

**SEPTEMBER 2005**

**COMMISSION DECISIONS AND ORDERS**

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**SEPTEMBER 2005**

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

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

Secretary of Labor, MSHA v. Original Sixteen to One Mine, Inc., Docket Nos. WEST 2004-330-M, WEST 2004-272-M. (Judge Melick, August 19, 2005)



## COMMISSION DECISIONS AND ORDERS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

September 20, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2004-67
v.	:	
	:	
WEBSTER COUNTY COAL LLC	:	

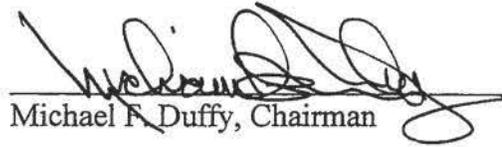
BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

On August 31, 2005, the Secretary of Labor filed with the Commission a Motion to Correct the Decision Approving Settlement issued in these proceedings by Commission Administrative Law Judge T. Todd Hodgdon on November 8, 2004. The Secretary seeks to correct a mistake her counsel made in calculating the total penalty amount, which was subsequently submitted to the judge. The judge's order became a final order of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under Commission Procedural Rule 69(c), a judge may correct clerical errors in a final order with leave of the Commission. 29 C.F.R. § 2700.69(c).

Upon consideration of the Secretary's motion, it is granted. We reopen the case, remand the matter to the judge, and grant him leave to correct the error.



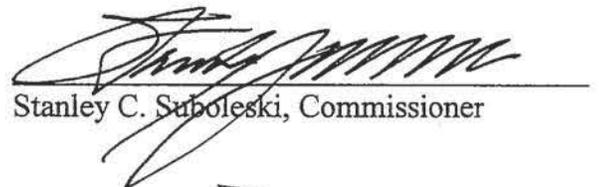
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Stanley C. Saboleski, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

September 20, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2005-121-M
v.	:	A.C. No. 12-00066-57245 K536
	:	
SERVICE TRANSPORT, LLC	:	

BEFORE: Duffy, Chairman; 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. (2000) ("Mine Act"). On August 15, 2005, the Commission received a letter from counsel for Service Transport, LLC ("Service Transport") which we construe as a motion to reopen a penalty assessment that purportedly became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On May 23, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Service Transport a proposed penalty assessment. Mot. at Attach. Service Transport contested the proposed penalty assessment in a letter dated June 20, 2005 and sent to the Department of Labor's Office of the Solicitor in Chicago, Illinois, with a copy also sent to the Commission. *Id.* Neither the Office of the Solicitor or the Commission processed the contest, as this is normally done by MSHA's Civil Penalty Compliance Office. The Secretary does not oppose Service Transport's request for relief.

Here, Service Transport attempted to timely contest the proposed penalty assessment, but

was under the mistaken impression that it had to file its contest at the Commission. Indeed, the cover sheet routinely accompanying proposed assessments states: "30 CFR 100.7 gives you 30 days to either pay the Proposed Assessment or contest the Proposed Assessment with the Federal Mine Safety and Health Review Commission." These instructions further specify that if an operator wishes "to contest . . . just some of the violations listed in the Proposed Assessment," the contest must be sent to MSHA's Civil Penalty Compliance Office.

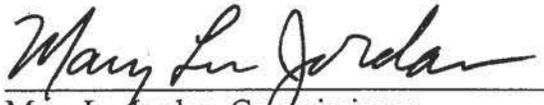
Under these circumstances, we conclude that the company's contest sent to the Solicitor of Labor and the Commission on June 20, 2005 constituted timely notification of the Secretary under section 105(a) of the Mine Act of its intention to contest the proposed penalty.

Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



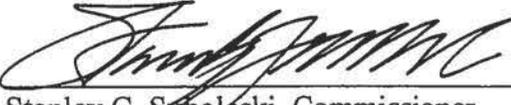
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Stanley C. Saboleski, Commissioner



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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

September 27, 2005

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. WEST 2004-86-M  
ADMINISTRATION (MSHA) :  
 :  
v. :  
 :  
CALMAT COMPANY OF ARIZONA :

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

DECISION

BY: Jordan, Suboleski, and Young, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”), Administrative Law Judge Gary Melick upheld an order and a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Calmat Company of Arizona (“Calmat”) alleging that Calmat had violated mandatory training and safety standards. 26 FMSHRC 409 (May 2004) (ALJ). Calmat filed a petition for discretionary review of the judge’s decision, which the Commission granted. For the reasons that follow, we affirm the judge’s decision.

I.

Factual and Procedural Background

Calmat operates a facility in Phoenix, Arizona, that consists of an aggregate mine, a “ready-mix” concrete batch plant, and an asphalt batch plant. Jt. Stip. 1; Tr. 154, 187. On August 11, 2003, MSHA Inspector Enrique Videl was at the facility to conduct an inspection of the mine and maintenance shop. 26 FMSHRC at 410; Jt. Stip. 13. After a pre-inspection conference at the facility’s main office, Inspector Videl walked outside and observed a man who was atop a Caterpillar 773B End Dump Truck (“Cat 773” or “haul truck”) that had been loaded onto an over-the-road “LowBoy” tractor-trailer for transport off the property. 26 FMSHRC at 410; Jt. Stips. 13 & 14; Tr. 87, 101-04; Gov’t Ex. P-3 (photograph taken by Inspector Videl

showing actual observation). The man was not wearing any fall protection. Jt. Stip. 13; Tr. 87. He was the driver of the LowBoy and an independent contractor hired by Pacific Tri-Star, Inc., a used, heavy-equipment dealer with which Calmat had negotiated the sale of the Cat 773. 26 FMSHRC at 410-11; Jt. Stip. 14; Tr. 113. Inspector Videl thereupon issued Calmat an imminent danger order for failure to provide site-specific training to the driver,<sup>1</sup> along with a citation for failure to provide him with safe access atop the Cat 773.<sup>2</sup> 26 FMSHRC at 410; Gov't Ex. P-5 (copies of order and citations).

At the time of the alleged violations, the LowBoy holding the Cat 773 was parked on a flat, dirt road adjacent to another dirt road in the vicinity of the concrete batch plant. 26 FMSHRC at 411; Jt. Stip. 19; Tr. 88-91. The area was located near a pile of aggregate to be used by the processing center of the concrete batch plant to produce ready-mix, as well as near the ready-mix truck parking lot and slump racks where ready-mix drivers clean their trucks and add water to loads. Jt. Stip. 19. A second LowBoy tractor-trailer holding another Cat 773 was parked nearby. 26 FMSHRC at 410-11; Tr. 151; Gov't Ex. P-3.

Calmat challenged the order and citation solely on the basis that the alleged violations occurred in an area of the facility that Calmat contends is excluded from MSHA's jurisdiction by an Interagency Agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"). 26 FMSHRC at 409. At the hearing, Calmat stated that, absent the existence of the concrete and asphalt batch plants at the facility, there would be no dispute because MSHA would have sole jurisdiction over the facility. Tr. 16-17. Calmat also agreed that, if MSHA's jurisdiction were found to be proper, it would pay the proposed penalties. 26 FMSHRC at 409 n.1.

After examining the Mine Act's definition of "coal or other mine" and accompanying legislative history, the judge held that because "the area in which the violations were cited was a private way or road appurtenant to 'an area of land from which minerals are extracted,'" the area fell within the statutory definition of a mine. 26 FMSHRC at 409-11. The judge further held that "unless specifically excluded by the Interagency Agreement as a concrete batch plant the cited area was within [MSHA's] jurisdiction." *Id.* at 411. The judge went on to find that, being approximately 400 feet away, the site of the alleged violations was a significant distance from the processing center for the concrete batch plant but near an aggregate stockpile used to supply it.

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<sup>1</sup> The order alleges a violation of 30 C.F.R. § 46.11(b)(4). Section 46.11 states, in pertinent part, that "(b) You must provide site-specific hazard awareness training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at a mine site, including: . . . (4) Customers, including commercial over-the-road truck drivers . . . ."

<sup>2</sup> The citation alleges a violation of 30 C.F.R. § 56.11001, which requires that "[s]afe means of access shall be provided and maintained to all working places."

*Id.*<sup>3</sup> However, the judge concluded that since the site was not within the area of the mine that the Interagency Agreement intended to exclude from the Mine Act's coverage – i.e., the concrete batch plant or its stockpiles – the site was within MSHA's jurisdiction. *Id.* Accordingly, the judge affirmed the order and citation and assessed civil penalties totaling \$2,975.00, the amount proposed by the Secretary for the two violations. *Id.*

## II.

### Disposition

On appeal, Calmat continues to base its challenge to MSHA's jurisdiction on its claim that the conduct for which Calmat was cited "occurred at a location squarely within the concrete batch plant and, therefore, beyond MSHA's jurisdiction under the Interagency Agreement." C. Amended Br. at 2.<sup>4</sup> Calmat contends that the judge failed to address the issue of which area of the facility constitutes the concrete batch plant exempt from MSHA's jurisdiction under the Interagency Agreement. C. Amended Br. at 4-6. Calmat maintains that the site of the alleged violations was completely surrounded by components of the concrete batch plant and that activities that took place on the road adjacent to the area cannot be attributed to the entire facility. C. Reply Br. at 5-7. Calmat argues that the judge further erred in finding that the site of the alleged violations was a private way or road appurtenant to a mine and that past use of the haul trucks in mining operations provided a sufficient basis for MSHA's exercise of jurisdiction in this case. C. Amended Br. at 7-8, 9-11; C. Reply Br. at 3-4, 9-12. Finally, Calmat asserts that it did not receive notice that the functional and operational areas of its concrete batch plant are regulated by MSHA. C. Amended Br. at 12; C. Reply Br. at 12-15.

The Secretary responds that the judge correctly concluded that the site of the alleged violations was subject to MSHA's jurisdiction because the area is adjacent to a road that originates at one of the entrances to the facility and extends through the facility to the excavation pit. S. Br. at 9-17. She asserts that the judge also correctly concluded the haul truck, atop which the man was standing, had been used in the past to haul mine product and that use provides an additional basis for MSHA's jurisdiction in this case. *Id.* at 17-22. The Secretary argues that the judge correctly determined that neither the haul truck nor the area in which it was parked is

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<sup>3</sup> See 26 FMSHRC at 410 (judge's reference to area "B"); Tr. 114-15 (inspector's testimony that haul trucks were approximately 400 feet from the processing center for the concrete batch plant at area "B").

<sup>4</sup> Calmat designated its petition for discretionary review and accompanying memorandum of points and authorities as its opening brief. Letter dated July 26, 2004. On September 14, 2004, the Commission received Calmat's notice of errata and amended memorandum of points and authorities, which deleted five lines of text and added four lines of text. While this filing occurred after the Secretary filed her brief, she neither objected nor responded.

excluded from MSHA's jurisdiction because neither was within an area specifically excluded by the Interagency Agreement. *Id.* at 22-26. The Secretary contends that, pursuant to the language and purpose of the Mine Act and the Interagency Agreement, Calmat had fair notice that the haul truck and the area in which it was parked are subject to MSHA's jurisdiction. *Id.* at 26 n.8.

Section 4 of the Mine Act provides in part that "[e]ach coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. "Coal or other mine" is defined in section 3(h)(1) of the Act as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1). Pursuant to subsection (C)'s language requiring that the Secretary, in making a determination of what constitutes mineral milling for purposes of the Mine Act, give due consideration to the convenience of delegating to one Assistant Secretary the authority over the health and safety of miners employed at one physical establishment, MSHA and OSHA entered into an Interagency Agreement.<sup>5</sup> 44 Fed. Reg. 22,827 (Apr. 17, 1979), *amended by* 48 Fed. Reg. 7,521 (Feb. 22, 1983).

Under the Interagency Agreement, some operations which could be considered "mineral milling" are regulated by MSHA while others are regulated by OSHA. Paragraph B.6.b., which delegates to OSHA jurisdiction over, among other things, concrete and asphalt batch plants, including those located on mine property, is relevant to the Calmat facility in this case. 44 Fed. Reg. at 22,828. Also, Appendix A of the Interagency Agreement provides that, with regard to concrete ready-mix or batch plants, OSHA's jurisdiction commences upon arrival of sand and gravel or aggregate at the plant stockpile. *Id.* at 22,830.

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<sup>5</sup> Under section 4 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (2000) ("OSH Act"), OSHA has jurisdiction to regulate the working conditions of only those employees whose occupational health and safety is not regulated by other federal agencies or by state agencies pursuant to the OSH Act. 29 U.S.C. § 653(b)(1).

A. Whether the Secretary Properly Exercised MSHA's Jurisdiction

In determining whether the Secretary has adhered to the Interagency Agreement in exercising MSHA's jurisdiction in this case,<sup>6</sup> the agreement as well as common sense dictates that we examine both the location where the cited conduct occurred and the nature of the conduct itself. The terms of the Interagency Agreement are clear that both work locations and work functions are important in determining the respective jurisdiction of the two agencies.<sup>7</sup> Moreover, focusing only on the location of the work, as Calmat urges (*see* C. Amended Br. at 6, 11; C. Reply. Br. at 5), would permit an operator at a facility, where there is both OSHA and MSHA-regulated work, to escape enforcement of one agency's regulations by moving the work to an area of the facility considered to be geographically outside that agency's jurisdiction. While there is no allegation that such conduct occurred here, we must be mindful of the potential for abuse in other cases.<sup>8</sup>

In reviewing the judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. *See* 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

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<sup>6</sup> Given Calmat's position that, absent a finding the cited conduct occurred within the concrete batch plant area of its facility, MSHA's jurisdiction would be appropriate, we do not address the basis for MSHA's jurisdiction under section 3(h)(1).

<sup>7</sup> As previously noted, Paragraph B.6.b. of the Interagency Agreement assigns concrete batch plants, i.e., locations, to OSHA's jurisdiction, but Appendix A specifies that OSHA's regulatory authority does not begin until after arrival of product at the stockpile. 44 Fed. Reg. at 22,828, 22,830. Another example of how the Interagency Agreement relies upon both location and function appears in Paragraph B.4. which provides that the term "milling" may be expanded to include processes that are related, technologically or geographically, or narrowed to exclude processes that are unrelated, technologically or geographically. *Id.* at 22,828. In addition, Paragraph B.5. then lists several factors to be considered in determining what constitutes milling and whether a physical establishment is subject to authority by MSHA or OSHA, including the processes conducted at the facility. *Id.*

<sup>8</sup> Our approach here is consistent with previous cases involving jurisdictional questions governed by the Interagency Agreement, where the Commission has examined various work sites as well as the functions performed and the processes conducted to determine MSHA's jurisdiction under the Mine Act. *E.g.*, *Watkins Engineers & Constructors*, 24 FMSHRC 669, 672-76 (July 2002); *Drillex, Inc.*, 16 FMSHRC 2391, 2394-96 (Dec. 1994); *W. J. Bokus Indus., Inc.*, 16 FMSHRC 704, 705-08 (Apr. 1994); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-55 (D.C. Cir. 1984) (considering physical proximity and operational integration to determine that slate gravel processing facility constituted a mine within Mine Act).

2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We also keep in mind the words of the Senate Committee responsible for drafting the Mine Act:

The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

The judge concluded that the area in which the cited conduct occurred was not within the area of the facility over which OSHA, according to the Interagency Agreement, had jurisdiction (i.e., the concrete batch plant or its stockpiles) but, rather, a flat area adjacent to a dirt roadway that ran through the facility from one of the entrances. 26 FMSHRC at 411. With regard to exactly where the Cat 773 was located, Joint Stipulation 19 states “the Cat 773 was located *on* a roadway” (emphasis added). Inspector Videll testified the area where the haul trucks were parked was a flat, dirt roadway, and he also estimated the area was merely 10 to 15 feet from another roadway used in entering and exiting the facility by himself and many others, such as Calmat's miners, other employees, and contractors, including aggregate truck drivers and mine maintenance contractors. Tr. 88-95, 124-25; *see* 26 FMSHRC at 411 (noting alleged violations occurred adjacent to the roadway used by various vehicles, including those of miners coming to and leaving work, trucks carrying mine personnel, and trucks used to maintain mine equipment).

Despite Joint Stipulation 19, Calmat argues the cited conduct took place on “raw land” near a road, not “on” a road. *See* C. Amended Br. at 9, 11; C. Reply Br. at 5, 9. Calmat can go no further, however, conceding the site at issue “was not necessarily a functional ‘component’ of the concrete batch plant.” C. Reply Br. at 5. Nevertheless, it urges that we overturn the judge's factual finding because the cited conduct occurred in an area that was completely surrounded by components of the batch plant. C. Amended Br. at 6, 11.

We do not entirely agree with Calmat's description of the area. As the judge found, the processing center for the concrete batch plant was 400 feet away from where the cited conduct took place. 26 FMSHRC at 411; *see* n.4, *supra*.<sup>9</sup> While the concrete batch plant stockpiles were

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<sup>9</sup> While Calmat is correct that the judge erroneously referred to the “processing center of the concrete batch plant” as the “concrete batch plant,” we believe the judge's error is harmless. *See* 26 FMSHRC at 410 & 411; C. Amended Br. at 4-6. The judge clearly states his understanding of the several areas excluded from MSHA's jurisdiction by the Interagency Agreement as follows: “It is . . . undisputed that certain areas are excluded from Mine Act jurisdiction by the Interagency Agreement. The Secretary acknowledges that these excluded areas include the concrete batch plant (area ‘B’ on Exhibit R-1) and the specific aggregate

considerably closer, also nearby was a maintenance shop at which mechanical work was performed on the haul trucks. Jt. Stip. 10. MSHA inspected the shop, and employees, including miners, checked in and attended safety meetings at the shop. Jt. Stips. 10 & 11; Tr. 75. Significantly, there was no fence or other clear demarcation line between the areas of the mine and those of the concrete batch plant.

In addition, Stephen Buckner, Calmat's plant manager, testified that the area at issue was not part of the concrete batch plant. Tr. 177-79. He further admitted that his choice of that area for loading the haul trucks onto the LowBoys had nothing to do with the concrete batch plant. Tr. 227. The site was selected because the LowBoy tractor-trailers onto which the haul trucks were being loaded are very long trucks and it was the "best," "safest," and "emptiest" place that was near to a road. Tr. 226-27.

Thus, the site of the alleged violations is a part of the facility that was not solely devoted to either MSHA-regulated aspects or OSHA-regulated aspects of the work performed there, and the site was near to both mining-related areas as well as the concrete batch plant. Consequently, an examination of the functions being performed that gave rise to the order and citation are appropriate.

It is clear that the cited conduct of the independent contractor had nothing to do with Calmat's concrete batch plant operations but, rather, occurred in connection with Calmat's mining operations. The Joint Stipulations indicate that the haul trucks had been used in functions at Calmat's facility that are indisputably subject to the Mine Act (i.e., prior to the arrival of product at the stockpile when, pursuant to Appendix A of the Interagency Agreement, OSHA's jurisdiction commences). Joint Stipulations 14 through 16 state, in part:

14. . . . The Cat 773 was a 50 Ton End Dump Truck which Respondent *had used in its mining operations*. In August 2002, however, the Cat 773 was relegated to Respondent's bone yard because it was inoperable for mining purposes – it had a cracked frame. . . .

15. During its active use by Respondent prior to August 2002, the Cat 773 was driven only by Respondent's *miner* employees, i.e., those who had received new miner or refresher miner training under the [Mine] Act.

16. The Cat 773 was used primarily, if not exclusively, as a *hauler*. A loader would excavate rocks and minerals from the pit and place the material inside the Cat 773. Then, the Cat 773 would *haul the material to the feed hopper*.

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stockpiles associated with the concrete batch plant (areas P ½, P 3/8, P 1 ½, PL and PS on Exhibit R-1)." 26 FMSHRC at 410. Moreover, in his ultimate finding describing the area excluded from MSHA's jurisdiction, the judge refers to both the concrete batch plant and its stockpiles. *Id.* at 411.

Jt. Stips. 14-16 (emphases added). See *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1296 (Nov. 2000) (holding dragline assembly site was a mine and dragline was equipment used in mining subject to Mine Act).

Calmat argues that the prior sale of the haul trucks removes them from MSHA's jurisdiction (C. Reply Br. at 14), but we cannot agree. As the facts underlying the order and citation show, the haul trucks remained at Calmat's facility pursuant to its interest and under its control. Witnesses, including Calmat's plant manager, testified that a mine mechanic drove the haul trucks from the bone yard to the subject area and was responsible for overseeing the job of preparing and loading them onto the LowBoy tractor-trailers. Tr. 136-41, 190-95, 202-04. Moreover, Calmat does not explain how the sale transferred jurisdiction over the work performed on the haul trucks to OSHA, when the haul trucks remained unrelated to Calmat's OSHA-regulated operations.

In summary, considering both the locational and functional aspects of this case, the site where the haul trucks were parked was not clearly part of the batch plant that was excluded from MSHA's jurisdiction by the Interagency Agreement, and the haul trucks themselves were clearly related to mining operations and within MSHA's jurisdiction. Because the alleged violations involve an independent contractor performing work on mining equipment under the direction of a mine employee in a dual-use area, and in light of Congress' clear intention that jurisdictional doubts be resolved in favor of coverage by the Mine Act, we believe the alleged violations properly fall under MSHA's jurisdiction. Accordingly, we conclude that substantial evidence supports the judge's conclusion that the Secretary correctly applied the Interagency Agreement in exercising MSHA's jurisdiction in this case.

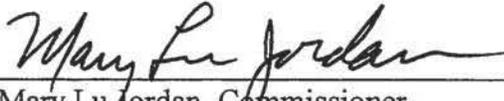
#### B. Whether Calmat Had Notice of MSHA's Jurisdiction

Courts have found adequate notice where "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects the parties to conform" by "reviewing the regulations and other public statements issued by the agency." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citing *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)). In this case, we conclude that adequate notice was provided Calmat by the language and legislative history of the Mine Act as supplemented by the Interagency Agreement, which carves out of MSHA's jurisdiction concrete batch plant operations. Where, as here, neither the geographic site of the alleged violations nor the haul trucks involved in the alleged violations were exclusively related to the concrete batch plant, it follows that Calmat should have known the site and haul trucks would be subject to MSHA's jurisdiction.

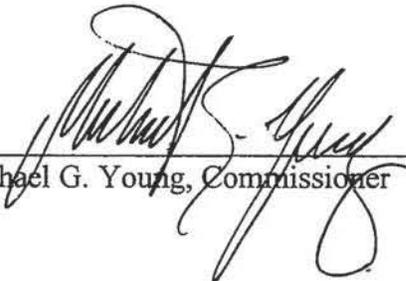
III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

  
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Mary Lu Jordan, Commissioner

  
\_\_\_\_\_  
Stanley C. Suboleski, Commissioner

  
\_\_\_\_\_  
Michael G. Young, Commissioner

Chairman Duffy, concurring:

I join with my colleagues in affirming the decision below; the substantial evidence rule compels that result. This case raises important questions regarding the effectiveness and predictability of enforcement under the Mine Act, however, that warrant a separate opinion.

In my view, the area where the violation occurred, referred to as area "H" in the exhibits, is more logically associated with that part of the property designated as being under OSHA's jurisdiction. By location, it is certainly more proximate to the OSHA side of the property than it is to the MSHA side of the property. It is directly adjacent to a material stockpile that feeds the concrete batch plant, and, according to the Interagency Agreement between MSHA and OSHA, OSHA's jurisdiction over concrete batch plants "commences after arrival of sand and gravel or aggregate at the plant stockpile." Interagency Agreement at Appendix A, 44 Fed. Reg. at 22,830. In addition, area "H" is located near the ready-mix truck parking lot and slump racks where ready-mix truck drivers clean their trucks and add water to loads. Jt. Stip. 19; Tr. 157-88.

Nevertheless, Calmat's principal witness testified that area "H" is not part of the concrete batch plant. Tr. 177-79. Conceding that the area in question is not part of the concrete batch plant constitutes a fatal admission against interest that supports the judge's conclusion that the area in question was subject to MSHA's jurisdiction, if only by default. That may be sufficient for the resolution of this case, but it offers little by way of guidance with respect to other properties that may be subject to the dual jurisdiction of OSHA and MSHA.

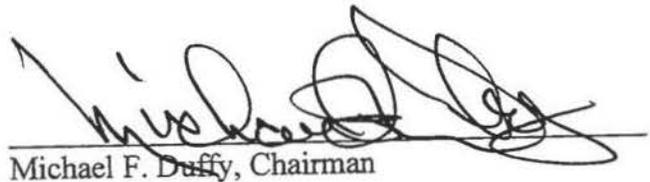
Paragraph B.2. of the Interagency Agreement restates the Secretary's statutory authority under 30 U.S.C. § 802(d) to delegate to one agency or the other the authority for all workplace safety and health enforcement at dual jurisdiction sites in the interest of administrative convenience. That was the circumstance in *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984), where all safety and health enforcement authority had been delegated to MSHA prior to commencement of the enforcement action giving rise to the litigation. Had the Secretary exercised her discretion here as she did in *Carolina Stalite*, particularly in light of the lack of clear lines of demarcation between the mining and mineral processing functions at the Calmat property (e.g., the shared use of the maintenance shop), there would have been no jurisdictional question to decide in this case.

The Secretary chose not to take that course of action, insisting that the area in question is inarguably within the regulatory purview of MSHA. That professed certainty is belied by the MSHA inspector's testimony that on his initial visits to the mine, he had to be directed by the operator's representative to those areas considered to be MSHA-regulated areas. Tr. 46, 64. Moreover, the inspector testified that prior to his observation of the violation, he had not intended to inspect the area in question as part of his regular inspection. Tr. 88. This was so despite the Act's command that mines be inspected in their entirety. 30 U.S.C. § 813(a). In

short, had the inspector not seen the violative condition occurring within area "H," MSHA's jurisdiction over the area would not have been invoked.<sup>1</sup>

In sum, if not for Calmat's fatal admission, I would hold that the area in question, by geographical location, was more logically aligned with the concrete batch plant and more appropriately within OSHA's jurisdiction. Granting that to be the case, the violative conduct would not have gone unsanctioned. Paragraph C.3. of the Interagency Agreement provides that when MSHA becomes aware of unsafe or unhealthful conditions in an area for which OSHA has enforcement authority, MSHA shall forward that information to OSHA, and under Paragraph C.4., OSHA shall notify MSHA of the ultimate disposition of the matter. 44 Fed. Reg. at 22,828. The inspector, therefore, after having been assured that the contractor's employee was no longer in danger, could have referred the matter to OSHA.<sup>2</sup>

This case illustrates the need to establish definitive jurisdictional authority for workplace safety and health at dual use properties by assigning exclusive responsibility to either MSHA or OSHA, or by clearly delineating beforehand those areas subject to enforcement by the respective agencies. In any event, the allocation of enforcement authority should not be left to the ad hoc approach adopted here.



Michael F. Duffy, Chairman

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<sup>1</sup> My colleagues conclude that MSHA's jurisdiction is supported by the fact that the contractor's employee was standing on equipment associated with mineral extraction, not concrete batch plant processing. Slip op. at 7-8. I do not believe that is dispositive. The contractor's employee could have been standing on a stack of giant widgets, and the hazard would have been the same. Moreover, section 3(h) of the Mine Act refers to mining equipment "used in, or to be used in . . . the work of extracting . . . minerals from their natural deposits . . ." The equipment here had been junked and sold, and was no longer used in the extraction process. 26 FMSHRC at 410-11.

<sup>2</sup> Notwithstanding his contention that the conduct he observed constituted an imminent danger under the Act, the inspector paused to take a photograph of the violative scene. Tr. 101-02. It would seem to me that a shouted "Get the hell down from there!" might have been a more appropriate and practical response. In any event, by the time the inspector arrived at the LowBoy, the contractor's employee had already returned safely to the ground. Tr. 87-88.

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ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

September 8, 2005

DANIEL B. LOWE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
	:	
v.	:	
	:	
	:	
SOUTHWEST DIVISION,	:	Docket No. WEST 2005-246-DM
AGGREGATE INDUSTRIES,	:	WE MD 2005-08
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	Mine I.D. 26-01845
MINE SAFETY AND HEALTH	:	Sloan Quarry #1001
ADMINISTRATION (MSHA),	:	
ROBERT M. FRIEND,	:	
Respondents	:	

**DECISION GRANTING MOTIONS FOR SUMMARY DECISION**  
**ORDER OF DISMISSAL**

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Daniel B. Lowe against Southwest Division, Aggregate Industries (“Aggregate Industries”) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). In his complaint, Mr. Lowe contends that his employment with Aggregate Industries was terminated after Robert M. Friend, MSHA’s Administrator for Metal/Nonmetal Safety and Health, complained to the president of Aggregate Industries about harassing calls Lowe was making to MSHA headquarters. Lowe contends that he was terminated because of his protected activities as a direct result of Robert Friend’s interference, intimidation, and harassment.

Although it appeared from the original complaint Lowe filed with MSHA that he wanted to include Friend in his section 105(c)(3) complaint, he only served Aggregate Industries with his complaint of discrimination in this case. At the time Lowe initiated this action, he was not represented by counsel. I permitted Lowe to serve the Secretary and Mr. Friend with his complaint of discrimination out of time subject to any objections that they might raise.

In response to Lowe’s complaint, the Secretary of Labor and Robert Friend filed an answer, a motion for summary decision, and a motion to dismiss. Aggregate Industries filed a

response to this motion and joined in that part of the motion that seeks dismissal of the complaint on the basis that Lowe did not engage in protected activity. Lowe filed an opposition to the motion for summary decision and motion to dismiss. For the reasons set forth below, the motion for summary decision is granted and this proceeding is dismissed against the Secretary, Mr. Friend, and Aggregate Industries.

## I. BACKGROUND

Aggregate Industries operates the Sloan Quarry near Las Vegas, Nevada. On or about February 8, 2005, Mr. Lowe filed a discrimination complaint with the local office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). On March 17, 2005, the Secretary determined that the facts disclosed during her investigation into Lowe's discrimination complaint do not constitute a violation of section 105(c) of the Mine Act.

On or about April 7, 2005, Lowe filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. The allegations contained in the complaint are set forth below along with other undisputed facts.

Mr. Lowe started working for Aggregate Industries in June 2004 as the company's regional safety manager. He states that he was responsible for investigating accidents, compliance with MSHA standards and regulations, and conducting safety training. He supervised three employees. Lowe also provided safety consultation and training services for Technos Corporation ("Technos"), a company that is not owned or otherwise affiliated with Aggregate Industries. Technos is a speciality contractor that provides fan services at mines. Its MSHA contractor number is LAH. Lowe provided these services for Technos as a contractor on his own time.

On September 22, 2004, MSHA Inspector Norman Zeeman issued Citation No. 6255580 to Technos at the 1604 Quarry and Plant located near San Antonio, Texas. This facility is owned and operated by Alamo Cement Company. The citation alleged that mobile equipment at the quarry had run over electrical power conductors (welding leads) in violation of 30 C.F.R. § 56.12005. On September 27, 2004, Lowe sent a letter to Edward Lopez, MSHA's metal/nonmetal district manager in Dallas, Texas, requesting a safety and health conference on Citation No. 6255580. The letter also stated that it was to serve as a Freedom of Information Act ("FOIA") request to obtain a copy of all of Inspector Zeeman's notes, photographs, and other documents pertaining to the citation. The letter was written on the stationery of Technos and was signed by Mr. Lowe as "Corporate Safety Manager, Technos Corporation." (Ex. 8 to Secretary's Motion). The letter stated that he was the "company representative handling this action" and asked that all documents be sent to his attention. The return address was for the offices of Technos in Schertz, Texas.

By letter dated October 21, 2004, Mr. Lopez responded to the FOIA request by stating that MSHA would not be providing any documents to Technos "under FOIA exception 7(A),

which protects from disclosure records or information compiled for law enforcement purposes whose disclosure could reasonably be expected to interfere with enforcement proceedings.” (Ex. 9 to Secretary’s Motion).

In his discrimination complaint, Lowe contends that MSHA violated FOIA in that MSHA “did not properly provide the requested information or proper documentation within 20 working days of the FOIA request.” (Lowe Complaint of Discrimination). He also contends that MSHA violated section 103(h) of the Mine Act. Lowe called Lopez on the telephone on October 26, 2004, following receipt of this letter. Lowe alleges that Lopez was “unprofessional” and “verbally abusive” during this call. Lowe received a fax from Lopez following this call. (Ex. 10 to Secretary’s Motion). Lowe alleges that the fax “attempted to cover up [Lopez’s] error related to providing the requested information under FOIA and the Act.” (Lowe Complaint of Discrimination). Both of the letters from Lopez explained the appeal process under FOIA.

Lowe states that as a result of abusive and unprofessional behavior of Lopez, he called John Correll, Deputy Assistant Secretary of Labor for Mine Safety and Health, to complain about Lopez. Lowe also faxed a letter to Correll on Technos stationery about his concerns. (Ex. 11 to Secretary’s Motion). He stated his belief that MSHA was violating FOIA by not providing him with the requested information. Lowe also stated his belief that Lopez “intentionally” started a “confrontation” with him during the phone call. *Id.* Lowe further stated that Lopez “refused to take responsibility for his actions which caused a violation of federal law” and that he “should be removed from a position of responsibility as the South Central Director of MSHA as he is incompetent.” *Id.*

On October 26, 2004, Lowe also faxed a FOIA request to David D. Lauriski, the Assistant Secretary of Labor for Mine Safety and Health, asking for all documents and information concerning the Secretary’s decision to “automatically deny the release of documents and records when requested by mine operators and contractors working on mine property as it relates to information related to inspection of mines and in particular MSHA field notes taken during inspection of mines.” (Ex. 12 to Secretary’s Motion).

On November 19, 2004, Mr. Correll sent Lowe a letter stating that MSHA’s interpretation of FOIA exemption 7(A) is “consistent with other Departmental FOIA policies and practices.” (Ex. 14 to Secretary’s Motion). The letter “encouraged” Lowe to appeal the denial. Correll also stated that his review “revealed no credible evidence of unprofessional conduct by Mr. Lopez in handling this [FOIA] matter.” *Id.* In his discrimination complaint, Lowe states that Correll’s letter is “evidence of John Correll’s poor investigation of my complaint related to Edward Lopez’s actions of October 23, 2004.”

On December 1, 2004, Mr. Lowe sent another letter to Correll. In the letter, he asserted that Lopez had been “less than honest” with Correll regarding the “time line” of his FOIA request of September 27, 2004. Lowe states that his FOIA request was received by the MSHA Dallas District Office via facsimile transmission on September 27. Lowe also states that “[w]e received

the FOIA denial response in our office on October 26 . . . via facsimile transmission . . .” (Ex. 15 to Secretary’s Motion). Lowe states in his letter to Correll that “the duration of the response from MSHA [to the FOIA request] was in fact 22 days which we all know to be unlawful under FOIA.” Lowe’s letter further states that it is “his belief that Mr. Lopez has not been honest or professional in the lawful handing of our FOIA request and in fact has been deceitful and untruthful to you as well during your inquiry to this matter.” *Id.* Finally, Lowe asked Correll to call him “to advise me as to what actions MSHA is prepared to take in this matter regarding this unlawful act.” *Id.* The letter concludes by stating that if Correll does nothing in response to his letter, he is “prepared to take this matter to the Office of the Inspector General.” *Id.*<sup>1</sup>

In his discrimination complaint, Lowe states that on or soon after December 1, 2004, he tried to call Correll again but, because Correll was out of the office, he talked to Robert Friend. Lowe alleges that “Robert Friend was very abusive to me during the conversation and was extremely irate that I was making a complaint against Edward Lopez and that I had sent my . . . complaint letter to Elaine Chao, Secretary of Labor.” (Discrimination Complaint).

On December 3, 2004, Robert Friend faxed Lowe’s letters of October 26, 2004, and December 1, 2004, to James Addams, President of Aggregate Industries. Friend also talked to Addams about Lowe on the phone that day. Lowe believes that action by Friend was “nothing more than intimidation tactics, pure harassment, and interference at the hand of Robert Friend in an effort to do me personal harm.” (Discrimination Complaint). On December 6, 2004, Addams discussed the situation with Lowe. Addams asked Lowe to let him review any letters that he sends to MSHA on behalf of Technos before they are mailed to help Lowe get his “point(s) across to MSHA in a more professional manner.” *Id.* Lowe thanked Addams for his help.

Lowe stated that, “[d]ue to Robert Friend’s willful personal harassment and interference of my actions that I was taking in accordance with my statutory rights as a miner, I began the process of making a complaint to . . . the Mine Safety and Health Administration and in particular either John Correll or David Dye.” (Discrimination Complaint). At this point, Lowe called MSHA’s headquarters in Arlington, Virginia, several times in an attempt to talk to either Correll or Dye. Lowe states that on December 8, 2004, Friend called him “and was extremely irate and stated that he was going to have me fired from my employment with Aggregate Industries if I did not drop my complaint.” *Id.* Lowe states that he told Friend that he was going to file a complaint with the Inspector General to which Friend replied, “bring it on.” *Id.*

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<sup>1</sup> Marvin W. Nichols, Jr., the Director of MSHA’s Office of Standards, Regulations and Variances, also sent Lowe a letter dated November 19, 2004, in response to Lowe’s FOIA request of October 26 directed to Mr. Lauriski. The letter listed several documents that fit within the FOIA request but stated that these documents have been “redacted from public disclosure under Exemption 2 which allows for protection of internal administrative markings and practices.” (Ex. 13 to Secretary’s Motion).

Lowe states that after that call with Friend on December 8, Addams asked Lowe to stop calling MSHA. Lowe states that he responded by telling Addams that he had the right to call MSHA because Robert Friend was harassing and intimidating him. *Id.* Addams told Lowe that Friend had called him and complained about Lowe's calls to MSHA headquarters.

Following these events, Lowe began preparing complaints to be filed with the Inspector General and the Federal Bureau of Investigation ("FBI"). Lowe states that he decided to try to discuss these issues with David Dye before he filed these complaints. To that end, on January 18, 2005, he sent an e-mail to Dye asking Dye to call him. The e-mail states, in part, that he has "serious complaints against several top members of your agency" that he would like to discuss. *Id.* Lowe further advised Dye in the e-mail that if he did not hear from Dye within 24 hours, he intended to meet with the FBI to file a civil rights complaint "as I have been the victim of your senior staff members under the color of law." (Ex. 17 to Secretary's Motion).

On January 19, 2005, Friend or another MSHA official forwarded Lowe's January 18<sup>th</sup> e-mail to Addams. Lowe was terminated from his employment at Aggregate Industries on January 20, 2005. Lowe stated that Addams told him that "he had to terminate my employment with Aggregate Industries because I had made a complaint against MSHA and that MSHA was the federal agency that governs most of Aggregate Industries' business and that he, as President of the Southwest Region, was afraid of MSHA retaliating against Aggregate Industries businesses." (Ex. A ¶17 to Lowe's Opposition).

The Secretary proposed a penalty of \$60.00 for the alleged violation set forth in Citation No. 6255580 and Technos contested the citation and penalty under the Commission's procedural rules at 29 C.F.R. § 2700.26. The Secretary filed a petition for assessment of penalty on January 26, 2005, but Technos failed to file an answer as required by 29 C.F.R. § 2700.29. On April 14, 2005, the Commission's chief administrative law judge issued an order requiring Technos to show cause why it did not file an answer. When Technos failed to respond to the show cause order, the chief judge entered an order of default dated May 23, 2005, Docket No. CENT 2005-92-M. (Ex. 5 to Secretary's Motion).

## **II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS**

In her motion, the Secretary argues that Lowe failed to allege a *prima facie* case of discrimination in that his alleged activities were not protected activities under the Mine Act. All of the activities that Lowe contends were protected were taken as a representative of a mine operator, Technos Corporation, rather than on behalf of miners. She contends that advocacy on behalf of a mine operator is not protected under section 105(c) of the Mine Act. His activities had nothing to do with involving miners in the improvement of safety at the mine.

The Secretary also contends that Lowe's activities protesting the Department of Labor's interpretation of FOIA are not protected under section 105(c). Even if Lowe's original protests were protected, "when his correspondence became attenuated from Mine Act matters and turned

into complaints of missed deadlines under FOIA” they were no longer protected under the Mine Act. (Secretary’s Motion 21).

Finally, the Secretary argues that the Secretary and Friend must be dismissed from this case because neither the Secretary nor Friend may be sued under section 105(c) for actions taken during the course of his employment. “MSHA officials acting under the color of their authority are not amenable to suit under section 105(c) of the Mine Act.” *Id.* at 25 quoting *Meredith v. FMSHRC*, 177 F.3d 1042, 1056 (D.C. Cir. 1999).

Aggregate Industries, through counsel, concurs with that part of the Secretary’s motion for summary decision that seeks dismissal on the basis that Lowe did not engage in activity protected by section 105(c) of the Mine Act. It points to Lowe’s representation that, at all pertinent times, he was acting as a representative of Technos. Aggregate Industries also points to Lowe’s representation in his complaint to the Department of Labor’s Inspector General, dated January 21, 2005, that he filed the FOIA request while “conducting consultation services for Technos.” (P. 1, Attachment C to Aggregate Industries Reply). Lowe also acknowledged that the “services” he provided for Technos had “absolutely nothing to do with Aggregate Industries.” *Id.* at p. 3. As a consequence, his alleged protected activities did not arise within the scope of his employment as safety manager with Aggregate Industries.

Lowe maintains that the motions should be denied. Lowe states that, because he was a miner, he is entitled to the protections of section 105(c). He contends that he was also a representative of the miners working for Technos. Lowe states that he sought the information from the Secretary not only on behalf of Technos but also on behalf of miners who were subject to being blamed for the alleged violation. Lowe argues that he is entitled to pursue his miner’s rights under the Mine Act without being discriminated against by the Secretary and Aggregate Industries. Lowe believes that the communications sent by him to MSHA officials are protected activities and were not inappropriate.

Because the record in this case “contains no declarations or evidence . . . from Robert Friend or any other MSHA representative explaining what . . . gave them the right to contact Mr. Addams and threaten Aggregate Industries if they did not silence Mr. Lowe’s complaints,” there are “huge questions of material fact that make summary decision impossible in this case.” (Lowe Response 13). He argues that he should be allowed to complete discovery before the Secretary’s motion should be considered. Finally, Lowe argues that Friend was not acting under color of law when he made threats to get him terminated from his job with Aggregate Industries.

### III. DISCUSSION

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] Act” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any

possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987).

The Commission's Procedural Rule at 29 C.F.R. § 2700.67(b) sets forth the grounds for granting a motion for summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

I find that Lowe did not raise genuine issues of material fact in his response to the Secretary's and Aggregate Industries' motions and that they are entitled to summary decision as a matter of law. The facts clearly demonstrate that Lowe did not engage in protected activities prior to his termination from employment at Aggregate Industries.

The activities that Lowe relies on center around his request for information from MSHA concerning Citation No. 6255580 issued to Technos at the Alamo Cement facility in Texas. He made this request through FOIA on September 27, 2004. In his opposition to the motions for summary decision, Lowe states that he filed the FOIA request as a step to contesting the citation. (Lowe Opposition 3). The information sought by Lowe through the FOIA request would have been available to him through discovery if he had filed a pre-penalty contest of the citation with the Commission or if he had filed discovery after the Secretary proposed a penalty. *See* 29 C.F.R. §§ 2700.20 and 2700.56 through 2700.58. Mine operators do not generally use FOIA to get information about citations issued to them by MSHA. Lowe states that he did not know that

Technos was held in default with respect to Citation No. 6255580 and states that he has asked the Commission to reopen the case. (Ex. A ¶ 21 to Lowe's Opposition).

I hold that Lowe's communications with MSHA concerning the FOIA request were not protected activities under section 105(c) of the Mine Act. I reach this conclusion based on a number of factors discussed below.

Miners have the "right to complain to the operator and to the Secretary of alleged dangers or violations." *Pasula* at 2790. "The successful enforcement of the 1977 Mine Act is . . . dependent on the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction." *Id.* "[I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation [in the enforcement of the Act]." *Donovan on behalf of Anderson v. Stafford Construction*, 732 F.2d 954, 960 (D.C. Cir. 1984) (brackets in original) (citation omitted). A miner's complaints or actions are protected even if they go beyond what is required under the Secretary's health and safety standards "if they are based on a miner's 'good faith, reasonable belief' that such precautions are needed" so long as "the precautions themselves are reasonable." *Sec'y on behalf of Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 993 (Sept. 1999).

In this case, Lowe was not complaining about safety or health conditions at Technos' operations at the Alamo Cement Company. Instead, he believed that MSHA should not have issued the subject citation because he did not consider welding leads to be power conductors subject to section 56.12005. (Ex. 7 to Secretary's Motion). He wanted a copy of Inspector Zeeman's notes to aid him in a conference with the MSHA Dallas District Office in his attempt to get the citation vacated or modified. In taking these steps, Lowe was acting as an agent of Technos, not as a miner or a representative of miners. His actions were not designed to correct an unsafe condition or improve the safety of miners. He was seeking information from MSHA to help him negotiate a settlement for Technos with respect to Citation No. 6255580.

In his response to the motions for summary decision, Lowe states that he was seeking the information to "rebut" the citation not only on behalf of Technos but on behalf of two miners "who were subject to being blamed for the alleged violation to assist them in clearing their records of the alleged incident." (Lowe Opposition 10). He states that he was taking these actions as a miners' representative. *Id.* at 11. He filed a document dated August 16, 2005, signed by 13 miners employed by Technos designating him as their representative for mine safety and health purposes, which states that he has been their representative since August 2000. (Ex. C to Lowe's Opposition).<sup>2</sup> Lowe may well be a "miners' representative" when seeking to improve the health and safety of miners, but he was not acting as a miners' representative when he sought information to contest the citation.

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<sup>2</sup> Neither Technos nor Lowe filed this miners' representative designation with MSHA under 30 C.F.R. § 40.2.

As events progressed in the autumn of 2004, the discussions and correspondence between Lowe and MSHA turned from the initial document request to Lowe's concern that Lopez was disrespectful, abusive, unprofessional, and incompetent. Much of Lowe's anger at Lopez arose because MSHA provided its response to Lowe's FOIA request in 22 days rather than 20 days. Lowe also believed that MSHA was misusing exemption 7(A) of FOIA. These disputes between MSHA and Lowe have nothing to do with improving the safety of miners working for Technos. Lowe was not complaining about alleged violations or hazardous conditions. These discussions are not protected under section 105(c) of the Mine Act.<sup>3</sup>

I have relied on the facts presented by Lowe, including his characterization of his phone calls with MSHA officials, and the undisputed correspondence in reaching my conclusion that summary decision is warranted in this case. Further discovery would not reveal facts that would mitigate against a finding that Respondents are entitled to summary decision.

I believe that it is important to note that conflicts described above could have easily been avoided. The conduct of MSHA's management was far from exemplary. MSHA denied Lowe's FOIA request, yet it knew that he was acting as a representative of Technos. I find it hard to believe that Messrs. Lopez, Correl, and Friend were not aware that Lowe would be entitled to the inspector's notes and photographs for Citation No. 6255580 if he contested the citation before the Commission. None of these MSHA officials suggested to Lowe that he contest the citation once the Secretary proposed a penalty and that he file discovery with the Office of the Solicitor asking for the inspector's notes. If such a suggestion had been made, Lowe would have had access to the information he wanted and MSHA would not have been faced with a confrontation concerning the Secretary's recent policy of denying FOIA requests for basic information from MSHA. See "Records show Sharp Increase in MSHA FOIA Denials," *Mine Safety and Health News*, Vol. 12, No. 11, p. 222, May 31, 2005. It should also be noted that, if Lowe had contested the citation within 30 days of its issuance, he could have obtained the inspector's notes through the Commission's discovery rules before a penalty was proposed by the Secretary.

I also note that Lowe presented documentary evidence to support his contention that Friend contacted Addams for the purpose of putting pressure on Lowe to stop calling MSHA officials and to stop complaining about Lopez's response to his FOIA request. (Ex. D to Lowe's

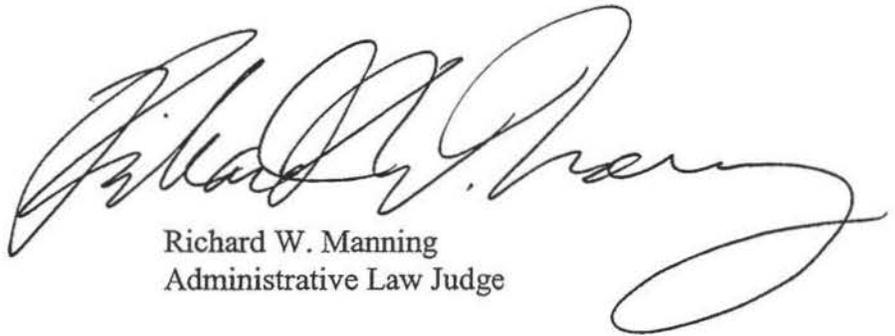
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<sup>3</sup> It also bears noting that none of the activities that Lowe contends were protected under the Mine Act were taken on behalf of miners working for Aggregate Industries or miners working at facilities operated by Aggregate Industries. In a letter dated March 7, 2005, to the MSHA special investigator who was investigating Lowe's discrimination complaint, Addams stated that he was not aware that Lowe was representing Technos in safety matters before MSHA until Friend called him on December 3, 2004. (Ex. E to Lowe's Opposition). He stated he terminated Lowe for "conflict of interest, failing to perform his job satisfactorily, failing to comply with clearly communicated policy, insubordination, and misrepresentation." *Id.* at 3. Conflict between Lowe's evidence and Addams' letter on this issue goes to the motivation for his termination by Aggregate Industries, which has no bearing on the issues presented by the motions for summary decision.

Opposition). For purposes of this decision I accepted Lowe's evidence and argument. I assume that the Department of Labor's Inspector General is looking into this matter pursuant to Lowe's formal complaint. Because I granted the Secretary's and Aggregate Industry's motions for summary decision, I did not consider the Secretary's motion to dismiss, which was based on *Meredith v. FMSHRC*.

#### IV. ORDER

For the reasons set forth above, the motions for summary decision filed by the Secretary of Labor and Aggregate Industries are **GRANTED** and the discrimination complaint filed by Daniel B. Lowe against Aggregate Industries, the Secretary of Labor, and Robert Friend under section 105(c)(3) of the Mine Act is **DISMISSED**.<sup>4</sup>



Richard W. Manning  
Administrative Law Judge

#### Distribution:

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RWM

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<sup>4</sup> Because this case is being dismissed, Aggregate Industries' motion to compel is moot.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001

September 28, 2005

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. VA 2005-17  
Petitioner : A.C. No. 44-07048-48293  
v. :  
: :  
HUBBLE MINING COMPANY, LLC, : Mine No. 4  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

This case concerns a proposal for assessment of civil penalty filed pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), the Act, seeking a civil penalty assessment for one alleged violation of a mandatory safety standard found in Part 75, Title 30, Code of Federal Regulations.

The parties have settled the matter and the Secretary has filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement. The proposed settlement is as follows:

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7342837	11/22/04	75.1725(c)	\$2,500.00	\$100.00

In support of the proposed settlement, the parties have submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, including information regarding Respondent's ability to pay and history of previous violations.

In particular, with regard to Citation No. 7342837, which was issued because a conveyor belt was not locked out while repairs were underway, the Secretary states that following a conference, the inspector's original finding that the violation was a significant and substantial contribution to a mine safety hazard was deleted and the inspector's gravity finding was changed to indicate the violation was unlikely to result in an injury to miners. The Secretary believes the settlement amount reflects these changes.

After review and consideration of the pleadings, arguments and submission in support of the settlement motion, I find the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

**ORDER**

Respondent is **ORDERED** to pay a civil penalty of \$100.00 in satisfaction of the violation in question. Payment is to be made to MSHA within 30 days of the date of this proceeding. Upon receipt of full payment, this proceeding is **DISMISSED**.



David F. Barbour  
Administrative Law Judge  
(202) 434-9980

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

September 30, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2005-54-M
Petitioner	:	A.C. No. 13-00691-42086
	:	
v.	:	
	:	IA Portable #1
HIGMAN SAND & GRAVEL, INC.,	:	
Respondent	:	

**DECISION**

Appearances: Thomas J. Pavlat, Conference & Litigation Representative, Mine Safety and Health Administration, Duluth, Minnesota, for Petitioner; Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Higman Sand and Gravel, Inc. (“Higman Gravel”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Sioux City, Iowa.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Higman Gravel operates the IA Portable #1 (the “plant”) in Plymouth County, Iowa. It is a small gravel-processing facility that includes a pit as well as a plant where the excavated rock is crushed and screened. MSHA Inspector Christopher Willett inspected the plant on September 14, 2004, and he issued the citations at issue in this case.

**A. Citation No. 6153982**

Inspector Willett issued Citation No. 6153982 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12032. The body of the citation states:

The cover plate for the control box for the rock screw was removed and not replaced exposing energized electrical conductors. This is located on the east wall of the wash plant electrical shed 5.5 feet

above the floor. The rock screw is started and stopped from this area daily. This exposes a person to the hazard of contacting energized components which could result in electrocution.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that Higman Gravel's negligence was moderate. The cited safety standard provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The Secretary proposes a penalty of \$286.00 for this citation.

Inspector Willett testified that when he entered the electrical shed he noticed that the cover was not on the electrical control box for the rock screw. (Tr. 41; Ex. G-15). Cover plates must be in place except for testing or repair. The box was energized at the time of his inspection. (Tr. 42). The bottom of this electrical control box was about 5½ feet above the floor on a wall with other similar boxes. He believed that a start/stop switch was located underneath the box. (Tr. 45). Terminals inside the box were exposed which carried electricity at 240 volts. Inspector Willett testified that there were no barricades or other impediments to entry into the building. A few miscellaneous hand tools and supplies were kept in the eight by twelve foot building.

Inspector Willett determined that it was reasonably likely that someone would be injured by the cited condition because miners have to enter the building to start and stop the plant. (Tr. 47-48). With the cover off the electrical box, a miner could accidentally come in contact with the energized terminals or wires in the box. Because the violation presented a hazard that someone could be electrocuted, the inspector determined that the violation was S&S. (Tr. 48-49). He determined that the operator was moderately negligent because Justin Higman was not aware that the cover was off the box.

Harold Higman, the owner of Higman Gravel, testified that the switches used by the plant operator to turn equipment on and off are located next to the door of the shed. (Tr. 99-101). He stated that the control box cited by Inspector Willett is about six to seven feet away from these switches. (Tr. 102). It would not be necessary for the plant operator to walk near the control box to operate these switches. Higman testified that the only time that a miner would be near the control box is when the heaters must be reset. The heaters in this box switch the rock screw circuit off whenever the screw motor is pulling more current than its capacity. (Tr. 130-31). The heaters are designed to open the circuit to prevent the motor from overheating. To reset the heaters, the cover is removed from the control box by the plant operator and the reset buttons in the control box are pushed in. (Tr. 104). The control box is de-energized with a knife blade switch before these buttons are reset. (Tr. 110, 126, 129, 136). Higman testified that the hand tools and other supplies are on the opposite side of the electrical shed. (Tr. 109). He does not believe that it is reasonably likely that anyone would be injured by the condition cited by the inspector. (Tr. 111-12).

Frank Rollins operates the plant for Higman Gravel. He testified that, on the day of Inspector Willett's inspection, the rock screen became overloaded with rock which caused the motor for the screw to overheat, causing its heaters to pop out. (Tr. 149). Rollins removed the accumulated rock from the screw and the screen. When he entered the electrical shack, he opened the knife blade switch to cut off power to the control box. (Tr. 156-57). Next, he reset the heaters and closed the knife blade switch. (Tr. 150, 172, 174, 185). He turned the plant on with the switches located by the door of the shed. (Tr. 186). Rollins testified that he forgot to put the cover back on the control box that morning after he reset the heaters. (Tr. 169). The shed has a wooden floor which is kept clean and free of tripping hazards. (Tr. 152). Rollins operates a payloader and he enters the electrical shed only twice a day, unless there is a breakdown. (Tr. 193).

I find that the Secretary did not establish that this violation was S&S. Higman Gravel admits that the cover was off the control box so it does not contest the fact of violation. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary did not prove that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury, assuming continued normal mining operations. The Secretary established the first, second, and fourth elements of the *Mathies* criteria. The IA portable is a small operation. The only individual working at the plant was Mr. Rollins. All other employees work in the pit. Rollins spends most of his time loading customers' trucks with product. He enters the electrical shack each morning to get supplies necessary to grease equipment before the start of the shift. He then enters the shack to turn on the plant. He stands at the door and turns on the equipment in sequential order while watching the equipment through the door. The switches he uses to perform this task are only a foot inside the door. He reverses the process to shut down equipment at the end of the shift. None of these tasks require him to be at the end of the shack where the cited control box is located.

The only times that Rollins is near the cited control box is when there is a problem at the screen and rock screw that causes the heaters to pop out. To reset the heaters, Rollins enters the

shack, walks up to the control box, and turns off the power using the knife-blade switch near the box. He removes the cover for the control box to reset the heaters. After he resets the heaters, he should replace the cover. On September 14, 2004, however, Rollins reestablished power with the knife-blade switch and then started the plant operating using the switches near the door to the shed, as described above, without replacing the cover to the control box.

Rollins' exposure to the hazard was quite low. It was highly unlikely that he would come in contact with energized components within the control box. There were no tripping or stumbling hazards in the area. The bottom of the box was over five feet above the floor. No other miners would have entered the shack, assuming continued normal mine operations. Although there was a slight hazard presented by the violation, it was not reasonably likely that anyone would be injured by the cited condition.

### **B. Citation No. 6153983**

Inspector Willett issued Citation No. 6153983 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a). The body of the citation states:

A guard was not provided for the drive pulley or counterweight for the rock screen. Material was built up under the drive and counterweight to where they are 6 feet above grade. This exposes a person to the hazard of contacting moving machine parts which could result in crushing or dismembering injuries.

The inspector determined that it was unlikely that someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Higman Gravel's negligence was moderate. The cited safety standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Willett testified that the drive pulley was about eight feet above the ground, but that it was about six feet above material that was built up under the rock screen. (Tr. 26-27, 215; Ex. G-5). The inspector, who is about 6' 3" tall, did not measure the height of the pulley above the built-up material but he stood about three feet away and estimated that the pulley was at eye level. (Tr. 223). The inspector testified that the built up material was rock which had fallen from the screen and that the rock appeared to have been there for "quite some time because it was solid and stable." (Tr. 27-28). He testified that there were no barricades to prevent miners from walking through the area. Willett estimated that built-up material to be about six feet wide and two feet deep. (Tr. 216). The conditions around the counterweight for the pulley, which was on the opposite side of the rock screen, were the same. (Tr. 29-30; Ex. G-6).

Inspector Willett determined that it was unlikely that anyone would be injured by the cited conditions because miners do not normally travel through the area. (Tr. 30-31). He said that the rock screen is a “wet operation” and that, at the time he wrote the citation, water was running off the sides of the screen. (Tr. 62). He considered the operator’s negligence to be moderate because Justin Higman, the company official who accompanied him on the inspection, was not aware that material had built up in the area. (Tr. 31).

Harold Higman testified that the area cited by Inspector Willett is not a walking or working surface. (Tr. 114-15). Miners cannot walk through the area because the hopper under the screen is in the way. He believes that a miner would have to get on his hands and knees to get through the area. In addition, Higman testified that anyone who traveled under the pulley or counterweight would get a shower from water running off the screen. (Tr. 115; Ex. G-5, G-6). He stated that employees do not walk in the area under the cited pulley and counterweight. (Tr. 119). Spilled rock is usually cleaned up during the shift and “for sure” before the start of the following shift. (Tr. 134). A payloader is used to clean up the material. Higman testified that material does not usually build up to a depth of two feet before it is cleaned up. (Tr. 134). He also testified that such an accumulation can develop in a few hours if there is a problem at the screen. (Tr. 144).

Frank Rollins testified that when the screen became overloaded with rock on September 14, a lot of material fell to the ground. This material piled up to a depth of several feet. (Tr. 151). Rollins testified that he could not reach the pulley or the counterweight without jumping while standing on the accumulations. (Tr. 159). He further testified that nobody ever walks under or near the counterweight or the pulley. He always cleans up accumulations with his payloader and he has never used a shovel to clean up the material. If he can, he will clean up any spills during the day but, if he is too busy loading trucks, he will clean up any spills first thing the following morning. (Tr. 168-69). Any spills in the area will be in a pile rather than flat. (Tr. 197). Justin Higman testified that he could reach the pulley from the top of the material only with a great deal of effort. (Tr. 198).

I find that the Secretary did not establish a violation of the safety standard. Subsection (b) of section 56.14107 provides that “[g]uards shall not be required where exposed moving machine parts are at least seven feet away from walking or working surfaces.” I find that the condition cited by Inspector Willett fits within this exception. There is no dispute that the pulley and counterweight were more than seven feet above the ground. The parties dispute whether they were more than seven feet above the material that had built up under the rock screen. For purposes of this decision, I assume that the distance between the pulley and the counterweight to the top of the built-up material was less than seven feet. I find, however, that these locations were not walking or working surfaces.

The top of the accumulations was not a walking or working surface for a number of reasons. First, the evidence establishes that miners would not have any reason to work or walk through the area. I credit the testimony of Higman Gravel’s witnesses that miners would not

want to stand or travel on the accumulations because water rains down from the top of the screen on a fairly constant basis. Anyone in the area would get quite wet. The photographs show water running off both sides of the screen. (Ex. G-5, G-6). In addition, I credit the testimony of Higman Gravel's witnesses that a miner could not use that route to get from one area of the plant to another without getting on his hands and knees to crawl under equipment. Frank Rollins, the only employee who works around the plant, cleans up accumulations using his payloader. Rollins testified that he tries to clean up the accumulations at least once a shift. He credibly testified that he never uses a shovel to clean up material in the area and that he never enters the area while equipment is running for any other purpose. Thus, I conclude that the nearest possible working or walking surface was, at best, several feet back from the accumulations. A miner working or walking several feet back from the accumulations would be more than seven feet from the pulley and the counter weight.

The Commission interprets this safety standard to "import the concept of reasonable possibility of contact and injury." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In that case, the Commission held that this standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* The Commission made clear that citations issued under this standard must be "resolved on a case-by-[case] basis." *Id.* I find that the Secretary did not establish that there was a reasonable possibility of contact because, as stated above, the built-up area under the screen was not a walking or working surface and the nearest possible walking or working surface was more than seven feet away from the pulley and counterweight. There was no risk that anyone stumbling or falling would come into contact with the moving parts or that anyone would make contact due to inattention or careless behavior. Other Commission administrative law judges have vacated citations under similar circumstances. See *Hamilton Pipeline, Inc.*, 24 FMSHRC 915, 922-23 (Oct. 2002) (ALJ); *Chrisman Ready-Mix, Inc.*, 22 FMSHRC 1256, 1259-61 (Oct. 2000) (ALJ); *Allied Custom Gypsum, Inc.*, 22 FMSHRC 654, 657-58 (May 2000) (ALJ); and *Knock's Building Supplies*, 20 FMSHRC 535, 540-41 (May 1998) (ALJ) ("spillage [from a wash screen] did not convert what was not normally a walking or working area into one.")

### **C. Citation No. 6153984**

Inspector Willett issued Citation No. 6153984 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12004. The body of the citation states:

The outer jacket of the power cord to the rock stacker was cut exposing inner conductors to damage. The cut was 3/4 of an inch long and located near the cord hanger, 5 feet high, at the tail pulley of the conveyor. This exposes a person to the hazard of contacting stray electrical current which could result in electrocution.

The inspector determined that it was unlikely that someone would be injured as a result of this condition but that, if an injury were to occur, it could be fatal. He determined that the violation was not S&S and that Higman Gravel's negligence was moderate. The cited safety standard provides, in part, that "[e]lectrical conductors exposed to mechanical damage shall be protected." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Willett issued the citation because the power conductor (the "cord") was damaged. (Tr. 33; Ex. G-9). The damage appeared to be a half-inch long nick in the outer jacket of the cord. (Tr. 34). The inner conductors were not damaged. He believed that the power cord carried 240 volts. The inspector determined that it was unlikely that anyone would be injured as a result of the cited condition because there was nobody working in the area and no bare electrical conductors were exposed. (Tr. 35). He did not know whether the power cord was live at the time of the inspection, but the stacker was operating. (Tr. 73, 217). Inspector Willett believes that the cord provided power to the stacker. (Tr. 217-18). He considered the operator's negligence to be moderate because Justin Higman was not aware of the violation.

Harold Higman testified that the power cord was not energized and it was not connected to a power source. (Tr. 120). He stated that the cord had been out of service for years. (Tr. 121). Power to the rock stacker was provided from overhead power lines through a different electrical cord. *Id.* Rollins testified that the power cord was not energized and that the cord had not been used for at least 16 years. (Tr. 161). He also testified that power was supplied to the rock stacker from overhead power lines. *Id.* Justin Higman testified that he was not aware that the stacker did not receive its power from the cited cord at the time of the inspection. (Tr. 203).

I find that the Secretary did not establish a violation. I credit the testimony of Higman Gravel's witnesses that overhead power lines provided electricity to the rock stacker. The power cord cited by the inspector was not energized and had not been used for years. Although the cited electrical cord was damaged, it had apparently been used when power was supplied to the rock stacker by a portable generator. I hold that, under the circumstances, the cited cord was not an electrical conductor for purposes of the safety standard.

The Secretary questions the testimony of the operator's witnesses because Inspector Willett had not been advised of this alleged fact at the time of his inspection. Harold Higman usually accompanies MSHA inspectors during inspections of the plant, but he was not available at the time of Inspector Willett's inspection. Justin Higman is not directly involved in the operation of the plant because he concentrates on sales, marketing, and office work. (Tr. 189). Justin Higman accompanied the inspector on September 14 and I credit his testimony that he was not aware that the cited cord was not used.

The Secretary defines "conductor" as "a material, usually in the form of wire, cable, or bus bar, capable of carrying an electric current." 30 C.F.R. § 56.2. An argument can be made that, because the cited cord was "capable of carrying electric current," it was an electrical conductor which had to be protected against mechanical damage despite the fact that it was not

being used. Ordinarily, a citation should not be vacated on the basis that a cited electrical cord was not being used at the time of the inspection. In this case, however, the cited cord had not been used for a significant length of time and there was no indication that it would be used in the future. Rollins testified that he had worked at the plant for 16 years and that he could not recall that the cord had ever been used.

Because the cited electrical cord had not been used for a considerable length of time and it does not appear that it would be used, I find that it no longer functioned as a conductor as that term is defined by MSHA. Thus, the conditions presented did not violate the safety standard.

#### **D. Citation No. 6153985**

Inspector Willett issued Citation No. 6153985 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12004. The body of the citation states:

The outer jacket to the feed bin conveyor at the Spec Plant was damaged exposing inner conductors to mechanical damage. The damaged area is exposing inner conductors for 1.5 inches. The cord is not energized, but inner conductors are faded from being exposed to the sunlight for a period of time. This exposes a person to the hazard of contacting stray electrical current which could result in electrocution.

The inspector determined that it was unlikely that someone would be injured as a result of this condition but that, if an injury were to occur, it could be fatal. He determined that the violation was not S&S and that Higman Gravel's negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Willett issued the citation because the outer jacket of the power cord to the feed bin was damaged. (Tr. 36-37; Ex. G-12). The damage appeared to be a tear about an inch and a half long in the outer jacket of the cord. (Tr. 37). The inner conductors were not damaged but they were faded, which indicated that the condition had not been recently created. Small particles of rock and sand were in the cord. (Tr. 38). The cord was hanging alongside the conveyor. Although the cord was not energized, it controlled the feed bin to the spec plant. A portable generator would have to be started to energize the cord. The inspector determined that it was unlikely that anyone would be injured as a result of the cited condition because the conveyor was not in operation. (Tr. 39). He considered the operator's negligence to be moderate because Justin Higman was not aware of the violation.

Harold Higman testified that the cited power cord was not energized and that the generator which provided power to the cord was out of service because the battery for the generator was dead. (Tr. 122). He stated that the equipment would have been inspected before the conveyor was started. (Tr. 123). Higman testified that the conveyor had not been used for

“some time” and it was taken apart and removed from the property shortly after the inspection. He believes that the tear was created by a loader operator when the area around the conveyor was cleaned up the last time it was used. The spec plant was in a separate location from the rest of the plant and it had no “operating association with the other equipment” at the plant. (Tr. 143). Rollins testified that the spec plant was about 100 feet away from the other equipment. (Tr. 180).

Justin Higman testified that he told Inspector Willett that the spec plant was shut down and was scheduled to be torn down and removed from the plant. (Tr. 204). The spec plant had been out of service for some time. (Tr. 206-07). The spec plant was not tagged out. (Tr. 210). Inspector Willett recalls being told that other equipment at the plant had been abandoned, but he did not believe that this conversation applied to the spec plant. (Tr. 216).

I find that the Secretary did not establish a violation. The spec plant was shut down and was not being used. I credit the testimony of Harold Higman that the battery to the portable generator that supplied power to the cord was dead. The equipment was torn down shortly after the inspection and removed from the property. The cited cord did not function as an electrical conductor at the time of the inspection so the damage to the cord did not present a safety hazard. Inspector Willett recognized that the cord was not energized at the time of his inspection. I find that this cord had not been used for some period of time and there is no evidence that the cord had ever been used to conduct electricity in the damaged condition. My analysis of Citation No. 6153984 set forth above, also applies to this citation.

#### **E. Citation Nos. 6153986, 6153987, and 6153988**

Higman Gravel agreed to withdraw its contest of these citations at the hearing. As a consequence, these citations are affirmed as written.

## **II. APPROPRIATE CIVIL PENALTIES**

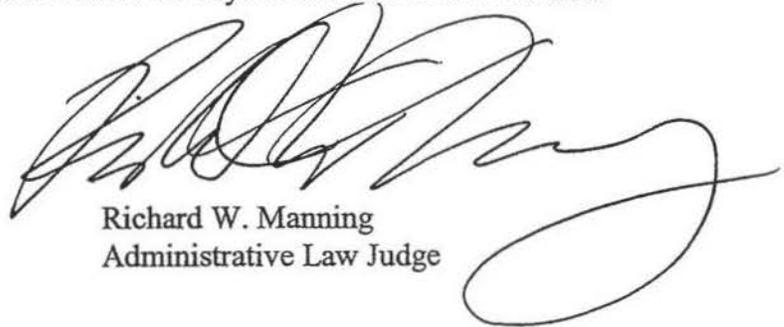
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The IA Portable #1 has a history of 12 citations issued during the 24 months preceding the inspection. (Ex. G-1). Higman Gravel is a small operator and the IA Portable #1 is a small mine. All of the violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Higman Gravel’s ability to continue in business. With respect to Citation No. 6153982, the gravity was non-serious and the negligence was moderate. With respect to the remaining citations, the gravity and negligence are as set forth in the citations. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

### III. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
6153982	56.12032	\$60.00
6153983	56.14107(a)	Vacated
6153984	56.12004	Vacated
6153985	56.12004	Vacated
6153986	56.14107(a)	60.00
6153987	47.44(b)	60.00
6153988	56.12004	60.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Higman Sand & Gravel, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$240.00 within 30 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

Distribution:

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RWM