

OCTOBER 1998

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OCTOBER 1998

There were no cases in which review was granted during the month of October:

Review was denied in the following cases during the month of October:

Secretary of Labor, MSHA v. Hobet Mining, Inc., Docket No. WEVA 96-170, etc.
(Judge Melick, August 31, 1998)

Secretary of Labor, MSHA v. Cyprus Emerald Resources Corporation, Docket No.
PENN 94-23, etc. (Judge Hodgdon, September 30, 1998)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 16, 1998

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

v.

UNIQUE ELECTRIC

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Docket No. WEST 95-333-M

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

DECISION

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

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge Richard W. Manning abused his discretion by considering an operator's cessation of business as a factor warranting a reduction in the penalty, in light of section 110(i) of the Mine Act, 30 U.S.C. § 820(i), which requires that penalties should take into account "the effect on the operator's ability to continue in business." 19 FMSHRC 783, 792 (Apr. 1997) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's penalty assessment. For the reasons that follow, we vacate the judge's penalty assessment and remand for reassessment.

I.

Factual and Procedural Background

At the time of the fatal accident that was the subject of this proceeding, the Washington/Niagara Limited Partnership operated the Washington Mine, an underground gold mine in Shasta County, California. 19 FMSHRC at 784. Sub-level 2 of the mine contained

water in the drift¹ requiring continuous pumping. 19 FMSHRC at 785. On September 5, 1994, Henry E. Feutrier, the Washington Mine's general manager, entered the mine alone to check a submersible pump on sub-level 2. *Id.* at 783, 785. The next day, two miners discovered Feutrier's body under the water. *Id.* at 783.

Representatives of the Department of Labor's Mine Safety and Health Administration ("MSHA") and the California Division of Occupational Safety and Health investigated the fatality and determined that Feutrier had received an electrical shock and later drowned. *Id.* at 784. MSHA attributed Feutrier's death to the failure of a circuit breaker to trip, resulting in the pump on which Feutrier was working being energized. *Id.* The circuit breaker failed to trip because a "neutral bar inside [a] breaker panel enclosure was not bonded to the grounded enclosure" *Id.* (quoting MSHA's accident investigation report, Ex. S-1, at 77).

Kim Warnock, an electrician licensed by the State of California, provided electrical services to the Washington Mine through his sole proprietorship, Unique Electric. *Id.* at 785. Unique Electric "was simply the name that Mr. Warnock used when he provided services to his customers [and] was not a separate legal entity." *Id.* Warnock's sole proprietorship had no employees or assets, and was not incorporated. *Id.*; Tr. 360. Warnock, doing business under the name Unique Electric, performed electrical work for the mine between 1992 and 1994. 19 FMSHRC at 785-86. He performed all the electrical work required to open sub-level 2 in 1994, including installing the transformer and the electrical panel board containing the circuit breaker. *Id.* He also rewired and installed the submersible pump 1 month before the accident. *Id.*

On September 9, 1994, MSHA Inspector Arnold E. Pederson issued a citation under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), to Unique Electric, alleging a significant and substantial ("S&S") and unwarrantable violation of 30 C.F.R. § 57.12025.² 19 FMSHRC at 784. The Secretary proposed a civil penalty of \$8,500. *Id.* Warnock contested the violation and special findings, appearing before Judge Manning pro se.

The judge found that "the pump circuit was not properly grounded at the time Warnock installed the pump . . . about a month prior to the accident[.]" and that it was not properly grounded at the time of the accident as a result. *Id.* at 790-91. Based on these findings, the judge concluded that Unique Electric violated section 57.12025. *Id.* at 791. The judge noted that "[s]tatements in MSHA's accident investigation report and the amount of the proposed penalty"

¹ "Drift" is defined as, inter alia, "[a] horizontal gallery . . . driven from one underground working place to another and parallel to the strike of the ore." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 169 (2d ed.1997).

² Section 57.12025 states in pertinent part: "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection."

indicated MSHA's apparent belief that Warnock was solely responsible for Feutrier's death. *Id.* The judge disagreed, finding that many events, some attributable to Washington/Niagara, led to the fatality, including serious damage to the pump's cable resulting from its being pulled over rocks. *Id.* The judge concluded that the violation was S&S, but noting that the Secretary apparently abandoned her allegation of unwarrantable failure, vacated this allegation and modified the charging document to a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). 19 FMSHRC at 791-92.

The judge assessed a \$400 civil penalty against Unique Electric based on his findings³ that the violation was serious and abated in good faith, and that Unique Electric had no history of previous violations, was "very small," and was "negligent in failing to ground the pump circuit." *Id.* at 792. Noting that "Unique Electric no longer exists[, and that, thus] Mr. Warnock will have to pay any penalty assessed," the judge reasoned:

In *Basin Resources, Inc.*, 19 FMSHRC 211 (January 1997), I held that if a mine operator is no longer in business and does not intend to return to the mining business, this fact should be taken into consideration in considering the ability to continue in business criterion. I held that civil penalties are remedial, not punitive, and are designed to "induce those officials responsible for the operation of a mine to comply with the Act and its standards." *Id.* at 212 (citation omitted).

19 FMSHRC at 792.

II.

Disposition

The Secretary first asserts that the judge reduced Unique Electric's penalty because Warnock was no longer a mine operator and had no intention of returning to the mining business. PDR at 5 (the Secretary designated her PDR as her brief). She argues that the judge erred in so doing under the "ability to continue in business" criterion of section 110(i) because, "[b]y definition, a penalty cannot have an effect on an operator's ability to continue in business if the operator is no longer in business." *Id.* at 7. Noting that the purpose of the criterion is "to

³ Section 110(i) sets forth six criteria to be considered by Commission judges in the assessment of penalties under the Act: "[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation." 30 U.S.C. § 820(i).

prevent, where appropriate, a penalty from driving an operator out of business,” the Secretary argues that “[t]he plain language and purpose of [the] ‘ability to continue in business’ criterion thus establish that Congress intended that the . . . criterion would have no effect on civil penalty assessments when an operator is not in business.” *Id.* The Secretary further argues that, under the judge’s rationale, a valuable deterrent to comply with the Mine Act would be lost where an operator who expects to be going out of business knows that it will receive a reduction in penalty when it eventually goes out of business. *Id.* at 8-9. Finally, the Secretary argues that the judge himself implicitly acknowledged the deterrence provided by a penalty to an out-of-business operation by refusing to reduce Unique Electric’s penalty to a nominal amount. *Id.* at 9. Unique Electric did not file a brief.

Determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act’s penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). While “a judge’s assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal” *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

The operator cited in this case, Unique Electric, presents us with an unusual set of circumstances. The judge found that Unique Electric was nothing more than a trade name Warnock used when he provided services at Washington/Niagara’s Washington Mine. 19 FMSHRC at 785. Unique Electric had no employees or assets, nor even any separate legal identity apart from Warnock himself. *Id.*; Tr. 360. In fact, Unique Electric no longer exists because “Warnock is now employed by an electrical contractor that works exclusively at state and federal installations.” 19 FMSHRC at 792. The judge’s observation, therefore, that “Warnock will have to pay any penalty assessed,” *id.*, was equally true when Unique Electric was still an ongoing business concern because in this case the line between “operator” and “individual” is virtually indistinguishable.

This case, therefore, is akin to one brought against an individual under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), and, for that reason, the judge did not err when he concluded that he needed to consider the effect of the penalty on Warnock as an individual. In the context of an individual found liable under section 110(c), the Commission has construed “the ability to continue in business” criterion as requiring a judge to make findings regarding the effect of a penalty on the individual’s ability to meet his financial obligations. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997); *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 824 (May 1997). Just as Congress determined that a penalty should not drive an operator out of business, we believe Congress likewise did not intend for a penalty to prevent an individual from meeting his or her financial obligations. Although Warnock was cited as an operator under section 104, and not as an individual agent under section 110(c), it was appropriate, nevertheless, for the judge to consider whether the proposed penalty would affect Warnock’s ability to meet his financial obligations. Because the judge made no finding in this regard, however, we find it

necessary to vacate the judge's penalty assessment and remand the case to him so he can make appropriate findings consistent with this decision, and consider such findings in assessing a new penalty.⁴

Our decision should not be interpreted to suggest that any mine operator can obtain a reduction in the penalty assessed against it for a Mine Act violation pursuant to the "effect on the operator's ability to continue in business" criterion by going out of business. On the contrary, we emphasize that our holding in this case is confined to the extraordinary circumstances presented herein, in which Unique Electric, the named operator, was nothing more than the trade name used by Warnock to provide his own services (electrical) to the Washington Mine, and had no separate legal identity or personnel apart from Warnock himself. Under these unusual circumstances, we find it appropriate to remand this case to the judge to determine whether the penalty would affect Warnock's ability to meet his financial obligations irrespective of whether Unique Electric was still in business.

We also note that although the Secretary proposed a penalty of \$8,500, the judge assessed a significantly lower penalty of \$400. The judge concluded that a reduction in penalty was appropriate because, as he had noted in his *Basin* opinion: "[i]f an operator is no longer in the mining business, penalties do not have a deterrent effect on future compliance with the Mine Act and the Secretary's safety and health standards." 19 FMSHRC at 213. We agree with the Secretary that a penalty assessed against an operator who is no longer in business nevertheless provides a deterrent against future violations of health and safety standards. Admittedly, there may be no need to deter this particular operator. However, as one Court of Appeals has noted in an analogous case under the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., the failure to assess a penalty could cause other employers to "become complacent in the knowledge that future civil penalties could be avoided by ceasing operations on the eve of the Commission hearing." *Reich v. Occupational Safety and Health Review Comm'n*, 102 F.3d 1200, 1203 (11th Cir. 1997). Indeed, as that court noted, we need to "worry about creating an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name." *Id.* Moreover, even "employers who were going out of business for ordinary commercial reasons would have little incentive to comply with safety regulations to the end if monetary penalties could be evaded once the business quit altogether." *Id.*

The judge's erroneous determination that no deterrent purpose would be served by the penalty in this case provides another reason why we must vacate and remand for reassessment.


⁴ Our dissenting colleague complains we are imposing an unreasonable "degree of exactitude" on the assessment process. Slip op. at 8. On the contrary, the Commission has long held that, while the Secretary's penalty proposals are not binding on the Commission or its judges, when penalties "substantially diverge from those originally proposed, it behooves [our] judges to provide a sufficient explanation of the bases underlying the penalties" to avoid "an appearance of arbitrariness." *Sellersburg*, 5 FMSHRC at 293; *c.f. Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) (adequate findings are "critical" when a judge assesses a penalty that significantly departs from that proposed by the Secretary).

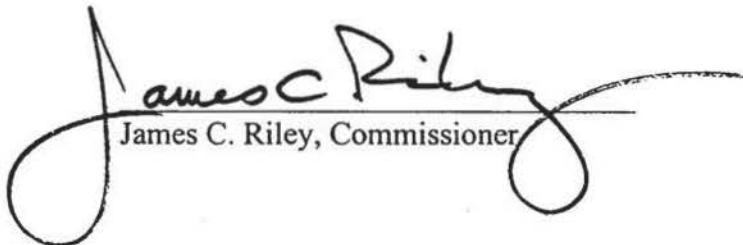
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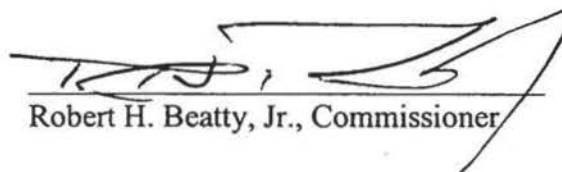
Conclusion

For the foregoing reasons, we vacate the judge's penalty assessment against Unique Electric and remand for further proceedings consistent with this decision.


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner


Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting:

I disagree with the majority's remand order. I would affirm the judge because I find no abuse of discretion in his penalty determination. I therefore dissent.

This appeal is focused solely on the judge's exercise of the Commission's de novo "authority to assess all civil penalties" for violations of the Mine Act pursuant to section 110(i), 30 U.S.C. § 820(i). Specifically, the Secretary has raised the issue of whether the judge abused his discretion when, in assessing the \$400 penalty against Unique Electric, he considered the fact that the company was no longer in business and had no intention of returning to the mining business under the "ability to continue in business" criterion of section 110(i). PDR at 7. Relying on the purported "plain language and purpose" of the criterion, the Secretary argues that it should "have no effect on civil penalty assessments when an operator is not in business." *Id.*

I do not accept the Secretary's interpretation of the "ability to continue in business" criterion of section 110(i). The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). The Commission has held that under various circumstances, the penalty criteria of section 110(i) are anything but clear in operation. *See, e.g., Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997) (although some criteria do not apply to individuals on their face, judges must consider them in such contexts by analogy). Here, Congress clearly did not address assessment of penalties against operators who are no longer in business in section 110(i). The first sentence of section 110(i) grants the Commission exclusive authority to assess civil penalties under the Mine Act. 30 U.S.C. § 820(i). As the agency thus charged with administering section 110(i), the Commission must interpret the provision to give it "the most harmonious, comprehensive meaning possible." *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-32 (1973).

Keeping in mind that it is the Commission's function to authoritatively interpret section 110(i), I view the "ability to continue in business" criterion as setting forth a broad mandate to consider the effect of penalties on the economic well-being of those held liable under the Act, however situated. No other criterion serves this important purpose. Were I to follow the Secretary's suggestion here, the Commission's penalty assessment would be made in the absence of any consideration of the effect of the penalty on Warnock, a result I find inconsistent with the criterion's broad mandate. I am not prepared to render the criterion a nullity by interpreting it in such a way as to render it moot. *See* 2A Norman J. Singer, *Sutherland Stat. Constr.* § 46.06 (5th ed. 1992) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute."). Indeed, if the Commission were to remand this case to the judge and instruct him to ignore the facts surrounding the dissolution of Unique Electric and Warnock's assumption of its liabilities, which the Secretary essentially urges and which the majority declines to do, this could result in an artificially high penalty being assessed that would be more punitive than remedial in nature. I would thus hold that when assessing a penalty under

section 110(i), Commission judges must examine the economic effect of the penalty, be it against a large corporate operator, a corporate operator in bankruptcy, or, as in this case, a sole proprietorship that has dissolved.

The question remains as to whether the judge properly considered the effect of the penalty he assessed against Unique Electric.¹ I agree with the majority that, because “Unique Electric was nothing more than a trade name Warnock used when he provided services, . . . [t]his case . . . is akin to one brought against an individual under section 110(c).” Slip op. at 4. But this is precisely the view taken by the judge when he found that “Warnock will have to pay any penalty assessed.” 19 FMSHRC 783, 792 (Apr. 1997) (ALJ). Nevertheless, the majority insists on remanding this case to the judge with the direction that he “consider whether the proposed penalty would affect Warnock’s ability to meet his financial obligations.” Slip op. at 4.

I find a remand here unnecessary for several reasons. First, in the case on which the majority relies, *Sunny Ridge*, the judge had failed to make *any* findings on several of the section 110(i) criteria when he assessed penalties against two individuals. 19 FMSHRC at 272, 274. In contrast, the judge here made findings on all six criteria. 19 FMSHRC at 792. The majority’s remand order essentially requires the judge to supplement the record with evidence of Warnock’s financial situation. Slip op. at 4-5. Such supplementation of the record assumes that penalty assessments require a degree of exactitude I find simply unsupported by the language of section 110(i). In assessing penalties, the Commission need only “consider” the penalty criteria, and the Act specifically provides that the Secretary, in providing information on the criteria, “shall not be required to make findings of fact concerning” the criteria. 30 U.S.C. § 820(i). Instead, she “may rely upon a summary review of the information available to [her].” *Id.* The majority’s remand order strays far beyond this mandate of simplicity. More to the point, I believe that the judge’s finding that “Warnock will have to pay any penalty assessed” (19 FMSHRC at 792), in the absence of any evidence adduced by either party on the question of his finances, satisfies the Act’s requirement to “consider” the effect of the penalty on Warnock.

I also believe that the majority’s remand is based on a misunderstanding of the judge’s opinion. The majority states:

The judge concluded that a reduction in penalty was appropriate because, as he had noted in his *Basin* opinion: “[i]f an operator is no longer in the mining business, penalties do not have a deterrent effect on future compliance with the Mine Act and the Secretary’s safety and health standards.”

Slip op. at 5 (citing *Basin Resources, Inc.*, 19 FMSHRC 211, 213 (Jan. 1997)). This is not,

¹ The Commission reviews a judge’s penalty assessment under an abuse of discretion standard. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986).

however, what the judge did here. Instead, he stated:

[I]f a mine operator is no longer in business and does not intend to return to the mining business, this fact should be taken into consideration in considering the ability to continue in business criterion. . . . [C]ivil penalties are remedial, not punitive, and are designed to “induce those officials responsible for the operation of a mine to comply with the Act and its standards.”

19 FMSHRC at 792 (citing *Basin Resources*, 19 FMSHRC at 211-12). In fact, there is no mention in the judge’s opinion that any single factor alone led him to reduce the penalty.

I recognize that the penalty the judge assessed was significantly lower than that proposed by the Secretary. But, in view of the particular facts and circumstances of this case, I am not prepared to say that the judge abused his discretion or that the penalty is inconsistent with the statutory criteria or the Act’s deterrent purposes. The demise of Unique Electric and Warnock’s peculiar situation are factors that could have warranted a significant reduction in the penalty. I also note that a lower penalty could reflect the judge not finding the violation unwarrantable as the Secretary had alleged in the citation. See 19 FMSHRC at 792. The judge was under no obligation to adopt the penalty proposed by the Secretary — his penalty assessment was *de novo*. *Wallace Bros., Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996). Nor was he required to follow any sort of formula in assessing a penalty. As the Commission has recognized, “there is no requirement that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

I agree with the majority that penalties under the Mine Act are intended to have both a specific and a general deterrent effect, and that even when “there may be no need to deter [a] particular operator,” a general deterrent still must be considered. Slip op. at 5. But I find nothing in the judge’s decision indicating that he failed to consider the general deterrent effect of the penalty he assessed. I find his decision consistent with Commission precedent, which states that “deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria,” and that “[d]eterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.” *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 (Sept. 1996).

I do not find the majority’s reliance on the Eleventh Circuit’s decision in *Reich v. Occupational Safety and Health Review Comm’n* convincing. Slip op. at 5 (citing 102 F.3d 1200, 1203 (11th Cir. 1997)). In that case, the court vacated the decision of an administrative law judge dismissing as moot a case against a corporate shipyard operator because the operator was in the final stages of going out of business. 102 F.3d at 1201. The effect of the judge’s opinion was to absolve the operator of any and all liability under the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., for an incident that had led the Secretary to fine the company \$692,000. 102 F.3d at 1201. In contrast, Unique Electric (in the guise of Warnock)

still faces liability for its negligence. Moreover, I certainly do not believe that this is the sort of case where affirming the judge would create an “incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name.” Slip op. at 5 (quoting 102 F.3d at 1203).

As stated above, I recognize that the degree of Warnock’s liability is significantly less than that originally proposed by the Secretary. But even if I disagreed with the amount of the penalty assessed against Warnock, even if I believed that under the facts of this case, a far higher penalty should have been imposed, any such opinion is irrelevant. This penalty determination was committed to Judge Manning’s discretion, and I find no indication that he abused that discretion. Accordingly, I would affirm the judge’s assessment of a \$400 penalty against Unique Electric.


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 30, 1998

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

v.

WHITE OAK MINING &
CONSTRUCTION COMPANY, INC.

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Docket Nos. WEST 96-235
WEST 96-338

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

DECISION

BY: Marks, Riley, and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is the decision by Administrative Law Judge T. Todd Hodgdon that White Oak Mining & Construction Company, Inc. ("White Oak"), did not violate 30 C.F.R. § 48.7(a) when it gave employee Keith Smith task training as a miner operator of a continuous mining machine.¹ 19 FMSHRC 1414, 1433-34

¹ Section 48.7 states, in pertinent part:

(a) Miners assigned to new work tasks as mobile equipment operators . . . shall not perform new work tasks in [this] categor[y] until training prescribed in this paragraph and paragraph (b) of this section has been completed. This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. The training program shall include the following:

(Aug. 1997) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determination.

I.

Factual and Procedural Background

White Oak owns and operates the White Oak No. 2 Mine, an underground coal mine in Carbon County, Utah. *Id.* at 1414; Tr. 140-41. The mine employs the "room and pillar" method of mining using remote-control continuous mining machines to perform 40-foot, extended-cut mining. 19 FMSHRC at 1415; Tr. 524, 558. From 1972 to 1992, the mine was operated by Valley Camp using similar mining methods. 19 FMSHRC at 1414-15.

In 1975, Smith started working at the mine, which was then operated by Valley Camp. Tr. 46. In approximately 1976 and 1977, Smith received task training on continuous miners, first as a miner helper and then as a miner operator. Tr. 69, 72-73. From 1976 to 1983, he worked underground as a miner helper or miner operator. Tr. 72. From 1983 to 1987, Smith worked mainly on the surface in non-continuous miner duties, although he sometimes worked underground with continuous mining machines. Tr. 73-74. From 1987, he worked "off and on"

(1) *Health and safety aspects and safe operating procedures for work tasks, equipment, and machinery.* The training shall include instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks, and shall be given in an on-the-job environment; and

(2)(i) *Supervised practice during non-production.* The training shall include supervised practice in the assigned tasks, and the performance of work duties at times or places where production is not the primary objective; on [sic]

(ii) *Supervised operation during production.* The training shall include, while under direct and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

....

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

30 C.F.R. § 48.7(a) and (b) (emphases in original).

as a miner operator but starting in 1990, he worked steadily as a miner helper and miner operator. Tr. 76. During Smith's time with Valley Camp, he task trained over ten miner operators and about the same number of miner helpers. Tr. 76-77.

On November 2, 1992, Valley Camp closed the mine. Tr. 78. White Oak purchased and reopened it in October 1993. Tr. 46, 78. Smith was recalled to the mine as a miner helper because of his experience with the mine equipment. Tr. 78-79, 532. In October 1993, he attended an eight-hour refresher course at a college before being allowed to work underground for White Oak. Tr. 79. Upon arriving at the mine, he was given mine-specific training involving a tour of the mine, the section, and the face, and task training as a miner helper. Tr. 79-80. From October 1993 until January 1994, he worked as a miner helper, assisting Shane Hansen, a miner operator and the mine's safety director. Tr. 78, 81-82, 209, 496-97.

On January 18, 1994, Smith was task trained as a miner operator by Hansen. Tr. 61, 508-10. During Smith's task training, Hansen covered four of the six required subjects in the company's training plan. Tr. 89-93, 512. The two subjects he did not cover were changing miner bits and servicing continuous miners. Tr. 91-93. Smith's task training also did not cover all of the course materials required by the training plan, such as applicable MSHA standards. Gov't Ex. P-8 at 2; Tr. 95, 97, 509. During non-production, Smith was allowed "a few minutes to play with the controls and get used to everything and then [Hansen and he] trammed" to the face and began production. Tr. 510-11. After Smith began cutting coal, Hansen stayed with him for most of the remaining shift and helped him on the miner. Tr. 503, 511.

On March 7, 1995, Blue Samples, a 20-year old inexperienced miner, started work at the mine. 19 FMSHRC at 1420; Tr. 227. One week after his arrival, Smith task trained Samples as a miner helper. Tr. 49-55. On March 24, while Samples was working as a mine helper with a continuous miner operated by Smith, Samples was hit and killed by the tail boom of the machine. 19 FMSHRC at 1420; Tr. 47.

As a result of the fatal accident investigation by inspectors with the Department of Labor's Mine Safety and Health Administration ("MSHA"), White Oak was issued an order alleging that the task training of Smith as a miner operator amounted to a significant and substantial ("S&S") violation of section 48.7(a)² that resulted from White Oak's unwarrantable failure to comply with the standard. 19 FMSHRC at 1421-22. The company was also issued an order alleging that Samples was not properly task trained as a miner helper under section 48.7(c). *Id.* at 1420-21. White Oak challenged the orders, and the matter proceeded to hearing before Judge Hodgdon.

² The order originally charged a violation of section 48.7(c) but it was amended to an alleged section 48.7(a) violation. 19 FMSHRC at 1421 n.3.

The judge held that the task training of Smith as a miner operator did not amount to a violation of section 48.7(a).³ Reasoning that section 48.7 does not provide sufficient notice of the required conduct, the judge applied the “reasonably prudent person” test to determine whether Smith’s task training was adequate under the standard. *Id.* at 1423-24, 1433-34. The judge noted that, although Smith’s training “lasted only between 15 and 30 minutes, and . . . did not cover everything contained in the company’s training plan,” Smith had extensive experience with continuous miners. *Id.* at 1433. Accordingly, he determined that a reasonably prudent person would conclude that Smith had been adequately trained as a continuous miner operator, and he vacated the order. *Id.* at 1434.

The Secretary subsequently filed a petition for discretionary review, challenging the judge’s finding that White Oak did not violate section 48.7(a) when it task trained Smith as a miner operator.

II.

Disposition

The Secretary asserts that the judge erred in vacating the citation. She argues that the language of section 48.7(a) is unambiguous and that the judge erred in using the reasonably prudent person test to determine whether Smith was properly task trained as a miner operator. S. Br. at 7, 8-9 n.5. She contends that Smith’s task training did not satisfy the requirements of the standard because it did not contain information on the health and safety aspects of operating a continuous miner, and did not include supervised practice under production or non-production conditions. *Id.* at 3, 10. White Oak responds that the judge was correct in his determination that the language of section 48.7(a) is not clear, that it was appropriate to apply the reasonably prudent person test, and that Smith’s task training complied with section 48.7(a). WO Br. at 3, 19-22.

Section 48.7(a) sets forth requirements that task training must include “instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks,” and must include either “supervised practice . . . where production is not the primary objective” or “direct and immediate supervision [when] production is in progress.” 30 C.F.R. § 48.7(a). While we agree with the Secretary that section 48.7(a) sets forth requirements to be included in task training, those requirements are broadly worded. It is not clear from the regulation which “health and safety aspects” and “safe operating procedures” must be covered in training or the extent or duration required for “supervised practice” or “direct and immediate supervision.”

³ The judge held, however, that White Oak violated section 48.7(c) when it task trained Samples as a miner helper, that the violation was S&S, and that it resulted from the operator’s unwarrantable failure. 19 FMSHRC at 1428, 1431-32. White Oak did not file a petition for discretionary review challenging those determinations.

In construing broadly worded regulations, the Commission has recognized that it is appropriate to consider whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1617-18 (Sept. 1987). Accordingly, the judge did not err in his determination to apply the reasonably prudent person test to the language of section 48.7(a).⁴

Nonetheless, we conclude that the judge erred in his application of the test. The judge determined that any inadequacies in Smith's task training were offset by his years of experience with continuous miners. 19 FMSHRC at 1433. The judge stated that "[i]f Smith were a new miner, had never been a miner helper or had never operated a continuous miner before, [his task training] would clearly be inadequate. But that is not the case." *Id.* Although task training should be adapted to reflect experience, the judge erred to the extent that he considered Smith's years of experience as a substitute for the standard's requirements that task training include health and safety information and supervision.

The judge failed to provide sufficient factual findings on evidence relating to whether Smith's task training included the health and safety information and supervised practice or supervised operation during production required by section 48.7(a). Without adequate findings of fact and the basis for them, the Commission cannot effectively perform its review function. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). Accordingly, we vacate the judge's

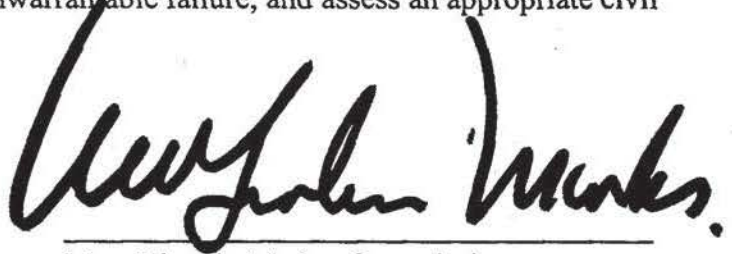
⁴ We do not place as much reliance on the operator's training plan as do our dissenting colleagues. See slip op. at 7 n.2. Unlike the regulations for roof control and ventilation plans, which have extensive and detailed content requirements, there are no such requirements for training plans covering section 48.7(a) task training. Compare 30 C.F.R. § 48.3 with 30 C.F.R. §§ 75.220, 75.221, 75.370, 75.371. Although White Oak's training plan was approved by MSHA, it is very brief and, as the judge noted, does not appear to cover the health and safety aspects and safe operating procedures required by section 48.7(a). 19 FMSHRC at 1432; Gov't Ex. P-8 at 2. Our colleagues claim that White Oak's training "plan was presumably tailored . . . to the specific conditions at its mine." Slip op. at 7 n.2. However, it is noteworthy that White Oak did not tailor its training plan to its mine but simply took Valley Camp's training plan, put White Oak's cover letter on it, and resubmitted it to MSHA. Tr. 524. To further support their claim that White Oak's training plan was entitled to considerable weight because it was mine-specific, our colleagues also cite to *Jim Walter Resources, Inc.*, 9 FMSHRC 903 (May 1987). Slip op. at 7 n.2. However, *Jim Walter Resources* does not involve training plans but instead deals with ventilation plans, which, as discussed above, are far more detailed and comprehensive. Unlike our colleagues, we believe it is appropriate to judge Smith's training against the training requirements of section 48.7(a) using the reasonably prudent person test rather than against an overly terse training plan developed by the operator that may not fully comply with the requirements of section 48.7(a).

determination and remand to the judge to determine whether the task training provided to Smith amounted to the type of training that a reasonably prudent person would have provided in order to meet the protection intended by the standard's requirements.

III.

Conclusion

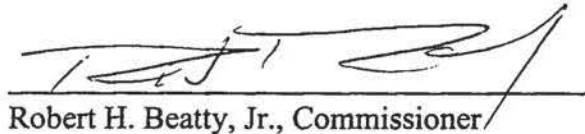
For the foregoing reasons, we vacate the judge's determination that White Oak did not violate section 48.7(a) and remand for further analysis consistent with this decision. If the judge finds that White Oak violated section 48.7(a), he shall also consider whether the violation was S&S and resulted from the operator's unwarrantable failure, and assess an appropriate civil penalty.

A large, stylized handwritten signature in black ink, reading "Marc Lincoln Marks".

Marc Lincoln Marks, Commissioner

A handwritten signature in black ink, reading "James C. Riley".

James C. Riley, Commissioner

A handwritten signature in black ink, reading "Robert H. Beatty, Jr.". The signature is written over a horizontal line.

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Verheggen, dissenting:

The record in this case reflects that Smith's task training included the necessary health and safety information and supervised practice required by section 48.7(a). Because substantial evidence supports the judge's finding that White Oak Mining complied with the regulation,¹ we would affirm his decision and therefore dissent from our colleagues remand order.

Our colleagues in the majority contend that the regulation does not "contain information on the health and safety aspects of operating a continuous miner," and consequently, they approve the judge's use of the "reasonably prudent person test" to evaluate compliance with section 48.7(a). Slip op. at 4-5. However, they fail to adequately acknowledge the existence of the operator's training plan, approved by MSHA,² which provides a blueprint for ascertaining whether appropriate health and safety training occurred. Reference to the training plan is consistent with this particular regulatory scheme, as section 48.7(a) is written in deliberately broad terms, with the details to be provided by each individual operator's training plan. Therefore, we see no need to adopt the objective, but nonetheless still general standard of what training a "reasonably prudent person" would have provided, when we have as a reference the specific elements in White Oak's training plan. Rather, we believe the pertinent inquiry is whether the Secretary has proven that the operator failed to comply with the provisions of the training plan, and conclude that in this case she did not meet this burden.³

¹ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

² Under section 115 of the Mine Act, 30 U.S.C. § 825, every mine operator is required to have a health and safety training program approved by the Secretary. Our colleagues characterize White Oak's training plan as "overly terse," and, consequently, "do not place . . . much reliance on" it. Slip op. at 5 n.4. We believe, however, that this plan provides the only mine-specific frame of reference to evaluate the training given Smith. The plan was presumably tailored, with MSHA's approval, to the specific conditions at its mine. As the Commission has noted in another context, "[t]he ultimate goal of the [mine plan] approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord." *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). Also, although our colleagues assert that the plan "may not fully comply with the requirements of section 48.7(a)" (slip op. at 5 n.4), the propriety of the plan is not before us in this appeal.

³ Our reliance on the operator's own training plan is consistent with the importance we place on an operator's roof control and ventilation plan. See *Jim Walter Resources*, 9 FMSHRC

White Oak's training plan contains six required elements that a miner operator must learn during the training program. Gov't Ex. P-8 at 2. The evidence in the record reflects that Smith completed four of these six elements. Tr. 89-93, 512; WO Br. at 6-7. Thus the Secretary's only possible claim that White Oak failed to comply with the provisions of the training plan would rest on Smith's lack of training on two remaining elements of the plan: changing of bits and the servicing of the continuous miner. On this particular record, this does not suffice to prove a violation.⁴

Section 48.7(a) is not applicable when a miner has "demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment." Although it is undisputed that Smith was required to undergo task training, since he had not performed the miner operator job within 12 months, he had performed some aspects of that job within that time period; in fact, he had changed bits and serviced the machine as a miner's helper. Tr. 92-93; 498; W.O. Br. at 16. In other words, there was an overlap in function between the helper and operator's jobs because Smith performed this work during the period immediately preceding his task training. His trainer, Hansen, would have been aware of this because Smith worked as Hansen's helper. Tr. 86, 496-97. Thus, under the language of the regulation, he was not required to be trained on these two elements of the plan.

We find it troubling that MSHA issued this order having made little or no effort to discuss with either Smith or Hansen the substance of the training provided. Tr. 199, 202-03, 260-61. Instead, the Secretary appears to treat White Oak's failure to utilize the manufacturer's service bulletin's guidelines on the safe operation of continuous miners as virtually a per se violation. S. Post-Hearing Br. at 14, 16. However, the training plan approved by MSHA does not require that this manual be used. Even the plan's reference to course materials does not identify the manufacturer's bulletin.⁵

We emphasize that we do not disagree with the application of the reasonably prudent person test to this regulation in the absence of more specific guidance. For instance, because this plan is silent about how long task training should be conducted, we agree with our colleagues in

at 907 (once ventilation plan approved, its provisions are enforceable as mandatory safety standards); *U.S. Steel Mining Co.*, 8 FMSHRC 314, 318-20 (Mar. 1986) (affirming judge's finding that operator violated its roof control plan).

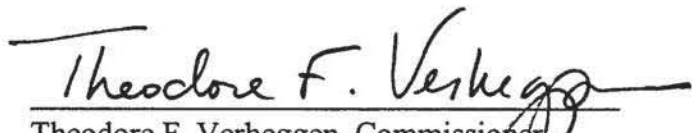
⁴ The Secretary's sweeping assertion that "there can be no doubt that the specific requirements of Section 48.7(a) were not satisfied" (S. Br. at 10) — offered without a shred of record support — hardly suffices to sustain her claim.

⁵ We agree with the judge, however, that the manufacturer's bulletin would provide an excellent training reference and that MSHA might want to include it in the training plans it reviews and approves in the future. 19 FMSHRC at 1427.

the majority that the reasonably prudent person test could be applied to this part of the regulation. We believe that under this test, the 15 minutes of oral instruction provided here constitutes compliance with section 48.7 (a) in light of Smith's extensive mining background.⁶

In conclusion, substantial evidence in the record supports the judge's determination that no violation occurred, and accordingly, we would affirm.


Mary Lu Jordan, Chairman


Theodore F. Verheggen, Commissioner

⁶ We agree with our colleagues in the majority that it would be inappropriate to substitute a miner's experience for training that fails to meet the requirements of the regulation. Slip op. at 5. Because they are correct, however, that "task training should be adapted to reflect experience," we cannot say that 15 minutes of training was inadequate under this regulation. *Id.*

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 30, 1998

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

v.

LAFARGE CONSTRUCTION
MATERIALS, and
THEODORE DRESS

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Docket Nos. LAKE 95-114-RM
LAKE 95-239-M
LAKE 96-28-M

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

DECISION

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

These consolidated civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involve a citation issued to Lafarge Construction Materials ("Lafarge") alleging an unwarrantable and significant and substantial ("S&S") violation of 30 C.F.R. § 56.16002(a)(1)¹ for failure to remove loose materials before allowing a miner to enter a surge bin, and a related allegation that Theodore Dress, a foreman for Lafarge, is personally liable under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), for knowingly authorizing the violation. Administrative Law Judge David F. Barbour concluded that Lafarge violated section 56.16002(a)(1) and that the violation was S&S and the result of unwarrantable failure. 18 FMSHRC 2199, 2208-10 (Dec. 1996) (ALJ). He also

¹ Section 56.16002 provides, in part:

(a) Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be—

(1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials

concluded that Dress knowingly authorized the violation by not taking additional steps to clear the surge bin. *Id.* at 2210-12. For the reasons that follow, we affirm the judge's findings of violation, unwarrantable failure, and section 110(c) liability.

I.

Factual and Procedural Background

On July 15, 1994, Theodore Dress, a foreman at Lafarge's Marblehead quarry in Ottawa County, Ohio, noticed sand leaking through a hole in the discharge chute at the bottom of the quarry surge bin. 18 FMSHRC at 2200-03. The surge bin is a metal structure measuring approximately 22 by 22 feet square and 13 feet high. *Id.* at 2201-02; Tr. 92. Crushed limestone, up to 10 inches in size, is deposited into the top of the surge bin. 18 FMSHRC at 2201. The surge bin has mechanical vibrators that shake the bin and cause the limestone to fall through openings in the bottom of the bin into a discharge chute and onto a conveyor belt below, where it is transported for further processing. *Id.* at 2201-02. In addition, a hand bar is available that can be used to manually scale the limestone inside the surge bin. *Id.* at 2203; Tr. 43, 105-06, 119-20.

In order to repair the hole, Dress determined that a metal patch needed to be welded over the hole from the inside of the discharge chute. 18 FMSHRC at 2203. In preparation for the repair, Dress ordered that the vibrators be kept running until electronic sensors indicated the surge bin was empty, and that the vibrators be run for an additional 20 to 30 minutes to dislodge any remaining loose materials. *Id.*; Tr. 40, 97, 113. Following the vibrating procedure and after the surge bin was deenergized and locked out, Dress and Daniel Harder, the miner assigned to do the repair, visually inspected the inside of the surge bin from the discharge chute. 18 FMSHRC at 2203. Both men observed an inverted cone-shaped wall of hard-packed fines,² known as the "dead bed," that had compacted around the openings in the bottom of the bin. *Id.* at 2202-03; Tr. 96, 107-08. At the top of the dead bed, which was about 6 to 8 feet high, was a ridge that caused loose rock deposited inside it to slide down through the openings into the discharge chute and loose rock deposited outside it to accumulate along the sides of the surge bin. 18 FMSHRC at 2202; Tr. 96. Both men observed loose rocks at the top of the dead bed, which they believed lay outside the ridge and would not fall. 18 FMSHRC at 2203. They did not use the scaling bar to knock down this loose material, concluding that it would be safe to enter the surge bin to perform the repair. *Id.*

Harder climbed inside the surge bin and welded the metal patch for approximately 45 minutes when he heard rocks begin to fall around him. *Id.* at 2204. He crouched down and attempted to exit the surge bin, but succeeded in getting only his head out of the bottom opening

² "Fines" is defined, in part, as "[f]inely crushed or powdered material, e.g., . . . crushed rock, . . . as contrasted with the coarser fragments . . ." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 208 (2d ed. 1997).

because rocks had fallen around his back and shoulders preventing him from getting all the way out. *Id.* Dress, who had remained outside the surge bin, helped Harder remove some of the rocks and, after about 5 minutes, Harder was freed. *Id.* Harder suffered minor cuts and bruises. *Id.*; Tr. 36-37.

While conducting a regular inspection at the Marblehead quarry in October 1994, James Strickler, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), learned of the accident and issued to Lafarge Citation No. 4413670, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging an S&S violation of section 56.16002(a)(1) for failure to remove loose materials before entering the bin. 18 FMSHRC at 2204-05; Gov't Ex. 3. Strickler later modified the citation to allege, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), an unwarrantable failure to comply with the standard. 18 FMSHRC at 2205; Gov't Ex. 3. Subsequently, the Secretary proposed a civil penalty assessment of \$3,800 against Lafarge. 18 FMSHRC at 2210. In addition, following a special investigation, the Secretary proposed a civil penalty assessment of \$3,000 against Dress, pursuant to section 110(c) of the Mine Act, alleging that, by not taking additional steps to clear the surge bin of loose materials, he knowingly authorized the violation. *Id.* at 2210-12. Lafarge and Dress challenged the proposed assessments.

Following an evidentiary hearing, the judge concluded that Lafarge violated section 56.16002(a)(1), that the violation was S&S, and that it resulted from Lafarge's unwarrantable failure to comply with the standard. *Id.* at 2208-10. Finding the language of the standard clear, the judge determined that, although the surge bin was equipped with mechanical devices and other effective means to remove loose materials, Lafarge failed to "operate the vibrators to eliminate all of the loose rock, and . . . to ensure that the remaining loose rock was barred down prior to Harder entering the bin . . ." *Id.* at 2206-07. He further determined that the activity of patching the hole constituted "normal operations" within the meaning of the standard. *Id.* at 2207-08. The judge determined that the violation was the result of unwarrantable failure because "no one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate" and "[t]he company should have required more," e.g., it should have visually inspected the surge bin from above and used the scaling bar to remove any loose material, regardless of how long the vibrators had run. *Id.* at 2209-10. In addition, the judge concluded that Dress knowingly authorized the violation because he observed the loose materials yet failed to take additional steps to clear the surge bin. *Id.* at 2210-12. Accordingly, the judge assessed civil penalties of \$2,500 against Lafarge and \$500 against Dress. *Id.* at 2210, 2212. The Commission granted the petition for discretionary review subsequently filed by Lafarge and Dress challenging the judge's conclusions.

II.

Disposition

Lafarge and Dress (the “Contestants”) argue that the judge erred in concluding that the standard was violated. L&D Br. at 5-13; L&D Reply Br. at 3-4. The Contestants assert that the surge bin was “equipped” with mechanical devices for handling materials, and that the plain language of the standard does not regulate how such devices are to be utilized nor specify that the vibrators be run longer than 25 to 30 minutes or that the bin be inspected from the top. L&D Br. at 5-7, 9-12; L&D Reply Br. at 3-4, 6. They also assert that patching the hole in the surge bin does not constitute “normal operations,” and thus the standard is inapplicable. L&D Br. at 7, 12-13. In addition, the Contestants argue that, by following the quarry’s longstanding procedures of clearing and inspecting the surge bin, which were consistent with industry practice, Lafarge’s actions did not amount to unwarrantable failure. *Id.* at 6-7, 14-19; L&D Reply Br. at 1-5. They further argue that Dress’ actions did not reflect a disregard for safety or legal requirements, and so did not constitute a knowing violation under section 110(c). L&D Br. at 7, 20-24; L&D Reply Br. at 4-6.

The Secretary responds that the judge properly concluded that Lafarge violated the standard. S. Br. at 1, 7-14. She asserts that her interpretation of the standard is entitled to deference because it is consistent with the language and purpose of the standard. *Id.* at 8-9. She also asserts that the standard provided notice that devices with which surge bins are “equipped” must be used in an effective manner to be considered an “effective means of handling materials,” and that repairing the surge bin was part of “normal operations.” *Id.* at 10-13. In addition, the Secretary argues that substantial evidence supports the judge’s conclusions that the violation was the result of unwarrantable failure and that Dress knowingly authorized, ordered, or carried out the violation. *Id.* at 1-2, 14-19.

A. Violation

The parties disagree over the meaning of section 56.16002(a)(1). The “language of a regulation . . . is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary’s interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (reviewing body must “look to the administrative construction of the regulation if the meaning of the words is in doubt”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (“Deference . . . is not in order if the rule’s meaning is clear on its face.”) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d

1502, 1509 (D.C. Cir. 1984)). Here, we conclude that the language of section 56.16002(a)(1), which requires surge bins to have “mechanical devices or other effective means of handling materials,” clearly requires that the devices be used effectively. As we explain below, we also conclude that the plain language of the regulation supports the Secretary’s view that repairing the surge bin constitutes “normal operations.”

We find unpersuasive the Contestants’ argument that the standard was not violated because the surge bin was “equipped” with mechanical devices for handling materials. Although the bin was furnished with vibrators and a scaling bar to remove loose rock, the record indicates that Lafarge failed to utilize these devices effectively. After Lafarge operated the vibrators for 25 to 30 minutes, Dress and Harder looked inside the bin and, despite their observation of loose materials, they did not continue to run the vibrators or use the scaling bar to clear the loose materials before Harder entered the bin.³ 18 FMSHRC at 2203; Tr. 16-18, 24, 27-28, 41, 43, 116-20. We agree with the judge that, “under the standard, both the means for achieving the end and effective use of the means were required.” 18 FMSHRC at 2207. By employing the words “so that,” the standard is clearly designed to achieve a result, and that result cannot be achieved unless the equipment is actually utilized properly. In this case, we conclude that the standard requires effective use of the vibrators and scaling bar, and that Lafarge failed to effectively use them to clear the loose materials before allowing Harder to enter the bin.

In addition, we reject the Contestants’ argument that the standard is inapplicable because the activity of patching the hole in the surge bin does not constitute “normal operations.” The judge found that patching the hole constituted maintenance of the surge bin and that maintenance is considered part of normal operations. *Id.* at 2205. The Contestants also characterized the work as a maintenance task. *See* L&D Br. at 4 (referring to the “welding maintenance task”). In fact, Dress characterized his duties as overseeing maintenance and testified that maintenance is part of normal operations at the quarry. Tr. 56, 111-12; *see also* Tr. 53 (referring to maintenance of the discharge chute under the surge bin). Thus, we conclude that patching the hole is clearly covered by the phrase “normal operations” and that the standard adequately expresses the Secretary’s intention to reach that activity. From our conclusion that the meaning of the standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that adequate notice provided by unambiguous regulation).

³ We agree with the Contestants that the standard does not specify procedures for clearing or inspecting the surge bin, e.g., that the vibrators be run longer than 25 to 30 minutes, the scaling bar be used to clear loose materials, or the bin be inspected from above. By his statements that Lafarge should have required that the bin be inspected from above and that the bar be used to remove any loose material (18 FMSHRC at 2209, 2212), the judge merely articulated the means that were available to Lafarge for further action.

Based on the foregoing, we conclude that substantial evidence⁴ supports the judge's determination that Lafarge violated section 56.16002(a)(1) by "expos[ing Harder] to entrapment by the caving or sliding of materials" inside the surge bin. We therefore affirm the judge's finding of a violation.

B. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). In addition, the Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"). As we explain below, we conclude that substantial evidence supports the judge's determination that Lafarge's failure to effectively use the vibrators and scaling bar to protect Harder from falling materials constituted a serious lack of reasonable care sufficient to find an unwarrantable failure.

We agree with the judge that the hazard posed by loose materials falling from atop the surge bin was serious and thus warranted heightened precautions by the operator. 18 FMSHRC at 2209. As Lafarge's foreman, Dress was held to a high standard of care in this matter. *E.g.*, *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997). The record indicates that Dress observed "loose and general[] large rock" on top of the dead bed in the surge bin. Gov't Ex. 2 at 5. In fact, it is undisputed that both Dress and Harder observed loose rock in the bin. The basis of this unwarrantable failure charge, therefore, is their unfounded conclusion that the rock was

⁴ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

located where it would not cause harm.⁵ Dress' observation of "loose and general large rock" on top of the cone-shaped interior of the surge bin should have served as a forceful warning that a dangerous situation existed. He simply assumed, based on his belief that the rock was laying outside the ridge, that it would not cause a perilous situation. Instead, the mere presence of the rock should have prompted Dress to take reasonable measures to ascertain whether it was actually positioned so that it would do no harm and, if not, to make efforts to remove the rock.

Given the fact that the observation of the loose rock should have generated extra precautions, and an inquiry as to whether the rock presented a danger, our dissenting colleague's insistence that the danger was not obvious (slip op. at 18) misses the point: the fact that the danger might not have been immediately obvious did not absolve Dress of his duty to investigate the situation. If he had not hastily jumped to a conclusion, but instead conducted the more thorough examination that the presence of loose rock warranted, the danger would have become quite apparent. As the judge pointed out, Lafarge could have taken further steps to ensure safety in this dangerous situation, i.e., it could have required that the bin be viewed from above and that a scaling bar be used to remove the loose materials, but Lafarge failed to take those steps. 18 FMSHRC at 2209. The judge correctly concluded that Dress' failure to recognize the danger and to take further steps to clear the bin reflected a "serious lack of reasonable care."⁶ *Id.* at 2209-10. In sum, we agree with the judge that Lafarge's procedures were inadequate, and that Lafarge should have required more. *Id.*

We find unavailing the Contestants' argument that, by following the quarry's longstanding procedures of clearing and inspecting the surge bin, which were consistent with industry practice, Lafarge's actions did not amount to unwarrantable failure. Regardless of the accuracy of this statement, we are not inclined to permit Lafarge to disregard the clear

⁵ We believe that our dissenting colleague places undue weight on the judge's general statement that rock *outside the ridge* of the dead bed "slid[e]s away from the openings and does not pose a hazard to anyone working below." Slip op. at 16 (quoting 18 FMSHRC at 2202). As the dissent acknowledges, however, the judge also found that rock *inside the ridge* of the dead bed "slid[e]s down through the opening." *Id.* Rock falling inside the ridge was the rock that covered Harder, which is the focus of this inquiry. The falling of rock inside the ridge supports the judge's conclusion that "patching the hole from inside the bin potentially was a very dangerous job." 18 FMSHRC at 2209. The judge explained his finding of high danger as follows: "Any miner assigned to do the job was subject to being injured or killed unless loose rock above the miner was removed. This potential threat required heightened precautions on the part of Lafarge and those acting for it." *Id.* The fallen material constitutes substantial evidence in support of the judge's finding of danger.

⁶ The judge's discussion made clear that, contrary to the dissent's claim (slip op. at 16), his analysis went far beyond the mere occurrence of the accident to support his unwarrantable failure finding. See 18 FMSHRC at 2209-10.

requirements of the standard, and substitute in its place a questionable industry practice that does not satisfactorily prevent the entrapment of miners.

Commissioner Verheggen contends that we are not utilizing the Commission's traditional unwarrantable failure test. Slip op. at 17-18. He faults us for focusing on the high degree of danger posed by the violation and failing to question whether the danger was obvious and whether the operator was on notice that greater compliance efforts were required. *Id.* at 17-19. Contrary to our colleague's assertion, we are not departing from the Commission's precedent setting forth the criteria for an unwarrantable failure determination. Rather, consistent with prior Commission cases on unwarrantable failure, we are applying only those factors that are relevant to the facts of this case.⁷ Furthermore, the judge's analysis fully addressed these factors when he found that, given the high degree of danger, the operator should have been aware of the hazardous condition but instead failed to take appropriate measures to remove the loose rock poised above the miner. 18 FMSHRC at 2209; see *Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813-15 (Aug. 1998) (operator's awareness of significant and obvious danger supports unwarrantable failure). In addition, the judge's decision clearly reflects his view that the danger was obvious. 18 FMSHRC at 2209 ("Harder was required to work in the immediate presence of loose rock").

When violations have exposed miners to extremely dangerous conditions, the Commission has not always relied on most of the remaining factors. A case in point is *Midwest Material*, in which the Commission found unwarrantable an operator's extension of a crane boom. 19 FMSHRC at 34-37. As in the present case, the Commission relied on the high degree of danger and the heightened standard of care required of a foreman. *Id.* at 34-35. We specifically rejected the judge's reliance on the short duration of the violation and contrasted the high degree of danger presented in that case with the cases involving coal accumulations, stating:

The judge's reliance on the relatively brief duration of the violative conduct was misplaced, in view of the high degree of danger posed by the hazardous condition and its obvious nature. Given the extreme hazard created by [the foreman's] negligent conduct, that misconduct is readily distinguishable from other types of violations — such as those involving the accumulation of coal dust — where the degree of danger and the operator's responsibility for learning of and addressing the hazard may increase gradually over time.

⁷ We note that Commissioner Verheggen also concludes that three of the factors are irrelevant in this case. Slip op. at 19 n.4.

Id. at 36.⁸ These principles apply with equal force to the present violation.

We also disagree with our dissenting colleague's emphasis on the need to prove causation — in this case, how the rock fell. Slip op. at 17 (speculating that rock fall may have been caused by Harder's actions). He cites to no Commission decisions, and we know of none, where the Secretary was required to prove causation of harm in a case involving unwarrantable failure. The aggravated conduct required for a finding of unwarrantable failure is the kind of conduct that, like simple negligence, results in a breach of duty. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 30, at 164 (5th ed. 1984). On the other hand, causation is required in "a cause of action founded upon negligence, from which liability for damages to another's interests will follow." *Id.* at 164-65. Causation is not at issue in an unwarrantable failure case in which the relevant inquiry is simply whether aggravated conduct occurred, not whether one entity harmed another.

Based on the foregoing, we conclude that substantial evidence supports the judge's determination that Lafarge demonstrated a serious lack of reasonable care by failing to clear the loose materials atop the surge bin to adequately protect Harder. Therefore, we affirm the judge's unwarrantable failure holding.

C. Section 110(c) Liability

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

⁸ See also, e.g., *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (holding unwarrantable, without discussion of obviousness, extent, duration, or abatement efforts, a foreman's decision to permit use of shuttle car with serious brake problem) (citing *Quinland Coals*, 10 FMSHRC at 708-09).

conclude that substantial evidence supports the judge's determination that Dress is liable under section 110(c) of the Mine Act for knowingly authorizing, ordering, or carrying out the violation.

We agree with the judge's conclusion that Dress should have taken additional steps to clear the surge bin. 18 FMSHRC at 2210-12. In *Kenny Richardson*, the Commission stated that a person has reason to know under section 110(c) "when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." 3 FMSHRC at 16 (quoting *United States v. Sweet Briar, Inc.*, 92 F. Supp. 777, 780 (W.D.S.C. 1950)). The record establishes, and the Contestants do not dispute, that Dress had actual knowledge of the loose materials atop the surge bin yet failed to take measures that were available to remove the loose materials before allowing Harder to enter the bin. Instead, Dress relied on his opinion that the materials would not fall. This opinion was based on Dress' visual inspection of the bin from the discharge chute. The judge concluded that such inspection did not give a sufficiently full perspective of what remained in the bin and that "[i]nspection from above also was necessary." 18 FMSHRC at 2209. Under the circumstances, we conclude that Dress had reason to know of the serious danger of falling rock and that his belief that Harder could safely enter the surge bin was unreasonable. Cf. *New Warwick Mining Co.*, 18 FMSHRC 1365, 1370-71 (Aug. 1996) (finding aggravated conduct under unwarrantable failure analysis because operator's efforts to achieve compliance with standard were unreasonable). As Lafarge's agent,⁹ Dress was responsible for recognizing the serious hazard posed by the loose materials and "it became incumbent upon him to meet a standard of care proportionate with the danger." 18 FMSHRC at 2211-12. Instead, Dress relied on procedures that the judge found "were wholly inadequate." *Id.* at 2212.¹⁰

With respect to the concerns of our dissenting colleagues, we note that both Commissioners Riley and Verheggen refer to the "judgment call" involved in assessing the safety of the surge bin. Slip op. at 13-14 & 20. In this regard, Commissioner Verheggen asserts that no "information" was available to provide Dress with either actual knowledge or reason to know of the violative condition. *Id.* at 19.¹¹ As we have stated, Dress actually observed the

⁹ There is no dispute regarding Lafarge's corporate status and Dress' status as its agent. 18 FMSHRC at 2210.

¹⁰ We note that section 110(c) does not require that an agent intend that someone will be hurt. See *Kenny Richardson*, 3 FMSHRC at 15 (rejecting argument that willfulness must be shown to establish personal liability under Coal Act).

¹¹ Commissioner Verheggen's reliance on Inspector Strickler's one time use of the isolated phrase "judgment call," in an attempt to overturn the judge (slip op. at 20), is inconsistent with the precepts of substantial evidence review. Under section 113(d)(2)(A)(ii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(ii), the Commission is charged with reviewing a judge's findings to determine whether substantial evidence supports them. See *Eastern Associated Coal*

loose rock from the vantage point of the discharge chute and, subsequently, failed to view the bin from above. Such a view would have provided Dress with further information to enable a better-informed “judgment call” regarding the condition inside the surge bin. Based on these facts, we conclude that substantial evidence supports the judge’s determination that Dress demonstrated a “lapse of judgment” in this case. 18 FMSHRC at 2212.

In addition, Commissioner Verheggen asserts that the judge’s finding that Dress acted in good faith and with a degree of care appropriate to the condition inside the surge bin militates against finding section 110(c) liability. Slip op. at 19. Although Dress may have had a good faith belief that the surge bin was safe, as we explained above, his belief was unreasonable. An unreasonable belief that a practice is safe, even if held in good faith, is not a defense to liability under section 110(c). See *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (Aug. 1994) (*reasonable*, good faith belief of mine manager served as a defense to section 110(c) liability); cf. *Cyprus Plateau*, 16 FMSHRC at 1615-16 (unreasonable albeit good faith belief of foreman was no defense to unwarrantable failure). Moreover, contrary to our colleague’s assertion, the judge specifically found that Dress failed to attain a proper standard of care. See 18 FMSHRC at 2211-12 (“Rather than [meet a standard of care proportionate to the danger], Dress relied on the usual procedures . . . [that] were wholly inadequate.”).

Based on the foregoing, we conclude that substantial evidence supports the judge’s determination that Dress demonstrated aggravated conduct by failing to clear the loose materials atop the surge bin to adequately protect Harder. Therefore, we affirm the judge’s section 110(c) holding.

Corp., 13 FMSHRC 178, 185 (Feb. 1991) (“[t]he Commission’s task is not a de novo reweighing of somewhat conflicting evidence but a determination of whether there is substantial evidence in the record to support the judge’s conclusions”).

In any event, Inspector Strickler claimed only “[t]hat’s a judgment call whether it’s loose or not” and was not using that phrase to refer to an overall assessment of the bin’s safety. Tr. 78. And, as we have noted, in this case it is uncontroverted that the material was loose, and the critical question was where the material was located. Moreover, the inspector emphasized that Dress “should have made sure that there wasn’t any loose material in that bin. That’s taking a little bit more time and more precaution. . . . [Dress should have] take[n] another pair of eyes up at the top of the feeder and look down on it and see if anything could be loose.” Tr. 82.

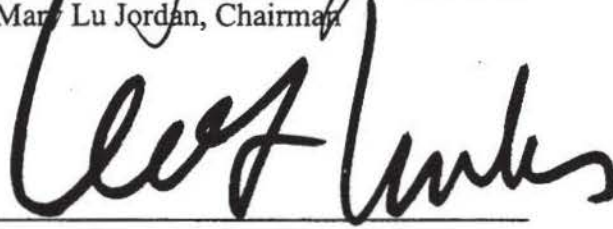
III.

Conclusion

For the foregoing reasons, we affirm the judge's findings of violation, unwarrantable failure, and section 110(c) liability.



Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner



Robert H. Beatty, Jr. Commissioner

Commissioner Riley, concurring in part and dissenting in part:

I concur with the opinion insofar as it affirms the judge's determinations that Lafarge violated 30 C.F.R. § 56.16002(a)(1) and that the violation was the result of Lafarge's unwarrantable failure to comply with the standard. Slip op. at 4-9. I respectfully dissent, however, from the majority's decision to affirm the judge's determination that Theodore Dress is personally liable under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Slip op. at 9-11. I conclude that substantial evidence does not support the judge's determination that Dress is liable under section 110(c). 18 FMSHRC 2199, 2210-12 (Dec. 1996) (ALJ).

With respect to the underlying violation, the judge found, and the Commission majority agrees, that Lafarge's actions constitute more than ordinary negligence and indicate "a serious lack of reasonable care," arguably the lowest threshold of aggravated conduct necessary to support characterization of the violation as unwarrantable. Slip op. at 7, 9; 18 FMSHRC at 2210; see *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995). Regarding individual liability, the judge emphatically stated: "It is certain that Dress did not intentionally violate the standard." 18 FMSHRC at 2211. However, the judge further stated: "[I]t also is clear that intent is not the issue." *Id.* Therefore, the question before the Commission is whether Dress knew or should have known of the violative condition (*Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); accord *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997)) in order to have "knowingly acted" when he violated the standard (*Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971))).

The record substantiates that Dress followed Lafarge's supposedly industry standard procedures for inspecting the surge bin prior to the repair work. The judge found, and the Commission majority agrees, that, industry standard or not, Lafarge's procedures were insufficient in light of the potential for entrapment, which actually occurred. Slip op. at 7-8; 18 FMSHRC at 2209, 2212. The judge also conceded "the company's relative unfamiliarity with emptying the bin." 18 FMSHRC at 2210, 2212. In fact, the judge went so far as to find: "The evidence leads inescapably to the conclusion that no one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate. . . . The company should have required more." *Id.* at 2209. It is in this factual context that the Commission must evaluate Dress' conduct. Surely the Commission majority does not intend to hold corporate agents automatically liable as individuals for the unwarrantable violations of operators. Are corporate agents expected to possess greater experience and expertise than their employers, as the judge and Commission majority would require in the instant case? "Knowing" conduct arises not from a presumption of omniscience, but is supposed to be viewed from the perspective of a person exercising reasonable care under the circumstances. *Kenny Richardson*, 3 FMSHRC at 16 (quoting *United States v. Sweet Briar, Inc.*, 92 F. Supp. 777, 780 (W.D.S.C. 1950)). Applying that principle here to what

the judge describes as a "judgment call" (18 FMSHRC at 2209) leads to the inescapable conclusion that Dress could not have been expected to have knowingly acted in violation of the standard.

Accordingly, I would reverse the judge's section 110(c) holding, which I believe lacks the requisite support in the record.


James C. Riley, Commissioner

Commissioner Verheggen, concurring in part and dissenting in part:

I agree with my colleagues that the judge's finding of a violation of section 56.16002(a)(1) is supported by substantial evidence, and I concur in result with Part II.A of their opinion as further explained below. I disagree, however, with their conclusion that the judge properly found that the violation was unwarrantable and that Theodore Dress was personally liable for it. I therefore dissent from Parts II.B and II.C of the majority's opinion.

1. Violation

I agree with my colleagues that Lafarge's repair activities constituted "normal operations" as that phrase is used in section 56.16002(a)(1), and were thus clearly covered by the standard. I disagree, however, with the basis for the majority's finding of a violation. They state that "the bin was furnished with vibrators and a scaling bar to remove loose rock," and "conclude that the standard requires effective use of" these devices. Slip op. at 5. They find a violation because "Lafarge failed to effectively use [these devices] to clear the loose materials before allowing Harder to enter the bin." *Id.*

I find that Lafarge violated the standard on much narrower grounds. As my colleagues note, section 56.16002 "is clearly designed to achieve a result." *Id.* Although they fail to mention what that result is, I find the standard is clearly intended to prevent miners from being "exposed to entrapment by the caving or sliding of materials" in surge bins such as that used by Lafarge, and in which "loose unconsolidated materials are stored, handled or transferred." 30 C.F.R. § 56.16002(a)(1). Here, there is no dispute that Harder was entrapped by a rock fall in the surge bin. 18 FMSHRC 2199, 2204 (Dec. 1996) (ALJ). In light of this fact *alone*, I find that Lafarge violated the standard, it being well established that operators are liable without regard to fault for violations of the Mine Act. *See, e.g., Asarco, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989).

2. Unwarrantable Failure

In essence, the judge found that Lafarge had a heightened duty of care because "patching the hole from inside the bin potentially was a very dangerous job." 18 FMSHRC at 2209. In support of his finding that Lafarge failed to meet its duty of care, the judge observed that although the company "relied on procedures normally used at the quarry to make sure the bin was safe . . . [,] no one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate." *Id.* He concluded that Lafarge's violation was unwarrantable insofar as "the company was guilty of a serious lack of reasonable care" because it "should have required more," such as requiring workers to inspect the bin for loose material "from both below and above," and to scale from above for loose material "no matter how long the vibrators had run." *Id.*

I find the judge's analysis problematic for several reasons. First, it is unclear from his decision what objective criteria he used to conclude that Lafarge's conduct amounted to "a serious lack of reasonable care." *Id.* In fact, the only criteria he cites are Nelson's uncertainty regarding "how long it took to clear the bin" and Inspector Strickler's opinion that "[i]nspection [of the bin] from above also was necessary." *Id.* I find these two factors alone an insufficient basis on which to hold Lafarge responsible for an unwarrantable failure to comply with section 56.16002(a)(1), particularly when viewed in the context of other findings made by the judge and the testimony of Lafarge employees.

Most of the facts of this case are undisputed. The damage to Lafarge's surge bin required that a repair be made inside the bin. Tr. 21. Before making the repair, Lafarge followed its standard practice of running the bin empty to clear it of any loose material. 18 FMSHRC at 2203; Tr. 97-98. Harder and Dress then visually examined the bin to determine if any loose material remained. 18 FMSHRC at 2203; Tr. 23, 40-41; *see also* Tr. 98-99 (describing operator's standard procedure "to check the bin for loose material"). The judge noted that both men "concluded that it was safe for Harder to patch the hole." 18 FMSHRC at 2203. The judge also found that although Harder and Dress saw some loose material, they determined that "the rock was lying on the side of the dead bed away from the opening," and that they both believed it would not fall. *Id.*

Notably, there is no indication in the judge's opinion that he discredited this testimony. In fact, commenting generally on the function of the dead bed, the judge agreed with Harder and Dress that rock in the location where they observed the loose material posed no hazard. Specifically, the judge found that "[r]ock on the sides of the ridges opposite the openings slid[e]s away from the openings *and does not pose a hazard to anyone working below.*" *Id.* at 2202 (emphasis added). He further found that "[r]ock on the other sides of the ridges slid[e]s down through the openings" — and, presumably, could pose a significant hazard to workers in the bin. *Id.* In view of these findings, I believe that the critical question in this case is the location from which the material fell on Harder.

Unfortunately, the judge left this critical question unanswered insofar as he failed to comment on Dress' testimony that the loose material he observed "was on the outside edge of the dead bed." Tr. 41. Instead, the judge simply concluded that Lafarge's violation was unwarrantable by virtue of the fact that Harder was trapped by falling rock. A more careful review of the record reveals that the Secretary failed to adduce any evidence addressing the question of the location from which the rocks fell. This holds true for her rebuttal case as well — she offered no evidence to rebut Dress' testimony that the loose rock was situated on what the judge found to be the safe side of the dead bed. *See* 18 FMSHRC at 2202.

The record thus contains only evidence that any loose material present was in a location from which the judge found it would not pose a hazard. I find that this evidence, and the absence of any contrary evidence from the Secretary, contradicts the judge's conclusion that the violation was unwarrantable. Indeed, I could affirm the judge's conclusion only if I were to presume that

the rock that fell on Harder was on the hazardous side of the dead bed, a presumption for which I can find no record support.¹

Nor is there any evidence in the record concerning *how* the rock fall occurred — only that it occurred in the first instance. The closest the record comes to revealing the cause of the accident is testimony by Dress that Harder apparently climbed “off of the vibrator” up to a ledge, and that this may have caused the material to fall. Tr. 125-26. Although the judge did not comment on this testimony in his decision, it raises the possibility that Harder may have jarred some rock loose when climbing up to the ledge. If true, this scenario would cast considerable doubt on the judge’s finding of unwarrantable failure, which rests primarily on his conclusion that, in light of the high degree of danger associated with working in the surge bin, Lafarge did not do enough to ensure that there was no loose rock in the bin before Harder entered it (18 FMSHRC at 2209-10). If Harder’s actions caused the fall, however, there is little Lafarge could have done to prevent the accident. I believe that the judge erred in failing to consider, and make findings of fact concerning, Dress’ testimony regarding whether Harder’s actions might possibly have caused the rock fall.

Indeed, I find the judge’s decision legally insufficient because he failed to examine the various factors the Commission has traditionally used in determining whether an operator’s conduct is unwarrantable. These factors include the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, and the operator’s knowledge of the existence of the violation. See *Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813 (Aug. 1998); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984).

Obviously, these factors need to be viewed in the context of the factual circumstances of a particular case — some factors may be irrelevant to a particular factual scenario. But here, the judge did not go beyond examining the degree of danger posed by Lafarge’s violation — and erred as a result. The majority also fails to apply the Commission’s traditional unwarrantable failure test. Instead, like the judge, they collapse the test into a single dispositive factor: whether a “high degree of danger [is] posed by a violation.” Slip op. at 6. I find this approach at odds with the Commission precedent, under which it is clear we must look at a variety of factors when

¹ The majority nevertheless concludes that “[r]ock falling inside the ridge was the rock that covered Harder.” Slip op. at 7 n.5. No citation to the record is offered in support of this contention. In fact, no such record evidence exists.

determining whether a violation is unwarrantable.² Moreover, I believe that the “test” used by the judge and the majority hopelessly blurs the distinction between gravity and the aggravated negligence which the term “unwarrantable failure” describes.

Examining factors other than the danger of the violation, I find further reason to reverse the judge’s unwarrantable failure determination. From the testimony of Dress and Harder that they saw no danger when they inspected the bin, for example, it follows that the danger here was anything but obvious.³ Indeed, the judge acknowledged that had Dress believed there was any danger, Dress would “never” have assigned Harder to repair the bin. 18 FMSHRC at 2211. And even the Secretary’s key witness, Inspector Strickler, conceded that any assessment of the condition of the bin would have to have been based on “a judgment call.” Tr. 78. It is clear from

² The cases on which the majority bases its test all involved more than just danger as factors contributing to findings of unwarrantable failure. See *Midwest Material*, 19 FMSHRC at 35 (finding “the obvious nature of the hazard” to be “a further indication” of unwarrantable failure in addition to the “extreme danger” of the violation); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (unwarrantable finding based on fact the operator was “aware of the shuttle car’s serious brake problem and failed to follow up appropriately by remedying it”); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (operator “deliberate[ly]” removed signs that warned of dangerous roof conditions in violation of their own procedures for overriding decisions to “danger off” areas); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129-30 (July 1992) (considering variety of aggravating factors, including fact that operator knew and was specifically warned that work was taking place too near power lines, and operator’s inadequate measures taken to guard against known hazards associated with power lines); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure based primarily on “the extensive and obvious nature of the conditions, the history of similar roof conditions, and [the operator’s] admitted knowledge of the conditions”). See also *Rock of Ages Corp.*, 20 FMSHRC 106, 115-16 (Feb. 1998) (considering various factors in finding unwarrantable failure in addition to extreme danger associated with violation, i.e., undetonated pyrodex explosives, including fact that a foreman’s “discovery of the four unexploded bags of pyrodex should have alerted [him] to the possibility of additional misfires,” “the experimental nature of the pyrodex blasting” at the operator’s quarry, and operator’s inability to explain “its negligence and the lack of safety precautions”).

³ The majority claims that “the judge’s decision clearly reflects his view that the danger was obvious.” Slip op. at 8 (citing 18 FMSHRC at 2209). In fact, he made no findings that could support such an inference about his views. The majority also cites a *Cyprus Emerald* case for the proposition that an “operator’s awareness of . . . obvious danger supports” a finding of unwarrantable failure. *Id.* (citing 20 FMSHRC at 813-15). Unlike the hazard in this case, though, at issue in *Cyprus Emerald* was a “very large refuse pile — estimated by MSHA to be as much as 1 million tons,” which the operator had permitted “to develop over 18 years without attention to commonly accepted engineering principles.” 20 FMSHRC at 814.

the record that no one at Lafarge actually knew a violation existed. Nor had the company been placed on notice that greater efforts were necessary for compliance. In fact, the need to make repairs to surge bins arose very infrequently (Tr. 34, 94-95), so the judge was correct in noting “no one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate” (18 FMSHRC at 2209) — or, as the record amply reveals, that the procedures were *inadequate*. Based on the un rebutted testimony of Harder and Dress that they believed the bin was safe, testimony the judge recited in his decision without disapproving it, Lafarge had no reason to believe its procedures were inadequate.⁴ Accordingly, I would reverse the judge’s finding of unwarrantable failure.

3. Section 110(c)

I find the judge’s conclusion that Dress was liable under section 110(c) similarly lacking in record support or legal foundation. As the majority correctly states, section 110(c) liability arises when an individual “in a position to protect employee safety and health . . . fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition,” and that such liability is predicated on aggravated conduct constituting more than ordinary negligence. Slip op. at 9. Here, however, there was no “information” that would have given Dress either actual knowledge or reason to know of the existence of a violative condition in the surge bin. Moreover, the record contains no evidence that Dress engaged in any aggravated conduct — that he, for example, recklessly disregarded an obvious hazard, or intentionally ordered Harder to repair the bin knowing full well that a rock fall was imminent, or was indifferent to Harder’s safety. Nor do I find any evidence indicating he showed a serious lack of reasonable care.

To the contrary, the evidence — and more importantly, the judge’s findings — indicate that Dress acted in good faith and with a degree of care appropriate to the conditions apparently existing before the accident. Indeed, the conditions observed by both Harder and Dress posed no *apparent* hazard. They testified that some loose material was present, but that it “was lying on the side of the dead bed away from the opening” (18 FMSHRC at 2203), a position from which the judge found rock “slid[e]s away from the openings *and does not pose a hazard to anyone working below*” (*id.* at 2202, *emphasis added*). Moreover, the judge included in his factual findings Dress’ testimony that he did not believe work in the bin posed any danger. *Id.* at 2203. The judge also credited Harder’s testimony “that Dress never would assign [Harder] to do a job that Dress believed was dangerous.” *Id.* at 2211. In a similar vein, Harder testified as follows after being examined and cross examined:


⁴ Other factors traditionally considered by the Commission that do not appear to apply to this case include the extent of the violative condition, how long it existed, or Lafarge’s efforts to abate it.

Could I just say one thing? . . . I'd just like to say on Ted's behalf that . . . I do not believe that . . . if he thought it was dangerous in there, I don't believe he would have ever sent me in there to do that job.

Tr. 37.

But the most significant record evidence that contradicts the Secretary's allegation that Dress' conduct was aggravated is Inspector Strickler's remarkable statement that to assess the safety of the bin would necessarily have involved "a judgment call." Tr. 78. The term "judgment call" means "any subjective or debatable determination[,] personal opinion or interpretation." *Random House Dictionary of the English Language* 1036 (2d ed. 1987). In other words, a "judgment call" is a determination on which reasonable minds might differ. In support of its affirming the judge's finding of section 110(c) liability, the majority argues that Dress' "belief that Harder could safely enter the surge bin was unreasonable." Slip op. at 10. Yet Dress' belief was based on what the Secretary, through her witness at trial, concedes was "a judgment call." I fail to see how Dress' conduct can be found unreasonable when it is a matter on which even the Secretary concedes reasonable minds could differ. Nor do I believe that the majority's rationale is supported by Commission precedent, under which more than mere unreasonableness is required to support a finding of section 110(c) liability.

Dress' reasonable, good faith belief that no hazard existed in the surge bin is amply supported by the record, and leads me to find the judge erred in finding section 110(c) liability. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (Aug. 1994). Accordingly, I would reverse the judge's finding.


Theodore F. Verheggen, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

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October 8, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-11-M
Petitioner	:	A.C. No. 10-01634-05517
	:	
v.	:	Portable Plant No. 1
	:	
WESTERN CONSTRUCTION, INC.,	:	
Respondent	:	

DECISION

Appearances: Megan J. Green, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Maurice O. Ellsworth, Esq., Howard, Ellsworth, Ipsen & Perry, Boise, Idaho, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Western Construction, Inc. ("Western Construction"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petition alleges one violation of the Secretary's safety standards. A hearing was held in Boise, Idaho.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Western Construction operates Portable Plant No. 1 (the "plant"), which was in Elmore County, Idaho, at the time of MSHA's inspection. The plant was being used to produce aggregate for a road construction project. The plant includes a jaw crusher and a feeder conveyor (the "feeder"). The feeder is at an angle and is used to convey rock to the crusher. (Ex. R-1). The feeder is about 25 feet long and about 4 feet wide. Heavy metal aprons are attached to the frame of the feeder to keep the rock from spilling off the sides of the feeder. These aprons are at an angle so that the feeder assembly resembles a large "V" with a flat bottom. A metal bar connects the top of the aprons on each side of the feeder near the discharge end. The conveyor itself consists of metal cleats or slats, sometimes called flights, that are similar to the track on a dozer. The slats move rock that is pushed onto the feeder at the feeder trap up to the top of the feeder where the rock dumps into the jaw crusher. The vertical distance between the slats and the top of the aprons is about four feet.

Rock is pushed onto the feeder at the bottom with dozers operated by Claude Sarbaum and other employees. The dozer operators are instructed to push rock that is four feet in diameter or less onto the feeder. When the jaw crusher becomes plugged with material, it is shut down to free the material.

On June 23, 1997, MSHA Inspector Robert Capps arrived at the plant to conduct an inspection. Soon after he arrived, he observed Mr. Sarbaum standing on the feeder near the discharge end. At the time Inspector Capps observed this condition, he was about 150 feet away near the tool trailer. He became quite excited and motioned to Mr. Sarbaum to get off the feeder. Sarbaum walked back to his dozer and waited. Inspector Capps walked to the dozer and asked Mr. Sarbaum to step down. The inspector put his hands on Sarbaum's shoulders and told him that he was an MSHA inspector and that it was a violation of MSHA regulations to walk on the feeder.

Inspector Capps issued a combination 104(a) citation and 107(a) imminent danger order (the "citation") soon after he observed the condition. It alleges a violation of 30 C.F.R. § 56.11001, as follows:

A Cat D10N dozer operator was observed using an unsafe means of access to go from the primary feeder trap to the primary jaw crusher to assist in the removal of an oversized rock from the jaw. The dozer operator walked/climbed across the primary feeder, which was mostly full of loose material, to the jaw area. The jaw was still rotating as he arrived at the opening above it. He could have fallen into the moving jaw. He was not secured from fall with a safety belt and lanyard (56.15005). There was an imminent danger of falling into the jaw.

Inspector Capps determined that the violation was of a significant and substantial nature ("S&S") and was the result of the mine operator's high negligence. Section 56.11001 provides that a "[s]afe means of access shall be provided and maintained to all working places." The citation was terminated when Mr. Sarbaum was removed from the feeder and instructed on safe access. On June 26, 1997, Inspector Capps modified the citation to "add [an] additional violative evaluation" for section 56.15005. That safety standard provides that safety belts and lines shall be used where there is a danger of falling.

The Secretary filed a petition for assessment of civil penalty for this citation on November 3, 1997, charging Western Construction with a violation of section 56.11001. The proposed penalty of \$1,500 was specially assessed under 30 C.F.R. § 100.5. The Secretary conducted an investigation to determine whether any agent of Western Construction should be assessed a penalty under section 110(c) of the Act, but no charges were filed.

A. Fact of Violation

1. Summary of the Testimony

The facts in this case are in dispute. Inspector Capps testified that he was standing at the main controller's booth at the plant when he observed Mr. Sarbaum on the feeder. (Tr. 12). Although he was about 150 feet away, the inspector was at an elevated position and his view was not obstructed except by dust in the air. (Tr. 13). He stated that the feeder is about 15 feet above the ground at its highest point. (Tr. 16). The inspector stated that he saw Mr. Sarbaum walking up the feeder towards the discharge end near the jaw crusher. (Tr. 17). The feeder was not running and the jaw crusher had been turned off. The crusher was still rotating from its own momentum. Inspector Capps described the metal bar connecting the aprons on both sides of the feeder assembly as a "spreader bar." (Tr. 15). He stated that it was made of tubular steel, that it keeps the aprons in position, and that it can also be used to lift the feeder assembly. *Id.* He stated that the vertical distance between the slats of the feeder and the spreader bar is about six feet.

Inspector Capps testified that Mr. Sarbaum traveled beyond the spreader bar and looked down into the jaw crusher that was still rotating. (Tr. 17). He was not tied off. The inspector testified that he could clearly see that Mr. Sarbaum was between the spreader bar and the discharge end of the feeder despite the fact that he was 150 feet away. He also testified that the feeder was mostly full of rock. (Tr. 18). The rock was more than half way up the sides of the aprons. (Tr. 19). Thus, the inspector believes that Mr. Sarbaum walked on top of the uneven rocky surface to reach the discharge end of the feeder.

Inspector Capps believes that Western Construction violated the standard because a safe means of access was not provided. Mr. Sarbaum could have fallen off the sides of the feeder as he walked up the feeder and he could have fallen into the jaw crusher as he looked down into the crusher. (Tr. 19). The inspector believes that Mr. Sarbaum could have tripped on the rough, uneven surface of the rocks on the feeder. (Tr. 21).

MSHA Inspector Robert Palmer conducted an investigation of the incident. He testified that the rocks on the feeder presented a tripping and falling hazard. (Tr. 54-55). He stated that if Mr. Sarbaum had fallen, he could have been seriously injured. He stated that a fall into the crusher could have been fatal.

Mr. Sarbaum, an experienced heavy equipment operator, testified that on June 23 he was gathering rocks with the dozer and pushing them onto the feeder trap. (Tr. 99). He stated that he pushes a new load onto the feeder every five to ten minutes. Another dozer operator was also pushing rock into the feeder on that day. (Tr. 102). When he was getting ready to push one load onto the feeder, he saw that the feeder was empty and it was not running. (Tr. 101). He looked at the feeder operator, who works in a booth past the discharge end of the feeder, and she signaled that the jaw crusher was plugged. Mr. Sarbaum did not push any more rock onto the feeder. He was concerned that something that he had pushed onto the feeder could have caused

the crusher to become plugged, so he got off his dozer, walked onto the feeder, traveled up the feeder to look down into the crusher, and saw a big rock in the crusher that was causing the problem. (Tr. 102)

Mr. Sarbaum testified that before he went into the feeder, he signaled to the crusher operator who sits in the control house. (Tr. 104). Through hand signals, he indicated to the crusher operator that he was going onto the feeder. *Id.* The crusher operator, Jake Chavarria, waved back. Mr. Chavarria disappeared for a short time, returned to the control house, and waved a second time. (Tr. 119). Mr. Sarbaum understood this to mean that the feeder had been locked out. Mr. Sarbaum then walked onto the feeder. He was not instructed to travel up the feeder by his supervisor and he did not expect to assist in freeing the plug. Mr. Sarbaum testified that he "was just curious to see what happened." (Tr. 110).

Mr. Sarbaum testified that he walked only as far as the spreader bar, which he called the "safety bar." (Tr. 103). He stated that he would never travel past the safety bar because to do so would be unsafe, particularly when the jaw is moving. He also testified that the feeder was virtually empty of rock when he walked on it. Mr. Sarbaum stated that there was very little rock on the feeder when he approached it in his dozer. *Id.* As he walked up the feeder, he did not have to step over rocks because there "wasn't any material" on the feeder. (Tr. 106). He stated that he could see the slats of the feeder. He testified that there was some rock and dirt on the feeder and that he could see 90% of the slats. (Tr. 122).

Mr. Sarbaum testified that when he reached the safety bar, he was able to look over the end of the feeder and see part of the crusher. (Tr. 108). He could see a large rock lodged in the crusher. (Tr. 106). He stated that the safety bar was at about the level of his chest and that he did not travel beyond the bar. The bar was about five feet from the discharge end of the feeder. (Tr. 107). Mr. Sarbaum testified that he was not in any danger when he walked up the feeder because it was nearly empty and the four-foot high aprons on the feeder would keep him from falling off the feeder even if he were to stumble. In addition, he was not in danger of falling off the end of the feeder into the jaw crusher because he did not travel beyond the safety bar.

He stated that he has walked up the feeder in similar circumstances on a number of occasions and that he normally walks back down the feeder and returns to his dozer once he sees what is plugging the crusher. In this instance, he saw someone waving his arms at him near the tool trailer. (Tr. 111). After Mr. Sarbaum returned to his dozer, the man approached him and motioned him to step down from the dozer. The man put his hands on Mr. Sarbaum's shoulders, identified himself as an MSHA inspector, and told him that he should not be walking on the feeder when the crusher is in motion. Mr. Sarbaum became upset when the inspector put his hands on his shoulders.

2. Discussion and Analysis

For the reasons set forth below, I find that the Secretary established a violation of section 56.11001. First, I find that the standard applies to the feeder because Mr. Sarbaum walked up the

feeder to look into the crusher. The standard provides that a safe means of access shall be provided and maintained to all working places. Working place is defined as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. Although the area near the discharge end of the feeder is not a working place in the traditional sense, Mr. Sarbaum walked up the feeder for a specific purpose: to see what was in the crusher. He was not directed to look into the crusher by his supervisor, but this was his general practice and his supervisor was aware of this practice. The feeder conveyor was the normal travelway that was used by Mr. Sarbaum. Accordingly, I find that the end of the feeder was a working place.

The parties dispute the amount of rock that was on the feeder at the time. Inspector Capps testified that the feeder was about half full of rock. Mr. Sarbaum testified that it was mostly empty. For reasons that are not clear to me, Inspector Capps did not inspect the feeder after he talked to Mr. Sarbaum near his dozer. The inspector observed the condition from a distance of 150 feet, walked to the dozer, and talked to Mr. Sarbaum, but he did not examine the feeder from the dozer. The inspector stated that he did not need to look at the feeder from the dozer because he saw everything he needed to see from 150 feet away. (Tr. 37). The feeder is at an angle and it would be difficult to see the conditions inside the feeder from a distance of 150 feet because of the aprons. He had a clear view of the discharge end of the conveyor, however.

Given the fact that Mr. Sarbaum was actually on the feeder and the inspector only saw the feeder from a considerable distance, I generally accept Mr. Sarbaum's account of the conditions inside the feeder. I find that the feeder was mostly empty but that there was rock on the feeder. Mr. Sarbaum testified that he saw a large rock in the crusher; he did not say that he saw a lot of smaller rock and dirt on top of or around the large rock. It is likely that at least some rock remained on the feeder when it was shut down. Thus, I find that rocks of various sizes were on the feeder but that it was not half full, as the inspector believed. I find that the discharge end of the feeder contained a considerable amount of rock, as observed by the inspector.

The testimony also conflicts as to whether Mr. Sarbaum traveled past the spreader bar when he looked into the jaw. On one hand, Mr. Sarbaum testified at the hearing that he did not go beyond the spreader bar and that he would never do so because it would be dangerous. He also made this statement to Inspector Palmer during the special investigation. (Tr. 53). Inspector Capps testified that he saw Mr. Sarbaum walk up the feeder, get on the other side of the spreader bar and look down into the jaw crusher. (Tr. 17). He testified that he is positive that Mr. Sarbaum crossed under the spreader bar because he had a clear view of the discharge end of the feeder from his observation point. (Tr. 18).

I find that it would have been difficult to see much of the crusher if one were to stand behind the spreader bar. Mr. Sarbaum is over six feet tall and the spreader bar was about six feet above the surface of the feeder. It is possible that he could have observed a small part of the crusher without crossing under the spreader bar. I find that the testimony of Inspector Capps is more credible on this issue, however. I rely, in part, on the photographs introduced by Western Construction. (Ex. R-1, R-2). Given the angle of the feeder and the distance between the spreader bar and the end of the feeder, it is unlikely that anyone could see a significant part of the

crusher from that location. He would have had to travel past the spreader bar or leaned forward under the bar to examine the crusher.

I agree with counsel for the Secretary that even if Mr. Sarbaum did not travel beyond the spreader bar, he was still in danger of falling. (Tr. 127-28). He walked up the feeder to the spreader bar and rocks on the feeder presented a stumbling hazard. He could have stumbled and sprained an ankle or hit his head on one of the aprons. Other cases present similar situations. In one case, an administrative law judge affirmed an S&S violation of section 56.11001 because an employee, who was walking on an empty elevated conveyor belt, could have been knocked over by a gust of wind. *Walker Stone Co.*, 14 FMSHRC 603, 606 (April 1992). In *USS*, 13 FMSHRC 145, 154 (January 1991), an administrative law judge affirmed a citation issued under this standard because of an accumulation of rock on a walkway that was up to eight inches deep. It is not necessary to find that Mr. Sarbaum would have fallen off the feeder or fallen into the crusher in order to sustain a violation. As stated above, Mr. Sarbaum could have injured himself without falling from the feeder.

Mr. Sarbaum testified that he believed that it was safe for him travel up the feeder to observe the crusher and pointed to the fact that no employee of Western Construction has ever been injured while walking on a feeder. I credit Mr. Sarbaum's testimony in this regard, but the fact that an employee has never been injured does not mean that an injury would never have occurred if this practice continued at Western Construction. I find that the Secretary established that Western Construction did not provide Mr. Sarbaum with safe access to the discharge end of the feeder. I find that it was reasonably likely that Mr. Sarbaum or another employee would be injured if this practice continued at the mine. Accordingly, I affirm the violation.

B. Significant and Substantial Nature of the Violation

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

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

I find that the Secretary established the first two elements of this test. There was a violation of the standard and a measure of danger to safety contributed to by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation will result in an injury. I find that the Secretary established that an injury was reasonably likely in this instance and that such an injury would be of a reasonably serious nature.

As stated above, the surface of the feeder was uneven, there were rocks of various sizes along the feeder, and it was reasonably likely that Mr. Sarbaum would trip and fall, if the practice of walking up the feeder continued unabated at the plant. There was no handrail or other device that one could hold to steady oneself. It was also reasonably likely that a fall would result in an injury of a reasonably serious nature. An employee could twist his ankle, break a bone, or hit his head on the apron. If the feeder contained a significant amount of rock, someone could fall off the side of the feeder because the apron would no longer act as a barrier to such a fall. It was also reasonably likely that Mr. Sarbaum or another dozer operator would fall off the feeder into the crusher if this practice continued. Western Construction argues that the stumbling hazard presented in the feeder is no greater than the stumbling hazard presented while walking on the ground at the plant. I disagree. Anyone walking up the feeder is restricted to a confined area and he cannot walk around obstructions as he could on the ground.

C. Other Issues

At the hearing, the Secretary presented evidence of a violation of section 56.15005. The petition for assessment of penalty does not mention a violation of that section. Exhibit A, attached to the petition, lists only a violation of section 56.11001. The citation itself, including the modification, refers to section 56.15005. I hold that the only issue before me is the allegation concerning section 56.11001. In civil penalty cases, the Secretary proposes civil penalties for alleged violations of her safety and health standards. A separate penalty is proposed for each alleged violation. In this case only one penalty has been proposed. I reject the Secretary's argument that the proposed penalty in this case covers both alleged violations. Although it is clear that Mr. Sarbaum was not wearing a safety belt or line, a penalty was not proposed for that alleged violation and any issues concerning that safety standard are not before me.

Western Construction presented evidence that it operates the plant in a safe manner. It argues that it is not "renegade company" and that its policy "emphasizes safety first." (Tr. 70). It introduced two safety awards it received from MSHA's Holmes Safety Association. Western Construction received one award for working 100,392 hours from January 1986 through March 1995 without any fatal accidents or permanent total disability accidents. (Ex. R-3). It received another award for working 50,392 hours between April 1991 through March 1995 without incurring a lost time injury. (Ex. R-4). Western Construction's achievements in this regard are commendable. It must be stated, however, that safe mine operators are issued citations from MSHA. The fact that Western Construction was issued the subject citation does not mean that it is a renegade company or that it does not emphasize safety. The citation simply indicates that the conditions described in this citation presented a safety hazard to employees.

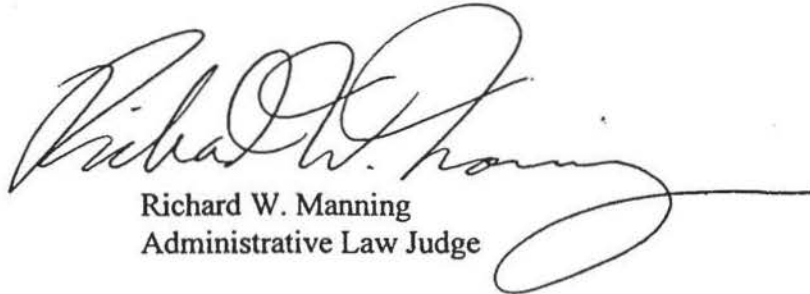
II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The parties stipulated to many of the criteria. I find that seven citations were issued at the plant in the 24 months preceding June 23, 1997. The plant worked about 20,692 man-hours per year at that time. Western Construction worked about 41,293 man-hours per year at that time. The violation was rapidly abated. The penalty assessed in this decision will not have an adverse effect on Western Construction's ability to continue in business. The violation was S&S and it created a serious safety hazard.

Inspector Capps determined that Western Construction's negligence was high because it was a normal practice at the mine for dozer operators to walk up the feeder to find out what was in the jaw crusher. (Tr. 21-22). The employees at the plant did not consider this practice to create a significant hazard. Although I disagree with this assessment, management at the plant was not indifferent to safety issues. I credit the testimony of Eldon Heath, the crusher superintendent, that safety is a primary concern at the plant. (Tr. 88). Nevertheless, I find that there was a lack of reasonable care in allowing employees to walk along the feeder. I hold that Western Construction's negligence was moderate to high. Based on the penalty criteria, I find that a penalty of \$1,000 is appropriate for this violation.

III. ORDER

Accordingly, Citation No. 7959086 is **AFFIRMED** and Western Construction, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,000.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES
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OCT 9 1998

BLACK DIAMOND CONSTRUCTION	:	EQUAL ACCESS TO JUSTICE
INC.,	:	PROCEEDING
Applicant	:	
v.	:	Docket No. EAJ 98-1
	:	
SECRETARY OF LABOR,	:	Formerly WEVA 98-1
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Before: Judge Barbour

This case is before me on an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA) (28 U.S.C. § 2412). Black Diamond Construction, Inc. (Black Diamond) filed the application against the Secretary of Labor's Mine Safety and Health Administration (MSHA), based upon the dismissal of a civil penalty case (Docket No. WEVA 98-1) the Secretary brought against the company pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act) (30 U.S.C. § 815(a)).

The EAJA provides for the award of attorney's fees and other expenses to a prevailing party against the United States or an agency thereof unless the position of the government "was substantially justified or that special circumstances make an award unjust" (28 U.S.C. § 2412(d)(1)(A)). Black Diamond contends the Secretary's allegation that the company violated two mandatory training standards found in 30 C.F.R. Part 48 was "not substantially justified."

PROCEEDINGS IN DOCKET NO. WEVA 98-1

On October 17, 1997, the Secretary filed with the Commission a petition for the assessment of civil penalties against Black Diamond. The petition was assigned Commission Docket No. WEVA 98-1. The petition alleged that Black Diamond committed two violations of 30 C.F.R. Part 48. Order No. 4404455 cited the company for a violation of section 48.25(a), a mandatory training standard requiring in part that each new miner receive no less than 24 hours of new miner training. The order charged that the company was an independent contractor of a coal operator and that the company's employee, Brian Casto, was performing general labor duties at a work site without having received the required training. Citation No. 4404941 cited the company for a violation of section 48.29(c), a mandatory standard requiring an operator to

certify a miner received the training required and keep the certification form at the mine for 2 years, or for 60 days after termination of the miner's employment. The citation charged that a copy of the form required for Black Diamond's employee, Matthew Adkins, was not available at the mine site.

The Secretary proposed the assessment of a civil penalty of \$108 for the alleged violation involving Brian Casto and a civil penalty of \$50 for the alleged violation involving Matthew Adkins.

The company denied it violated the regulations, and the case was assigned to Commission Administrative Law Judge Jerold Feldman, who required the parties to confer to discuss settlement, and if they were unable to settle the case, to submit synopses of their legal arguments, expected proofs, lists of expected exhibits, and stipulations. After the parties determined a settlement was not possible, Black Diamond responded to Judge Feldman by maintaining it was not liable for the alleged violations because it was MSHA's policy to exempt from Part 48 individuals engaged in construction work of the type the company contracted to perform (Response to Prehearing Order 1). On the other hand, the Secretary advised the judge that the company had contracted to drain an impoundment at a preparation plant in order to allow longwall mining to commence under the impoundment and in her opinion the company's workers "were hired to make alterations to the impoundment, and thus were repair and maintenance workers subject to the Part 48 training requirements" (Prehearing Statement 2).

The Secretary detailed how the inspector, Ernest Thompson, saw Brian Casto on mine property and inquired as to his duties, how Brian Casto replied he had driven a truck on the property on three occasions, and how this lead Thompson to conclude Casto was a general laborer on the mine site and thus was a "miner" as defined in Part 48 (*Id.* 3). Similarly, Thompson had observed Adkins working on mine property and determined Adkins, like Brian Casto, was a "miner" subject to the training regulations (*Id.*).

Upon receipt of the responses, Judge Feldman noticed the case for hearing. One day before the hearing, the Secretary moved for dismissal on the grounds the case was moot. The Secretary stated, "After reviewing the record . . . the Secretary . . . vacated the . . . order and citation" (Sec's Mot. To Dismiss). The Secretary attached copies of the vacations to the motion. Each was dated the day before the hearing, and each was worded: "After consultation with the Office of the Solicitor, [the order or citation] is hereby vacated" (*Id.* Attachs 1 and 2). Judge Feldman then dismissed the civil penalty case.

THE EAJA APPLICATION

In its EAJA Application, Black Diamond asserted that on the day the order and citation were issued, William Casto met with Inspector Thompson and informed Thompson the company

was demolishing the impoundment.¹ Black Diamond claimed Casto also told Thompson that employees of independent contractors who performed such work were exempt from the training requirements (Appl. 2). According to Black Diamond, Thompson dismissed Casto's contention. Casto characterized Thompson as "all puffed up and not wanting to listen to any reasonable discussion of the facts of the case" (Appl. Exh. 1 at 11).

The company also maintained that later, in a June 25, 1997 post-inspection conference at MSHA's Madison, West Virginia field office, William Casto again contended the cited employees were exempt. Casto reminded Don Ellis, an MSHA supervisor, as well as other MSHA personnel, of provisions in MSHA's Program Policy Memo (PPM) that exempted Black Diamond's employees from the requirements. Casto told Ellis he had spoken with an MSHA official in Mount Hope, West Virginia, who confirmed that surface construction workers were exempt from the requirements.

Casto characterized Ellis's response as one of "try[ing] to confuse the issue" (Appl., Exh. 2 at 35). According to Casto, Ellis stated MSHA never considered the work in which Black Diamond was engaged to be surface construction work. In Casto's opinion Ellis "wavered from one side of the room to the other" (Id.). When Casto asked for "some information, a case, rules and regulations that explain[ed] MSHA's position," Ellis' only response was "[I]t's always been MSHA's policy" (Id.).

Finally, Black Diamond stated that after the Secretary filed her petition for the assessment of civil penalties, the company continued to maintain it was exempt from the training regulations. It responded to Judge Feldman by citing the PPM, and reiterating its position that under the PPM the Part 48 regulations were not applicable to the work it was doing.

In Black Diamond's opinion, the pertinent provisions of the PPM are found in Volume III, Part 48.2/48.22. Part 48 is devoted to training and retraining miners. Section 48.2/48.22 concerns, among other things, "Independent Contractor Training." It states in part:

A. Coverage and Training Requirements

Independent contractors working at a mine are miners for Part 48 training purposes, except as explained below:

* * * * *

This policy does not cover independent contractors who are shaft and slope workers, surface construction workers, or workers involved in underground

^{1/} William Casto is a vice president of Black Diamond and Brian Casto's father.

mine construction work that causes the mine to cease operation (III PPM 14) (emphasis added)).

The PPM defines surface construction work as:

Persons Performing Construction Work

Construction work includes the building or demolition of any facility, [or] the building of a major addition to an existing facility (III PPM 14(a)(emphasis added)).

The PPM concludes:

If workers are performing construction work as described above — no training is required (III PPM 14(b) (emphasis added)).

In the company's view, because the Secretary knew the company was engaged in demolishing the impoundment but did not quite the case until after the company was "forced to go to the expense of a legal defense and deposing witnesses[,] [j]ustice . . . requires an [EAJA] award (Appl. 7).

THE SECRETARY'S RESPONSE

The Secretary answered the EAJA Application by asserting: (1) that the company had not established financial eligibility for an award of attorney's fees and expenses under the EAJA; (2) that her position Brian Casto and Adkins were subject to the training requirements was "substantially justified" within the meaning of the EAJA; and (3) that the attorney's fees applied for by the company were in excess of those allowed by the EAJA.

The majority of her arguments concerned the issue of substantial justification. In making them, the Secretary highlighted what she believed to be the relevant facts. She stated that during February 1997, an impoundment elimination plan was filed with MSHA. The impoundment was part of a refuse disposal facility that in turn was part of a preparation plant. The impoundment had been in existence for several decades and was created by damming a mountain hollow. The dam was made of coal fines and rock. Water and slurry were impounded behind the dam. Under the elimination plan, water was to be pumped out of the impoundment, the impoundment area was to be filled, and the dam was to be rendered inoperable in order to allow a mine beneath the impoundment to extend its longwall mining limits without fear of water seepage (Answer 1, citing to Attach. A).² The company, an independent contractor, was hired to pump out the water in the impoundment and to backfill the area, among other things.

^{2/} Attach. A is a copy of the impoundment elimination plan in effect when the order and citation were issued on May 15, 1997. A revised plan was submitted in April 1997. It was approved on May 23, 1997 (see counsel for Sec's letter of September 21, 1998 and counsel for Black Diamond's letter of September 29, 1998).

On May 15, 1997, Thompson and an inspector trainee went to the preparation plant after they learned that work was being done at the impoundment. At the impoundment site they met Brian Casto, who was standing by a truck. Thompson asked Casto if he had driven the truck, and Casto answered he had. Casto told the inspectors he had also preshift examined the truck. Thompson began to inspect the truck. He asked Brian Casto to move the truck and to apply its brakes. Casto seemed to have difficulty getting the truck to go in gear, and Thompson concluded Casto did not know much about the truck. Thompson asked Brian Casto for his training records. Casto responded he had not been trained (Ans. 3).

Adkins, who was operating a bulldozer at the impoundment site, came over to the truck and Thompson began to inspect the bulldozer. Thompson asked Adkins about his training, and Adkins stated he had not received any training. Thompson then "told both men that they were being withdrawn from the mine site for not having the requisite training," and it was agreed that everyone would go to the mine office (Ans. 4). On the way to the office the miners' representative who accompanied the inspector and the trainee told Thompson that in addition to operating the truck, Brian Casto had been out on the impoundment in a boat (Id.).

At the office, Casto stated he had driven the truck on three different occasions to pick up fuel. Based on Casto's use of the truck, Thompson concluded Brian Casto was a new miner performing general labor duties and that he should have had new miner training as required by section 48.25(a). Because Casto admitted he had not been trained, Thompson issued Order No 4404455, charging Black Diamond with a violation of the standard (Ans. 4).

William Casto then came to the office. He told Thompson that Brian Casto was not a miner, but Brian Casto confirmed he had driven the truck three different times, and that he had gone out on the impoundment in a boat. Thompson told William Casto that Brian Casto was considered a miner under the law and must receive newly employed, inexperienced miner training (Ans. 5, citing to Attach. D (Thompson notes)).

In addition to discussing the training status of Brian Casto, Thompson asked to see copies of Adkins's training certificates. Because the certificates could not be found, Thompson concluded the company violated section 48.29(c), the standard requiring the certificates be kept at the mine site (Ans. 5).

Turning to the June 25, 1997 conference, the Secretary agreed William Casto argued to MSHA the company was performing "construction work" because it was demolishing the impoundment, and that Casto directed MSHA's attention to page 14(b) of the PPM which states "[c]onstruction work includes the . . . demolition of any facility." According to the Secretary, MSHA's position, as represented by Ellis and others, was that Brian Casto was a miner because he was driving the truck and was going out on the impoundment, and in any event MSHA never considered impoundments to be construction sites (Ans. 7).

Finally, the Secretary contended that prior to responding to Judge Feldman, counsel for the Secretary discussed the matter with Thompson, reviewed the case law and the PPM, and based on a belief that Casto and Adkins were hired to make alterations to the impoundment, concluded both were performing general labor duties like a "miner" and thus were subject to the training regulation (Ans. 7-8). It was only as the trial date approached and the expected witnesses were deposed that the Secretary, "based on her prosecutorial discretion," vacated the order and citation (Id. 8).

IS BLACK DIAMOND ELIGIBLE FOR AN AWARD

The Commission's rules implementing the EAJA are found at 29 C.F.R. Part 2704. Commission Rule 2704.100 provides for the award of attorney fees and other expenses to "eligible . . . entities who are parties to certain administrative proceedings (called 'adversary adjudications') before [the] Commission" (29 C.F.R. § 2700.100). To be eligible, the applicant must be a "party" as that term is defined in 5 U.S.C. § 551(c)(3). Section 551(c)(3) defines a "party" as including "a person or agency named or admitted as a party . . . in an agency proceeding." Under the Commission's rules party status is accorded "[a] person, including the Secretary or an operator, who is named as a party" (29 C.F.R. § 2700.4). The Commission's rules also state the definitions in section 3 of the Mine Act apply (29 C.F.R. § 2700.2). Section 3(f) defines as "person" as "any individual, partnership . . . corporation, firm subsidiary of a corporation, or other organization" (30 U.S.C. § 802(f)). Black Diamond is a corporation named by the Secretary as the respondent in Docket No. WEVA 98-1. That case was an adversary adjudication. Black Diamond therefore is a "party" for EAJA purposes.

The rules also require a corporation that is a party to have a net worth of not more than \$7 million and not more than 500 employees. The net worth and the number of employees are determined as of the date the underlying proceeding was instituted (29 U.S.C. §§ 2700.104(b)(4), 2700.104(c)).

Black Diamond asserted in its application that when the civil penalty proceeding was filed on October 17, 1997, the company was owned by Ahern & Associates, a company that contracts with the mining industry. According to Black Diamond, on that date Ahern had 122 employees, Black Diamond had 17 employees, and the net worth of Ahern was \$2,530,839 (Appl. 4-5).

In her answer, the Secretary did not question the number of employees but, citing *Dun & Bradstreet Business Records Plus for West Virginia*, noted that Ahern had annual sales of \$20,701,000 for the fiscal year ending September 30, 1997. She also noted the comptroller of the company declined to make a financial statement to Dun & Bradstreet. The Secretary stated that with annual sales of more than \$20 million and no independent verification of net worth, the issue of whether Black Diamond met the financial eligibility requires of the EAJA was unresolved (Ans.10-11).

To support its contention of a net worth of not more than \$7 million, Black Diamond submitted two pages of a statement titled "Consolidated Balance Sheets, Ahern & Associates, Inc. and Subsidiary, as of September 30, 1997" (Black Diamond Reply, Exh. A). In view of the Secretary's concerns, I found the submission insufficient to establish the company's fiscal eligibility for an EAJA award because the submission lacked an indication as to who prepared it, lacked an assurance as to its accuracy, and was incomplete. Accordingly, I ordered the company to produce a complete financial statement showing the net worth of Ahern & Associates. I required the statement to be based upon a CPA's examination conducted in accordance with generally accepted auditing standards and presenting fairly the financial position of the company as found by a CPA in accordance with generally accepted accounting principles.

In response, the company submitted a complete independent auditor's report showing the consolidated financial position of Ahern & Associates, Inc. and Black Diamond as of September 30, 1997, the closest date to the commencement of underlying civil penalty case for which a complete statement could be obtained.³ The report indicates that although the company did indeed have revenues of more than 20 million dollars, significant costs and expenses were associated with the revenue, and the net worth of the company was not more than the statutory limit (Independent Auditors' Report 2-4).

Therefore, I find the company has met the statutory requirements for eligibility.

WAS THE SECRETARY'S POSITION SUBSTANTIALLY JUSTIFIED

The burden is on the Secretary to establish her litigation position was "substantially justified." The EAJA does not define "substantial justification." However, the standard was directly adopted from the context of federal civil litigation discovery, where the essence of "substantial justification" is whether "reasonable people could genuinely differ" (*See The Essentials of the Equal Access to Justice Act*, 56 La. L. Rev. 22 (1995)). Thus, in drafting the

³/ Prior to submitted the report counsel for Black Diamond in effect orally moved that the statement be placed under seal and not be subject to public disclosure. She based her request upon the sensitive nature of the financial material revealed in the report. Counsel for the Secretary did not oppose her request, provided she be allowed to review the material and be afforded the opportunity to copy whatever she deemed necessary. I orally granted the motion, subject to counsel for the Secretary's request.

Counsel for the Secretary reviewed the material *in camera*. She did not find it necessary to make copies. The report remains under seal in the record. While it may be reviewed by the Commission or another appellate body, it is exempt from disclosure under the Freedom of Information Act, and it is exempt from any other review of the file by the public (*see* 29 C.F.R. § 2704.202(b)).

legislation, Congress stated that “where the Government [could] show that its case had a reasonable basis both in law and fact, no award [would] be made” (*Id.* 23), and the Supreme Court echoed this statement by defining “substantially justified” as meaning that the government’s position must have a “reasonable basis both in law and fact” (*Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see also James M. Ray, employed by Leo Journagan Construction Co., Inc.* 20 FMSHRC ___, Docket No. EAJ 96-4 (September 30, 1998) (slip op. 8-9)). The focus is directly upon the justification of the government’s conduct and the judge must ask, whether reasonable people could differ on the validity of the government’s position (*See* 56 La. L. Rev. 51).

The judge also must keep in mind the fact that the government has settled or withdrawn from a case does not necessarily signal an unreasonable position. Other factors, such as changes in an agency’s policies or priorities, or a lack of resources, or developments outside the agency’s control may cause the government to drop a proceeding it reasonably expected to win (*Kuhn v. Board of Governors of the Federal Reserve System*, 930 F.2d 39 (D.C. Cir. 1991)).

When, as here, the government is accused of violating its own regulations or rules, the question is whether there are reasonable grounds for debate about the meaning and application of the rule or whether instead the agency acted in direct violation of the regulatory or policy prescription. If the government’s legal position is fairly debatable, the government is not liable. In other words, the government must be alerted by plain statutory or regulatory language or by clear case precedent before its position can be assailed as unjustified (56 La. L. Rev. 77).

In this case the Secretary is accused of taking a position at odds with her PPM. Operators and contractors repeatedly have been reminded by the Commission that the Secretary’s policies and interpretations as announced in the PPM may put them on notice as to the requirements of the Act and the regulations (*E.g., Dolese Bros.*, 16 FMSHRC 689, 694 (April 1994); *Daanen & Janssen, Inc.*, (20 FMSRHC 189,194 (March 1998)). Thus, in addition to the Act and the regulations, operators and contractors have come to rely upon the PPM and to abide by its policies. Given this reliance, the pronouncements and policies set forth in the PPM are equivalent to the Act and regulations for EAJA purposes, and the Secretary cannot take an enforcement position that unreasonably varies from the PPM without subjecting herself to EAJA liability.

The primary issue in the underlying case was whether the work being performed at the impoundment was “construction work.” The Secretary acknowledges that under the PPM independent contractor workers who perform “construction work” are classified as “construction workers,” that the demolition of any facility constitutes such work, and that construction workers are exempt from training. However, she also points out that workers performing “maintenance or repair work” must receive Part 48 training and that the PPM states “maintenance or repair work” includes the “upkeep or alteration of equipment or facilities” (Sec’s Ans. 15, *citing to* III PPM 15). She believes it reasonable to consider Black Diamond’s work as alteration work not as demolition and construction work.

While there is some dispute between the parties as to whether William Casto made clear the company's position to Thompson on the day the order and citation were issued, the Secretary concedes that by June 25, 1997, at the latest and as a result of Casto's meeting with Ellis and others, MSHA fully understood that the company claimed it was exempt from the regulations because it was performing "construction work" as described in the PPM (Sec. Ans. 7-8). Consequently, as of June 25, the Secretary could proceed without incurring liability for attorney's fees and expenses only if her position was reasonable.

As noted, the PPM states, "[i]ndependent contractors working at a mine are miners for Part 48 training purposes, expect as explained below" (III PPM 48 at 14(emphasis added)). It also states, the Secretary's policy with regard to training independent contractors "does not cover independent contractors who are shaft and slope workers, surface construction workers or workers involved in mine construction work that causes the mine to cease operation. All other independent contractors must receive the appropriate Part 48 training" (Id.). The statement explains that persons engaged in the "building or demolition of any facility, [and] the building of a major addition to an existing facility" are considered to be "surface construction workers" (Id. 14(b)). On the other hand, independent contractors "who are maintenance or service works contracted by the operator to work at the mine for frequent or extended periods" must be trained (Id. 14(a)). Maintenance or repair work includes the "upkeep or alteration of . . . facilities" (Id. 15).

Prior to Thompson's inspection, MSHA knew by word of mouth that construction work was underway at the impoundment site (Thompson Dep. 29). In addition, the impoundment elimination plan filed with MSHA described the work to be done (Sec. Ans., Attach. A). It specifically stated that the purpose of the project was "to eliminate the impounding capability of [the] existing . . . refuse disposal facility" (Id. at 4). This work required the draining, backfilling, and grading of the impoundment (Thompson Dep. 10, 54). When the project was completed, the area would be considered "a course refuse pile" and would be subject to regulations different from those for the impoundment (Shelton Dep. 9).

The specific work required to eliminate the facility included using up to 1.4 million cubic yards of coal refuse to cover and fill the existing impoundment. The project involved spreading the refuse with bulldozers, as the impoundment was pumped dry. The project also included the construction of diversion ditches (Shelton Dep. 12), and the construction of sludge cells (Sec. Ans., Attach. A). In addition, it involved the total elimination of 25 to 30 feet of the impoundment dam and use of the dam material as fill (Shelton Dep. 11). In effect, the dam would cease to be a dam.

It tortures logic beyond reason to maintain a project designed to "eliminate the impoundment capability" of an existing refuse disposal facility and to replace it with a different type of refuse disposal facility, a replacement that included the construction of new structures, was not "construction work" as described in the PPM., especially when the project is considered against the backdrop of MSHA's explanation of "construction work."

The Secretary acknowledges that in 1979, then MSHA Administrator Joseph Cook issued a memorandum stating that construction of impoundments and refuse piles was considered construction work. The memorandum did not state the demolition of an impoundment was construction work (Sec. Ans. 17-18). However, as the Secretary agrees, the 1979 memorandum was superseded by the PPM, and the PPM clearly states that demolition is "construction work." It is logical to regard the PPM as broadening what the Secretary regards as "construction work," not as continuing her omission, and demolition of the impoundment is exactly what Black Diamond was doing.

"Demolition" is "the act or process of demolishing," and to "demolish" is to "do away with" something (*Webster's Third New International Dictionary* (1986) at 600). All of the work being undertaken by Black Diamond was directed at "doing away with" the impoundment. It's essential elements — the water reservoir and its dam — were disappearing. They were to be replaced with a completely different refuse storage facility. True, the overall purpose of the new facility, the storage of refuse, was the same as that of the old facility, but the facility itself was different. Moreover, and as is clear from the plan and from the deposition of MSHA's impoundment expert, Shelton, the work not only involved demolition, it involved surface construction.

To argue, as does the Secretary, that the work was "maintenance work" because it involved the "alteration" of a single refusal disposal facility from an impoundment to a refuse pile, is to argue contrary to the Secretary's own regulations, which distinguish impoundments from refuse piles and treat them as totally different facilities (see 30 C.F.R. §§ 77.214 - 77.215-4 and 30 C.F.R. §§ 77.216 - 77.216-5). Moreover, to argue that what constitutes "construction work" is governed by the underlying purpose of the thing being built or demolished, is to argue something the PPM does not state, and is to take a position that previously has been rejected.⁴ Further, to assert the work was maintenance work is to ignore Judge Gary Melick's reasoning that maintenance work involves projects where "the basic structural design [is] not changed" (*Frank Irey, Jr., Inc.*, 11 FMSHRC at 993). Given the total elimination of the impoundment, it is unreasonable to maintain it was only altered and that its basic structural design was unchanged.

The Secretary is also unreasonable to the extent she argues her position is substantially justified because Brian Casto and Adkins were engaged in work that subjected them to hazards typical of mining. Virtually any demolition work at a mine can involve the operation of a truck and a bulldozer and can subject the contractor's employees to the hazards inherent in such work. Because contractor employees engaging in demolition frequently are subject to the same or similar hazards as surface miners, accepting the Secretary's argument would render the exception meaningless.

⁴/ Commission Administrative Law Judge George Koutras found that extensive demolition, rebuilding, and installation of a new system in a preparation plant was construction work not requiring Part 48 training, even though the facility's underlying purpose remained one of coal preparation (See *Dakco Corporation*, 10 FMSHRC 1259, 1289-90 (September 1988)).

I recognize the Commission's judges should be reluctant to discourage the Secretary from advancing novel and credible theories for her authority and that a less than closely scrutinized and reasoned EAJA award can hinder the remedial effectiveness of the Act. But I also recognize the law requires the Secretary's theory of liability to be such that a reasonable person with knowledge of the facts would conclude the Secretary was correct. Given the Secretary's statement in the PPM as to what constitutes "construction work," given the type of work the Secretary knew was taking place at the impoundment, given the Secretary's regulatory distinction between refuse piles and impoundments, given the guidance offered by *Dakco Corporation* and *Frank Irey, Jr., Inc.*, and given the early contention by Black Diamond that it was exempted from the requirements of the standards by the PPM, I conclude a reasonable person would have found the Secretary was both wrong and unreasonable in maintaining that Black Diamond was engaged in "maintenance work" rather than "construction work" as the terms are explained in the PPM. In other words, I conclude the Secretary has failed to establish that her position was substantially justified. Accordingly, Black Diamond is entitled to an EAJA award.

THE AWARD

The Act provides that an award of attorney fees not exceed \$125 per hour "unless the agency determines by regulation that an increase in the cost of living or a special factor . . . justifies a higher fee (5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412 (d)(2)(B)). The Commission's regulation states that no award may exceed \$75 per hour (29 C.F.R. § 2704.106((b)).⁵ Black Diamond seeks a fee of \$130 per hour (Appl. 5). It argues courts "routinely have made retroactive cost of living (COLA) adjustments . . . to the maximum attorney fee rate in EAJA cases" (*Id.*). The Secretary opposes a fee of \$130 per hour. She argues the Commission is without authority to increase the fee above that allowed by the EAJA (Sec's. Ans. 19, n.10, citing 5 U.S.C. § 504(b)(1)(A)).

I agree with the Secretary. The language of the EAJA is clear. It limits an award to a rate of \$125 per hour unless the agency acts by regulation to increase it. I have no authority unilaterally to increase the rate. I am aware another Commission judge has found that he does have such authority and has applied a COLA multiplier to the statutory rate, but I respectfully decline to follow his lead (See Contractor's Sand and Gravel, 18 FMSHRC 1820, 1827-30 (October 1996) (ALJ Cetti)).

All of the legal services and expenses for which reimbursement is sought have been invoiced by the company's counsel. The services are for time spent by counsel in preparing to defend Docket No. WEVA 98-1 and in preparing and arguing the EAJA application. The

^{5/} The regulation tracks the fee limit originally legislated. The Commission has yet revise the regulation to raise the fee cap to \$125 per hour.

expenses are for photocopying, long distance telephone calls, reporters' fees for depositions, facsimile copies, and subpoena service fees.⁶ As in the case of the legal services, the expenses were incurred by Black Diamond in defending the underlying civil penalty case and in preparing and arguing the EAJA application.

I have reviewed the invoices and find all of the listed legal services and expenses are allowable. I calculate Black Diamond's award for legal services and expenses as follows:

Total legal services invoiced

104 hours @ \$125 per hour = \$13,000

Total expenses invoiced = \$ 1,390.25

Total award = \$14,390.25

ORDER

The Secretary is **ORDERED** to pay Black Diamond an award of \$14,390.25 within 30 days of the date of this Decision.


David Barbour
Administrative Law Judge

Distribution:

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Yoor Kim, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

dcp

^{6/} The invoices are attached to the EAJA application (Appl., Exh. 3) and to a letter dated September 23, 1998. The expense listed on Invoice No. 1525 for subpoena service by Charleston Investigations, Inc. is explained by the company's counsel in a letter dated September 24, 1998.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 9 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-381
Petitioner	:	A.C. No. 46-06051-03689
v.	:	
	:	Stockton Mine
CANNELTON INDUSTRIES, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-100
Petitioner	:	A.C. No. 46-06051-03698-A
v.	:	
	:	Stockton Mine
CHARLES PATTERSON, Employed by	:	
CANNELTON INDUSTRIES, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-101
Petitioner	:	A.C. No. 46-06051-03697-A
v.	:	
	:	Stockton Mine
GEORGE RICHARDSON, Employed by	:	
CANNELTON INDUSTRIES, INC.,	:	
Respondent	:	

FINAL DECISION ON REMAND

Before: Judge Hodgdon

On August 27, 1998, I issued a remand decision in these cases finding that the company unwarrantably failed to comply with section 75.400 of the regulations, 30 C.F.R. § 75.400, and that company foremen Patterson and Richardson knowingly authorized the violation, subjecting them to individual liability under section 110(c) of the Act, 30 U.S.C. § 820(c). *Cannelton*

Industries, Inc. et al, 20 FMSHRC 880 (August 1998). However, because information concerning Patterson's and Richardson's income, family support obligations or ability to pay a penalty had not been presented at the hearing, the parties were given an opportunity to present such evidence before I issued a final decision. *Id.* at 887. That evidence has now been submitted and the parties have had an opportunity to comment on it.

**Motion for Reconsideration and to Reopen the Record
and Motion to Stay Remand Proceedings**

In addition to submitting financial information, the Respondents have also filed a Motion for Reconsideration and to Reopen the Record and Motion to Stay Remand Proceedings. These motions are based on two pieces of evidence which were in the possession of Respondent's counsel during the hearing, but which he neglected to offer into evidence. Stating that this case was counsel's first before the Commission and citing Rule 60(b) Fed. R. Civ. P., the Respondents request that I reconsider my decision, reopen the record to take additional evidence and stay the remand proceedings to do so. For the reasons set forth below, the motions are denied.

Respondents attempted to have the same evidence considered by the Commission when the case was before it on appeal. The reasons offered for seeking such consideration were the same ones now presented to me. The Commission denied the request. *Cannelton Industries, Inc. et al*, 18 FMSHRC 1597 (September 1996). Thus, that decision is the law of this case.

Furthermore, even if the Commission's decision were not binding, I would deny the motions. As the Secretary has forcefully demonstrated in her brief opposing the motions, the evidence is not admissible. Finally, even if the evidence were admissible, it would not change my decision. While it may have some tendency to support the company's case, it falls far short of rebutting the Secretary's case. Accordingly, the motions to reconsider, reopen and stay are **DENIED**.

Civil Penalty Assessments

Both Patterson and Richardson have submitted their employment and financial status in the form of affidavits. Patterson states that he is 53 and still employed in the coal mining industry, although he believes that he may have to retire because his "job security is reduced due to developments that may lead to mine closure." Affidavit of September 18, 1998. He relates that in addition to his wife, he is also providing financial assistance to his mother, mother-in-law, daughter, son and brother. *Id.* Patterson asserts that his current income, after taxes, is \$3,700.00 per month and that he has monthly expenses of \$3,545.00 per month. *Id.*

Richardson states that he is 54 and has not "worked in coal mining employment since April 27, 1994 and cannot return to such employment due to my medical disabilities." Affidavit of September 17, 1998. He claims that his only income is \$2,943.00 per month from Social

Security Disability payments and a Long Term Disability Program and that he has monthly expenses of \$3,106.09 per month. *Id.*

The Secretary states that "MSHA has no evidence that either of the named individuals has any prior history of knowingly violating the Mine Act or its regulations." Letter of September 21, 1998. The Secretary did not file any comments on the submissions of Patterson and Richardson.

Following the guidance in *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997), I find that the gravity of this violation was serious, that the Respondents' negligence was very high, that the violation was abated in good faith, that neither Patterson nor Richardson has any previous history of 110(c) violations and that both were shift foremen. With respect to Patterson, I find that his income and family support obligations are as set out in his affidavit.

I have more trouble making a finding concerning Richardson's income and support obligations. His affidavit does not state whether or not he is married. Moreover, it contains a statement which seriously affects his credibility. He states that he was last employed in mining on April 27, 1994. However, at the hearing on October 12, 1995, he testified that at that time he was employed as an "acting shift foreman" by Cannelton Industries. (Tr. 247.) Consequently, the accuracy of his affidavit is questionable and raises the concern of whether his failure to reveal his marital status, which could have been an innocent omission, may have been deliberate.

In this regard, I note that Richardson claims to have *two* car payments of \$385.00 and \$487.00, respectively. Affidavit of September 17, 1998. If he is not married and he is, in fact, spending more each month than he takes in, such expenditures would appear to be an unessential extravagance.

The significance of this omission is that if he is married, I cannot perform the two step analysis of his financial position required by the Commission in *Wayne R. Steen*, 20 FMSHRC 381, 385 (April 1998), because I cannot determine either Richardson's household financial condition or his share of the household's net worth, income and expenses. Thus, I cannot make any findings on his "size" or "ability to continue in business." *Id.*

The remedy for this circumstance is not to further delay this case by requesting additional information, but to find that, by failing to submit accurate information when given the opportunity to do so, his "ability to continue in business" will not be affected by the imposition of an authorized penalty in this case. The Commission has previously held with respect to operators that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *accord Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (April 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994). There does not appear to be any reason that the same presumption should not also apply to 110(c) respondents.

Therefore, I find that, since Richardson has not credibly established his income and family support obligations, his ability to pay or the affect a penalty will have on them, he will not be adversely affected by the imposition of a penalty. Considering all of the penalty factors, I conclude that a civil penalty of \$300.00 is appropriate.

Returning to Patterson, I find that a civil penalty of \$300.00 is also appropriate for him.. This finding is based on the fact that his affidavit indicates a surplus of \$155.00 per month and that he attributed expenditures of \$100.00 per month to "recreation," \$166.00 per month as "[c]ontribution to saving for yearly vacation to the beach" and \$100.00 per month as "[c]ontribution to saving for yearly vacation to the lake," which indicate that payment will not require him to forego the necessities of living.

It is apparent that both Respondents are of limited financial means. Accordingly, I will direct that the penalties be paid in instalments consistent with their individual circumstances.

ORDER

Cannelton Industries, Inc. is **ORDERED TO PAY** a civil penalty of **\$3,600.00** within 30 days of the date of this order. Charles Patterson is **ORDERED TO PAY** a civil penalty of **\$300.00** in six monthly instalments of \$50.00 per month, the first payment to be made within 30 days of the date of this order. George Richardson is **ORDERED TO PAY** a civil penalty of **\$300.00** in 12 monthly instalments of \$25.00 per month, the first payment to be made within 30 days of the date of this order. With respect to Patterson and Richardson, failure to make any payment as scheduled will result in the entire, unpaid balance becoming immediately due and payable, together with such court costs as may be incurred by the U.S. Department of Labor in collecting such amounts. On receipt of payment by Cannelton and receipt of final payment by Patterson and Richardson, these cases are **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 14 1998

GILBERT V. ANKROM,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. LAKE 98-126-DM
	:	NC MD 98-01
WOLCOTTVILLE SAND & GRAVEL	:	
CORPORATION,	:	Willcottville Sand & Gravel
Respondent	:	Mine ID 33-04399
	:	
	:	

DECISION

Appearances: Robert J. Tscholl, Esq., Canton, Ohio, for Complainant;
John T. Billick, Esq., Patrick H. Lewis, Esq., Belkin, Billick, Harrold & Wiencek,
Co., L.P.A., Cleveland, Ohio, for Respondent.

Before: Judge Weisberger

This case is before me based upon a Complaint filed by Gilbert V. Ankrom alleging that he was discriminated against by Wolcottville Sand & Gravel ("WS&G") in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Pursuant to notice, the case was scheduled to be heard June 17-18, 1998. Subsequently, the parties each obtained counsel. Both counsel requested an adjournment to adequately prepare for the hearing. The requests were granted, and the case was rescheduled and heard in Akron, Ohio, on July 21-22, 1998. On September 14, 1998, Complainant filed Proposed Findings of Fact and a Memorandum. On September 16, 1998, Respondent filed Proposed Findings of Fact. On September 23, 1998, Respondent filed a Reply to Complainant's Proposed Findings of Fact. Complainant's Reply to Respondent's Proposed Findings of Fact was received on September 28, 1998.

1. Summary of the Evidence

A. Complainant's case

1. Ankrom's testimony

On August 12, 1997, Gilbert V. Ankrom was hired by Kevin Schemp to work as a front-end loader operator at WS&G's gravel pit. According to Ankrom, Schemp told him that he thought that the job would last about 2 ½ years. Ankrom commenced working on August 18,

1997, operating a front-end loader during the night shift, which in addition to Ankrom, included Dan Gay, and David Gay.

Ankrom stated that from the first day on the job he became aware that the front-end loader did not have a seatbelt, and he reported this to his supervisor, a person whom he identified as "Mark." Ankrom also alleged making safety complaints to Schemp commencing the first or second week after he started to work at WS&G.

After approximately 3 weeks, Dennis H. Jackson commenced to work as the foreman in charge of Ankrom's shift. Ankrom complained to Jackson that the road over which he had to drive the front-end loader did not have any berms. According to Ankrom, this condition was not corrected until he almost ran off the side of the road. He was not sure if this occurred prior to, or after September 11, 1997. Ankrom encouraged Jackson to contact state and/or federal mine inspectors to ensure that the following safety concerns would be rectified: (1) employees were making repairs to various belts without adequate safety equipment, (2) berms were required, and (3) drag lines were being operated without lights.

On September 11, 1997, the subject site was inspected by Ohio State Inspector Fred Kidd, who issued correction orders to WS&G. Ankrom did not speak to Kidd about any of his safety concerns.

Ankrom testified that on October 8, 1997, he informed Glenn Freese, the day shift foreman that the berms were inadequate, and that the previous day his front-end loader had almost rolled over. According to Ankrom, this incident resulted from the action of Dan Gay, the hoe operator, who had narrowed the roadway and removed the berm. According to Ankrom, Freese did not respond. Ankrom also related this incident to Jackson, and had a "conversation" with him "involving the MSHA inspectors coming to the pit" (Tr. 146). The site was subsequently inspected by a state inspector, and Ankrom talked to him regarding the chain of command at WS&G, and the lack of a safety belt on a previous inspection of a loader.

Ankrom continued to make safety complaints to Schemp through the end of October 1997. On October 31, WS&G employees were asked to indicate on a form whether they had any safety concerns. Ankrom filled out the form and returned it. On the form he stated his complaints about the lack of inspections by foremen prior to the start of each shift, and the lack of adequate berms. In early November, 1997, during an inspection by Ohio Inspector Kidd, Ankrom informed Kidd that there was no berm on the roadway.

On Friday, November 7, 1997, Ankrom was told by Schemp that he would be returned to the night shift to increase production.¹ According to Ankrom, Schemp also told him that he

¹/ In the middle of October, Ankrom and Jackson had been moved by Schemp to the day shift from the night shift.

knew who was calling the inspectors, although he did not state whom he suspected. On November 8, Ankrom called inspector Kidd regarding the lack of berms. On November 9, at 11:00 a.m., Schemp called Ankrom at home, and asked him why he had not shown up for work. Ankrom informed him that it was not yet 6:00 p.m., and that he was scheduled for the night shift. Ankrom testified that Schemp told him that he was to have reported on Sunday morning, "[a]nd then got into a big heated discussion about safety practices at the mine" (Tr. 172). According to Ankrom, he complained to Schemp about the lack of berms, and the lack safety harnesses when repairs were performed on the belt. Ankrom also told Schemp that since he (Ankrom) was qualified as a foreman, he would be willing to help WS&G comply with safety standards, and a "very heated" discussion ensued regarding the operation of the mine (Tr. 173).

On November 10, 1997, Schemp left a message on Ankrom's telephone answering machine that he had decided to no longer rent the moxy trucks that Ankrom had been driving, and to operate only a day shift "until the weather breaks" (Tr. 186). Schemp informed Ankrom that he was laid off until further notice, and that he would call him "at the point that there's something to do here" (Tr. 186-187).

On November 12 and 14, 1997, Ankrom returned to the site and observed two moxy trucks in operation.

On March 12, 1998, Ankrom talked to Schemp at WS&G's office and asked him what was going on regarding his job. According to Ankrom, Schemp said that the job was expected to last only another 4 months. Ankrom was never contacted by Schemp regarding a return to work.

2. Jackson's Testimony

Dennis H. Jackson became the night shift foreman in November 1997, supervising Ankrom, Daniel Gay, and David Gay. Jackson testified that, prior to September 9, 1997, Ankrom had complained to him about working in the fog without adequate berms, and the lack of safety belts in one of the end dumpers. According to Jackson, when he discussed these safety concerns with Schemp, the latter changed the subject of the conversation, and did not address them.

According to Jackson, he asked Frees to create a berm, and Frees attempted to, but it was still not adequate.

In order to address his and Ankrom's safety concerns, Jackson contacted Ohio Inspector Kidd, and MSHA. Following these contacts, the site was inspected by state and MSHA inspectors. According to Jackson, Schemp "... conveyed to the rest of the employees that MSHA had come and did an on-site inspection, and he was curious as to why" (sic.) (Tr. 61-62).

On November 10, Jackson was laid off by Schemp who told him that for safety reasons he did not want the crew to operate moxy trucks in the mud. Jackson testified that he passed by the pit the following day after he was laid off, and observed moxy trucks in operation. He indicated that he was never recalled.

B. Respondents' Case

1. Schemp's Testimony

Schemp, who has been the superintendent at the site since July 1997, indicated that in the middle of October 1997, he moved Jackson and Ankrom to the day shift to operate moxy trucks to haul material and remove overburden, but kept David Gay and Dan Gay on the night shift. Schemp explained that he made this change because the night shift was ineffective, and he wanted to experiment to see if the hauling operation could be performed by WS&G employees rather than by a contractor.

Schemp explained that the day after he laid off Ankrom and Jackson, he laid off Dan Gay and David Gay, the remaining members of the night shift. Schemp indicated that after he laid off the night shift, the terms of the rental agreement for the two moxy trucks were amended allowing WS&G to use those trucks until the end of the work season, i.e., approximately December 10. He stated that each truck was used approximately 13 hours subsequent to the layoff.

Schemp indicated that in February 1998, he was "trending" (sic)(Tr. 294) not to recall Ankrom if he could find a "better qualified, better help" (Tr. 294). When the night shift was resumed on March 20, 1998, he recalled Dan Gay and David Gay, hired a laborer, moved a miner from the day shift to the night shift, and added a miner to operate a front-end loader similar to the one operated by Ankrom. Schemp indicated that he did not recall Ankrom, because the latter was unable to keep the floor clean and flat, allowing water to run off. Also, Schemp was concerned about the length of time that Ankrom was taking loading his bucket, and Ankrom's "willingness to work, his attitude towards work" (Tr. 293). Schemp indicated that Ankrom's ability as a front-end loader did not improve with time, and he had to counsel him regarding maintaining the floor flat and level, keeping the floor clean around the stock pile, and taking too much time filling the bucket. He also counseled him regarding the method of filling the bucket. Schemp said that he counseled him weekly which was more frequently than he counseled other front-end loaders. He indicated that there was no formal discipline policy at the mine.

Schemp indicated that he did not recall Jackson because his performance was worse than Ankrom's.

2. Dan Gay's Testimony

Dan Joseph Gay who also operated a front-end loader along with Ankrom testified that the latter "always" left the pit floor uneven (Tr.322).

II. Findings of Fact and Discussion

A. Applicable Law

The Commission, in *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, *Tri-Star*, at 2463-2464, stated as follows:

The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. *Pasula*, 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation, v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

B. Ankrom's Prima Facie Case

1. Protected Activities and Adverse Action

The parties stipulated that Ankrom engaged in protected activities in voicing safety concerns on November 3, 1997, and November 9, 1997. The testimony of Ankrom and Jackson, which was not impeached or contradicted, establishes that additionally Ankrom engaged in protected activities by expressing safety concerns to Jackson, Schemp, and Freese, and in discussing with Jackson the need to consult with government inspectors and to bring safety concerns to their attention.

The parties further stipulated that WS&G took adverse action against Ankrom when it laid him off on November 10, 1997, and failed to recall him in February or March 1998. Hence, the pivotal issue for resolution is whether the adverse actions taken by WS&G were motivated in any part by Ankrom's protected activities.

2. Motivation

In general, the commission in *Hicks v. Cobra Mining, Inc., et al.*, 13 FMSHRC 523 (1991) discussed the principles to be applied in evaluating motivational nexus as follows (13 FMSHRC, supra, at 530):

The Commission in previous rulings has acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary o.b.o. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983) quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965).

In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC 2510.

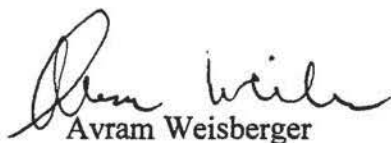
Schemp, the only WS&G official who took action adverse to Ankrom, was fully aware of the latter's safety complaints, as they were made to him. The record also establishes a coincidence in time between Ankrom's last protected activities stipulated to have occurred on November 9, 1997, and the adverse action of a layoff which occurred the next day. Also, the record supports a finding of some indicia of animus on Schemp's part toward complaints of safety. According to Ankrom, Schemp told him that he knew who was calling the inspectors, and that he intended to downsize the company as he was tired of all inspections that were taking place. Although on direct examination Schemp firmly denied having made this statement, his denial loses credibility in light of his testimony on cross-examination. He was asked whether he had told Kidd that part of the reason for downsizing the second shift "was due to the safety complaints" (Tr. 313). He responded that he did not remember, and that his testimony on direct denying that statement was not accurate. Also, Schemp did not deny Ankrom's testimony that in a telephone call on November 9, when Ankrom brought up the topic of safety concerns, a heated discussion ensued. Schemp also did not deny Ankrom's testimony that when he (Ankrom) told him that "a lot of things" (Tr. 173) do not comply with state or federal safety standards, he hung up. Further, although the entire night shift including Ankrom was laid off essentially at the same time, only the shift members who had made safety complaints, i.e., Jackson and Ankrom, were not subsequently recalled. Taking into account all these factors, I find that Ankrom has established that the adverse actions taken against him by WS&G were motivated in any part by his protected activities. Thus, I find that Ankrom has established a prima facie case.

C. WS&G's Affirmative Defense

Schemp testified that he did not terminate Ankrom due to his safety complaints, and did not suspect that Ankrom had made safety complaints to MSHA. Since the entire shift was laid off, including two members who did not make any safety complaints, I find that the layoff of Ankrom would have been taken in any event based on factors not related to the protected activities, i.e., economic and weather conditions. Whether such a layoff was based upon sound personnel management policies is not a proper issue for this forum. Also, I find that WS&G has established that it would have taken the adverse action of not recalling Ankrom, in any event based on his work history. Schemp testified, in essence, that his decision not to recall Ankrom was not based upon Ankrom's safety complaints, but was based upon his dissatisfaction with Ankrom's failure to maintain the pit floor level and clean, and to fill the bucket in a timely fashion. In support of Schemp's allegations, Gay, who worked with Ankrom, testified that Ankrom always left the floor uneven. Ankrom did not testify in rebuttal to rebut these charges. I find that the record establishes that Ankrom did not maintain the floor properly, and fill the bucket in a timely fashion as expected by Schemp. Also, the lack of significant animus toward safety complaints is evidenced in Schemp's testimony that one other miner, David Blank had, like Ankrom, reduced to writing his safety concerns, but was not laid off, discharged, or subjected to any adverse action. Indeed, according to Schemp, Blank was returned to work in the 1998 season. Since his testimony was not impeached or contradicted, I accept it. Hence, for all these reasons, I find that WS&G has established that it would have laid off and not recalled Ankrom in any event based on unprotected activities. For all these reasons, I find that it has not been established by Ankrom that he was discriminated against in violation of section 105(c) of the Act. Accordingly, the Complaint is to be dismissed.

ORDER

It is **ORDERED** that the Complaint be **DISMISSED**, and this case be **DISMISSED**.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 21, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-55-M
Petitioner	:	A.C. No. 04-00099-05526
	:	
v.	:	Lime Mountain
	:	
LIME MOUNTAIN COMPANY,	:	
Respondent	:	

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Byron M. Ishkanian, Professional Safety Engineer, Santa Barbara, California, for Respondent.*

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Lime Mountain Company ("Lime Mountain"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petition alleges one violation of 30 C.F.R. § 56.15005. The parties presented testimony and exhibits at an evidentiary hearing.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Lime Mountain operates a limestone quarry (the "quarry") in San Luis Obispo County, California. On October 8, 1997, MSHA Inspector Herbert Bilbrey was at the quarry. As the inspector was leaving, he looked over at the load-out facility and saw a man on top of a pneumatic bulk trailer (the "bulk trailer") holding a compressed air hose. The man was using the hose to clean off the top of the trailer. Part of the hose was coiled behind him on the trailer. Inspector Bilbrey estimated that the man was about 11 feet above the ground. He was not using a safety belt or line and the inspector believed that he was in danger of falling. Inspector Bilbrey

* I permitted Mr. Ishkanian, who is not an attorney, to represent Lime Mountain Company at the hearing, under the authority of 29 C.F.R. § 2700.3(b)(4).

ordered the man off the truck and issued a combination section 104(a) citation and 107(a) imminent danger order (the "citation") to Lime Mountain.

Citation No. 4523948 alleges a violation of 30 C.F.R. § 56.15005, as follows:

A contract truck driver for Royal Trucking was observed on top of his pneumatic trailer using a compressed air hose to blow the top of his trailer off and [was] not using any fall protection, located at the load-out bins. The company did not provide an area to open and close lids on top of truck where the contractors could do this safely.... The superintendent was not aware of this requirement....

Inspector Bilbrey determined that the violation was of a significant and substantial nature ("S&S") and was the result of the mine operator's moderate negligence. Section 56.15005 provides that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling...." The citation was terminated when the "contractor truck driver was removed from the truck" and instructions were given on "the use of the fall protection that was installed" in the area. The Secretary filed a petition for assessment of civil penalty for this citation charging Lime Mountain with a violation of section 56.15005 and proposing a penalty of \$240.

A. Fact of Violation

1. Summary of the Testimony

The basic facts in this case are not in dispute. The load-out facility consists of about four storage bins that are supported by a metal structure made of I-beams. Lime from the quarry is loaded into the bins. Various trucking companies dispatch trucks with drivers to the quarry to load product into the bulk trailers. One tractor generally pulls two bulk trailers. Lime Mountain does not own or operate trucks or trailers used to transport lime to customers. Independent trucking companies transport the lime to customers. The bulk trailers have rounded bodies and are loaded from the top. At least one hatch is located at the top of each trailer. Upon arrival at the quarry, the driver of a rig proceeds to the scale house. At the time the citation was issued, the driver pulled up to the load-out facility, climbed up the ladder on the back of each trailer and opened the hatches. He then pulled the truck forward under the bins, went up the adjacent stairs, and loaded material into the trailers. After he was finished loading, he closed the hatches and drove the rig back to the scale house.

In this instance, the driver of the rig pulled out of the load-out facility and parked his rig along the side of this facility where there was a compressed air hose. He used this hose to clean dust and dirt off the trailers. He was not directed to do this by Lime Mountain, but it was not an unusual activity for a driver to clean off his rig after loading. (Tr. 93).

The trailers used to transport lime from the quarry are standard trailers used to transport bulk material on highways. They are loaded from the top through hatches, as described above,

and unloaded from the bottom. They have ladders on the back and two handrails along the top that are about four inches high. William Wahl, president of Lime Mountain, testified that a little over a million and a half tons of material has been shipped out of the quarry since 1984. (Tr. 84). He estimates that drivers have opened hatches on top of the trailers in the manner described above about 200,000 times since that date and he testified that no driver has fallen from a truck or has been injured while opening hatches during that period. *Id.*

Inspector Bilbrey testified that he issued the citation because there was a danger that the driver could fall off the trailer. He was not using a safety line and there were no handrails that would protect him from falling. The inspector believed that the presence of lime dust on the top of the trailer as well as the compressed air hose made a fall highly likely. He believed that an imminent danger was present because the man was using the compressed air hose to clean off the top of the trailer and he could have easily slipped or tripped on the hose. The inspector ordered the driver off the truck as soon as he could get his attention.

Inspector Bilbrey also testified that the violation was S&S. He based his S&S determination on his belief that a fatal accident was highly likely. He relied, in part, on fatal accident reports that he had reviewed involving similar circumstances. The inspector testified that a fall of 11 feet onto hard-packed soil can easily be fatal. Inspector Bilbrey determined that Lime Mountain's negligence was moderate because the foreman testified that the company had safety lines available but that he was not aware that safety lines were required for truck drivers when they were on the tops of trailers.

Paul Belanger, a supervisory special investigator for MSHA, testified that falls from the top of trucks, trailers, and rigs often result in serious or fatal injuries. He cited a number of examples in which drivers of trucks were killed when they fell from the top of their rigs. (*See for example* Ex. P-4).

Lime Mountain does not dispute the basic facts described above. It maintains that MSHA should have cited the independent contractor who employed the driver, that the violation was not S&S, and that it was not negligent. Mr. Wahl testified that MSHA has inspected the quarry 37 times since 1984 and never advised him or his employees that safety lines are required when truck drivers open hatches on trailers or when they clean the tops of the trailers. He stated that the load-out facility is directly visible and any inspector would have been able to see that safety lines were not being used. Mr. Wahl also testified that the truck drivers were free to use Lime Mountain's safety lines or to bring their own, but that Lime Mountain did not have supervisory control over the drivers and it was not responsible for training the drivers on safety matters. He stated that Lime Mountain's employees do use safety lines where there is a danger of falling.

Based on the history at the quarry, Mr. Wahl testified that it was unlikely that the driver would have been seriously injured. As stated above, drivers have climbed onto trailers about 200,000 times at the quarry and there have been no injuries. He believes that the citation should have been designated non-S&S and he introduced a citation issued at a different quarry in which

a similar violation was designated non-S&S. (Ex. R-3). He contends that MSHA's enforcement of this standard is inconsistent.

2. Discussion and Analysis

I find that the Secretary established a violation of section 56.15005. The driver of the rig was on top of the trailer holding a compressed air hose. There was a danger of falling off the trailer. The driver was not using a safety line and suitable handrails were not present. Although Lime Mountain had not been given specific notice that the safety standard applied to bulk trailers, I find that MSHA has consistently enforced the standard to require fall protection in this and in other similar situations. MSHA issues citations under this standard when it becomes aware that truck drivers are standing on the tops of bulk trailers without adequate fall protection.

The Mine Act imposes strict liability on a mine operator. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). In this case, the driver was in danger of falling and he was not using a safety belt and line.

B. Significant and Substantial Nature of the Violation

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

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).

There was a violation of the standard and a measure of danger to safety contributed to by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed

to by the violation will result in an injury. I find that the Secretary established that an injury was reasonably likely in this instance and that such an injury would be of a reasonably serious nature.

The driver was on top of a metal surface 11 feet above the ground that was covered with lime dust in at least some areas. He was holding a compressed air hose and the hose was coiled behind him. I find that it was reasonably likely that he would fall. The dust created a slipping hazard and the hose presented a tripping hazard. In one of the examples submitted by the Secretary, a truck driver was blown off a trailer by a gust of wind as he was closing a hatch. (Tr. 58; Ex. P-8). Thus, a driver can fall in the absence of dust or an air hose. The fact that no truck driver has been injured at the quarry while on top of a trailer does not mean that an injury would never occur if this practice continued at the quarry. I credit the testimony of the Secretary's witnesses that if a driver fell from a trailer, the injury would likely be very serious or fatal. The fact that a different inspector determined that a similar violation at another mine should be designated as non-S&S is not controlling. There may have been mitigating circumstances in that case that led the inspector to determine that an injury was not reasonably likely. (Tr. 61-62).

I also find that the presence of the driver on top of the trailer in this instance created an imminent danger because this condition "could reasonably be expected to cause death or serious physical harm" before the condition could be abated. (30 U.S.C. § 802(j); *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996)). This condition had a reasonable potential to cause death or serious injury within a short period of time. *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991).

C. Other Issues

Lime Mountain contends that it should not be held responsible for this violation because the independent contractor, Royal Trucking, employed the driver and was responsible for his unsafe actions. Inspector Bilbrey testified that he cited Lime Mountain rather than the independent contractor because Lime Mountain did not provide a place for a driver to tie off when using the compressed air hose. He stated that if there had been a place to attach a lanyard at the compressed air hose, he would have cited Royal Trucking instead of or in addition to Lime Mountain. (Tr. 32). In this case he only cited Lime Mountain because there was no place for the driver to attach a safety line if he wanted to tie off.

The Commission and courts have held that under the Mine Act's strict liability provisions, a mine operator, although faultless itself, may be held liable for the acts of its independent contractors. (*Extra Energy, Inc.*, 20 FMSHRC 1, 5 (January 1998)(citations omitted); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981)). The Secretary has wide enforcement discretion and may proceed against a mine operator, independent contractor, or both. The Commission has determined that a mine operator seeking to establish an abuse of that discretion "bears the heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on an improper understanding of the law." (*Extra Energy*, 20 FMSHRC at 5).

In this case I find that the evidence supports the Secretary's decision to cite Lime Mountain. While the Secretary may have had the authority to cite the independent contractor as well, its decision not to do so has no bearing on my findings in this case. The inspector stated that he cited Lime Mountain because it did not provide a place for drivers to attach a safety line at the compressed air hose. The citation was abated when Lime Mountain attached two bars to the structure supporting the storage bins. One of these bars is adjacent to the air hose. Safety lines can now be attached to this bar and drivers can use the compressed air hose without a danger of falling. They can also use the bars to attach a safety line when they open and close the hatches on the top of the trailers. I hold that the Secretary did not abuse her discretion when it cited Lime Mountain for this violation.

Lime Mountain also contends that its negligence was low in this case. I agree. The Secretary is under no legal obligation to provide each mine operator with notice of the requirements of all of her safety standards. Nevertheless, I credit the testimony of Mr. Wahl that the quarry has been inspected 37 times and that it has never been cited for violations of this standard with respect to trucks at the load-out facility. The load-out facility is centrally located at the quarry and the fall protection issue should have been obvious to MSHA inspectors. In addition, I credit the testimony of Mr. Wahl that Lime Mountain's employees use safety lines where there is a danger of falling in or around the bins at the load-out facility. Finally, Lime Mountain has less control over the actions of drivers employed by independent contractors than it has over its own employees. Lime Mountain did not direct or supervise this truck driver's activities at the load-out facility. Accordingly, I find that Lime Mountain's negligence was low.

Mr. Wahl testified that he stresses safety at Lime Mountain and that he would never do anything to put his employees in jeopardy. (Tr. 88-90). I credit his testimony in this regard. It must be stated, however, that quarry operators who operate in a safe manner are issued citations by MSHA from time to time. The fact that Lime Mountain was issued the subject citation does not mean that it does not emphasize safety. The citation simply indicates that the conditions described in this citation presented a safety hazard to truck drivers.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The parties stipulated to many of the criteria. I find that six citations were issued at the quarry in the 24 months preceding October 8, 1997. The quarry worked about 15,880 man-hours per year at that time. The violation was rapidly abated. The penalty assessed in this decision will not have an adverse effect on Lime Mountain's ability to continue in business. The violation was S&S and it created a serious safety hazard. Lime Mountain's negligence was low. I find that a penalty of \$150 is appropriate for this violation.

III. ORDER

Accordingly, Citation No. 4523948 is **AFFIRMED** and Lime Mountain Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$150.00 within 40 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Richard W. Manning". The signature is fluid and cursive, with a large, stylized "M" at the end.

Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 23 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-86-M
Petitioner	:	A.C. No. 41-03817-05506
v.	:	
	:	Mine: Pinto Valle No. 1
PRICE CONSTRUCTION, INC.,	:	
Respondent	:	

DECISION

Appearances: Madeleine T. Le, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for the Secretary;
Bob Price, Pro se, President, Price Construction, Inc., Big Spring, Texas, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("the Secretary") seeking the imposition of civil penalties against Price Construction, Inc. ("Price") for allegedly violating various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, the case has heard in Zapata, Texas, on September 9, 1998.¹

I. Citation No. 4446968 and Order No. 4446969

A. The Inspector's Testimony

On August 26, 1997, MSHA Inspector Laman Jay Lankford inspected Price's Pinto Valle No. 1 Mine. He described the terrain at the mine as generally flat, but indicated that dump trucks have to travel up an elevated roadway to go to the hopper to dump their load.

^{1/} Subsequent to the hearing, the Parties filed memorandums pertaining to the scope of 30 C.F.R. § 56.14131(a) at issue in Citation No. 4446968 and Order No. 4446969.

Lankford testified that at approximately 10:30 a.m., he stopped one of the two bobtail dump trucks operating in the area, and asked the driver to open the door. Lankford stated that he observed that the driver was not wearing a seatbelt; that it was lying on the floor under the seat. Approximately 5 minutes later, Lankford stopped the other truck and observed an unbuckled seatbelt on the floor beside the seat and slightly to the rear. Lankford issued a Citation under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("the Act"), and an Order under section 104(d)(1) of the Act each alleging a violation of 30 C.F.R. § 56.14131(a) which provides as follows: "[s]eatbelts shall be provided and worn in haulage trucks." According to Lankford, he terminated the Citation and Order that he issued by requiring the seatbelts to be put on.

According to Lankford, the MSHA database indicates that the number one cause of fatalities involving accidents of haul dump trucks is the nonuse of seatbelts. He opined that there was a reasonable likelihood that an injury would have resulted as a consequence of the seatbelt not being worn. Lankford explained that this conclusion was based upon the MSHA database, as well as the fact that the cited trucks have to back up to the hopper on a ramp elevated about 12 feet above the "lay of the land" (Tr.62). According to Lankford, if there would be "a mechanical failure, those trucks have been known to tip over, and there has been fatalities resulting" (*sic*) (Tr. 30).

Lankford indicated that when he asked the drivers in English why they were not wearing a belt, they shrugged. He also indicated that at a close-out conference the foreman, Jose Marcello Quiroz, who accompanied him in his inspection, did not indicate that there was any company policy to educate employees to wear a seatbelt. Lankford stated that after he cited the second truck, he asked Quiroz what was going on and why the operators were not wearing seatbelts. According to Lankford, Quiroz said that they had been told to, but he did not mention the existence of any disciplinary procedures, spot checks, or safety meetings. In the 2 year period ending August 29, 1997, Price was cited, at the subject mine, on two previous occasions for not having complied with the mandatory standards requiring the wearing of seatbelts on mobile equipment which does not include haul trucks. Price was also cited on two occasions for not having complied with the regulation at issue, section 56.14131(a), supra, which requires the wearing of seatbelts in haulage trucks.

B. Discussion

1. Citation No. 4446968

When Lankford observed the first truck cited, the door was open, and the operator, Rene Valadez, was not wearing a seatbelt. Valadez testified, in essence, that until the truck was stopped by the inspector, he had been wearing his seatbelt. However, when the inspector motioned to him to stop the truck, he took his seatbelt off, and opened the door, intending to exit the truck. I observed his testimony, and found him to be a credible witness in this regard.

Section 56.14131(a), supra, provides that seatbelt shall be worn “in haulage trucks” (Emphasis added). When Valadez was observed and cited by Lankford, he had removed his belt as part of the continuing action of opening the door, and exiting from the truck. As such, when observed by Lankford, he can no longer be considered to have been “in” the truck. Hence, the seatbelt requirement set forth in section 56.14131(a) supra, does not apply.

I observed Valadez’ demeanor, and found his testimony credible that, prior to the time he had taken off the seatbelt in order exit the truck, he had been wearing it. The record is devoid of any evidence, direct or otherwise, that Valadez had not been wearing his seatbelt when he was in the truck prior to having removed it in order to exit the truck. Lankford did not observe him or the interior of the truck at any time prior to the time the door was opened. I thus find that it has not been established that Valadez was not wearing the seatbelt while he was “in” the truck. Thus it has not been established that Price violated section 56.14131(a), supra. Accordingly, Citation No. 4446968 shall be dismissed.

2. Order No. 4446969

a. Violation of section 56.14131(a), supra

Jesus Lopez, the driver of the second truck Lankford cited, testified that when he was stopped by Lankford and he opened the door of the haul truck, he had the seatbelt on, and that he also had been wearing it while he was driving. I totally discredit his testimony that he was wearing his seatbelt when he stopped the vehicle and opened the door, as it was contradicted by the testimony of Lankford and Quiroz, Prices’ foreman. They both testified that when the door on Lopez’ truck was opened, the latter did not have his seatbelt on, and it was hanging down. I observed the demeanor of Lankford and Quiroz, and found their testimony credible on this point. I thus find that Lopez was not wearing his seatbelt when the door was opened.

According to Lopez, it is the policy of Price for haul truck drivers to wear their seatbelts, and that he had been so instructed when he was hired and at other subsequent times. He also testified that he always wears his seatbelt, and that he wore it on August 26, while operating the haul truck before it was stopped by Lankford. Inasmuch as I have found Lopez’ testimony not credible that he was wearing his seatbelt when the door was opened, I find the balance of his testimony that he had been wearing his seatbelt when the vehicle was in operation not to be worthy of belief, based upon the principle of falsus in uno, falsus in omnibus. Moreover, since I have found that Lopez was not wearing a seatbelt when observed by Lankford and Quiroz after the vehicle was stopped, it may reasonably be referred that he had not been wearing the seatbelt prior to that time when he was operating the vehicle, especially in light of the absence of any credible evidence to the contrary. I thus find for all these reasons that it has established that Price did violate section 56.14131(a) supra, as alleged.

b. Significant and Substantial

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

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

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

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U. S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U. S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

According to Lankford, his conclusion that the violation was significant and substantial was based upon his opinion that an injury was reasonably likely to have occurred, as not wearing a seatbelt is the leading cause of fatalities in accidents involving haul trucks. He also noted that the trucks at issue are required to drive up a ramp 12 feet above the rest of the area, and dump their load into a hopper. He indicated that a fatality could have resulted if, at that point, a "mechanical failure" would have occurred. However, there is no evidence in the record as to the presence of any condition that would have made it likely for any mechanical failure to have occurred. In the absence of such evidence it can not be concluded that there was any likelihood that an injury producing event would have been reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial.

c. Unwarrantable Failure

In the 2 year period preceding the violation at issue, Price was cited at the subject site for seatbelt violations on four vehicles. However, according to the uncontradicted testimony of Quiroz, employees are instructed to wear their seatbelts, and are provided with such information in writing when they start to work. He further testified that he instructs employees weekly to wear their seatbelts, and checks at least once a day when employees get off their trucks to see if they are wearing seatbelts. Quiroz indicated that if he observes an employee not wearing a seatbelt, "I chew them out" (Tr. 108). He also indicated that he had told Lopez that he could be fired for not wearing a seatbelt. None of this testimony has been impeached or contradicted. I thus accept it. Within this framework, I find that it has not been established that the violation was as a result of Price's aggravated conduct. As such I can not find that the violation was as the result of Price's unwarrantable failure. (c.f., *Emery Mining Corp.*, 9 FMSHRC 1997 (1987)).

d. Penalty

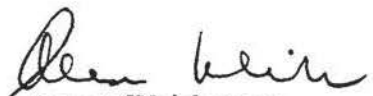
Although Price has a training program policy regarding the use seatbelts, the history of violations indicate that it did receive four citations for seatbelt violations within 2 years prior the issuance of the Order at issue. I thus find that Price was negligent to a moderate degree. Also, should an accident have occurred and the vehicle overturned, a driver not wearing a seatbelt could have been fatally injured. I thus conclude that the violation was of a moderately high level of gravity. Taking into account the remaining factors set forth in section 110(i) of the Act, as stipulated to by the parties, I find that a penalty of \$500.00 is appropriate for this violation.

II. Citation Nos. 4446966, 4446967, 4446971, 4446972, 4446973, 4446974, 4446975, and 4446976.

At the hearing, the Secretary made a motion to approve a settlement agreement regarding the above referenced citations. It is proposed to reduce the total penalties sought from \$765 to \$671. I have considered the representations of the Secretary as set forth at the hearing as well as the documentation in the file, and I find that the proposed settlement is appropriate under the Act, and I approve it.

ORDER

It is **ORDERED** that within 30 days of this Decision, Respondent pay a total civil penalty of \$1,171 for the violation found herein. It is further **ORDERED** that Citation No. 4446968 be dismissed, and Order No. 4446969 be amended to a section 104(a) citation that is not significant and substantial.


Avram Weisberger
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 23 1998

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 98-28
Petitioner : A.C. No. 11-00877-03503 B08

v.

GUNTHER-NASH MINING :
CONSTRUCTION COMPANY, :
Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 98-42
Petitioner : A.C. No. 11-00877-03504 A B08

v.

ALBERT R. GONZ, :
Employed By GUNTHER-NASH :
MINING CONSTRUCTION COMPANY :
Respondent :

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor,
Chicago, Illinois for the Petitioner;
William H. Howe, Esq., Howe, Anderson & Steyer, P.C., Washington, D.C.
for Gunther-Nash Mining Construction Company and Albert R. Gonz.

Before: Judge Melick

These consolidated civil penalty proceedings are before me pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Gunther-Nash Mining Construction Company (Gunther-Nash) and Albert R. Gonz, as an agent of Gunther-Nash, with violations of the mandatory standard at 30 C.F.R. § 77.1908(o). The general issue before me is whether there was a violation of the cited standard, and, if so,

whether that violation was "significant and substantial", whether the violation was caused by the "unwarrantable failure" of Gunther-Nash and whether the violation was a "knowing" violation committed by Albert Gonz, as an agent of a corporate mine operator within the meaning of section 110(c) of the Act. If the violation is found to have been committed and if that violation is found to have been knowingly committed by Albert Gonz as an agent of a corporate operator, then appropriate civil penalties must also be assessed utilizing the relevant criteria under 110(i) of the Act.

The citation at bar, No. 4263749, issued pursuant to section 104(d)(1) of the Act alleges a "significant and substantial" violation of the standard 30 C.F.R. § 77.1908(o) and charges as follows:¹

During the shaft sinking of the No. 5 airshaft of the Wabash Mine; two miners were working over the shaft installing a platform. Only one of the miners (victim) was wearing a safety belt, but it was not properly attached. Other acceptable means were not provided to prevent persons from falling down the shaft when work was being performed over the shaft. Upon exiting this platform, one miner fell over the shaft. Upon exiting this platform, one miner fell approximately 140 feet down the shaft, resulting in fatal injuries.

As amended at continued hearings, the Secretary is now alleging that two persons were in violation of the standard by not wearing properly attached safety belts while working over the shaft. Although not identified in the citation by name they are presumably James Horn and the deceased, Kelly McIntosh (Secretary's Br. p.26). The cited standard provides that "[p]roperly attached safety belts shall be worn by all persons required to work in or over any shaft where there is a drop of 10 or more feet, unless other acceptable means are provided to prevent such persons from falling into the shaft."

¹Section 104(d)(1) provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

It is undisputed that Kelly McIntosh, a supervisory employee (walking boss) for Gunther-Nash, was present over the No. 5 airshaft at the Wabash Mine late in the evening of May 17, 1996, without tying-off or attaching his safety belt. Around 11:45 p.m. he fell through an opening in a platform over the shaft approximately 150 feet into the shaft causing his death. McIntosh was not scheduled to work until later, on the 12:00 midnight shift, but had arrived early that evening. At the time of the accident, the No. 5 airshaft had an opening approximately 18 feet in diameter. Outside the opening there was an additional 3 ½ foot-wide concrete wind-sweep onto which a rectangular pattern of steel beams was being bolted into place. Portions of the shaft opening were covered by doors and a steel deck. Openings nevertheless still remained over the shaft and through which the victim fell. (See Government Exhibit No. 1). Aside from the use of properly attached safety belts and a fence around the perimeter, there was no other means to prevent persons from falling into the shaft.

Respondents first maintain that there was no violation of the cited standard as to the deceased, Mr. McIntosh, because the Secretary failed to prove that at the time he fell he had been "required to work" over the shaft within the meaning of the standard. The Secretary does not argue, and cites no evidence, that McIntosh was indeed "required to work" over the shaft at the time he fell to his death. The evidence clearly shows that he was then voluntarily assisting other workers before the commencement of his shift. She has therefore failed to establish an essential element for a violation of the cited standard as to the deceased. Accordingly the charges in amended Citation No. 4263749 concerning Kelly McIntosh must be vacated as to both Gunther-Nash and Albert Gonz. The evidence that McIntosh had been working over the shaft without a properly attached safety belt in the presence of, and with the knowledge of, superintendent Albert Gonz, nevertheless may be considered in determining negligence, "unwarrantable failure" and whether Gonz committed a "knowing" violation under Section 110(c) of the Act.

Whether there was a violation of the cited standard with respect to James Horn requires further examination of the evidence. Monty Wilson was, at the time of the alleged violation, a miner/driller for Gunther-Nash, and a union safety committeeman. At the time of the accident Wilson was working on one of the steel beams over the shaft. He was tightening "red head" bolts which were being used to tie the beam onto the concrete wind sweep. Respondent Gonz and "Smiley" (James Horn) were working on the opposite side of the shaft. Wilson had tied-off onto a fence post. According to Wilson, Gonz was then placing the doors over the open shaft and neither Gonz nor Horn were wearing safety belts. According to Wilson, they very seldom wore their safety belts. On cross-examination Wilson acknowledged that Gonz was working on the doors or drilling on the beams at the edge of the wind sweep outside the fence but that the fence had been taken down where he and Gonz were working. Significantly, Wilson recalled that on a prior occasion Gonz had taunted him by asking Wilson if he was "scared" because he was about to put on his safety belt. According to Wilson, Gonz never wore a safety belt himself while working over the shaft.

Gonz, as superintendent, was Horn and McIntosh's supervisor. According to Gonz, McIntosh was indeed working over the subject shaft and was not tied off. Gonz usually met with

McIntosh, who was one of his "walking bosses", before the start of each shift to review work plans. Gonz testified that when he observed McIntosh working over the shaft without being tied off he told him to meet at his office. Gonz claims that he thought that would take care of the problem. Gonz also testified that he assumed Horn had been tied off while working over the collar doors that night. According to Gonz, Horn had been standing next to him a few minutes earlier and was then wearing a safety belt. He denies having seen or having any knowledge of any of the workers (except McIntosh) not tied off that day. In particular he maintains that he did not know that Horn was not tied off until that was disclosed at a subsequent hearing.

Victor Wunderlich was employed by Gunther-Nash as a "cherry-picker" and hydraulic crane operator. He was working as crane operator and hoist man on May 17, 1996, the date of the accident. He recalled that on a prior occasion, on May 15 or May 16, Gonz' crew members were not tied off while removing the shaft coping. He also recalled an incident about four days before this accident in which the entire crew was working inside the fence without safety belts. Wunderlich told Gonz at the dinner break about the crew not wearing their safety belts. After the dinner break the crew was wearing their belts.

Dale Laur was a miner/driller for Gunther-Nash at the time of the accident. Kelly McIntosh was his "walking boss". On the night of the accident, May 17, 1996, he was working the midnight shift. Before the shift started he saw McIntosh walk onto the steel beams over the shaft without a belt.

James Horn worked as a "top man" for Gunther-Nash. Gonz was his supervisor on the 4:00 p.m. to 12:00 midnight shift. On May 17, 1996, they were preparing to place the collar on the shaft, mount doors over it and close it off. He was inserting the "red head" bolts into the concrete. He admitted that he was over the shaft himself at least once without his safety belt being tied off. He recalled seeing Gonz inside the fence with his safety belt on. Gonz was some 30 to 40 feet away when he took his belt off, but moved to within 10 or 15 feet of him. According to Horn, McIntosh, always wore a safety belt, but he was not sure whether he was tied off that night. Horn admitted that he was over the doors without a safety belt for five or six minutes. He knew he should not have been without his belt because Gonz and Wunderlich had been "onto us all week about not wearing safety belts." He recalls that Gonz told him "ten times" that week to get his safety belt on. He recalled being warned several times on other jobs but he was never issued sanctions such as written warnings for failing to wear a safety belt on other jobs. Horn continues to work for Gunther-Nash.

Stephen James Heath was a miner/driller for Gunther-Nash at the time of the accident. He too continues to be employed by Gunther-Nash. He was working over the shaft at the time of the accident. Beams were in place and he was drilling holes into the concrete to secure the beams. He was not tied off with his safety belt while he was bolting over the shaft although he knew he was supposed to be. He maintains that Gonz was not present at this time. He noted that if "they" see you not tied off within the fenced area "as a rule" you will be told to get tied off.

Samuel Parkhill was working under Gonz at the time of the accident. He continues to work for Gunther-Nash as a "boss". According to Parkhill there were occasions while he was drilling or bolting over the shaft during which was not tied-off with his safety belt. Sometimes the lanyard was not long enough to tie-off. He was not aware that longer belts or ropes were available at the mine site. Parkhill also admitted that there were times when he was not tied off while he was within the fenced area. He testified however that he was tied off when Gonz was present at the time of the accident.

Based on the unchallenged testimony of James Horn alone, it is clear that there was a violation of the cited standard. The violation was also clearly "significant and substantial". A "significant and substantial" violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated "significant and substantial", if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

We have explained further that the third element of the Mathies formula 'requires that the Secretary establish likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, 3 FMSHRC 327, 329. Halfway, Incorporated, 8 FMSHRC 8 (January 1986). Clearly, after Kelly McIntosh died under circumstances similar to those under which James Horn was working, there can be no question but that this violation was "significant and substantial".

The violation is also alleged to have been the result of "unwarrantable failure": "Unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997 (December 1987). It is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* at 2003-04; Rochester and Pittsburgh Coal Company, 13 FMSHRC 189, 193-194 (February 1991). Relevant issues therefore, include such factors as the extent of a violative condition, the length of time that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. Mullins and Sons Coal Company, 16 FMSHRC 192, 195 (February 1994). Repeated similar violations and also be relevant to this inquiry because they indicate an operator has notice that greater efforts are necessary for compliance with the standard. Peabody Coal Co., 14 FMSHRC 1258 (August 1992).

In addition, the violation is also alleged to have been a "knowing" violation by Albert R. Gonz as an agent of corporate operator Gunther-Nash. It is undisputed that Gonz was, at the time of the violation, employed by Gunther-Nash as a superintendent. It has been stipulated that Gunther-Nash was a corporation. He was accordingly an agent of a corporate operator within the meaning of section 110(c) of the Act.

Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. Kenny Richardson, 3 FMSHRC 8, 16 (January 1982), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). Accord, Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. Warren Steen Constr., Inc., 14 FMSHRC 1125, 1131 (July 1992) (citing United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." Kenny Richardson, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. BethEnergy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992).

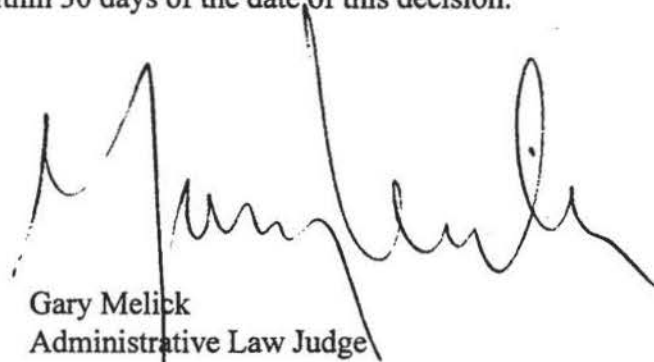
There is no direct evidence in this case that Gonz knew Horn was working over the subject shaft without being properly tied off and, indeed, Gonz testified that he assumed Horn was tied off because he had earlier seen him wearing a safety belt. However, given what I find to be credible evidence of the egregious failure by Gonz to have enforced the cited standard, including what I find to have been his failure to have enforced the standard against McIntosh resulting in his death, the failure on that same shift of at least three other miners working directly under Gonz' supervision to have worn properly attached safety belts while working over the shaft and Gonz' own habitual failure to comply with the standard in the presence of his subordinate workers, I conclude that his conduct may be characterized as reckless and showing such indifference and lack of reasonable care as to constitute "unwarrantable failure". These findings are based on the credible testimony of Monty Wilson, Stephen Heath, Samuel Parkhill and James Horn. Significantly, Wilson testified that both Horn and Gonz himself seldom wore a safety belt and that Gonz once taunted him for wearing a safety belt. Moreover, according to Wilson, neither Gonz nor Horn were wearing tied off safety belts the night McIntosh fell into the shaft. No motive has been shown for Wilson to have testified other than truthfully. Under the circumstances I find that the violation was indeed the result of "unwarrantable failure".

Based upon the aforementioned evidence I also conclude that Gonz committed a "knowing" violation. According to the credible evidence, four miners under Gonz' supervision, and Gonz himself, were working over the shaft around the time of the fatal accident, without properly tied off safety belts. Under these circumstances and considering the credible evidence of prior lack of compliance with the standard by Horn and Gonz himself, I find that Gonz had reason to know that Horn would also have been in violation of the standard as charged. While Respondents cite Gunther-Nash's alleged training program and policies as reasons for negating findings of "unwarrantability" and a "knowing" violation, these programs and policies warrant but little consideration in light of what had been clearly a blatant disregard for actual compliance with the safety belt requirements.

In assessing a civil penalty in this case I have considered that the violation was of the highest gravity and the result of extraordinarily high negligence. I also note the operator's size and history of violations and give credit for good faith abatement. No evidence has been produced regarding Mr. Gonz' history of violations or his "size" or "ability to continue in business" as defined by the Commission in *Sunny Ridge Mining Co.*, 19 FMSHRC 254 (February 1997). The burden is in any event upon the operator or the individual agent to produce evidence of the inability to continue in business. Accordingly I find civil penalties of \$50,000 and \$1,000 respectively, against Gunther- Nash and Albert Gonz, to be appropriate.

ORDER

The "significant and substantial" violation and "Section 104(d)(1)" Citation No. 4263749 are hereby affirmed. Gunther-Nash Mining Construction Company is directed to pay a civil penalty of \$50,000 within 30 days of the date of this decision. Albert Gonz, an agent of the corporate mine operator, has violated the provisions of Section 110(c) of the Act and is hereby directed to pay a civil penalty of \$1,000 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 23 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-57
Petitioner	:	A. C. No. 46-01968-04121
v.	:	
	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Barbour

The Commission has directed me to reconsider whether a violation of 30 C.F.R. § 75.1101-23(a) was of a significant and substantial nature ("S&S") (*Consolidation Coal Co.*, 20 FMSRHC ___, Docket No. WEVA 94-57 (September 16, 1998)).

FACTS AND PROCEDURAL BACKGROUND

Section 75.1101-23(a) requires an operator to "adopt a program for the instruction of all miners in the . . . proper evacuation procedures to be followed in the event of an emergency." A citation alleging a violation of the standard was issued to Consol by the Secretary's Mine Safety and Health Administration (MSHA) following MSHA's investigation of a March 15, 1993, fire at Consol's Blacksville No. 2 Mine. The fire was in the belt entry, at the belt drive of the 16-M longwall section.

At the time the fire occurred, there were two fire detection systems in the entry: a heat sensor system and a carbon monoxide ("CO") monitoring system. The CO system was only partially completed in that the last CO sensor of the system and the system's outstation were not installed.

The belt entry was ventilated by two splits of air. The air in one split flowed from the longwall face outby, down the belt entry, until it entered the return at the regulator. The air in the other split flowed from the belt entry transfer point, inby through a box check, over the belt drive, through a second box check, and into the return at the regulator. In terms of ventilation, the working sections potentially affected by the fire were the 16-M and 17-M sections, both of which were inby the fire.

The fire was detected by a miner who was traveling the belt entry. He reported the fire to the person underground who was in charge of the section and to the dispatcher on the surface. Almost immediately thereafter, the heat sensor alarm at the tailpiece activated, confirming the fire, and the person in charge of the section telephoned the 16-M section and informed the longwall miners to assemble at the headgate. The dispatcher contacted the mine foreman and the assistant mine foreman. The superintendent also learned of the fire and directed the mine foreman to take charge of the situation. The mine foreman told the dispatcher to send water cars to the area. In addition, the assistant mine superintendent began to travel toward the site of the fire.

At about the same time as the fire was detected, the 16-M section foreman saw smoke moving toward the regulator in the return. He then saw the person who originally detected the fire and the two men traveled to the box check nearest the belt drive. They entered the belt entry and proceeded to the site of the fire at the belt drive. Water was spraying from the fire suppression system. It had doused the fire, and there were no flames. The 16-M section foreman called the mine superintendent and told him the fire was out.

Meanwhile, the longwall crew assembled as instructed. They discussed the route they would take to evacuate the section. After they decided on the route, a crew member telephoned the foreman who had been placed in charge of the situation. The crew member told the foreman what the miners planned to do. However, the foreman stated the fire was out and that the crew should stay together on the section. As a result, no one on the 16-M section evacuated to an area outby the fire. In addition, no one left the 17-M section.

MSHA investigated and issued an order of withdrawal charging Consol with a violation of section 75.1101-23(a) because of noncompliance with its firefighting and evacuation plan. The Secretary asserted management "did not assure that those persons . . . in the affected area be immediately withdrawn outby" (Gov. Exh. 6A at 1). The Secretary also asserted that management's failure to immediately withdraw the miners was S&S.

I concluded the Secretary proved a violation of the standard (18 FMSHRC 1189, 1229-31 (July 1996)). I found the company violated both its "general duty immediately to withdraw the affected miners of the 16-M and 17-M sections" and its specific duty to "withdraw the 16-M section miners outby when the fire sensor alarm activated" (18 FMSRHC at 1231).

I also found the violation was not S&S. I reasoned the Secretary proved three of the four criteria required by the Commission in *Mathies Coal Co.*, 6 FMSHRC 3, 3-4 (January 1984), but she did not prove there was a reasonable likelihood the hazard contributed to would have resulted in an injury (18 FMSHRC at 1233). Because the fire was extinguished when the company failed to withdraw the miners or was extinguished shortly thereafter, I found it was not likely the fire at the belt would have intensified had normal mining operations continued. Further, even if the fire rekindled as mining operations continued, I found the heat sensors and CO monitors along the belt would have detected the fire and made its rapid extinguishment probable. Thus, any fire was

likely to be of short duration and not of major intensity (18 FMSHRC at 1233). Finally, I found that given the ventilation system, it was not reasonably likely smoke and fumes would have gone to the face of either section. In making this finding, I credited the testimony of Consol's mining consultant (18 FMSHRC at 1234).

The Commission reversed. It held I disregarded the fact the heat sensor system had been turned off after the fire and was not turned on until well after the shift on which the fire occurred. In addition, it held that I failed to address testimony the CO sensor at the regulator was placed at an incorrect location so that it would have failed to detect any fire between the belt drive area and the regulator inby the belt drive. Finally, the Commission found I failed to consider evidence there had been a programming error with the CO sensor located at the belt drive so that there may have been no CO monitoring between March 15 and March 23. Therefore, the Commission instructed me to reconsider whether "there was a reasonable likelihood the hazard of rekindling a fire would result in an injury" (*Consolidation Coal Co.*, slip op. 6). The Commission expressly directed my attention to testimony that part of the belt located a short distance outby the belt drive was bubbled and blistered (Tr. 297, 746-747, 876).

S&S

In determining the reasonable likelihood of injury from the hazard of rekindling the fire (*Consolidation Coal Co.*, slip op. 6), it is important to recall the Commission's instruction that an S&S finding "must be based on the particular facts surrounding the violation, including the nature of the mine involved" (*Texasgulf, Inc.*, 4 FMSHRC 498, 501 (April 1988) (emphasis added)). Given this directive, I must take into account the facts surrounding the May 15 fire and the nature of the ventilation system at the mine.

First, to establish there was a reasonable likelihood of injury from the hazard of rekindling the fire, the Secretary had to prove it was reasonable likely the fire would have reignited. She failed to do so. The testimony is clear the fire was of short duration and was extinguished minutes after it broke out. The testimony also established the most likely ignition source of the fire was the friction created by the belt slipping over the rollers at the belt drive, which, in turn caused heat that ignited pine boards alongside the belt drive. The resulting fire burned the boards and scorched the belt, causing the belt to bubble and blister.

After the fire was ignited, the belt continued operating for a very short time and then shut down. This is confirmed by the fact the blistered portion of the belt was found no more than 50 feet from the belt drive and by the fact that those in the face area noticed that the belt stopped right before the alarm activated. Shutting down the belt eliminated one of the possible reignition sources, and there is no indication the slippage problem would have recurred when mining resumed because the problem would have been corrected prior to that.

Although it is possible smouldering wood or coal could have been transported inby the belt drive for a short distance before the belt shutdown, the beltline was examined past the point it was reasonable to expect the wood or coal could have traveled and no evidence of any ignition source was detected.¹ Further, miners stayed in the belt drive area for about an hour after the fire was out. They checked coal under the belt near the belt drive to make sure the fire did not restart and I infer they would have detected any indication of the fire restarting in any other nearby area along the belt. For these reasons, I conclude it was not reasonably likely the fire would have rekindled.²

Second, even if the fire had rekindled, the Secretary did not establish it was reasonably likely smoke and fumes would have traveled to the working sections and posed a hazard to the miners. Previously, I noted the inspector agreed that given the mine's ventilation system, smoke and fumes normally would have been carried away from the working sections and out the return. I also credited the testimony of Consol's ventilation expert who "persuasively and . . . fully" explained that the air pressure differential between the track entry and the belt entry made it very unlikely that smoke ever would have traveled to the faces, barring a fire of major intensity and of up to 10 hours duration (18 FMSHRC at 1233-34). In view of the the fact miners stayed in the area of the belt drive for about an hour after the ignition, and given the fact a rekindled fire would have had to be very close to the belt drive area, I infer that any such fire would have been detected and extinguished long before it gained the intensity and duration necessary to reverse the airflow. Therefore, upon examining the particular facts surround the violation of section 75.1101-23(a), I conclude the violation was not S&S.

That the Secretary's proof has failed is not surprising. Her S&S assertion was ill-founded from its inception. Contrary to the Commission's instruction in *Texasgulf*, the inspector testified he based the finding on "facts surrounding other belt fires and other fires in coal mines where persons have not been evacuated," not on facts particular to the May 15 fire and the Blacksville No. 2 Mine (Tr. 517).



David Barbour
Administrative Law Judge

^{1/} Given the brief period that elapsed between the ignition and the shut down of the belt, nothing would have been carried much further than the bubbled and blistered area of the belt.

^{2/} This finding should not be viewed as contrary to the statement in the initial decision that "the fact the fire was extinguished did not mean that potential ignition sources, which could have started a fire, had not been carried inby . . . the fire" (18 FMSHRC at 1231). The statement describes the viewpoint of miners at the longwall face who were unaware of the source of the fire and of the facts surrounding the fire and its extinguishment.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 26 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-88-M
Petitioner	:	A.C. No. 14-01467-05519
	:	
v.	:	Portable Plant No. 1
	:	
WALKER STONE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Barbara J. Renowden, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner; Keith R. Henry, Esq., Weary, Davis, Henry, Struebing, Troup & Kaus, Junction City, Kansas, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Walker Stone Company ("Walker Stone"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petition alleges three violations of the Secretary's safety standards. A hearing was held in Junction City, Kansas.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Walker Stone operates a portable crusher and quarry (the "quarry") in Butler County, Kansas. On November 13, 1997, MSHA Inspector James G. Enderby inspected haulage equipment at the quarry. During his inspection he issued four citations under section 104(a) of the Mine Act and Walker Stone contested three of these citations in this civil penalty proceeding.

A. Citation No. 4670673

This citation alleges a violation of 30 C.F.R. § 56.14101(a)(2), as follows:

The parking brake of the Caterpillar 966 C wheel loader would not hold the loader on the ramp at the primary crusher when tested.
The test was done when the bucket of the loader was empty. The

loader was being used to haul shot rock from the quarry to the primary crusher.

Inspector Enderby determined that the violation was of a significant and substantial nature ("S&S") and was the result of Walker Stone's moderate negligence. Section 56.14101(a)(2) provides that "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." The citation was terminated after the parking brakes were repaired. The Secretary proposes a penalty of \$136 for this alleged violation.

Inspector Enderby asked Mick Johnston, who was the supervisor at the quarry, to start up the Caterpillar 966 C wheel loader (the "loader"). This loader was a spare loader that was generally used when the other loader at the quarry was not available. Inspector Enderby examined the operating systems on the loader, including the braking systems. The service brakes passed the inspector's test. Inspector Enderby asked Mr. Johnston to drive the loader up the ramp for the crusher and apply the parking brake without using the service brakes. The bucket on the loader was empty. The parking brake did not hold the loader. These facts are not contested by Walker Stone.

I find that the Secretary established a violation of the safety standard. The loader was equipped with a parking brake which was not capable of holding the loader. The ramp is angled at about 18 degrees which is the maximum grade at the quarry. The loader is classified as "self-propelled mobile equipment."

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

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).

There was a violation of the standard and a measure of danger to safety contributed to by the violation. The issue critical is whether there was a reasonable likelihood that the hazard contributed to by the violation will result in an injury. I find that the Secretary did not establish that an injury was reasonably likely in this instance.

The service brakes were in good condition on the day of the inspection. If the loader stalled on the ramp to the crusher, the service brakes would prevent the loader from rolling back down the ramp. When the hydraulic system for the service brakes fails, pressure generally remains in the braking system for several hours. The loader operator would need to use the parking brake as an emergency brake only if there was a major rupture in the hydraulic system. Thus, the loader operator would use the parking brake to control the vehicle if the engine stalled on the ramp and the hydraulic system was ruptured so that the service brakes would not hold. These two events would have to occur simultaneously. As stated above, the loader was a spare that was not normally used to haul rock to the crusher.

The loader is about 8½ feet wide and about 15 feet long. The ramp is about 16 to 18 feet wide, 40 feet long, and about 7 feet high at the top. If all braking systems were to fail while the loader was at the top of the ramp, the loader would roll about 25 feet down the ramp. Walker Stone was cited for not having berms on the ramp during this same inspection. The ramp was more than twice as wide as the loader, however, so it is unlikely that the loader operator would run off the side of the ramp in the event all braking systems failed. The working area for the loaders was relatively flat throughout the remainder of the quarry.

The quarry employed three individuals at the crushing plant: the crusher operator, the operator of the regular loader, and Mr. Johnston. These individuals did not walk around in the area of the crusher while the loader was operating. I find that it was not likely that anyone would be run over in the event all of the braking systems failed and the loader rolled down the ramp. The quarry did not operate at night. A pug mill was also located at the quarry.* Rock crushed in the Walker Stone's crusher was transported to the pug mill via a belt conveyor. The pug mill was not operated by Walker Stone and employees of the mill did not work around the crusher. The pug mill was not near the route that the loaders traveled when transporting shot rock to the crusher.

I find that it was not reasonably likely that the hazard contributed to by this violation would result in an injury, assuming continued normal mining operations. First, it is unlikely that all braking systems would fail while the loader was on the ramp and that, as a consequence, the loader would roll down the ramp or off the side of the ramp. Second, even assuming such an event occurred, it is unlikely that anyone would be injured as a result. Pedestrians were not usually in the area and the quarry does not operate at night. Even if one were to assume that the

* A "pug mill" is a machine for mixing clay with water. *A Dictionary of Mining, Mineral, and Related Terms*, 875 (1968). It is not clear from the record if the pug mill at the quarry mixed clay and water, but it processed at least some of the product from the crusher.

loader rolled off the edge of the ramp, it is unlikely that the loader operator would be seriously injured unless he were not wearing a seatbelt. The loader was 13½ feet high and the ramp is about 7 feet high at its highest point. The loader was equipped with rollover protection.

Thus, although I find that an operational parking brake is required by the standard, I find that under the facts of this case the violation was not S&S. I recognize that injuries and fatalities have occurred at mines where a parking brake was not working on mobile equipment. For example, in *Fluor Daniel, Inc.*, 16 FMSHRC 2049 (October 1994)(ALJ), a miner was killed when he was pushed over a berm by a runaway fork lift truck. The braking systems on the truck had been tested at the beginning of the shift. In that instance, however, the truck had been turned off, put in neutral, and the parking brake set when it rolled forward striking a miner working in front of the truck. The truck was on an incline. In the present case, the operator of the loader would never park his vehicle on the ramp to the crusher. The Secretary's case was not based on such a scenario. I find that too many unlikely events would have to occur simultaneously in order for the violation to contribute to a reasonably serious injury.

I find that the violation was serious and that Walker Stone's negligence was moderate. It was serious because it created a safety hazard. This defect should have been detected during preshift examinations of the loader.

B. Citation No. 4670674

This citation alleges a violation of 30 C.F.R. § 56.14100(b), as follows:

The drive lights on the Caterpillar 966 C wheel loader were not being maintained. The headlight on the right side of the operator was broken and the left one did not work. The drive lights would make for safer operation of the loader during limited visibility and high dust periods.

Inspector Enderby determined that the violation was S&S and was the result of Walker Stone's moderate negligence. Section 56.14100(b) provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The citation was terminated after the lights were repaired. The Secretary proposed a penalty of \$136 for this alleged violation.

I find that the Secretary established a violation. Broken headlights on a loader are a defect that affects safety. Although the quarry is not open at night, it operates between 7 a.m. and 5 p.m. It is almost dark at the beginning and end of the shift at certain times of the year. Weather conditions, such as fog, rain, drizzle, and snowfall, can affect visibility. Inspector Enderby noted that it was foggy and overcast on the day of his inspection. In such conditions, the loader operator could fail to see other vehicles, equipment, or pedestrians. There is no dispute that the cited conditions had existed for a considerable length of time.

Walker Stone does not contest the fact that the lights were not working. It argues that the condition did not create a safety hazard. Mr. Johnston testified that he would shut down the quarry if the weather conditions were so severe that equipment operators could not see to operate their equipment. He also testified that the loader is not put into service until an hour after the beginning of the shift and that it is shut down well before the end of the shift. He stated that the loader was clearly visible on the day of the inspection and that he could see other equipment and pedestrians from the operator's cab without the use of headlights.

I believe that these factors directly relate to whether the violation was S&S, not to the fact of violation. The inoperable lights were a defect that affected safety and the defect was not corrected in a timely manner to prevent the creation of a hazard to the operator and other persons working in the quarry.

I find that the Secretary did not establish that the violation was S&S. The loader only operated during daylight hours. A safety hazard was presented during inclement weather, especially near the beginning and end of the shift, but it is not reasonably likely that the lack of operable headlights will result in an injury. As stated above with respect to the previous violation, only three individuals worked in the area. I credit the testimony of Mr. Johnston that a loader operator can see obstacles, equipment, and pedestrians when operating the loader without the use of headlights. I also credit his testimony that if visibility becomes so obstructed by fog or other weather conditions that employees cannot see well enough to do their work, he shuts down the quarry. I recognize that the ramp was not protected by berms at the time the citation was issued. This fact increases the hazard presented by the violation, but given the evidence discussed above, including the fact that the ramp was short and wide, I believe that it does not establish that the violation was S&S. I have taken the fact that berms were not present into consideration in assessing the civil penalty.

In many instances, the lack of headlights would create an S&S violation. Under the facts of this case, an injury was not reasonably likely. Other inspectors and administrative law judges have reached the same conclusion in similar circumstances. See *Bob Bak Construction*, 19 FMSHRC 582, 604-05 (March 1997)(ALJ).

I find that the gravity of the violation was moderate because it created a safety hazard to employees. I find that Walker Stone's negligence was moderate. The parties agree that this condition existed for a considerable length of time. This quarry had been inspected numerous times by MSHA inspectors and the condition was not cited during these inspections. David Walker, president of Walker Stone, testified that he would have made sure that headlights were operational on all mobile equipment if he had known that it was required under this standard. Because the standard does not mention headlights and the quarry operates only during daylight hours, he did not understand that headlights were required to be operational under the standard. Nevertheless, similar citations were issued at Portable Plant No. 4 and at the Kansas Fall Quarry in October 1997. Thus, Walker Stone was put on notice of the requirements of the standard at that time.

C. Citation No. 4670675

This citation alleges a violation of 30 C.F.R. § 56.14100(b), as follows:

The drive lights on the Caterpillar 980 C wheel loader were not being maintained in a functional condition. The use of drive lights would make for safer operation of the loader during limited visibility.

Inspector Enderby determined that the violation was S&S and was the result of Walker Stone's moderate negligence. The citation was terminated after the lights were repaired. The Secretary proposed a penalty of \$136 for this alleged violation.

I find that the Secretary established a violation for the same reasons discussed above. Broken headlights on a loader is a defect that affects safety. This loader is the vehicle that is normally used to transport shot rock from the quarry to the crusher. There is no dispute that the cited conditions had existed for a considerable length of time. I find that the inoperable lights were a defect that affected safety and the defect was not corrected in a timely manner to prevent the creation of a hazard to the operator and other persons working in the quarry.

For the reasons discussed above, I find that the Secretary did not establish that the violation was S&S. The loader only operated during daylight hours. A safety hazard was presented during inclement weather, especially near the beginning and end of the shift, but it is not reasonably likely that the lack of operable headlights will result in an injury. I rely on the same facts in reaching this conclusion as I did for Citation No. 4670674. I also find that the gravity of the violation was moderate and that Walker Stone's negligence was moderate.

II. APPROPRIATE CIVIL PENALTIES

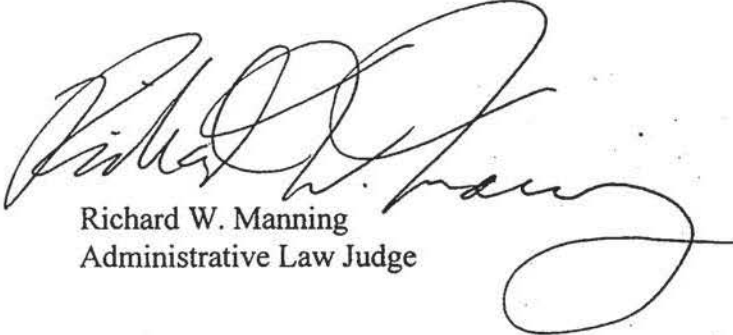
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The parties stipulated to many of the criteria. I find that one citation was issued at the quarry in the 24 months preceding November 13, 1997. The quarry was a small operation employing three individuals at the plant. The Secretary did not submit evidence as to the size of Walker Stone. Based on the penalty points assessed by MSHA, I find that it is a relatively small operator. The violations were rapidly abated. The penalties assessed in this decision will not have an adverse effect on Walker Stone's ability to continue in business. I find that the penalties set forth below are appropriate for the violations.

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>
4670673	56.14101(a)(2)	\$120.00
4670674	56.14100(b)	100.00
4670675	56.14100(b)	100.00

Accordingly, the citations listed above are **AFFIRMED** as modified to delete the S&S determinations, and Walker Stone Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$320.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Barbara J. Renowden, Conference & Litigation Representative, Mine Safety and Health Administration, P.O. Box 25367, Denver, CO 80225-0367 (Certified Mail)

Keith R. Henry, Esq., Weary, Davis, Henry, Struebing Troup & Kaus, P.O. Box 187, Junction City, KS 66441 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

303-844-3577/FAX 303-844-5268

October 26, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-99-M
Petitioner	:	A.C. No. 14-01560-05508
	:	
v.	:	Portable Plant No. 4
	:	
WALKER STONE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Barbara J. Renowden, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner; Keith R. Henry, Esq., Weary, Davis, Henry, Struebing, Troup & Kaus, Junction City, Kansas, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Walker Stone Company ("Walker Stone"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petition alleges two violations of 30 C.F.R. § 56.14100(b). A hearing was held in Junction City, Kansas.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Walker Stone operates a portable crusher and quarry (the "quarry") in Geary County, Kansas. On October 30, 1997, MSHA Inspector Chrystal Dye inspected haulage equipment at the quarry. During her inspection, she issued two citations under section 104(a) of the Mine Act.

Citation No. 4670753 alleges a violation of 30 C.F.R. § 56.14100(b), as follows:

The headlights on the Cat. 980 B loader, No. 19, were not functional to make the loader visible to others and to improve visibility for the operator. Headlights were not necessary during the inspection. It was a sunny day and no visible dust blowing around. No foot traffic in the area.

Citation No. 46707545 is similar to the first citation except that it covers the Cat 980 PG loader. Inspector Dye determined that the violations were not of a significant and substantial nature ("S&S") and were the result of Walker Stone's moderate negligence. Section 56.14100(b) provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The citations were terminated after the lights were repaired. The Secretary proposes a penalty of \$50 for each alleged violation.

I find that the Secretary established the violations. Inoperable headlights on a loader are a defect that affects safety. The quarry does not operate after dark. Its hours are generally 7:30 a.m. to 4:30 p.m. It is almost dark at the beginning and end of the shift at certain times of the year. Weather conditions, such as fog, rain, drizzle, and snowfall, can affect visibility. The quarry is close to a lake and fog is not uncommon in the morning. In such conditions, the loader operator could fail to see other vehicles, equipment, or pedestrians. The quarry employed nine individuals at the time of the inspection. There is no dispute that the cited conditions had existed for a considerable length of time.

Walker Stone does not contest the fact that the lights were not working. It argues that the lack of headlights did not create a safety hazard. Walker Stone contends that other employees working at the quarry can clearly see the loaders without the headlights on and that the headlights do not improve the loader operators' ability to see obstacles, pedestrian, and other equipment. Mike Marts, foreman at the quarry, testified that he shuts down the quarry in inclement weather and whenever visibility is a problem. He also testified that the loaders are put into service after the beginning of the shift and that they stop operating before the end of the shift.

I believe that these factors directly relate to the gravity of the violations rather than to the fact of violation. The inoperable lights were a defect that affected safety and the defect was not corrected in a timely manner to prevent the creation of a hazard to the operator and other persons working in the quarry. Although a loader operator may not normally need headlights to operate safely, conditions can quickly change. For example, the wind can pick up and send dust into the air making it difficult for operators of other equipment to see the loaders. The violations created a safety hazard to employees. I agree with the inspector's analysis that the violations were not highly serious.

Walker Stone argues that MSHA should have exercised its discretion to advise quarry operators of the need to have operable headlights on mobile equipment because the safety standard does not specifically require working headlights. Walker Stone introduced an MSHA document entitled "Metal and Nonmetal Fatality Reduction Program: Talking Points," dated September 1997, that was distributed to mine operators. (Ex. R-A). In this document, MSHA stresses that mine operators should review conditions at their mines to eliminate conditions that have led to fatal accidents. It lists such conditions as inadequate guards, unblocked equipment, and loose ground. It does not mention lights on mobile equipment. Walker Stone's witnesses testified that the company would have taken steps to fix all lights on mobile equipment if it knew that lights were required by MSHA. Its witnesses also testified that the quarry has been inspected by MSHA many times and it has never been cited for inoperable lights on mobile

equipment. These witnesses stated that the subject of lights was never raised by MSHA in the past and that Walker Stone should not be penalized for the lack of headlights.

The Secretary's approach to enforcing her safety and health standards is committed to her discretion. In the absence of proof of an abuse of that discretion, I do not have the authority to vacate citations based on her enforcement strategies. Apparently, the Secretary had become concerned about the number of accidents at metal and nonmetal mines, particularly haulage accidents, and directed MSHA inspectors to conduct inspections that focused on haulage issues at such mines. While I agree with Walker Stone that the Secretary could have issued a more specific memorandum to mine operators that included an instruction to check headlights, her decision not to do so does not constitute an abuse of her discretion. Likewise, the decision of Inspector Dye to issue citations for the lack of operable headlights does not constitute an abuse of discretion. The Mine Act imposes strict liability on a mine operator. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. I cannot vacate the citations on the basis that the Secretary did not provide specific advance guidance to Walker Stone.

I find that Walker Stone's negligence was low. The parties agree that the cited conditions existed for a considerable length of time. This quarry had been inspected numerous times by MSHA inspectors and the conditions were not cited during these inspections. David Walker, president of Walker Stone, testified that he would have made sure that headlights were operational on all mobile equipment if he had known that it was required under this standard. Because the standard does not mention headlights and the quarry operates only during daylight hours, he did not understand that headlights were required to be operational under the standard.

II. APPROPRIATE CIVIL PENALTIES

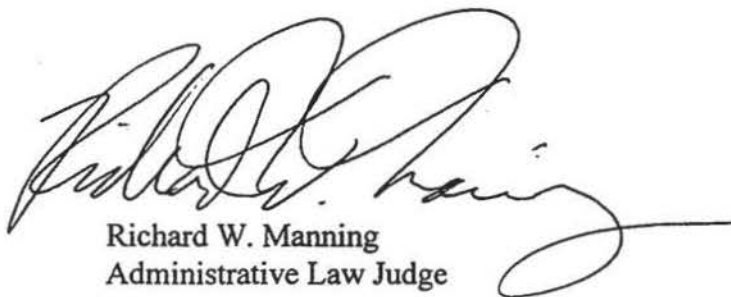
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The parties stipulated to many of the criteria. I find that two citations were issued at the quarry in the 24 months preceding October 30, 1997. The quarry was a small operation employing nine individuals at the plant. Walker Stone is a relatively small operator. The violations were rapidly abated. The penalties assessed in this decision will not have an adverse effect on Walker Stone's ability to continue in business. I find that the penalties set forth below are appropriate for the violations.

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>
4670753	56.14100(b)	\$50.00
4670754	56.14100(b)	50.00

Accordingly, the citations listed above are **AFFIRMED** and Walker Stone Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$100.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Barbara J. Renowden, Conference & Litigation Representative, Mine Safety and Health Administration, P.O. Box 25367, Denver, CO 80225-0367 (Certified Mail)

Keith R. Henry, Esq., Weary, Davis, Henry, Struebing Troup & Kaus, P.O. Box 187, Junction City, KS 66441 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

303-844-3577/FAX 303-844-5268

OCT 26 1998

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

v.

WALKER STONE COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 98-115-M
A.C. No. 14-00164-05535

Kansas Falls Quarry & Mill

DECISION

Appearances: Gary L. Grimes, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing, Troup & Kaus, Junction City, Kansas, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Walker Stone Company ("Walker Stone"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petition alleges one violation of 30 C.F.R. § 56.14100(b). A hearing was held in Junction City, Kansas.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Walker Stone operates a quarry and mill (the "quarry") in Dickinson County, Kansas. On October 29, 1997, MSHA Inspector Chrystal Dye inspected haulage equipment at the quarry. During her inspection, she issued one citation under section 104(a) of the Mine Act.

Citation No. 7925246 alleges a violation of 30 C.F.R. § 56.14100(b), as follows:

The headlights on the Cat. 988 B loader were not functional to make the loader visible to others and to improve visibility for the operator. Headlights were not necessary during the inspection. It was a sunny day and no visible dust blowing around. No foot traffic in the area.

Inspector Dye determined that the violation was not of a significant and substantial nature ("S&S") and was the result of Walker Stone's moderate negligence. Section 56.14100(b) provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The citation was terminated after the lights were repaired. The Secretary proposes a penalty of \$50.

I find that the Secretary established the violation. Inoperable headlights on a loader are a defect that affects safety. The quarry operates during daylight hours only. It is almost dark at the beginning and end of the shift at certain times of the year. Weather conditions, such as fog, rain, drizzle, and snowfall, can affect visibility. The quarry is close to a river and fog is not uncommon in the morning. In such conditions, the loader operator could fail to see other vehicles, equipment, or pedestrians. The loader operator must travel through a tunnel under a county road at the beginning and end of each shift. The quarry employed 25 to 30 individuals at the time of the inspection. There is no dispute that the cited condition had existed for a considerable length of time.

Walker Stone does not contest the fact that the lights were not working. It argues that the lack of headlights did not create a safety hazard. Walker Stone contends that other employees working at the quarry can clearly see the loader without the headlights on and that the headlights do not improve the loader operator's ability to see obstacles, pedestrian, and other equipment. Clifford Moenning, foreman at the quarry, testified that he shuts down the quarry in the event of fog or inclement weather. He also testified that the loader is put into service after the beginning of the shift and that it stops operating before the end of the shift.

I believe that these factors directly relate to the gravity of the violation rather than to the fact of violation. The inoperable lights were a defect that affected safety and the defect was not corrected in a timely manner to prevent the creation of a hazard to the operator and other persons working in the quarry. Although a loader operator may not normally need headlights to operate safely, conditions can quickly change. For example, the wind can pick up and send dust into the air making it difficult for operators of other equipment to see the loader. Headlights may also be necessary in the tunnel, especially on an overcast day at the end of the shift in the autumn or winter. The violation created a safety hazard to employees. I agree with the inspector's analysis that the violation was not highly serious.

Walker Stone argues that MSHA should have exercised its discretion to advise quarry operators of the need to have operable headlights on mobile equipment because the safety standard does not specifically require working headlights. Walker Stone introduced an MSHA document entitled "Metal and Nonmetal Fatality Reduction Program: Talking Points," dated September 1997, that was distributed to mine operators. (Ex. R-A). In this document, MSHA stresses that mine operators should review conditions at their mines to eliminate conditions that have led to fatal accidents. It lists such conditions as inadequate guards, unblocked equipment, and loose ground. It does not mention lights on mobile equipment. Walker Stone's witnesses testified that the company would have taken steps to fix all lights on mobile equipment if it knew that lights were required by MSHA. Its witnesses also testified that the quarry has been

inspected by MSHA many times and it has never been cited for inoperable lights on mobile equipment. These witnesses stated that the subject of lights was never raised by MSHA in the past and that Walker Stone should not be penalized for the lack of headlights.

The Secretary's approach to enforcing her safety and health standards is committed to her discretion. In the absence of proof of an abuse of that discretion, I do not have the authority to vacate citations based on her enforcement strategies. Apparently, the Secretary had become concerned about the number of accidents at metal and nonmetal mines, particularly haulage accidents, and directed MSHA inspectors to conduct inspections that focused on haulage issues at such mines. While I agree with Walker Stone that the Secretary could have issued a more specific memorandum to mine operators that included an instruction to check headlights, her decision not to do so does not constitute an abuse of her discretion. Likewise, the decision of Inspector Dye to issue citations for the lack of operable headlights does not constitute an abuse of discretion. The Mine Act imposes strict liability on a mine operator. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. I cannot vacate the citation on the basis that the Secretary did not provide specific advance guidance to Walker Stone.

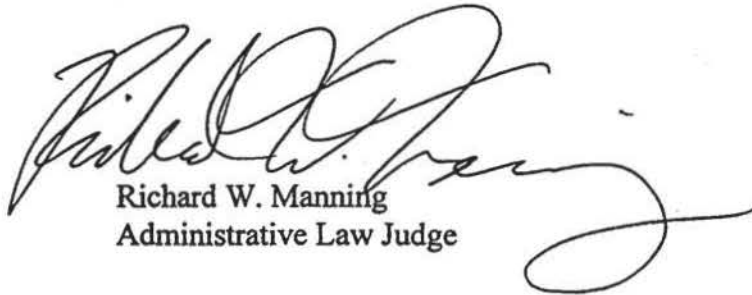
I find that Walker Stone's negligence was low. The parties agree that the cited condition existed for a considerable length of time. This quarry had been inspected numerous times by MSHA inspectors and the condition was not cited during these inspections. David Walker, president of Walker Stone, testified that he would have made sure that headlights were operational on all mobile equipment if he had known that it was required under this standard. Because the standard does not mention headlights and the quarry operates only during daylight hours, he did not understand that headlights were required to be operational under the standard.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The parties stipulated to many of the criteria. I find that 10 citations were issued at the quarry in the 24 months preceding October 29, 1997. The quarry was a medium-sized operation employing 25 to 30 individuals at the plant. Walker Stone is a relatively small operator. The violations were rapidly abated. The penalty assessed in this decision will not have an adverse effect on Walker Stone's ability to continue in business. Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I find that a penalty of \$80 is appropriate for the violation. I increased the penalty slightly based on the history of previous violations at the quarry and the size of the quarry.

III. ORDER

Accordingly, Citation No. 7925246 is **AFFIRMED** and Walker Stone Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$80.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Gary L. Grimes, Conference & Litigation Representative, Mine Safety and Health Administration, P.O. Box 25367, Denver, CO 80225-0367 (Certified Mail)

Keith R. Henry, Esq., Weary, Davis, Henry, Struebing Troup & Kaus, P.O. Box 187, Junction City, KS 66441 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 27 1998

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-255-D
on behalf of ROCOE RAY YOUNG,	:	BARB CD 98-13
Complainant	:	
v.	:	Huff Creek No. 1 Mine
	:	Mine ID 15-17234
LONE MOUNTAIN PROCESSING, INC.,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee on behalf of the Complainant;
Marco M. Rajkovich, Jr., Esq., and Melanie J. Kilpatrick, Esq., Wyatt, Tarrant and Combs, Lexington, Kentucky on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by the Secretary of Labor on behalf of Roscoe Ray Young, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that Lone Mountain Processing, Inc., (Lone Mountain) violated Section 105(c)(1) of the Act, when it failed to hire Young, an applicant for employment.¹

¹Section 105(c)(1) of the Act, provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Motion to Dismiss

In a bench decision the Respondent's motion to dismiss for the alleged untimely filing of the Complaint was denied. That decision is set forth below with only non-substantive changes.

First I am going to rule on the motion to dismiss for untimely filing. This case is before me on the complaint by the Secretary of Labor on behalf of Roscoe Ray Young under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, alleging that Lone Mountain Processing Inc. refused to hire Mr. Young in violation of Section 105(c)(1) of the Act.

It is undisputed that Mr. Young was advised by letter received on September 18, 1997 that he would not be hired by Lone Mountain and that he did not file a complaint with the Mine Safety and Health Administration alleging that he suffered discrimination until December 8, 1997, some 81 days later. Lone Mountain argues therefore that the complaint should be dismissed as untimely.

In relevant part, Section 105(c)(1) of the Act prohibits discrimination against an applicant for employment for engaging in certain protected activities. If the applicant for employment believes that he has suffered discrimination in violation of the Act and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation in accordance with Section 105(c)(2) of the Act

The Commission has held that the purpose of the 60-day time limit is to avoid stale claims but that a miner's late filing may be excused on the basis of justifiable circumstances. The authorities are *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21 (January 1984) and *Herman v. Imco Services* 4 FMSHRC 2935 (December 1982).

In those decisions, the Commission cited the Act's legislative history relevant to the 60-day time limit. I quote: "[w]hile this time limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances, circumstances which could warrant the extension of the time limit would include a case where the miner within a 60-day period brings the complaint to the attention of another agency or his employer or the miner fails to meet the time limit because he is misled as to, or misunderstands his rights under the Act."

The Commission noted accordingly that timeliness questions must be resolved on a case-by-case basis taking into account the unique circumstances of each situation.

At the temporary reinstatement proceedings, the transcript of which has

been incorporated into this record by reference and agreed to by both parties, Mr. Young testified that on September 18, 1997, when he received the letter notifying him that he would not be hired, he thought he had a one-year statute limitations (which he also thought existed with respect to most lawsuits and litigation) within which he had to file his complaint. He testified that he was unaware of the 60-day time limit on filing discrimination complaints. I certainly find this testimony to be credible and that the delay in this case of approximately 21 days beyond the 60-day time limit I find excusable.

In reaching this conclusion, I have not disregarded the testimony that he had annual refresher training and training to receive certification as a mine foreman including training regarding the subject of miner's rights. There is no evidence however that such training specifically informed him of the 60-day filing requirement. I find that the fact that Mr. Young received such training does not suggest that he was indeed informed of the 60-day filing requirement.

The motion to dismiss for untimely filing is denied.

The Merits

This Commission has long held that a Complainant seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of establishing that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981).

It is undisputed that on September 3, 1997, and until September 4, 1997, Young was employed by Arch of Kentucky (Arch) as a roof bolter. In anticipation of a layoff at Arch, Young had applied for employment as a roof bolter at Respondent Lone Mountain's Huff Creek No. 1 Mine. As a condition of employment with Lone Mountain, Young was required to take a timed roof bolting test on September 3, 1997. He claims that during the second part of the test, he encountered unsafe roof conditions. He was given time to correct these conditions by using a scaling bar, but maintains that he nevertheless had to slow down to safely complete the test thereby causing him to fail to meet the requisite speed to be hired. The Secretary argued on his behalf at hearing that even though Mr. Young did not refuse to continue taking the test or request a different testing location, Lone Mountain discriminated against Young by not providing another place for him to take his roof bolting testing.

At the conclusion of Mr. Young's testimony, upon which the Secretary acknowledged she was relying to establish discriminatory retaliation, Respondent filed a motion to dismiss on the grounds that the Secretary failed to establish a *prima facie* case. In a bench decision set forth below with only non-substantive changes, the motion was granted and the case dismissed.

I grant the motion to dismiss filed today for the reason that the secretary has failed to establish a *prima facie* case. First of all, Section 105(c)(1) of the Act provides in relevant part that no person shall in any manner discriminate against or otherwise interfere with the exercise of the statutory rights of any applicant for employment in any coal mine subject to this Act because such applicant for employment has filed or made a complaint under or related to this Act including a complaint notifying the operator or the operator's agent of an alleged danger or safety violation in a coal mine or because of the exercise by such applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

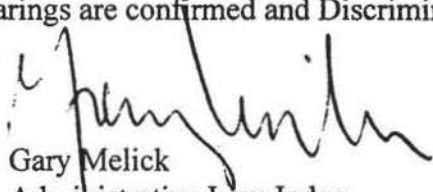
Now, I find first of all that Mr. Young's statement to Mr. Sisk, who is an undisputed agent of the operator--that the roof in the second place in which he was to continue taking the roof bolting test was bad--was indeed a complaint protected under Section 105(c)(1) of the Act. Now, as retaliation, adverse action, or disparate treatment, the Secretary argues that Mr. Young had to continue taking the roof bolting test in the same place he would have had to take the test had he not made a safety complaint.

I presume the Secretary would argue, and I believe this was made in the off-the-record argument, that once Mr. Young made the safety complaint, the operator had an obligation to change the location of the test.² However, since it is undisputed that the location of the test was not changed because of Mr. Young's safety complaint, there is simply no evidence of retaliation or adverse action or disparate treatment.

Mr. Young himself has testified that he was expected to take the test in the second location whether or not he made the safety complaint. The safety complaint that he made did not change the location of the continuation of the roof bolting test. Therefore, the Secretary cannot sustain her burden of proving discriminatory retaliation for that complaint. Therefore, I grant the motion to dismiss.

ORDER

The bench decisions issued at the hearings are confirmed and Discrimination Proceedings Docket No. KENT 98-255-D are dismissed.



Gary Melick
Administrative Law Judge

²The Secretary also acknowledged however that she is not pursuing this case under a "work refusal" theory.

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W. 6TH FLOOR
WASHINGTON D.C. 20006-3868

October 23, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-156-M
Petitioner	:	A. C. No. 09-00075-05529
	:	
v.	:	
MARTIN MARIETTA AGGREGATES,	:	Camak Quarry
Respondent	:	

ORDER TO QUASH AND REVOKE

This case is a petition for the assessment of civil penalties under section 110(a) of the Act. The hearing is scheduled for October 28, 1998.

The Solicitor has filed a motion to quash a subpoena that had been issued to produce Mitchell Adams at the hearing. The operator has filed a motion in opposition. Mr. Adams is an MSHA special investigator in training who participated in the investigation of this matter for the purpose of determining whether action for individual liability should be brought under section 110(c). MSHA has decided not to bring a 110(c) action.

On October 13, 1998, I issued an order directing that Mr. Adams appear for the taking of a deposition. However, in that order I also decided that under Commission precedent MSHA did not have to produce the special investigation report which was privileged. And I noted that any knowledge of special investigators about specific facts was second hand and was available from witnesses closer to the events in question. Finally, I reminded counsel that the deliberative process privilege protected the confidentiality of recommendations and deliberations made by special investigators. On October 21, 1998, Mr. Adams and Mr. Steve Kirkland, the special investigator on the case, were deposed.

In his motion to quash, the Solicitor advises that Mr. Adams is a special investigator in training and that he is scheduled for special training in Denver, Colorado, for the weeks of October 26 and November 2. Attached to the motion is a memorandum dated October 21 to the Solicitor from Terry E. Phillips, the MSHA supervisory special investigator for the Southeastern region. According to Mr. Phillips, the Southeastern region has only one qualified special investigator and the shortage of such investigators is a problem in other MSHA districts. To address this situation, MSHA has set up the course that Mr. Adams is scheduled to attend. Mr. Adams has been in training to become a special investigator and this course is the last critical element in his training necessary to authorize him to conduct investigations on his own. No other classes of this type are scheduled or even planned by MSHA at this time.

In response to the motion to quash, the operator represents that Mr. Adams is a necessary and critical witness for its defense. The operator wishes to have Mr. Adams address the issues of high negligence and unwarrantable failure and in this connection states that many questions about the accident were asked in the special investigation, but not by the inspectors who issued the citations (e.g. who released the brakes of the locomotive and why; and what was the practice and rule at the mine regarding the use of radio communications and setting the brakes).

After carefully considering the motions filed by the parties, I have determined that the motion to quash should be granted. The facts involved in the examples given by the operator, supra, can better be obtained directly from individuals who have first hand knowledge of those matters and who undoubtedly occupy positions of responsibility in the operator's own organization. Insofar as Mr. Adams may have a different view of negligence than the issuing inspectors, it is I who must make the determinations regarding the existence and degree of negligence as well as the propriety of imputation of negligence. The opinions of Mr. Adams who participated in a much later investigation undertaken for different purposes would be of little help to me in reaching conclusions regarding any facet of the negligence issue. In addition, the fact that Mr. Adams has not even completed his training to become a special investigator, further reduces the value and relevance of his opinions.

The foregoing demonstrates sufficient reason to revoke the subpoena so that Mr. Adams may proceed with his scheduled training. 29 C.F.R. § 2700.60(c).

It is **ORDERED** that the motion to quash be **GRANTED** and that the subpoena previously issued be **REVOKED**.

A handwritten signature in black ink, appearing to read "Paul Merlin", with a long horizontal flourish extending to the right.

Paul Merlin
Chief Administrative Law Judge

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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

October 26, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-333-M
Petitioner	:	A.C. No. 04-03425-05503 TIR
	:	
v.	:	Washington Mine
	:	
UNIQUE ELECTRIC,	:	
Respondent	:	

ORDER TO SUBMIT INFORMATION

I issued my decision in this case on April 23, 1997. The Federal Mine Safety and Health Review Commission (the "Commission") vacated the \$400 penalty I assessed against Unique Electric and remanded the case to me for further proceedings consistent with the Commission's decision. The Commission vacated the penalty I assessed based on concepts developed in its decisions in *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (February 1997) and *Ambrosia Coal & Construction Co.*, 19 FMSHRC 819, 823-24 (May 1997). These decisions discuss how penalties should be assessed against agents of corporate mine operators under section 110(c) of the Federal Mine Safety and Health Act of 1997, 30 U.S.C. § 820(c). The \$8,500 penalty in this case was proposed by the Secretary under section 110(a) of the Mine Act. The Commission held that the present case is "akin to one brought against an individual under section 110(c) of the Mine Act" because Kim Warnock, the owner of Unique Electric, was self-employed at the time the citation was issued. *Slip op. at 4.*

In its decision, the Commission directed that I reconsider the penalty taking into consideration the six criteria set forth in section 110(i) of the Mine Act.¹ With respect to the ability to continue in business criterion, the Commission directed that I consider "whether the proposed penalty would affect Warnock's ability to meet his financial obligations." *Id.* With

¹ The criteria are "the [mine] operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i).

respect to the size of the business criterion, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth. *Ambrosia*, 19 FMSHRC at 824. In *Sunny Ridge*, the Commission set forth its analysis with respect to penalties brought against individuals as follows:

The criteria regarding the effect and appropriateness of a penalty can be applied to individuals by analogy, and we find that such an approach is in keeping with the deterrent purposes of penalties assessed under the Mine Act. In making such findings, judges should thus consider such facts as an individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay. Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on gravity of a violation and whether it was abated in good faith can be made on the same record evidence...."

19 FMSHRC at 272.

The Commission further analyzed how penalties should be assessed against individuals in *Wayne Steen, employed by Ambrosia Coal & Construction Co.*, 20 FMSHRC 381, 385-86 (April 1998). The Commission stated that "our judges must engage in a two-step analysis..." as follows: *Id.*

First, they must determine [an individual's] household financial condition. Then they must make findings on the ... "size" and "ability to continue in business" criteria on the basis of the [individual's] share of his or her household's net worth, income, and expenses.

In order to perform this analysis, Mr. Warnock shall provide me with the following information on or before **November 17, 1998**:

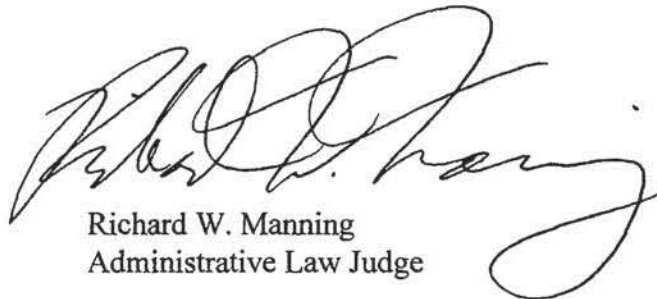
1. A statement of Mr. Warnock's income in 1997. The statement should indicate whether there has been a major change in income since December 1997.
2. A statement of Mr. Warnock's net worth and financial obligations. This information should be in the form of a balance sheet showing his major assets and liabilities. The statement should indicate which assets are held jointly with his wife or any other individual and which liabilities are joint obligations. Mr. Warnock shall also describe his "family support obligations" and his share of his "household's net worth, income and expenses."

3. Any argument that Mr. Warnock wishes to make concerning the facts and issues involved in this case.

A copy of these statements should also be sent to Ms. Coplick at the Department of Labor. In conjunction with information request No. 1, Mr. Warnock shall also send me a copy of his 1997 Federal Tax return. He need not send the tax return to Ms. Coplick. I will place my copy under seal so that it is not available to the public.

The Secretary of Labor shall file any response to Mr. Warnock's filing on or before **December 4, 1998.**

The parties should understand that, based on my review of the record in this proceeding and the information provided by Mr. Warnock, the penalty I assess may be higher, lower, or the same as the \$400 penalty I assessed in my April 23, 1997, decision. The parties are encouraged to confer in an attempt to reach agreement on a penalty or to enter into stipulations regarding the penalty criteria or the financial information submitted by Mr. Warnock. If the parties wish to hold a conference call with me to discuss these issues, they are invited to do so.



Richard W. Manning
Administrative Law Judge

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Mr. Kim Warnock, 1136 Cedar Street, Shasta Lake City, CA 96019

RWM

