb. 2002) (ALJ). The judge also dismissed two citations alleging violations of 30 C.F.R. §§ 50.10<sup>4</sup> and 50.12.<sup>5</sup> *Id.* at 186-88. The Commission directed sua sponte review of the dismissal of the Part 50 violations. The Secretary of Labor subsequently filed, and the Commission granted, a petition for discretionary review challenging the judge's negative unwarrantable failure and section 110(c) determinations as well as the dismissal of the Part 50 violations. For the reasons that follow, we affirm in part and reverse in part.

I.

Factual and Procedural Background

Cougar operated an underground coal mine located in Johnson County, Kentucky. Cougar was one of several mining companies owned and operated by James Booth and Ted McGinnis. In June 1999, mining had terminated at Cougar Mine No. 8 and the equipment was being moved to another location. 24 FMSHRC at 176.

Combs, a general mine manager, was in charge of moving the equipment at Cougar. *Id.* at 177 n.1. On the evening of June 15, 1999, Combs instructed miner Paul Preece, who was not

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<sup>3</sup> Section 110(c) provides in pertinent part: "Whenever a corporate operator violates a mandatory health or safety standard, . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to . . . civil penalties."

<sup>4</sup> Section 50.10, entitled "Immediate notification," provides:

If an accident occurs, an operator shall immediately contact the [Department of Labor, Mine Safety and Health Administration ("MSHA")] District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Arlington, Virginia by telephone, at (800) 746-1553.

<sup>5</sup> Section 50.12, entitled "Preservation of evidence," provides:

Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

a certified electrician, to saw off a power cable leading to the power center<sup>6</sup> with a hacksaw the following day. *Id.* at 177, 179. Preece replied that he could save the line by ascending the A-1 pole and disconnecting the line at the cross-arm area. *Id.* at 179. Combs instructed Preece not to do that. *Id.*; Gov't Ex. 17. Combs further instructed Preece that if Coy Contractors, an independent contracting firm that handled electrical moves of power stations, was present at the site, Preece was to let its personnel disconnect the wire from the pole. 24 FMSHRC at 179. On the morning of June 16, 1999, Combs again instructed Preece to cut the high line at the entrance to the power center. *Id.* Preece once more suggested that he climb the A-1 pole to save the line, and Combs again told him not to do so. *Id.*; Tr. III 95-96.

A certified electrician had opened the three fused disconnects on the A-1 pole, so that by June 16, 1999, electricity was shut off to the high line cable and power center. Tr. I 96, 176-79; Tr. III 207, 257. However, the main line, which connected at the top of the disconnects, was still energized. Tr. I 96-100, 174-79; Tr. III 29-31. Later in the morning of June 16, Preece asked for, and was given, a "hot stick"<sup>7</sup> by the foreman at the Cougar site, Rick Jarvis. 24 FMSHRC at 180, 185. Preece and another miner, Pat Cantrell, rode in a boom truck and disconnected three capacitors<sup>8</sup> on a telephone pole located a distance from the power center, which Preece mistakenly believed disconnected all the power leading into the A-1 pole. *Id.* at 177; Tr. III 98-99.

Next Preece drove to the A-1 pole and climbed up the boom truck onto the pole. Tr. III 101; Jt. Stip. 10. In attempting to disengage the high line cable from the bottom of the disconnect structure, Preece's left arm inadvertently touched one of the live wires at the top of the disconnect structure. Tr. I 177-79; Tr. III 104-05; Gov't Ex. 22, at 10. As a result, Preece received a shock of 7,200 volts of electricity. 24 FMSHRC at 177. Preece fell a distance of approximately 18 feet. *Id.* at 177, 186; Jt. Stip. 11. Before landing on the ground, Preece hit his head on the edge of the power center. 24 FMSHRC at 177. He was found unconscious and without any pulse. *Id.* Jarvis administered cardiopulmonary resuscitation ("C.P.R.") to Preece and he revived. *Id.* at 177, 187; Gov't Ex. 16. Preece suffered lacerations to his head, serious

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<sup>6</sup> The power center or substation supplied electricity to the various underground equipment at the mine. 24 FMSHRC at 176-77. It was a portable unit, physically located on the ground. R. Ex. 5. The source of electricity for the power center was a high line cable extending from a utility pole above the power center ("A-1 pole"). 24 FMSHRC at 176-77. The high line cable, in turn, was attached to three high-voltage fused disconnect switches located on the middle cross-arm of the A-1 pole. *Id.* at 177. The disconnects work like switches, in that when they are opened and functioning properly, a visible gap is created that prevents power from flowing. Tr. I 46-48. Incoming power from the main circuit enters the top of the disconnects and outgoing power flows from the bottom. Tr. I 47.

<sup>7</sup> A "hot stick" is an insulated pole with a hook on its end, which is used to open or close disconnect switches. 24 FMSHRC at 180; Tr. I 52.

<sup>8</sup> Capacitors are electrical components that store electricity. Tr. I 171, 174-75.

burns, and a fractured vertebra in his neck. 24 FMSHRC at 177. Preece was taken from the mine site to the emergency department at a nearby hospital. *Id.* at 187. Later that day, Preece was transferred by helicopter to the burn unit at a hospital in West Virginia. *Id.*

Cougar did not inform the Department of Labor's Mine Safety and Health Administration ("MSHA") of the incident. *Id.* at 177, 186. MSHA became aware of it at approximately noon on the following day, June 17, 1999, when MSHA Inspector Donald Roby was inspecting another one of the McGinnis and Booth mines and miners told him what had happened to Preece. Tr. I at 30-37. Before MSHA investigated the incident, Cougar cut the high line, and moved both the power center and the boom truck that Preece was driving. 24 FMSHRC at 186. Cougar did not secure permission from MSHA before doing so. *Id.*

As a result of an investigation, MSHA issued a number of citations and orders. Of pertinence to the current proceeding on appeal, MSHA issued a section 104(d) order alleging a violation of section 77.501, and also alleged that Combs was liable under Mine Act section 110(c) for the section 77.501 violation. *Id.* at 177. MSHA also issued two section 104(a) citations alleging violations of sections 50.10 and 50.12. *Id.*

The matter proceeded to hearing before Judge Weisberger. The judge found that Cougar violated section 77.501 on the basis of a concession in its post-hearing brief. *Id.* at 178. He also determined that the violation was significant and substantial ("S&S"). *Id.* at 181-82. The judge credited the testimony of Combs that he did not instruct Preece to ascend the A-1 pole and disconnect the high line. *Id.* at 178-80. On that basis, the judge concluded that the Secretary had not established that Combs knowingly authorized, ordered, or carried out the section 77.501 violation, as provided under section 110(c) of the Mine Act. *Id.* Based on that analysis and finding no aggravated conduct on the part of foreman Jarvis, the judge determined that the violation was not caused by Cougar's unwarrantable failure to comply with the standard. *Id.* at 180-82. In addition, the judge found no violation of sections 50.10 and 50.12, both of which are triggered by an occurrence of an "accident." *Id.* at 186-88. He reasoned that because the Secretary failed to establish that an "accident" as defined in 30 C.F.R. § 50.2(h)(2)<sup>9</sup> occurred, the Secretary did not prove that sections 50.10 and 50.12 were violated. *Id.*

## II.

### Disposition

#### A. Mine Act Section 110(c) Liability

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil

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<sup>9</sup> Section 50.2(h)(2) defines "accident," in part, as "[a]n injury to an individual at a mine which has a reasonable potential to cause death."

penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

The judge found that Preece's action in ascending the A-1 pole and attempting to disconnect the high line cable violated section 77.501.<sup>10</sup> 24 FMSHRC 178. He further ruled that the Secretary failed to establish that Combs authorized Preece to climb the pole and disengage the line. *Id.* at 180. The judge's determination of no section 110(c) liability is based on his credibility determination that Combs expressly prohibited Preece on two separate occasions from ascending the pole. *Id.* at 179. The Commission has long held that a judge's credibility determinations are not to be overturned lightly and are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998). Additionally, two witnesses testified to hearing Combs's explicit prohibition that Preece not ascend the pole. Tr. III 84, 95-96.

Substantial evidence<sup>11</sup> further supports the judge's finding that Combs did not commit a

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<sup>10</sup> Our dissenting colleague states that Combs' instruction to Preece to saw the de-energized cable at the power station could be the basis for section 110(c) liability because there is no Mine Act requirement that an order, which might be violative if executed, be followed before a citation can issue. Slip op. at 12. We disagree. Section 110(c) is clear in premising individual liability on "knowingly ordered" violations of mandatory health and safety standards. 30 U.S.C. § 820(c). *See also* 30 U.S.C. §§ 814(a) and (d). Whether a supervisor's order establishes a violation is dependent on whether and how it is carried out. Premising section 110(c) liability on Combs' unexecuted order is too contingent and hypothetical, particularly in light of Preece's decision to ignore the order and climb the pole.

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

knowing authorization of the section 77.501 violation. Combs testified that he did not consider the cutting of the de-energized high line cable with a hacksaw while standing on the ground to be electrical work. Tr. III 255. Similarly, both MSHA Inspectors testified that cutting the cable with a hacksaw posed virtually no risk of injury. Tr. I 97-98; Tr. II 340. In addition, Preece's actions were aberrant and idiosyncratic. We agree with the judge that there is simply no evidence in the record that showed that Preece had on any occasion disregarded an order of a supervisor. 24 FMSHRC at 180. The record also showed that Preece had worked with Combs for six years. Tr. III 233. Hence it was not foreseeable that Preece would act contrary to the direct order of his supervisor. Cf. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 258-262 (Mar. 1988) (affirming judge's finding of no operator negligence when miner disobeyed order of a supervisor and caused a violation of Mine Act).

In sum, we affirm, as supported by substantial evidence in the record, the judge's dismissal of the section 110(c) violation against Combs.

B. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission determines whether conduct is aggravated in the context of unwarrantable failure by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy*, 14 FMSHRC at 1243-44; *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). Supervisors and foremen are held to high standard of care in an unwarrantable analysis. *Midwest Material*, 19 FMSHRC at 35. All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or

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U.S. 197, 229 (1938)). Under this test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The judge found that Preece's actions in ascending the pole violated section 77.501, but that Combs did not authorize Preece to undertake such an action. 24 FMSHRC at 178-80. As discussed in the preceding section, Preece's climb up the pole constituted unforeseeable conduct on the part of a rank-and-file miner. Under Commission precedent, the aggravated conduct of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure. *Martin Marietta Aggregates*, 22 FMSHRC 633, 636 & n.6 (May 2000); *Whayne Supply Co.*, 19 FMSHRC 447, 452-53 (Mar. 1997). However, an operator may be held responsible for an unwarrantable failure based on its own conduct. *Id.* As the Commission has stated:

[W]here a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct.

*Whayne*, 19 FMSHRC at 452-53 (quoting *S. Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("*SOCCO*") (emphasis omitted)).

Applying this doctrine, we note that Combs expressly prohibited Preece on two separate occasions from ascending the pole. 24 FMSHRC at 179. Nor was there any reason for Combs to believe that Preece would disobey his instructions or that he would need direct supervision because they had worked together for six years. Tr. III 233. We agree with the judge when he rejected the Secretary's argument that Cougar should have more closely supervised Preece. 24 FMSHRC at 180. As the judge found, "[t]here [was] no evidence to suggest that Preece had on any occasion, disregarded an order of a supervisor or had proceeded to act contrary to such an order." *Id.* Thus, we fail to find any aggravated conduct on the part of Cougar. See *SOCCO*, 4 FMSHRC at 1464-65 (providing that when rank-and-file miners knowingly behave in a manner contrary to safety instructions, their negligence is not imputable to the operator).

The Secretary claims that Cougar's violation should be deemed unwarrantable because of Combs' initial instruction to Preece to cut the line. S. Br. at 10-11. We are not convinced. As Cougar asserts (C. Br. at 9), had Preece followed the two explicit instructions of Combs, cutting the disconnected high line with a hacksaw would have posed no risk of danger to Preece. Even the Secretary's witnesses, Inspectors Bartley and Justice, testified that cutting the high line at the entrance of the power center would pose no risk of electrical shock. Tr. I 97-98; Tr. II 340. In light of the low level of danger associated with Combs' instruction, this is an inadequate basis to overturn the judge's determination that the violation was not a result of unwarrantable failure.<sup>12</sup>

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<sup>12</sup> In light of the fact that the Secretary does not argue on appeal that foreman Jarvis' actions contributed to an unwarrantable failure, we affirm the judge's finding that the Secretary failed to establish that a finding of unwarrantable failure could be based on Jarvis' actions. 24 FMSHRC at 181.

On the basis of substantial evidence in the record, we affirm the judge's determination that the violation of section 77.501 was not a result of unwarrantable failure.

C. Violations of Sections 50.10 and 50.12

The judge correctly determined that both section 50.10, requiring immediate notification, and section 50.12, requiring preservation of evidence, are triggered by an occurrence of an "accident." 24 FMSHRC at 186. "Accident" is defined in section 50.2(h)(2) as "[a]n injury to an individual at a mine which has a reasonable potential to cause death." The judge, applying the plain terms of section 50.2(h)(2), evaluated whether Preece's injuries had a reasonable potential to cause death. 24 FMSHRC at 186. He then summarized the parties' stipulations, stating that "Preece received an electric shock of exposure to 7,200 volts and as a result fell 18 feet . . . , and hit his head on the edge of the power center before hitting the ground; that he was found on the ground with no pulse . . . ." *Id.* at 186-87. We find that the judge did not need to continue his analysis beyond the stipulations. The record indicates that Preece did not have a pulse when he was found by foreman Jarvis. 24 FMSHRC at 177, 187; Gov't Ex. 16. Furthermore, we hold that the near electrocution, combined with Preece's 18-foot fall and the hitting of his head on the power center, had a reasonable potential to cause death per se. Because the record supports no contrary determination, we reverse the judge's conclusion and hold that an accident, as it is defined in section 50.2(h)(2), occurred. *Power Operating Co.*, 18 FMSHRC 303, 306-07 (Mar. 1996); *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993).

We are not persuaded by Cougar's assertion, and the judge's reliance thereon, that because Preece was conscious and alert when management personnel arrived at the scene, they could reasonably surmise that Preece's injuries lacked the potential to cause death. 24 FMSHRC at 188. Looking at the evidence after Preece was revived by C.P.R., the record does show that Preece was conscious and somewhat alert when he talked to Cougar high management official McGinnis as he was being taken by an ambulance from the mine site. Tr. III 245, 280-82. However, Cougar's assertion overlooks two important points. First, a Cougar foreman performed C.P.R. on Preece (Gov't. Ex. 16; 24 FMSHRC at 187), and so the knowledge that Preece lost his pulse is imputable to Cougar. *Capitol Cement Corp.*, 21 FMSHRC 883, 894 (Aug. 1999); *SOCCO*, 4 FMSHRC at 1463-64 (noting that "operators typically act in the mines only through such supervisory agents."). Second, and perhaps most significantly, the very fact that Preece needed C.P.R. indicates that his injury had a reasonable potential to result in death.

The Secretary rightly takes issue with the judge's legal test for determining whether an "accident" has occurred that distinguishes between the act of injury and the damages suffered as a result of the act. 24 FMSHRC at 186-87. The judge incorrectly discounted testimony relating to the "nature of the accident" or the "act of the accident" as irrelevant to the question of whether the injuries had a reasonable potential to cause death. *Id.* at 187. For example, Inspector Bartley testified that he never separated the accident from the injuries, but considered the whole picture: "I mean, you sustain the injuries in the accident. I don't know how you can separate." Tr. II 291. The judge also erroneously discredited the inspector's opinion on Preece's injuries and required that the Secretary furnish a medical opinion that Preece's injuries had a reasonable potential to cause death. 24 FMSHRC at 187-88.

In analogous circumstances, the Commission has long held that an opinion of an inspector is sufficient, by itself, to establish that a hazard had a “reasonable likelihood” of producing a “reasonably serious injury” under the analysis of whether a violation is significant and substantial (“S&S”). *Power Operating*, 18 FMSHRC at 306-07; *Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993). *Accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). In addition, in that S&S analysis, the Commission has recognized that “[a]s a practical matter,” the showing that a hazard was reasonably likely to produce an injury and the showing that the injury was reasonably likely to be reasonably serious “will often be combined in a single showing.” *Mathies Coal Co.*, 6 FMSHRC 1, 4 (Jan. 1984). If we were to accept the judge’s construction, a medical or clinical opinion of the potential of death would be needed before an accident is even determined to be reportable under section 50.10. Such a construction would serve to frustrate the immediate reporting of near fatal accidents. See *Donovan on behalf of Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 959 (D.C. Cir. 1984) (providing that the Mine Act should not be administered in a hypertechnical and purpose-defeating manner); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993) (rejecting judge’s construction that would thwart standard’s purpose and lead to absurd results). In the field, the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner’s chance of survival. The decision to call MSHA must be made in a matter of minutes after a serious accident.

This leads to the question of whether sections 50.10 and 50.12 were violated. The parties stipulated and the judge found that “[a]fter the accident [involving Preece], Cougar moved a boom truck and high-voltage power center from the accident site without first obtaining the permission of MSHA.” 24 FMSHRC at 186. The judge also found, based on stipulation, that after the accident the operator failed to notify MSHA immediately. *Id.* at 177. Thus, there is no dispute that Cougar violated sections 50.10 and 50.12. *American Mine*, 15 FMSHRC at 1834.

Cougar defends its failure to contact MSHA immediately on the grounds that the regulations are not clear in that Preece’s injury could fall under the definition of “occupational injury” set forth in 30 C.F.R. § 50.2(e), for which there is a ten-day reporting requirement.<sup>13</sup> We note that Preece’s injuries also fit the definition for occupational injury and therefore the potential exists for some confusion in the reporting requirements.<sup>14</sup> We do not perceive any lack

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<sup>13</sup> Section 50.2(e) defines “occupational injury” as “any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties . . . .” 30 C.F.R. § 50.2(e). Section 50.20 provides in pertinent part: “The operator shall mail completed [Mine Accident, Injury, and Illness Report] forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.” 30 C.F.R. § 50.20(a).

<sup>14</sup> According to the preamble to proposed Part 50, published twenty-five years ago in the Federal Register, all accidents must be reported immediately and that “[u]nder § 50.20 all accidents must be reported, as must all occupational injuries and illnesses, whether or not accident related” in writing within 10 days of their occurrence. 42 Fed. Reg. 55,568 (Oct. 17,

of notice on the part of Cougar here due to the per se nature of the accident. However, it would benefit the mining community if the Secretary would clarify when it is urgent to notify MSHA, when it is not, and what reports are required. It would be preferable to provide such clarification in the standards themselves. *See* n.14, *supra*.

In sum, we reverse the judge's dismissals and find violations of sections 50.10 and 50.12 based on undisputed record evidence. We remand to the judge for the assessment of penalties. On remand, if the judge perceives any confusion in the Part 50 reporting requirements, he should consider it as a mitigating factor for penalty purposes. *See King Knob Coal Co.*, 3 FMSHRC 1417, 1422 (June 1981) (providing that confusion caused by MSHA policy statements justified reducing element of negligence for penalty purposes).<sup>15</sup>

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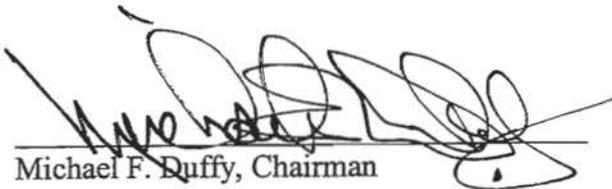
1977). Under the preamble, there appears to be a dual reporting requirement such that, even if one were to characterize an injury as an occupational injury, an operator would not be excused from immediately reporting it if it met the qualification of an accident as well. Nonetheless, this preamble does not appear in the Code of Federal Regulations, to which most operators refer.

<sup>15</sup> Because we conclude that an accident occurred on the basis of the record in this case, the Secretary's judicial notice request, seeking review of supplemental material showing that burns and fractures may result in death, is moot. *Sec'y of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1538 n.10 (Sept. 1997) (declining to address judicial notice request when no longer at issue).

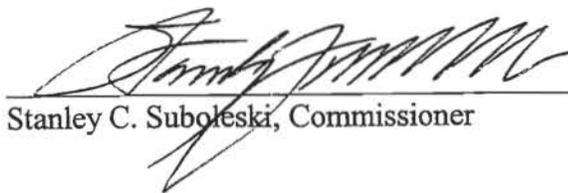
III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that Combs was not liable under section 110(c) and Cougar's violation of section 77.501 was not a result of unwarrantable failure. We also reverse the judge's dismissal of the violations of sections 50.10 and 50.12, find violations of those sections, and remand for the assessment of appropriate civil penalties.



Michael F. Duffy, Chairman



Stanley C. Suboleski, Commissioner

Commissioner Beatty, dissenting in part:

While I agree with my colleagues that we should reverse the judge's determinations that Cougar did not violate 30 C.F.R. §§ 50.10 and 50.12, I must respectfully dissent from the majority's decision to affirm the judge's unwarrantability and section 110(c) liability findings with respect to 30 C.F.R. § 77.501.

The record in this case suggests that much of the Secretary's case regarding the violation of section 77.501 focused on Preece's decision to climb the A-1 pole and attempt to disconnect the high line cable. In fact, this is exactly what the judge focused on in determining the violation was not unwarrantable and that Combs was not liable for it under section 110(c). 24 FMSHRC at 178-82. While this was one of the theories advanced by the Secretary, the record is very clear that the Secretary also presented evidence to support an alternative theory: that Preece would have also violated the regulation if he had followed Combs' instructions to cut the high line with a hacksaw. Had he followed through on this order, Preece would have been considered an unqualified person performing electrical work under the regulations. Tr. I 192-95, 218-22. Consequently, the Secretary advanced the theory at trial that the operator was in violation of section 77.501 on this point alone, and that the violation was unwarrantable, and that Combs was liable under section 110(c) because he had issued the order. S. Post-Hr'g Br. at 48-51.

In addressing this issue the judge did not analyze the unwarrantability and 110(c) issues in connection with Combs' decision to direct Preece to cut the high-voltage line with a hacksaw. See slip op. at 3 & n.6. The judge reasoned that since Preece did not follow through on Combs' order to cut the high-voltage line, the section 77.501 violation issued to Cougar was based only on Preece's climbing the A-1 pole. 24 FMSHRC at 179 n.2.

In my view, the judge's analysis on this point is flawed for a couple of reasons. First, I am unaware of any requirement in the Mine Act that a miner must actually carry out an order to violate a regulation before a citation can issue. It appears to me that such a requirement would have a significantly adverse impact on miner safety.<sup>1</sup> Second, while the order charging Cougar

---

<sup>1</sup> My colleagues rely on various Mine Act sections to conclude that "[w]hether a supervisor's order establishes a violation is dependent on whether and how it is carried out." Slip op. at 5 n.10. The legislative history of the Mine Act is clear, however, that miners are not to acquiesce to unsafe conditions but to take an "active part in the enforcement of the Act." S. Rep. No. 95-181, at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978). Moreover, under the majority's rationale that an unexecuted order cannot provide the basis for section 110(c) liability (slip op. at 5 n.10), even a supervisor issuing an order requiring a miner to engage in a serious violation of the Mine Act would be exempt from liability under section 110(c) so long as the miner refused to follow the order. I cannot agree with such an approach.

with the section 77.501 violation is by no means a model of clarity,<sup>2</sup> the record is clear that the Secretary provided Cougar with ample notice that she was also charging that Combs' instruction to Preece to cut the high-voltage line was a separate and distinct violation of section 77.501. Moreover, the record clearly establishes that the Secretary was also pursuing a finding of unwarrantability and section 110(c) liability against Combs in connection with the alleged violative condition. Tr. I 192-95, 218-22. Since that is all that was required of the Secretary in presenting her case (*see Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997)), the judge was required by Commission Procedural Rule 69 to consider and rule upon the Secretary's arguments in this regard. *See* 29 C.F.R. § 2700.69(a) (stating that a judge's decision "shall include all findings of fact and conclusions of law, and the reasons for bases for them, *on all the material issues of fact, law or discretion presented by the record*") (emphasis added).

On review, the Secretary is requesting reversal of the judge's unwarrantability and 110(c) findings based on the theory that Combs' order that Preece cut the high-voltage line violated section 77.501. S. Br. at 10-18. In fact, the Secretary's brief rests *entirely* on this alternate theory which she advanced during the trial. *Id.* Interestingly, Cougar's counsel, in his response brief, concedes that Combs instruction was a violation of section 77.501. C. Br. at 8-9.<sup>3</sup> Unfortunately, the judge did not address this issue in his decision. Given these facts, I cannot join my colleagues in the majority to affirm the judge on the issues of unwarrantability and 110(c) liability. Simply stated, the majority's decision to affirm does not address the issues raised by the Secretary, but instead addresses a theory of this case on which neither of the parties appear to disagree.

Thus, I think the need for a remand on the unwarrantability and 110(c) issues is plain. In my view, the Commission should not be making determinations on special findings regarding

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<sup>2</sup> The order issued to Cougar states:

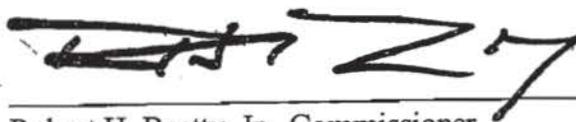
Electrical work, (disconnecting of a high-voltage cable) was being conducted on the surface area of the mine by a non-qualified person (electrical). The operator failed to de-energize and ground all lines supported on this pole while work was being performed. A serious accident occurred while an employee was conducting this work. There were no qualified electricians on mine property at the time of the accident. A certified mine foreman was within 100 feet, (in clear view) of the power pole where the work was being conducted. There was not an electrically certified person on mine property at the time of the accident.

Gov't Ex. 12.

<sup>3</sup> Cougar's counsel had previously conceded the same point at the hearing. Tr. I 223.

conduct that the judge should have addressed, but did not, in determining whether there had been a violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 362-64 (Mar. 2000) (remanding for determination of unwarrantability on all allegations of violative conduct despite judge's determination that violation he found was not unwarrantable). As the majority opinion demonstrates, to do so the Commission has to make the necessary findings of fact and conclusions of law on the matter in the first instance. This is not the Commission's role under the Mine Act. See *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

In light of my belief that remand is plainly called for in this case, I will not offer a critique of the substance of the majority's affirmance of the judge's unwarrantability and section 110(c) findings.



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 12, 2003

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. CENT 2002-80-M
ADMINISTRATION (MSHA)	:	CENT 2002-124-M
	:	CENT 2001-285-M
v.	:	CENT 2001-286-M
	:	CENT 2001-363-M
CACTUS CANYON QUARRIES	:	CENT 2001-364-M
OF TEXAS, INC.	:	CENT 2001-379-M

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

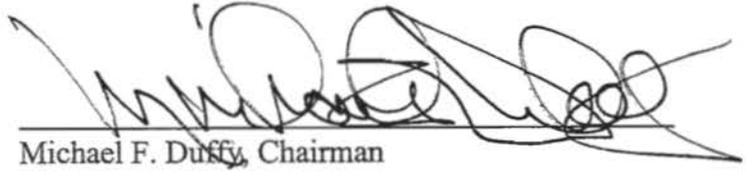
ORDER

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”). Cactus Canyon Quarries of Texas, Inc. (“Cactus Canyon”) has filed with the Commission a document styled “Petition for Discretionary Review” challenging an unpublished order issued by Administrative Law Judge Irwin Schroeder denying its motion to certify for interlocutory review an earlier order by the judge. In his earlier order, Judge Schroeder denied Cactus Canyon’s motion to dismiss the instant proceeding on the basis of the Secretary of Labor’s delayed proposed penalties and late-filed petitions for assessment. See 25 FMSHRC 164, 169 (Mar. 2003) (ALJ). The Secretary filed an opposition to Cactus Canyon’s petition with the Commission.

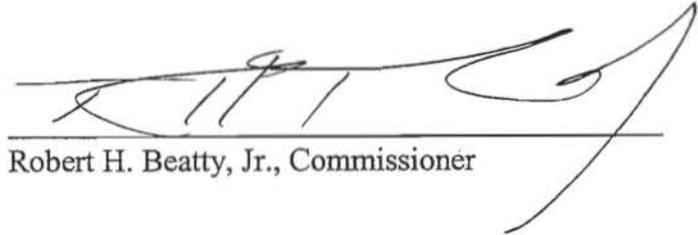
Although Cactus Canyon has styled its document as a “Petition for Discretionary Review,” the petition meets the requirements for filing a petition for interlocutory review under Commission Rule 76(a)(1), 29 C.F.R. § 2700.76(a)(1), and we therefore construe the petition accordingly. *Southmountain Coal, Inc.*, 16 FMSHRC 28 (Jan. 1994) (construing a pleading styled as a petition for discretionary review as a petition for interlocutory review).

Upon consideration of the pleadings filed by Cactus Canyon and the Secretary, the Commission, in its discretion, denies review of Cactus Canyon's petition. See 29 C.F.R. § 2700.76(a).



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Michael F. Duffy, Chairman



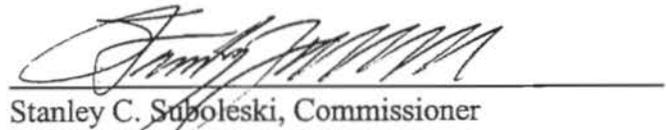
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Robert H. Beatty, Jr., Commissioner



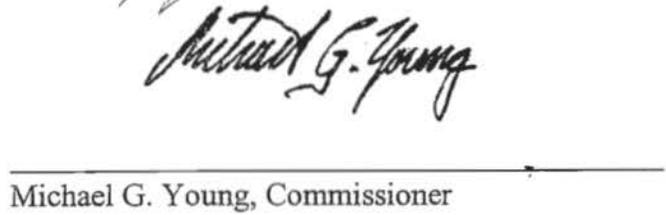
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Mary Lu Jordan, Commissioner



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Stanley C. Suboleski, Commissioner



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Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, NW, Suite 9500  
Washington, D.C. 20001

August 28, 2003

MARTIN COUNTY COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 2002-42-R
	:	Citation No. 7144401;10/17/01
	:	
	:	Docket No. KENT 2002-43-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Citation No. 7144402;10/17/01
Respondent	:	
	:	Docket No. KENT 2002-44-R
	:	Citation No. 7144403; 10/17/01
	:	
	:	Docket No. KENT 2002-45-R
	:	Citation No. 7144404; 10/17/01
	:	
	:	Preparation Plant
	:	Mine ID No. 15-05106
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDINGS
Petitioner,	:	
v.	:	Docket No. KENT 2002-261
	:	A.C. No. 15-05106-03570
	:	
	:	Docket No. KENT 2002-262
	:	A.C. No. 15-05106-03571
MARTIN COUNTY COAL CORPORATION,	:	
Respondent.	:	Preparation Plant
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
Petitioner	:	
v.	:	Docket No. KENT 2002-251
	:	A.C. No. 15-05106-03501 WNH
	:	
GEO/ENVIRONMENTAL ASSOCIATES,	:	
Respondent	:	Preparation Plant

**ORDER DENYING MOTION TO RECONSIDER  
DISMISSAL OF CITATIONS**

These cases are before me both on Petitions by the Secretary for the assessment of Civil Penalties for alleged violations of mine safety regulations as well as on Petitions by the mine operator and by a consultant to the mine operator to contest the issuance of citations for the alleged violations. A hearing was held in these cases, beginning on June 9, 2003. At the virtual end of the case to be presented by the Secretary, I granted, in part, a motion by the operator and the consultant to dismiss the Petitions by the Secretary for failure to present a sufficient *prima facie* case. The Secretary filed a motion to reconsider the partial dismissal. I deferred ruling on the motion to reconsider until the completion of the presentation of evidence by both sides after the completion of the second phase of the hearing which began on August 4, 2003.

I indicated on the record at the close of the presentation of evidence that I would deny the motion to reconsider. I stated the basic reasons for my decision to deny the motion and indicated I would incorporate those reasons in a written order that would be available to the parties for the purpose of preparing post hearing written arguments. Those written arguments are now due on October 3, 2003. The purpose of this order is to provide an explanation of the reasons for my decision.

#### **Citation No. 7144402**

This Citation alleges Respondent Martin County Coal Company violated 30 C.F.R. §77.216(d) by failing to comply with the approved impoundment plan for the Big Branch slurry impoundment in that Respondent failed to periodically “redirect” the slurry discharge along the seepage barrier created around the impoundment.

#### **Citation No. 7144409**

This Citation alleges both Respondents, Martin County Coal Company and Geo/Environmental Associates, violated 30 C.F.R. §77.216-3(d) by failing to include in the weekly impoundment inspection report for October 12, 2000, a list of all measures taken to abate hazards at the Big Branch slurry impoundment. Both the operator and the technical consultant are responsible for the weekly inspection report.

#### **Discussion**

##### **Slurry barrier sealing**

The Regulation which is the foundation for Citation No. 7144402 is simple in concept and language. It says every mine slurry impoundment must have a plan that has received the approval of the District Manager. Once the plan is approved the plan must be followed. In some sense this regulation puts the District Manager in the position of umpire, calling balls and strikes as plans are submitted for approval, rather than an author or developer of plans. The fact remains, however, that MSHA is the regulator of slurry impoundments and the District

Manager's approval results in a regulation (also known as a plan) that imposes requirements and limitations on the construction, operation and maintenance of the impoundment. The MSHA District Manager is not required to perform the detailed engineering work necessary to draft a plan, but is in a position to require changes in the plan down to size of pipe or placement of commas. The plan becomes the regulation for purposes of MSHA enforcement.

The Secretary, in requesting reconsideration of my initial dismissal of this Citation, has pointed to a decision by Judge Barbour in *Consolidation Coal*, 18 FMSHRC 1189, 1226 (July, 1996) as standing for a general rule that the operator that submits a plan for MSHA approval remains the author of the plan to the extent the language is unclear. Two problems are immediately apparent in the position taken by the Secretary. First, Judge Barbour's decision was subsequently vacated by the Commission, 20 FMSHRC 949 (Sept., 1998) albeit on other grounds. Second, Judge Barbour is clear in that case that he is applying an exception to the usual rule of interpretation of documents in order to prevent imprecise draftsmanship from producing a meaning to a document which is inconsistent with the overall safety objectives of the MSHA regulatory program. Only if it was clear that Martin County Coal Company's position was inconsistent with the overall safety objectives of the Mine Safety Act would Judge Barbour place the interpretative burden on the operator. As the ultimate approving authority for the impoundment plan, MSHA is responsible for any ambiguities it could have resolved prior to approval.

The theory of liability pursued by the Secretary under this Citation is very specific and detailed. The theory of liability is directly connected to the theory used by the Secretary to explain the impoundment failure of October 11, 2000. The Secretary's argument proceeds in these steps:

1. The regulation, 30 C.F.R. §77.216 requires the operator to comply with the approved impoundment plan;
2. The approved impoundment plan requires the operator, once the seepage barrier is completed, to direct fine coal refuse along the seepage barrier by periodically redirecting the discharge of the fine coal slurry;
3. The discharge of the fine coal slurry was not appropriately redirected along the seepage barrier so as to prevent the impoundment failure through piping internal erosion as the Secretary has hypostasized;
4. The impoundment failed on October 11, 2000, because fine slurry was not redirected along the seepage barrier as required by the regulation.

This argument requires, for it to be effective, that the phrase "periodically redirecting" had a meaning well understood by prudent mining engineers in 1994 that would require actions by the mine operator as now thought necessary by the Secretary. This is not a question of "notice" of the meaning asserted by the Secretary. Lack of notice would be an affirmative defense by the operator if the Secretary successfully completed a *prima facie* case. My conclusion was that the Secretary never completed a *prima facie* case because the Secretary never

established that prudent mining engineers in 1994 would have understood “periodically redirecting” the fine coal slurry discharge to mean the kind of impoundment operation which the Secretary now contends was necessary to prevent impoundment failure in the manner it occurred on the Big Branch portion of the Martin County Coal Company mine.

It is important that the Secretary’s theory of how the impoundment failure of October 11, 2000, occurred implies a deficiency in the impoundment seepage barrier. But there was no evidence that anyone was contemplating this particular failure mechanism at the time the impoundment sealing plan was approved. Even the Secretary’s impoundment design expert, Richard Almes, testified that the phrase “periodically redirect the slurry discharge” had no established technical meaning in 1994 or in 2000. The slurry discharge methods that the Secretary alleges were required under the 1994 plan were far from standard industry practice in impoundment management. His testimony is consistent with that of the MSHA impoundment inspector. The inspector testified he was familiar with the 1994 plan and had visited the impoundment 3 or 4 times a year between 1994 and 2000. It never occurred to him that the slurry discharge methods used by Martin County Coal Company were insufficient. This testimony represents interpretation of the 1994 plan through conduct rather than an attempt to estop the Secretary as a result of long delay in asserting an argument. The Secretary is not subject to estoppel in her pursuit of public safety.

The Secretary argues at some length that an operator of a coal slurry impoundment is obligated to produce the purpose of the impoundment plan through what ever means the operator may choose. Since the purpose of the 1994 plan was to prevent impoundment failures, goes the argument, the operator clearly did not do enough of the right things. Such an argument misstates both the general legal status of an approved impoundment management plan as well as the language of the plan approved for the Big Branch impoundment. The regulation requires an impoundment operator to manage the impoundment as specified in the approved plan as approved. If the plan is written in specific operational terms, the impoundment needs to be managed in those specific terms. On the other hand, if the plan is written in terms of goals and objectives without specific operational requirements, then the operator is free to use what ever methods are congenial so long as the goals and objectives are met. But here the plan was specific and operational. The Secretary failed to established a violation of those requirements and I have no choice but to dismiss the claim and vacate the Citation.

### **Inspection Report**

The regulation concerning weekly inspection reports is likewise very simple. The regulation requires a report at least every seven days by a qualified person. The report must include, among other things, a report of the action taken to abate hazardous conditions. The day following the October 11, 2000, impoundment breakthrough the impoundment inspector that normally conducted the 7 day examinations visited the impoundment and prepared a report of his visit on the usual form. The Secretary contends the inspector did not satisfy the requirement of the regulation to report actions taken to abate hazardous conditions.

The only hazardous condition at the impoundment on the morning of October 12, 2000, established in this record was the impoundment breakthrough. The inspector's report notes very tersely that the impoundment breakthrough had been plugged. The Secretary utterly failed to offer any evidence that would tend to show this report was inadequate compliance with the regulation. Counsel for the Secretary "argued" at some length that the inspector could have said a great deal more than the hole had been plugged. But he did not offer record proof of any requirement for the inspector to have said more. I cannot find anything in the text or context of the regulation which suggests the inspector was required to do more than note the hazard abatement actions as he did. The record does not support a conclusion that the regulation was violated in any way of October 12, 2000. The Citation must be vacated.

### Order

For the reasons given above, the motion to reconsider is denied and Citations 7144402 and 7144409 are vacated and the pending Civil Penalty Petitions to the extent based on those Citations are **DISMISSED**.

  
Irwin Schroeder  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

September 2, 2003

EDDIE M. JEANLOUIS, SR.,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2002-279-DM
v.	:	SC MD 2002-04
	:	
MORTON INTERNATIONAL,	:	Weeks Island Mine & Mill
Respondent	:	Mine ID 16-00970

**DECISION ON LIABILITY**

Appearances: Toni K. Jeanlouis, St. Martinsville, Louisiana, for the Complainant;  
Willa B. Perlmutter, Esq., Patton Boggs, LLP, Washington, DC for the  
Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on August 30, 2002, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(3) (1994), by Eddie M. Jeanlouis, Sr. (Jeanlouis) against Morton International (Morton).<sup>1</sup> The provisions of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1) protect a miner's right to express safety related concerns. Section 105(c)(1) provides, in pertinent part, "No person shall . . . in any manner discriminate against . . . any miner . . . because such miner . . . exercise[d] . . . any statutory right afforded by this Act."

The hearing in this matter was conducted in Lafayette, Louisiana, on May 20 and May 21, 2003. Jeanlouis' wife, Toni K. Jeanlouis, who is not an attorney, represented him at the hearing. The parties filed post-hearing briefs.

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<sup>1</sup> Jeanlouis' complaint which serves as the jurisdictional basis for this matter was filed with the Secretary of Labor (the "Secretary") on November 20, 2001, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Jeanlouis' complaint was investigated by the Mine Safety and Health Administration (MSHA). On July 1, 2002, MSHA advised Jeanlouis that its investigation did not disclose any section 105(c) violations. On August 30, 2002, Jeanlouis filed his discrimination complaint with this Commission which is the subject of this proceeding.

## **I. Statement of the Case**

This case requires resolving whether Jeanlouis' March 10, 2001, warning to Dalton Alleman, a temporary and inexperienced loader operator, is protected activity. Jeanlouis alleges his statements are protected because they were uttered in response to Alleman's unsafe loader operation. Morton admits Jeanlouis' suspension was motivated by Jeanlouis' confrontation with Alleman. However, Morton asserts Jeanlouis' behavior was not protected because it was motivated by Jeanlouis' desire to cause a work slowdown. Consequently, on March 23, 2001, Morton suspended Jeanlouis for two weeks without pay. Jeanlouis seeks relief from the suspension.

As discussed herein, to prevail a complainant must demonstrate that he engaged in protected activity, and, that the adverse action complained of was motivated by that activity. Jeanlouis need only prove that his March 10, 2001, behavior was protected since Morton admits this behavior was the reason for Jeanlouis' suspension.

For the reasons discussed below, the preponderance of evidence demonstrates Jeanlouis' behavior was protected because it was motivated by his concern for safety rather than a desire to encourage a work slowdown.<sup>2</sup> I reach this conclusion for several reasons. Namely: (1) the information provided to Morton by Alleman, who did not testify, is not credible; (2) Jeanlouis had no motive to cause a work slowdown since the company did not maintain accurate production statistics for each loader operator prior to March 10, 2001; (3) Jeanlouis had never been warned about his production; (4) Jeanlouis did not encourage any other loader operator to slow down; and (5) company policy encourages employees to warn other employees about unsafe practices. Consequently, Jeanlouis' discrimination complaint shall be granted since his suspension was motivated by protected activity.

## **II. Preliminary Findings Of Fact**

### **a. Background**

The Weeks Island Mine and Mill located near Lafayette, Louisiana is a mining complex owned and operated by Morton International. The complex includes an underground salt mine located on Weeks Island. The underground mine is operated in three shifts: the day shift from 7:00 a.m. to 3:00 p.m.; the evening shift from 2:30 p.m. to 10:30 p.m.; and the graveyard shift from 10:00 p.m. to 6:00 a.m. The shifts overlap so that the mine is covered throughout the day. Employees work on rotating shifts.

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<sup>2</sup> Having concluded that Jeanlouis' suspension was motivated by his March 10, 2001, protected activity, I have not addressed the significance, if any, of Jeanlouis' complaint about overcasts, or, his request for light duty due to a neck injury that occurred when his loader bucket hit an overcast. An overcast is an irregularity in the mine floor.

At this underground facility, cutters and drillers cut the floor and drill holes for blasting. After the holes are loaded and the face is shot, loader operators in 988 Caterpillars muck the loose salt from the area. The loader operators are followed by scalers, who scale loose material from the ribs and face. The loaders re-enter the area to clean the cuts after which the entire process begins again.

Loader operators haul salt from the floor, ribs and face to the feeder where the salt is conveyed to a stockpile before being hoisted to the mill. The distance from the face to the feeder varies from approximately 50 to 100 yards. The loaders haul the salt in entries approximately 20 feet high and 50 feet wide. There is a two-way traffic pattern in the entries. Thus, loaders pass each other while traveling in opposite directions. Caterpillar 988 loaders travel the entries in second gear at approximately seven to 14 miles per hour. The maximum speed of a 988 Caterpillar is 21.8 miles per hour. To promote safety, Morton encourages employees to speak directly to other employees if they are observed doing something that is unsafe. (Tr. 253-54, 372-73).

On or before March 10, 2001, the loader operators kept track of their daily trips from the face to the feeder by recording each trip on a manual counter or "clicker." Load counts were based on an honor system with no means of company verification. (Tr. 242-43, 393-94). Although the company was developing a new tracking system for measuring loader operator productivity, Charles Edward Young, Morton's Facility Manager, admitted that statistics were not available to employees in March 2001, and that Jeanlouis had never been warned about his productivity. (Tr. 602-06, 610-12).

b. Eddie Jeanlouis

Jeanlouis has been employed at the Weeks Island underground mine since May 1994. He was hired as a general laborer, he was promoted to a scaler, and he ultimately became a loader operator. Jeanlouis has had several mishaps during his nine year tenure at Morton that were not attributed to misconduct. In December 1994, Jeanlouis upended his loader onto its bucket. In August 1999 he drove his loader over a power center. Finally, in January 2001 his loader rolled over, reportedly because of a hole in a bench and low tire pressure. None of these incidents resulted in injury and Jeanlouis was never disciplined. (Tr. 546).

Dalton Gary, a Morton loader operator for approximately 20 years, has known Jeanlouis for almost ten years. (Tr. 273). Gary, and Lynel Wilson, the union's chief steward, both opined that Jeanlouis was not the type of employee that was capable of intimidating another employee. (Tr. 282, 302-03). Gary believed that Jeanlouis did not have a history of disciplinary problems. (Tr. 275). Finally, with respect to productivity, Gary opined Jeanlouis' load count was the same as the other loader operators. (274-75).

Morton management personnel repeatedly testified that Jeanlouis was a good employee. For example, Derek Christian, the third shift supervisor who has been employed by Morton for 21 years, testified Jeanlouis was a good employee who had never been disrespectful or insubordinate. (Tr. 228). Christian stated, to his knowledge, Jeanlouis had never been reprimanded. (Tr. 227). Christian testified that he was surprised Jeanlouis had been suspended because he did not believe Jeanlouis said “[w]hat he was alleged to have said to [Alleman]. . . . I base my opinion on [Jeanlouis’] work ethic on my shift.” (Tr. 231-32). Finally, Christian testified that he never had any problems with Jeanlouis’ productivity as a loader operator. (Tr. 232-34). Leonard Olivier, the day shift supervisor who has been a Morton employee for 33 years, testified he has never had any complaints about Jeanlouis’ work performance. Olivier, consistent with the testimony of Christian and Gary, also opined Jeanlouis’ productivity as a loader operator was “average.” (Tr. 392).

As Facility Manager, Young is responsible for overseeing everything that occurs at the Weeks Island plant site including production and operation at the underground mine. Young is responsible for safety, quality control and customer service. Charles Justice, the Human Resource Manager, reports to Young. Young testified that, with the exception of the March 10, 2001, incident, “Mr. Jeanlouis appears to be a good employee. He’s had no incidents at all that I’m aware of . . . And, you know, I don’t really have anything bad to say about him.” (Tr. 595). Young conceded that Morton did not have any concerns about Jeanlouis’ temperament. (Tr. 656).

c. Dalton Alleman

Dalton Alleman was subpoenaed to testify by Jeanlouis. Alleman appeared on the morning of the hearing and requested to be released from the subpoena. In support of his request, Alleman submitted a letter from Dr. J. B. Falterman, Sr., dated May 19, 2003, indicating Alleman was not a candidate for court proceedings because he was on medication for anxiety and that he had recently been released from the hospital. Both parties agreed that Alleman should be excused from testifying. (Tr. 6-7).

At the time of the in March 2001 incident, Alleman was a relatively new employee who was training to become a loader operator. (Tr. 84-86, 309-10, 595-96; Comp. Ex. 7). Without specifying the date, Christian stated that he once warned Alleman to slow down his operation of a loop truck. (Tr. 229-30). Gary and Wilson also testified they were aware of instances when Alleman was observed operating equipment at excessive speeds. (Tr. 276-78, 280, 309-11).

Company officials stated Alleman was “volatile” and that he had “erupted vocally a couple of times.” (Tr. 543-44, 659-60). Approximately six months after Jeanlouis’ suspension, Alleman was suspended from October 13 through October 20, 2001, for reckless operation

of a Gator after he “bumped” a fellow employee’s Gator.<sup>3</sup> At the time of the incident, Alleman was involved in an altercation with the other Gator operator. At that time, Aleman was referred for anger management sessions. (Tr. 535-43). Alleman was again referred for anger management classes in April 2002. (Tr. 657-61).

d. The March 2001 Incident

On March 10, 2001, Jeanlouis worked the day shift, and Alleman and Wendell Chambers, a powderman, worked the evening shift. Alleman approached Jeanlouis as Jeanlouis was parking his loader at the end of his shift. Jeanlouis testified that he and Alleman had almost collided the previous week when Alleman operated his Caterpillar 988 loader in high gear around a corner at a high rate of speed passing between Jeanlouis and the beltline. (Tr. 83-84). Jeanlouis stated he told Alleman:

You need to slow down. You’re driving the loader too fast. . . . you and I almost got in a collision . . . about a week before this.

(Tr. 82).

Jeanlouis stated Alleman replied “you can’t tell me how to run a loader.” (Tr. 82-83). Jeanlouis testified he answered:

Well Dalton, I’m not trying to tell you how to run a loader. All I’m asking you just to be safe. Just watch yourself. I mean be safe for yourself and the other employees.

(Tr. 82-83).

At the beginning of the March 10, 2001, evening shift, Chambers was at his locker, approximately 10 feet away from Jeanlouis and Alleman. (Tr. 329). The loader was parked between the locker and where Jeanlouis and Alleman were speaking. (Tr. 324-25, 328-29). Chambers was the only person who overheard any portion of the conversation. (Tr. 464-66). Chambers testified he overheard Jeanlouis tell Alleman “to slow down” and that “you’re making us look bad.” (Tr. 325-27). Chambers indicated “[he had] no idea what [Jeanlouis] meant by that, by what he said.” (Tr. 327-28). Chambers stated, “there was nothing else I overheard.” (Tr. 326). Chambers testified he did not overhear any reference to “load counts” in the conversation. (Tr. 331). Chambers stated neither Jeanlouis nor Alleman was threatening the other. (Tr. 325). Morton does not contend that Jeanlouis encouraged any of the other loader operators to “slow down.” (Tr. 680).

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<sup>3</sup> A Gator is a four-wheel mine transportation vehicle manufactured by John Deere.

e. The Investigation

Alleman reported his March 10 conversation to Leonard Olivier, the day shift foreman. Unlike Chambers who opined that the conversation was non-confrontational, Olivier related Alleman told him Jeanlouis “was in my face.” Alleman told Olivier:

Mr. Jeanlouis jumped all in my face and jumped in my shit about how much salt I’m hauling and how fast I’m hauling the salt saying I’m making other operators look bad.

(Tr. 368).

Olivier was upset that Jeanlouis talked directly to Alleman without going through management. Olivier told Alleman:

Well let me point out one thing to you, if that is the way the conversation went, it shouldn’t have went like that. Eddie or nobody else has the right to dictate to you or anyone else how to perform your job. We train you in order to do a job and to do it as efficiently as possible. We train you as a loader operator. If you progress well, you’re doing pretty good as a loader operator, and unless myself or the other foremen have a problem with the way you’re operating the loader, no one is to dictate to you or anybody else how to perform the job. You need to go ahead and continue doing your work as well as possible and as well as you see fit, and, if we see a problem, we’ll address the problem with you.

(Tr. 372).

Shortly after talking to Alleman, Olivier asked Jeanlouis if he “[told] Alleman anything about him running the loader too fast, hauling too much salt and making the other operators look bad.” (Tr. 373-74). Jeanlouis replied that “I didn’t tell Alleman nothing like that. I told Alleman he was running that loader too fast. It was like he was running that loader in third gear.” (Tr. 374). Olivier replied:

Well, okay. The only thing I want to point out to you , I don’t know what exactly went on between you and Mr. Alleman, but it’s not your job or anybody else’s job to dictate to the other people on their efficiency of their work . . . . We don’t need that kind of stuff going on between employees.

(Tr. 374-75).

After speaking to Jeanlouis, Olivier learned that Alleman had also complained about Jeanlouis to Lane Hendricks, Morton's Mine Production Superintendent. Hendricks requested Olivier to document his conversations with Alleman and Jeanlouis so the company could "pursue it." (Tr. 376). On March 19, 2001, Olivier prepared written notes of his conversations. The notes were recorded several days after Olivier spoke to Alleman and Jeanlouis. (Comp. Ex. 3). In the final analysis, Olivier opined that "it was one word against the other." (Tr. 379).

On March 14, 2001, the matter was brought to the attention of Charles Justice, Morton's Human Resource Manager by Dan Schmidt, Morton's Mine Manager. Schmidt informed Justice that Alleman had told Olivier that Jeanlouis had confronted Alleman "about the number of loads [Alleman] was hauling." (Tr. 443). Significantly, as noted, Chambers did not report overhearing any remarks about load counts. (Tr. 331).

Justice began his investigation on March 16, 2001, when he interviewed Alleman. Alleman told Justice that Jeanlouis had confronted him, that it was a rather heated discussion, that Jeanlouis told him to slow down the number of loads he was hauling, and, that he was making others look bad. Alleman alleged Jeanlouis said, "you get a hundred today, they'll want 110 or 120 tomorrow. If you don't get it, they'll have you up there in front of a kangaroo court." (Tr. 447). Justice made notes of his interview with Alleman. (Resp. Ex. 5). The allegations by Alleman to Justice about 'load counts and a kangaroo court' are inconsistent with Olivier's testimony and notes that do not reflect that Alleman initially made these allegations. (Tr. 368; Comp. Ex. 3).

On March 16, 2001, shortly after interviewing Alleman, Justice interviewed Chambers because Alleman stated Chambers had witnessed the conversation. (Tr. 454). Chambers told Justice, "I heard a little, what I got was Eddie telling Dalton he needed to slow down, he was going too fast with loads. He (Dalton) was trying to make everyone look bad." (Resp. Ex. 6). Although Chambers did not interpret what he had overheard, Justice concluded what Chambers overheard had to do with load counts not safety. (Tr. 459-60). Chambers testified he did not tell Justice that he overheard anything said "about load counts." (Tr. 330-31; Resp. Ex. 6).

After interviewing Alleman and Chambers, Justice concluded he was investigating charges of harassment and encouraging a work slowdown. (Tr. 461-62). Article I, section 1.6E of the union contract with the International Chemical Workers Union Council gives Morton the unqualified right to discipline or discharge employees engaging in a work slowdown. (Resp. Ex. 8).

On March 19, 2001, Justice held a fact finding meeting with Jeanlouis, Schmidt, Hendricks, personnel officer Myra Russo, and union representative Frederick Williams. At the meeting Jeanlouis continued to maintain that he told Alleman to slow down because he was operating unsafely. (Tr. 118). Justice told Jeanlouis he violated section 1.6 of the bargaining agreement because "you can't tell a fellow worker to slow down, no way, no how, on salt." (Tr. 118-19). Jeanlouis was informed he was suspended and he was immediately escorted off of the island by a security guard. (Tr. 119).

In a disciplinary letter dated March 23, 2001, Jeanlouis was advised that Morton concluded he had encouraged a work slowdown in violation of the Collective Bargaining Agreement by verbally intimidating Alleman in an attempt to coerce Alleman to reduce the number of loads he hauled per shift. Consequently, Jeanlouis was suspended without pay for two weeks. He was permitted to return to work as of Monday, April 2, 2001. (Comp. Ex. 7).

### **III. Further Findings and Conclusions**

#### **a. The Timeliness Issue**

Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), provides that any miner “who believes that he has been . . . discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint of discrimination with the Secretary alleging such discrimination.” The subject adverse action is the imposition of Jeanlouis’ two week suspension on March 23, 2001. The 60 day filing period specified in section 105(c)(2) ended on May 23, 2001. Jeanlouis initially filed his complaint with the Secretary on November 20, 2001, approximately six months late.

Morton sought dismissal of Jeanlouis’ complaint as untimely during the pre-trial phase of this proceeding. During pre-trial conferences, I advised Morton that the Commission has previously determined the 60 day filing period specified in the statute is not jurisdictional, and, that in the absence of a showing of prejudice, a late filing may be excused. *See Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff’d mem.*, 750 F2d 1093 (D.C. Cir. 1984). However, I deferred ruling on Morton’s motion until after the hearing to provide Morton an opportunity to argue in support of dismissal in its post-hearing brief. (Tr. 30-31).

The Commission has concluded that “a miner’s genuine ignorance of applicable time limits may excuse a late filed discrimination complaint.” *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984). Jeanlouis is represented by his wife, who is not an attorney. Although the explanation for Jeanlouis’ late filing is not well articulated, Jeanlouis asserts he was unaware of his miner’s rights under the Act. (Resp. Ex. 2). Jeanlouis’ assertion is supported by fellow loader operator Dalton Gary who testified he was not familiar with his miner’s rights although he has been employed by Morton for 23 years. (Tr. 282-83). Finally, Young testified he was unaware of any previous discrimination cases brought against the company during the last 15 years. (Tr. 627-28). Thus, it is reasonable to conclude that Jeanlouis was unaware of the filing deadline specified in the Mine Act.

Having concluded Jeanlouis was unfamiliar with the filing requirements, the focus shifts to whether Morton has been prejudiced by Jeanlouis’ six month delay. *Sec’y of Labor on behalf of Hale v. 4-A Coal Co.*, 6 FMSHRC 905, 908-09; (June 1984); *Sec’y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905 (June 1986); *Sec’y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov.1994); *Sec’y of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1325 (Aug. 1996). Morton argues:

[if Jeanlouis'] complaint had been timely filed and [the] matter proceeded on ordinary schedule, Mr. Alleman's problems would never have come to the court's attention . . . . it would be grossly inappropriate now to penalize Morton because of Mr. Jeanlouis' unilateral delay. Had the complaint been filed within the required time frame and prosecuted in accordance with the usual schedule, the trial could well have taken place in the late summer or early fall of 2001- before Mr. Alleman's anger management issues had developed.<sup>4</sup>

(*Resp. Mem. Of Law*, p.6).

Thus, Morton views Jeanlouis' untimely filing as prejudicial because it resulted in the exposure of adverse facts that occurred after Jeanlouis' suspension. The consideration of relevant evidence that comes to light because of a hearing delay does not give rise to a claim of legal prejudice. Rather, Jeanlouis' filing delay was fortuitous because it provided a better opportunity to weigh the conflicting accounts of the March 10, 2001, confrontation. Accordingly, Morton's motion shall be denied. *Nantz*, 16 FMSHRC at 2214-15 (failure to meet time limits in sections 105(c)(2) and 105(c)(3) should not result in dismissal, absent a showing of "material legal prejudice").

b. Analytical Framework

As the complainant in this case, Jeanlouis has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Jeanlouis must establish that he engaged in protected activity, and the aggrieved action was motivated, in some part, by that protected activity. See *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Ordinarily, a mine operator may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Since Morton concedes Jeanlouis' suspension was motivated by his interaction with Alleman, Morton's rebuttal is limited to establishing that Jeanlouis' March 10, 2001, activity was not protected. Determining whether Jeanlouis engaged in protected activity has two components. The first, is resolution of the differing accounts of the March 10, 2001, incident which presents a question of fact. After resolving the contextual nature of what Jeanlouis said, the remaining issue is whether the remarks constitute protected activity which is a question of law.

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<sup>4</sup> Morton notes that this case was further delayed by Jeanlouis' efforts to retain counsel. Although Jeanlouis did retain counsel, his counsel withdrew and he ultimately prosecuted his complaint himself. (*Resp. Mem. Of Law*, fn.4).

c. Jeanlouis' Prima Facie Case

As noted, Jeanlouis only has the burden of proving his March 10, 2001, activity is protected since Morton's motivation is not in issue. Jeanlouis' testimony is direct evidence. It is supported by the character evidence provided by Christian (Tr. 227-28, 231-32), Olivier (Tr. 392), Gary (Tr. 282), Justice (Tr. 546), Wilson (Tr. 302-03) and Young (Tr. 656). Jeanlouis' characterization of his conversation with Alleman is also supported by Chambers who did not overhear anything said about load counts. (Tr. 331). Jeanlouis' testimony is further supported by Morton's admission that Jeanlouis had no motive to encourage a work slowdown since he was not privy to productivity statistics, and, he had never been warned about his productivity. (Tr. 602-06, 610-12). Finally, Jeanlouis' assertion that he was motivated by safety is supported by the undisputed fact that there is no evidence that Jeanlouis encouraged any other loader operator to "slow down." (Tr. 680). Thus, Jeanlouis has presented a *prima facie* case that he engaged in protected safety-related activity.

d. Morton's Rebuttal Case

i. Communication of Complaint

Having presented a *prima facie* case, the burden of going forward shifts to Morton. As an initial matter, Morton argues that even if the confrontation was about safety rather than productivity, the confrontation does not constitute protected activity because Jeanlouis did not communicate his complaint directly to Morton. (*Resp. Mem. of Law*, fn.1). On the contrary, Jeanlouis did communicate his complaint to Morton when he discussed his complaint about Alleman with Olivier, a supervisory agent. Nevertheless, the issue is Morton's knowledge of the alleged protected activity. It is immaterial that the mine operator learned of the alleged protected conduct indirectly.

Moreover, the expression of safety related concerns among miners is consistent with the type of protected activity contemplated by the Mine Act. *Sec'y on behalf of Bernardyn v. Reading Coal Co.*, 22 FMSHRC 298, 309 (March 16, 2000) (dissenting opinion) *citing* S. Rep. No 95-181, at 36 (1977), *reprinted* in Senate Subcomm. On Labor, Comm. On Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (Act's anti-discrimination provision should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation"). Suspending a miner for expressing safety concerns to a fellow miner would create a chilling effect on a miner's willingness to point out safety problems. In fact, Morton encourages employees to discuss safety concerns with each other. (Tr. 372-73).

## ii. Independent Business Judgement Issue

Morton also relies on the Commission's decision in *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), to assert that its suspension of Jeanlouis is a business decision that is entitled to deference. *Chacon* and its progeny hold that Commission Judges should not substitute their business judgment for that of the mine operator concerning whether a particular adverse action was "just" or "wise." The line of cases in *Chacon* limits the Commission's inquiry to whether the adverse action was motivated by an independent business decision that was unrelated to protected activity. For example, the termination of a miner for absenteeism or insubordination ordinarily will not be disturbed by the Commission even though the miner has a history of engaging in safety related activity, provided the mine operator demonstrates the termination was independently motivated by a legitimate business justification.

Morton's reliance on *Chacon* for the proposition that I should defer to Morton's business judgment in this case is misplaced. To defer to a mine operator on whether a particular activity is protected would eviscerate the anti-discrimination provisions of section 105(c), as well as trivialize the Commission's role as a disinterested adjudicative body. Whether a miner's conduct constitutes protected activity is a question of law that can only be determined by the Commission.

## e. Resolution of the Protected Activity Issue

### i. Probity of Alleman Hearsay

Morton's assertion that Jeanlouis' conduct is not protected because he purportedly encouraged Alleman to 'decrease his load count to avoid a kangaroo court' is based on hearsay evidence since Alleman did not testify. Hearsay evidence is admissible in Commission proceedings as long as it is material and relevant. *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (March 1998) (citations omitted).

However, hearsay testimony is entitled to little weight if it is surrounded by inadequate indicia of probativeness and trustworthiness. *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135-36, (May 1984). The credibility of Alleman's hearsay statements has been compromised by his conduct. Alleman asserted Jeanlouis was "in his face." However, Morton described Alleman as "volatile," and it required Alleman to attend anger management classes in October 2001 and April 2002. (Tr. 543-44, 657-61). Alleman denies that he was operating equipment unsafely as Jeanlouis charged, however, Morton suspended Alleman in October 2001, for reckless operation of equipment. (Tr. 535-43). Moreover, Gary (Tr. 276-78, 280), Christian (Tr. 230), and Wilson (Tr. 309-11), testified they were aware of instances when Alleman was observed operating equipment at excessive speeds. Thus, unlike Jeanlouis, Alleman has a history of employee misconduct.

Moreover, hearsay evidence is not probative if it is without corroboration, and if it lacks circumstances that lend to its credence. *Id* at 1136. Alleman's "kangaroo court" allegation was not corroborated by Chambers who testified he did not overhear any discussion of load counts. In addition, the "kangaroo court" remark reported to Justice on March 16, 2001, was not reported by Alleman to Olivier following the incident. Alleman simply told Olivier that Jeanlouis' warning was limited to 'slow down because you are making us look bad.' Moreover, Alleman's hearsay lacks credence in that the evidence reflects Jeanlouis had no apparent motive to encourage a work slow down.<sup>5</sup> On the other hand, Alleman had a motive to misrepresent Jeanlouis' warning to avoid disciplinary action for his alleged unsafe loader operation.

Morton has failed to demonstrate that Jeanlouis made any statements that clearly reflected an attempt to encourage a work slowdown. This conclusion is consistent with Olivier's testimony that indicates that, initially, the major issue was Jeanlouis' failure to speak to management instead of speaking directly to Alleman. What started as Jeanlouis' failure to go directly to management quickly escalated to charges that Jeanlouis encouraged a work slowdown. Such a charge provided Morton with the unfettered right to discipline Jeanlouis under the Collective Bargaining Agreement with little opposition from the union. (Tr. 118-19). In the final analysis, the evidence only supports that Jeanlouis told Alleman "to slow down, you're making us look bad." Having resolved the factual issue concerning the statement's content, the remaining question of law is whether the statement, when viewed in context, is protected.

Morton has expressed puzzlement, incredulity and surprise that Jeanlouis would attempt to incite a work slowdown. In this regard, Facility Manager Young was admittedly "puzzled" why Jeanlouis would encourage a work slowdown given the lack of productivity reports. (Tr. 618). Human Resource Manager Justice testified, it ". . . was a strange thing, . . . why would [Jeanlouis] have been concerned about the number of loads." (Tr. 544-45). Finally third shift supervisor Christian could not believe "[w]hat [Jeanlouis] was alleged to have said to [Alleman]," and he "was somewhat surprised" that Jeanlouis was suspended. (Tr. 230-32). Thus, the evidence, when viewed in context, demonstrates that it was unlikely that Jeanlouis was trying to encourage a work slow down.

As Olivier opined, "it was one word against the other." (Tr. 379). On balance, it is more likely that Jeanlouis was attempting to warn Alleman, who was training to become a loader operator, not to try to impress management by operating at a higher speed than the other loader operators. In other words, the credible evidence reflects that Jeanlouis' conduct was protected because it was motivated by a concern for safety rather than by a concern over productivity.

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<sup>5</sup> Young concedes Jeanlouis had no reason to be concerned about his productivity. (Tr. 602-06, 610-12). However, Young speculated Jeanlouis' statements may have been motivated by a desire for overtime. (Tr. 579). There is no evidence to support such speculation, especially since Jeanlouis did not encourage other loader operators to slow down.

Assuming, *arguendo*, Jeanlouis' statement, "slow down, you're making us look bad," was also motivated by his unprotected desire for a work slowdown, a significant portion of Jeanlouis' warning concerned safety issues. After all, the goal was for Alleman to operate more slowly. If Alleman had not been operating faster than the other loader operators, the comments Morton seeks to attribute to Jeanlouis would be senseless. Subordinating productivity to promote safety is a fundamental goal of the Mine Act. The Commission has concluded, when a significant portion of a conversation concerns safety, it is protected even if unprotected statements are uttered during the same conversation. *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 839-40 (May 1997).

As a final matter, Morton asserts Alleman's personnel problems are irrelevant because they came to light after Jeanlouis was suspended. Morton's relevancy objections were overruled because the evidence is relevant as it pertains to Alleman's credibility. (Tr. 537-39, 656-62). The ultimate issue is not, as Morton suggests, whether it had a good faith reasonable belief in March 2001 that Jeanlouis did not engage in protected activity. Rather, the proper question is whether Jeanlouis' March 2001 activity was protected. A just resolution of this question requires the beneficial use of hindsight. As Young, Morton's Facility Manager, candidly conceded, "[if] this happened today, . . . perhaps I [would] look at [it] a little different, yes, sir, I would." (Tr. 660-61).

To prevail, a complainant need only show that the adverse action complained of was motivated by protected activity. The failure of a mine operator to recognize the protected nature of the activity is not a defense. Accordingly, Jeanlouis' complaint shall be granted because his two week suspension was motivated by his protected activity.

### **ORDER**

In view of the above **IT IS ORDERED** that Eddie M. Jeanlouis, Sr.'s discrimination complaint concerning his suspension without pay for the two week period preceding his return to work on April 2, 2001, **IS GRANTED**.

This Decision on Liability is an interim decision. It does not become final until a Decision on Relief is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer **before September 19, 2003**, in an attempt to reach an agreement on the specific relief to be awarded. If the parties agree to stipulate to the appropriate relief to be awarded they shall file a Joint Stipulation on Relief **on or before September 26, 2003**. An agreement concerning the scope and amount of relief to be awarded shall not preclude either party from appealing this decision.

If the parties cannot agree on the relief to be awarded, the parties **ARE FURTHER ORDERED** to file, **on or before October 3, 2003**, Proposals for Relief specifying the appropriate relief to be awarded. For the purposes of calculating relief, the parties are encouraged to stipulate to an average weekly salary, including overtime. If the parties cannot reach a joint stipulation, the parties should furnish documentation, such as payroll records, pay stubs or tax returns, to support their average weekly pay calculation. After Petitions for Relief are filed, I will confer with the parties to determine if there are disputed factual issues that require an evidentiary hearing.

Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act. Consequently, the Secretary shall be provided with a copy of this decision so that she may file a petition for assessment of civil penalty with this Commission.



Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

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/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

September 5, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2003-16
Petitioner	:	A. C. No. 46-05868-03596
	:	
v.	:	
	:	
U.S. STEEL MINING CO., LLC,	:	
Respondent	:	Pinnacle Prep Plant

**DECISION**

Appearances: James F. Bowman, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Mt. Hope, West Virginia, on behalf of Petitioner;  
Anthony F. Jeselnik, Esq., U.S. Steel Mining Company, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against U.S. Steel Mining Company, LLC (“U.S. Steel”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a single violation of a regulation requiring the reporting of mine accidents, illnesses and injuries, 30 C.F.R. § 50.20(a), and proposes a civil penalty of \$55.00. A hearing was held in Beckley, West Virginia. For the reasons set forth below, I find that U.S. Steel did not violate the regulation, as alleged, and vacate the citation.

Findings of Fact

On May 12, 2002, David Martin, a miner employed by U.S. Steel at its Pinnacle Preparation Plant, reported to the Mine Safety and Health Administration (“MSHA”) that he had suffered an occupational injury two months earlier, on March 11, 2002, and that U.S. Steel had refused to submit a report of the injury to MSHA. Robert Blair, an MSHA inspector, reviewed MSHA’s files and determined that no report of the injury had been submitted. He visited the plant on May 13, 2002, spoke to management officials, and determined that, on March 14, 2002, Martin reported to U.S. Steel that he had suffered an occupational injury on March 11, 2002. U.S. Steel did not submit a report of occupational injury to MSHA because it believed that Martin was not injured at the mine. Blair entertained U.S. Steel’s explanation for reaching that

conclusion, but determined that U.S. Steel failed to prove that a reportable occupational injury had not occurred.

Blair issued Citation No. 7211045, citing U.S. Steel for violating 30 C.F.R. § 50.20(a), which requires that mine operators report occupational injuries to MSHA within ten working days after they occur.<sup>1</sup> He described the violation in the “Condition or Practice” section of the citation as follows:

The operator fail[ed] to submit to the District Office a 7000-1 Form, in the required 10 working day [period], for an accident that happen[ed] on 03/11/2002, but was not reported to mine management until 03/14/2002. This was a lost time accident.

Ex. P-1.

Blair determined that the reporting violation was unlikely to result in an injury, that it was not significant and substantial, that it affected one person and that it was the result of the operator’s moderate negligence. A civil penalty of \$55.00 is proposed for the violation.

#### The Alleged Injury

Martin had been employed by U.S. Steel for over 30 years. He had a good attendance record and had suffered no previous lost-time work injuries. On March 11, 2002, he was assigned to clean the coal load-out area, which required that he open and close water valves located at the bottom of the raw coal silo. That area was dimly lit and its floor was covered with spilled coal ranging in depth from one to three feet. Martin testified that about 10:30 a.m., as he walked across the coal spillage to reach a water valve, his head struck a steel rod projecting from another valve. His protective “hard hat” was knocked off and he fell against a tank. He felt a “small burning or tingling sensation” in his neck, and rubbed it. He did not experience any pain, thought that he was “OK,” and went back to work. Tr. 38-39. He did not report to management that he had been injured.<sup>2</sup> About 1:30 p.m., he was experiencing a severe headache and shortness of breath. He determined that he could not continue working, and called Alan Couch, a fellow miner, and asked to meet with him. Couch was a certified emergency medical technician (EMT),

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<sup>1</sup> The term “occupational injury” is defined in the regulations, 30 C.F.R. § 50.2(e), as follows:

(e) *Occupational injury* means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties or transfer to another job.

<sup>2</sup> U.S. Steel had a policy that all work injuries are to be reported immediately. Ex. P-7.

and was frequently consulted when miners suffered injuries.

Martin met Couch at a nearby building, where Couch stored some medical equipment in a locker. Ray Green, another miner, was also present. Couch examined Martin and measured his blood pressure, obtaining a disturbingly high result of 198/125. A second test administered approximately 10 minutes later produced similar results, 198/120. Couch believed that he asked Martin the history of his symptoms, but does not recall anything unusual being said. Martin did not tell Couch about hitting his head, and did not complain to Couch about neck or shoulder pain. Tr. 63-64, 107. Couch was concerned that Martin's blood pressure was high. Green told Martin that he should see a doctor before he suffered a heart attack or stroke, a comment that caused Martin to become concerned because his father had died of a brain aneurism. Couch and Martin agreed to meet on the hour for the remainder of the shift, to monitor Martin's blood pressure. After Couch departed, however, Martin decided that he would seek medical attention rather than return to work.

Martin called his wife, who checked with a doctor and advised him that the doctor was available to see him. Martin proceeded to the office of shift foreman Thurman Chapman and told him that he needed to see a doctor because his head hurt, his blood pressure was high, and he was short of breath. He did not state or indicate in any way that he had hit his head or suffered an occupational injury. Tr. 42-43, 138. Chapman later reported that Martin told him that he had been suffering from headaches for several days. Tr. 124-25. Martin denied making such a statement. Tr. 59, 62. Martin stated that if he did not come to work the next day, he would take a "personal day" off. Under the union contract, miners have five personal days that they can take off during the year, with pay. If they provide reasonable notice, they are virtually entitled to take the day off. Management has very little control over their use of personal days.

When Martin left the mine, he drove to the office of Dominador Lao, M.D. His blood pressure was measured at 174/102, and he complained of severe headache, sinus pressure, a sore throat and sinus headaches. Tr. 44; ex R-1. Dr. Lao did not testify at the hearing, and his notes in the medical records are largely illegible. However, his nurse's notes of Martin's complaints are clear and reflect that Martin did not mention hitting his head or suffering a work-related injury, which Martin acknowledged. Ex. R-1; tr. 75. Martin did not return to work, and has not worked since March 11, 2002.

That evening, Couch called Martin's home and spoke to him about 7:00 p.m. Couch was upset with Martin for not telling him that he was leaving and was going to "chew him out."<sup>3</sup> During that conversation, which Martin does not recall, he told Couch that he had hit his head

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<sup>3</sup> When Martin did not meet Couch for the follow-up blood pressure check, Couch tried to reach him by radio and became concerned when Martin failed to respond. Thinking that Martin might have lost consciousness, Couch searched for him. When he returned to his locker to change the battery in his radio, Couch encountered an electrician who told him that Martin had left to seek medical attention.

while working in the coal silo. Tr. 97. This was the first time that Martin had mentioned to anyone that he had suffered a work-related injury.

On March 12, 2002, Martin underwent a computed tomography examination (CT scan) of his head and cervical spine. The results of the test were unremarkable, i.e., minimal degenerative changes from the C4 to C7 level and some spurring encroaching on the neural foramina at the C5-6 and C6-7 levels. Ex. P-4. Dr. Lao was notified of the results. On March 13, 2002, Martin again saw Dr. Lao, who re-examined him and discussed the results of the CT scan. Dr. Lao told Martin that it was possible that he had a ruptured vertebra and a pinched nerve, and asked him if he had hit his head or neck at work. Martin, for the first time, made a connection between the March 11 incident and his current symptoms, and told Dr. Lao about hitting his head on the valve in the coal silo area. Dr. Lao asked whether an accident report had been submitted and Martin replied in the negative. Dr. Lao prepared a report, which Martin took to the plant that afternoon.

#### U.S. Steel's Decision Not to Submit an Accident Report

The next day, March 14, 2002, Martin went to the mine and requested that an accident report be prepared for him. He was referred to Barry O'Bryan, coordinator of outside services. Martin told him of the March 11 incident and that Dr. Lao thought that he might have a pinched nerve. O'Bryan declined to submit a report, in part, because Martin had left the mine without reporting the incident.<sup>4</sup> O'Bryan noted that some people have non-work related accidents and then try and get workers compensation coverage, and told Martin that he would likely get compensation, but that U.S. Steel would protest it. A union official later referred Martin to MSHA, and his visit to MSHA's office on May 12, 2002, triggered Blair's inspection the following day. Martin, in fact, did receive workers compensation benefits, although U.S. Steel's challenge to his claim apparently has not been finally resolved.

O'Bryan refused Martin's request to initiate an internal U.S. Steel report of an accident because he did not believe that Martin had been injured at the plant on March 11, 2002. As he explained at the hearing, "the stories were so contradictory, I refused." Tr. 140. In three days, the story had changed "radically" from a "sickness with blood pressure problems to an accident." Tr. 142. Donald Presley, Respondent's safety manager, testified that he did not submit an occupational injury report to MSHA because he, too, believed Martin's claim was false, a conclusion shared by other U.S. Steel managers.

Their joint conclusion was based upon several factors. First, Martin did not report the injury when it occurred. Second, he had not told Couch or Green that he had suffered an injury when Couch, an EMT, examined him for purposes of assessing his physical condition. As O'Bryan explained, "If I'm going to an EMT and hit my head, I'm going to tell the EMT,

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<sup>4</sup> O'Bryan declined to prepare an internal U.S. Steel report of injury, which would have been forwarded to its safety manager, Donald Presley. Presley was responsible for preparing and submitting MSHA injury reports and workers compensation reports.

especially if my head is hurting.” Tr. 148. Third, Martin had not told Chapman that he had suffered an injury during their fairly lengthy conversation on March 11, 2002. Fourth, Chapman reported that Martin had said that he had been suffering from headaches for several days, indicating that they were not brought about by an injury suffered that day. Fifth, Martin had requested a personal day off if he did not appear for work the next day. Personal days are highly valued because management has very little control over their use. Most miners hoard their personal days so that they can use them when regular vacation days would generally not be approved, e.g., holiday weeks, hunting season, or other times when many miners might want to take leave. Tr. 155-58. As O’Bryan explained, “I have never – I’ve been a manager for 26 years. I have never had a union employee tell me to give him a [personal] day if he’s had an accident. I mean, it just totally wouldn’t happen. You don’t take [personal] days.” Tr. 156. He was also highly skeptical of the fact that Martin’s injury report was made after he had seen Dr. Lao, who was “pretty well known as a workmens comp doctor.”<sup>5</sup> Tr. 149. O’Bryan testified that he “believed absolutely” that Martin’s version of events was changed by his visit to Dr. Lao and that Dr. Lao’s involvement “had a lot to do” with the decision. Tr. 149, 166.

### The Citation

Blair visited the preparation plant on May 13, 2003, and met with O’Bryan. Presley, the safety manager, participated by phone. O’Bryan and Presley told Blair that they didn’t believe that Martin had suffered an injury at the mine. While he did report on March 14, that he had been injured on March 11, they stated that, on March 11, he reported only that he had a headache and high blood pressure and left work to consult a doctor. Tr. 13, 22. Blair apparently accepted Martin’s claim at face value.<sup>6</sup> He concluded that there had been a “lost time accident,” that no report had been filed within the prescribed time, and issued the citation. He testified that he issued the citation because Presley and O’Bryan offered “no evidence whatsoever” to support their conclusion that Martin was not injured at the mine. Tr. 14. “They did not prove” that Martin did not sustain an occupational injury on March 11, 2002. Tr. 19.

### Conclusions of Law - Further Factual Findings

### The Applicable Law

The Secretary has the obligation to prove each element of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d.*, *Secretary of Labor v. Keystone Coal Mining Corp.*,

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<sup>5</sup> O’Bryan testified that, in the previous three years, the plant had experienced over 30 cases of compensation claims based upon carpal tunnel syndrome, nearly half of the work force, and that “the vast majority of those cases went through Dr. Lao. He is pretty well know as a Comp doctor.” Tr. 149.

<sup>6</sup> Blair testified that he didn’t investigate Martin’s claim. Tr. 20.

151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). In order to establish that U.S. Steel violated 30 C.F.R. § 50.20(a), the Secretary was obligated to prove that an occupational injury occurred,<sup>7</sup> and that U.S. Steel was aware of the injury and failed to report it to MSHA within the required time period. It is undisputed that Martin reported an injury to U.S. Steel on March 14, and that U.S. Steel did not report the injury to MSHA. The critical issue, which is hotly contested, is whether Martin suffered an occupational injury at U.S. Steel's mine on March 11, 2002.

### The Alleged Occupational Injury

Martin testified that he sustained an injury when he struck his head while working in the coal silo. Medical records also lend support to his claim. Dr. Lao's largely illegible records indicate that when prompted on March 13, 2002, Martin told him about striking his head on March 11. A magnetic resonance imaging (MRI) examination performed on April 8, 2002, disclosed a herniated cervical disk with compression of the left nerve root, a condition not inconsistent with his claim. Ex. P-5. A medical consultant retained in conjunction with Martin's workers compensation claim concluded in a July 17, 2002, report that Martin "sustained a significant injury to his cervical spine in the [March 11] work related incident." Ex. P-6, p. 3.

Other facts, largely undisputed, suggest that Martin did not suffer an injury at the mine. Particularly troubling is his failure to mention striking his head to Couch or Dr. Lao. He

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<sup>7</sup> Respondent argues that the citation refers to an "accident," and since this incident clearly was not an accident, as defined in the regulations, the citation should be vacated. See 30 C.F.R. § 50.2(e). This argument is rejected. Blair's inappropriate use of the word "accident" in the body of the citation was not misleading, because it is clear from the references to a 10 day reporting period and a "lost time" incident, that the citation was issued for failure to report an occupational injury. Respondent also argues that the Secretary has failed to prove that Martin suffered an occupational injury, as that term is defined in the regulations. In order to establish an occupational injury, the Secretary must prove that a miner suffered an injury at a mine, for which he received "medical treatment," as opposed to diagnostic tests, or that prevented him from performing his normal work duties on a day following the injury. 30 C.F.R. § 50.2(e); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148 (Nov. 1989); *Consolidation Coal Co.*, 11 FMSHRC 966, 972 (June 1989). Martin suffered from a very serious chronic medical condition, high blood pressure, for which he received considerable medical treatment, and which most likely played a major role in his inability to work after March 11, 2002. Neither party presented expert medical testimony on the causation issues, i.e., whether Martin received medical treatment for the blow to his head, or whether he would have been able to return to work but for the injury resulting from that impact. It appears, however, that Martin did obtain medical treatment, physical therapy and traction, as well as medication, for a diagnosed injury to his cervical spine. Tr. 79; ex. P-6. The crucial question is whether he suffered such an injury on March 11, while working at Respondent's facility.

consulted those individuals for medical treatment, and their diagnosis of his condition necessarily included an exploration of the duration and possible causes of his symptoms. His failure to relate that he struck his head is extremely difficult to understand. His request for a personal day off is also highly inconsistent with the claim that he suffered an on-the-job injury. Questions of credibility and some shortcomings in the medical evidence also weigh against finding that Martin was injured at the mine.

Though Martin impressed me as a reasonably credible witness, his testimony regarding the accuracy of his recollection was inconsistent.<sup>8</sup> He was under considerable physical and emotional distress on the afternoon of March 11, 2002, suffering from a severe headache and shortness of breath, and was concerned about his high blood pressure in light of his family history. Under the circumstances, his claimed inability to recall certain events is understandable.<sup>9</sup> However, when asked about his alleged statement to Chapman that he had been suffering from headaches for three or four days, he claimed to have a clear recollection that he made no such statement during their meeting. Tr. 59, 62. When questioned about a notation in Dr. Lao's records that might be interpreted as a report by Martin that he had suffered from headaches for several days prior to March 11, rather than denying counsel's interpretation of the notes he explained that he typically suffered from sinus headaches during that time of year. Tr. 76.

The MRI report evidences a condition consistent with an injury that could have been caused by a blow to the head. However, that examination was not done until April 8, and is of little probative value as to when or where such an injury may have been sustained.<sup>10</sup> The July 17 medical report<sup>11</sup> was related to his workers compensation claim, and is based, perhaps in

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<sup>8</sup> Martin was taking six medications at the time he testified, which he stated made him feel light-headed, dizzy and disoriented. Tr. 34. However, those effects were not apparent during his testimony. He recalled details, such as the results of the blood pressure tests performed on the morning of his alleged injury, with accuracy and consistency.

<sup>9</sup> When questioned about his failure to tell Dr. Lao's nurse about striking his head, he explained that he "wasn't thinking right, just didn't think of it." Tr. 75. He also stated that he did not tell Dr. Lao about it on March 11 or 12 because he "just couldn't remember," and that he didn't tell the individuals who administered the CT scan on March 12 because he "didn't think of it - and has trouble remembering anyway." Tr. 78, 81. He also did not recall the substance of the conversation with Couch on the evening of March 11.

<sup>10</sup> Martin apparently suffered a similar injury in 1992, as a result of raking leaves. Ex. P-6, p. 2

<sup>11</sup> The MRI exam and consultant's report were not done until after the time that the Secretary contends that U.S. Steel's reporting obligation expired. It is unclear when U.S. Steel obtained copies of the medical records and reports.

significant part, on what appears to be an erroneous premise, i.e., that Martin experienced an “acute onset of neck pain and stiffness following that injury, associated with stinging sensation in his neck.” Ex. P-6, p. 1. Martin’s testimony does not support that statement. He testified only that he briefly experienced “a small burning, tingling sensation” in conjunction with striking his head. Tr. 38.

Considering all of these factors, I find that the Secretary failed to prove, by a preponderance of the evidence, that Martin suffered an occupational injury at Respondent’s mine on March 11, 2002.

I have also considered the fact that Martin told Couch that he had struck his head during their telephone conversation on the evening of March 11, 2002, which supports the injury claim. While O’Bryan and other U.S. Steel managers discounted that report because it followed Martin’s visit to Dr. Lao, it appears that Dr. Lao did not prompt a connection between the alleged incident and Martin’s symptoms until March 13, 2002. However, I do not find this fact sufficient to alter my conclusion that the Secretary failed to carry her burden of proof.

#### Respondent’s Failure to Report the Claimed Injury was Justified

Assuming for purposes of argument, that Martin suffered an occupational injury, I find that U.S. Steel’s determination not to submit a report within the required time frame was justified and did not violate the regulation.

The Secretary, in her brief, relies upon an excerpt from a December 1998 MSHA publication, identified as “Report on 30 CFR Part 50,” which is intended to provide “guidance” to operators on their reporting obligations and specifically addresses “questionable injuries.” Page 38 of the report purportedly contains the following question and answer:<sup>12</sup>

Question 58. Should an operator report questionable injuries?

Answer: Operators have an obligation to investigate all injuries happening or alleged to have happened on mine property. After an investigation has been completed, the operator must make the determination as to whether the incident is reportable to MSHA. *If he has any doubt, he should report.* If the operator’s conclusion is that no incident occurred, then there is nothing to report. (emphasis in Petitioner’s Brief).

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<sup>12</sup> The Secretary did not offer the report in evidence and did not submit a copy with her brief. She represents that the “report is published by the National Mine Health and Safety Academy and is intended for 30 CFR classroom training.” Pet. Br., n.5 at p. 13. The report appears to be the latest MSHA publication of instructional guidelines for completing the injury reporting form. See *Consolidation Coal Co.*, *supra*, 11 FMSHRC at 970.

This guideline is consistent with the regulation and is entitled to deference. *See, e.g., Garden Creek Pocahontas Co., supra*, 11 FMSHRC at 2151. U.S. Steel's witnesses were very convincing in relating their belief that Martin did not sustain an injury while working on mine property on March 11, 2002. I find that their determination not to submit a report of injury to MSHA was based upon a firm conviction that no injury had occurred, a belief that they hold to this date. Their belief, based upon the factors discussed above, was reasonable. Under the Secretary's instructions, an operator who reasonably concludes that an occupational injury did not occur has "nothing to report."

The Secretary counters that U.S. Steel did not conduct an adequate investigation of the claimed injury, and therefore, cannot take advantage of the guidance. Operators are required to investigate all occupational injuries. 30 C.F.R. § 50.11. However, the thorough investigation and detailed report mandated by the regulation, which includes an explanation of the injury and a description of steps taken to prevent a similar occurrence in the future, is required only where there has been a determination that an occupational injury occurred. Here, U.S. Steel conducted a reasonable investigation and concluded that no occupational injury had occurred. It entertained Martin's report and interviewed virtually all of the persons with whom Martin had come into contact on the pertinent date. There were no physical manifestations of the occurrence or the claimed injury. Martin testified, in essence, that his hard hat was "pretty beat up" and would not have had any markings on it that could have helped to confirm his claim. Tr. 70. There is no evidence that an inspection of the scene of the claimed incident, when it was reported several days after it was alleged to have occurred, could have provided any useful information.

### Conclusion

The Secretary failed to prove, by a preponderance of the evidence, that Martin suffered an occupational injury on March 11, 2002. In addition, U.S. Steel's managers conducted a reasonable investigation of Martin's claim, and concluded that Martin had not suffered an occupational injury. As instructed by the Secretary's guidelines, there was nothing for U.S. Steel to report, and it cannot be sanctioned for failing to report the alleged injury.

### ORDER

The Secretary has failed to carry her burden of proving that Respondent violated 30 C.F.R. § 50.20(a), as alleged in Citation No. 7211045. The citation is, accordingly, **VACATED**.



Michael E. Zielinski  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

September 23, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2003-167
Petitioner	:	A.C. No. 15-17165-03541
	:	
v.	:	
	:	
STILLHOUSE MINING, LLC,	:	
Respondent	:	Mine No. 1

**DECISION**

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;  
Mr. Monroe L. West, Safety Agent, Stillhouse Mining, LLC, Benham, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Stillhouse Mining, LLC, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary’s mandatory health and safety standards and seeks a penalty of \$1,957.00. A hearing was held in Big Stone Gap, Virginia. For the reasons set forth below, I affirm the citation, as modified, and assess a penalty of \$575.00.

**Background**

Stillhouse Mining, LLC, operates an underground coal mine, known as Mine No. 1, in Harlan County, Kentucky. Stillhouse is owned by Black Mountain Resources, LLC, a division of Cumberland Resources, LLC. The mine has been in operation since 1999 and has two production shifts and one maintenance shift.

On March 13, 2002, MSHA Inspector William Clark, was at the mine to perform a regular quarterly inspection. When he went underground and arrived at the working section, he discovered during his “danger run” that there were no deflector curtains in the numbers six and seven entries.<sup>1</sup> Believing this to be a violation of the company’s ventilation control plan, Clark

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<sup>1</sup> Clark testified that a “danger run” is “a check performed each time along the working section of the face areas” for hazardous conditions which could be an imminent danger. (Tr. 12.)

issued Citation No. 7532251. It alleges a violation of section 75.370(a)(1) of the Secretary's health and safety regulations, 30 C.F.R. § 75.370(a)(1), because: "The approved ventilation plan that requires deflector curtains to be maintained within 40 feet of the face is not being complied with on 002 MMU. There are no deflector curtains installed in the #6 and #7 entries that have been driven approximately 120 feet in by the last open crosscut."<sup>2</sup> (Govt. Ex. 5.)

Section 75.370(a)(1) requires, in pertinent part, that: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." With regard to the citation, Stillhouse's Mine Ventilation Plan provided that:

Deflector curtains will be installed in all other entries of the working section [except those where coal is being cut] and maintained to within 40 feet of the face. These curtains may be lifted for cleanup purposes. Upon completion of scooping operations the curtain will be put back into its proper position. The deflector curtains will extend out by the crosscut a minimum of four (4) feet.

(Govt. Ex. 6 at 1.)

### **Findings of Fact and Conclusions of Law**

Stillhouse "concedes that technically the Plan was not followed." (Resp. Br. at 7.) The company contests, however, the gravity and negligence cited in the violation as well as the amount of the proposed penalty. As discussed below, I find that the company has the better position on these issues.

The inspector testified that as he worked his way across the section, he did not see deflector curtains in either the number six or the number seven entry. (Tr. 18-20.)<sup>3</sup> He stated that the entries had already been cleaned and that the scoop that would normally be used to clean the entries was parked in the number six entry, two crosscuts out by the face. (Tr. 25-26.) Inspector Clark further testified that he took methane readings in the two entries with his

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<sup>2</sup> As originally written, the citation alleged that an injury was "highly likely" to result from the violation. At the hearing, counsel for the Secretary moved to modify it to "reasonably likely." The motion was granted without objection. (Tr. 27-28.)

<sup>3</sup> The transcript is replete with errors. For instance, it has Inspector Clark stating: "I noticed there were some curtains in the number six entry." (Tr. 18.) In fact, he testified: "I noticed there were no curtains in the number six entry." Where important to the decision, corrections in the transcript will be noted; otherwise no attempt will be made to correct the many mistakes.

methane detector and obtained a reading of .3 percent methane near the face in the number six entry. (Tr. 19.) He also said that he detected methane bubbling up through a water hole in the floor of the number six entry. (Tr. 34.)

Inspector Clark related that when he told Brown that he was issuing a citation for the violation, Brown told him that the curtains had been removed for cleaning and that he had realized, just shortly before Clark approached him, that he had no ventilation in the entries and had sent out to the surface for new curtains. (Tr. 20, 39, 70-71.) Clark testified that at the time he issued the citation he did not see new curtains anywhere on the section, although he may have seen a old curtain that could have been re-hung. (Tr. 20, 27, 39, 63-65.)

Brown did not dispute at the hearing that the deflector curtains were missing from the numbers six and seven entries when Clark informed him that he was issuing a citation. (Tr. 101, 134-35.) He testified that the curtains had been removed because they had become covered with mud and water and had started pulling down from the roof bolts. (Tr. 100.) He claimed, however, that at the time the inspector informed him of the citation, the number six entry had been scooped and the scoop operator was moving the scoop to the number seven entry to begin scooping it. He further contended that he was getting ready to hang new curtains in the number six entry and that the new curtains were present on the section, one on the scoop and the other on the ground in front of him. (Tr. 135-37.)

Based on Brown's admission that there were no deflector curtains in the numbers six and seven entries as well as the Respondent's previously note concession in its brief, it is apparent that the company was not in compliance with its ventilation plan. Consequently, I conclude that Stillhouse violated section 75.370(a)(1) as alleged.

#### Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts

surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Here, the first requirement, an underlying violation of a safety standard, has already been found. Next, the parties are in agreement that the ventilation plan's provision for deflector curtains is to prevent the accumulation of methane, which could result in an ignition or explosion, in the non-working sections. (Tr. 13-14, 23-24, 110.) Thus, the second requirement is met in that the failure to have the curtains up contributed to the danger of methane accumulation and explosion.

As is frequently the case, however, whether this violation is S&S turns on the third criterion. For this violation, the Secretary has failed to prove that there was a reasonable likelihood that the hazard contributed to would result in an injury. The Inspector testified that he detected .3 percent methane in the number six entry and found methane seeping from a water hole. He did not detect any methane in the number seven entry. (Tr. 57.) He also testified that records indicated that Mine No. 1 liberated 122,000 cubic feet of methane during a 24 hour period, that there had been at least two previous ignitions in the mine, that the mine was part of the Harlan coal seam in which there had been methane ignitions in an Arch of Kentucky mine and that there had been fatal methane explosions in other coal mines. (Tr. 28-33, 81-83.) Finally, Inspector Clark testified that methane becomes explosive at a concentration of five percent. (Tr. 33.)

All of this evidence would be relevant to the third element if the Secretary had established that the methane was approaching explosive levels and that there was some means of igniting it. Clearly, .3 percent is nowhere near an explosive level. Unfortunately, there is no evidence to indicate how long it would take for the methane to reach a dangerous level. The inspector did not know. (Tr. 47, 80.) Since the evidence shows that the required preshift and on-shift inspections were being performed, the number six and seven entries would presumably have been checked for methane accumulation at least every eight hours even if the curtains remained down. (Resp. Ex. E.)

More significant than the failure to establish explosive levels of methane, however, is that there is no evidence of ignition sources. Since the two entries were idle, it was incumbent on the Secretary to show how the methane would be ignited if it did reach a dangerous level. The Commission has held that "in order for ignitions or explosions to occur, there must be a confluence of factors, including a sufficient amount of methane in the atmosphere . . . and ignition sources." *Texasgulf, Inc.*, 10 FMSHRC at 501. The Secretary has shown neither.

Accordingly, I conclude that the violation was not “significant and substantial.” The citation will be modified appropriately.

### **Civil Penalty Assessment**

The Secretary has proposed a penalty of \$1,957.00 for this violation.<sup>4</sup> However, it is the judge’s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that the proposed penalty will not adversely impact the company’s ability to continue in business and that the operator demonstrated good faith in abating the violation. (Tr. 8.) Therefore, I make the same findings. They also stipulated that the controlling entity produced 4,209,630 tons of coal and that Mine No. 1 produced 568,365 tons of coal during the 12 months preceding the issuance of the citation. (Tr. 9.) From this I find that the mine is a large mine and the operator is a medium sized operator.

From the Assessed Violation History Report and the Proposed Assessment Data Sheet, I find that Stillhouse has an average history of previous violations. (Govt. Exs. 2 & 3.) In accordance with my conclusion that the violation was not S&S, I find that the gravity of this violation was not great.

Finally, with regard to the operator’s negligence, I do not agree with the inspector that it was “high.” Inspector Clark believed that the company was highly negligent because he assumed that the section foreman had been informed that Clark was at the mine to perform an inspection prior to Clark’s arriving on the section. Therefore, since the foreman had not corrected the situation after being informed that an inspection was taking place, Clark rated the foreman’s negligence as “high.” (Tr. 40-45.)

The inspector’s theory of negligence, which the Secretary has adopted in her brief, is incorrect as a matter of law. “Negligence is committed or omitted conduct which falls below a standard of care established under the Act to protect persons against the risk of harm.” 30 C.F.R. § 100.3(d). Thus, the negligence in this case occurred with the failure to have curtains in the entries. Whether the foreman knew that an inspector was present and did not correct the situation before the inspector arrived on the section, has no bearing on that determination.

Here the evidence shows that the curtains had become wet and muddy and had to be replaced. The company was negligent in not having the replacement curtains on the section

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<sup>4</sup> This penalty was obviously proposed prior to the modification of the citation at the hearing.

when the old curtains were removed.<sup>5</sup> However, the fact that the curtains had to be replaced rather than lifted as provided in the ventilation plan is a mitigating factor. Therefore, I find that the operator was “moderately” negligent in connection with this violation.

Taking all of these factors into consideration, I conclude that a penalty of \$575.00 is appropriate for this violation.

**Order**

In view of the above, Citation No. 7532251 is **MODIFIED** by deleting the “significant and substantial” designation and by reducing the level of negligence from “high” to “moderate” and is **AFFIRMED** as modified. Stillhouse Mining LLC is **ORDERED TO PAY** a civil penalty of **\$575.00** within 30 days of the date of this decision.

  
T. Todd Hodgdon  
Administrative Law Judge

Distribution: (Certified Mail)

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Monroe West, Agent, Stillhouse Mining, LLC, P.O. Box 527, Benham, KY 40807

/hs

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<sup>5</sup> In this regard, I credit Inspector Clark’s testimony on this fact over Brown’s. I do not find it credible that, if the curtains were on site, Brown would not have pointed that fact out to the inspector.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, NW  
Suite 9500  
Washington, DC 20001

September 24, 2003

SECRETARY OF LABOR, MSHA, on	:	TEMPORARY REINSTATEMENT
behalf of ROBERT C. GOULD, JR.,	:	PROCEEDING
Complainant	:	
	:	Docket No. WEST 2003-405-DM
v.	:	WE MD 2003-12
	:	
GULF TRANSPORT, L.L.C.,	:	Mine ID 26-00500 F176
Respondent	:	Newmont Gold Quarry

## ORDER FOR TEMPORARY REINSTATEMENT

Before: Judge Schroeder

This case is before me on an application filed on September 4, 2003, by the Secretary of Labor on behalf of Robert C. Gould, Jr., pursuant to Section 105(c) of the Mine Safety and Health Act of 1977. The application seeks the temporary reinstatement of Mr. Gould to his prior employment by Gulf Transport, L.L.C., as a miner employed to drive a truck. According to the affidavit filed with the application, Mr. Gould's employment by Gulf was terminated on July 24, 2003, following an MSHA investigation of an accident that involved a vehicle operated by Mr. Gould. The Secretary asks that Mr. Gould be reinstated to his employment pending completion of the investigation by the Secretary of Mr. Gould's complaint of discrimination under Section 105.

Under the procedural rules of the Commission, particularly 29 C.F.R. § 2700.45, the respondent in an application for temporary reinstatement has ten days from respondent's receipt of the application to request a hearing on the application. The application includes a certificate of service that indicates a copy of the application was delivered to the respondent by electronic facsimile on September 4, 2003, and by physical delivery on September 5, 2003. Delivery by facsimile is effective under the Commission's procedures. A request for a hearing was due no later than the close of business on Monday, September 15, 2003. I assume without deciding that the ten day period is subject to enlargement on a showing of "good cause" even though I have been unable to find any authority stating that the time period is subject to enlargement.

On September 17, 2003, I received an electronic mail message from Mr. Jamie Cooper, Chief Executive of Gulf Transport, requesting a hearing. I consider his message to also be an application for enlargement of time to request a hearing since it was then two days late. As I understand the message from Mr. Cooper, he makes two claims of "good cause" for relief from

the time limitation on a request for a hearing. First, he claims to have only recently understood the procedures for consideration of a request for temporary reinstatement. Second, he claims that his distance from the scene (he apparently spends most of his time in Australia) made it difficult to make a timely request for a hearing. I find both of these arguments unpersuasive.

First, any person or organization in the business of mining in the United States should be held responsible for being familiar with the employee protections afforded by Section 105 of the Mine Safety Act. Second, upon being assigned this case on September 5, 2003, I telephoned the office of Gulf Transport in Elko, Nevada to verify service of the application. I spoke to the local manager and offered to answer any questions the manager had about the procedures used by the Commission to consider such applications. The manager indicated he would be in contact with Mr. Cooper in Australia concerning the matter. I also telephoned counsel for the Secretary to advise him of my conversation with the Gulf Transport manager and to encourage immediate communication between the parties concerning the possibility of a hearing. I find as a matter of fact that Gulf Transport had knowledge of the opportunity for a hearing (a fact also described in the moving papers by which the Secretary sought reinstatement of Mr. Gould) well before the deadline for making a hearing request. The availability of electronic transmission of information, including actual documents by facsimile, undercuts the argument based on distance of upper management from the scene. I find Gulf Transport, L.L.C., has not demonstrated good cause for its failure to request a hearing within the ten day period for making such requests. It is, therefore, my responsibility to determine the application on the basis of the record now before me that includes a brief statement from Mr. Gould along with an affidavit from the Department of Labor investigator, Mr. Horn.

The legal standard for evaluating an application for temporary reinstatement is whether the application is "not frivolous." *Secretary v. Perry Transport, Inc.*, 14 FMSHRC 2086 (December 1992). It is clear to me that this standard is far less demanding than the standard applied in the District Courts to applications for temporary restraining orders, i.e. the probability of success on the merits combined with a balance of harm to the respective parties. In providing this interim relief procedure under the Mine Safety Act, the Congress demonstrated that its concern was only for the harm to a worker not receiving a pay cheque. For the period necessary for the Secretary to complete an investigation into a claim of discrimination (a whistle blower protection designed to encourage disclosure of safety problems) the Congress wanted miners to feel secure in keeping food on the table. Under the Mine Safety Act, the Secretary has 90 days to complete an investigation of the complaint of discrimination.

The record in this case indicates the miner was terminated within a few days of the miner engaging in conversations with representatives of the Secretary concerning an accident that occurred during mine operations. The close proximity in time of the two events provides sufficient basis to imply a connection for purposes of the "not frivolous" test for temporary reinstatement. *Secretary v. A & K Earth Movers, Inc.*, 22 FMSHRC 3232 (March 2000). The standard has been satisfied in this case based on this record.

**ORDER**

It is ORDERED that Mr. Robert C. Gould be reinstated in his position as truck driver for Gulf Transport, L.L.C., in its Elko, Nevada operations at his previous rate of pay and with his previous benefits. This order is effective as of the date given above and will remain effective until completion by the Secretary of an investigation of Mr. Gould's complaint of discrimination filed with the Secretary on August 4, 2003.



Irwin Schroeder  
Administrative Law Judge

Distribution: (Certified Mail)

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Robert C. Gould, Jr., 1182 Sewell Drive, Elko, NV 89801

James Cooper, Gulf Transport, L.L.C., 975 5<sup>th</sup> Street, Elko, NV 89801

**ADMINISTRATIVE LAW JUDGE ORDERS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001

September 4, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-92-M
Petitioner	:	A.C. No. 40-00106-05502 E24
v.	:	
	:	
AUSTIN POWDER COMPANY,	:	Parsons Quarry
Respondent	:	

**ORDER GRANTING MOTION TO AMEND  
PETITION FOR ASSESSMENT OF PENALTY**

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d). On August 22, 2002, an inspector of the Mine Safety and Health Administration (“MSHA”) issued Citation No. 6098714 to Austin Powder Company (“Austin Powder”) at its Parsons Quarry in Decatur County, Tennessee. The citation alleges a violation of section 56.6900 of the Secretary’s safety regulations, requiring that “Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer.” 30 U.S.C. § 56.6900. The “condition or practice” is described in the citation as follows:

Damaged or deteriorated explosive material was not disposed of in a safe manner in accordance with the instructions of the manufacturer. Approximately 15 gallons of contaminated Hydrox 503 (ammonium nitrate solution in emulsified form) was placed in and near a plastic garbage can located at the storage bin facility. Employees that work in the area are exposed to an explosion hazard. According to the Material Safety Data Sheet (MSDS), this emulsion may explode when subjected to fire or shock.

On May 14, 2003, the Secretary filed a petition to assess a \$340.00 penalty for the violation. Austin Powder filed an Answer on May 19, 2003. A hearing was scheduled for August 28, 2003, in Memphis, Tennessee.

The Secretary moves to amend Citation No. 6098714 to change the description of the “condition or practice” and the section of the Regulations allegedly violated. Respondent opposes the motion and moves for dismissal of the case. Alternatively, in the event that the

Secretary's motion is granted, Respondent moves to continue the hearing.<sup>1</sup> For the reasons set forth below, the motion is granted.

The Secretary proposes to change the standard alleged to have been violated to section 56.4104(b), which requires that "Until disposed of properly, waste or rags containing flammable or combustible liquids that could create a fire hazard shall be placed in covered metal containers or other equivalent containers with flame containment characteristics. Additionally, the Secretary seeks to substitute the following language for the description of the violation:

Approximately 15 gallons of contaminated Hydrox 503 (Ammonium Nitrate solution in emulsified form) was not placed in a metal or other equivalent container. This material was placed in and near a plastic garbage can located at the storage bin facility. This created a fire hazard because, according to the Material Safety Data Sheet (MSDS), this emulsion may explode then [sic] subjected to fire or shock and has a flashpoint of 165 degrees Fahrenheit.

The Secretary takes the position that the facts underlying the proposed amendment are virtually the same as stated in the citation, as originally issued. Because the evidentiary focus is on the nature of the material, she argues, the proposed amendment only changes the characterization of the material from explosive to flammable. Moreover, she contends, because the facts remain the same as originally pled, and because no discovery has taken place in this case, Respondent is not prejudiced by the proposed amendment. By asserting that modification of the citation will not result in undue delay, the Secretary attests to her willingness to go forward with the hearing, as scheduled. Finally, the Secretary asserts that the essential facts of the case support the allegation of violation under either standard.

Respondent argues that it would be extremely prejudiced should a modification of the citation, so substantive in nature, be permitted so close to the hearing, that its defense has been prepared in reference to an explosives standard, and that it has not been afforded the opportunity to prepare a defense to a combustibles standard. Furthermore, Respondent asserts that, as early as September 13, 2002, during an informal conference on the citation, it had specifically informed MSHA that the cited material was not explosive, and that MSHA had rejected the company's position at that time. Finally, Respondent contends that the cited material is neither explosive nor combustible, so that no violation of either standard occurred. Respondent's arguments are not persuasive.

Although there is no provision in the Commissions's Rules for amending citations, the Commission has held that modification of a citation or order is analogous to amendment of

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<sup>1</sup>By mutual agreement of the parties, the hearing is rescheduled for November 6 or 7, 2003.

pleadings under Federal Rule of Civil Procedure 15(a).<sup>2</sup> *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990). The Commission has required a liberal application of Rule 15(a) explaining that:

In Federal civil proceedings, leave for amendment “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. See 3 J. Moore, R. Freer, *Moore’s Federal Practice*, Par. 15.08[2], 15-47 to 15-49 (2d ed. 1991) . . . . And, as explained in *Cyprus Empire*, legally recognizable prejudice to the operator would bar otherwise permissible modification.

*Wyoming Fuel*, 14 FMSHRC at 1290.

Guided by Rule 15(b), the Commission has also recognized that a citation may be modified even *after* a hearing, where the parties have, in fact, litigated an unpled claim:

This result is in accord with Rule 15(b) of the Federal Rules of Civil Procedure, which provides for conformance of pleadings to the evidence adduced at trial, and permits the adjudication of issues actually litigated by the parties irrespective of pleading deficiencies.

*Faith Coal Company*, 19 FMSHRC 1357, 1362 (August 1997); see *Berwind Natural Resources Corp.*, 21 FMSHRC 1284, 1323 at n.41 (December 1999).

There is no evidence that the Secretary is acting in bad faith or is seeking amendment for the purpose of delay. In fact, the Secretary expressed her willingness go to hearing, as scheduled, should permission to amend the citation be granted. Respondent’s argument that it would be prejudiced by the amendment appears to turn on lack of time to prepare a defense to the allegation that the stored material was combustible, since it acknowledges that, had the modification been made in September 2002, there would have been little prejudice.

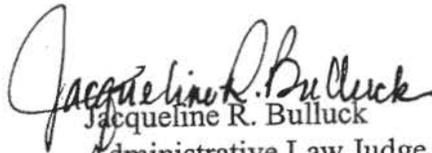
By seeking to amend the citation, the Secretary has not altered the underlying facts of the citation, i.e., that contaminated Hydrox 503 was improperly stored. Respondent contends that the substance is neither explosive nor combustible. Assuming this to be true, however, places Respondent in the same position under either standard - - by proving the actual nature of the

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<sup>2</sup>The Commission’s Procedural Rules provide that on questions of procedure not regulated by the Act, the Commission’s Rules, or the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, the Commission and its Judges shall be guided by the Federal Rules of Civil Procedure so far as “practicable.” 29 C.F.R. § 2700.1(b).

substance, Respondent may affirmatively rebut the Secretary's case. Moreover, since no discovery has been conducted to date, and Respondent has been granted a continuance of the hearing, Respondent has ample opportunity to further develop its defense.

Accordingly, the Secretary's Motion to Amend Petition for Assessment of Penalty is **GRANTED** and it is **ORDERED** that Citation 6098714 is **MODIFIED** to change the language of the "condition or practice" and to allege a violation of section 56.4104(b). In addition, Respondent may conduct discovery, as it deems necessary.

  
Jacqueline R. Bulluck  
Administrative Law Judge  
(202) 434-9987

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

September 10, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2002-85
Petitioner	:	A. C. No. 46-07273-03731
v.	:	
INDEPENDENCE COAL COMPANY, INC.,	:	Justice No. 1 Mine
Respondent	:	
and	:	Docket No. WEVA 2002-172
BILL BURGETTE, employed by	:	A. C. No. 46-07273-03739 A
INDEPENDENCE COAL COMPANY,	:	
	:	Docket No. WEVA 2003-8
and	:	A. C. No. 46-07272-03741 A
	:	
GREG NEIL, employed by	:	
INDEPENDENCE COAL COMPANY,	:	
Respondents	:	Justice No. 1 Mine

**ORDER GRANTING MOTION TO AMEND PLEADINGS**

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994), the “Act.” On August 28, 2003, the Secretary filed a motion to amend the pleadings “in order to incorporate into the citation and orders at issue, modifications issued by MSHA [the Department of Labor’s Mine Safety and Health Administration], dated August 20, 2003, which allege with greater specificity the charges set forth in the petition filed against the Respondents.”<sup>1</sup>

These cases involve one citation and two orders issued by MSHA against Independence Coal Company, Inc. (Independence) pursuant to Section 104(d) of the Act. The Secretary has filed petitions for assessment of civil penalty against Independence and against two of Independence’s agents, Bill Burgette and Greg Neil, for knowingly authorizing, ordering, or carrying out, as agents of Independence, the alleged violations.

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<sup>1</sup> Hearings which commenced on August 19, 2003, were continued to enable the Secretary to amend the charging documents to provide a more particular description of the charges including a specification of the dates and times of the alleged violations.

In a response to the Secretary's motion to amend filed September 8, 2003, the Respondents object only to that part of the proposed amendment appearing in Order No. 7190107-04, Section II, under paragraph 8 "Condition or Practice" insofar as it alleges a violation of the on-shift standard for examinations after the 8:30 a.m. roof fall, *i.e.*, Item No. 11 "10/30/00 by Bill Burgette, second shift." Respondents claim that the proposed amendment interjects a new issue into the case as to the adequacy of on-shift examinations made by Mr. Burgette after the 8:30 a.m. roof fall and prior to the "Section 103(k)" order issued by the Secretary later that day. The Respondents argue that while the original order in this case dealt with events before the 8:30 a.m. roof fall it did not address events after 8:30 a.m. Respondents object to the introduction of this issue after the commencement of trial claiming prejudice. They argue that the allegedly new issue would necessitate a re-opening of depositions and the recalling of at least one witness, Inspector Jackson Nunnery, at hearings. They further claim prejudice because the proposed amendment comes "almost three years after the event, and after six hours of testimony." Burgette claims, in addition, that the added "Section 110(c)" allegation was one "for which no investigation was performed and for which he has had no notice."

Although there is no provision in the Commission's rules for amending the charging documents, the Commission has held that modification of a citation or order is analogous to amendment of pleadings under the Federal Rules of Civil Procedure, Rule 15(a). *Secretary v. Wyoming Fuel Company*, 14 FMSHRC 1282 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990). In *Wyoming Fuel Company*, 14 FMSHRC at 1290, the Commission stated as follows:

In Federal civil proceedings, leave for amendment "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. *See* 3 J. Moore, R. Freer, *Moore's Federal Practice*, Par. 15.08[2], 15-47 to 15-49 (2d ed. 1991) . . . . And, as explained in *Cyprus Empire*, legally recognizable prejudice to the operator would bar otherwise permissible modification.

Respondents did not allege, and there is no evidence that the Secretary is acting in bad faith or is seeking amendment for the purpose of delay. Respondents argue only that they would be prejudiced because the proposed amendment of Order No. 7190107, would allegedly interject a new issue into the case, *i.e.*, the adequacy of an on-shift examination made by Mr. Burgette after the 8:30 a.m. roof fall and before the issuance of the "Section 103(k)" order. Respondents claim that these allegations were not contained in the original order and were not a part of this case when the hearing began. They further allege that the new allegations would cause delay because of the necessity to reopen depositions and recall at least one witness.

It is noted in examining the original Order No. 7190107, that the specific allegations now asserted were neither included nor excluded. Indeed, there was a lack of particularity in the

original allegations which led to the necessity for clarification provided by the proposed amended citation. While this lack of particularity may have been grounds for a motion to dismiss, no such motion was filed. I also note that Respondents do not claim that they were misled by the Secretary during discovery so that presumably, upon appropriate discovery, the Respondents could have determined that the Secretary had in fact included within the scope of original Order No. 7190107, a violation of the on-shift examination standard after the roof fall. Under all the circumstances I do not find that the proposed amendment would cause legal prejudice to the Respondents. Indeed, I find that the particularity provided in the proposed amended charging documents provide much needed specificity including the dates and times of the violations. Such particularity will better enable the Respondents to defend the charges and enable the trial judge to ascertain specifically what charges have been brought in the instant cases.

For all of the above reasons the Secretary's Motion to Amend Pleadings is granted.

A handwritten signature in black ink, appearing to read 'Gary Melick', with a stylized, cursive-like script.

Gary Melick  
Administrative Law Judge  
202-434-9977

Distribution: (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

September 11, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2002-80
Petitioner	:	A.C. No. 36-07456-03532
	:	
v.	:	Docket No. PENN 2003-10
	:	A.C. No. 36-07456-03533
D & F DEEP MINE BUCK DRIFT,	:	
Respondent	:	Docket No. PENN 2003-38
	:	A.C. No.36-07456-03534
	:	
	:	Buck Drift Mine

## **ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION TO LIMIT TRIAL ISSUES**

The Secretary of Labor has filed a paper captioned "Motion to Limit Trial Issues," in essence, a motion for partial summary decision, arguing that Respondent is precluded from litigating the issues of whether it violated section 103(a) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 813(a), with respect to the citations at issue in Docket Nos. PENN 2003-10 and PENN 2003-38. As grounds for the motion, the Secretary asserts that those issues were fully litigated in related federal civil proceedings, that the Secretary prevailed on those issues, and that Respondent is bound by the outcome. Respondent filed an opposition to the motion, challenging the Secretary's assertion that the violation alleged in PENN 2003-10 was actually litigated, but conceding that it is bound by the federal court's finding that it violated the Act with respect to the citation at issue in PENN 2003-38. For the reasons that follow, the Secretary's motion is granted as to PENN 2003-38 and is denied as to PENN 2003-10.

On November 19, 2001, a citation was issued to Respondent charging a violation of 30 C.F.R. § 75.203(a), i.e., that it was mining excessively wide entries. Respondent was given until 8:00 a.m., the following day to abate the violation. On November 21, 2001, Jack McGann, an inspector employed by the Secretary's Mine Safety and Health Administration ("MSHA"), appeared at the mine, apparently for purposes of conducting an inspection to determine if the violation had been abated. Respondent's foreman, Randy Rothermel, Jr., refused to allow the inspection, and McGann issued Citation No. 7003551, charging Respondent with denying entry to the mine, a violation of section 103(a) of the Act.

The Secretary filed a civil action in the U.S. District Court for the Middle District of Pennsylvania against Randy Rothermel, Jr. and Cindy Rothermel, Respondent's principals, seeking temporary and permanent injunctive relief, barring them from interfering with the

Secretary's efforts to enforce the Act.<sup>1</sup> On November 23, 2001, after a hearing, the District Judge found that "it appear[ed]" that the Rothermels had violated the Act and issued a preliminary injunction barring the Rothermels from, *inter alia*, "interfering with, hindering or delaying the Secretary of Labor from carrying out the provisions of the Act."<sup>2</sup> Pursuant to the injunction, MSHA inspected the mine the following day and the denial of entry citation was terminated. The Secretary then requested that the preliminary injunction be lifted and the federal court action was later withdrawn, or voluntarily dismissed. A proposed civil penalty in the amount of \$750.00 was assessed for the violation charged in Citation No. 7003551. Respondent contested the citation and penalty, and the Secretary's petition for assessment of civil penalty was assigned Commission Docket No. PENN 2003-10.

On January 30, 2002, another MSHA inspector arrived at Respondent's mine to conduct a respirable dust survey. Randy Rothermel refused to allow the inspector to enter the mine to conduct the survey. Citation No. 7003958 was issued, charging Respondent with denying entry to an authorized representative of the Secretary in violation of section 103(a) of the Act. Again the Secretary sued the Rothermels in federal court, seeking temporary and permanent injunctive relief.<sup>3</sup> The Rothermels defended, challenging the Secretary's legal authority to conduct respirable dust surveys. The Secretary prevailed in that action. A permanent injunction was entered on April 25, 2002, enjoining the Rothermels from "delaying, hindering, and/or denying entry to authorized representatives of the Secretary who are attempting to conduct inspections and/or sampling or otherwise fulfill the responsibilities of the Secretary and/or her authorized representatives under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*" Ex. F to the Secretary's motion, at p. 9. The Rothermels appealed that decision, which was affirmed. *Chao v. Rothermel*, 327 F.3d 223 (3rd Cir. 2003). A proposed civil penalty in the amount of \$1,500.00 was assessed for the violation charged in Citation No. 7003958. Respondent contested the citation and penalty and the Secretary's petition for assessment of civil penalty was assigned Commission Docket No. PENN 2003-38.

The Secretary contends that the doctrine of collateral estoppel, or issue preclusion, bars Respondent from relitigating issues adjudicated in the prior federal court actions, specifically, the lawfulness of the denials of entry to MSHA inspectors on November 21, 2001, and January 30, 2002. Respondent does not oppose the motion as to the January 30, 2002, denial of entry, recognizing that the legality of that action was litigated to a final judgment, affirmed on appeal, in the 2002 federal court action. Respondent opposes the motion as to the November 21, 2001,

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<sup>1</sup> U.S. District Court for the Middle District of Pennsylvania, action No. 3:CV-01-2228.

<sup>2</sup> Order, dated November 23, 2001, granting preliminary injunction, exhibit B to the Secretary's motion.

<sup>3</sup> U.S. District Court for the Middle District of Pennsylvania, action No. 3:02cv202.

denial of entry.<sup>4</sup>

The Secretary relies on cases from the Third Circuit that establish four prerequisites for application of issue preclusion: (1) the issue sought to be precluded is the same as that involved in the prior action; (2) the issue was actually litigated; (3) it was determined by a final and valid judgment; and (4) the determination was essential to the prior judgment. *See, e.g., National Railroad Passenger Corp. v. Penn. Public Utility Comm.*, 288 F.3d 519 (3rd Cir. 2002). I accept this as an accurate statement of the law to be applied in this proceeding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992).

The Secretary contends that the lawfulness of Rothermel's denial of entry to inspector McGann on November 21, 2001, was litigated in both of the federal court actions and that Respondent is precluded from relitigating that issue in this case. The lawfulness of the November 2001 denial of entry was directly at issue in the 2001 federal lawsuit. However, that issue was not litigated to a final and valid judgment. The Secretary prevailed on a motion for a preliminary injunction by demonstrating a probability of success on that issue.<sup>5</sup> However, the preliminary injunction was later lifted at the Secretary's request and no final judgment was ever entered in that action.

The 2002 federal injunctive action was litigated to a final and valid judgment. Directly at issue in that case was the lawfulness of Rothermel's denial of entry on January 30, 2002, and the Secretary's authority to conduct respirable dust surveys. The Secretary contends that the lawfulness of the November 2001 denial of entry was also raised and litigated in that case. The transcripts of the hearings on the preliminary injunction motion and the request for permanent injunctive relief reveal that, although the November 2001 denial of entry was discussed, it was far from a focus of attention. The April 25, 2002, Memorandum and Order granting the permanent injunction notes in the "Background" section that: "On November 19-21, 2001, the Rothermels prevented representatives of the Secretary from conducting a roof plan inspection of the Rothermels' Buck Drift Mine." Ex. F to the motion, at pp. 1-2. In discussing the "balance of equities" factor, the court noted, *inter alia*, that "the Rothermels' frequent denial of entry to MSHA inspectors is a drain on the resources of MSHA and a potential danger to other miners." *Id.* at p. 8. The latter passage was apparently based upon testimony given in response to a

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<sup>4</sup> The Rothermels were named as individual defendants in the federal actions in their capacities as operators and controllers of the D & F Deep Mine Buck Drift. They actively litigated the issues in those cases. Application of preclusion principles to Respondent here, based upon the outcome of those cases, comports with due process considerations. Respondent does not contend otherwise.

<sup>5</sup> As the District Judge found, "it *appears* that Randy Rothermel and Cindy Rothermel violated the Federal Mine Safety and Health Act . . . by refusing to allow the authorized representative of the Secretary of Labor access to the mine." (emphasis added). Order dated November 23, 2001, in U.S. District Court for the Middle District of Pennsylvania, action No. 3:CV-01-2228, exhibit B to the Secretary's motion.

question addressed to MSHA's assistant district manager regarding his belief that MSHA inspectors would be denied access to the mine in the future. He replied, in part, "Well, the reason is because he's denied us entry several times already, and I have worked in this district nine years, and it's just the nature of this operator's attitude." Transcript of March 13, 2002, hearing in action No. 3:02cv202, Ex. E to the motion, at p. 39.

After reviewing the transcripts of proceedings and decision entered in the 2002 federal court action, I must conclude that the lawfulness of the November 21, 2001, denial of entry was not actually litigated in that proceeding. The fact of the denial was noted in the court's discussion of the background of the controversy. It was also most likely included in the reference to "frequent" denials of entry, the third of three factors discussed in the court's balance of equities analysis. However, nowhere does it appear that the lawfulness of that denial of entry was actually litigated and determined. Moreover, because of the reference to "several" or "frequent" denials of entry, it does not appear that a determination of the lawfulness of that particular denial of entry was an essential element of the final judgment entered in that case. Consequently, application of the doctrine of issue preclusion as to the lawfulness of Respondent's denial of entry on November 21, 2001, would not be appropriate.

### ORDER

Based upon the foregoing, the Secretary's Motion to Limit Trial Issues is **GRANTED** as to the lawfulness of the denial of entry on January 30, 2002, and is **DENIED** as to the lawfulness of the denial of entry on November 21, 2001. Respondent is precluded from relitigating the fact that it violated the Act as alleged in Citation No. 7003958. Respondent may, however, litigate the appropriateness of the gravity and negligence determinations, as well as the amount of the civil penalty.<sup>6</sup>



Michael E. Zielinski  
Administrative Law Judge

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<sup>6</sup> This order addresses only the issues raised by the Secretary's motion, i.e., whether the outcome of the federal court proceedings precludes Respondent from litigating the lawfulness of the November 21, 2001, and January 30, 2002, denials of entry. Both the Commission and the courts have recognized that the Secretary's authority to conduct inspections of mines under section 103(a) of the Act is extremely broad. *Donovan v. Dewey*, 452 U.S. 594 (1981); *Tracey & Partners*, 11 FMSHRC 1457 (Aug. 1989). It appears that there are few, if any, factual disputes regarding the November 2001 incident, and it is possible that discovery responses, affidavits or similar evidence might have established that there was no genuine issue as to any fact material to that issue, thereby making disposition by summary decision appropriate. At present, however, such a determination cannot be made.

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/mh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

September 23, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-136
Petitioner	:	A.C. No. 01-01322-04258
	:	
	:	Docket No. SE 2003-137
	:	A.C. No. 01-01322-04259
	:	
	:	Docket No. SE 2003-138
v.	:	A.C. No. 01-01322-04260
	:	
	:	Docket No. SE 2003-140
	:	A.C. No. 01-01322-04262
	:	
JIM WALTER RESOURCES, INC.,	:	Docket No. SE 2003-141
Respondent	:	A.C. No. 01-01322-04263
	:	
	:	Docket No. SE 2003-142
	:	A.C. No. 01-01322-04264
	:	
	:	Docket No. SE 2003-144
	:	A.C. No. 01-01322-04266
	:	
	:	Docket No. SE 2003-145
	:	A.C. No. 01-01322-04267
	:	
	:	Docket No. SE 2003-146
	:	A.C. No. 01-01322-04268
	:	
	:	No. 5 Mine

**ORDER DENYING RESPONDENT'S MOTION TO DISMISS**

These matters are before me based on Petitions for Assessment of Civil Penalties filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) (1994) (the Act). Jim Walter Resources, Inc. (JWR) has filed a motion to dismiss 195 citations and orders that were issued during inspections conducted between April 19, 2002, and March 12, 2003. The Secretary filed oppositions to JWR's motion and JWR filed a reply.

In support of its motion, JWR asserts the Secretary failed to provide notification of the proposed penalty assessments within a reasonable time as required by section 105(a) of the Act, 30 U.S.C. § 815(a). The Secretary issued a comprehensive proposed assessment for all 195 citations/orders on April 24, 2003. JWR received notification of the Secretary's proposed assessment on May 2, 2003.

Although Commission Rule 28(a), 29 C.F.R. § 2700.28(a), requires the Secretary to file petitions for assessment of civil penalty within 45 days of a mine operator's contest of the Secretary's proposed penalty assessments, the Commission's Rules and the Act do not provide a specific filing deadline for the Secretary's notification of proposed penalties. Section 105(a) of the Act only requires that the Secretary to notify the operator of the civil penalty to be assessed "... within a reasonable time after the termination of such inspection or investigation . . . ." In cases where the Secretary's 105(a) notification of proposed penalties is delayed, the Commission has noted that it examines the same factors it considers in the closely related context of the Secretary's delay in filing her petitions for assessment of civil penalty with the Commission: namely, the reason for the delay and whether the delay prejudiced the operator. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996).

Thus, the threshold question is whether the Secretary's April 24, 2003, notification of her proposed penalties for all 195 citation and orders issued from April 19, 2002 to March 12, 2003, constitutes a delay as contemplated by section 105(a). As JWR noted in its September 15, 2003, Response to the Secretary's Supplemental Opposition, to JWR's knowledge, no operator has ever moved to dismiss large numbers of citations issued over a period of time where the Secretary elected to propose penalties simultaneously rather than in a piecemeal fashion. (*JWR's Resp.* at pp. 3-4). The Secretary argues that JWR has presented no legal justification or legal authority for the proposition that the Secretary must assess civil penalties seriatim. (*Sec'y's Opp.* at p.2). For the reasons discussed below, I conclude that JWR has failed to demonstrate that the Secretary's April 24, 2003, proposed penalties can be characterized as "delayed" given the extraordinary number of citations and orders and the chronology of events in these proceedings.

The Commission, citing legislative history, recently reiterated that there are circumstances, although rare, when a prompt proposal of a penalty may not be possible. *Black Butte Coal Company*, 25 FMSHRC 457, 459 (August 2003) citing *Steel Branch*, 18 FMSHRC at 13-14 (January 1966). Put another way, there are instances when prompt notification by the Secretary is not administratively feasible. In such instances, the Secretary's notification cannot be considered delayed.

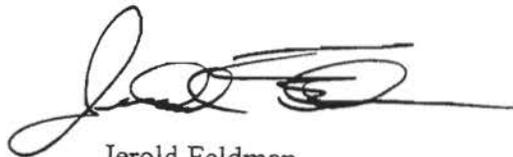
In the instant case, although JWR does not delineate which of the 195 citations and orders it seeks dismissed as a result of the Secretary's April 24, 2003, comprehensive civil penalty notification, only the three oldest orders and 29 oldest citations issued during the period April 19, 2002, to July 31, 2002, present a colorable claim of delay. Moreover, at JWR's request, intervening safety and health conferences were conducted after the issuance of some of

these citations and orders that, of necessity, extended the notification period. Notwithstanding any delay caused by health and safety conferences, JWR received notification of the civil penalty proposals for this initial batch of orders and citations within approximately nine months. Notification of the penalty proposals for the remaining 163 citations was received in nine months or less. As noted by Judge Manning, civil penalties typically are proposed by the Secretary within three to nine months after a citation is issued. *CDK Contracting Company*, 25 FMSHRC 71, 74 (February 2003) (ALJ).

Whether the Secretary's notification period is reasonable, as contemplated by section 105(a), must be determined on a case-by-case basis. Although the Commission is responsible for determining whether the Secretary's notification occurred within a reasonable time, it would be inappropriate for the Commission to micro-manage the Secretary's Office of Assessments, in the absence of an abuse of discretion, in instances where that office decides that a comprehensive assessment notification is more efficient than a piecemeal assessment process. Thus, there is no basis for concluding that the Secretary's comprehensive notification, within nine months for the vast majority of the numerous citations and orders in issue in these proceedings, constituted a delay that must be justified by the Secretary. Significantly, even in instances of undue delay, not evident here, Congress has expressed its expectation that the failure to promptly propose a civil penalty ". . . shall [not] vitiate any proposed penalty proceeding." *Black Butte*, 25 FMSHRC at 459 (citing S. Rep. No. 95-181, at 34 (1977), reprinted in Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978)).

Having determined that there was no delay requiring an explanation by the Secretary, I need not address whether JWR has been prejudiced by the Secretary's comprehensive rather than piecemeal assessment approach. However, I note that JWR could have elected to contest the subject citations and orders within 30 days of issuance pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d). *CDK Contracting*, 25 FMSHRC at 76. While JWR could not have predicted the Secretary's processing period for notification of her proposed penalties during the 30 day contest period, at its option, JWR's pre-penalty contests could have been stayed pending consolidation of the civil penalty proceeding. Any stay could be lifted at JWR's request if it decided to proceed to hearing without waiting for the Secretary's penalty proposal.

**ACCORDINGLY**, Jim Walter Resources, Inc.'s Motion to Dismiss **IS DENIED**. **IT IS ORDERED** that the parties initiate a telephone conference with the undersigned within 14 days of the date of this Order to discuss a mutually satisfactory hearing date.



Jerold Feldman  
Administrative Law Judge

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/hs