OCTOBER 1999

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

OCTOBER 1999

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

Secretary of Labor, MSHA v. Rostosky Coal Company, Docket No. PENN 99-73.
(Judge Bulluck, September 3, 1999)

There were no cases filed in which Review was denied during the month of October

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 13, 1999

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

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

DIRECTION FOR REVIEW AND ORDER

BY: Marks, Verheggen 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"). On October 5, 1999, the Commission's Office of Administrative Law Judges received a petition for discretionary review from Joseph Rostosky challenging a decision issued by Administrative Law Judge Jacqueline Bulluck against Rostosky Coal Company ("Rostosky") on September 3, 1999. 21 FMSHRC 1017 (Sept. 3, 1999) (ALJ). Rostosky is not represented by counsel but by its co-owner, Joseph Rostosky. In her decision, Judge Bulluck affirmed a citation and an order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"), ordered Rostosky to pay a civil penalty of $2,000, and directed that the case be dismissed upon receipt of payment. *Id.* at 1023.

Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A); 29 C.F.R. § 2700.70(a). Rule 70(d) of the Commission's Procedural Rules also requires that in a petition for discretionary review, "[e]ach issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record, when assignments of error are based on the record, and by statutes, regulations, or other principal authorities relied upon." 29 C.F.R. § 2700.70(d); *see also* 30 U.S.C. § 823(d)(2)(A)(iii).

The Commission received Rostosky's petition for filing on October 5, 1999, 1 day past the 30-day deadline.[1] His petition also fails to meet the requirements of Rule 70(d). The Commission, however, has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). The Commission has also entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g., McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204 (June 1980) (finding good cause where counsel for previously pro se complainant only obtained judge's decision 10 days prior to deadline for filing petition, and mailed petition on 30th day). In keeping with these principles, we believe that since Rostosky was not represented by counsel, we should not dismiss this petition because it was 1 day late.[2]

Additionally, in the interests of justice, we conclude that Rostosky be afforded the opportunity to conform his petition to the requirements of the Mine Act and our Procedural Rules. Therefore, upon consideration of Rostosky's petition, it is hereby granted for the limited purpose of affording Rostosky an opportunity to amend his petition to comply with the requirements of section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). Any such amended petition must include a statement of issues identifying those portions of the judge's decision that he believes were wrongly decided.

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[1] Although, Rostosky's petition was mailed on October 1, 1999, within the 30-day deadline for filing, it was received by the Commission's Office of Administrative Law Judges on the 31st day, October 5. Rule 70(a) of the Commission's Procedural Rules specifies that "[f]iling of a petition for discretionary review . . . is effective upon receipt." 29 C.F.R. § 2700.70(a).

[2] In *Dykhoff v. U.S. Borax Inc.*, 21 FMSHRC 976 (Sept. 1999), the Commission denied a petition for discretionary review as untimely filed. Commissioners Marks and Beatty dissented from the majority's order dismissing the pro se miner's petition on timeliness grounds. *Id.* at 979. Commissioner Verheggen notes that he would have denied Dykhoff's petition notwithstanding its untimeliness because it was based on facts that did not serve as the basis for his original complaint and attempted to advance an alternative theory of discrimination not raised before the judge. *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319-21 (Aug. 1992). To the extent that *Dykhoff* could be read to stand for the proposition that untimely petitions for discretionary review made by pro se litigants be routinely denied, Commissioner Verheggen rejects such a reading.

Rostosky must file any amended petition with the Commission, with service upon the Secretary, within 20 days. The Secretary may file an opposition to the amended petition within 10 days after service.[3]

Mark Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[3] Chairman Jordan and Commissioner Riley would deny the petition for review as untimely, since it was received after the thirty-day deadline and included no explanation for the late filing. Administrative law judge decisions sent to parties routinely include a notice that a party seeking review must make sure that his or her petition for review is received by the Commission within thirty days after the date of issuance of the administrative law judge's decision.

They also are mindful of the difficulty encountered by the pro se litigant, and note that, upon reasonable explanation, they have shown flexibility towards late-filed petitions. However, they also note that Rostosky offers no explanation for his late filing, nor states any basis for appellate review in his letter. They believe that granting even limited review under such circumstances makes a nullity of the Commission's procedural rules.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 99-164-M
	:	A.C. No. 24-01302-05508
RAVALLI COUNTY	:	

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

ORDER

BY: Jordan, Chairman; 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"). On June 25, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Ravalli County ("Ravalli") for failing to answer the Petition for Assessment of Penalty filed by the Secretary of Labor on April 1, 1999, or the judge's Order to Respondent to Show Cause issued on May 14, 1999. The judge assessed the civil penalty of $954 proposed by the Secretary.

On September 9, 1999, Judge Merlin received a facsimile from Ravalli, which included a copy of a letter dated June 30, 1999 from Ravalli's attorney to the Department of Labor's Mine Safety and Health Administration's ("MSHA") District's Office in Denver, Colorado, requesting that the default order be set aside and a proceeding on the merits allowed. Mot. at 1. With this request, Ravalli also attached a copy of a letter dated April 28, 1999 sent to MSHA's District Office, contesting the citations and a letter dated June 29, 1999 from Ravalli to its attorneys regarding its actions in handling this matter and the default order entered by Judge Merlin in this proceeding. *Id.* at 3-5. In its June 30 letter to MSHA, Ravalli asserts that it believed that its April 28 letter to MSHA satisfied its filing requirements in response to the Secretary's petition for assessment of penalties and the judge's show cause order. *Id.* at 1. It also alleges that it believed MSHA's District's Office would forward its letter to the Federal Mine Safety and Health Review Commission ("the Commission") and would have sent the letter to the Commission itself if it had known MSHA would not forward its letter. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued on June 25, 1999. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission received Ravalli's letter on September 9, 1999, more than 30 days after the judge's default order had become a final decision of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances involving mistake, inadvertence, or excusable neglect. *F. W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995); *see* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). On the basis of the present record, we are unable to evaluate the merits of Ravalli's position. In the interest of justice, we reopen the proceeding, treat Ravalli's letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See Cecil Kilmer Flagstone*, 21 FMSHRC 480, 481 (May 1999) (treating letter misdirected to Regional Solicitor's Office as a late-filed petition requesting relief from a final order and remanding to judge); *F. W. Contractors*, 17 FMSHRC at 248 (treating letter asserting that answer had been misdirected to Regional Solicitor's Office as late-filed petition and remanding to judge).

We remand this matter to the judge, who shall determine whether final relief from default is warranted under Rule 60(b).[1] If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] In view of the fact that the Secretary does not oppose Ravalli's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 27, 1999

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

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

ORDER

BY THE COMMISSION:

Before us is a Motion to Reopen Case filed by Durango Gravel ("Durango") on October 4, 1999. Mot. Durango seeks to reopen the above-captioned discrimination matter in which we determined that Durango's termination of complainant Clay Baier violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (1994) ("Mine Act"). 21 FMSHRC 953 (Sept. 1999). In its motion, Durango claims that, on September 26, 1999, Baier admitted to Jim Helmericks, owner of Durango, that "the reason he brought his action was to recover money [Helmericks] withheld from his pay to recover damages to . . . equipment, and had nothing to do with [Baier's] concern for safety." Mot. Durango states that this admission constitutes "new evidence" and requests that we reopen the above-captioned proceeding so that we may "discover what really took place in this incident." *Id.*

The Secretary of Labor opposes Durango's motion. The Secretary construes Durango's motion as one for relief from final judgment under the "newly discovered evidence" provision of Federal Rule of Civil Procedure 60(b). S. Opp'n at 1. The Secretary submits that Baier's alleged admission that he brought this discrimination proceeding to recover money Durango withheld from his paycheck was not in existence at the time of the hearing, and that such evidence would not produce a different outcome. *Id.* at 2, 5. She also maintains that Baier's motivation in bringing his 105(c) claim is irrelevant to the merits of the case and that the alleged admission is duplicative of evidence Durango produced at the hearing that Baier's filing of a discrimination claim was motivated by a desire to recover money withheld by Durango. *Id.* at 2-6.

Although Durango does not specify the basis for its motion, we construe Durango's motion as a request for relief from final Commission judgment based on newly discovered evidence under Fed. R. Civ. P. 60(b)(2). To establish that Rule 60(b)(2) relief is appropriate, the

newly discovered evidence must have existed at time of trial or concern facts that were in existence at time of trial, and must be sufficiently significant that it is likely to change the outcome of the case. 12 James Wm. Moore et al., Moore's Federal Practice § 60.42[2] (3d ed. 1998) ("Moore's Federal Practice"); *Bruno v. Cyprus Plateau Mining Corp.*, 11 FMSHRC 150, 153 (Feb. 1989).

Here, the evidence Durango seeks to introduce relates to its claim at the hearing that Baier filed his complaint to recover money withheld by Durango. Tr. 47-48, 53, 144-147, 154-55. Other evidence of Baier's motivation in bringing his discrimination claim existed at the time of the hearing. Tr. 144-47, 155. Accordingly, Durango has met the Rule 60(b)(2) requirement that the newly discovered evidence relate to facts in existence at the time of trial. *See* 12 Moore's Federal Practice § 60.42[2] (citing *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1075 n.3 (D.C. Cir. 1983) (stating that crucial inquiry is whether proffered evidence relates to facts in existence at time of trial, rather than whether the proffered evidence existed at time of trial)).

However, the evidence Durango seeks to introduce is not material to any of the issues tried. Our analysis of discrimination cases focuses on whether the adverse action an operator takes upon a complainant was motivated by the complainant's protected activity, and, if so, whether the operator would have subjected the complainant to adverse action notwithstanding the protected conduct. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 & n.20 (Apr. 1981).

By contrast, the evidence Durango presents in its motion relates solely to Baier's motivation in filing his discrimination claim (Mot.), and is not related to any element of the Commission's discrimination framework. Moreover, while Baier's complaint initiated the Secretary's investigation, it was the Secretary who initiated the discrimination proceeding on Baier's behalf. 21 FMSHRC at 955. To the extent Durango seeks to use Baier's alleged admission to attack his credibility, Commission and federal caselaw interpreting Rule 60(b)(2) make clear that the newly discovered evidence may not be mere impeachment evidence. *See Bruno*, 11 FMSHRC at 153; *Baxter Int'l, Inc. v. Morris*, 11 F.3d 90, 93 (8th Cir. 1993) (evidence that defendant had used proprietary information to start his own business would have only been used to impeach defendant's character, it would not contradict trial testimony). Finally, given that Durango presented evidence at the hearing (Tr. 47-48, 53, 144-147, 154-55) that Baier was motivated to file his claim by a desire to recover money withheld from his paycheck, the purported newly discovered evidence is merely cumulative. *See, e.g., Parrilla-Lopez v. United States*, 841 F.2d 16, 19 (1st Cir. 1988) (stating that proffered evidence "would be cumulative, and therefore is not newly discovered evidence"); *Trans Mississippi Corp. v. United States*, 494 F.2d 770, 773 (5th Cir. 1974) ("evidence merely cumulative or impeaching is not generally within the canon of 'newly discovered evidence' for . . . Rule 60(b) purposes").

In any event, Baier admitted at hearing that one of the major reasons he contacted MSHA was so that he could recover wages he felt Durango owed him. Tr. 144, 155. Thus, Baier's alleged admission is not of sufficient magnitude that it is likely to change the outcome of the case. *See Bruno*, 11 FMSHRC at 153-54; *see also Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211-12 (9th Cir. 1987) (denial of motion proper because "the [newly-discovered evidence], even if produced in a timely fashion, would not have propelled . . . [movant] over the hurdle of summary judgment.").

Accordingly, we reject Durango's request for relief from the Commission's decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
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Falls Church, Virginia 22041

October 4, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 98-131-M A. C. No. 41-03878-05506
v.	:	
	:	Gibbs Pit
ODELL GEER CONSTRUCTION, COMPANY, INCORPORATED, Respondent	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 99-124-M A. C. No. 41-03878-05507
v.	:	
	:	Gibbs Pit
WILLIAM A. HOOTEN, JR. Employed by ODELL GEER CONSTRUCTION, COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Suzanne F. Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Rodney P. Geer, Esq., Odell Geer Construction Company, Inc., Belton, Texas, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Odell Geer Construction Company, Inc., and William A. Hooten, Jr., respectively, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege five violations of the Secretary's mandatory health and safety standards and seek a penalty of $25,000.00 against the company and a penalty of $2,500.00

against Hooten. A hearing was held in Austin, Texas. For the reasons set forth below, I affirm the citation and orders and assess penalties of $15,000.00 and $500.00, respectively.

Background

Odell Geer Construction operates the Gibbs Pit mine in Youngsport, Texas. The mine consists of a crusher and wash plant. The wash plant was set up in May or June of 1997. On October 20, 1997, MSHA Inspector Robert D. Seelke conducted a regular inspection of the Gibbs Pit. During the inspection he observed five conveyor belts in the wash plant which did not have catwalks, hand rails or any other apparent means of safely accessing the head pulleys, which were at least 12 feet off of the ground.

After talking with miners working around the belts, Seelke determined that the head pulleys were being maintained by a miner walking up the inclined conveyor belt. As a result, he issued one citation and four orders under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging violations of section 56.11001 of the Secretary's regulations, 30 C.F.R. § 56.11001. Citation No. 7860014 alleged that:

> A safe means of access was not being provided to the head pulley of the over the screen belt at the wash plant. Employees had to walk the inclined conveyor to the head pulley which was approximately 20 foot [*sic*] above ground level. Hand rails were not provided. Employees stated that they must grease the head pulley at least every other day. This condition has existed for approximately 6 weeks. It was determined that the superintendent was aware of the hazard and had made no apparent effort to correct it. This is an unwarrantable failure.

(Govt. Ex. 6.)

Order Nos. 7860015, 7860016, 7860017 and 7860018 were worded identically, except for the name of the conveyor belt involved. They stated:

> A safe means of access was not being provided to the head pulley of the "D" belt ["B" belt, "F" belt, screen belt] at the wash plant. Employees had to walk the inclined conveyor to the head pulley which was approximately 12 to 15 feet above ground level to perform maintenance work. Hand rails were not provided. Employees stated that they must grease the head pulley at least every other day. This condition has existed for approximately 6 weeks. The superintendent Jr. Hooten engaged in aggravated conduct constituting more than ordinary negligence in the fact that he knew employees were accessing the head pulley and had made not apparent effort to correct it. This is an unwarrantable failure.

(Govt. Ex. 6.)

After the citation and orders were issued, a 110(c), 30 U.S.C. § 820(c), special investigation was conducted to determine if any of Odell Geer's agents should be held personally liable for the violations. As a consequence of this investigation, the Secretary filed a Petition for Assessment of Penalty against William A. Hooten, Jr., commonly referred to as Junior Hooten.

Findings of Fact and Conclusions of Law

Section 56.11001 requires that: "Safe means of access shall be provided and maintained to all working places." The company concedes that it violated the regulation, but contests the "significant and substantial," "unwarrantable failure" and 110(c) allegations. (Tr. 311-12, 317.) I find, however, that the violations occurred as alleged by Inspector Seelke.

Significant and Substantial

A "significant and substantial" (S&S) 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 S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary 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.

See also Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., 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).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As usual, it is the third criterion -- whether the violation is reasonably likely to result in an injury -- which is in question. There is no doubt that the violations occurred. Nor is there any claim that the violations would not contribute to a safety hazard. No evidence was presented that any injury was ever suffered by anyone walking up the belts, or at least none was ever reported.[1] However, Steven Gore, the employee responsible for greasing the head pulleys a minimum of every other day, testified that the belts consisted of: "Slick black rubber. It had just a minute amount of material on it. It was pretty slick, especially if it had some of the smallest rock that's made, F rock. If it had a little bit on there you'd have to hold onto the belt to walk up there." (Tr. 25.) He said that he had "fallen lots of times." (*Id.*)

Since the only way to access the head pulleys was to walk up the belts and since the belts were slick and did not provide a uniform, firm surface, I conclude that the lack of hand rails or other safe means to grease the head pulleys contributed to a reasonable likelihood that someone would be injured by slipping and falling off of the belts.[2] In view of the height of the belts at their head pulleys, it is apparent that a fall off of the belt would result in a reasonably serious injury involving broken bones at a minimum. Accordingly, I conclude that the violations were "significant and substantial."

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[1] Steven Gore testified that he had a "few slippages and falling down once in awhile. I didn't claim it on L&I and it was never talked about." (Tr. 30.)

[2] In reaching this conclusion, I reject the company's argument that a crane, which was located on the property, or a man-lift could have been used to work on the head pulleys. No one, from the safety director on down, testified that it had occurred to them to use the crane for such tasks or that they had suggested to Horace Kelley, the foreman, or Gore that the crane be used. Furthermore, the company did not even own a man-lift, but would have had to rent one every time work on the head pulleys was required.

Unwarrantable Failure

The term "unwarrantable failure" is also found in section 104(d)(1) of the Act, which establishes more severe sanctions for any violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The Commission has established the following factors as being indicative of whether a violation is unwarrantable:

> [T]he extent of a violative condition, the length of time 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, and the operator's efforts in abating the violative condition. *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); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. *E.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (August 1998).

In this case, it is undisputed that five of the six conveyor belts in the wash plant violated the regulation; thus, the violation clearly was extensive. It is also undisputed that the violations had existed since the conveyor belts were erected in July 1997 until the citation and orders were issued in October 1997, a considerable length of time. In addition, the violations were obvious. Inspector Seelke testified that: "Not seeing any catwalks, handrails, manlifts on site, that question came into my mind. And I asked the question, how do you maintain your head pulleys [?]" (Tr. 119-20.) John L. Rovetto, company safety director, testified on this issue as follows:

JUDGE: Mr. Rovetto, when you were accompanying the inspector on the inspection, you said that when he looked up at the head pulley you knew what he was going to ask?

A. Yes, sir.

JUDGE: How did you know what he was going to ask you?

A. I could see the grease hoses weren't there, sir.[3]

JUDGE: So it was readily apparent then?

A. If you were standing under the head pulley, yes, sir.

(Tr. 286-87.) On the other hand, the violations do not appear to have posed a high degree of danger, nor had the operator been placed on notice that greater efforts were necessary for compliance.

It is apparent that the operator was aware of the existence of these dangerous condition from the time the conveyor belts were constructed. Rovetto testified that he had an "on-the-ground conference" with Ed Zvolanek, the superintendent prior to Hooten, Hooten and Kelley in June before the conveyors were erected and told them that the easiest way to put catwalks and railings on the conveyors would be to put them on while the conveyors were on the ground, before they were raised. (Tr. 253.) He further testified that in mid-July Kelley came to him and told him that the conveyors were being put up without the catwalks. He said that after he checked into the matter, he informed Kelley that grease hoses were going to be installed. Rovetto and Hooten both testified that they assumed that Kelley had had the grease hoses installed, although neither bothered to check.

Kelley testified that he was given grease hoses to install at the crusher, but not on the head pulleys. He claimed that he talked to Rovetto and Hooten on several occasions about the unsafe means of accessing the head pulleys to grease them. Gore testified that he also complained to Hooten about having to climb up the belt to grease the head pulley. Hooten denied that anyone ever told him that the head pulleys were being accessed by walking up the belt.

The company implies that Kelley deliberately failed to install the grease hoses, after being told to do so, because he was miffed at Hooten having been selected as superintendent rather than he. This argument, although plausible, provides no defense to the unwarrantable failure allegation. In the first place, I find Kelley's testimony to be credible and Hooten's not to be. In

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[3] Hooten and Rovetto testified that catwalks and railings were not necessary because they had intended to install grease hoses on the head pulleys so that the pulleys could be greased from the ground.

the second place, even if Hooten's testimony were believable, it would not provide any support to the company's position that it did not act unwarrantably.

Hooten testified that he and Kelley did not always see "eye-to-eye," that Kelley did not always do what he was told and that, as a result, he checked up on most, if not all, of the things he directed Kelley to carry out. (Tr. 227-29.) Hooten also admitted stressing to Gore the importance of regularly greasing the head pulleys. Yet, he claimed he never checked to see if the grease hoses had been installed. If true, this indicates extraordinary indifference in direct contrast to his assertion that he had to follow-up on everything that Kelley did.

Finally, if Kelley did intentionally not install the grease hoses, the company is still not absolved. As foreman, Kelley was an agent of the operator. Therefore, his actions are attributable to the operator and clearly demonstrate an unwarrantable failure.

While testifying on this issue, Rovetto said: "After hearing testimony today, I have to believe that someone knew the hoses weren't put on there." (Tr. 270.) I reach the same conclusion, and find that Rovetto, Hooten and Kelly all knew, or should have known, that the conveyors did not have a safe means of access, and that Hooten and Kelley knew, or should have known, that they were being accessed unsafely.

In conclusion, the violations in this case were extensive, involving five of the six conveyor belts at the wash plant, they had been in existence for at least three months, they were obvious and the operator was aware of their existence. All of this demonstrates an indifference to the problem and a serious lack of reasonable care on the part of the Respondent. Accordingly, I hold that the violations in this case were the result of the company's unwarrantable failure to comply with the regulation.

Hooten's 110(c) Liability

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held that to violate section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

The evidence in this case that Hooten acted knowingly is overwhelming. I find the testimony of Gore and Kelley that they specifically told him that something needed to be done because the head pulleys were being accessed by climbing up the belt to be credible. Further, I find Hooten's claim that he did not know how the belt was being accessed to be incredible. By his own testimony he spent 70 percent of his time at the Gibbs Pit. According to him, much of

that time was spent checking up on Kelley. It is impossible to believe that he spent that much time on the ground yet never noticed anyone walking up the conveyor belt or that the grease hoses had not been installed.

Moreover, his asserted lack of knowledge is contradicted by his response to the inspector when asked how the head pulleys were accessed. He said: "I don't know. I guess they must be using the conveyor." (Tr. 252.) He later told James Thomas, the special investigator, the same thing, that "he assumed the way they were going up there was by walking up the conveyor." (Tr. 169.) To neither inspector did he express any shock or dismay that the grease hoses had not been installed, or attempt to explain that he had directed their installation.[4]

Consequently, I find that Hooten was in a position to affect safety and that he failed to act even though he had knowledge that the conveyor belts had no safe means of access. Therefore, I conclude that he acted knowingly and is liable under section 110(c) of the Act.

Civil Penalty Assessments

The Secretary has proposed penalties of $5,000.00 for each of the five violations by the company and $500.00 for each of the five violations by Hooten. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

The Company's Penalty

In connection with the penalty criteria concerning the company, the parties have agreed that: (1) the operator demonstrated good faith in abating the violations; (2) Odell Geer Construction worked 58,736 man hours in 1997, of which 34,449 were worked at the Gibbs Pit; and (3) Odell Geer Construction Company's ability to remain in business would not be adversely affected by the payment of a $25,000.00 penalty. (Tr. 291-94.) From this I find that the company demonstrated good faith in abating the violations; that both the mine and its controlling entity are small operations; and that Odell Geer's ability to remain in business will not be affected by a penalty imposed in this case.

Based on the company's Assessed Violation History Report, (Govt. Ex. 1), I find that the company has a very low history of prior violations. Because these violations could have resulted in a serious injury, I find that the gravity of the violations was serious. Further, in accordance with the finding that these violations resulted from an unwarrantable failure, I find that the operator's negligence was "high."

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[4] In fact, the only disagreement anyone from the company raised concerning these violations, when they were issued, was to request that they be included in a "single citation." (Tr. 287-88.)

Taking all of the penalty criteria into consideration, I conclude that a penalty of $3,000.00 is appropriate for each violation.

Penalty for William A. Hooten, Jr.

Because no evidence was presented at the hearing concerning the penalty criteria and Hooten, I asked the parties to stipulate "how the penalty criteria would affect Mr. Hooten" and to submit it in writing as Joint Exhibit 1. (Tr. 297-98.) Joint Exhibit 1 was filed on August 4, 1999. However, it only consists of an affidavit by Mr. Hooten setting out his income and expenses. According to that, he has annual expenses of $26,047.44 and an annual "take home" income of $26,613.69.

In connection with the penalty criteria, as applied to individuals, I find that the gravity of these violations was serious, that Hooten's negligence was "high," that he has no previous history of 110(c) violations and that he is the mine superintendent. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997).

Since the affidavit submitted does not state whether Hooten is married, I cannot perform a two step analysis of his financial position because I cannot determine either his household financial condition or his share of the household's net worth, income and expenses. *Wayne R. Steen*, 20 FMSHRC 381, 385 (April 1998). Thus, there is no evidence as to his "size" or "ability to continue in business." *Id.*

The remedy for this circumstance, however, is not to further delay this case by requesting additional information, but to find that, by failing to submit the 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.

Taking all of the penalty criteria into consideration, I conclude that a penalty of $100.00 for each violation is appropriate.

Order

Citation No. 7860014 and Order Nos. 7860015, 7860016, 7860017 and 7860018 in Docket No. CENT 98-131-M and the civil penalty petition in Docket No. CENT 99-124-M, alleging that William A. Hooten, Jr., knowingly authorized the violations in the citation and

orders, are **AFFIRMED.** Accordingly, Odell Geer Construction Company, Inc., is **ORDERED TO PAY** a civil penalty of **$15,000.00** and William A. Hooten, Jr., is **ORDERED TO PAY** a civil penalty of **$500.00**, within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

October 6, 1999

UNITED MINE WORKERS OF AMERICA, LOCAL UNION 2232, DISTRICT 20, on behalf of MINERS, Applicants,	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. VA 99-79-C
ISLAND CREEK COAL COMPANY, Respondent	:	VP No. 8 Mine Mine ID 44-03795

DECISION

Appearances: Max Kennedy, International Representative, United Mine Workers of America, Castlewood, Virginia, for the Applicants;
Elizabeth S. Chamberlin, Esq., Consol, Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint for Compensation filed by the United Mine Workers of America ("UMWA"), pursuant to section 111 of the Federal Mine Safety and Health Act of 1977 ("the Act") seeking compensation due certain miners employed by Island Creek Coal Company ("Island Creek") on the ground that they were withdrawn from Island Creek's VP8 Mine pursuant to a section 107(a) Withdrawal Order issued on December 2, 1998. The case was heard in Kingsport, Tennessee, on June 24, 1999. On September 22, 1999, the Respondent filed a Post Hearing Brief. On September 24, 1999, the Applicants filed a Post Hearing Brief.

I. Findings of Fact

On December 2, 1998, David Fowler, an MSHA inspector, accompanied by Billy Eugene Shelton, a miner employed by Island Creek who was a union walk-around, and Michael Canada, Island Creek's mine safety inspector, inspected the three south entries, in Island Creek's VP8 Mine, an underground coal mine. Fowler, along with Canada and Shelton, proceeded to walk south down the No. 1 entry of the three north mains area. Fowler and Canada had digital methane detectors with them. Before they reached the No. 1 west development area, Fowler's

methane detector indicated a reading of 2.1 percent, and Canada's detector indicated 1.8 percent. Fowler told Canada that he would issue a citation if it would subsequently be determined that his detector was accurate.[1]

Since Fowler's digital methane detector had revealed elevated methane, the inspecting party proceeded to walk further south down the entry to investigate the source of the methane, and the areas affected in order to eliminate this hazard. In the area of the No. 1 entry east of the No. 19 seal, Fowler and Canada took additional methane readings with their digital detectors. Fowler's detector indicated a reading of 4.5 percent.[2] Fowler told Shelton to bring him his Riken methane detector which is more accurate than the digital detectors Fowler and Canada had been using. Canada than told Fowler that he would have to pull his people based on Virginia law, if the Riken detector would indicate methane of 4.5 percent. Fowler determined to continue his investigation.

At approximately 11:30 a.m., Shelton returned with the Riken detector which revealed a methane reading of 4.5 percent in the No. 2 development area. Canada left Fowler and Shelton to call the mine dispatcher. Canada told the latter to get everyone out of the mine due to elevated methane.

Fowler and Shelton then continued south down the No. 1 entry to investigate further. Elevated methane readings up to 10 percent were observed in the Nos. 4 and 5 development areas. In addition, plaster sealing the Nos. 4 and 5 development areas from the gob area was no longer intact, evidencing the presence of methane.

At approximately 12:00 n., Canada rejoined Fowler in the No. 4 development area where methane in the range of 8 to 9 percent was detected. Fowler told Canada that a section 107(a) order would be issued because ". . . [h]e knew what area was involved, how much methane was involved, and was sure of the origination"(Tr. 69). According to Fowler, he asked Canada or another management official "to remove the men from underground" (Tr. 73). According to Canada, Fowler never told him to withdraw any miners, nor did he discuss the scope of the 107(a) order, or whether it required the withdrawal of anyone from the mine. In this connection, on cross-examination, Fowler agreed that it is possible that he told Canada that he was not considering a 107(a) order because the men had already been withdrawn.

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[1]/ At 12:12 p.m., Fowler issued a section 104(a) citation, No. 7297958, alleging a violation of 30 C.F.R., § 75.323(e), which was subsequently vacated.

[2]/ Canada's detector indicated a methane level a few tenths less than indicated on Fowler's detector.

It was stipulated that the 107(a) order was issued at 12:12 p.m. Fowler explained that it was then that he determined that the miners should be withdrawn. The order, that Fowler reduced to writing when he exited the mine, contains Fowler's description of the conditions warranting the issuance of the order. In paragraph 15 of the order, under the hearing *Area or Equipment,* Fowler set forth as follows: "5 Dev. and 4 Dev." There are no other words used in the order to describe the area of the mine subject to the order i.e., the area from which miners were ordered to be withdrawn.[3]

Sometime after 1:00 p.m., after the order was issued, Fowler met some rank and file miners at the B shaft, and told them to go outside. Fowler informed Terry Suder, the mine's superintendent, that he needed to make sure to get everyone out of the mine. It was stipulated that the first miners exited the mine at approximately 1:30 p.m.

II. Section 111 of the Act

The Applicants' right to compensation is predicated upon section 111 of the Act, which, as pertinent, provides as follows:

> If a coal or other mine or area of such mine is closed by an order issued under . . . section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the results of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift.

III. Discussion

The present controlling authority for the issues at bar is *Local Union 1261, District 22, UMWA* v. *Consolidation Coal Company*, 11 FMSHRC 1609 (1989), *Aff'd sub nom. Local Union 1261* v. *FMSHRC*, 917 F.2d 42 (D.C. Cir. 1990). As in the case at bar, the issue therein was whether miners are entitled to compensation under the first and second sentences of section 111 when the mine operator has voluntarily closed the mine for safety reasons prior to the issuance of an order described in section 111, but where such an order is subsequently issued.

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[3]/ In paragraph 10 of the order, *Gravity*, subparagraph D, *The Number of Persons Affected*, Fowler set forth as follows "060." Fowler explained in his testimony that he thought at the time that there were 60 miners underground. On its face, the number of persons affected relates to the gravity of the violative conditions, rather than being a specific designation of the area of the mine being subject to an order of withdrawal.

The Commission in that case, at 11 FMSHRC 1613-1614, held as follows:

> The meaning of the first two sentences of section 111 is clear. If a specified withdrawal order has been issued, "all miners working during the shift when such order was issued who are idled by such order" are entitled to compensation for the remainder of their shift. (Emphasis added.) If the order is not terminated prior to "the next working shift, all miners on that shift who are idled by such order" are entitled to compensation for up to four hours. (Emphasis added.) The language is in nowise qualified. Thus, to be entitled to shift compensation, a miner must either be working during the shift when the specified order was issued and have been idled by the order or, if the order is not terminated prior to the next working shift, must be on the next working shift.
>
> Here, the preconditions for entitlement to shift compensation were not met. At the time the order was issued, no miners were working nor had they been since the previous evening at which time Consol had voluntarily withdrawn all miners in order to guarantee their safety. Therefore, none of those for whom compensation is claimed were "working during the shift when . . . [the] order was issued." Further, Consol advised miners on the other two shifts that "the mine is idled until further notice." [Citation omitted.] Therefore, none of those for whom compensation is claimed were on "the next working shift." (Emphasis added.) [Footnote omitted.] We therefore hold that the claimants, not having met these plainly stated prerequisites, were not eligible to be compensated.

The court of Appeals, on review, held that the Commission's interpretation limiting the phrase "working during the shift," to miners actually working when the order is issued, was a reasonable interpretation. *Local Union 1261*, 917 F.2d at 47.

The Commission majority explained the rationale for its decision as follows:

> Apart from the plain wording of the statute, there are also practical considerations. A statute should not be construed in a way that is foreign to common sense or its legislative purpose. *Sutherland Statutory Construction* §§ 45.09, 45.12 (4th ed. 1985). As discussed, the Mine Act involves a balancing of the interest of mine operators, and miners, with safety being the preeminent concern. Section 2 of the Mine Act specifies at the outset that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource -- the miner," and section 2(e) adds that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." The Mine Act was not intended to remove from an

operator the right to withdraw miners from a mine for safety reasons. While MSHA has the authority to order such withdrawal, it does not have that power exclusively.

* * * * *

The purpose and scope of shift compensation can also be determined by another important concern expressed by Congress in adopting section 111 in its specific terms: insulating the mine inspector from any repercussions that might arise from his withdrawing miners and temporarily depriving them of their livelihood. A key passage from the Report of the Senate Committee setting forth the rationale for the miners' compensation provision concludes by stating, "[t]his provision will also remove any possible inhibition of the inspector in the issuance of closure orders." Leg. Hist. At 635. This convinces us that Congress intended shift compensation rights to arise only when the physical removal of miners is effectuated by the inspector himself so that the inspector in carrying out his enforcement duties is not inhibited or distracted by workplace considerations wholly extraneous to the protection of miners.

11 FMSHRC at 1614-15

In the case at bar, the sequence of events is basically not at issue. I find that at approximately 11:30 a.m., Canada told the dispatcher to get everyone out of the mine due to elevated methane. Thus, when Fowler issued the section 107(a) order, an order had already been given by Consol withdrawing the miners. Under the holding and rationale of *Local Union*, supra, the removal of the miners previously ordered to be withdrawn by Canada, was not effectuated by Fowler's order. These miners were no longer "working" when Fowler issued the 107(a) order, and are not entitled to compensation under section 111, supra.

Applicants argue, however that the instant case is distinguishable from *Local Union*, supra, in that here, Consol attempted to avoid section 111 liability by withdrawing miners in anticipation of withdrawal action by MSHA. The Commission in *Local Union*, supra, appeared to suggest that this might be a possible distinguishing factor. See *Local Union 1261*, fn6 at pp. 1614-1615. However, this suggestion by the Commission is clearly dictum as it was not necessary for a disposition of the issues presented therein. Nor is there any authority that would compel a ruling that where an operator withdraws miners in anticipation of the issuance of a 107(a) order, the withdrawn miners are entitled to section 111 compensation where the 107(a) order is subsequently issued.

Moreover, such a broad ruling, if applied to a situation where an operator might have anticipated the possibility of the issuance of a 107(a) order, but also withdrew miners based on

safety concerns, would appear to thwart the Commission's concerns regarding the purpose of section 111, supra. As stated by the Commission in *Local Union*, supra, at 1614,

> . . . it would be a departure from the clear intent and purpose of the Act to penalize the operator for voluntarily idling miners for their own protection. To impose such liability could conceivably encourage less conscientious operators in similar circumstances to continue production, at risk to the miners, until the MSHA inspectors arrived to issue a control order idling the miners. We do not believe that the Mine Act was intended to stifle such safety conscious actions by operators, as Consol took here.

Further, Applicants have not established that Consol's decision to remove miners was made in anticipation of the issuance of a 107(a) order. When the digital detectors revealed methane in excess of 4 percent, Canada expressed his intent to remove miners to comply with Virginia Law, should readings in excess of 4.5 percent be confirmed with the Riken detector. In contrast, the only communication Fowler had made to Consol regarding action that he was considering was his statement that he was contemplating issuing a section 104(a) citation[4] should the reading that he had obtained with his digital methane detector be subsequently verified with the Riken detector. At 11:30 a.m., when the Riken testing indicated methane at 4.5 percent, Canada told Fowler that he was going to withdraw miners, and then he (Canada) ordered their withdrawal, Fowler had not indicated that he was even contemplating issuing a withdrawal order, or that he had found the conditions to constitute any type of imminent danger. Fowler's decision to issue the withdrawal order was first made by him shortly after 12:00 p.m., only after he had ascertained the source and extent of methane accumulations.

For all the above reasons, I conclude that the Applicants are not entitled to compensation under section 111 of the Act.

ORDER

It is **ORDERED** that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

4/ On direct examination, Fowler indicated that he had told Canada or some other management official that he would be issuing a section 107(a) order as he was sure of the origination of the methane, and asked them to remove the men form underground. However, on cross-examination, it was clarified that after he had concluded that the 3, 4, and 5 development areas were involved, i.e., after 12:00 n., he told Canada that he would be issuing a section 107(a) order.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 7, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-260-M
Petitioner	:	A. C. No. 34-01570-05524
v.	:	
	:	Docket No. CENT 99-93-M
NELSON BROTHERS QUARRIES ,	:	A. C. No. 34-01570-05525
INCORPORATED,	:	
Respondent	:	Docket No. CENT 99-110-M
	:	A.C. No. 34-01570-05526
	:	
	:	Docket No. CENT 99-141-M
	:	A.C. No. 34-31570-05527
	:	
	:	Quapaw Mine

DECISION

Appearances: Erica J. Rinas, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Paul M. Nelson, President, Nelson Brothers Quarries Incorporated, Quapaw, Oklahoma, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor (the Secretary) against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a). The petitions seek to impose a total civil penalty of $1,911.00 for 18 alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines. These matters were heard on August 10, 1999, in Springfield, Missouri.

At the hearing, the parties were advised that I would defer my ruling on the 18 citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties waived the filing of briefs. Accordingly, this written decision formalizes the bench decision issued with respect to each of the contested citations. The bench decision vacated four citations and affirmed nine citations. With respect to the remaining citations, the Secretary stipulated to vacating two citations and the parties reached a settlement wherein the respondent agreed to pay a $55.00 civil penalty for each of three non-S&S citations. A total civil penalty of $652.00 was imposed for the nine affirmed citations. Thus, the total civil penalty imposed in this matter, including the $165.00 the respondent agreed

to pay, is $817.00. The bench decisions herein are edited versions of the bench decisions issued at trial with added references to pertinent case law.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the Commission's standards with respect to what constitutes a significant and substantial (S&S) violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In determining if it is reasonably likely that a cited condition will result in serious injury, it is not necessary to show that miners were exposed directly to the resultant hazard at the time of the inspection. Rather, the Commission has stated:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood of injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986).

The bench decision also applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The respondent, Nelson Brothers Quarries, is a small mine operator that is subject to the jurisdiction of the Mine Act. The evidence reflects that the respondent has a good compliance history with respect to previous violations in that it was cited for only three significant and substantial violations during the two years preceding the issuance of the citations in issue; that, with the exception of one citation where the respondent was waiting for ordered parts, the respondent abated the cited conditions in a timely manner; and that the $1,911.00 civil penalties proposed by the Secretary will not effect the respondent's ability to continue in business.

I. Findings and Conclusions

The citations that are the subject of these proceedings were issued by Mine Safety and Health Administration (MSHA) Inspector Curtis W. Dement during the course of his regular 1A bi-yearly inspections of the respondent's surface limestone mine site conducted in October 1997 and July 1998. The citations are addressed herein in the order the Secretary presented them at trial, rather than by the docket number they were assigned.

Nelson Brothers Quarries Incorporated is a small mine operator that extracts limestone from the Quapaw Mine site located in northeast Oklahoma in Ottawa County. The mine site consists of a pit and a crushing plant. There are approximately six employees working at this facility.

A. Citation Nos. 4454811 and 4460056

At the beginning of the trial the Secretary moved to vacate Citation Nos. 4454811 and 4460056 because the facts surrounding the issuance of these citations do not support the alleged violations of the mandatory safety standards. The Secretary's motion to vacate these citations was granted at the hearing. Accordingly, **Citation Nos. 4454811 and 4460056 are vacated.**

B. Citation No. 4454808

During the course of Dement's October 1997 inspection, Dement observed an unguarded left portion of a radiator fan blade on a Dart end dump truck. Dement noted the unguarded fan blade was approximately 14 inches from a ladder that drivers use to enter the operator's cab. Dement concluded it was reasonably likely, given continuing mining operations, that a driver could sustain serious injury in the event he inadvertently caught his hand in the moving fan blade. Consequently, Dement issued Citation No. 4454808 alleging an S&S violation of the mandatory safety standard in section 56.14107, 30 C.F.R.§ 56.14107, that requires fan blades to be guarded to protect persons from contact with moving parts.

Ralph Carter, the respondent's foreman, testified the Dart truck was not manufactured with a guard over the cited exposed area of the fan blade. In addition, Carter opined that, if a driver lost his balance on the ladder, the driver would fall off the ladder to the ground without touching the fan blade. A photograph of the cited fan blade area was admitted in evidence.

The bench decision for Citation No. 4454808 noted the controlling case law on guarding citations is *Thomas Brothers Coal Company, Inc.*, 6 FMSHRC 2094 (September 1984). In *Thomas Brothers* the Commission stated:

> We find that the most logical construction of the [guarding] standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

6 FMSHRC at 2097.

Applying the concept of reasonable possibility of contact during inadvertent falling or momentary inattention, the evidence reflects the unguarded area of the fan blade is approximately 14 inches from the side of the ladder. Stumbling, by nature, is sudden and unanticipated. In such circumstances, it is reasonably likely that the operator of this Dart truck will grab onto this unprotected area as a reflex. In such an event, the operator will sustain serious injury to his hand from contact with the moving fan blade. Accordingly, **Citation No. 4454808 is affirmed**.

With respect to the appropriate civil penalty, the absence of screw holes reflects that the truck may not have been manufactured with a guard in the cited area. In this regard, there is no evidence that a guard had been installed and subsequently removed. Consequently, the degree of negligence attributable to the respondent is reduced from moderate to low. Thus, **the civil penalty is reduced from the $111.00 initially sought by the Secretary to $75.00**.

C. Citation No. 4454809

Further inspection of the Dart end dump truck revealed the truck's back-up horn, used to alert other vehicles and persons in the vicinity of the truck of its backward movement, was not operative. Consequently, Dement issued Citation No. 4454809 citing a non-S&S violation of the provisions of 56.14132(a), 30 C.F.R. § 56.14132(a), that requires back-up warning devices on mobile equipment to be maintained in functional condition.

Paul M. Nelson, the respondent's President, admitted the back-up horn was not functional. However, Nelson testified he preferred that truck drivers and personnel on the ground use caution when vehicles are driven in reverse, and that employees communicate directly instead of using a safety horn to warn of danger.

The bench decision concluded that Nelson's preference for direct verbal communications did not absolve the respondent of its duty to maintain the back-up warning device. Accordingly, **Citation No. 4454809 is affirmed and the $50.00 civil penalty proposed by the Secretary shall be imposed**.

D. Citation No. 4454810

Dement tested the Dart end dump truck and determined it had a defective parking brake in that the parking brake would not prevent movement when the truck was standing still with its typical load on the maximum grade it travels as required by section 56.14101(a)(2), 30 C.F.R. § 56.14101(a)(2). Consequently, Dement issued Citation No. 4454810 alleging a non S&S violation of section 56.14101(a)(2). The Secretary subsequently modified this citation to alternatively allege a violation of section 56.14100(c) for the respondent's failure to "tag out" the Dart end dump truck after the respondent alleged the truck was not in service.

The bench decision rejected the respondent's assertion that a violation did not lie because the dump truck had a dump brake in addition to the parking brake that could be used to hold the truck in place. The respondent's assertion is belied by the fact that the vehicle is equipped by the manufacturer with a parking brake and there is no evidence that the parking brake is redundant or otherwise unnecessary. The bench decision also noted that alleging that a vehicle is currently not in service is not a defense to a citation citing a vehicle defect. An inspector can cite a violation of a mandatory safety standard without direct observation of a violation. *Emerald Mines Corp.*, 9 FMSHRC 1590 (Sept. 1987); *aff'd,* 863 F.2d 51, 55 (D.C. Cir. 1988). The presence of a defective vehicle on mine property that has not been taken out of service provides a basis for concluding that the vehicle was last operated in its defective condition. In addition, a back-up piece of equipment that is not properly maintained suddenly can be placed in service. Consequently, **Citation No. 4454810 is affirmed and the respondent shall pay the $50.00 civil penalty proposed by the Secretary**.

E. Citation Nos. 4460044, 4460049 and 4460054

At the hearing the Secretary agreed to modify Citation No. 4460044 by deleting the significant and substantial designation. Citation Nos. 4460049 and 4460054 had been issued as non-S&S citations. **The respondent agreed to pay a total civil penalty of $165.00 comprised of $55.00 civil penalties for Citation Nos. 4460044, 4460049 and 4460054**.

F. Citation No. 4460045

During the course of Dement's July 1998 regular inspection of the Quapaw facility, Dement noted a missing wiper blade on the wiper arm of a 966 Caterpillar front end loader. Dement issued Citation No. 4460045 for a non-S&S violation of the provisions of section 56.14100(b), 30 C.F.R. § 56.14100(b), that requires defects that affect safety to be corrected.

The respondent's defense to this alleged violation is that the front end loader is used in a high dust environment. Therefore it is not uncommon to spread mud on the windshield when wiper blades are used.

The bench decision noted that, as asserted by the respondent, there may be situations when a wiper blade is not effective. However, the absence of a wiper blade precludes using windshield wipers when they would be beneficial, particularly in heavy rain. **Accordingly, the bench decision affirmed Citation No. 4460045 but reduced the civil penalty from $55.00 to $35.00 based on a reduction in the respondent's negligence**.

G. Citation No. 4460046

Dement observed two V-belts on an air compressor that was located against a wall in a parts trailer near the plant office. At the time of Dement's observations, two men were working outside the trailer using the compressor to power equipment. Dement concluded a person could sustain serious injuries if he were to get entangled in the moving v-belt. Consequently, Dement issued Citation No. 4460046 citing an S&S violation of the mandatory guarding standard in section 56.14107(a).

At the hearing the respondent admitted the compressor belt was not guarded. However, the respondent asserted the only purpose served by the parts trailer was to house the compressor. The respondent further contended that personnel were not exposed to moving parts because the compressor could be turned on and off from outside the trailer.

The respondent's defense, in essence, is that the trailer housing the compressor served as perimeter guarding. However, perimeter guarding is not a substitute for site specific guarding of moving parts because once an individual enters inside the guarded perimeter he is exposed to the hazard of inadvertent contact. *See Moline Consumers Company*, 15 FMSHRC 1954, 1957-58 (September 1993) (ALJ). **Accordingly, Citation No. 4460046 is affirmed**. However, Dement did not rebut the facts proffered by the respondent that men rarely enter the trailer, and that the compressor can be turned on and off outside the trailer. Consequently, **Citation No. 4460046 is modified to a non-S&S citation** to reflect that it is unlikely that a serious injury will result as a consequence of the cited condition. **Therefore, a $55.00 civil penalty is imposed for this citation**.

H. Citation No. 4460050

During Dement's July 1998 inspection, Dement went down a set of steel steps located between the generator trailer and the plant. The steps were embedded in a sloping dirt bank. Upon stepping on the first step, the step came loose and the left side of the step raised in the air. As a result, Dement issued Citation No. 4460050 citing an alleged S&S violation of the provisions of section 56.11001, 30 C.F.R. § 56.11001, that require a safe means of access to all working places. Dement concluded the cited condition was attributable to the respondent's moderate negligence. At the beginning of the hearing the Secretary moved to modify the citation to reflect

a low level of negligence "because the steps broke or moved when the MSHA inspector stepped on them, and it was not readily apparent that the steps were damaged before that." (Tr. 25). Consequently, the Secretary lowered her proposed penalty for this citation to $111.00.

Consistent with the Secretary's modification, Dement candidly testified, "[the steps] were in place. They all looked alike. It could have broke [sic] when I stepped on it." (Tr. 148-49).

The bench decision noted that, although the Mine Act is a strict liability statute, a violative condition must pre-exist an inspector's observations. The Secretary carries the burden of establishing the fact of a violation. Here, Dement testified the violative condition may not have existed until he stepped on the step. Consequently, there was no maintenance obligation on the part of the respondent that would give rise to liability. Accordingly, **Citation No. 4460050 is vacated.**

I. Citation No. 4460047

Dement noted that the parts trailer containing the compressor that he cited for unguarded v-belts had two areas of missing floor, each measuring approximately three feet by three feet. One area was located on the left hand side of the entrance to the trailer, and the other area was located at the end of trailer at the rear of the compressor. Dement also felt the trailer floor giving way under his feet and concluded the floor could break away under a person causing serious leg injuries. Based on his observations, Dement issued Citation No. 4460047 citing an S&S violation of the safe access provisions of section 56.11001.

The respondent admits the missing areas of trailer flooring cited by Dement and the deteriorated condition of the remaining floor. In this regard, the respondent explained that the trailer floor had been damaged significantly as a result of flooding that occurred in 1993. However, the respondent relied on the fact that employees rarely go into the trailer in that the compressor can be operated from outside the trailer.

Citation No. 4460047 cites a violation of section 56.11001 that requires a mine operator to provide and maintain a safe means of access to all working places. Section 56.2, 30 C.F.R. § 56.2, of the regulations defines "working place" as "any place in or about a mine where work is being performed." An area can constitute a working place even if it is periodically accessed rather than accessed on a daily basis. Applying the Commission's controlling case on determining whether a condition is unsafe, it is clear that a reasonably prudent person, familiar with industry standards and the factual circumstances surrounding the condition and use of the trailer, would recognize the cited hazard required corrective action. *See Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Here, there is a need to periodically service the compressor. Given the admitted missing and deteriorated portions of trailer flooring, it is reasonably likely, in the context of continued mining operations, that someone entering the trailer will sustain serious injuries as a result of the unstable floor. Accordingly, the Secretary has demonstrated that access to the trailer was unsafe. Consequently, **Citation No. 4460047 is affirmed, including the S&S designation, and the $122.00 civil penalty sought by the Secretary shall be imposed.**

J. Citation No. 4460048

During his July 1998 inspection, Dement informed foreman Ralph Carter of his desire to inspect the Caterpillar DW water wagon. Dement's contemporaneous notes reflect Carter stated the water wagon was operated only once or twice a month, and that the battery was dead. Carter also stated "the brakes need some work." (Tr. 183-84). Carter testified that the brake problem was caused by mud on the brake shoes that interfered with the shoes' contact with the brake drum. Carter testified the condition was routinely corrected by hitting the brake shoes with a wrench to dislodge the mud. He did this after the battery had been recharged.

Dement was unable to test the service brakes due to the discharged battery. Nevertheless, solely on the information provided by Carter, Dement issued Citation No. 4460048 alleging an S&S violation of section 56.14101(a) that requires a service brake to be capable of stopping and holding a vehicle on the maximum grade it travels. The Secretary has the burden of proving the alleged violation. Vehicles "needing brake work" can still perform adequately. While Carter's statement that "the brakes needed some work" is an admission entitled to evidentiary weight, I conclude, given the Secretary's burden of persuasion, that this statement, alone, in the absence of testing the vehicle, is insufficient to establish, by a preponderance of the evidence, that the service brake was ineffective to the extent contemplated by section 56.14101(a). Accordingly, **Citation No. 4460048 is vacated**.

K. Citation No. 4460051

Dement observed a self-cleaning tail pulley on the second -overs- conveyor was not guarded on the left hand side. The conveyor belt was not operating at the time of Dement's observations. Dement issued Citation No. 4460051 citing a non-S&S violation of the guarding standard in section 56.14107(a). Dement characterized the cited condition as non-S&S because he concluded "no one goes in the area when the belt is running." (Gov. Ex. 21).

The respondent introduced photographs illustrating that the area of the unguarded pulley essentially was under the steel belt support structure. (Resp. Exs. 22(a) and 22(b)). Moreover, the testimony reflects the cited area was in the inner perimeter of three belt structures. It was necessary to walk around to perimeter of these belt structures to approach the cited area on the other side. Dement testified the cited pulley was "10 to 12 feet, at least" from the area where people normally walk. (Tr. 196).

As previously noted, in *Thompson Brothers*, the Commission noted the guarding standard imports the concepts of reasonable possibility of contact and injury, including contact from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. Here, Dement has characterized the possibility of contact and injury as unlikely. The cited area is inside a belt structure more than 10 feet away from where people normally travel. In this regard, section 56.14107(b) exempts the guarding requirement for moving parts that are at least seven feet away from walking surfaces. Given the totality of circumstances, including the protection of the moving parts afforded by the belt structure, the location of the pulley inside the belt structure, and the absence of people traveling within 12 feet of the cited area, I conclude that the Secretary has

failed to satisfy her burden of demonstrating a violation of the cited mandatory standard. Accordingly, **Citation No. 4460051 is vacated**.

L. Citation No. 4460052

Dement issued Citation No. 4460052 citing a violation of the guarding standard in section 56.14107(a) for three unguarded "V" belts on the 4 feet by 12 feet second screen. Dement noted in the citation that a walkway led up to the belt and pulleys. The belt was not operating at the time of Dement's inspection and Dement was informed that no one travels the walkway when the screen is running. Dement characterized the cited violation as non-S&S.

The respondent maintains the cited "V" belts did not have to be guarded because no one is on the structure when the screens are operating. In support of its position, the respondent presented testimony reflecting that the screen was accessed by a ladder placed at the other side of the screen. Based on the placement of the ladder, the respondent asserted the only way to approach these unguarded belts when they were in operation was to walk across the moving screen, which would be virtually impossible.

The bench decision noted that the reasons that provided the basis for vacating Citation No. 4460051 that concerned an unguarded tail pulley, *i.e.*, that it was located in an area where people do not normally travel, were absent in this instance. Unlike the circumstances in Citation No. 4460051, here the unguarded area is adjacent to a walkway. Given continuing mining operations, it is likely that personnel may be required to traverse the walkway to observe the screen in operation for maintenance purposes. The requirement to guard moving parts adjacent to walkways to prevent the hazard of inadvertent contact is the precise purpose of section 56.14107(a). Although exposure to such a hazard may be infrequent, as acknowledged by the non-S&S designation of the cited condition, an identifiable hazard still exists. Consequently, **Citation No. 4460052 is affirmed and the $55.00 civil penalty sought by the Secretary shall be imposed**.

M. Citation No. 4460053

Citation No. 4460053 was also issued for an alleged violation of the guarding provisions of section 56.14107(a). The citation concerns an inadequately guarded self cleaning tail pulley on the impactor belt. Dement characterized the cited condition as non-S&S in nature.

At the hearing the respondent presented credible testimony that the cited pulley guard is removed for cleaning the area around the pulley each time the belt is used. The respondent further testified that the guarding was inadequate to cover the entire pulley because the guard had been reinstalled incorrectly. The guard was installed lengthwise rather than in the direction of its width. Dement agreed that the guard may have been installed improperly, and he conceded that he may not have issued this citation if he had been aware that the guard had been installed incorrectly. (Tr. 227).

Notwithstanding the strict liability of the Mine Act, I have given the respondent the benefit of the doubt in this instance. Since the guard was adequate, although incorrectly, installed, **I am vacating Citation No. 4460053**.

N. Citation No. 4460055

Dement issued Citation No. 4460055 for a non-S&S violation of section 56.14132(a) because there was no audible back-up alarm on a red Chevrolet welding truck. The cited mandatory standard requires maintenance of existing audible warning devices. The respondent presented evidence that the cited vehicle was a 1970 model that was not equipped with a back-up alarm. It is undisputed that the truck carries a stationary welder on its truck bed directly behind the operator's cab that obstructs the operator's view. Consequently, at the hearing, to conform to the evidence, I permitted the Secretary to modify Citation No. 4460055 to cite a section 56.14132(b)(1) violation. This mandatory safety standard requires the installation of audible back-up alarms, even if not originally installed by the manufacturer, when the operator's view is obstructed.

The respondent contended an audible alarm was unnecessary because it could use a spotter. However, there is insufficient evidence to establish operation of this truck was limited only to situations when a spotter was present. The photograph of the cited vehicle reflects the operator's rear view was significantly obstructed by the welding equipment. Therefore, an audible warning device was required. (Gov. Ex. 29).

The abatement date for Citation No. 4460055 was July 23, 1997, two days after the issuance of the citation. Upon returning to the mine site on August 25, 1997, Dement determined the audible warning device had not been installed on the cited welding truck. Consequently, Dement issued a 104(b) Order No. 4460128. The Secretary seeks to impose a total civil penalty of $281.00 for this non-S&S violation and 104(b) order in view of the respondent's failure to timely abate the citation.

Carter testified that he could not abate the citation by the July 23, 1997, deadline because he had to order the horn to retrofit the truck. The parts were delivered on August 18, 1997. Dement testified that an extension of the abatement period would have been granted upon the respondent's request.

There is no evidence that the respondent failed to timely abate the other cited violative conditions that are the subject of these proceedings. While, absent an extension request, the respondent's failure to timely abate cannot be excused entirely, the delay in obtaining parts is a mitigating circumstance. In view of the above, **Citation No. 4460055 and 104(b) Order No. 4460128 are affirmed. The delay in obtaining the necessary parts justifies the imposition of a reduction in civil penalty from $281.00 to $110.00**.

O. Citation No. 4460057

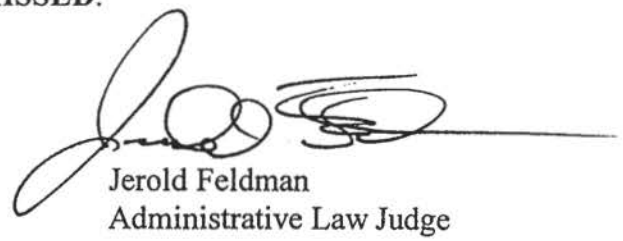
Dement testified that, with the exception of one piece of paper that did not specify particular dates, there was no evidence that on-shift examinations were being performed. Consequently, Dement issued Citation No. 4460057 citing an S&S violation of the on-shift requirements of section 56.18002(a), 30 C.F.R. § 56.18002(a), that requires at least one on-shift examination of each working place. Section 56.18002(b), 30 C.F.R. § 56.18002(b), requires a record of such examinations must be kept for at least one year, and that such examination records must be made available to mine inspectors upon request.

The respondent states the pit, the plant, and the stockpile areas of the mine facility are checked informally each shift. However, citing "a real paperwork burden," the respondent admits it does not keep formal records of such examinations. (Tr. 259).

In the absence of documentation of such examinations consisting of entries in an on-shift book that demonstrate hazard recognition and appropriate, timely action to correct hazardous conditions, there is inadequate evidence to support the respondent's claim that thorough on-shift examinations had occurred. The respondent's reliance on "paperwork burdens" for its failure to record on-shift examinations and remedial maintenance is rejected. The respondent's paperwork burden must be subordinate to its obligation to ensure safety. Recording on-shift examination results documents hazardous conditions and alerts the mine operator of the need for timely remedial action. Accordingly, **Citation No. 4460057 is affirmed**. Giving the respondent the benefit of the doubt that informal on-shift examinations did occur, **I will reduce the $161.00 penalty proposed by the Secretary to $100.00**.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 4454811, 4460047, 4460050 and 4460056, **ARE VACATED. IT IS FURTHER ORDERED** that Nelson Brothers Quarries Incorporated **pay a total civil penalty of $817.00** in satisfaction of the remaining citations and order in these proceedings.[1] Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, theses docket proceedings **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/mh

[1] The bench decision noted the total civil penalty imposed was $812.00. (Tr. 264). The $812.00 was based on the mistaken belief that the respondent had agreed to pay a $50.00 civil penalty for Citation No. 4460044. However, the transcript reveals the respondent agreed to pay the $55.00 civil penalty initially proposed by the Secretary for Citation No. 4460044. (Tr. 121-23). Consequently, the correct total civil penalty due and payable by the respondent in these matters is $817.00.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

October 8, 1999

CYPRUS CUMBERLAND RESOURCES, CORPORATION	:	CONTEST PROCEEDING
Contestant	:	Docket No. PENN 98-15-R
v.	:	Order No. 3657679; 9/25/97
SECRETARY OF LABOR,	:	Cumberland Mine
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Mine ID 36-05018
Respondent	:	

DECISION ON REMAND

Before: Judge Feldman

This case concerns the propriety of the September 25, 1997, issuance of 104(d)(2) withdrawal Order No. 3657679 at Cyprus Cumberland Resources Corporation"s (Cyprus') Cumberland Mine. The withdrawal order was predicated on 104(d)(1) Citation No. 3657625 that was issued at Cyprus' Cumberland facility on June 18, 1997. The only contested issue is whether the Mine Safety and Health Administration (MSHA) had performed a "clean inspection" of the Cumberland Mine between June 18, 1997, and September 25, 1997, thus relieving Cyprus of the consequences of the 104(d) "chain" withdrawal sanctions provided in section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2) of the Act.[1] The Secretary has stipulated that, with the exception of the 60 West Mains haulage, the entire Cumberland Mine had been inspected during the relevant interim period between the issuance of the predicate 104(d)(1) citation and the subject withdrawal order.

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[1] Section 104(d)(2) provides:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

The 60 West Mains haulage is approximately 4,200 feet long and has been the primary route of travel into and out of the Cumberland Mine since 1983. It is an area where there is no active mining. Therefore, the condition of this area changes little from inspection to inspection. The evidence reflects, from June 18, 1997, through September 25, 1997, at least eleven mine inspectors traveled the 60 West Mains haulage a total of 135 round trips in slow moving battery operated vehicles (crickets or mantrips).[2] (Resp. Ex 1). During these trips these inspectors had an opportunity, if not an obligation, to repeatedly observe the roof, rib, and track conditions in the 60 West Mains haulage to ensure these conditions were not hazardous. These inspectors could have left their battery operated vehicles at any time if they had observed any hazardous or violative condition.

The Secretary does not dispute the fact that mine inspectors routinely traveled down the 60 West Mains Haulage. However, the Secretary asserts a clean inspection had not occurred until September 26, 1997, when the 60 West Mains haulage was inspected on foot.

The initial decision determined the 60 West Mains haulage had been inspected prior to the September 25, 1997, issuance of the subject withdrawal order by virtue of the daily observations of the rib, roof and track conditions by MSHA inspectors that routinely traveled this mine entry. As a result, the initial decision modified 104(d)(2) withdrawal Order No. 3657679 to a 104(d)(1) citation. 20 FMSHRC 285 (March 1998) (ALJ).

On July 29, 1999, the Commission vacated the modification of 104(d)(2) withdrawal Order No. 3657679 and remanded this matter for further consideration. 21 FMSHRC 722. In its remand, the Commission noted the Secretary has relied on the testimony of supervisory inspector Robert Newhouse to prove that a "regular" inspection of 60 West Mains haulage had not occurred between June 18, 1997, and September 25, 1997. *Id.* at 728. However, the Commission also noted "an intervening clean inspection is not limited solely to a complete regularly scheduled inspection, but may be composed of a combination of inspections, so long as taken together they constitute an inspection of the mine in its entirety." *Id.* at 726, *quoting U.S. Steel* 6 FMSHRC at 1912. In this regard, the Commission has determined a clean inspection can consist of a series of regular and spot inspections. *Kitt Energy Corp.*, 6 FMSHRC 1596 (July 1984), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985). Consequently, the Commission directed me to consider entries made by Cyprus in a log it maintained summarizing mine inspector activities to determine if there were any entries evidencing spot inspections in the 60 West Mains haulage during the relevant time frame. 21 FMSHRC at 728. Cyprus' inspection activity log has been admitted as respondent's exhibit 1.

Specifically, in directing me to examine the Cyprus log and its various entries, the Commission noted:

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[2] Mine inspectors McCort, Radolec, Terrett, Dean, Wilson, Pogue Kelly, Gulley, Patterson, Rantovich, and MSHA supervisory mine inspector Newhouse, traveled the 60 West Mains haulage during this period. (Resp. Ex. 1). It is unclear whether several of these individuals are state rather than MSHA inspectors.

> The log and its various entries must be examined and weighed against other evidence admitted into the record. Such examination and fact-finding more appropriately reside with the judge in the first instance, rather than with the Commission on review.

Id. (Emphasis added).

Pursuant to the Commission's remand, the Secretary and Cyprus were provided with an opportunity to address whether the Cyprus log reflects any entries concerning MSHA spot or regular inspections in the 60 West Mains preceding the issuance of the September 25, 1997, withdrawal order. The Secretary filed her Position on Remand on September 22, 1999. The Secretary correctly states there are no entries in Cyprus' log reflecting a regular or spot inspection of the 60 West Mains.

Cyprus filed its Position Statement on this question on September 30, 1999. Cyprus states its log entries note the ultimate inspection destination of inspectors on particular days. Although Cyprus states the log places inspectors in the area of the 60 West Mains haulage, Cyprus does not contend that its log contains any entries reflecting regular or spot inspections in the 60 West Mains haulage.

I have considered the information the Commission directed me to consider in light of the Commission's prior holding in *Kitt Energy* that a clean inspection can consist of a combination of inspections, including regular and spot inspections.

In *Kitt Energy*, the Commission rejected the Secretary's "attempt to exclude from consideration under section 104(d)(2) all inspections other than the so-called regular inspections [as] unconvincing." 6 FMSHRC at 1599. The Commission further stated:

> [the Secretary's] designations of inspections as "spot" or "regular" inspections are administrative designations not established in the Act . . . . Any MSHA inspector conducting any enforcement inspection authorized by the Mine Act is required to cite every observed violation of the Act or its standards. The fact that during a particular inspection an inspector may give emphasis to particular types of hazards does not serve to place blinders on the inspector or prevent the issuance of citations for other violations.

Id.

The Court of Appeals, in affirming the Commission's *Kitt Energy* decision, noted the Commission had determined "a 'clean' inspection could be comprised of any type of inspection ('regular' or 'spot') or any combination of various inspections, so long as the mine was completely inspected." 768 F.2d at 1479 (emphasis added) (footnote omitted).

The initial decision in this matter recognized there is no evidence of any activity by MSHA officials that MSHA has characterized as a "spot" or "regular" inspection of the 60 West Mains.

However, MSHA's characterization of its activities as not constituting a regular or spot inspection, while relevant, is not material or probative evidence on whether an inspection of the 60 West Mains haulage in fact occurred. Rather, resolution of whether an inspection of the 60 West Mains haulage had been performed must be based on an analysis of MSHA's actions, not how MSHA chooses to characterize its actions.[3]

Thus, the question is whether the Secretary has satisfied her burden of proof that the 60 West Mains haulage was not inspected for 104(d)(2) purposes despite the daily presence of numerous mine inspectors in that entry. The Secretary cannot prevail simply by establishing that inspectors had not exited their battery operated vehicles to inspect electrical boxes located in the 60 Mains. During quarterly inspections of a mine in its entirety, MSHA inspectors do not inspect each piece of mining equipment, all ventilation controls, or all entries in a mine. (Tr. 144, 331-2, 481, 708-9, 804-5). Rather, inspectors focus their attention on areas where mining is actively occurring. (Tr. 294). It follows that the required degree of thoroughness for an adequate inspection of a mine area under section 104(d)(2) is dependent on whether the area is the site of active mining.[4]

During the course of oral argument before the Commission in this proceeding, the difficulty of describing the requisite inspection activities necessary to establish that a "clean" inspection of an entire mine had been performed for 104(d)(2) purposes was addressed:

> **Commissioner Riley**: Well, what is the all-hazards language that the court inserted in *Kitt* ? What should we read into that? Does that mean that an area can be inspected but unless it is certified as having been inspected and free of all hazards [in] that particular section[,] in fact the entire mine hasn't been inspected for purposes of 104(d)(2)? (Oral Argument, Tr. 11)
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> * * * * *
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> **Ms. Geraghty**: I think you've got to look at it on a case-by-case basis, and I think that the Commission has clearly said that spot inspections if there are a sufficient number of them can constitute an inspection for purposes of getting a clean

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[3] Evidence is immaterial if it is relevant to prove a proposition, but the proposition is neither in issue nor probative of a fact in issue. Jerome Prince, Richardson on Evidence (10th ed. 1973). The contestant does not contend, nor could it prove, that MSHA performed what MSHA designated as "spot" or "regular" inspections in the 60 West Mains haulage. The fact that MSHA did not administratively designate its mine inspectors' activities in the 60 West Mains haulage as "spot" or "regular" inspections, is not probative on whether those activities constituted an inspection.

[4] For example a "regular" inspection of the 4,200 feet long 60 West Mains haulage on September 26, 1997, took 1½ hours to complete. A "regular" inspection of a comparable longwall area undoubtedly would take a much longer period of time. *See* fn. 7, *infra*.

> inspection . . . . [T]he Secretary is not required to inspect every single inch of a mine, even during quarterly inspections . . . . I mean I think its important to distinguish between, you know, having to inspect every inch of the mine and looking at the mine in its entirety, you know, have we covered this mine in terms of looking for hazards that you would expect to find in a mine. (Oral Argument, Tr. 12, 13-14).

Resolution of whether or not a clean inspection has occurred must be done on a case-by-case rather than a deferential basis.[5] 21 FMSHRC at 726 citing Kitt Energy; UMWA v. FMSHRC, 768 F.2d at 480. The evidence is equivocal as to whether any MSHA inspector disembarked from a cricket or mantrip in the 60 West Mains haulage during the time in question. Inspector Patterson testified although he could not remember doing so, "it's possible" he left the battery operated vehicle for closer observation. (Tr. 301). However, as previously noted, inspectors could have left their vehicles at any time if they had observed any conditions that caused concern.

Notwithstanding the above discussion of the probative value of MSHA's "regular" and "spot" characterizations, in the final analysis, resolution of this case is quite simple. The question is whether a reasonable person, familiar with the deterrent purposes of section 104(d)(2) with respect to unwarrantable failure, would conclude that the numerous mine inspectors' observations (during approximately 135 round trips) of the 60 West Mains haulage ribs, roof, and track, constitute an adequate inspection for hazardous conditions in that inactive mine area. *See Ideal Cement Company*, 12 FMSHRC 2409, 2415-16 (November 1990) (the reasonable person analytical approach the Commission has adopted in evaluating the fairness of application of broad safety standards to particular factual settings).

Applying the reasonable person test, it is unreasonable to conclude that MSHA mine inspectors, who are intimately familiar with the hazards of mining, would repeatedly travel an entry without ensuring there are no hazardous rib, roof, or track conditions. It is likewise unreasonable that mine inspectors, during a three month period beginning in June 1997, would repeatedly travel an entrance of a mine, to enter deeper inby, without ensuring that traveling through the entrance was safe. Waiting until September 26, 1997, to inspect the 60 West Mains haulage, when MSHA was about to finally exit the mine after it had completed its quarterly inspection, is as prudent as closing the barn door after the horse has departed.

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[5] The need for a case-by-case analysis will only arise when the Secretary asserts the absence of a clean inspection. Although deference may be accorded the Secretary's interpretations of regulatory and statutory provisions in appropriate circumstances, deferring to the Secretary on this central factual issue of whether an inspection of the entire mine in fact occurred, would trivialize due process and pay lip service to the Commission's case-by-case approach.

As previously noted, the Commission has held the Secretary has the burden of proving the absence of an intervening clean inspection. *Kitt Energy*, 6 FMSHRC at 1600. In proving the absence of a clean inspection, the Secretary must prove there were portions of the mine that remained to be inspected at the time that the disputed 104(d)(2) order was issued.[6] *Id.* If the Secretary wishes to rely on an uninspected area of a mine to continue enforcement of a 104(d)(2) probationary chain, she should not rely on an inactive mine area, that has been traveled by no fewer than eleven inspectors, a total of approximately 270 times.[7] Simply put, I reject the essential premise advanced by the Secretary in this case - - that numerous inspectors, to a person, turned the proverbial blind eye as to whether there were any hazardous rib, roof, or track conditions in the 60 West Mains haulage.

Finally, in reaching this conclusion, I recognize that the D.C. Court of Appeals, in affirming *Kitt Energy*, rejected the argument that "an inspector's physical presence in each area of the mine - - regardless of the object of the inspection or the hazards actually examined for in each particular area - - qualifies as an intervening 'clean' inspection." 21 FMSHRC at 726, *quoting Kitt Energy*; UMWA v. FMSHRC, 768 F.2d at 1479. Consistent with *Kitt Energy*, I am not suggesting the casual traversing of mine areas to arrive at other mine locations for the purpose of inspecting those areas constitutes an inspection of the area traveled. However, here the 60 West Mains haulage is the primary means of entry and exit from the Cumberland Mine. To conclude that numerous mine inspectors traveled this area without determining if ingress and egress was safe with respect to the rib, roof and track conditions, as well as with respect to ventilation, would deny the obvious. I decline to do so.

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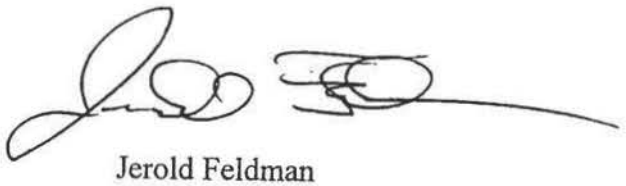
[6] In *Kitt Energy*, the Commission recognized the inherent difficulty imposed on the Secretary in proving a negative - - that a clean inspection had not occurred. The Commission stated, in order to satisfy her burden of proof, the Secretary need only keep records of the areas in a mine that have been inspected. 6 FMSHRC at 1600. Inherent in the Commission's directive is that the Secretary's records will reflect areas of the mine that remained to be inspected because there had been little or no MSHA inspector presence. Here, the dilemma for the Secretary is that records demonstrate daily inspector presence in the 60 West Mains haulage.

[7] The quarterly inspection was completed on September 26, 1997, the day after the subject withdrawal order was issued, when inspector George Rantovich walked the 60 West Mains haulage. Rantovich's inspection took 1½ hours, and he found no violations of any mandatory safety standard. 20 FMSHRC at 289. Completing this inspection within 1½ hours appears to be at odds with the Secretary's assertion that a clean inspection of this 4,200 feet long mine entry required a thorough inspection of the roof conditions; rib conditions; track conditions, including whether the track is blocked properly and the joints are tight; ventilation stoppage; the direction of air flow; any manholes; clearances; fire fighting equipment; and any electrical installations in the entry, including cables, wiring and switches. *See* 21 FMSHRC at 727, fn.6.

ORDER

Consistent with the Commission's directive, I have considered the Cyprus inspection activity log entries in relation to the other evidence of record. I conclude the Secretary has failed to demonstrate, by a preponderance of the evidence, that a "clean" inspection of the Cumberland Mine had not occurred prior to the September 25, 1997, issuance of 104(d)(2) Order No. 3657679. Consequently, the modification of 104(d)(2) Order No. 3657679 to a 104(d)(1) citation **IS REINSTATED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

October 12, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-228-M
Petitioner	:	A. C. No. 14-01560-05511
v.	:	
	:	
WALKER STONE COMPANY INC.,	:	
Respondent	:	Portable Plant #4

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of Petitioner;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troop, LLP, Junction City, Kansas, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor against the Walker Stone Company (Walker) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," alleging one violation of the mandatory standard at 30 C.F.R. § 56.14130(g) and seeking a civil penalty of $104.00 for that violation. The general issue before me is whether Walker committed the violation as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

The citation at bar, No. 7926770, alleges a "significant and substantial" violation of the noted standard and charges as follows:

> The operator of the D-8K Cat dozer, Company No. 8PI was operating the dozer a [*sic*] the reclaim area and not wearing his seatbelt. The dozer had a RPOS [*sic*] with no cab and was working on a [*sic*] incline at the time of inspection. The employee had been trained and knew that a seatbelt is required to be worn when the dozer is in operation. A seatbelt is needed and required to prevent injury in the event of an emergency.

The cited standard, 30 C.F.R. § 56.14130(g), provides as relevant hereto that "seatbelts shall be worn by the equipment operator."

Walker does not dispute the violation but challenges the Secretary's "significant and substantial" and gravity findings. According to Inspector James Timmons of the Mine Safety and Health Administration (MSHA), he was performing an inspection at Portable Plant No. 4 on March 30, 1999, when he observed a bulldozer at the reclamation site working on a grade while its operator was not wearing a seatbelt. The bulldozer, a D-8K Caterpillar model, was according to Inspector Timmons, operating in an area including "inclines and rough terrain." The bulldozer had rollover protection bars but no cab. Timmons concluded that the violation was "significant and substantial" because it would be reasonably likely for there to be a fatality in the event of an emergency such as a rollover. Timmons also opined that if the bulldozer should suddenly stop or if the operator should fall out of the cab onto the crawlers he could also suffer injury. The bulldozer could suddenly stop if the blade should drop to the ground or if the brakes were inadvertently activated.

The bulldozer operator admitted that he was required to wear a seatbelt and that he had been trained to wear it. He nevertheless felt that he could escape injury by jumping if the bulldozer turned over and that he could do so more easily without a seatbelt.

Foreman Scott Litke testified that the bulldozer operator had in fact been trained to wear his seatbelt and the training records in evidence support his testimony (See Resp.'s Exh. No. 4, Page 2, Item 13). Litke opined that, at worst, there was only a four-to-one incline in the area in which the bulldozer was then operating and there were no conditions that could cause a rollover. Litke also noted however that the bulldozer operator had failed a drug test earlier in March, before the instant violation, and subsequently resigned after again failing a drug test. Litke had previously observed this employee operating a bulldozer without his seatbelt and warned him to put it on. This event occurred the same week that he had been trained. The employee was not disciplined.

David Walker, Chief Executive Officer of Walker Stone Company, also testified that all employees are trained to wear seatbelts. Walker also opined that the conditions present at the time of the violation were neither hazardous nor "significant and substantial." He noted that the area in which the bulldozer was operating was "too flat" and observed that they had never had a bulldozer turn over in the history of their operations. Walker did acknowledged however, that it could be hazardous if the bulldozer was working on a highwall. He noted that there was in fact another location on the mine property at which this bulldozer could have been working on a five to six-foot highwall. He observed however that the ground was very stable at the highwall.

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

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

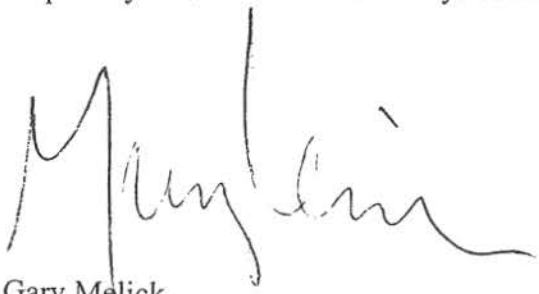
See also Austin Powder Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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

Under the facts of this case, particularly wherein this bulldozer could be expected to be working above a five or six-foot highwall, the violation was clearly "significant and substantial" and of high gravity. Although there is evidence that this employee had previously been warned about failing to use his seatbelt, the Secretary attributes only low negligence to the operator. In light of its previous efforts to train and warn this employee about the need to wear his seat belt I would agree with the Secretary's assessment. The operator is small to medium in size and has no prior history of the violation charged herein. The history is otherwise unremarkable with a modest number primarily of "$50.00" violations. There is no dispute that the violation herein was timely abated by instructing the employee to wear his seatbelt. Under all the circumstances a civil penalty of $75.00 is appropriate.

ORDER

Citation No. 7926770 is affirmed with its "significant and substantial" findings and the Walker Stone Company is hereby directed to pay a civil penalty of $75.00 within 40 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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October 12, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-216
Petitioner	:	A. C. No. 36-01555-03508
v.	:	
	:	Stiteler Strip
JOSEPH ROSTOSKY COAL COMPANY,	:	
Respondent	:	

DECISION

Before: Judge Barbour

This civil penalty proceeding arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C.§815(d)) (Mine Act or Act). The Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a civil penalty against Joseph Rostosky Coal Co. ("the company") for an alleged violation of 30 C.F.R. §48.29(c). The standard is one of several mandatory safety standards pertaining to the training and retraining of miners. The standard requires that "[c]opies of training certificates for currently employed miners shall be kept at the mine site for 2 years, or for 60 days after termination of employment." The Secretary alleges the violation occurred at the company's Stiteler Strip Mine, a surface coal mine located in Washington County, Pennsylvania. She proposes the company be assessed a civil penalty of $55 for the alleged violation.

In answering the Secretary, the company denies that it violated the standard. It asserts that it cannot keep copies of the certificates at the mine site, due to vandalism. Therefore, it keeps copies at the home of its owner. The company also argues alternatively that the proposed penalty is excessive.

Following the filing of the company's answer, the matter was scheduled for trial. In a September 29, 1999 teleconference, counsel for the Secretary and the representative of the company advised me they believed they could stipulate to all of the pertinent facts, except those relating to the effect of any penalty on the company's ability to continue in business (see Judge's Note To File (September 29, 1999)). I advised the parties that there was no need for an evidentiary hearing, and if they presented me with stipulations and such other documentary evidence as they might have bearing on the ability to continue in business criterion, I would issue a decision based on the written record. The parties indicated they preferred to proceed in this

manner, and they effectively waived their right to a hearing.[1]

On October 6, 1999, I received a copy of the parties' stipulations. A copy of Joseph Rostosky's 1998 Schedule C, in which he reported to the Internal Revenue Service the company's profit or loss from that year, was included as an attachment to the stipulations (Stip.).

THE ISSUES

The issues are whether the company violated section 48.29(c), and, if so, the amount of the civil penalty that must be assessed.[2]

THE VIOLATION

Citation No. 3937426 states in pertinent part, "Copies of training certificates . . . [were] not available at the mine site for inspection" (Stip. Exh. 1 at 1). The parties stipulated that the violation existed as charged but acknowledged as a fact, and as the answer asserted, that the copies were not kept at the mine because of the possibility of vandalism (Stip. 7). Based on the stipulations, I find the referenced copies were not at the mine as required and that the violation existed as charged.

THE PENALTY CRITERIA

In assessing a civil penalty, I must consider the criteria set forth in section 110(i) of the Act (30 U.S.C. §820(1)(i)).

The parties agreed that in the 24 months prior to March 25, 1999 (the date Citation No. 3937426 was issued), the company had one assessed violation (Stip. 9; Stip Exh. 2). This is a negligible prior history.

The parties further agreed that MSHA documents showed the mine's annual production of

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[1]Although the company's owner, Joseph Rostosky, entered an appearance on behalf of the company, he was not available for the teleconference and the company was represented by his wife. Mrs. Rostosky assured counsel for the Secretary and me that she spoke for the company unless we received a subsequent notification from Joseph Rostosky nullifying her representations and agreements. No such notification was received, and Mr. Rostosky signed the stipulations upon which this decision is based.

[2]As I explained to Mrs. Rostosky, if I find a violation occurred, I have no authority to waive the civil penalty (30 U.S.C. 820(a)).

coal was approximately 16,647 tons (Stip. 10; Stip. Exh. 3). They recognized the company believes that its production was less and that the company was free to submit evidence to that effect. Because the company has not submitted such evidence, I find that the mine's annual production was 16,647 tons and that the operator is small in size.

The parties do not dispute the gravity and negligence findings made by the inspector -- that the company's negligence was "low", that any resulting injury or illness would involve "no lost workdays", that two persons were affected by the violation, and that the violation was not a significant and substantial contribution to a mine safety hazard (Stip. 8). Therefore, I find that the violation was due to the company's low negligence and that the violation was not serious.

In the teleconference, I explained to the company's representative that the burden of proof with regard to the ability to continue in business criterion was on the company. The company's 1998 Schedule C shows that Joseph Rostosky reported a profit of $5,973 for 1998, after reporting a gross income of $254,923 and total expenses of $247,268. (Of the total expenses, $17,505 was depreciation (Stip. at 4).) The financial data establishes that a modest penalty of the amount proposed will not effect on the company's ability to continue in business.

Finally, although the parties did not stipulate as to the good faith of the company in attempting to achieve rapid compliance, the violation was terminated when the company timely moved copies of the training certificates to the mine. This constituted good faith compliance (Stip. Exh. 1 at 2).

PENALTY ASSESSMENT

I credit the company's concerns about vandalism at the mine. The company's representative explained repeatedly that the problem had resulted in the loss of company property. She was sincere in her belief that it was better to keep the company's records (including copies of its training certificates) at the Rostosky home rather than risk their destruction at the mine. Because the standard is specific in requiring copies of the certificates (and other records) to be kept at the mine site, the company may want to pursue a modification of section 48.29(c) (and other standards) to allow for the retention of documents elsewhere than at the mine (30 U.S.C. §811(c)). However, this is a matter for the company and the Secretary to resolve.

Given the fact that the company's negligence was low and the violation was not serious, and given the small size of the company, its minimal history of previous violations, and its good faith in complying, I conclude that a nominal civil penalty of $25 is warranted.

ORDER

Within 30 days of the date of this decision, the company **WILL PAY** the Secretary $25 for its violation of section 48.29(c) as set forth in Citation No. 3937426, and upon payment of the penalty this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge

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Joseph Rostosky, Owner, Rostosky Coal Company, R.D. No. 3, Box 112, Monongahela, PA 15063 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

October 13, 1999

JAMES C. KEYS, JR., Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. CENT 99-267-DM
REINTJES OF THE SOUTH, INC., Respondent	:	SC MD 99-07
	:	Ormet Primary Aluminum
	:	Mine ID 16-00354 FDP

DECISION

Before: Judge Zielinski

James C. Keys, Jr. ("Keys" or "Complainant") initiated this proceeding by filing a complaint of discrimination pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(3). Complainant alleges that Reintjes of the South, Inc.("Reintjes" or "Respondent"), discriminated against him as a result of his complaints regarding alleged violations of the Act made on November 22, 1996, the day he allegedly suffered a work-related injury when a fellow employee deliberately sprayed him with caustic material. The essence of his cause of action, as deduced from the *pro se* complaint and attached documents, is that he was fired on November 22, 1996, after complaining to a Reintjes official that it had failed to train employees as required by the Act.[1]

Keys filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") on February 16, 1999, more than 2 years beyond the 60 days allowed by section 105(c)(2) of the Act. In the interim he failed in an attempt to secure workmen's compensation benefits beyond payment of some medical expenses associated with his initial treatment. MSHA determined that no violation of the Act had occurred and by notice dated May 24, 1999, advised Complainant of that determination and his right to file an action with the Commission on his own behalf. Complainant filed the instant complaint with the Commission on June 30, 1999.

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[1]/ The complaint states a cause of action of discrimination under the liberal construction accorded *pro se* pleadings. See, *Clyde Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918 (1996).

In response to the complaint, Reintjes filed an answer and a motion to dismiss or in the alternative for summary judgement, arguing, *inter alia*, that Keys did not timely file either his complaint with the Secretary or the Commission and that it suffered prejudice as a result.

Complainant failed to timely respond to the motion, the service copy of which was eventually returned to Respondent marked "unclaimed." On August 24, 1999, an order was issued directing Complainant to show cause why Respondent's motion should not be granted. The Order to Show Cause was mailed to Complainant by both certified and regular mail and included a copy of Respondent's answer and motion. Complainant was specifically directed to address Respondent's timeliness arguments and "whether any untimely actions were justified." During a telephonic status conference on September 1, 1999, the parties acknowledged receipt of the August 24, 1999 order and the issues raised in the motion were discussed. Particular emphasis was placed on Complainant's need to justify any delay in filing his complaints. On September 2, 1999, a Scheduling Order was entered, reflecting the substance of the discussions and reiterating the directive that Complainant address the timeliness issues and "submit any facts or arguments that he relies on as justification for any untimely filing."

Complainant's response to the show cause order and motion was received on September 7, 1999. Respondent filed a reply on September 20, 1999, including affidavits supporting its claims of prejudice. Complainant did not file a response, as permitted by the scheduling order.

Filing with the Commission

Reintjes' argument that Keys' complaint was not timely filed with the Commission is easily disposed of. While the complaint was filed 37 days following the date of the letter noting MSHA's finding of no discrimination, the 30 day time period prescribed in section 105(c)(3) of the Act and Commission Rule 2700.41[2] commences with *receipt* of the determination, not the purported mailing date. Complainant asserts, in his response to the show cause order, that "someone else" was allowed to sign for the original delivery and that the copy he received was mailed on June 24, 1999. There is no evidence in the record establishing that Keys actually received the MSHA letter before June 1, 1999. I find that the complaint was timely filed with the Commission.[3]

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[2]/ 29 C.F.R. § 2700.41.

[3]/ Respondent claims that its ability to rebut complainant's explanation for the allegedly untimely filing of his complaint was prejudiced because it determined during a phone call on September 10, 1999, that a witness was then deceased. However, Respondent failed to establish whether the unavailability of information from the witness is attributable to Keys' alleged delay of a few days, or it's own determination to not pursue an investigation or formal discovery upon receipt of the complaint. The prejudice claim is rendered moot by the finding that the complaint was timely

Filing with the Secretary

Reintjes argument that Keys' filing of a complaint with the Secretary of Labor's MSHA was untimely carries considerably more weight. Section 105(c)(2) of the Act specifies that:

> Any miner * * * who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may **within 60 days after such violation occurs**, file a complaint with the Secretary alleging such discrimination. * * * (emphasis supplied.)

Here, the alleged discriminatory action, Respondent's firing of Complainant, occurred on November 22, 1996. Under section 105(c)(2), Complainant's allegation of discrimination should have been filed with MSHA on or before January 22, 1997. However, the complaint was not filed with MSHA until February 16, 1999, 2 years and 26 days beyond the statutory deadline.

The Commission has held that the 60 day time limit in section 105(c)(2) of the Act is not jurisdictional and that non-compliance may be excused on the basis of justifiable circumstances. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982). As the Commission stated in *Herman*, 4 FMSHRC at pp. 2138-39:

> The placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by :
>
> > Preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witness have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.
>
> *Burnett v. N.Y. Central R.R. Co.*,380 U.S. 424, 428 (1965), *quoting R.R Telegraphers v. REA*, 321 U.S. 342, 348-49 (1944). * * *

The cases dealing with justification for delays in filing identify several factors that are typically considered, including: complainant's capacity or ability to initiate and pursue such a remedy, *See, William T. Sinnott, II v. Jim Walter Resources, Inc.*, 6 FMSHRC 2445 (1994) (Maurer, ALJ); complainant's awareness of his rights under the Act, *Id.; Hollis, supra.; Secretary of Labor on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.*, 18 FMSHRC 278 (1996)(Manning, ALJ)(delay of 107 days justified by prompt filing after complainant first became

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filed.

aware of rights under the Act, filing of substantially identical allegations in workmen's compensation and employment discrimination claims and absence of prejudice to respondent); *Secretary of Labor on behalf of Smith v. Jim Walter Resources, Inc.*, 21 FMSHRC 359 (1999) (Melick, ALJ)(10 month delay excused by filing within 65 days of first learning of rights under section 105(c), no claim of prejudice by respondent); *Secretary of Labor on behalf of Gay v. Ikard-Bandy Co.*, 18 FMSHRC 341 (1996)(Melick, ALJ)(3 month delay excused by filing 1 day after first learning of section 105(c) rights and no claim of prejudice); and, the length of the delay and whether it has resulted in prejudice to a respondent. Prejudice is inherent in any delay, because witnesses' recollections fade. *See, Sinnott, supra,* (delay of over 3 years "inherently prejudicial"). Consequently, the lengthier the delay, the stronger the justification required to overcome it. *See, Roland A. Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (1997)(Fauver, ALJ.)("very special circumstances" required to justify delay of over 2 years). Concrete demonstrable prejudice may also occur, e.g. the unavailability of witnesses or documents. All such factors must be weighed to reach the ultimate determination of whether, on the facts of the particular case, the delay was justified. *Hollis, supra; Herman, supra.*

The delay here, in excess of 2 years, is truly extraordinary. Complainant has made no attempt to justify the delay, despite the instructions in the show cause and scheduling orders. While he claims significant injury, he clearly was not incapacitated and actively pursued his workmen's compensation case. He does not claim to have been unaware of his rights under the Act, and his complaint and related papers evidence considerable familiarity with it's provisions.[4]

Respondent's ability to defend against the allegations has been prejudiced by the delay. Evidence of any discussions that Keys may have had with Reintjes officials on or about November 22, 1996, the only protected activity claimed by Keys, would be critical to prosecution and defense of the claim. Recollections of any such discussions are likely to have faded considerably. Respondent has also submitted affidavits establishing that training records and potential witnesses may no longer be available. However, whether or not there were training violations and whether or not Keys was injured in the manner he claimed would not likely become issues in this proceeding. *See, Munsey v. FMSHRC*, 595 F.2d 735, 742-43 (D.C.Cir 1978)(safety complaints are protected activity even if frivolous or not made in good faith).[5]

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[4]/ His papers reference; a "Guide Manual to Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977;" section 110(f)'s criminal penalties for making false statements; and, training and posting requirements.

[5]/ There is no merit to Respondent's claim of prejudice because its exposure to a back pay award has been substantially increased by the delay. Respondent is adequately protected by the requirement of proof of causation for any claimed relief and the doctrine of mitigation of damages.

Complainant's primary interest in the present action appears to be obtaining compensation for damages resulting from the November 1996 injury.[6] He was involved in a lengthy workmen's compensation proceeding in an attempt to secure compensation. His complaint to MSHA was submitted only after his workmen's compensation claim was denied, a delay of more than 2 years for which he has offered no justification.

ORDER

Based upon the factors discussed above, Complainant's delay of more than 2 years beyond the prescribed period for filing a complaint of discrimination with MSHA was not justified. Accordingly, the complaint is hereby dismissed.

Michael E. Zielinski
Administrative Law Judge

Distribution:

Mr. James C. Keys, Jr., 1115 Ina Claire Drive, Opelousas, LA 70570 (Certified Mail)

Mark N. Savit, Esq., Adele L. Abrams, Esq., Patton Boggs, LLP, 2550 M Street, NW, Washington, DC 20037 (Certified Mail)

dcp

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[6]/ The response to the Show Cause Order itemizes relief claims of medical expenses of $4,662.98, lost wages of $83,835.00 and $40,000.00 for pain and mental distress, and states:

> * * * * By law, I was injured badly and I am entitled to medical treatment and wages by the LWCC. I am demanding that they pay me what is owed. * * * *

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

October 13, 1999

DUMBARTON QUARRY ASSOCIATES, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 98-32-RM
	:	Citation No. 7709068; 10/31/97
v.	:	Dumbarton Quarry
	:	Docket No. WEST 98-69-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Citation No. 7709045; 10/28/97
	:	La Vista Quarry
Respondent	:	Docket No. WEST 98-70-RM
	:	Citation No. 7709046; 10/28/97
	:	La Vista Quarry
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 98-246-M
	:	A.C. No. 04-00097-05526
	:	La Vista Quarry
v.	:	Docket No. WEST 99-88-M
DUMBARTON QUARRY ASSOCIATES, Respondent	:	A.C. No. 04-02380-05537
	:	Dumbarton Quarry

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the Secretary of Labor; David W. Donnell, Esq., Peterson Law Corporation, Rocklin, California, for Dumbarton Quarry Associates.

Before: Judge Manning

These cases are before me on notices of contest filed by Dumbarton Quarry Associates ("Dumbarton") and petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Oakland, California, on September 14, 1999.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Dumbarton Quarry and the La Vista Quarry are operated by Dumbarton in Alameda County, California. In October 1997 MSHA Inspector James Goodale inspected both quarries. During the inspection, he issued a number of citations and orders including the three at issue in these proceedings.

A. Dumbarton Quarry

On October 31, 1997, Inspector Goodale inspected the Dumbarton Quarry. During his inspection he issued Citation No. 7709068 alleging a violation of 30 C.F.R. § 56.18002(a), as follows:

> An adequate examination of work places [was] not being conducted by the mine operator. Several violations were cited relating to examining work areas.

Inspector Goodale determined that the violation was of a significant and substantial nature ("S&S") and was the result of Dumbarton's moderate negligence. Section 56.18002(a) provides, in part, that a "competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." The standard further states that the operator "shall promptly initiate appropriate action to correct such condition." The Secretary proposes a penalty of $267 for this alleged violation.

During his inspection, Inspector Goodale inspected both the pit and the crushing plant. Inspector Goodale noted that equipment in the pit was in excellent condition. (Tr. 52). He testified that he observed a number of violations at the crushing plant. (Tr. 52-64). He issued seven citations for these violations. (Ex. G-4). He testified that each of these violations was obvious. (Tr. 64). The inspector believed that these violations could have been prevented if adequate examinations of the workplaces were conducted. *Id.* He concluded that these violations would not have existed if adequate on-shift examinations were conducted because the violations were very obvious. He issued the citation on that basis.

The citations that Inspector Goodale relied upon to support this citation allege violations of various safety standards. The inspector issued two S&S citations alleging violations of 30 C.F.R. § 56.12025. In each case, the citation states that electrical extension cords being used in the crusher area were not grounded. (Tr. 58-60, 63-64). He was concerned that ungrounded electrical circuits created a shock hazard. He also issued two citations alleging violations of the Secretary's guarding standard at section 56.14107(a). The other citations allege violations of sections 56.12008 (fittings for power wires), 56.16005 (securing gas cylinders), and 56.4603(b) (closure of valves). (Ex. G-4). Only the two violations of section 56.12025 were designated as S&S by the inspector. Dumbarton paid the penalties proposed by the Secretary for all seven of these citations.

Inspector Goodale testified that Dumbarton kept records of its examinations of working places. The records indicated that "everything was okay" throughout the crusher area. (Tr. 68). The inspector stated that he issued the citation because the examinations were not adequate under the safety standard. (Tr. 67-68). He determined that the citation was S&S based on the fact that two of the citations he issued in the crusher area were S&S. (Tr. 66).

Dumbarton maintains that Citation No. 7709068 should be vacated and, in the alternative, that it should be modified to a non-S&S citation. It argues that the citations relied upon by the inspector to establish that the examinations were inadequate did not cite conditions that adversely affected safety or health and the conditions were not obvious, in any event, including the two S&S citations. (Tr. 153). Citation No. 7709064 alleges that the ground lug was missing from the plug of an extension cord. Dumbarton argues that the only way for an examiner to detect such a condition would be to remove and inspect each plug at the mine. It contends that the on-shift examiner is not required to take such an action during his inspection. Further, it argues that there is no evidence concerning how long this condition had existed. (Tr. 154). It believes that the lug could have broken off the plug the day before the inspection.

Dumbarton argues that the guarding violation alleged in Citation No. 7709061 is not obvious because a gate was present to protect persons from contacting the pinch point. It contends that a reasonable person could assume that this gate complied with the safety standard. (Tr. 154-55; Ex. G-5). It believes that because the alleged guarding violation did not create a safety hazard to employees, the examiner's failure to note the condition does not violate section 56.18002(a).

In order to determine whether a violation occurred, the requirements of the standard must be examined. The Commission has identified three requirements of section 56.18002 as follows: (1) ... workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (September 1988). The record-keeping requirement is set forth in subsection (b) of the standard. The Secretary defined a competent person as "a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned." 30 C.F.R. § 56.2.

There is no dispute that the citations issued by the inspector used to support the instant citation were issued in "working places," as that term in defined in section 56.2. Inspector Goodale also admitted that Dumbarton had conducted examinations of the working places. He examined the records kept by Dumbarton that "indicated that they had done their examination of workplaces; they'd checked off that they'd done it." (Tr. 67). He testified that he issued the citation despite the fact that examinations were being made and recorded because he believed that the examinations were inadequate. (Tr. 68). The identity of the individual who performed the examinations is not disclosed in the record.

The Secretary did not introduce any evidence as to the competency of Dumbarton's examiner. The Commission held that the term "competent person" within the meaning of the standard "must contemplate a person capable of recognizing hazards that are known by the operator to be present in the work area or the presence of which is predictable in view of a reasonably prudent person familiar with the mining industry." *FMC Wyoming* 1629. In *FMC Wyoming*, the Commission determined that the examiner was not competent because he had no training or experience in asbestos recognition and was assigned to examine areas in which asbestos was being removed without his knowledge. In the present case, there is no evidence that Dumbarton's examiner was not familiar with and could not recognize safety hazards that are typically present in a quarry and crusher environment.

In the present case, the Secretary attempts to prove a violation by showing that the examiner was not competent or, if competent, his examinations were inadequate because seven citations alleging safety hazards were issued in the crusher area during the MSHA inspection. There have not been any Commission or administrative law judge decisions that address this issue in a comprehensive way. In most cases, the Secretary presented direct proof that the examinations were not conducted or that the examinations were not recorded. Former Commission Judge Arthur Amchan vacated a citation alleging a violation of section 56.18002(a) where testimony established that the required examinations were done. Judge Amchan concluded that the fact that the MSHA inspector "found a number of violative conditions may be the result of [the operator's] belief that the conditions cited were not violations, rather than an indication that workplace examinations were not performed." *Higman Sand & Gravel, Inc.* 18 FMSHRC 951, 962-63 (June 1996).

The Secretary's Program Policy Manual on section 56.18002 provides, in part:

> Evidence that a previous shift examination was not conducted or that prompt corrective action was not taken will result in a citation for violation of §§ 56/57.18002(a) or (c). This evidence may include information which demonstrates that safety or health hazards existed prior to the working shift in which they were found. Although the presence of hazards covered by other standards may indicate a failure to comply with this standard, MSHA does not intend to cite §§ 56/57.18002 automatically when the Agency finds an imminent danger or a violation of another standard.

(*Program Policy Manual*, Volume IV, Subpart Q <http://www.msha.gov/regs/complian/ppm/pmvol4e.htm#77>). Although the language of this manual is not binding on the Secretary, I note that it indicates that evidence in support of a violation "*may include* information which demonstrates that safety or health hazards existed prior to the working shift in which they are found." (Emphasis added). In this case, the only evidence presented to support the violation is the fact that Inspector Goodale issued seven citations during his inspection of the crusher area.

I find that many of the conditions cited by Inspector Goodale were either not obvious or they arguably did not present serious safety hazards. Because Dumbarton paid the penalties for the underlying citations, I assume that the conditions described therein existed and that they violated the cited safety standards. In Citation No. 7709061, a gate was used in lieu of a guard at a tail pulley. The gate was not locked at the time the citation was issued, but a lock was present. (Ex. G-5). An examiner might have concluded that this condition did not present a safety hazard, especially if the gate was locked. In Citation No. 7709064, the grounding prong on the plug of the cited extension cord was plugged into a wall socket. The violation was not obvious. I credit Inspector Goodale's testimony concerning the nature of the other five violations. The conditions described in these five citations should have been recorded by the examiner because they presented obvious safety hazards.

Although I appreciate Inspector Goodale's concern that the examinations were not discovering safety problems, I find the fact that five citations were issued citing visible safety problems is too slender of a reed on which to hang a violation of section 56.18002(a) in this case. The examinations were being made and recorded. There has been no showing that the examiner was not competent. Moreover, it is not uncommon for an MSHA inspector to issue multiple citations at a mine that cite conditions which should have been detected by the operator's examiner. Citations under section 56.18002 are generally not issued under such circumstances. The Secretary may be able to establish a violation of the safety standard by proving that obvious conditions were not being corrected. In this case, however, I find that such proof is insufficient to establish a violation. Accordingly, Citation No. 7709068 is VACATED.

B. La Vista Quarry

1. Citation No. 7709045

On October 28, 1997, Inspector Goodale inspected the La Vista Quarry. During his inspection he issued Citation No. 7709045 alleging a violation of 30 C.F.R. § 56.11001, as follows:

> Safe access was not provided on the elevated platform leading to the 5100 Symons crusher. A buildup of spilled materials, old parts, belting, etc. [was] observed [on] the walkway where an employee must travel daily to check the crusher for plug-ups. The walkway was approximately five foot above ground level, if any more materials would accumulate, the handrails provided would be ineffective. This condition was recorded and reported to the General Manager on the back of the time cards. The time cards were reviewed. The General Manager stated he neglected this condition, didn't think it was serious enough to correct right away.

Inspector Goodale determined that the violation was of a significant and substantial nature ("S&S") and was the result of Dumbarton's high negligence. He issued the citation under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. Section 56.11001 provides that a "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of $400 for this alleged violation.

Inspector Goodale testified that he observed spilled material, belting, and some old parts along the elevated platform leading to the Symons crusher at the crushing plant. (Tr. 19-20). He determined that it was heavily traveled because he observed footprints in the material. The inspector stated that the platform is the sole travelway to the Symons crusher. (Tr. 22). He also stated that the examiner would be required to travel through this area when conducting his on-shift examination. The elevated platform is shown on a photograph that he took during his inspection. (Ex. G-2, p. 1).

Inspector Goodale considered the accumulated material to present a tripping and stumbling hazard. He also stated that the accumulations create a slipping hazard. The inspector stated that because the accumulations of spilled material were very fine, they would become extremely slippery when wet.

Inspector Goodale asked the miners' representative about the material present along the elevated platform. The inspector testified that the representative told him that the conditions existed for some time and that the plant operator was reporting the condition to the quarry manager on the back of his time cards. (Tr. 24).

Following his inspection, Inspector Goodale asked Rick Case, the quarry manager, about the accumulation of material along the elevated platform and asked to see the records of on-shift examinations that are required to be kept under section 56.18002(b). The inspector determined that Dumbarton complied with the record-keeping requirements of that section by having the examiner report safety problems on the back of his time card. (Tr. 29-30). Inspector Goodale reviewed the time cards for the plant operator and saw that he reported the spillage on the elevated platform on the back of his time card for at least the previous three or four days. (Tr. 31).

Inspector Goodale testified that he asked Mr. Case about the spillage and that Mr. Case told him that he regularly reviews the plant operator's time cards, that he was aware of the spillage, and that he did not take steps to have the spillage cleaned up because he did not consider it to be a serious problem. (Tr. 32-33, 91). The inspector issued the citation as a section 104(d)(1) unwarrantable failure citation largely because Mr. Case knew of the conditions and did not take any steps to remove the accumulations. He determined that the violation was S&S because he believed that there was a reasonable likelihood that the hazard presented would result in a serious injury. (Tr. 40-1, 83-84, 93-94).

Robert McCarrick, General Manager for Dumbarton, testified that employees are instructed to report serious safety concerns directly to the quarry manager either in person or via radio. (Tr. 105-06). He also stated that employees are authorized to shut down an area at the quarry in order to correct a hazardous condition. In addition, he testified that regular safety meetings are held at the quarry at which employees can raise safety concerns.

Rick Case testified that he was not aware that there was a significant spill on the elevated platform at the time of the inspection. (Tr. 114). He stated that the notation on the time cards indicated that there were "some rocks and spills on catwalks and walkways." *Id.* He stated that there are always some spills on the walkways when the crusher is running and employees go around and clean them up. (Tr. 115). He testified that he interpreted the notations on the time cards to indicate that there was some spillage, but the notations did not state that there was a major spill or that a hazardous condition was present. (Tr. 115-16). Mr. Case testified that, given the size of the spill, the crusher operator should have taken steps to have it cleaned up or, at a minimum, directly notify him of the hazard. (Tr. 115-17). Finally, Mr. Case testified that he does not believe that there were old belts or parts in the spillage and that the inspector was only seeing shadows in the spillage. (Tr. 120, 124).

I find that the Secretary established a violation of the safety standard. A safe means of access to the crusher was not maintained. The elevated platform was used as a travelway to gain access to the crusher, which is a working place as that term is defined in section 56.2. Employees must travel to the crusher from time to time. Indeed, the inspector observed foot- prints in the area. The spilled material prevented safe travel. The fact that conveyor belts or other old parts may not have been present does not lessen 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 would 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 violation presented a significant tripping, stumbling, and slipping hazard. The presence of handrails along the edge of the elevated platform made it less likely that anyone would fall off the platform as a result of the hazard but, assuming continued mining operations, more spillage could have created a falling hazard. Without considering the potential fall hazard, I find that it was reasonably likely that someone would trip, stumble, or slip on the accumulated fine material and suffer a reasonably serious injury such as a twisted ankle, torn ligament, or dislocation of a knee, assuming continued normal mining operations. The violation was serious because a lost workday injury was reasonably likely.

The Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). 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, 193-94 (February 1991). The Commission stated that "a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

I find that the violation was the result of Dumbarton's unwarrantable failure to comply with the standard because its failure to clean up the spilled material on the elevated platform constituted a serious lack of reasonable care. The accumulation of spilled material was extensive, it had been present for at least a few days, and no effort had been made to remove it. Dumbarton argues that Mr. Case was not at fault because he reasonably believed that the accumulation did not present a significant hazard. The issue, however, is not Mr. Case's conduct, but whether Dumbarton exhibited aggravated conduct constituting more than ordinary conduct. A significant amount of spilled material was present on top of the elevated platform that created an obvious hazard to anyone walking through the area. The spillage was duly noted on the crusher operator's time cards, as was the custom at the mine. The examiner's notations were being ignored, either because Mr. Case was not giving them due regard or because the crusher operator did not emphasize the hazard in his notes sufficiently.

Mr. Case was a management employee. Although the crusher operator was not a management employee, he was an agent of Dumbarton for the purpose of conducting and recording the required on-shift examinations so his actions and mistakes are fully imputable to Dumbarton. *Rochester & Pittsburgh Coal Co.* 13 FMSHRC 189, 194-96 (February 1991).

Thus, between the two of them, Dumbarton had been put on notice that greater efforts were necessary to provide and maintain a safe means of access to the crusher. There is no evidence that the area was being cleaned up on a regular basis and that new spills were occurring. Although I would not necessarily characterize Dumbarton's conduct with respect to this spillage as exhibiting "reckless disregard," "intentional misconduct," or "indifference" to the hazard present, I find that it constituted a serious lack of reasonable care. Consequently, Citation No. 7709045 is AFFIRMED as issued.

2. Order No. 7709046

On October 28, 1997, Inspector Goodale issued Order No. 7709046 alleging a violation of 30 C.F.R. § 56.11001, as follows:

> Safe access was not provided on the elevated platform around the 5100 Symons crusher. A buildup of spilled materials, old parts, belting, etc. [was] observed on the walkway where an employee must travel daily to check the crusher. The walkway was approximately nine feet above ground level, if any more materials would accumulate, the handrails provided would be ineffective. This condition was recorded and reported to the General Manager on the back of the time cards. The time cards were reviewed. The General Manager stated he neglected this condition, didn't think it was serious enough to correct right away.

Inspector Goodale determined that the violation was S&S and was the result of Dumbarton's high negligence. He issued the order under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. The Secretary proposes a penalty of $400 for this alleged violation.

The conditions cited by the inspector in this order are very similar to the conditions in the previous citation. The spilled material in this case was on the deck above the area cited in the previous citation and the accumulation was immediately adjacent to the crusher. (Ex. G-2, p. 2). The parties offered testimony and argument with respect to this alleged violation that was entirely consistent with that offered for Citation No. 7709045.

Dumbarton contends that this condition should have been included in the original citation since there is only one travelway to the crusher. I hold that it was within the Secretary's discretion to issue separate citations because the cited conditions were on two different decks. Dumbarton questions whether Inspector Goodale really knew whether there was a hazardous accumulation of spilled material because the cited area was nine feet off the ground and he did not travel to the deck to inspect it. The inspector testified that it would have been hazardous for him to travel to the deck and I credit his testimony that he could see enough to establish that safe

access was not provided to the crusher. The same hazards were present on this deck as on the elevated platform cited in the previous citation. In addition, this deck was higher off the ground.

For the reasons discussed above with respect to Citation No 7709045, I find that the Secretary established a violation of the safety standard, the violation was S&S, and it was the result of Dumbarton's unwarrantable failure to comply with the standard. Consequently, Order No. 7709046 is AFFIRMED as issued.

II. APPROPRIATE CIVIL PENALTIES

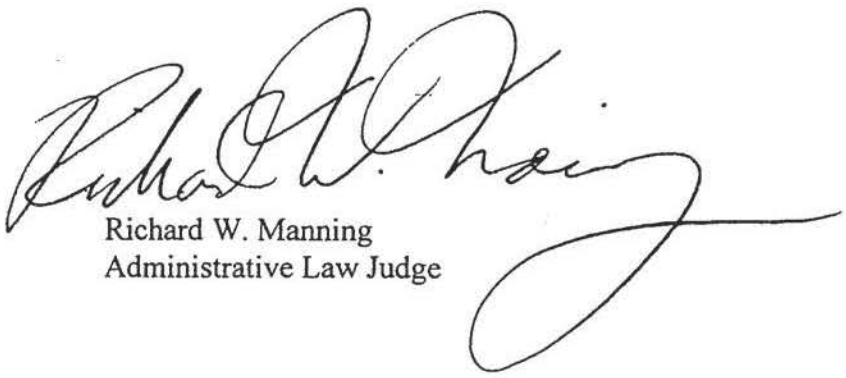
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Because I vacated the citation issued at the Dumbarton Quarry, I have only considered the information provided by the parties with respect to the La Vista Quarry. I find that no citations were issued at the quarry during the two years prior to this inspection. (Tr. 9). The quarry is a relatively small- to medium-sized facility that worked about 36,700 manhours and employed about 12 miners. (Tr. 9, 122). Dumbarton as a whole worked about 83,900 manhours. The violations were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on Dumbarton's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

Citation/Order No.	30 C.F.R. §	Penalty
WEST 98-246-M		
7709045	56.11001	$400.00
7709046	56.11001	400.00
WEST 99-88-M		
7709068	56.18002(a)	Vacated

Accordingly, Citation No. 7709068 is **VACATED**; Dumbarton's notice of contest in WEST 98-32-RM is **GRANTED**; and WEST 99-88-M is **DISMISSED**. Citation No. 7709045 and Order No. 7709046 are **AFFIRMED** as written; Dumbarton's notices of contest in WEST 98-69-RM and WEST 98-70-RM are **DISMISSED**; and Dumbarton Quarry Associates is **ORDERED TO PAY** the Secretary of Labor the sum of $800.00 within 30 days of the date of this decision. Upon payment of the penalty, WEST 98-246-M is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
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Falls Church, Virginia 22041

October 14, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-263-M
Petitioner	:	A. C. No. 41-03278-05520
v.	:	
	:	South Quarry
JOBE CONCRETE PRODUCTS, INC.,	:	
Respondent	:	

DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Jobe Concrete Products, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $80,000.00. For the reasons set forth below, I modify and affirm the citations and assess a civil penalty of $6,000.00.

The parties filed a motion for partial settlement of the case. In the partial settlement, the parties agreed that the Secretary would modify Citation No. 7925871 from a 104(d)(1) citation, 30 U.S.C. § 814(d)(1), to a 104(a) citation, 30 U.S.C. § 814(a), by reducing the level of negligence alleged from "high" to "moderate" and deleting the "unwarrantable failure" designation. The parties also agreed that they would submit the case based on joint exhibits and a stipulation of facts, including a stipulation on all of the penalty criteria, with the exception of "negligence," and that they would file briefs addressing the level of negligence and an appropriate penalty. I issued an order granting the motion for partial settlement on March 3, 1999.

Background

The South Quarry is an open pit limestone mine owned and operated by Jobe Concrete Products, Inc., in El Paso County, Texas. Limestone is extracted by drilling and blasting. The mined limestone is hauled by front-end loader and trucks to the plant where it is crushed, sized and stored in stockpiles. The finished products are sold for general industry and road construction. The mine has 12 employees.

At about 1:30 p.m., on January 19, 1998, Valentine Moreno, age 72, was fatally injured when the cargo box on the Terex Model 2766C, 27.5 ton capacity, all-wheel drive, articulated dump truck that he was driving overturned. When the cargo box turned onto it's right side, the truck came to a sudden stop and Moreno was apparently ejected from the cab. No one saw the accident. The first person on the scene found Moreno lying across the engine, face down on top of the windshield. The motor was still running. Moreno was pronounced dead at the scene.

The MSHA investigation of the accident determined that:

> The truck was normally used to haul broken limestone from the quarry to a primary crusher located in the plant yard, a distance of approximately one thousand feet.
>
> Th[e] road [from the quarry to the crusher] declined at approximately 10 degrees or 17 percent. It was graded smooth and was bermed properly from top to bottom. The road wound slightly down the hill to a switchback curve located approximately 300 feet from the crusher. Traffic on the road was one way only.
>
> Tire tracks found on the roadway identified the path of the truck. The tracks, identified as the left side tire tracks, veered off the left side of the roadway approximately 250 feet uphill from the switchback curve. They followed the left shoulder for about one hundred feet to a bump in the shoulder and then crossed at a forty-five degree angle to the right shoulder of the roadway. The tracks then made a straight line down the right shoulder, across the switchback to a berm constructed of large rocks. Paint marks as well as scrape marks were imprinted on the large boulders constructing the berm.
>
> The truck came to rest with the cab upright and the cargo box laying [*sic*] on it's right side approximately thirty feet from where the markings were found on the rocks. There were no skid marks on the roadway to suggest that the brakes had been applied.

(Jt. Ex. 1.)

The investigation resulted in the issuance of two citations. Both citations state that:

> A fatal accident occurred at this operation on January 19, 1998, when a truck driver lost control of the truck he was driving while en route from the quarry to the crusher. The bed of the articulated truck overturned when

> the vehicle struck a rock berm at the bottom of the quarry access ramp. The cab remained upright, but the victim was thrown through the windshield.

Citation No. 7925870 alleges a violation of section 56.9101, 30 C.F.R. § 56.9101, in that: "An examination of the vehicle and roadway did not reveal defects affecting safety or unsafe conditions." Citation No. 7925871 charges a violation of section 56.14131(a), 30 C.F.R. § 56.14131(a), because: "The victim was not wearing a seatbelt. No effective effort was made to ensure truck seatbelts were worn. The instructions to wear seatbelts were in English; the victim spoke Spanish. The operator did not establish a practice of following-up to see that seatbelts were being worn."

Findings of Fact and Conclusions of Law

Section 56.9101 requires that: "Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used." Section 56.14131(a) provides that: "Seat belts shall be provided and worn in haulage trucks." The parties have stipulated that the violations occurred and that they were "significant and substantial." (Stips. III.B.2., III.A.5.; II.B.2., II.A.5.) Accordingly, I so conclude.

Civil Penalty Assessment

The Secretary has proposed penalties of $30,000.00 and $50,000.00, respectively, for these two violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

Section 110(i) provides that:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

With regard to these criteria, the parties have stipulated that:

(1) The operator's history of violations shows only 9 violations during the preceding 24-month period, which is a relatively low history of previous violations.

(2) Respondent is a relatively small operator. The mine employed 12 persons, normally operating one shift a day, five and one-half days per week.

(3) The proposed penalty would probably not affect the operator's ability to continue in business.

(4) The violation[s] w[ere] promptly abated in good faith . . . .

(5) The gravity of the violation[s] was serious, in that the violation[s] w[ere] significant and substantial, as the driver of the vehicle was fatally injured . . . .

(Stips. II.A. & II.B.) Thus, the only issue left for determination is the degree of the operator's negligence with regard to the violations.

The Secretary has alleged that the level of negligence in both citations is "moderate."[1] Determining the level of negligence in this case is complicated by two factors. The first is that no one witnessed the accident, so there is no way to know exactly what happened. The second is that the negligence of a rank-and-file non-supervisory employee cannot be directly imputed to the operator for purposes of penalty assessment. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982).

With regard to the first factor, it is possible to infer from the facts available that some negligence on the part of Moreno was involved. He clearly was not wearing his seat belt when the accident happened and it is evident from the tracks left by the truck that he did not have control of it. While it is possible to speculate on scenarios that do not involve negligence on the part of the driver, *e.g.*, he had a heart attack, there is no evidence in the record to support such speculation. Furthermore, such speculation would not explain his failure to wear a seat belt. Consequently, I conclude that Moreno was negligent in not wearing a seat belt and not maintaining control of his truck.

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[1] Citation No. 7925871 originally alleged that the company's negligence was "high," however, as noted above, the Secretary agreed to modify it to "moderate" in the partial settlement. I am deciding this case on the assumption that she has carried out this part of the agreement.

Turning to the second factor, the Commission has held that although a non-supervisory employee's negligence is not directly imputable to the operator, "where a rank-and-file employee has violated the act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Id.* (citation omitted). Based on the evidence before me, I conclude that Jobe had taken reasonable steps to prevent the violative conduct.

In connection with this issue, the parties stipulated that:

> [1]. At the time of the accident, Jobe did not have a written seat belt policy, although its employees were trained that they were required to wear seat belts whenever they operated a motor vehicle. Jobe's unwritten policy was communicated in both English and in Spanish at regular safety meetings which supervisors held with their employees, and it required supervisors to check their employees for compliance periodically. Drivers were warned that they would be disciplined if found out of compliance.
>
> [2]. Signs reminding employees of the importance of seat belt use, including MSHA warnings and related safety training materials, were posted at locations where miners would see them, but those signs were only in English.
>
> [3]. Most employees speak only Spanish.
>
> [4]. A July 1997 memorandum from Company President Irene Epperson to supervisors, including Moreno's supervisor, forwarded several MSHA "Fatalgrams," including at least one warning of the importance of maintaining control of one's truck and wearing seat belts, and that memorandum instructed the supervisors to use them in their safety meetings with employees.
>
> [5]. MSHA's field notes from its accident investigation revealed that, when asked by MSHA, miners stated that Jobe had a policy requiring them to wear seat belts and that they complied with it. Other than the fact that Moreno was found not wearing his seat belt after the accident, MSHA has no evidence that seat belts were not worn regularly by Jobe's employees or that Jobe did not properly enforce its seat belt policy.
>
> [6]. Moreno's supervisors had considered him, prior to the accident, to be a safety-conscious employee who conscientiously wore his seat belt; three supervisors have provided sworn affidavits

that they personally had observed Moreno wearing his seat belt, and two of those supervisors testified that they personally and regularly instructed their employees including Moreno, to use seat belts.

[7]. MSHA has no evidence that Moreno was not a conscientious seat belt wearer. The only evidence MSHA has regarding Moreno's seat belt compliance prior to the accident is that: (a) he attended safety meetings conducted by MSHA in which the requirement to wear seat belts was stressed; and (b) when MSHA conducted a spot check during an inspection five months before the accident, MSHA documented the fact that Moreno himself (as well as all others checked) was wearing his seat belt.

[8]. Jobe's records show that, as required by company policy, Moreno regularly checked his vehicle to ensure that his seat belts were operational before operating his truck; those records show that Moreno checked on his seat belt before he began operating his truck on the day of the accident.

[9]. Only one prior citation for a seat belt violation was ever issued to Jobe; it was assessed a $50 civil penalty.

[10]. MSHA is unaware of any evidence that Moreno was speeding or that excessive speed played any role in the accident.

[11]. Moreno was familiar with the road, having previously driven it periodically when filling in for regular truck drivers, as well as having driven it every day for the two weeks he had been serving as truck driver prior to the accident, all without incident. Each day during that two-week period, Moreno drove the same 1,000 foot route each way, back and forth, all day long.

[12]. The speed limit was 15 miles per hour and drivers were trained not to exceed it.

[13]. No speed limit signs were posted on the road down to the rock plant.

[14]. Moreno had been a heavy equipment operator for over 25 years. During the one and one-half years of employment at the mine, he had demonstrated competence operating such equipment, including pit trucks. Although he had been classified as a dozer operator for most of his tenure at the mine, Moreno had

> periodically filled in as a truck driver when he was not needed as a dozer operator.
>
> [15]. Supervisors testified in their sworn affidavits that Moreno was a "safe and careful pit truck driver" and was among their "most experienced and careful equipment operators" generally.
>
> [16]. Supervisor Armando Garcia had Moreno trained in the safe operation of such pit trucks by operating them under the supervision of an experienced driver who rode with Moreno on and off for two days, prior to assigning him to perform the task on his own. Such supervised training during production is standard practice before Garcia assigns a new driver to operate those trucks.
>
> [17]. MSHA has no evidence that would suggest that Moreno was anything but a safe, experienced, mature mobile equipment operator without any blemishes on his driving record, at the mine or elsewhere.
>
> [18]. MSHA is unaware of any evidence that Jobe's supervision, training or disciplining of its employees was negligent.

(Stips. II.B. 3-11; III.B. 4-7, 9-13.)

It is hard to understand how the Secretary can argue that Jobe was "moderately" negligent when she has stipulated that "MSHA is unaware of any evidence that Jobe's supervision, training or disciplining of its employees was negligent." Nevertheless, even without the stipulation, the evidence clearly indicates that Jobe was not negligent. The only area where Jobe can be faulted is that its seat belt reminder signs were only in English. Even that fact, however, is not significant in this case. The record is silent as to whether Moreno could read and understand English. But the record is clear that Moreno was instructed in Spanish to wear his seat belt and that he routinely did so.

Accordingly, I find that Jobe exercised diligence with respect to its employees wearing seat belts and maintaining control of mobile equipment and could not have known that Moreno would apparently act otherwise in this instance. Therefore, I conclude that Jobe was not negligent and will modify the citations appropriately.

Taking all of the penalty criteria into consideration, I conclude that a civil penalty of $3,000.00 for each citation is condign.

Order

Citation Nos. 7925870 and 7925871 are **MODIFIED** by reducing the level of negligence from "moderate" to "none" and are **AFFIRMED** as modified. Jobe Concrete Products, Inc. is **ORDERED TO PAY** a civil penalty of **$6,000.00** within 30 days of the date of this decision.

T. Todd Hodgden
Administrative Law Judge

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/nj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

October 15, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-26-M
Petitioner	:	A. C. No. 22-00679-05503
v.	:	
	:	Scott Pit
COUSINS' AGGREGATE SALES &	:	
HAULING, INC.,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Secretary;
Ronald W. Fisk, Vice President, Cousins' Aggregate Sales & Hauling, Inc., New Orleans, Louisiana, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Penalty filed by the Secretary of Labor ("Secretary"), alleging that Cousins' Aggregate Sales & Hauling, Inc., ("Cousins") violated various mandatory safety standards set forth in Title 30 Code of Federal Regulations. Pursuant to notice, the case was hearing in Convington, Louisiana, on September 14, 1999. The Parties waived the filing of a post hearing brief.

I. Introduction

On September 10, 1996, Joseph Boudreaux an employee of Cousins walked on top of a pipeline, located over a body of water, in order to access a dredge that was approximately 80 feet from the shore. Boudreaux fell from the pipeline into the water and drowned. Subsequent to an investigation, MSHA Inspector Benny W. Lara, issued a citation alleging a violation of 30 C.F.R. § 50.10 and two orders issued pursuant to section 104(d) of the Federal Mine Safety and Health Act of 1977 ("the Act") alleging violations of 30 C.F.R. §§ 56.15020 and 56.14100(b), respectively.

II. Citation No. 4446089 (violation of section 103(j) of the Act, and 30 C.F.R. § 50.10)

A. Violation

Section 103(j) of the Act provides that in the event of an accident occurring in a mine " . . . the operator shall notify the Secretary thereof . . . ." Section 50.10, supra, as pertinent, provides that "[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." (Emphasis added.)

None of Cousins agents or officers took the initiative in notifying MSHA of the accident at issue on September 10, 1996. Indeed, Cousins conceded at the hearing that it did violate section 50.10, supra. Accordingly, I find that Cousins did violate section 50.10, supra.

B. Penalty

There is no evidence that this violation would have resulted in an injury to any miner. I thus find that the gravity of this violation was low. At the date of the accident, Cousins had only three employees, and thus is considered a small operation. Also, prior to the issuance of the orders and citations at issue, MSHA had not issued Cousins any other citations or orders. Thus, Cousins does not have any history of violations. The Parties stipulated that the violations were abated in a timely manner, and in good faith.

In essence, Lara opined that the level of Cousins' negligence was high. In support of this opinion Lara cited that fact that Cousins had been in operation for 10 years, had been subject to MSHA's jurisdiction at other sites for this period of time, and therefore should have known of its reporting responsibilities pursuant to section 103(j), supra, and section 50.10, supra. On the other hand, John Caldwell, who was Cousins' superintendent at the site in question on September 10, testified he did not call MSHA after the accident because he thought that the site was not subject to MSHA jurisdiction as it was not in operation. In this connection, he stated that although approximately 20 tons of material had been produced and piled up, no material had been sold. Don Fisk, Cousins' President, also was of the opinion that the site was not subject to MSHA jurisdiction, as equipment on the site was still being rebuilt. Also, Fisk indicated that after he was informed of the occurrence of the fatality shortly after 9:30 a.m., he was excited and that it did not occur to him to call anyone except Ron Fisk, Cousins' Vice President. For these reasons, I conclude that the level of Cousins' negligence to have been less than moderate.

At the present time, Cousins has been dissolved as a corporation, and is no longer in operation. Further, Cousins' lease of the site was not renewed by the lessor. I thus find that imposition of a penalty would have a negative effect on Cousins' ability to remain in business.

Based upon all the above, I conclude that a penalty of $50.00 is appropriate for this violation.

III. Order No. 4446094 (violation of 30 C.F.R. § 56.15020)

A. Violation

Section 56.15020, supra, provides as follows: "[l]ife jackets or belts shall be worn where there is a danger from falling into water."

According to Lara, his investigation revealed that the decedent had not been wearing a life jacket.[1] Also, Lara's investigation revealed that the decedent, immediately prior to his drowning, was walking a pipeline located over water. Cousins has not disputed this testimony. I thus find that the decedent was not wearing either a life jacket or belt when he walked on the pipeline located over water. I find that this situation presented a danger of falling into water. I thus find that Cousins did violate section 56.15020, supra.

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)(l). 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.

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[1]/ When the decedent's body was retrieved from the water, he was not wearing a life jacket.

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).

The pipeline at issue was approximately 10 inches in diameter and, as observed by Lara, had some sand on its surface. It was located over water that was approximately 15 feet deep, and extended approximately 85 feet from the shore to a dredge. Given these circumstances, and the fact that a fatality did occur, I find that it was reasonably likely that the hazard contributed to by the violative condition of not wearing either a life jacket or a belt while traversing the pipeline at issue, i.e., falling into the water below the pipeline, would have resulted in an injury of a reasonable serious nature, i.e., striking one's head against the pipe or falling into the water and drowning. I thus conclude that the violation was significant and substantial within the framework of the Commission's decision in *Secretary* v. *Mathies*, supra.

B. Unwarrantable Failure

According to Caldwell, on several occasions he had told Alex Parker, the dredge operator, to wear a life jacket. Caldwell stated that he had told Boudreaux, the other employee on the site, more than once to wear his life jacket. Caldwell indicated that the day prior to the accident, he had told Boudreaux not to walk the pipeline. Caldwell indicated that, within 30 days of the accident, he (Caldwell) always wore his life jacket.

Fisk testified that on July 1, he had purchased an additional four life jackets,[2] and had the name of each employee placed on a life jacket. Approximately a week after the four life jackets were purchased, Fisk had the dredge moved from its location close to shore to a point approximately 70 feet from the shore, and told Caldwell, Parker, and Boudreaux to no longer walk on the pipeline, and to have their life jackets whenever they are around water.

On the other hand, Caldwell testified that he was not told by anyone that it was unsafe to walk the pipeline, that he saw both Ron Fisk and Don Fisk, Cousins' Vice President, walk the pipeline, that although he had told Parker and Boudreaux not to walk the pipeline they continued to do so, that he did not discipline them, that Cousins did not have any safety rules or disciplinary

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[2]/ Prior to July 1, there were three life jackets at the site for the three employees.

program, and that he did not always wear his life jacket while in the rowboat[3] that was used to access the dredge. Fisk stated that after July 1, he observed Boudreaux walking the pipeline without his jacket and that he told him not to do it.[4] Importantly, Fisk, who was the company's president, and should have set a good safety example, conceded when the dredge had been located only 20 feet from the shore, he had walked on the pipeline without a life jacket. Although the water under the pipe was 5 feet deep, and the pipe extended only 20 feet, a life jacket should have been worn as there clearly existed some degree of danger of falling into the water.

Within the context of the above evidence, I find that the violation herein occurred as the result of Cousins' negligence, and that the level of this negligence reached the point of aggravated conduct, and thus constituted an unwarrantable failure (see, *Emery Mining Corp.*, 9 FMSHRC 1997 (1987)).

C. Penalty

I find that the gravity of this violation was relatively high, and that the level of Cousins' negligence was relatively high as set forth above. Considering the remaining factors set forth in section 110(i) of the Act, as discussed above, (II B.). I find that a penalty of $2,000.00 is appropriate for this violation.

IV. Order No. 4446095 (violation of C.F.R. § 56.14100(b)

A. Violation

Section 56.14100(b), supra, provides, as pertinent, that ". . . [d]efects on any equipment, . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

The usual means to provide access to the off shore dredge, in order to repair or service it, was by rowing an aluminum rowboat that was located on the shore.

According to Lara, when he inspected the subject site on September 12, 1996, he rowed to the dredge in the rowboat along with Caldwell. According to Lara, on the way back to the shore, after the boat had been in the water for approximately 20 minutes, he observed approximately 2 inches of water on the bottom of the boat. He indicated that there were three holes on the bottom of the boat, and the diameter of one hole was approximately the size of an eraser on a pencil. According to Lara, to the best of his recollection, when he entered the boat prior to rowing to the dredge, it did not have any water in it.

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[3]/ The rowboat was referred to by the witnesses as a "jon boat."

[4]/ Fisk indicated that he did not fire Boudreaux because he felt that Boudreaux, whom he described as a hard worker, needed the job.

Caldwell indicated that he had repaired the boat by caulking it on September 9, 1996, but did not test it after he made the repairs. Importantly, Caldwell did not contradict Lara's testimony regarding the depth of the water on the bottom of the boat as observed by him, and the fact that there was no water in the boat prior to its being launched. I thus conclude that, when observed by Lara, the boat did leak. Further, according to the uncontradicted testimony of Lara, the leaks, as observed by him, could only get worse, and, if not corrected, would affect safety, and could cause the boat to sink, thus creating a hazard to any persons in the boat. I thus find that the rowboat did have a defect affecting safety.

Caldwell testified that after he observed the boat leaking on September 9, 1996, he caulked it, and that he had also previously patched leaks around rivets. Fisk testified that he had put silicone around the rivets "off and on." However, since the boat was leaking on September 12, as observed by Lara, I conclude that, in spite of previous patching, all the leaks had not been corrected. Thus, I find that it has been established that Cousins did violate section 56.14100(b), supra.

B. Significant and Substantial

Caldwell opined that the leaks in the boat were "not serious." Fisk testified that he never saw any hole as large as a quarter inch in diameter as testified to by Lara. He opined that the boat was "not leaking badly." However, considering the fact that the boat provides the normal way for employees to travel to the dredge, the distance the boat travels from the shore to the dredge, the fact that, as testified to by Lara and not contradicted, 2 inches of water accumulated in the bottom of the boat after it had been in the water for 20 minutes, and considering the depth of the water in the pond, I conclude that, within this context, the violation was significant and substantial (see, *Mathies*, supra).

C. Unwarrantable Failure

Caldwell testified that in the month prior to the date of the accident after he had informed Don Fisk and Ron Fisk, the two principal officers of Cousins, regarding the leaks in the boat, and they had refused to fix the boat. However, later on in his testimony he indicated that although neither Don Fisk nor Ron Fisk told him to fix the boat, when he had reported the leaks to Don Fisk the first time the latter did not respond, and Caldwell could not recall his response the second time. Caldwell did not set forth with any specificity any words spoken to him by Ron Fisk from which he concluded that the latter had refused to fix the boat. In contrast, I observed the demeanor of Ron Fisk, and found his testimony credible that he had not refused to fix the boat, and that "off and on" he had repaired leaks around the rivets with silicone. Futher, Caldwell had attempted to patch the leaks with caulking on September 9, and also a few weeks prior to that date. Within this context, I find that Cousins had not neglected the leaks, and had made attempts to repair them. Accordingly, its conduct cannot be found to have been aggravated conduct. Thus, I conclude that the violation herein was not the result of Cousins' unwarrantable failure (see *Emery*, supra).

C. Penalty

Since the violative conditions could have resulted in the boat's capsizing, and thus causing injuries to employees, I find that the gravity of the violation was relatively high. For the reasons set forth above (IV. C.), I find that Cousins was aware of the leaking condition of the boat, but that it did make an attempt to repair the leaks. Thus, I conclude that the level of its negligence was moderate. Taking into account the remaining factors set forth in section 110(i) of the Act, as discussed above (II. B.), I conclude that a penalty of $200.00 is appropriate for this violation.

ORDER

It is **ORDERED** that Order No. 4446095 be amended to a section 104(a) citation that was significant and substantial. It is further **ORDERED** that within 30 days of this Decision, Cousins shall pay a total civil penalty of $2,250.00.

Avram Weisberger
Administrative Law Judge

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October 22, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-190-M
Petitioner	:	A.C. No. 05-04422-05508
	:	
v.	:	Docket No. WEST 99-304-M
	:	A.C. No. 05-04422-05510
HI VALLEY CRUSHING INC.,	:	
Respondent	:	Portable Plant #1

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
John Carroll, owner, Hi Valley Crushing Inc., Villa Grove, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Hi Valley Crushing ("Hi Valley"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Denver, Colorado, on October 1, 1999.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hi Valley operates Portable Plant No. 1, which was in Chaffee County, Colorado, at the time of the MSHA inspection. On October 15, 1998, MSHA Inspector Steven Ryan inspected the portable plant. Mr. John Carroll, the owner of the plant, was the only person present at the time of the inspection. Mr. Carroll employs one other person, his son, at the plant. Inspector Ryan issued one citation and four orders under section 104(d)(1) of the Mine Act.

A. Citation No. 7923099

Citation No. 7923099 alleges a violation of 30 C.F.R. § 56.14107(a), as follows:

> There is no guard to the self-cleaning tail pulley of the Kolberg stacker conveyor that feeds the plant screen, to protect a person

> from making contact with the moving machine part that can cause a serious injury to a person. The tail pulley is approximately two feet up off the ground, and there is a shovel in the area, and the area has been shoveled out under the tail pulley. One other employee normally works around the plant while in operation. The owner-operator stated that he and his son, the other employee, know what is wrong with the plant and do not go around these areas when the plant is in operation. The owner also stated that he knew that the pulley should be guarded, but just had not got around to building a guard. The plant has been in operation at this location for at least one month.

Inspector Ryan determined that the violation was of a significant and substantial nature ("S&S") and was the result of Hi Valley's high negligence. He issued the citation under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. Section 56.14107(a) provides, in part, that "[m]oving machine parts shall be guarded to protect persons from contacting ... drive, head, tail, and takeup pulleys ... and similar moving parts that can cause injury." The Secretary proposes a penalty of $500 for this alleged violation.

There is no dispute that the tail pulley was not equipped with a guard. The conveyor belt was running at the time of the inspection and material was being dumped onto the moving belt. (Tr. 19-20; Ex. 7). Inspector Ryan testified that the pinch points of the tail pulley were very accessible and that he could see a shovel in the area. The inspector determined that the violation was the result of Hi Valley's unwarrantable failure because Mr. Carroll told him he knew that the tail pulley was not guarded and that a guard was required. (Tr. 27). The inspector testified that Mr. Carroll told him that he did not have time to make and install a guard. (Tr. 23). He also testified that Mr. Carroll told him that the pulley had been protected by a guard when the plant was at the previous job site.

Mr. Carroll testified that a guard was in place when he was crushing at the Henderson Mill in Grand County, Colorado. (Tr. 109, 141-42). He removed the guard after the plant was transported to the Chaffee County location because he needed to construct a new hopper for that conveyor. (Tr. 114). He stated that the "hopper is a structural part of the guard." *Id.* He stated that he had just finished constructing the hopper and had not yet installed a guard when the inspector arrived. He indicated that, although the plant had been at the Chaffee County location for about 30 days, he had run the plant for only about half a day. (Tr. 113). He testified that he was running material to test the hopper and other components at the plant. *Id.* He said that "we weren't in full-blown operation." *Id.* Upon examination by the judge, Mr. Carroll stated that he had been running for about two weeks on an intermittent basis to check everything out. (Tr. 115). He stated that he may have also been running material for a gradation test to check the quality of the product. *Id.* Mr. Carroll testified that neither he nor his son would have shoveled accumulated material from around the pulley while the plant was running. (Tr. 127). Mr. Carroll

contends that the violation was not serious and that Hi Valley's negligence was not high, given these circumstances. (Tr. 123).

There is no dispute that the tail pulley was not guarded. It is also clear that the pulley was near the ground and was directly accessible to anyone walking through the area. Although Mr. Carroll testified that he knew that a guard was required, he believed that there was a provision that allowed an operator to test his equipment before he replaced the guards. (Tr. 129). I agree with Mr. Carroll that if Inspector Ryan issued a citation while Hi Valley was installing and testing the new hopper assembly, it might be appropriate to vacate the citation. *See* 30 C.F.R. § 56.14112(b). In this case, however, the new hopper had been in place for two weeks and the plant was being operated intermittently during that period. (Tr. 134). This period is too long to be considered a "test" that would allow the pulley to remain unguarded. A crusher operator cannot permit a pulley to remain unguarded during the shakedown period for the plant. Hi Valley was required to provide a guard once the hopper was installed. The "testing" exception requires that the area be guarded as soon as possible after changes are made so that employees are not exposed to the hazard. Inspector Ryan testified that Hi Valley had crushed a considerable quantity of material during this two-week period. (Tr. 147-48). I find that the Secretary established a 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 would result in an injury. As discussed below, 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, assuming continued normal mining operations.

Hi Valley argues that because only two people were employed at the crusher, Mr. Carroll and his son, the possibility of an injury was remote. Mr. Carroll argues that both he and his son knew that the unguarded pulley presented a hazard when the plant was operating and, consequently, they would not work around when the plant was running. He argues that the safety standard is more applicable to large mines because employee exposure is greater. I agree that Mr. Carroll and his son would not purposefully take actions that would endanger their own safety. Nevertheless, employees frequently come in contact with moving machine parts by accident, or as a result of momentary inattention or ordinary human carelessness. (Ex. 10 through 13). Inspector Ryan testified that during MSHA accident investigations, it is often discovered that the employee who was seriously injured by an unguarded pinch point was not supposed to be working near the equipment when the accident occurred. (Tr. 60-61). I must take into consideration the vagaries of human conduct when analyzing the S&S issue. The fact that only two people are employed at the crusher does not mitigate the hazard. Inspector Ryan testified that MSHA's records show that the accident rate at sand and gravel mines with five or fewer employees is greater than accident rates at larger mines. (Tr. 148-49). In addition, other people are occasionally at the plant, including truck drivers and employees of the company that owns the property on which the crushing plant was operating. (Tr. 59). The violation was S&S.

The more difficult issue is whether the violation was the result of Hi Valley's unwarrantable failure to comply with the safety standard. The Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). 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, 193-94 (February 1991). The Commission stated that "a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted). The Commission also takes into consideration the mine operator's knowledge of the existence of the dangerous condition. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (August 1994).

Inspector Ryan based his unwarrantable failure determination on the fact that Mr. Carroll knew that the pulley was not guarded and also knew that tail pulleys are required to be guarded. (Tr. 23, 34). The inspector testified that Mr. Carroll advised him that the pulley had been guarded at the Henderson Mill before the plant was moved to the present site. Mr. Carroll testified that both he and his son knew where the hazards were at the plant and that they had sufficient judgment to avoid these hazardous areas when the plant was operating. (Tr. 60, 126-28). Mr. Carroll apparently believed that he could run the plant during the plant's shakedown period without guards in place, as long as the plant was not "in production."

I find that the violation was obvious and had existed for at least two weeks. Hi Valley received nine citations for violations of section 56.14107 since 1990. (Ex. 2). Mr. Carroll knew that the violation existed and also knew that it created a hazardous condition. His argument that Hi Valley's negligence was low because everyone knew that it was hazardous is not credible. A mine operator cannot comply with the requirements of the Secretary's safety standards by pointing out all of the hazards at the mine and telling employees to stay away from them. Hi Valley's argument that it did not know that it could not "test" the plant with the guard off is also not convincing. Section 56.14112(b) provides that guards "shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." This is a very narrow exception. A reasonably prudent person would not interpret this exception to allow a mine operator to run machinery for an extended period of time without guards on the basis that the operator was "testing" the plant to make sure that it was capable of producing crushed rock to the customer's specifications. I credit Inspector Ryan's testimony that there were large piles of material at the site that had been crushed by Hi Valley during the two week "testing" period. (Tr. 161-63). Once the new hopper was in place, it was clear that a guard was required. I find that the Secretary established that Hi Valley's failure to install a guard to protect the cited tail pulley was a result of a serious lack of reasonable care that constitutes aggravated conduct.

B. Order No. 7923105

Order No. 7923105 alleges a violation of 30 C.F.R. § 56.14112(b), as follows:

> There is no guard on the top portion of the tail pulley guard of the fines stacker conveyor that allows a person to make contact with the moving machine part that can cause serious injury. Guards shall be securely in place when machinery is in operation, except when adjusting or testing that cannot be performed without the removal of the guard. The owner-operator stated that he knew the guard was off but did not go near the area when the plant was in operation.

Inspector Ryan determined that the violation was S&S and was the result of Hi Valley's high negligence. He issued the order under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. Section 56.14112(b) provides that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guards." The Secretary proposes a penalty of $600 for this alleged violation.

There is no dispute that the top of the guard was missing. Inspector Ryan testified that only side guards were provided for the tail pulley and that the pinch points on the pulley were easily accessible. (Tr. 30). He stated that if someone were to slip, trip, or fall in the area, he could easily come into contact with the moving parts and sustain a serious injury. (Tr. 32). The

inspector further testified that Mr. Carroll told him that the top part of the guard was torn off when the plant was at the Henderson Mill. Finally, he testified that Mr. Carroll knew that the top of the guard was missing but that he and his son stayed away from the area. (Tr. 34).

Mr. Carroll testified that the cited conveyor was not being used at the Henderson Mill but a loader operator backed into the equipment and damaged the guard. (Tr. 110). After the equipment was transported to Chaffee County, Mr. Carroll built a new guard for the tail pulley except for a top piece. (Tr. 122). Mr. Carroll did not provide any explanation as to why he did not construct a top for the guard.

I find that the Secretary established a violation of section 56.14112(b) because a complete guard was not securely in place while the conveyor was operating. I also find that the violation was S&S for the same reasons described above for Citation No. 7923099. The Secretary established that an injury was reasonably likely and that such an injury would be of a reasonably serious nature, assuming continued normal mining operations. The area was readily accessible and it was reasonably likely that someone would slip, trip, or fall into the moving machine parts.

I also find that the Secretary established that the violation was the result of Hi Valley's unwarrantable failure to comply with the safety standard. Mr. Carroll knew that the top of the guard was missing and that it presented a hazard. Hi Valley argues that, because everyone knew to stay away from the area when the plant was operating, it's negligence was low. I reject this argument for the reasons set forth above. Its failure to replace the top of the guard constitutes a serious lack of reasonable care that demonstrates aggravated conduct.

C. Order No. 7923100

Order No. 7923100 alleges a violation of 30 C.F.R. § 56.12028, as follows:

> The owner-operator of the crushing plant did not do a continuity and resistance test of the electrical systems of the plant after setting up in this new location, nor did the operator have a ground rod driven into the earth to provide a low resistance earth connection. These tests shall be conducted immediately after installation, modification, or repair. The operator stated that he knew that a continuity and resistance test was required upon each move and set up. He stated that the last grounding test was good. He also stated that sometimes you just have to crush rock and that he did not get around to doing the test.

Inspector Ryan determined that the violation was not S&S, but that it was the result of Hi Valley's high negligence. He issued the order under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. Section 56.12028 provides, in part, that "[c]ontinuity and resistance of grounding systems shall be tested immediately after

installation, repair, and modification ...." This standard also requires the operator to keep a record of the required tests. The Secretary proposes a penalty of $400 for this alleged violation.

Inspector Ryan testified that there were no records showing that the required resistance and continuity test had been performed after the plant had been moved to Chaffee County. He further stated that when he asked Mr. Carroll about the test, he replied that the test had not been done. (Tr. 42). Inspector Ryan testified that Mr. Carroll "said it was good at the last place he set up, he had no need to do it [again], he had just moved from there and it was good at the last operation ... where he had done the test." *Id.* The inspector also noticed that a grounding rod was not installed at the diesel generator for the plant. (Tr. 45-46). Ronald Renowden, an electrical specialist with MSHA, testified that continuity and resistance tests are important in order to ensure that electrical circuits are grounded. (Tr. 69-70). He stated that grounding wires and connections can loosen when a crushing plant is moved and set up at a new site. MSHA has always required that portable plants be tested whenever they are moved. (Tr. 87). He testified that people have been killed and injured as a result of ungrounded circuits. (Tr. 73).

Mr. Carroll testified that he did not test the grounding system. (Tr. 123). He said that he tested the circuits at the Henderson Mill but that he had not gotten around to it at the Chaffee County site. (Tr. 124). Mr. Carroll testified that the electrical system on the plant is in "top-notch" shape and that his failure to test did not create a safety hazard. *Id.* He stated that when he performed the test to abate the citation, the grounding system was functioning properly. *Id.*

I find that the Secretary established a violation of section 56.12028. There is no dispute that the test was not performed and recorded. I find that the test was required under the safety standard after the plant was moved to the new location. The Inspector determined that the violation was not S&S, although he testified that he thought it was serious. (Tr. 44). Although I agree that a violation of this standard can often create a serious safety hazard, I find that in this case the violation was not particularly serious. I accept Mr. Carroll's testimony that the system passed the continuity and resistance test and that the electrical system was in good shape.

I find that the Secretary established that the violation was a result of Hi Valley's aggravated conduct. Mr. Carroll admitted that he failed to perform the test. He did not offer any reasons for not doing it except that he did not think it was important. Although the test revealed that the grounding system was functioning, it was impossible to know that without the required testing. The test is necessary to make sure that the grounding circuits are functioning properly after the crusher is moved to a new location. I credit Mr. Renowden's testimony as to the importance of this test. He testified that this safety standard is one of MSHA's most important electrical regulations because it helps ensure that employees will not be exposed to an electric shock hazard. (Tr. 69). Hi Valley's failure to perform this test demonstrates a serious lack of reasonable care that constitutes aggravated conduct.

D. Order No. 7923104

Order No. 7923104 alleges a violation of 30 C.F.R. § 56.18002(a), as follows:

> The owner-operator of the crushing plant did not have a record of the required work place examination. A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. . . . The owner stated that he and his son both know what is wrong at the plant and stay away from the area when in operation, and that he kept records at the last job for TIC at the Henderson Mill operation. [Mr. Carroll] knew that records were to be kept and that conditions that adversely affect safety need to be corrected. The plant has been in operation for at least one month at this location.

Inspector Ryan determined that the violation was not S&S, but that it was the result of Hi Valley's high negligence. He issued the order under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. Section 56.18002(a) provides, in part, that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." This standard also requires the operator to promptly initiate action to correct any hazardous conditions found during the examination. Subsection (b) of the standard requires the operator to keep a record of the required examinations. The Secretary proposes a penalty of $400 for this alleged violation.

Inspector Ryan testified that Hi Valley did not have any records of the required work place examinations. (Tr. 49). He stated that Mr. Carroll told him that he did not need to keep such records because he and his son knew what was wrong at the plant and they kept away from those areas when the plant was in operation. (Tr. 49-50; Ex. 5). Inspector Ryan testified that the guarding citation and order he issued cited conditions that existed for more than one shift. He stated that these obvious conditions help demonstrate that the required examinations were not taking place or that the hazardous conditions found during such examinations were not being corrected. (Tr. 51). He further testified that these examinations are important to detect hazardous conditions and Hi Valley's failure to do them constitutes an unwarrantable failure.

Mr. Carroll testified that Hi Valley's practice is to not keep this type of record. (Tr. 124). He stated that he kept records of examinations at the Henderson Mill because TIC, the general contractor at that site, required them. (Tr. 124-25). Mr. Carroll testified that because he and his son are the only employees at the plant, they know about any equipment defects or other safety problems and they fix it. He stated that "writing it down on a piece of paper ... would not make it any safer for us than not writing it down...." (Tr. 125). Finally, he testified that "I know full well that it's a regulation ... [but] I don't think it applies so much in this case." *Id.*

I find that the Secretary established a violation of section 56.18002. While it appears that Hi Valley informally has been conducting safety checks from time to time, there is no established procedure for conducting the examinations or recording the results. (Tr. 126). Mr. Carroll stated that neither he nor his son "make a walk-around" or "do an inspection." *Id.* Examinations were performed at the Henderson Mill because the general contractor and mill operator required such examinations.

I find that the violation was of a reasonably serious nature. Examinations are important because they reveal safety problems before anyone is endangered. Recording the results of the examinations is important, even at a small mine, so that anyone can look to see what hazards may exist before equipment is started or energized. For example, on the morning of the inspection, Mr. Carroll's son was not at the plant. The son could have observed a safety hazard near the end of the previous day. He might forget to tell his father and his father could be injured because he had no knowledge of the condition. If Hi Valley maintained records of examinations, the son could record the condition which would alert the father in his son's absence. Although no system is perfect, a written record of on-shift safety examinations greatly reduces the chances of serious injury. (*See* Exs. 23 through 25).

I also find that the Secretary established that the violation was a result of Hi Valley's aggravated conduct. Mr. Carroll admitted that Hi Valley did not comply with this safety standard. He stated that he knew that such examinations were required and that records of the examinations were also required. Indeed, he had complied with this regulation at the Henderson Mill. He believed that the examinations and records were not important at a small two-man operation. I find that this conduct demonstrates a serious lack of reasonable care that constitutes aggravated conduct.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that two citations were issued at the plant during the two years prior to this inspection. (Ex. 1). Hi Valley is a very small operator that worked about 2,000 man-hours annually and employed two people. (Tr. 5). The violations were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on Hi Valley's ability to continue in business. My findings with regard to gravity and negligence are set forth above. The penalties proposed by the Secretary were specially assessed under 30 C.F.R § 100.5. Based on the penalty criteria, I find that the penalties set forth below are appropriate. The reduction in the penalties is based primarily on the small size of the operator.

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:

Citation/Order No.	30 C.F.R. §	Penalty
WEST 99-190-M		
7923100	56.12028	$100.00
7923104	56.18002(a)	200.00
7923105	56.14112(b)	300.00
WEST 99-304-M		
7923099	56.14107(a)	300.00

Accordingly, the citation and orders contested in these cases are **AFFIRMED** as set forth above, and Hi Valley Crushing Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $900.00 within 40 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

October 15, 1999

SECRETARY OF LABOR, MSHA on behalf of LEWIS FRANK BATES, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEVA 99-121-D
v.	:	HOPE CD 99-12
CHICOPEE COAL COMPANY, INC., Respondent	:	Lilly Branch Surface Mine Mine ID 46-08723
SECRETARY OF LABOR, MSHA on behalf of EARL CHARLES ALBU, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEVA 99-122-D
v.	:	HOPE CD 99-12
CHICOPEE COAL COMPANY, INC., Respondent	:	Lilly Branch Surface Mine Mine ID 46-08723

ORDER GRANTING RESPONDENT'S MOTION TO COMPEL

These discrimination proceedings are scheduled for hearing on November 2, 1999, in Charleston, West Virginia. Before me for consideration are the respondent's motion to compel, conveyed during the course of a telephone conference with the parties, and the Secretary's written opposition to the respondent's motion. The respondent seeks to discover any written statements prepared by Mine Safety and Health Administration (MSHA) investigators that were signed by the complainants in these discrimination proceedings.

The Secretary opposes discovery of such statements asserting that the statements are protected by the work product privilege.[1] Specifically, the Secretary seeks to protect from disclosure "summaries of the [complainants'] statements written by [MSHA special investigator] Meadows and then signed by the [complainants] as being accurate." *Sec.'s opposition to motion to compel*, p.2 (footnote omitted).

[1] During the conference call, the Secretary also cited the informant's privilege as a basis for withholding disclosure. However, as the complainants' identity is known to the respondents, the Secretary no longer asserts the informant's privilege.

The Work Product Privilege

As a threshold matter, I do not believe that the work product privilege applies to a statement obtained by an MSHA investigator that has been signed by a party. The Secretary cannot prevent disclosure by asserting the signed statement is really the investigator's work product because it is only the party's acknowledgment of the accuracy of what the investigator heard the party say. A party's signed statement is what it is. Consequently, the respondent's motion to compel shall be granted because a party's signed statement is not protected by the work-product privilege.

However, assuming for the sake of argument that the work-product privilege applies, this privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. In *ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege, stating:

> In order to be protected by this immunity under [Rule] 26(b)(3), the material sought in discovery must be:
>
> 1. documents and tangible things;
>
> 2. prepared in anticipation of litigation or for trial; and
>
> 3. by or for another party or by or for that party's representative.
>
> It is not required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.' If the court orders that the materials be produced because the required showing has been made, the court is then required to 'protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.' *Id.* at 2558 (citations omitted).

The burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege. Assuming the signed statements are protected under the work-product privilege 'as tangible documents prepared by or for the Secretary in anticipation of litigation,' the analysis shifts to whether the respondent has a substantial need for the complainant's statements, and whether depriving the respondent of these documents would constitute an undue hardship. *P. & B. Marina, Ltd. Partnership v. Logrande,* 136. F.R.D. 50, 57 (E.D.N.Y. 1991), *aff'd*, 983 F.2d 1047 (2d Cir. 1992).

I am not convinced by the Secretary's suggestion that the respondent can obtain the equivalent information through other sources, such as deposing the complainants. The signed statements provided to the MSHA investigator by the complainants are unique in that the specific content of those statements serves as the basis for the Secretary's initiation of the subject 105(c)(2) discrimination proceedings. There is no assurance that the complainants' deposition testimony will be consistent with the earlier statements they provided to MSHA. In short, the respondents have a compelling need to examine the accuracy and truthfulness of these statements in preparation for trial.

Significantly, even if a witness's signed statement is protected under another privilege, such as the informant's privilege, in a criminal proceeding, such statements are routinely disclosed at trial. *See Jencks v. United States*, 353 U.S. 657. 667-69 (1957); 18 U.S.C. § 3500 (Jencks Act). In this regard, the Commission has noted, in National Labor Relations Board (NLRB) administrative proceedings, the NLRB itself provides at trial, for cross examination purposes, a witness's prior statements relative to the subject matter of his testimony. See *Secretary of Labor o/b/o Donald L. Gregory, et al v. Thunder Basin Coal Company,* 15 FMSHRC 2228, 2237 (November 1993), referring to 29 C.F.R. § 102.118(b)-(d) (NLRB "Jencks" procedure).

It is unfortunate that the government would seek to withhold from disclosure the signed allegations that serve as the basis for these proceedings. If there is any material in the signed statements that should be redacted on the basis of another privilege not yet asserted by the Secretary, the Secretary should seek to protect such material from disclosure.

ORDER

In view of the above, **IT IS ORDERED** that the Secretary provide to the respondent, **on or before the close of business on Wednesday, October 20, 1999,** by facsimile and regular mail, all signed statements secured from Lewis Frank Bates and Earl Charles Albu during the course of MSHA's investigation in these discrimination matters.

Jerold Feldman
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

October 19, 1999

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of LEWIS FRANK BATES,	:	
Complainant	:	Docket No. WEVA 99-121-D
v.	:	HOPE CD 99-12
	:	
CHICOPEE COAL COMPANY, INC.,	:	Lilly Branch Surface Mine
Respondent	:	Mine ID 46-08723
	:	
SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of EARL CHARLES ALBU,	:	
Complainant	:	Docket No. WEVA 99-122-D
v.	:	HOPE CD 99-12
	:	
CHICOPEE COAL COMPANY, INC.,	:	Lilly Branch Surface Mine
Respondent	:	Mine ID 46-08723

ORDER DENYING THE SECRETARY'S MOTION FOR RECONSIDERATION
ORDER DENYING THE SECRETARY'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY REVIEW
AND
ORDER GRANTING IN PART THE SECRETARY'S MOTION FOR STAY

These discrimination proceedings are scheduled for hearing on November 2, 1999, in Charleston, West Virginia. On October 15, 1999, I issued an Order granting the respondent's motion to compel the disclosure of all signed statements secured from Lewis Frank Bates and Earl Charles Albu during the course of MSHA's investigation in these discrimination matters. The October 15, 1999, Order required the Secretary to disclose such signed statements, by facsimile and regular mail, on or before the close of business on Wednesday, October 20, 1999.

In a motion filed on October 19, 1999, the Secretary seeks reconsideration of the October 15, 1999, Order, and, alternatively, requests certification to the Commission of whether signed statements provided to MSHA by parties in discrimination matters are protected from discovery by the work-product privilege. If the Secretary's request for certification is denied, the Secretary seeks to stay the October 15, 1999, Order so that she may seek certification directly from the Commission.

In seeking reconsideration, the Secretary once again asserts the signed statements are protected work products because they were prepared by an agent of the Secretary in contemplation of litigation. As noted in the October 15, 1999, Order, a document purporting to be a party's signed statement is not entitled to the work-product privilege simply because an MSHA inspector, rather than the party, transcribed what the party said. Put another way, the work-product privilege applies to the thought processes and opinions of the Secretary's personnel and counsel, neither of which apply to statements by parties.

Moreover, as noted in the October 15, 1999, Order, even if such signed statements by discrimination complainants were protected under the work product privilege, a respondent in a discrimination proceeding has a compelling need to examine such statements because they are unique in that they provide the basis for the Secretary's initiation of a 105(c)(2) discrimination proceeding. In seeking reconsideration, the Secretary's relies on established case law holdings that general assertions of the impeachment value of documents protected by the work-product privilege are inadequate to overcome the privilege. The Secretary's reliance on such cases is misplaced. Here, the respondent's request is specific - - it seeks to examine the statements by the parties that motivated the Secretary's enforcement action.[1]

Finally, in her reconsideration request, the Secretary does not properly distinguish statements provided to MSHA by *parties* to a discrimination proceeding from statements obtained from individuals in general during the course of a section 105(c) or section 110(c) investigation. Non-party statements may be protected by the informant's privilege and/or the miner's privilege pursuant to Commission Rules 61 and 62, 30 C.F.R. 29 §§ 2700.61 and 2700.62. However, even non-party signed statements are not protected by the work-product privilege just because they were obtained by MSHA personnel. Accordingly, the Secretary's request for reconsideration of the October 15, 1999, Order compelling disclosure shall be denied.

Turning to the Secretary's alternative requests, an interlocutory discovery ruling is certifiable for Commission review under Rule 76 if it involves a controlling question of law that will materially advance the final disposition of this matter. 29 C.F.R. § 2700.76. I am not persuaded that compelling disclosure of the complainants' allegations, absent any claim that any portion of those allegations would violate another privilege, such as identifying a confidential informant, involves a controlling question of law. Moreover, it is a central goal of the Mine Act to expeditiously resolve discrimination matters. *See* Commission Order in *Sec. o/b/o Lonnie Bowling et al v. Mountain Top Trucking, et al,* 21 FMSHRC __ , slip op. at p.2 (September 24, 1999). Accordingly, I am not inclined to delay these proceedings.

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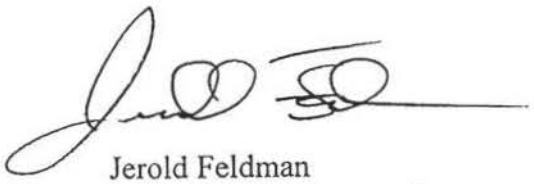
[1] As discussed in the October 15, 1999, Order, if there is any material in the parties' signed statements that should be redacted on the basis of another privilege, the Secretary should seek to protect such material from disclosure.

Although, I have denied the Secretary's request for certification of the October 15, 1999, ruling on discovery, I will grant the Secretary's request for a delay of the October 20, 1999, deadline for providing the complainants' signed statements to enable the Secretary to seek certification directly from the Commission. Consequently, the date for providing the respondent with the complainant's signed statements is extended until the close of business on Monday, October 25, 1999.

ORDER

In view of the above, the Secretary's requests for reconsideration, and, alternatively, for certification for review, of the October 15, 1999, Order compelling disclosure, **ARE DENIED**. Consistent with the above, **IT IS ORDERED** that the Secretary provide the respondent, **on or before the close of business on Monday, October 25, 1999,** by facsimile and regular mail, all signed statements secured from Lewis Frank Bates and Earl Charles Albu during the course of MSHA's investigation in these discrimination matters. **IT IS FURTHER ORDERED THAT** the scheduled hearing of these matters on November 2, 1999, shall proceed.



Jerold Feldman
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

October 28, 1999

EAGLE ENERGY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 98-72-R
	:	Citation No. 7166391; 3/11/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 98-73-R
ADMINISTRATION (MSHA),	:	Citation No. 7166392; 3/11/98
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-123
Petitioner	:	A.C. No. 46-07711-03674
v.	:	
	:	Mine No. 1
EAGLE ENERGY INCORPORATED,	:	
Respondent	:	

ORDER DENYING THE RESPONDENT'S MOTION TO COMPEL DISCOVERY AND ORDER DENYING THE SECRETARY'S REQUEST FOR SUBPOENA

The initial phase of the hearing in these matters was conducted from September 14 through September 17, 1999. The hearing is scheduled to reconvene on December 7, 1999. Before me for consideration is the respondent's motion to compel discovery of the Mine Safety and Health Administration Health (MSHA) and Safety Report concerning an April 21, 1998, meeting. The attendees on behalf of MSHA were James Bowman, Conference and Litigation Specialist, MSHA Inspector Thurman Workman and MSHA Supervisory Inspector Terry Price. The respondent was represented by then-counsel Donna Kelly. Also in attendance was Jeff Bennett, the respondent's Safety Director, Glen Conner, the respondent's President and Larry Ward, the respondent's General Manager. The respondent also seeks to discover any statements taken from individuals that will not be called by the Secretary in these proceedings.

Pursuant to my request, the Secretary has provided the relevant documents for my *in camera* review. The subject documents consist of an April 21, 1998, conference report and memoranda of MSHA interviews conducted between August and November 1998 with individuals who are employees of the respondent.

A conference call concerning the respondent's motion to compel and the Secretary's opposition was conducted on October 27, 1999. The Secretary asserts the respondent's motion should be denied because it is untimely. In the alternative, the Secretary contends the documents sought by the respondent are protected by the work-product privilege and the informant's privilege. If it is determined that the subject documents are protected, the respondent seeks disclosure of portions of these protected documents that contain factual material.

The Motion to Compel

As a threshold matter, Commission Rules 56 (d) and (e) provide that discovery shall be initiated within 20 days after an answer to a petition for assessment of civil penalty, and that discovery shall be completed within 40 days of its initiation. 29 C.F.R. § 2700.56(d) and (e). These rules authorize a judge to permit discovery after this date for good cause shown.

The respondent previously has sought to discover the April 21, 1998, conference report during the discovery period prior to the start of the September 14, 1999, hearing. The Secretary declined to provide the report at that time claiming it was protected by the deliberative process and work-product privileges. The respondent declined to file a motion to compel discovery of the conference report at that time. The respondent has failed to show the requisite good cause to support its untimely motion. Accordingly, the respondent's motion to compel the April 21, 1998, conference report shall be denied as untimely.

Similarly, the respondent has failed to show good cause for its untimely request for disclosure of statements the Secretary may have obtained from individuals who will not be called by the Secretary as witnesses. The respondent previously requested the Secretary to disclose all relevant statements obtained by MSHA in these matters during the discovery period prior to the beginning of the trial. The Secretary declined to provide such statements citing the informant's privilege. The respondent failed to seek disclosure by filing a motion to compel. The respondent now predicates its motion on the theory that statements taken by the Secretary by individuals not called as the Secretary's witnesses must contain information harmful to the Secretary's case. Such an assertion does not provide good cause for extending the discovery period. Accordingly, the respondent's motion to compel such statements shall also be denied as untimely.

Assuming the respondent's motion to compel was not untimely, the respondent's motion will be addressed on the merits because arguments advanced by the respondent in support of its motion during the October 27, 1999, conference call raise important issues.

The Secretary claims the subject documents are protected by the work-product privilege. The work-product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. In *ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege, stating:

> In order to be protected by this immunity under [Rule] 26(b)(3), the material sought in discovery must be:
>
> 1. documents and tangible things;
>
> 2. prepared in anticipation of litigation or for trial; and
>
> 3. by or for another party or by or for that party's representative.
>
> It is not required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.' If the court orders that the materials be produced because the required showing has been made, the court is then required to 'protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.' *Id.* at 2558 (citations omitted).

The burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege. It is clear that the conference report and memoranda of interviews conducted by MSHA between August and November 1998 sought to be protected under the work product privilege are "tangible documents" prepared "by or for the Secretary."

The determinative question concerning the applicability of the work-product privilege is whether these documents were "prepared in anticipation of litigation or for trial." Whether these documents are privileged because they were prepared with litigation in mind must be based on the nature of the documents and the factual situation in each particular case. *ASARCO,* 12 FMSHRC at 2558. If the documents can fairly be said to have been prepared **because of the prospect of litigation**, then the documents are covered by the privilege. *Id. [citing* Wright & Miller, *Federal Practice and Procedure §* 2024 p.198-99 (1970)]. If, on the other hand, litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purposes of litigation, it is not protected. *Id.* In addition, particular litigation must be contemplated at the time the document is prepared in order for the document to be protected. *Id.*

In addressing whether MSHA reports of a safety and health conference are prepared in contemplation of litigation, it is necessary to analyze MSHA's procedures for health and safety conferences contained in 30 C.F.R. § 100.6. Operators that elect not to contest citations may decide not to request a safety and health conference. Safety and health conferences are only conducted, subject to MSHA's approval, upon an operator's request. 30 C.F.R. §§ 100.6(b) and (c). Such conferences are the means by which operators may submit mitigating information including facts that operators believe warrant a finding that no violation occurred. 30 C.F.R. § 100.6(e). Citations that are not vacated are referred by the safety and health conference official to the Office of Assessments with the inspector's evaluation as a basis for determining the appropriate amount of civil penalty to be assessed. 30 C.F.R. §§ 100.6(f) and (g).

Thus, generally, only contested citations are the subjects of safety and health conferences. Moreover, the MSHA official conducting the conference uses the information submitted by the operator as a basis for the referral to the Office of Assessments. Upon receipt of a notice of proposed penalty issued by the Office of Assessments, the operator has 30 days to pay or contest the proposed penalty. 30 C.F.R. § 100.7(b). In essence, the safety and health conference is the initial step in the litigation process if the operator contests the proposed civil penalty. Such conferences are not routinely conducted, but rather, they are conducted when an operator challenges the initial citation. Accordingly, MSHA's internal reports of such conferences are prepared in contemplation of litigation and, as such, are protected by the work-product privilege.

Turning to the memoranda of interviews, these interviews were conducted between August and November 1998, after the respondent had contested the citations in issue. They contain MSHA's recollections and analysis of information provided by the interviewees, and, such memoranda were clearly prepared in contemplation of litigation. As such, these memoranda are protected by the work-product privilege. Having concluded they are protected by the work-product privilege, I note parenthetically, that the content of such interviews are also protected by the informant's privilege as asserted by the Secretary.

I am concerned by the respondent's argument that, assuming that documents are protected by privilege, factual material within protected documents are not covered by the privilege and must be disclosed. The respondent misses the point. Once the Secretary has satisfied her burden that the subject documents are protected by privilege, the burden shifts to the respondent to overcome the privilege by demonstrating a substantial need for the documents, and that failing to obtain the documents will result in undue hardship. P. & B. Marina, Ltd. Partnership v. Logrande, 136. F.R.D. 50, 57 (E.D.N.Y. 1991), aff'd, 983 F.2d 1047 (2d Cir. 1992). Thus, it is only after making such a showing to defeat the privilege that a party is entitled to see portions of protected documents with redactions to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *ASARCO,* 12 FMSHRC at 2558 (citations omitted).

The respondent has failed to make any showing of need or hardship. Significantly, the respondent's counsel, as well as other company officials, attended the April 21, 1998, MSHA conference meeting. The notion that hardship will ensue unless the respondent obtains MSHA's notes of a meeting that the respondent's counsel and company officials attended is difficult to understand and must be rejected.

Similarly, the subject memoranda of interviews concern information provided to MSHA by the respondent's employees. The respondent could have informally interviewed its employees, or it could have deposed them under subpoena during discovery. Thus, the respondent has failed to demonstrate the substantial need required to overcome the privilege.

Having failed to satisfy its burden of overcoming the Secretary's privilege, the respondent is not entitled to see redacted portions of privileged documents. Accordingly, notwithstanding the untimeliness of the respondent's motion, the respondent's motion to compel discovery is also denied on the merits.

Collateral Issues

Finally, during the October 27, 1999, conference call, the Secretary requested that I issue a subpoena so that the Secretary could obtain the military discharge papers of an individual who the respondent intends to call as an expert witness. The Secretary seeks the subpoena to determine whether the deposition testimony of this individual, with respect to his military discharge in the 1970's, impacts on his credibility as an expert witness in these proceedings.

Assuming for the sake of argument that this individual's deposition testimony under oath was not candid, with rare exceptions not applicable here, untruthful acts that have not resulted in a conviction are deemed to be collateral in nature. Extrinsic evidence of such acts are not admissible. *See* John W. Strong *et al.*, *McCormick On Evidence*, § 49, at 202 (5th ed. 1999); *see also Fed R. Evid.* 608(b). Consequently, the Secretary's subpoena request will be denied.

ORDER

In view of the above, the respondent's motion to compel discovery **IS DENIED**. The Secretary's request for subpoena **IS ALSO DENIED**.

Jerold Feldman
Administrative Law Judge

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