OCTOBER 2001

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

OCTOBER 2001

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

Secretary of Labor, MSHA v. United Metro Materials, Docket No. WEST 2000-35-RM. (Judge Cetti, September 28, 2001)

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

Secretary of Labor, MSHA, on behalf of DeWayne York v. BR & D Enterprises, Inc., Docket No. KENT 2001-22-D. (Judge Zielinski, August 31, 2001)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 23, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. SE 2001-151-M A.C. No. 31-02068-05523
46 SAND & STONE	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 30, 2001, the Commission received from 46 Sand & Stone ("Forty Six Sand") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose Forty Six Sand's request for relief.

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

In the request, Forty Six Sand, which is represented by counsel, asserts that its failure to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") was due to an internal processing error. Mot. at 1-3. It contends that it received the proposed penalty assessment on approximately July 10, 2001. *Id.* at 1. It asserts that on August 29, 2001, Forty Six Sand's president, Henry Long, discovered that the document had been misfiled. *Id.* at 1-2. It explains that the filing was

not discovered sooner because the company's safety director, who was responsible for contesting citations, had left the employment of the company. *Id.* at 2; Ex. D. at 1-2. The operator requests that the Commission reopen the assessment and permit Forty Six Sand to have a hearing on Citations Nos. 7794419, 7794420, and 7794421. Mot. at 1, 3. The operator attached to its request a copy of the proposed penalty assessment, copies of the citations, and the affidavit of Henry Long.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Forty Six Sand intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to an internal oversight. The affidavit attached to Forty Six Sand's request is sufficiently reliable and supports its allegations. In the circumstances presented here, we treat Forty Six Sand's late filing of a hearing request as resulting from inadvertence or mistake. *See Heartland Cement Co.*, 23 FMSHRC 1017, 1018-19 (Sept. 2001) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal processing error and operator's assertions were supported by affidavit); *Lehigh Portland Cement Co.*, 22 FMSHRC 1186, 1186-88 (Oct. 2000) (same).

Accordingly, in the interest of justice, we grant Forty Six Sand's request for relief, reopen the penalty assessment that became a final order with respect to Citation Nos. 7794419, 7794420, and 7794421, and remand to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 23, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. YORK 2001-65-M
	:	A.C. No. 19-01081-05502
READ SAND & GRAVEL	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 22, 2001, the Commission received from Read Sand & Gravel ("Read") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed

[1] On June 22, 2001, the Docket Office received a telephone call from Debbie Johnson, an employee of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inquiring about the status of a request filed by Read in February 2001. The Docket Office informed Ms. Johnson that the Commission had not received the request. On that same day, Ms. Johnson faxed to the Commission the subject request, which includes a letter from Read to the Commission dated February 28, 2001, and a letter from Read to Ms. Johnson dated February 26, 2001.

penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a). Read failed to timely submit a request for a hearing to contest the proposed assessment.

In its request, Read states that it is enclosing a petition to reopen the proceedings. Mot. Attached to the request is a letter dated February 26, 2001, in which Read states the following reasons for its contest of the proposed civil penalties: (1) it does not own, control or manage the subject property; (2) many of the violations were not within the scope of Mine Act jurisdiction because they did not involve the excavation or screening of sand; (3) some of the cited areas are outside of the mine area; and (4) the president and sole shareholder was "never contacted or otherwise approached by [MSHA] as to visits, issues, or violations." Attach. Ltr. dated February 26, 2001.

On June 29, 2001, the Commission received a response to Read's request from the Secretary of Labor. The Secretary contends that the first three grounds set forth by Read in its request pertain to the merits of the underlying case, rather than to the grounds for reopening the proposed penalty assessment that became a final order. Resp. at 2. She submits that although the fourth ground may pertain to reopening, Read failed to provide sufficient detail to enable the Secretary to determine whether reopening is warranted. *Id.* The Secretary notes that MSHA received a certified mail receipt indicating that the assessment was received by Read. *Id.* at 2-3 n.2.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Read's position. In the interest of justice, we remand the matter for assignment to a judge. *See, e.g., Red Coach Trucking*, 23 FMSHRC 125, 127 (Feb. 2001) (remanding where operator made unsubstantiated allegation that it failed to mail hearing request in part because owner was not at the site where proposed penalty assessment was sent). The judge shall direct Read to provide a more detailed explanation of why it believes that circumstances regarding MSHA's alleged failure to contact its president warrants reopening the matter, and shall allow the Secretary an opportunity to respond. The judge shall then determine whether relief from the final order is appropriate. 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.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 23, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEST 2001-162-M
J. DAVIDSON & SONS CONSTRUCTION COMPANY, INC.	: :	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 8, 2001, J. Davidson & Sons Construction Company ("Davidson") filed with the Commission a petition for interlocutory review of an order issued by Administrative Law Judge Richard Manning on July 9, 2001, denying Davidson's motion to certify for interlocutory review an earlier order by the judge. *See* 29 C.F.R. § 2700.76(a)(1). In his earlier order, Judge Manning denied Davidson's request for a show cause order. 23 FMSHRC 359 (Mar. 2001) (ALJ). On August 16, 2001, the Secretary of Labor filed an opposition to Davidson's petition for interlocutory review, and Davidson subsequently filed a reply to the Secretary's opposition.

Upon consideration of the pleadings filed by Davidson and the Secretary, we have determined that the judge's denial of Davidson's request for a show cause order does not involve a controlling question of law and that immediate review of that ruling would not materially advance the final disposition of this proceeding. *See* 29 C.F.R. § 2700.76(a)(2). Accordingly, we conclude that Davidson has failed to establish a basis for granting interlocutory review and, therefore, we deny the petition.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 2001-171
	:	A.C. No. 36-00958-04286
EIGHTY FOUR MINING COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan, and Riley, Commissioners[1]

ORDER

BY: Verheggen, Chairman; and Riley, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On July 16, 2001, the Commission received from Eighty Four Mining Company ("Eighty Four") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose Eighty Four's request for relief.

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

In its request, Eighty Four states that on February 22, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Eighty Four a proposed penalty assessment of $4867 for nineteen alleged violations. Mot. The operator maintains that it indicated on the proposed assessment form ("green card") its intent to contest the penalties related to four of the citations listed in the penalty proposal, Citation Nos. 07043597, 07045701,

[1] Commissioner Beatty recused himself from this matter and took no part in its consideration.

07078929, and 07076765, which amounted to $1647. *Id.* Eighty Four states that on March 12, 2001, it paid proposed penalties in the sum of $3220 for the remaining fifteen citations that it did not contest. *Id.* It submits that on May 23, 2001, MSHA issued a letter demanding payment for the penalties associated with Citation Nos. 07043597, 07045701, 07078929, and 07076765. *Id.* Eighty Four states that it was subsequently advised by MSHA's Office of Assessments that MSHA had not received the green card contesting the four subject proposed penalties. *Id.* Eighty Four submits that it has since resolved the issues involving Citations Nos. 07078929, and 07076765, but that it wishes to continue its contest of Citations Nos. 07043597 and 07045701. *Id.* Attached to the motion is a copy of the green card indicating the operator's intent to contest the subject proposed civil penalties.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

Eighty Four has offered a sufficient explanation demonstrating that it intended to contest Citation Nos. 07043597 and 07045701 and any related civil penalties, and that the proposed penalty assessment as to those citations became final as a result of "inadvertence" or "mistake." The operator's intention to contest these two citations is clearly apparent from the undisputed fact that Eighty Four paid the penalties proposed by MSHA for all but the citations it wished to contest. We also note that the Secretary does not oppose Eighty Four's request. In addition, no other circumstances exist that would render a grant of relief here problematic. Accordingly, in the interest of justice, we grant Eighty Four's unopposed request for relief to reopen the penalty assessment that became a final order with respect to Citation Nos. 07043597 and 07045701. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

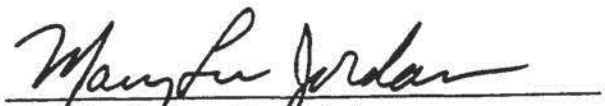
Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Commissioner Jordan, dissenting:

Although the majority may have correctly inferred that Eighty Four intended to contest the two citations at issue and their related civil penalties, slip op. at 3, it does not address the relevant question here, which is why MSHA never received the appropriate request for a hearing (or a "green card"). Eighty Four provides no explanation, and does not even assert that it ever mailed the hearing request. Rather, in its submission to the Commission (which, I note, is not in the form of a sworn statement) it simply claims that it is "at a loss to explain the missing 'green card.'" Mot.

In the absence of any proffered rationale whatsoever,[2] I am reluctant to grant relief, and would remand the matter for assignment to a judge to determine whether Eighty Four has met the criteria for relief under Rule 60(b). *See H & D Coal Co.*, 23 FMSHRC 382 (Apr. 2001) (remanding to a judge where operator alleged that it sent a hearing request to MSHA but MSHA did not receive it); *Original Sixteen to One Mine, Inc.*, 23 FMSHRC 149, 149-50 (Feb. 2001) (same); *Ahern & Assocs., Inc.*, 23 FMSHRC 121, 121-22 (Feb. 2001) (same). Accordingly, I respectfully dissent.



Mary Lu Jordan, Commissioner

[2] I recognize that the operator is appearing pro se, but believe this should not absolve it from supplying some justification as to why MSHA never received the green card.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 2001

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:	Docket Nos.	WEVA 98-72-R
ADMINISTRATION (MSHA)	:		WEVA 98-73-R
	:		WEVA 98-123
v.	:		
	:		
EAGLE ENERGY, INC.	:		

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

DECISION

BY: Verheggen, Chairman; Riley and Beatty, Commissioners

This contest and civil penalty proceeding involves two orders issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Eagle Energy, Inc. ("Eagle") under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Administrative Law Judge Jerold Feldman affirmed the violations charged in the orders, concluded that the violations were the result of Eagle's unwarrantable failure, and imposed penalties greater than those assessed by the Secretary. 22 FMSHRC 860 (July 2000) (ALJ). The Commission granted Eagle's petition for review in which it challenged the judge's findings and conclusions with regard to those issues. For the following reasons, we affirm the judge's conclusion that violations of the cited regulations occurred, and vacate and remand the unwarrantability determination and penalty assessments.

I.

Factual and Procedural Background

On February 26, 1998, Eagle maintenance foreman James Kerns was fatally injured when a rib roll occurred in the 2 North section at the No. 1 mine. 22 FMSHRC at 862. In the ensuing investigation, MSHA and West Virginia mine investigators and Eagle officials gathered at the 2 North section dumping point in the No. 2 entry at the 26th crosscut. *Id.* MSHA personnel included inspectors Thurman Workman and Vaughn Gartin and supervisory inspector Terry

Price. *Id.* Federal and state investigators were accompanied by Eagle vice-president Larry Ward, superintendent Terry Walker, and night shift foreman Roger Lovejoy. *Id.* Government and company personnel divided into teams to go to the accident site in smaller groups. *Id.* While one group waited, another proceeded to the accident scene. *Id.*

At about 6:50 p.m., while waiting to go to the accident site, Price walked from the dumping point through the 26th crosscut towards the No. 3 entry. *Id.* Price heard sounds that he attributed to "mountain bumping." *Id.* Mountain bumping is a geological condition in the mine caused by shifting rock due to the mining out of coal; the result is sloughage that falls from the roof and ribs. *Id.* at 870. While Price was walking toward the No. 3 entry, Workman headed in the direction of the No. 1 entry through the 26th crosscut. *Id.* at 862. Workman then doubled back through the 26th crosscut towards the No. 3 entry when he saw a kettle bottom with a roof bolt through the center of it. *Id.*

A kettle bottom is the oblong or cylindrical fossilized remains of a tree trunk that consists of "slickensided"[1] material that may be surrounded by a ring of coal. Kettle bottoms are primarily found in mine roofs consisting of shale.[2] *Id.* at 862-63. Kettle bottoms were a frequent occurrence at the Eagle mine. *Id.* at 863. When they were encountered, foremen usually

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[1] "Slickenside" is defined in *Dictionary of Mining, Mineral, and Related Terms*, 1025 (1968) (U.S. Dept. of Interior, Bureau of the Mines) as follows, "A polished and sometimes striated surface on the walls of a vein, or on interior joints of the vein material or rock masses. Produced by rubbing during faulting, on the sides of fissures, or on bedding planes."

[2] The *Dictionary of Mining, Mineral, and Related Terms*, 297 (2d ed. 1997) (American Geological Institute) defines "kettle bottom" as follows,

> A smooth, rounded piece of rock, cylindrical in shape, which may drop out of the roof of a mine without warning, sometimes causing serious injuries to miners. The surface usually has a scratched, striated, or slickensided appearance and frequently has a slick, soapy, unctuous feel. The origin of this feature is thought to be the remains of the stump of a tree that has been replaced by sediment so that the original form has been rather well preserved.

A publication issued by the Department of the Interior described a kettle bottom as follows: "Kettle bottoms . . . are the fossilized remains of trees that grew in ancient peat (coal) swamps . . . . Kettle bottoms can be found in either shale or sandstone roof rock. . . . Normally, kettle bottoms are highly slickensided and surrounded by a 0.25- to 0.75-in.'ring' of coal." Bureau of Mines, *Information Circular/1992*, "Preventing Coal Mine Groundfall Accidents: How to Identify and Respond to Geologic Hazards and Prevent Unsafe Worker Behavior," 8 (1992). Gov't Ex. 17.

identified them with spray paint or chalk to signal the roof bolters that additional roof support was needed, or dangered them off until they could be bolted. *Id.*; Tr. II 558; Tr. II 850-51.[3] When support was added to a kettle bottom, generally a roof bolt was placed just to the side of the kettle bottom with a half header or roof bolting plate overlapping the kettle bottom to hold it in place and ensure that it would not separate from the surrounding roof material. 22 FMSHRC at 863.

Price also observed the kettle bottom that Workman saw. *Id.* Because the kettle bottom was roof bolted in the center, rather than at the side with a supporting half header, Price and Workman concluded that the kettle bottom was not properly supported, and therefore they considered it to be a hazardous condition. *Id.*

Workman returned to the dumping point at the No. 2 entry, where he encountered Pete Hendricks, president of Eagle's parent company, Massey Coal Services. *Id.* Miners' representative Keith Casto was also present. *Id.* at 862-63. Workman, Price, and Casto proceeded to walk approximately 27 feet inby the dumping point where they observed a cluster of three kettle bottoms that were marked with orange paint. *Id.* at 863; *see* Gov't Ex. 11 A-E. Workman pointed out the painted kettle bottoms to Hendricks, who, according to Workman, stated that he paid his people to support the kettle bottoms. 22 FMSHRC at 863. After Workman pointed out the kettle bottoms, Eagle vice-president Larry Ward had the area dangered off until he had an opportunity to inspect them. *Id.* at 864. Workman had MSHA inspector Gartin photograph the painted cluster of kettle bottoms.[4] *Id.* At the completion of his conversation with Hendricks, Workman traveled into the 26th crosscut towards the No. 1 entry. *Id.* He saw an unsupported egg-shaped kettle bottom in the crosscut about midway between the No. 2 and No. 1 entries. *Id.*

Workman then joined an investigative team that went to the accident site. *Id.* After inspecting the accident site, Workman returned to the dumping point, and he was instructed to

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[3] "Tr." references are to the transcript of the hearing held before the administrative law judge. Cumulatively, there were 10 days of hearing, which convened on three separate occasions. "Tr. I" refers to the pages of the transcript volumes from the hearing on September 14-17, 1999; "Tr. II" refers to the pages of the transcript volumes from the hearing on December 7-9, 1999; and "Tr. III" refers to the pages of the transcript volumes from the hearing on February 15-17, 2000.

[4] Gartin ran out of film after he photographed the painted cluster of kettle bottoms, and he could not photograph any of the other kettle bottoms that were observed on February 26. 22 FMSHRC at 864. Months later, on November 21, 1998, shortly before the No. 2 section of the mine was to be abandoned, Eagle had photographs taken of many of the kettle bottoms at issue in this proceeding. *Id.* By that time, many of these areas of the roof were partially obscured by spray painting, rock dusting, and roof bolting plates and headers. *See* Jt. Ex. 1.

conduct a Triple A inspection in the No. 2 section inby the dumping point to the working faces. *Id.* Workman was accompanied by a West Virginia mine inspector. *Id.* Workman initially traveled up the No. 1 entry and observed a roundish oblong kettle bottom about six to nine inches in diameter, inby spad 2669. *Id.* Workman then walked through the 27th crosscut from the No. 1 entry to the No. 2 entry. *Id.* At the intersection of the 27th crosscut and the No. 2 entry, inby spad 2668, Workman saw a sunflower-shaped kettle bottom with jagged edges that was approximately six to nine inches in diameter. *Id.*

Workman next walked inby spad 2668 in the No. 2 entry. About 25 feet inby spad 2668, Workman noticed a kettle bottom that was similar in size to the prior kettle bottoms that he had observed. *Id.* In returning through the No. 3 entry, outby spad 2666, Workman saw a round kettle bottom that was about 6 to 10 inches in diameter.[5] *Id.* at 864-65. Workman walked through the 27th crosscut and went outby the No. 1 entry. In the entry, outby the 26th crosscut near spad 2664, Workman saw an unsupported kettle bottom that was round and about 6 to 10 inches in diameter. *Id.* at 865. In total, Workman saw ten kettle bottoms, nine of which were cited. *Id.*

At the completion of the inspection, Workman traveled to the mine surface and at 11 p.m, along with MSHA inspectors Gartin and Price, met with Massey Coal president Hendricks and Eagle officials to discuss the results of the investigation. *Id.* At the meeting, Workman issued a section 104(a) citation charging Eagle with a violation of section 30 C.F.R. § 75.202(a),[6] as a result of inadequate roof and rib support in the 2 North section.[7] *Id.* Workman based the citation

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[5] This kettle bottom was not cited in either of the orders that subsequently issued. *Id.* at 865.

[6] Section 75.202(a) provides:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

[7] The citation specified the following condition as a violation:

> The mine roof and coal ribs were not supported adequately to control the mine roof and ribs to protect persons from hazards related to falls of the roof or ribs in the 2 North section MMU 013-0. Beginning at spad line 2662 and 2661 and extending inby to face line of No. 1 entry, a distance of 350' and a distance of 370' in No. 2 and No. 3 entries the following condition [sic] were present in several locations, kettle bottoms present with no support, loose

on his observation of the unsupported kettle bottoms, loose and broken coal in the roof, unsupported coal ribs, and entry widths exceeding the 20 feet specified in Eagle's approved roof control plan. *Id.* MSHA did not issue any citations as a result of the investigation into the fatal accident. *See* Tr. I 232.

To abate the citation, Eagle vice-president Ward instructed safety director Jeffrey Bennett to paint any area of the roof that appeared slickensided. 22 FMSHRC at 865. Thereafter, Bennett used orange spray paint that was similar to what had been used to paint the three kettle bottom cluster near the dumping point. *Id.* The areas that were painted were bolted subsequently by installing roof bolts and half headers around the perimeters of the painted areas. *Id. See* Jt. Ex. 1. Ward considered these areas to be non-hazardous roof irregularities that were supported only to abate the citation. The citation was abated on March 2, 1998. 22 FMSHRC at 865. Eagle paid the penalty assessed as a result of the citation. *Id.* at 866.

On February 27, the day after the citation was issued, MSHA inspectors Workman and Price returned to the mine and inspected the preshift and onshift examination reports. *Id.* Based on a mine advancement map for the working faces in the 2 North section, which was prepared by Eagle vice-president Ward, Workman concluded that the area where the painted cluster of kettle bottoms was located had been mined during the day shift on February 24. *Id.* The inspectors looked at the examination reports for the preceding three days, February 24 through February 26. *Id.* During this period, the section foremen, Saunders, Fisher, and Miles, had performed collectively 17 examinations. *Id.* None of the roof conditions that Workman had identified as kettle bottoms on February 26, including the orange painted cluster, had been included in the reports. *Id.* On March 11, 1998, Workman issued two section 104(d)(2) orders to Eagle for performing "perfunctionary"(sic) preshift and onshift examinations in violation of 30 C.F.R. §§ 75.360(b)[8] and 75.362(a)(1),[9] respectively. *Id.* at 867. He designated each of the violations as

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> coal broken, and hanging, cracks present along the coal ribs with no support, No. 1 entry had been mined 22'10" wide to 23' wide with no additional supports installed.

Gov't Ex. 14.

[8] Section 75.360(b) provides, in pertinent part:

> (b) The person conducting the preshift examination shall examine for hazardous conditions . . . at the following locations:
>
> (1) Roadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.

significant and substantial ("S&S") and attributed them to Eagle's unwarrantable failure. *Id.* *See* Gov't Exs. 1 and 2.

Eagle contested the proposed penalties and a hearing was held. Before the judge, Eagle's primary defenses were that the roof conditions cited by MSHA in the orders were not kettle bottoms and, alternatively, that they were not exposed until mountain bumping and roof sloughage occurred on February 26, shortly before MSHA's investigation. 22 FMSHRC at 867.

The judge first noted that Eagle had made "two damaging admissions." *Id.* at 870. The first was a statement made by the president of Eagle's parent company, Pete Hendricks, to MSHA inspector Workman in which Hendricks acknowledged the presence of the painted cluster of kettle bottoms in the No. 2 entry. *Id.* *See* Tr. I 297-98. The second was Eagle's failure to

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> (2) Belt conveyors that will be used to transport persons during the oncoming shift and the entries in which these belt conveyors are located.
>
> (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.
>
> . . . .
>
> (10) Other areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination.

[9] Section 75.362(a)(1) provides, in pertinent part:

> At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

contest the section 104(a) citation, which cited a number of hazardous roof conditions including kettle bottoms. 22 FMSHRC at 870. The judge also found that the record evidence, including the credited testimony of MSHA's inspectors and exhibits, amply supported the presence of kettle bottoms. *Id.* at 871.

The judge further found that the presence of continuous miner bit marks, which indicated that the areas where the kettle bottoms were seen were exposed when they were mined, tight roof plates, no roof sloughage, and painted center line (drawn through the three painted clustered kettle bottoms), provided a rational basis for inferring that the painted kettle bottoms were exposed during the mining cycle on February 24, 1998. *Id.* at 872. With regard to the remaining unpainted kettle bottoms, the judge held the same facts, with the exception of the painted center line, supported the conclusion that the kettle bottoms were exposed during the normal mining cycle between February 24 and 26. *Id.* The judge rejected Eagle's defense that mountain bumping could have exposed the kettle bottoms on February 26. *Id.* at 873. The judge further applied the "missing witness" evidentiary rule to draw the inference adverse to Eagle that had it presented a witness to testify concerning the painting of the center line that ran through the painted cluster of kettle bottoms, that witness would have testified that the kettle bottoms were painted contemporaneously with the center line on February 24. *Id.* at 874. The judge continued that Eagle cannot escape application of the rule by denying that it knew the identity of the witness who painted the line. *Id.*

The judge affirmed the inspector's designation of the violations in the orders as significant and substantial ("S&S").[10] *Id.* at 874-76. The judge also concluded that the evidence reflected "the requisite unjustifiable conduct to support an unwarrantable failure" determination. *Id.* at 878.

In addressing the proposed penalties, the judge noted that the evidence suggested that Eagle acted with reckless disregard of the hazardous roof conditions in the heavily traveled No. 2 entry. *Id.* at 879. Relying on the painted cluster of kettle bottoms in the No. 2 entry, the judge noted that the cited violations were of extremely serious gravity. *Id.* The judge found that Eagle had an extensive history of violations. *Id.* The judge increased the proposed penalties from $3000, which had been initially proposed by MSHA, to $6000 for each order for a total penalty of $12,000. *Id.* at 880.

II.

Disposition

Eagle argues that substantial evidence does not support the judge's determination that it failed to observe and report the kettle bottoms. E. Br. at 7. In support, Eagle contends that the

[10] Eagle has not appealed the S&S determination to the Commission.

judge ignored testimony favorable to Eagle or failed to reconcile conflicting testimony, including the unrefuted testimony of the foremen and rank-and-file miners that they did not see any unsupported kettle bottoms from February 23 to 26. E. Br. at 9-11; E. Reply Br. at 1-6. Eagle argues alternatively that the conditions cited were not kettle bottoms, or that they were not observable prior to mountain bumping that occurred on February 26, which allowed obscured areas of the mine roof to become visible. E. Br. at 7. Eagle attacks the basis for the judge's discrediting the testimony of Scovazzo, who testified that the painted roof conditions cited were not indications of kettle bottoms but rather represented "doodling." *Id.* at 8-9. Further, Eagle challenges the judge for giving "preclusive effect to an uncontested citation" that Eagle settled for economic reasons. *Id.* at 11. Eagle argues that the citation was not litigated and did not involve the same issues as the section 104(d) orders in this proceeding. *Id.* at 11-12; E. Reply Br. at 6-7.

Eagle argues that the Commission should reverse the judge's unwarrantable failure findings because he based them entirely on the painted cluster of alleged kettle bottoms while ignoring the testimony concerning the other alleged kettle bottoms that were the basis for the orders. E. Br. at 9-16. Eagle attacks the judge's use of the "missing witness" rule that led him to infer, in light of Eagle's failure to present the witness who painted the center line, that the witness would have testified that the adjacent kettle bottoms were painted contemporaneously with the center line during the mining cycle on February 24.[11] *Id.* at 17-18. In particular, Eagle notes that the judge applied the rule even though the identity of the witness was not known to Eagle. *Id.* at 18-19. Finally, Eagle challenges the judge's imposition of a civil penalty of $12,000 because of aggravated conduct when the only evidence on which the judge relied was Eagle's failure to observe and bolt the painted cluster.[12] *Id.* at 19-20.

The Secretary argues that substantial evidence supports the finding of violations, because kettle bottoms existed in the mine and were visible, and Eagle failed to identify them in the preshift and onshift examination reports. S. Br. at 7-9. The Secretary contends that doctrines of res judicata or collateral estoppel did not bar the judge from relying on Eagle's prior payment of penalties in an uncontested citation that included an allegation of unsupported kettle bottoms. *Id.* at 9-10. The Secretary argues that Eagle failed to show that the judge abused his discretion in

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[11] Although Eagle addresses the use of the "missing witness" rule in relation to the judge's unwarrantability determination (E. Br. at 12) the judge applied the rule in rejecting Eagle's defense to the violation charged – that mountain bumping exposed the kettle bottoms shortly before the MSHA inspection on February 26. 22 FMSHRC at 873-74.

[12] While Eagle initially included in its petition for review the argument that the judge engaged in persistent questioning of witnesses that demonstrated bias and partiality and interfered with Eagle's presentation of its defense, it subsequently moved to withdraw that issue from the Commission's consideration. E. Mot., dated May 23, 2001. The Commission grants Eagle's motion.

crediting the Secretary's witnesses over Eagle's expert regarding the existence of kettle bottoms. *Id.* at 11-13. The Secretary asserts that there is no basis for overturning the judge's credibility resolutions and the inferences that he drew from the record, including his application of the "missing witness" rule. *Id.* at 14-24. With regard to unwarrantable failure, the Secretary contends that the judge's determination is supported by the record. *Id.* at 24-26. Finally, in support of the judge's penalty assessment, the Secretary states that the standard of review is abuse of discretion, and asserts that none of Eagle's arguments establish an abuse of discretion. *Id.* at 26-29.

A. Violation

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

We begin our consideration of the violations alleged in the orders by rejecting the judge's reliance in finding violations on Eagle's payment of the proposed penalty that arose from a prior section 104(a) citation. The prior citation charged Eagle with several hazardous roof conditions, including a nonspecific reference to kettle bottoms. Gov't Ex. 14. The orders at issue in this proceeding, on the other hand, specifically cited kettle bottoms by location that were not included in the preshift and onshift examination reports. Gov't Exs. 1 and 2. Thus, it is apparent from comparing the uncontested citation and the contested orders in this proceeding that there is a lack of identity of issues.[13] Therefore, the citation is not of any probative or precedential value to any aspect of the pending orders at issue here.

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[13] Neither the res judicata nor collateral estoppel doctrines would require that the payment of the penalty arising from the citation control the outcome of the litigation over the subsequent orders. "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or those in privity with them, based upon the same claim. . . . The crucial question is whether the clams involved in the two actions are identical; if not, res judicata is inapplicable." *Faith Coal Co.*, 19 FMSHRC 1357, 1365 (Aug. 1997) (citations omitted). As for collateral estoppel, "a judgment on the merits in a prior suit may preclude the relitigation in a subsequent suit of any issues actually litigated and determined in the prior suit. . . . Identity of issue is a fundamental element that must be satisfied before collateral estoppel may be applied." *Bethenergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992) (citations omitted).

Further, the other "admission" on which the judge relied, Massey president Hendrick's statement to Workman, when shown the painted cluster, that he paid his people to support kettle bottoms, was merely a response to Workman's calling his attention to the painted cluster and not probative of the presence of kettle bottoms throughout the 2 North section. Thus, Hendrick's statement is of limited evidentiary value to our consideration of the existence of the kettle bottoms in the 2 North section that were included in the orders.

Despite our rejection of the judge's reliance on these "admissions," we nevertheless conclude that there is substantial evidence that establishes the presence of kettle bottoms. The major difference in the testimony of the Secretary's witnesses and Eagle's witnesses concerned whether a kettle bottom included a rim of coal separating it from the surrounding rock. The Secretary's position was that no rim of coal was necessary for the existence of a kettle bottom, while Eagle's position was that a rim of coal was an essential part of a kettle bottom.[14] The definition of kettle bottom adopted by the judge does not require the presence of a ring of coal.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

The judge credited the testimony of MSHA investigators Workman and Price, who had 45 and 27 years of experience, respectively, that the kettle bottoms cited in the orders existed. 22 FMSHRC at 871. The judge further noted that kettle bottoms were common in this geographical area and, in particular, in the Eagle No. 1 mine. *Id.* The judge also found it significant that Workman and Price viewed the areas of the mine roof cited in the orders before abatement, thereby allowing them to observe the conditions in the roof prior to the areas being spray painted, roof bolted and supported with plates or headers, which obstructed all or a portion of the outer perimeters. *See Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 372-73 (Mar. 1993) (judge was warranted in crediting MSHA's expert because conditions observed by the operator's expert were different from those in existence at time of citation). In addition to the testimony of the witnesses, the judge also found support for the existence of kettle bottoms from the photographic

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[14] *Compare* Tr. I 110-16 (Workman), Tr. I 1108-10 (Price), Tr. II 181-83 (Price), Tr. II 203-04 (Casto), and Tr. III 81-82, 91-93 (Bias) *with* Tr. II 367-68 (Saunders), Tr. II 554 (Walker), Tr. II 885-86 (Miles), Tr. III 381-82 (Lovejoy), and Tr. III 515, 536 (Scovazzo).

evidence submitted at trial.[15] Jt. Ex. 1; Gov't Ex. 11.

The judge's final basis for discrediting Eagle's expert, Dr. Scovazzo, was his statement that the painted cluster was nothing more than "doodling."[16] 22 FMSHRC at 871. Scovazzo's doodling explanation conformed to the explanation given by Eagle vice-president Larry Ward that the painted cluster was graffiti. However, the judge was persuaded by the testimony of other witnesses that Eagle foremen used orange or red spray paint to designate kettle bottoms that were to be bolted. Tr. III at 281-82 (Bias); Tr. III at 1195-1198 (Ward). In these circumstances, it was not unreasonable for the judge to conclude that Scovazzo's doodling theory negatively impacted on his credibility as a witness.

Having found that the kettle bottoms that were the basis for the order existed, the judge addressed the issue of the duration of the cited conditions and Eagle's defense that the kettle bottoms were obscured by slate and that mountain bumping exposed them shortly before MSHA's inspection on February 26. The duration of the unsupported kettle bottoms is significant because the orders cited Eagle for performing perfunctory preshift and onshift examinations between February 24 and 26, when the areas were mined thereby exposing the kettle bottoms. The 17 examination reports that were written over this 3-day period did not have any reference or notation relating to the unsupported kettle bottoms that the MSHA inspectors observed on February 26. *See* Gov't Ex. 13 A-W. Therefore, key to establishing the violations charged in the orders is verifying that the kettle bottoms observed by the MSHA inspectors on February 26 went unobserved and unsupported by Eagle as the areas were mined during the period from February 24 to 26.

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[15] Eagle contends that one area of the roof, which it conceded possibly could have been categorized as a kettle bottom, was nevertheless adequately supported with a bolt through the center because the bolt was driven into a "rider seam" that was above the kettle bottom. E. Br. at 8 & n.5. Eagle argues that the judge ignored Scovazzo's explanation that the kettle bottom was adequately supported. *Id.* at 8. The judge failed to make any findings on whether the kettle bottom was adequately supported, although he should have. But this error is harmless because, even if the bolted kettle bottom was adequately supported and therefore not a hazard for purposes of per-shift and on-shift inspections, the various other kettle bottoms that Eagle failed to record in its examination books amply support the judge's findings of violations.

[16] Eagle argues that Scovazzo's response was "coerced." E. Br. at 9. However, Scovazzo's testimony was consistent with other Eagle witnesses who testified portions of the painted roof represented "graffiti." *E.g.*, Tr. II 785 (Fisher); Tr. III 1137-38 (Ward). Moreover, the testimony appears to be consistent with Eagle's position taken throughout the hearing. *See* Tr. I 825 (cross-examination of Workman). Therefore, we cannot conclude that the judge coerced this particular answer from Eagle's expert.

The judge noted that the statements by Eagle foremen that they failed to see unsupported kettle bottoms did not lead him to conclude that they were not observable. 22 FMSHRC at 870. The judge further noted the self interest of Eagle personnel in denying the existence of unsupported kettle bottoms in light of the fatal roof accident that had occurred at the mine. *Id.* at 872. With regard to the painted cluster of kettle bottoms in the No. 2 entry, the judge found that the kettle bottoms would have been exposed and then painted just minutes before the fatal accident on February 26, if mountain bumping exposed them — a theory the judge rejected as "implausible." *Id.*

In the absence of direct credited evidence on the issue of duration of the kettle bottoms, the judge looked to circumstantial evidence "to establish a violation by inference." *Id.* The Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id.*

We find that substantial evidence supports the judge's rejection of Eagle's defense that mountain bumping exposed the previously obscured kettle bottoms on February 26, just before the MSHA inspection. We note in particular that the judge relied on the presence of continuous miner bit marks that would have been obliterated if the roof had sloughed; tight roof plates that would have loosened if sloughing had occurred; and no evidence of roof sloughage on the mine floor to indicate that conditions had been recently exposed because of mountain bumping. 22 FMSHRC at 872.[17]

Further, based on these facts, it was reasonable for the judge to infer that the cluster of kettle bottoms was exposed when that section was mined during the normal mining cycle on February 24. *See Windsor Coal Co.*, 21 FMSHRC 997, 1002 (Sept. 1999) (Commission has permitted duration to be established through the use of circumstantial evidence). For the same reasons, it was appropriate for the judge to conclude that the remaining unpainted kettle bottoms were exposed during the normal cycles between February 24 and February 26, 1998. Given the repeated failure of the preshift and onshift examiners to observe and report the visible kettle bottoms between February 24 and 26 (*see* Gov't Exs. 13 A-W), substantial evidence supports the judge's conclusion that Eagle violated sections 75.360(b) and 75.362(a)(1) governing preshift and onshift examinations.

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[17] We find that the judge's reliance on what he characterized as a painted centerline (a line that is generally drawn by a foreman just after an area is mined) to be problematic in light of Eagle's testimony that the lines were drawn later to guide the installation of belt hangers. But this problem does not sufficiently detract from the evidence in support of the judge's finding for us to disturb it.

B. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actors's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Eagle's primary argument on review is that substantial evidence does not support the judge's unwarrantability determination and that he improperly applied the missing witness rule. Relying on testimony of Eagle witnesses concerning when the dumping point at the No. 2 entry was mined, thereby exposing the cluster of three kettle bottoms, the judge found that Eagle could have called as a witness the individual who painted the cluster of three kettle bottoms (22 FMSHRC at 873), or the centerline that ran through one of the painted kettle bottoms. *Id.* at 874. Its failure to call that witness led the judge to infer that the witness would have testified that the cited conditions were painted contemporaneously with the centerline during the mining cycle on the day shift on February 24, 1998. *Id.*

Generally, the missing witness rule provides that the failure to call an available witness who is within one party's control and has knowledge pertaining to a material issue may, if not satisfactorily explained, lead to an inference or presumption that the witness' testimony would have been adverse to the party. 75B Am Jur 2d § 1315. Application of the rule is within the sound discretion of the trial judge. *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149,

1150 (10th Cir. 1990). Many courts consider the following factors when determining whether an inference is appropriate: (1) the party against whom the inference is sought has the power to produce the witness; (2) the witness is not one who would ordinarily be expected to be biased against the party; (3) the witness' testimony is not comparatively unimportant, or cumulative, or inferior to what is already utilized; and (4) the witness is not equally available to testify for either side. *York v. AT&T*, 95 F.3d 948, 955 (10th Cir. 1996). If these criteria are satisfactorily proven, the fact finder may draw an inference against the party who failed to call the material witness.[18]

The judge found that Eagle did not present any evidence when and by whom the kettle bottoms were painted to support its argument that the painted kettle bottoms were exposed by mountain bumping and painted only minutes before the February 26 accident and MSHA's investigation. 22 FMSHRC at 872-73. The judge concluded that Eagle's failure to call the employee responsible for painting the kettle bottoms to testify about the matter created an adverse inference that the alleged witness would testify unfavorably to Eagle. *Id.* at 874. The judge reasoned that Eagle knew or should have known who painted the kettle bottoms, because under its normal operating procedures, the centerline and kettle bottoms were painted either by the foreman or at the foreman's direction. *Id.*

The identity of the witness who painted the kettle bottoms apparently was not known to either party.[19] Eagle called as witnesses the foreman on each of the three shifts who was responsible for performing inspections and marking the mine roof for bolting during the period February 24 to 26, as well as other foremen who worked in the 2 North section. Each of the foremen denied painting the cluster of three kettle bottoms or the centerline.[20] Tr. II 368, 378-79, 386-87, 441-42, 540-41 (Saunders); Tr. II 784, 850-51 (Fisher); Tr. II 865-66, 911-14 (Miles); Tr. III 459-62 (Lovejoy). The judge's inference is based on his finding that Eagle had actual or constructive knowledge of who painted the kettle bottoms. 22 FMSHRC at 873-74. We conclude that, in the circumstances of this case, the judge's application of the adverse inference was unreasonable. *See, e.g., Strong v. United States*, 665 A.2d 194, 197 (D.C. App. 1995) ("if a

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[18] The burden of demonstrating that these criteria are satisfied rests with the party requesting application of the inference. *Id.* (citing *Wilson*, 893 F.2d at 1151). Here, the issue of the use of the missing witness rule was raised at trial (by the judge) and briefed by the parties.

[19] No witness called either by the Secretary or Eagle testified that he saw the painted kettle bottoms prior to the accident investigation on February 26.

[20] If, as the Secretary alleges, the kettle bottoms were painted during the day shift on February 24, the foreman during that shift would be the best person to testify about that matter. *See* 22 FMSHRC at 874. Larry Saunders, the day shift foreman during the relevant time period (Tr. II. 350-51), denied painting the centerline or the kettle bottoms. Tr. II 368, 378-79, 386-87, 441-42, 540-41.

party has made reasonable efforts to produce the witness without success, no adverse inference will be permitted"); *see also United States v. Blakemore*, 489 F.2d 193, 195 (6th Cir. 1973) ("'Availability' of a witness to a party must take into account both practical and physical considerations.").

Moreover, the Secretary bears the burden of proving by a preponderance of the credible evidence that an operator's conduct, as it relates to a violation, is unwarrantable. *Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996). Here, the judge improperly allocated the burden of proof on Eagle to establish when the kettle bottoms were painted, a finding pivotal to the judge's unwarrantable failure conclusion.

Because the judge's application of the missing witness rule was unwarranted, his resultant finding that the three kettle bottoms were painted since the area was mined on February 24, 1998 (and therefore more obvious) must be reexamined. On remand, the judge must reexamine the record and any reasonable inferences[21] drawn from it to determine whether the Secretary has established by a preponderance of the evidence that the kettle bottoms were painted as early as February 24, whether they were painted later, or whether there is no evidence in the record as to when they were painted.[22] If the Secretary failed to establish when the cluster of kettle bottoms was painted, the judge must nevertheless also consider whether any miners saw or should have discovered the kettle bottoms.

In three of the four factors that the judge considered in relation to unwarrantability, he placed primary reliance on the existence of the cluster of kettle bottoms. We find, however, that the judge examined the violations too narrowly in focusing almost exclusively on the three painted kettle bottoms in the No. 2 entry to the exclusion of the other six kettle bottoms. *See* 22 FMSHRC at 877-78. *See also Emery Mining Corp.*, 9 FMSHRC at 2004-05 (roof support violation not unwarrantable where four roof bolts, among different, hundreds, had popped their

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[21] Our colleague errs in drawing several inferences from the record. See, e.g., slip op. at 21-22. The Commission has long held that judges may draw inferences from record facts so long as those inferences are "inherently reasonable and there [exists] a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989). While it is possible that inferences could have been drawn from the record, it is for the trier of fact to decide between reasonable inferences in the first instance. *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995).

[22] Commissioner Jordan suggests that the judge made a finding, independent of his use of the missing witness rule, that the kettle bottoms were painted on February 24. Slip op. at 23. We disagree. The judge's finding on this issue follows his use of the rule in his decision, and our colleague only reaches this finding after drawing several inferences that the judge did not. Slip op. at 21-22.

plates). The other cited kettle bottoms present circumstances that require full consideration in making an unwarrantability determination. On remand, the judge thus must consider the obviousness of *all* the kettle bottoms and the overall extent of the violative conditions.

For all these reasons, we must vacate and remand the judge's unwarrantable failure determinations.[23]

C. Penalties

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[24] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The judge must make "[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg,* 5 FMSHRC at 292-93. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). "An explanation is particularly essential when a judge's penalty assessment substantially diverges from the Secretary's original penalty proposal." *Douglas Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000) (citing *Sellersburg*,

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[23] Our colleague's suggestion that the judge's unwarrantability determination could somehow "be attributed to the implausible theories Eagle put forward," slip op. at 23, finds no support in Commission caselaw. It cannot be seriously questioned that the Secretary bears the burden of affirmatively proving the elements of unwarrantable failure without regard to the merits of an operator's defense.

[24] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

5 FMSHRC at 293). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings with regard to the penalty criteria are in accord with these principles and supported by substantial evidence.

Eagle asserts that substantial evidence does not support the judge's findings on gravity and negligence.[25] With regard to these two penalty criteria, the judge appears to have focused exclusively on the painted cluster of kettle bottoms. 22 FMSHRC at 879. Because we have concluded that the judge's inference that the cluster of kettle bottoms was painted on February 24 was unwarranted, the primary basis for his analysis of two of the penalty criteria is no longer valid. Additionally, in a final wrap-up analysis in which he considered the penalty criteria in their entirety, the judge again relied upon "the highlighted hazardous roof conditions in close proximity to the dumping point." *Id.* at 880.

Thus, it appears that the painted kettle bottoms, which the judge inferred were in existence since February 24, played a major part in the judge's assessment of penalties, which he doubled from $3000 to $6000 for each order. In light of our prior analysis concerning the use of the missing witness rule and the inference that the cluster of kettle bottoms was painted on February 24, we conclude that the judge's penalty assessment must be vacated and remanded for further consideration in light of our opinion. In addition to the erroneous inference that the cluster of kettle bottoms was painted on February 24 based on misapplication of the missing witness rule, the judge must consider all the kettle bottoms, not just the painted cluster, in his consideration of penalties.

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[25] The judge's analysis on the remaining criteria appears adequate, 22 FMSHRC at 879, and Eagle does not argue otherwise. *Compare Hubb Corp.*, 22 FMSHRC 606, 612-13 (May 2000).

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Eagle violated the Mine Act but vacate and remand his conclusions with regard to unwarrantability and penalties.

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Robert H. Betty, Commissioner

Commissioner Jordan, concurring in part and dissenting in part:

This case involves the failure of three foremen to note hazardous roof conditions in preshift and onshift reports for a period of at least two days. The judge concluded that "unsupported portions of roof that could fall at any moment, located in a heavily traveled area of the mine, were permitted to exist even after they had been identified by orange spray paint." 22 FMSHRC at 879. He determined that Eagle Energy's inadequate mine examinations amounted to an unwarrantable failure to comply with the requirements of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1). Because, as I explain below, that determination is supported by substantial evidence,[1] I would affirm his decision.[2]

The underlying condition prompting the issuance of the two orders under review was Eagle's failure to disclose, in its preshift or onshift books, a single one of the nine hazardous roof conditions (known as kettle bottoms) observed by MSHA inspectors during their investigation on February 26. In finding the violations unwarrantable, the judge properly applied the factors the Commission has considered in analyzing a charge of unwarrantable failure, which include the extent of the violative condition, the length of time that it has existed, whether the violation is obvious, and the degree of danger it poses. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). Also pertinent to this analysis is whether the operator had been placed on notice that greater efforts were necessary for compliance, *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997), and the operator's efforts at abating the violative condition, *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996). Applying these considerations to the violations at issue, the judge concluded that "the evidence clearly reflects the requisite unjustifiable conduct to support an unwarrantable failure." 22 FMSHRC at 878.

According to my colleagues, the judge's unwarrantable failure finding stems from his conclusion that the cluster of three kettle bottoms inby the dumping point had been circled with reflective paint since February 24, making the omission of any reference to this condition during the subsequent seventeen examinations particularly egregious. Slip op. at 15. Since they consider the February 24 date to have been reached only by inappropriately applying the missing witness rule, my colleagues conclude that the judge's unwarrantable failure determination cannot

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

[2] I concur in the majority's ruling affirming the judge's finding of violations of the two regulations.

stand. *Id.* They are mistaken. First, as my colleagues concede, the judge applied the missing witness rule when he rejected Eagle's mountain bumping defense, but did not utilize it in his unwarrantable failure analysis. Slip op. at 8, n.11, *citing* 22 FMSHRC at 873-74. In any event, there is ample evidence in the record to support the judge's conclusion that the kettle bottom cluster was painted on February 24, without resorting to inferences based on a missing witness rule. Therefore, even assuming arguendo that the judge's application of the missing witness rule was inappropriate, that mistake would amount to harmless error.

Underlying the question of when the kettle bottoms were painted is the issue of when they became visible. Eagle contends that eight of the nine kettle bottoms may not have been observable until after the mountain bumping, shortly before the MSHA inspector saw them on February 26. E. Br. at 7. I concur with my colleagues' determination that the judge appropriately rejected this theory, slip op. at 12, and that substantial evidence supports his finding that the cluster of three kettle bottoms inby the dumping point of the No. 2 entry was exposed (and therefore visible) during the normal mining cycle of this entry on February 24. *Id.*[3]

Turning to the painting of the kettle bottom cluster, my colleagues contend that the judge "improperly allocated the burden of proof on Eagle to establish when the kettle bottoms were painted,"[4] a finding they claim is "pivotal to the judge's unwarrantable failure conclusion." Slip op. at 15. My colleagues are wrong. In his unwarrantable failure analysis, the judge concluded that evidence pertaining to the bit marks and centerline showed that the kettle bottoms were revealed and painted during the February 24 day shift. 22 FMSHRC at 877. The judge did not shift the burden of proof — he simply drew rational connections from the evidence.

The record indicates a centerline is typically painted on the roof as an entry is mined, to guide the continuous miner in making the next cut. *Id.* at 863, 872; Tr. II 387; Tr. II 704-705. Evidence was introduced in this case that showed two painted lines on the roof of the No. 2 entry. 22 FMSHRC at 878, n.6, Gov't Ex. 11A. The judge determined that one line was drawn as a centerline, and the other line was drawn as a belt hanger line. 22 FMSHRC at 878, n.6. Given that the relevant part of the entry was mined on February 24, the judge concluded that the centerline was also drawn on that date. *Id.* at 872.

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[3] I also agree with the majority's conclusion that the judge properly determined that the remaining five unpainted kettle bottoms were exposed during the normal mining cycles between February 24 and February 26. Slip op at 12.

[4] My colleagues provide no explanation for this assertion. Their statement is somewhat puzzling because in the judge's sole reference to burden of proof he confirms that "the burden of proof that the kettle bottoms were visible and should have been noted by the preshift and onshift examiners remains with the Secretary." 22 FMSHRC at 872.

The centerline the judge found was drawn on February 24 extended through the middle of one of the three kettle bottoms inby the dumping point. *Id.* at 863, citing Gov't Ex. 11A; 22 FMSHRC at 872. It is reasonable to infer that a person who paints a line right over a kettle bottom would notice this hazardous condition. As my colleagues acknowledge, when kettle bottoms are encountered at Eagle's mine, foremen usually use chalk or spray paint to signal the roof bolters that additional support is needed, or they danger them off. Slip op at 2-3. Indeed the judge pointed out this was how Eagle highlighted roof irregularities while abating a citation for inadequate roof support and ribs. 22 FMSHRC at 865. Finally, it is undisputed that, at the time MSHA observed them on February 26, each of the three kettle bottoms inby the dumping point had been circled in the same orange paint that was used to draw the centerline. *Id.* at 863.

Since the kettle bottom cluster denoted hazardous roof conditions that needed additional support, and since the person painting the centerline would have noticed at least one of the kettle bottoms in the cluster as he or she painted the centerline right over it, and since the record reflects that the three kettle bottoms in the cluster were each circled with the same paint used to draw the centerline, it is reasonable to infer that whoever painted the centerline on February 24 observed these kettle bottoms and, consistent with the practice at the mine, circled the hazardous conditions at that time. Therefore, substantial evidence supports the judge's conclusion that the kettle bottom cluster was painted (and therefore obvious) on February 24.[5]

Although supported by substantial evidence, the determination that the kettle bottom cluster was painted on February 24 is not a finding pivotal to the judge's unwarrantable failure ruling, as my colleagues would have us believe. Slip. op at 15. Regardless of when they were painted or who painted them, the fact remains that on February 26, when they were observed by MSHA, three kettlebottoms, in close proximity, were each highlighted with a circle of reflective orange paint. 22 FMSHRC at 863. While the evidence can support the conclusion that they were painted as early as February 24, the fact that they might have been painted later does not undermine the judge's unwarrantability determination. Once they were painted with the reflective orange paint, the conditions were so obvious that, as the judge noted, "even the failure to note hazardous conditions that were marked for remedial action during the course of *one* preshift or onshift examination may constitute unwarrantable conduct." *Id.* at 877 (emphasis in original).[6]

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[5] My colleagues agree that the substantial evidence standard may be met by reasonable inferences taken from indirect evidence. Slip op. at 12, citing Mid-Continent Res., Inc., 6 FMSHRC 1132, 1138 (May 1984). Here, there is a "rational connection between the evidentiary facts and the ultimate fact [the date the cluster was painted] inferred." Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2153 (Nov. 1989).

[6] The last preshift exam at issue here took place on February 26 between 1:30 p.m. and 2:40 p.m. Gov't Ex. 13W. Thus, unless one accepts Eagle's argument that the kettle bottoms were painted minutes before the fatal accident, which occurred at approximately 2:50 p.m. on

In addition, it would be reasonable to conclude that the person who painted the centerline through one of the kettle bottoms was a foreman, since the record reflects that this is the employee who usually does that job. Tr. II 248, Tr. III 62, 445. Although the three foreman denied painting this particular centerline (indeed they denied even seeing it), the judge indicated he did not find their testimony credible: "In addressing the issue of duration, I note that it is not surprising that Eagle Energy's section foreman and other management personnel have denied knowledge of unsupported kettlebottoms, including those painted inby the dumping point, given the fact that a fatal roof accident had just occurred." *Id.* at 872.[7]

A foreman observing a hazardous roof condition on February 24, and the preshift and onshift books making no mention of the condition during seventeen subsequent inspections, justifies the conclusion that mandatory inspections were being carried out in such perfunctory manner as to indicate indifference worthy of the unwarrantable failure label. In other words, an unwarrantable failure determination is supported by the evidence in this case, without even relying on the fact that the cluster of kettle bottoms had been circled with paint.

Moreover, the question of when the kettle bottoms were painted goes to only one of the many factors in an unwarrantable failure analysis — the issue of whether the violations were obvious. Substantial evidence supports the judge's determination that the Secretary met her burden of proof regarding several other factors pertinent to the unwarrantable failure analysis as well. For example, the judge's finding that the duration of Eagle's failure to note the hazards was indicative of unwarrantable failure is clearly supported by the record evidence. Regardless of when the three kettle bottoms inby the loading point were painted to draw attention to the need for remedial action, they were, as my colleagues agree, visible as of February 24. Slip op. at 12. Furthermore, as the judge pointed out, at least three kettle bottoms must have been observed prior to MSHA's inspection by the person who painted them. 22 FMSHRC at 872.

In terms of the degree of danger created by these violations, the judge found that the kettle bottoms were repeatedly overlooked by the foremen conducting the examinations, and that this created an extremely dangerous situation due to the unpredictable nature of kettle bottoms. *Id.* at 877. This is consistent with his determination that the violation was significant and substantial ("S&S"), a finding that Eagle did not appeal. In his S&S analysis, the judge found

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February 26, one would have to conclude that the kettle bottoms were painted, and therefore obvious, during at least one preshift exam.

[7] As my colleagues note, a judge's credibility determinations are entitled to great weight and should not lightly be overturned. Slip op. at 10. *See also Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984) (when judge's finding rests on credibility determination, Commission will not substitute its judgement for that of judge absent clear indication of error). *aff'd*, 766 F.2d 469 (11th Cir. 1985).

that "there was a reasonable likelihood that the roof hazard contributed to by Eagle Energy's repeated inadequate preshift and onshift examinations will result in injury, and, that that injury will be reasonably serious, if not fatal, in nature." *Id.* at 876. In making this finding, he relied on abundant record evidence demonstrating the potential dangers of kettle bottoms, including a coal geology atlas introduced into evidence by Eagle which stated that kettle bottoms can fall without warning, causing injuries and fatalities, and that "'identification [of kettlebottoms] and subsequent support during mining is critical.'" 22 FMSHRC at 875, citing Resp't Ex 3 at 2. Roger Lovejoy, Eagle's evening shift foreman, testified that a kettle bottom is a hazardous condition because it can fall without any warning. Tr. III at 373. Inspector Workman testified that the kettle bottoms "could kill anyone at any time." Tr. I at 668. Substantial evidence thus supports the judge's finding that the foremen's repeated oversights in failing to note these hazardous conditions in their reports were "extremely dangerous." 22 FMSHRC at 877.[8]

The judge's unwarrantability determination can more appropriately be attributed to the implausible theories Eagle put forward, rather than to an erroneous application by the judge of a missing witness rule or burden of proof. Eagle maintained that none of the nine areas MSHA cited were kettle bottoms – they were instead "roof irregularities" that appeared as a result of mountain bumping, on February 26. *Id.* at 867. Coincidentally, between the time the mountain bumping allegedly caused these roof irregularities, and the time of the fatal accident, Eagle would have us believe that someone decided to doodle with spray paint. *Id.* at 873. According to Eagle, the circles that were painted around three of the irregularities, did not indicate a need for additional roof support, they were merely the way the graffiti artist decided to express him or herself. E. Br. at 16. Attempting to be charitable, the judge indicated he found Eagle's theories "unavailing." 22 FMSHRC at 871.

The majority's remand instructions charge the judge with making three discrete findings — two of which I may add, he has already made. First the majority requires him to review the record and any reasonable inferences drawn from it to determine whether the Secretary established when the kettle bottoms were painted. Slip op. at 15. But, as noted above, the judge has already found that "[t]he bit marks and centerline reflect the kettle bottoms were revealed and painted during the mining cycle on the day shift of February 24, 1998." 22 FMSHRC at 877.

Second, the majority instructs him to consider whether any miners saw or should have discovered the kettlebottoms. Slip op. at 15. However, he has already found that the kettle bottoms existed as early as February 24, and that the preshift and onshift examiners repeatedly failed to note them from February 24 through February 26. 22 FMSHRC at 872. Thus he has already determined that the kettle bottoms should have been discovered.

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[8] An additional factor relevant to an unwarrantable failure determination is the extensiveness of the hazardous conditions. *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). The judge found the conditions extensive because there were nine cited kettle bottoms. 22 FMSHRC at 877.

The majority's third and final remand order directs the judge to consider "the obviousness of all the kettle bottoms and the overall extent of the violative conditions." Slip op. at 15. I must take issue with the premise of this instruction, which is that the judge "examined the violations too narrowly in focusing almost exclusively on the three painted ketttlebottoms in the No. 2 entry to the exclusion of the other six kettlebottoms." *Id.* It is one thing for the Commission to vacate an unwarrantability determination that fails to take mitigating evidence into account, but here the majority finds fault because the judge relied on the most egregious aspect of the cited condition, and failed to discuss additional, *culpable* behavior on the part of the operator. Surely my colleagues do not think lesser violations should mitigate more serious ones.[9] Such an approach would certainly turn the unwarrantable failure provision on its head. Their decision, however, may well give readers the mistaken view that an operator, attempting to defend itself against the charge that its failure to report obvious roof hazards amounted to unwarrantable conduct, should point out that it also neglected to report less obvious conditions.

The persistent failure of Eagle's foremen to thoroughly conduct preshift and on-shift examinations so that the kettle bottoms could be detected, noted, and supported, establishes aggravated conduct constituting unwarrantable failure. Accordingly, I would affirm the judge, and thus respectfully dissent.

Mary Lu Jordan

Mary Lu Jordan, Commissioner

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[9] In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004-05 (Dec. 1987), the case relied on by the majority for the proposition that the judge erred by focusing on three kettle bottoms to the exclusion of six others, the operator was cited for violating a roof control standard. The judge's finding of unwarrantable failure was based on his conclusion that four roof bolts did not have bearing plates and that they should have been detected by preshift or onshift examiners. 9 FMSHRC at 2004. However, the Commission, in reversing the judge's unwarrantable failure determination, noted that Emery was not indifferent to roof support in that area of the mine, and described in detail the herculean efforts of the operator to adequately support the roof, including actions that exceeded the requirements of its roof control plan. *Id.* It was thus making a comparison between a small number of conditions in violation of the roof control standard, and a large area where there was attempted compliance. Here, in contrast, the majority is instructing the judge to consider the three painted kettle bottoms along with evidence of six other violative conditions, not evidence of compliance with the regulations.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2001-298
PERRY COUNTY COAL CORPORATION	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 29, 2001, the Commission received from Perry County Coal Corporation ("Perry") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its request, Perry, through counsel, asserts that its failure to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") was due to its mistake or inadvertence. Mot. It contends that it had filed Notices of Contest challenging the four citations (Citation Nos. 7497581, 7467118, 7467119, and 7512809) associated with the proposed penalty assessment. *Id.* Although the operator does not explain the circumstances leading to its mistake or inadvertence, Perry requests that the Commission reopen this matter. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

First, although counsel for Perry states that Notices of Contest were filed for Citation Nos. 7467118, 7467119, and 7512809, and relies upon these purported Notices of Contest in seeking relief here, no such contests have been docketed. Perry has thus offered no explanation for its failure to contest the penalties for these citations. Accordingly, we deny relief as to these penalties.

It is a matter of record, however, that Perry contested Citation No. 7497581. Docket No. KENT 2000-222-R. But on the basis of the present record we are unable to evaluate the merits of Perry's request for relief relating to the penalty for this citation. In the interest of justice, we remand the penalty proceeding relating to Citation No. 7497581 for assignment to a judge to determine whether relief from the final order is appropriate. *See Bailey Sand & Gravel Co.*, 20 FMSHRC 946, 946-47 (Sept. 1998) (remanding to judge where operator offered no explanation for its failure to contest the proposed penalty assessment); *Rivco Dredging Corp.*, 10 FMSHRC 624, 624-25 (May 1988) (remanding where operator was apparently unaware of the requirement to separately file notice of contest of citations and notice contesting proposed penalty assessment). If the judge determines that such relief is appropriate, the penalty proceeding for Citation No. 7497581 shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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October 31, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2001-511-M A.C. No. 02-02626-05528
v.	:	Docket No. WEST 2001-512-M A.C. No. 02–02626-05529
ASARCO, INC.	:	Docket No. WEST 2001-513-M A.C. No. 02-02626-05530
	:	Docket No. WEST 2001-584-M A.C. No. 02-02626-05528

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 29, August 23 and October 18, 2001, Asarco, Inc. ("Asarco") filed with the Commission requests to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

[1] Asarco's June 29 request was filed in Docket Nos. WEST 2001-511-M, WEST 2001-512-M, and WEST 2001-513-M; its October 18 request was filed in WEST 2001-511-M; and its August 23 request was filed in Docket No. WEST 2001-584-M. The civil penalty proceeding identified by Docket No. WEST 2001-584-M is duplicative of the civil penalty proceeding identified by Docket No. WEST 2001-511-M because both proceedings encompass the same proposed penalty assessment. Accordingly, we hereby dismiss Docket No. WEST 2001-584-M as duplicative of Docket No. WEST 2001-511-M.

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

In its motions, Asarco asserts that it intended to contest the proposed penalties, but that it did not submit green cards because it inadvertently paid the assessments.[2] Mot. (6-29-01) at 4, 7; Mot. (8-23-01) at 2, 6; Mot. (10-18-01) at 2, 6. Asarco submits that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued fifty-five citations to Asarco following an accident at Asarco's Mission Underground mine, and that it filed notices of contest as to all of those citations. Mot. (6-29-01) at 3; Mot. (8-23-01) at 1; Mot. (10-18-01) at 1. Asarco states that contests of 26 citations have been stayed pending a criminal investigation; 5 contests have been the subject of summary decision; and 24 contests remain pending. Mot. (6-29-01) at 3; Mot. (8-23-01) at 1-2; Mot. (10-18-01) at 1-2. It states that in addition to handling the litigation related to those citations, it has been involved in three discrimination cases that broadly relate to the citations. Mot. (6-29-01) at 3-4; Mot. (8-23-01) at 2; Mot. (10-18-01) at 2. Asarco explains that on January 19 and 23, 2001, Asarco personnel mistakenly paid the penalties for "some (but not all)" of the citations at issue in the pending contests because they were unaware that Asarco management was pursuing the contests. Mot. (6-29-01) at 4, 6-8; Mot. (8-23-01) at 2, 5-7; Mot. (10-18-01) at 2, 5-7. Asarco attached to its June 29 motion the declaration of Irwin P. Graham, the General Mine Supervisor at the Mission Underground mine; and Asarco's opposition to the Secretary's motion to dismiss. Asarco attached to its August 23 motion the identical declaration of Irwin P. Graham; an order issued by Administrative Law Judge Richard Manning on August 9, 2001; and the Secretary's response to Asarco's June 29 motion to reopen. Asarco attached to its October 18 motion copies of previous attachments; the Secretary's response to Asarco's August 23 motion; and a letter to Judge Manning dated October 16, 2001.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has

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[2] The proposed penalty assessments related to Docket Nos. WEST 2001-511-M, WEST 2001-512-M, and WEST 2001-513-M set forth the proposed penalties for twenty-six citations. In the captions of its motions to reopen, Asarco lists twenty-three citations that it wishes to reopen because they allegedly are associated with penalties that it paid in error. It has been determined administratively that, in addition to those twenty-three penalties, the penalties associated with the following citations have been paid, although Asarco did not include the citations in its list: Citations Nos. 07945579 (A.C. No. 02-02626-05528); 07945580 (A.C. No. 02-02626-05528); and 07934552 (A.C. No. 02-02626-05530).

found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate Asarco's position. Although Asarco lists twenty-three citations in its motions to reopen, and states that it paid the penalties for some, but not all, of the citations at issue in the contests that were not stayed, it appears that it might have paid twenty-six penalties. *See* n.2, supra. Because of this confusion in the record, and in the interest of justice, we remand the matter for assignment to a judge to determine which citations are the subject of Asarco's requests for relief from final order, and whether relief from the final order is appropriate. 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.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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Chief Administrative Law Judge David F. Barbour
Federal Mine Safety and Health Review Commission
1730 K Street, N.W., 6th Floor
Washington, D.C. 20006

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

October 3, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF LEE GARRETT, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 2001-146-DM SC MD 00-25 Arkansas Operations Mill
UNITED STEEL WORKERS OF AMERICA, LOCAL 4880 Intervenor	:	
v.	:	Mine ID 03-00257
ALCOA WORLD ALUMINA, LLC, and its successors, Respondent	:	

DECISION

Appearances: Madeleine T. Le, Esq., Tina D. Campos, Esq., and Connie M. Ackerman, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Complainant;
Dan A. Henry, President, United Steel Workers of America, Local 4088, Benton, Arkansas, *pro se*, for Intervenor;
Harold J. Engel, Esq., and Rebecca E. Silberbogen, Esq., Arent Fox Kintner Plotkin & Kahn, PLLC, Washington, D.C., for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Lee Garrett, against Alcoa World Alumina, LLC, under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Benton, Arkansas, on July 24, 2001. Further proceedings in the case were continued until October 9, 2001. For the reasons set forth below, the case is dismissed.

The parties have filed a Motion to Dismiss the proceedings because they "have reached an amicable settlement of the issues" and the Complainant has stated that he wishes to withdraw

his complaint. In a separate filing, the Secretary has moved to withdraw her Petition for Assessment of Civil Penalty. Commission Rule 11, 29 C.F.R. § 2700.11, provides that "[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission."

Accordingly, the motions for leave to withdraw are **GRANTED** and it is **ORDERED** that this case is **DISMISSED**. In view of the dismissal, the hearing scheduled for October 9, 2001, is **CANCELED**.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 4, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-39
Petitioner	:	A. C. No. 46-07711-03660
v.	:	
	:	
EAGLE ENERGY INCORPORATED,	:	
Respondent	:	Mine No. 1

DECISION ON REMAND

Before: Judge Feldman

The initial decision in this matter held that the violative water accumulations in Eagle Energy Inc.'s (Eagle Energy's) 10 Left escapeway of its Mine No. 1 cited in Citation No. 7163242 were not attributable to an unwarrantable failure. 21 FMSHRC 1235 (November 1999) (ALJ). While the initial decision determined Eagle Energy's degree of negligence was high, it was determined that Eagle Energy's conduct did not rise to the level of unjustifiable or inexcusable conduct necessary for the Secretary to prevail on the unwarrantable failure issue. *Id.* at 1249 n.5, 1251 n.7 (November 1999) (ALJ). On August 30, 2001, the Commission vacated the negative unwarrantable failure determination and the civil penalty assessment, and remanded for further analysis consistent with its opinion. 23 FMSHRC 829 (August 2001).

For the reasons discussed herein, I have determined that Eagle Energy's violation of 30 C.F.R. § 75.380(d)(1) was attributable to its unwarrantable failure.[1] However, given the Secretary's failure to prove the special findings made in connection with the alleged duration of the subject violation, there is an inadequate basis for increasing the civil penalty above the $2,500.00 assessed in the initial decision. 21 FMSHRC at 1251.

[1] Section 75.380(d)(1) provides, in pertinent part: "(d) each escapeway shall be -- (1) maintained in a safe condition to always assure passage of anyone, including disabled persons . . . ." 30 C.F.R. § 75.380(d)(1).

I. Background

Eagle Energy's Mine No. 1 is an extremely wet mine with recurring water problems. Water flows down to the mine from the surface and seeps in from an adjacent abandoned mine which is inundated with water. 23 FMSHRC at 830. There are over 100 pumps at locations throughout the mine where water chronically accumulates. *Id.* Approximately 5 million gallons of water are pumped out of the No. 1 Mine every day. *Id.* In areas of chronic accumulation, water can accumulate at depths of up to approximately eight inches per day. 21 FMSHRC at 1245. In short, areas of the mine floor are always wet, frequently with accumulations of several inches of water, because of slopes or irregularities in the mine floor, and, as discussed below, because of the cyclical nature of the pumping cycle.

While the 10 Left section was in production, water was removed from the escapeway by pumping it on to the belt line through discharge hoses. 23 FMSHRC at 830. The water was absorbed by the coal on the belt line and carried to the surface. *Id.* On July 9, 1997, Eagle Energy suspended production in the 10 Left section in anticipation of assembling a longwall that was to be relocated from another area of the mine. *Id.* Converting the 10 Left section to longwall operations required dismantling the belt line in order to move it from the No. 2 to the No. 1 entry. *Id.* In so doing, Eagle Energy lost its ability to discharge water on the belt line. *Id.* Consequently, on July 10, 1997, at the suggestion of Mine Safety and Health Administration (MSHA) Inspector Albert "Benny" Clark, Eagle Energy converted the section's incoming fresh water line, ordinarily used for dust suppression during mining operations, to a discharge line through which water could be pumped from the escapeway. *Id.* at 831.

At 4:00 p.m. on August 31, 1997, Eagle Energy converted the discharge line back to an incoming fresh water line to facilitate the anticipated longwall operations. *Id.* at 832-33. Eagle Energy anticipated completing the belt line installation on the morning of September 1, 1997. *Id.* at 832. However, the belt pulled apart when it was started on the morning of September 1. *Id.* Initial attempts to repair the belt were unsuccessful and the belt could not be successfully repaired until approximately 1:30 p.m. on September 2.[2] These events occurred during Labor Day weekend at a time when Eagle Energy's mine was short-staffed with only management personnel. *Id.* 831.

In its remand, the Commission concluded my disposition of the unwarrantable failure question placed too much emphasis on why Eagle Energy was unsuccessful in preventing hazardous water accumulations. 23 FMSHRC 837 n.8. Rather, the Commission stated the proper inquiry was whether ". . . Eagle Energy's failure to have an alternative method of discharging water readily available in case of problems in assembling the belt . . . ." constituted

[2] The initial decision determined the belt was repaired by the afternoon of September 2, 1997, between 12 noon and 3:00 p.m. 21 FMSHRC at 1243. For the purposes of this decision I have concluded that the belt repair was completed by approximately 1:30 p.m.

an unwarrantable failure. *Id.* In this regard, the Commission stated Eagle Energy's elimination of all means of pumping from the afternoon of August 31 to the afternoon of September 2 was, as a matter of law, an aggravating circumstance for unwarrantbale failure purposes. *Id.* at 837. In addition, the Commission determined that Eagle Energy's conduct was "highly negligent." *Id.* at 839.

II. Unwarrantable Failure

The Commission's determination that Eagle Energy's underlying conduct was aggravated in nature is the law of the case. It is well settled that unwarrantable conduct is aggravated conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04(Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *Buck Creek Coal, Inc.* v. *FMSHRC*, 52 F.3d 133, 136 (7TH Cir. 1995) (approving Commission's unwarrantable failure test). Accordingly, in view of the Commission's determination that the underlying conduct that gave rise to this case is aggravated, as well as the Commission's finding that Eagle Energy was highly negligent in allowing the water accumulations to occur, I am constrained to conclude that Eagle Energy's violation of section 75.380(d)(1) was attributable to its unwarrantable failure. 23 FMSHRC at 839 [*citing Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (holding that highly negligent conduct on its face suggests an unwarrantable failure)]. The conclusion that Eagle Energy's conduct was unwarrantable also is consistent with the Commission's findings that Eagle Energy's previous history of violations, and its failure to run a discharge hose to the Mudlick Mains, were aggravating factors. *Id.* at 837, 839.

The Commission directed that I reconsider Eagle Energy's history of previous violations. Eagle Energy received seven citations for water accumulations in the 10 Left Escapeway between May and August 1997. *Id.* at 838. The No. 1 Mine is an extremely wet mine. As discussed *infra*, since a period of water accumulations must occur before the pumping cycle can resume, it is apparent that, at the discretion of MSHA inspectors, Eagle Energy can face section 75.380(d)(1) liability on a daily basis. It is in this context that Eagle Energy's conduct was not unwarrantable *per se* solely because of its history of prior violations. 21 FMSHRC at 1249; *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001). (factors relevant to the unwarrantable failure issue must be viewed in the context of the factual circumstances in a particular case). With respect to notice, given the daily pumping of approximately 5 million gallons of water, irrespective of its history of previous violations, Eagle Energy was on notice that diligent compliance efforts were required.

The Commission also directed that I reconsider Eagle Energy's failure to run a 1000 feet long discharge line to the Mudlick Mains. As discussed *infra*, although the discharge waterline was converted to fresh water on August 31, pumping was not supposed to resume until September 1. The Secretary has not shown that the time and man hours necessary to run and connect discharge lines from each pump into a new Mudlick Mains discharge hose, given the holiday weekend shortage of workers, was significantly less than the time it took to fix the belt after it initially broke down on September 1. Moreover, the Mudlick Mains discharge hose was

not suggested by MSHA as a solution to the cited water accumulations of September 2, 1997. The Mudlick Mains discharge hose was suggested by MSHA inspector Clark on July 10, 1997, as an alternative to converting the fresh water line to a discharge line. Tr. III 90, V 290-92.[3] This alternative method of discharging water was rejected by Eagle Energy because it was too far to run a discharge line. 23 FMSHRC at 835. The efficacy of a Mudlick Mains discharge line has not been demonstrated.

III. Civil Penalty

I now revisit my initial imposition of a $2,500.00 civil penalty for this violation. It is noteworthy that the Secretary also initially proposed a $2,500.00 civil penalty for this violation. Ordinarily, I would be inclined to raise the civil penalty in a remand decision where the citation has been modified to reflect that the cited violation is attributable to an unwarrantable failure. However, the facts of this case fail to justify an increase in penalty.

Citation No. 7163242 states:

> The intake escapeway for the 10 Left has water in depths of 1 inches (sic) to 15 inches between cross cut 70 and 71 for a distance of 110 ft., water between 59 and 60 cross cuts in depths of 1 inch to 15 inches for a distance of 90 ft., water in depths of 1 inch to 12 inches between 51 and 52 cross cuts for a distance of 40 ft., and water in depths of 1 inch to 15 inches between beginning 20 ft. inby cross cut No. 49 and extending to cross cut 48 for distance of 120 ft. The water in all areas are (sic) muddy with loose coal and slick bottom. *This condition was reported [in the weekly examination book] on 8-15-97, 8-22-97 and 8-29-97.* (Emphasis added).

The Secretary's proposed $2,500.00 civil penalty was based on special findings under Part 100 of her civil penalty regulations. 30 C.F.R. Part 100. Section 100.5(h) of those regulations provides for special assessments for "[v]iolations involving an extraordinarily high degree of negligence or gravity or other unique circumstances." In this regard, in the special findings in Citation No. 7163242, in substantial testimony presented by the Secretary at trial, and in her appeal, an important, if not crucial, element of the Secretary's unwarrantable failure case has been that *these cited water conditions* existed for more than two weeks, *i.e.*, from August 15 through September 2, 1997, because the weekly examination book lacked notations reflecting

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[3] The transcript contains a separate volume for each day of the six day hearing. Transcript references note the volume by Roman numeral I through VI followed by the pertinent page number.

remedial pumping.[4] However, the Commission, in its remand, has affirmed the determination that the evidence fails to establish that the cited conditions existed for more than two days, *i.e.,* from August 31 through September 2, 1997. 23 FMSHRC at 839.

In analyzing the significance of Eagle Energy's inability to pump water for two days, it is essential to focus on the water pumping process. As noted in the initial decision, pumping water requires an alternating cycle of water accumulation and pumping, in that water must be allowed to accumulate to levels significant enough to pump. Tr. V 303-04, 306; 21 FMSHRC at 1236-37, 1247-48. When adequate accumulations occur, the pumps are turned on until the water is drained, at which time the pumps are turned off. Significantly, pumps cannot operate continuously because "dry pumping" would burn out the pump motors. *Id.* at 1237; Tr. III 119, 146-48. Even the Secretary does not assert that the pumps were required to run continuously. In this regard, Eagle Energy's production director John Adkins testified that the large-type portable commercial pumps used in Mine No. 1 do not have floats that automatically turn the pumps on and off. Tr. V 50-1. Adkins' testimony that the pumps must be manually turned on was corroborated by MSHA inspector Terry Price. *Id.* Inspector Clark conceded that water accumulation is an unavoidable consequence of the pumping cycle. Tr. V 306.

Under such circumstances, the evidence suggests Eagle Energy could not have pumped water from the afternoon of August 31, when it converted its discharge water line, until the following afternoon on September 1, 1997, when the water would have first reached depths that were adequate to pump. Although it should have started pumping on September 1, despite efforts by experienced belt assemblers, Eagle Energy was unable to resume pumping until September 2 because the belt broke when it was started on the morning of September 1. Thus, in the final analysis, Eagle Energy's conduct resulted in its inability to pump water for approximately 2½ shifts, from 4 p.m. on September 1 until 1:30 p.m. on September 2. It bears repeating that the duration of the violation was no more than several shifts rather than the duration of more than two weeks alleged by the Secretary in her special findings, at trial and on appeal.

In addressing the duration issue as it impacts on the Secretary's failure to support her special findings, I am cognizant that, in assessing penalties, this Commission makes *de novo* findings based on the record in adjudicatory proceedings, and it is not bound by Part 100 of the Secretary's penalty regulations. *Dolese Brothers Company*, 16 FMSHRC 689, 694 (April 1994) *citing Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Although Commission judges are not bound by the Secretary's special findings, ". . . consideration of all incidents of a violation, including the special findings, is appropriate." *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 (September 1987). In *Quinland*, the Commission stated:

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[4] Citation No. 7163242 does not rely on Eagle Energy's conversion of its waterline to fresh water on August 31 as a basis for its unwarrantable failure designation. In fact, the testimony reflects that the Secretary first became aware that the discharge hose had been converted to fresh water when it was raised by Eagle Energy at trial. *See* Tr. V 290-92.

> The validity of the allegation of violation and of any special findings made in connection with the alleged violation, all bear upon the appropriate penalty to be proposed by the Secretary prior to adjudication and to be assessed by the Commission if a violation is ultimately found . . . .

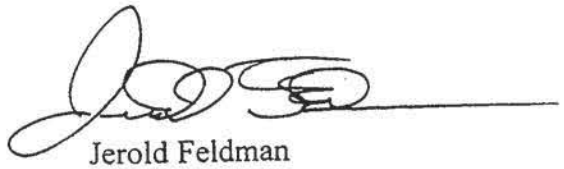
Id. (emphasis in original), *citing Old Ben Coal Co.*, 7 FMSHRC 205, 207-08 (February 1985).

In sum, the Secretary has failed to support her assertion that the violative water accumulations existed for more than two weeks. It follows that the evidence, establishing that the violative water accumulations existed for no more than several shifts, during a period when short-staffed management personnel were focused on repairing the belt that would alleviate the cited violative condition, does not warrant an increase in the $2,500.00 penalty assessed in the initial decision. Accordingly, a $2,500.00 civil penalty shall be assessed for 104(d)(1) Citation No. 7163242.[5]

ORDER

In view of the above, **IT IS ORDERED** that 104(d)(1) Citation No 7163242 reflecting that the cited violation of section 75.380(d)(1) is attributable to Eagle Energy Inc.'s unwarrantable failure **IS AFFIRMED**.

IT IS FURTHER ORDERED that Eagle Energy Inc. shall pay a $2,500.00 civil penalty in satisfaction of 104(d)(1) Citation No. 7163242. Payment is to be made within 40 days of the date of this decision. Upon timely receipt of payment this matter **IS DISMISSED**.[6]



Jerold Feldman
Administrative Law Judge

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[5] While I have not increased the $2,500.00 civil penalty assessed in the initial decision, I emphasize that the unanticipated problems it encountered in converting to longwall operations did not relieve Eagle Energy of its obligation to maintain its escapeways in this wet mine in a passable condition. *See* 21 FMSHRC at 1251.

[6] The parties have reached a settlement agreement with respect to two other citations that were the subjects of this civil penalty proceeding. Eagle Energy has agreed to pay civil penalties of $50.00 in satisfaction of Citation No. 7158529, and $300.00 for Citation No. 7163240. Thus, the total civil penalty owed by Eagle Energy in this matter is $2,850.00.

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/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 12, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, on behalf of	:	
GARY DEAN MUNSON,	:	Docket No. WEVA 2000-58-D
Complainant	:	MORG-CD-2000-01
v.	:	
	:	Federal No. 2
EASTERN ASSOCIATED COAL CORP.,	:	Mine ID 46-01456
Respondent	:	

DECISION
AND
FINAL ORDER

Appearances: Douglas N. White, Esq., Associate Regional Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Rebecca Oblak Zuleski, Esq., Furbee, Amos, Webb & Critchfield, P.L.L.C., Morgantown, West Virginia, for Respondent.

Before: Judge Zielinski

This matter is before me on a complaint of discrimination filed by the Secretary on behalf of Gary Munson pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(c)(2). On June 25, 2001, a Decision on Liability was issued, finding that Respondent discriminated against Munson in violation of the Act, and directing the parties to confer and attempt to reach agreement on the relief to be awarded to Munson and on the amount of an appropriate civil penalty.[1] The parties have conferred and reached agreement on all outstanding relief issues. As noted in the Decision on Liability, by stipulating to the specific relief to be awarded no party has waived, or compromised in any way, any right to seek review of this final decision.

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[1] *Sec'y of Labor on behalf of Munson v. Eastern Associated Coal Corp.*, 23 FMSHRC 654 (June 2001).

ORDER

Accordingly, based upon the stipulation of the parties and the Decision on Liability, which is adopted and incorporated by reference herein, it is **ORDERED** that:

Reinstatement

Respondent shall reinstate Complainant in the position that he held at the time of his suspension on December 6, 1999, at the same mine, on the same schedule and under the same working conditions that then existed, subject to the following condition. As a condition of Complainant's reinstatement, he shall be placed under the "Last Chance Agreement," a copy of which is appended to this decision. Respondent shall adjust all benefits, including but not limited to, pension, vacation and health benefits, to reflect exactly what those benefits would be had Complainant not been suspended on December 6, 1999, and shall promptly notify insurance carriers and pension providers, as necessary, to assure that such adjustments are made. Respondent shall provide Complainant with training to reacquaint him with the requirements and technical aspects of his job and to enable him to have the same level of certification or job qualification that he held as of December 6, 1999. The training shall be provided at Respondent's expense and while Complainant is receiving his full pay and benefits and shall include formal training, on-the-job training, orientation sessions, or any other training that will satisfy federal, state, or other applicable training requirements necessary for him to properly and safely perform his job.

Back Pay and Interest

Respondent shall pay Complainant $16,528.20, representing back pay, plus $2,333.84, in interest on the back pay amount, accrued through September 1, 2001. These are gross pay figures, from which appropriate legal deductions should be made. Additional interest shall accrue from September 1, 2001 to the date of payment, under the formula established in *Sec'y on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-05 (Nov. 1988). Payment shall be made within 30 days of the issuance of this decision.

Miscellaneous Expenses

Respondent shall pay Complainant $398.07 to compensate him for expenses he incurred as a result of the discrimination and litigation of this case. Payment shall be made within 30 days of the issuance of this decision.

Posting

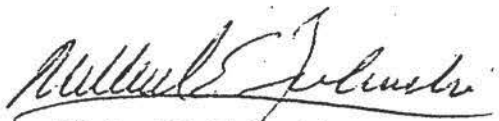
Respondent shall post, in a prominent place at the mine, where all miners can read it, a statement that the company will not discipline or take any adverse action toward any miner based upon the miner's exercise of rights under the Act. The statement shall not include any mention of Complainant's case and shall be posted within 30 days of issuance of this decision.

Civil Penalty

The Secretary proposed a civil penalty of $8,500.00, and Respondent does not challenge the amount of the proposed penalty, though it does contest liability. Respondent is a large operator with a significant number of safety violations and one other finding of discrimination. It does not contend that imposition of a penalty in the amount of $8,500.00 would impair its ability to remain in business and I find that the proposed penalty is appropriate to the size of Respondent's business. The equivalent of gravity, negligence and good faith considerations were addressed in the Decision on Liability. As noted in the Decision on Liability, I have rejected the Secretary's argument that Respondent's rejection of Complainant's attempt to rescind his economic reinstatement agreement evidences bad faith.

Based upon these considerations, Respondent is **ORDERED** to pay a civil penalty of $8,500.00 within 30 days.

This constitutes the "Decision of the Judge" on Munson's complaint of discrimination, within the meaning of Commission Procedural Rule 69(a), 29 C.F.R. § 2700.69(a).



Michael E. Zielinski
Administrative Law Judge

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Rebecca J. Oblak, Esq., Atkins & Oblak, PLLC, 5000 Hampton Center, Suite 4, Morgantown, WV 26505 (Certified Mail)

/mh

Attachment

LAST CHANCE AGREEMENT
between
GARY D. MUNSON and
EASTERN ASSOCIATED COAL CORPORATION

In order to resolve issues concerning the terms of reinstatement of Gary D. Munson, subsequent to his violation of Article XXII(i)(4) of the National Bituminous Wage Agreement and in order to achieve a remedy in accordance with the decision of Administrative Law Judge Michael Zielinski (Federal Mine Safety and Health Review Commission) in the Mine Act case docketed as WEVA 2000-58-D, and due to the particular circumstances of this situation, the parties agree to the following conditions for the continuation of Mr. Munson's employment with Eastern Associated Coal Corp.

1. Mr. Munson will be allowed to continue his employment under a special attendance control program that is specifically intended to require him to work on a regular and continuing basis. The terms of the program are as follows:

   a. For the calendar year 2001:

      (i) Mr. Munson may not be absent from work for any reason other than with explicit prior permission of the Manger-Preparation, Operations Manger, or their respective successors. It is understood that Mr. Munson may use his remaining contractual days in accordance with the above stipulations.

   b. Beginning January 1, 2002:

      (i) Mr. Munson may not be absent from work on any scheduled shift for any reason other that a contractually paid absence or with explicit prior permission of the Manager-Preparation, Operations Manager, or their respective successors. Such permission will not be unreasonably withheld.

      (ii) Mr. Munson may take no more than two (2) contractually paid days off work during any month without explicit prior permission of the Company. Such permission will not be unreasonably withheld.

2. Should Mr. Munson be found guilty of any violation of the published rules of conduct dated September 27, 2000, he may be discharged at the Company's discretion.

3. Any violation of this Last Chance Agreement will constitute "just cause" For Mr. Munson's discharge.

4. Mr. Munson acknowledges that this Agreement is being entered into based upon his promise that he can, and will, work consistently and regularly. He understands that his inability or failure to do so will result in his discharge.

5. Mr. Munson acknowledges that he has had an opportunity to confer with his Union Representatives and others of his choice regarding the terms and conditions of this Last Chance Agreement, and that he understands and agrees to abide by all the terms and conditions of this agreement.

6. Mr. Munson further agrees to permit the company (EACC) to exercise approval over any physician or medical facility from whom or from which he proposes to seek medical care which may result in his absence from work. Such approval will not be unreasonably withheld.

7. Mr. Munson acknowledges that the Company has an Employee Assistance Program that is available to assist with any personal problems that he may have that would affect his ability to work regularly in the future.

8. This Agreement is <u>not</u> in any way to be considered a part of Article XXII(i) of the National Bituminous Coal Wage Agreement.

9. This Agreement is entered into by the parties without precedent or prejudice and shall never be referred to in any future matters except those involving Mr. Munson.

10. This Last Chance Agreement will continue in effect until June 9, 2002, for this particular case only.

Gary D Munson
Gary D. Munson Ck: 43726

Eastern Associated Coal Corp.

Joseph M. Reynolds
For the Union

10/5/01
Date

xc: Mr. Blair McGill, EACC
Mr. Frank Peduti, EACC
Mr. C. Flanagan, EACC
LU1570 Mine Committee
File

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

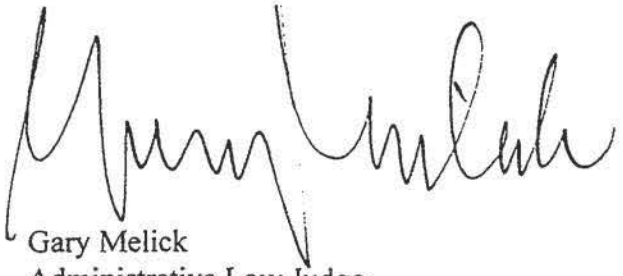
October 16, 2001

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

ORDER OF DISMISSAL

Before: Judge Melick

These Civil Penalty Proceedings are before me upon remand by the Commission to determine whether Respondent had adequate notice of the Secretary's interpretation of the standard at 30 C.F.R. § 56.14107(a) with respect to Citation Nos. 7974337, 7974340, 7974341, 7974342 and 7974343. The Secretary has now vacated these citations. Accordingly these proceedings have been rendered moot and, under the circumstances, are dismissed as to the issues on remand.



Gary Melick
Administrative Law Judge

Distribution:

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 17, 2001

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

DECISION

Appearances: Christopher Grier, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, Texas, on behalf of Petitioner;
Elizabeth M. Christian, Esq., San Antonio, Texas, on behalf of Respondent.

Before: Judge Melick

These cases are before me upon remand for assessment of a civil penalty in accordance with Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act). Following supplemental evidentiary hearings at which Respondent presented updated financial documentation and the testimony of Internal Revenue Service Enrolled Agent, Rhonda Schrum and Craig Jackson, Respondent's President, the parties negotiated a settlement. A reduction in penalty to $742.60 was proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proferred settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $742.60, in accordance with the following schedule: payments of $247.53 each within 40 days and 70 days of this order and a final payment of $247.54 within 100 days of this order.

Gary Melick
Administrative Law Judge

Distribution: (By Certified Mail)

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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 19, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-63-M
Petitioner	:	A.C. No. 04-01299-05536
v.	:	
	:	Docket No. WEST 2000-78-M
ORIGINAL SIXTEEN TO ONE MINE	:	A.C. No. 04-01299-05537
INCORPORATED,	:	
	:	Docket No. WEST 2000-195-M
Respondent	:	A.C. No. 04-01299-05538
	:	
	:	Original Sixteen to One

DECISION

Appearances: Christopher B. Wilkinson, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of Petitioner;
Michael M. Miller, President and Chief Operating Officer, Original Sixteen to One Mine, Inc., Alleghany, California, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Original Sixteen to One Mine, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petitions allege a total of 26 violations of mandatory safety and health standards, as well as other regulatory provisions and the Act itself. A hearing was held in Downieville, California on January 17 and 18, 2001 and was continued and concluded on April 3, 2001, in Nevada City, California. Following receipt of the transcript, the parties submitted briefs. The Secretary filed a motion to strike portions of Respondent's brief, to which an opposition was filed on September 24, 2001. That motion is denied. At the commencement of the hearing, the parties advised that the Secretary had elected to vacate eight of the citations and that Respondent had withdrawn its contest of seven citations. During the hearing, Respondent withdrew its contest as to one additional citation. Consequently, ten citations were litigated, for which the Secretary proposes total civil penalties of $3,797.00.

For the reasons set forth below, I vacate one citation, affirm nine citations and impose civil penalties totaling $1,030.00.

Background

The Original Sixteen to One Mine has been in operation for over 100 years and is one of the oldest and most unique underground mining operations in the country. The mining operation generally follows veins of ore, which in the Alleghany district have a moderate dip of 30 to 35 degrees. The rock formations in the area are relatively stable and there is very little timber used in the mine to support roofs or walls of stopes. Because the moderate dip is generally below the angle of repose of the muck, most of that broken rock does not have to be removed from the mine. In areas where slopes are greater than 35 degrees ladders have been installed, generally constructed from 2 inch by 4 inch lumber, though some metal ladders are also in use. The wood used for the ladders, like virtually all wood used in the mine, deteriorates over time and there is considerable water present which facilitates that process. There are many places in the mine that old timbers have rotted away, but no ground fall has resulted because of the stability of the surrounding material. The gold produced by the mine is of such a high grade that it is generally "hand sorted," i.e., the miners simply pick up nuggets of gold and place them into a sack on their belts.

By the time of the events here at issue, the mine had been affected by adverse economics in the gold mining industry and had scaled back its operations. On February 12, 1999, all 40 miners then working were laid off. A group of 14 of them, however, went back to work ostensibly as independent contractors, using the mine's equipment, but generally supplying their own tools. They determined where and how to mine and split the proceeds of their efforts with the mine. By the summer of 1999, the group of miners had dwindled to 6-7. That arrangement ended in October 1999, when some miners were re-hired by Original Sixteen to One.

The relationship between the Secretary's Mine Safety and Health Administration (MSHA) and Respondent, primarily through its President, Michael M. Miller, has grown increasingly antagonistic over recent years. Respondent cites the fact that from 1985 to 1997, when its operations were some ten times as large, a total of 83 citations had been issued at the mine. Conversely, in the 1997-99 time frame, some 85 citations have been issued. It has accused MSHA of conducting a "search and destroy" mission in an attempt to overwhelm it. Respondent issued subpoenas to the former Assistant Director of the Department of Labor and two other officials to testify at the hearing. Respondent hoped to illicit testimony regarding the meaning of regulatory provisions and enforcement policies that would explain what it viewed as excessive and arbitrary government enforcement action. It also attempted to call as a witness the member of the Secretary's Office of the Solicitor who prosecuted the cases. The subject subpoenas were quashed, after a telephonic hearing, on qualified immunity, privilege and relevance grounds, with the caveat that if Respondent was able to proffer admissible evidence essential to its defense that it expected to obtain from a particular witness, the ruling would be reconsidered. No such proffer was made. Other areas of concern were explored by Respondent

at the hearing, e.g., the experience, training and other qualifications of the MSHA inspectors and whether they were motivated to write additional citations to secure advancement.[1]

The citations and orders at issue in these cases arose out of inspections conducted by two inspectors employed by MSHA, Curtis Petty and Bruce Allard. One of Respondent's main challenges to the alleged violations is that they, and related gravity assessments, are based largely on subjective judgments made by inspectors who lack relevant experience and training to make such judgments, especially in the unique conditions presented by Respondent's mine. Both Petty and Allard were relatively new inspectors but both had fairly extensive mining experience.

Petty was certified as an "authorized representative" of the Secretary, an MSHA inspector, around August of 1998. Like all inspectors, he underwent extensive training at the National Mine Health & Safety Academy, graduating in December of 1998.[2] He also attended three week training courses in special and accident investigation. He accompanied experienced inspectors on inspections and, by the time he testified, had conducted several investigations of mine accidents, including accidents that had occurred at underground gold mines. He serves as one of twelve MSHA members of the National Mine Rescue Team, attends training with the team and assists in training mine operators. Prior to becoming an inspector, Petty worked for eight years at the Pegasus Gold Mine in Montana, serving as safety director for two years. He also worked in a mine in Peru for three years.

Allard also was trained at and graduated from the Academy. He became an MSHA inspector in July of 1999, one month prior to his inspection of Respondent's mine, his first inspection of an underground mine as a certified MSHA inspector. He worked for twenty two years at an underground gold mine in South Dakota operated by Homestake Mining Co., including, seven years as a hard rock miner and two years as a safety inspector. He served on Homestake's mine rescue team for seventeen years, and underwent yearly training for that position.

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[1] Although the litigation of these cases was difficult to control, despite the issuance of a detailed supplemental prehearing order requiring written proffers of lay and expert testimony and the submission of witness' qualifications in writing, it was conducted by the parties in a professional manner. A limited exception, however, was Respondent's characterization of the testimony and motivation of government witnesses that prompted the Secretary to file a motion to strike those references from the record. Respondent's position is that the characterizations are supported by evidence in the record and were not necessarily intended to connote criminal conduct. While the motion will be denied, Respondent is urged to avoid such controversial terminology, which does little to advance its arguments.

[2] He was certified as an inspector prior to his actual graduation because he was given credit, based upon his experience, and had attained the qualifications necessary for that position.

Independent Contractors

One of Respondent's defenses is that it should not be held responsible for violations that occurred while mining operations were being conducted by the small group of independent contractors. There is some question about the exact status of the "independent contractors." Respondent apparently continued to have men on-site and also continued to supply workmen's compensation coverage for the independent contractors. None of the independent contractors obtained permanent MSHA identification numbers, as permitted under 30 C.F.R. Part 45, and there is no evidence that other provisions of Part 45 were formally complied with. In any event, it is clear that an operator can be held "strictly liable for all violations of the Act that occur on the mine site, whether committed by one of its employees or an employee of one of its contractors. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (Feb. 1997) and cases cited therein. Respondent's independent contractor defense must be rejected.

Findings of Fact and Conclusions of Law

Citation No. 7969922

Citation No. 7969922 was issued by Inspector Petty on April 1, 1999, after inspecting the secondary escapeway. He observed several conditions that he concluded constituted a violation of 30 C.F.R. § 57.11051(a), which requires that escape routes be inspected at regular intervals "and maintained in safe, travelable condition." The conditions he observed were noted on the citation as:

> The secondary escapeway was not maintained as required. The fourth ladder from the 800 level had only one rail. The next ladder did not project 3 feet above the landing. Air/water pipes travel along the escapeway restricting access, requiring a person to either belly crawl under them or climb over them. The first ladder at the 2100 sub-level was not secured properly (loose) and the last ladder below the 2100 level was not secured properly as well. The third ladder above the 2200 level has a broken rail and the last ladder has a broken rung. Several ladders were not properly equipped with landings. In the event of a mine emergency requiring usage of the secondary escapeway miners could be endangered trying to travel through this section. If the escapeway was used to evacuate an injured miner, it is reasonably likely that at least one ladder would not support the weight of rescuers and victim. * * *

Petty inspected the mine with Mark Loving, a representative of Respondent, and Jerry Hulsey, a fellow inspector who was a large man, described as 6 feet 2 inches tall and weighing 285 pounds. The ladder with the broken rail actually cracked when Hulsey was on it, which led to Petty's conclusion that at least one ladder wouldn't bear the weight of a mine rescue team trying to evacuate an injured miner. Problems with unsecured ladders, such as one of those noted in the citation which was loosely secured with one wrap of bailing wire, and defects such as broken rungs, pose a higher risk of injury during an emergency.

Petty concluded that the violation was reasonably likely to result in an injury expected to result in lost work days or restricted duty, that the violation was S&S and that the operator's negligence was high, amounting to an unwarrantable failure to comply with a mandatory standard. He terminated the citation on May 11, 1999, because the mine was not conducting operations below the 800 level. He specified on the termination document that: "If and when the mine proceeds to operate below the 800 foot level, the secondary escapeway shall be renovated and made compliant as per the original citation. Failure to do so shall be recognized as aggravated conduct and appropriate action shall follow."

Petty based his determinations on his training, both as a miner and an inspector for MSHA, and his practical experience as a miner and a member of the national mine rescue team. His concerns about potential injuries were based upon his assessment that miners who are forced to use a secondary escapeway because of an emergency, e.g., a fire or ground fall, do so in a hurried manner and do not exercise the care of miners making a normal exit of a mine. The presence of smoke or dust can significantly impair a miner's ability to follow a prescribed route, avoid obstacles and use devices such as ladders. He was aware that there were several potential sources of fire in the mine, including electrical substations at different levels and a pump powered by electricity at the 2200 level. In addition, he considered difficulties that might be encountered by a mine rescue team wearing self-contained breathing apparatus attempting to enter the mine or transport an injured miner strapped into a "Stokes" stretcher through the secondary escapeway. He had traveled the secondary escapeway in 1998 and had pointed out many of the same shortcomings at that time to Respondent's then safety director and the mine manager, neither of whom were employed by Respondent at the time of this inspection.

Respondent's chief challenge to Petty's observations and conclusions are to his qualifications and experience and lack of familiarity with Respondent's mine and similar mines in the area. Respondent argues, e.g., that evaluating the sufficiency of the escapeway in the hypothetical situation of a mine rescue team using self-contained breathing apparatus is unrealistic because there has never been such a rescue required in the mines in that district. It also challenges the scenario of fire and smoke presence, because there are very few potential fire sources in the mine and argues that the miners are all experienced and well-trained and would not likely panic in the event that they had to use the secondary escapeway. Respondent also contends that Petty wrongly applied standards for travelways to this escapeway. Based upon examinations of the escapeway made in preparation for the hearing in this case, Respondent also asserts that its ladderways and landings met all applicable requirements and that all areas of the escapeway meet the minimum opening size requirement of 24 inches by 24 inches and that any difficulty that Hulsey had with tight quarters was due to his size, not a deficiency in the escapeway.

Respondent's objections to Petty's qualifications are easily dispensed with. Petty was an experienced miner, having been involved in safety issues for much of that time. He was extensively trained prior to becoming an MSHA inspector and is highly qualified in mine rescue techniques. It is clear that Petty was easily qualified to make judgments and determinations on the existence of violations and issues of gravity. The Secretary argues that an experienced inspector's "interpretation of the [regulatory] term 'safe [and] travelable' is entitled to

deference," citing *Martin v. OSHRC*, 499 U.S. 144, 148-49 (1991) and *Energy West Mining Co., v. FMSHRC*, 40 F.3d 457, 460-61 (D.D.Cir. 1994). The cases relied upon, however, address an entirely different issue, i.e., the deference to be afforded the Secretary's interpretation of an ambiguous regulatory provision. No such issues are presented here. The Commission has held that the judgment of an inspector is an "important element" in determining whether a violation is significant and substantial. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984); *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822-825-26 (Apr. 1981); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1999). Both Petty and Allard had limited experience as inspectors at the time of the inspections here at issue. However, they received considerable training and had substantial experience in the mining industry. Their conclusions are entitled to weight appropriate to their experience and qualifications.

I also reject Respondent's argument that, because the miners were highly experienced, the "panic factor" should not be considered in evaluating whether the escapeway was maintained in a safe and travelable condition. The secondary escapeway would be used as such only in the event of an emergency when the normal travelway was inaccessible. There would certainly be an element of urgency for miners using it and when evaluating the condition of the escapeway. it would be unrealistic to fail to take into consideration that miners may be hurrying, possibly with limited vision because of smoke.

Respondent's other arguments have more merit. Petty did not take measurements at critical points to determine the slope of ladders or stopes or of the size of openings where he concluded that passage was restricted. It appears that his concerns about restricted passage were largely related to Hulsey's difficulty because of his size and considerations of difficulties that a rescue team might encounter while carrying a stretcher and wearing self-contained breathing apparatus. Petty believed that the minimum opening for an escapeway was 24 inches by 24 inches[3] While an opening that size would appear adequate to allow expeditious passage by a miner under normal conditions, it would pose a considerable restriction for a large man and it would not be surprising that a miner or rescue team member would have to remove a self-contained breathing apparatus from his back to pass through such an opening.

Miller had not traveled the secondary escapeway in almost ten years. On January 15, 2001, in preparation for the hearing, he traveled a portion of it with two individuals, Jason Burke and Ray Witkopp, who took measurements of slopes and openings in the escapeway. Burke, a graduate engineer in the process of obtaining his State of California license as a civil engineer, had worked at Respondent's mine as a mine engineer doing mapping and surveying from October 1996 to June of 1998. Witkopp, an expert in the field of geology, has worked extensively with Miller in identifying areas of the mine that are likely to contain gold such that mining efforts can be more effectively directed. They traveled the escapeway from the 1700

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[3] *See*, 30 C.F.R. § 57.11037, which specifies a minimum opening of 24 inches by 24 inches for ladderways constructed after November 15, 1979, in underground travelways.

level to the surface and used a Brunton compass, tape measure and laser pointer to take measurements. They determined that the slopes of the stopes and other portions of the escapeway ranged from nearly horizontal to a maximum of 60 degrees. In every location where the slope was greater than 35 degrees ladders were provided. They had no difficulty negotiating pipes that crossed the ladderways and similarly, found no areas with significantly restricted openings. However, it is apparent that some pipes present during Petty's inspection had been moved because Allard visited the mine in October to, among other things, observe pipes that had been moved.

I credit the testimony of Burke, Witkopp and Miller, and find that the measurements that they took as to slopes were accurate. Those aspects of the escapeway would not change, even over a period of many years. At least from the 1700 level to the surface, ladders were provided on all slopes greater than 35 degrees and there were no slopes greater than 60 degrees. Witkopp and Burke did not travel to portions of the escapeway below the 1700 level and take similar measurements. The reason that their travel was limited was not explained, although it could have been because those areas were intended to be inactive.

Respondent's contention that Petty improperly applied standards applicable to travelways to the secondary escapeway also carries some force. The regulations contain relatively specific provisions applicable to underground travelways.[4] *See*, 30 C.F.R. §§ 57.11001-57.11041. Among them are 30 C.F.R. § 57.11006, which requires that ladders project 3 feet above landings or that substantial handholds be provided, and § 57.11041, which requires that landings be provided every 30 feet for ladders inclined more than 70 degrees. Similar provisions are not found in the regulations governing escapeways. While Petty did not issue citations for specific conditions that may have been violations had they occurred in a travelway, he did reference the more restrictive travelway regulations in describing conditions that he determined made the escapeway less safe.[5]

Respondent contends, in essence, that references to such conditions improperly graft regulations governing much more frequently used travelway into those governing escapeways. Accepting Respondent's argument, however, would lead to an absurd result, i.e., that the existence of a regulation governing a specific condition applicable to one area of a mine precludes an inspector from considering similar conditions in enforcing more general regulations applicable to another area. I hold that even though a specific condition in the escapeway did not itself violate a standard, e.g., the failure of a ladder to project 3 feet above a landing in the absence of substantial handholds, such a condition could properly be taken into account in evaluating whether the overall condition of the secondary escapeway was safe and travelable.

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[4] A travelway is defined in the regulations as "a passage, walk or way regularly used and designated for persons to go from one place to another." An escapeway is defined as "a passageway by which persons may leave a mine." 30 C.F.R. § 57.2.

[5] Petty testified that he viewed the specific conditions as violations but determined to group "several violations" together under the single citation he issued.

Petty did not cite Respondent for violating a regulation applicable to travelways and it likely would have been improper for him to have done so. As noted, *infra*, Allard did cite such specific conditions in the escapeway as violative of travelway regulations. The Secretary vacated those citations.

I am troubled by one of Petty's conclusions, however. His determination that "several ladders were not properly equipped with landings" is problematic, because at least some of the areas referred to were at or above the 1700 level, where the maximum slope was no more than 60 degrees. Those ladders were not inclined at or more than 70 degrees, so that landings every 30 feet would not have been required even for a travelway. Petty was using the travelway regulation, at least for reference. However, he did not take measurements of slopes or openings, and was likely in error in estimating the slope of the ladders, which is understandable in that environment. Allard apparently made a similar error during his later inspection. While additional landings may enhance safe travel in the escapeway, I will not consider the absence of such landings in determining whether the conditions violated the standard and, if so, whether the violation was significant and substantial or the result of Respondent's unwarrantable failure.[6]

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987).

The conditions observed by Petty, many of which are not rebutted by competent evidence,[7] establish a violation of the standard. I find that there were improperly secured ladders and ladders with a broken and a missing rail and a broken rung. I further find that air and water lines in one location did create restrictions that would impede expeditious travel through the escapeway and that handholds were not provided in some instances where they would have reduced the risk of injury to a miner using the escapeway. These conditions created a reasonable possibility of an injury to miners using the escapeway. I also find that Petty accurately evaluated the gravity factors when he concluded that it was reasonably likely that an injury resulting in lost work days or restricted duty could reasonably be expected in light of the violation.

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[6] Landings would serve a number of purposes, among them limiting the length of a fall and providing a place to rest. The travelway regulation evidences the Secretary's determination that such risks are substantially reduced where ladders are sloped less than 70 degrees.

[7] Respondent contends that its foreman repaired deficiencies in the escapeway. That, however, was clearly a reference to abatement efforts, not repairs that were done prior to Petty's inspection.

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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co*, 6 FMSHRC 1, 3-4 (Jan. 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. (footnote omitted)

See also, Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 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., Inc.*, 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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., 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 at 1574. 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

The Secretary's argument that the violation was S&S is based upon Petty's determination that a miner was likely to be injured while using the escapeway to leave the mine during an emergency and that a rescue team member might be injured. However, it is unlikely that the

secondary escapeway would be used under normal mining operations. There were very minimal mining operations being conducted during the time frame that the citation was issued and there was no evidence that any significant increase was planned in the reasonably foreseeable future. While there was some evidence that there were plans to do some active mining in the area near the secondary escapeway there was also evidence that future mining operations would be focused in the north end of the mine, necessitating development of a secondary escapeway in that area. Very few miners, no more than four, would have used the escapeway in the event of an emergency. While it is reasonably possible that a miner using the escapeway in an emergency might sustain an injury from the unsafe condition, the likelihood of an actual injury occurring under normal mining conditions was remote. Moreover, the injury reasonably likely to occur would not be serious, and would result from a slip or fall partially down a slope of 30-60 degrees. The escapeway was required to be inspected only "periodically," which would have been infrequent in light of the extremely limited mining operations being conducted in that area. A person qualified to make such inspections would not be doing so under emergency conditions.

The deficiencies noted with respect to use of the escapeway by a mine rescue team were legitimate concerns. However, the possibility of a mine rescue team having to enter the mine, even without wearing self-contained breathing apparatus, is so remote under the circumstances presented here, that the potential for injury to a mine rescue team member has virtually no effect on assessment of the risk or seriousness of injury. While there was evidence that a fire had occurred in a mine that is now part of the Original Sixteen to One Mine, that fire occurred some 50 years ago. The Secretary introduced no evidence of the circumstances of the fire. I accept Miller's testimony that the fire did not endanger miners, that no rescue or self-contained breathing apparatus was used and that conditions that resulted in that fire no longer exist in the mine.

I find that the Secretary has not met her burden of proving a reasonable likelihood that the hazard contributed to by the violation will result in an injury of a reasonably serious nature and that the violation was not S&S.

Unwarrantable Failure

In *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999), the Commission reiterated the law applicable to determining whether a violation was the result of an unwarrantable failure.

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)

(approving Commission's unwarrantable failure test). The Commission has recognized 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 violative condition, 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 & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission also considers whether the violative condition is obvious, or poses a high degree of danger. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

The Secretary's unwarrantable failure argument is based on the nature of the violation, its duration and prior notice to Respondent. Relying on *Faith Coal Co.*, 19 FMSHRC 1357, 1369 (Aug. 1997) and *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 488-89 (March 1997), the Secretary places particular emphasis on the prior notice factor based upon her argument that the deficiencies had been the subject of a citation issued in 1997 and had been pointed out to mine management during an inspection in 1998.

While it is true that a citation was issued in 1997 for failure to maintain the secondary escapeway in safe and travelable condition, such a citation, based upon a number of factors in a large area of the mine, many without reference to a specific location, is less probative on the prior notice factor than a prior citation citing a particular violation at a specific location.[8] Here, it is not at all clear that the conditions noted some two years earlier that resulted in the 1997 citation, were the same as those observed by Petty. Petty did not testify about the earlier citation and did not base his conclusion upon it.[9]

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[8] *See, e.g., Jim Walter Resources, Inc.*, 19 FMSHRC 480, 488-89 (March 1997), a case cited by the Secretary, where the issuance of an identical citation for the same problem at the same location less than two weeks earlier, combined with two other orders and an extensive history of similar violations, mandated an unwarrantable failure finding.

[9] Respondent argues that it contested that citation, that it has not yet been adjudicated and should not, therefore, be considered. The Secretary contends that there is no record of a contest. While there is some question as to the status of the citation, the Commission

The Secretary also relies, however, on the fact that Petty had pointed out some of his concerns to Respondent's previous safety director during an inspection of the escapeway in 1998. He specifically mentioned the air/water lines and restricted access and was concerned about missing landings. He concluded during his inspection that Respondent had done no work to remedy the problems he had identified in 1998. While I credit Petty's testimony to the extent that some of the conditions that he based the citation on existed in 1998, it is not clear that many of the particular conditions itemized on the citation existed in 1998. Moreover, Petty's comment included a reference to missing landings, which I have not relied on in determining that a violation existed.

I do not find that the violation was attributable to Respondent's unwarrantable failure to comply with the standard. The violation was based upon a number of factors, each of which, standing by itself would not have amounted to a violation. There is little evidence as to the duration of many of the conditions. One, in fact, occurred during the inspection, when a rung or rail cracked when Hulsey stepped on it. That area of the mine was generally inactive and miners were present infrequently, at best. It was required to be inspected only periodically when mining operations that created a possibility of use of the secondary escapeway were ongoing. The prior notice argument, for the reasons noted above, does not carry enough weight in combination with these factors to establish an unwarrantable failure here. In that regard, I also note that the individuals that Petty talked to in 1998 no longer worked for Respondent.

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held, in *Jim Walter Resources, supra*, that a citation issued as close as two weeks previously, and which obviously had not been adjudicated, was a proper element to take into consideration in assessing whether a violation was the result of an operator's unwarrantable failure. In any event, I place no weight on the previous citation, for the reasons noted above.

Citation No. 7969947

This citation involves Respondent's compliance with 30 C.F.R. part 49, which implements the Act's requirement in § 115(e) that every operator of an underground mine shall assure the availability of mine rescue capability for purposes of emergency rescue and recovery. Prior to 1998, Respondent's operations were of sufficient size that it could supply its own mine rescue teams. As financial difficulties overtook it, however, Respondent was no longer able to supply its own teams to satisfy the regulatory requirement. On September 22, 1998, Respondent was issued a citation for failure to comply with the Part 49 requirements. By May 6, 1999, Respondent had not come into compliance and MSHA saw little effort from Respondent to do so. On May 6, 1999, Petty issued a § 104(b) order to Respondent directing Miller to withdraw all miners from the underground operation. The order specified that: "This order will remain in place until the operator has complied with the requirements under CFR Part 49 and *an MSHA inspector lifts said order*." (emphasis added). Petty terminated, or lifted, the order on May 7, 1999, following receipt of a letter indicating that Toluene County search and rescue teams would respond in the event of an emergency. On May 12, 1999, however, Petty reinstated the order because Respondent had not satisfied all of the requirements of 30 C.F.R. § 49.3, which governs alternative mine rescue capabilities for small and remote mines. Respondent had not submitted a satisfactory escape and evacuation plan, as required by § 49.3(c)(5). The continuation sheet reinstating the order listed seven specific documentary requirements that Respondent had to satisfy and stated:

> The order to withdraw miners from the underground operation will remain outstanding until the small and remote mine rescue plan is sent to the western district office and is approved.

Jonathan Farrell, the mine manager, promptly gathered the required documents and Respondent submitted the documents by facsimile to MSHA's district office on or about May 13, 1999. Miller had several conversations with the MSHA official responsible for approving the documents, apparently Don Downs. After a day or two of review, Downs had a conversation with Miller and told him that the documents satisfied the regulatory requirement. Miller then allowed the miners to resume underground operations. The mine's operations were subsequently featured in a television program.

Petty became aware of the program and, since he had not lifted the reinstated order, concluded that Miller had resumed operations in violation of the order. On June 1, 1999, he traveled to the mine, ascertained that six miners were working underground and issued Citation No. 7969947, which cited Respondent for violating the order that had been "issued on May 12, 1999." He noted that an injury was unlikely to result from the violation, which was not S&S, and concluded that the operator's negligence was high, because of Miller's specific knowledge of the May 12, 1999 order. Miller had told him that MSHA district officials had allowed them to resume working underground. Petty then returned to the office, somewhat upset, where a meeting was held with involved MSHA officials, including Downs. Petty was focused upon the language of the May 6 order stating that only an MSHA inspector could lift it. He was satisfied,

at the conclusion of the meeting, that no MSHA inspector had lifted the order.

In order to facilitate Respondent's return to productive work, Petty returned to the mine the next morning with Downs, who reviewed Respondent's documentation in a meeting with Miller and Farrell. Petty testified that initial portions of the June 2 discussion appeared to indicate that some aspects of the order's requirements had not been satisfied. However, he did not remain for the discussion, which pertained to Downs' field of expertise, and did not know which, if any, of the itemized requirements of the May 12, order had not been satisfied. Downs confirmed that the documents provided by Respondent satisfied the Part 49 requirements and Petty terminated the order. During a break in the meeting, when Petty was absent, Miller and Farrell confronted Downs about his failure to admit to Petty that he had verbally approved the documents that had been submitted and, in essence, authorized the return to work. Downs was "embarrassed" by what he understood to have been overstepping his authority in essentially lifting the order.

The Secretary argues that Respondent is chargeable with high negligence because of its "intentional disregard of MSHA's authority" evidenced by the fact that it "blatantly failed to get an inspector's approval before sending miners back into the mine." The Secretary's argument, however, erroneously refers to the May 6, 1999 order, that was, in fact, terminated by Inspector Petty on May 7, 1999. The modification, referred to as the order "issued on May 12, 1999" in the citation, reinstated the previous order but did not specify or require that it be lifted only by an MSHA inspector. Rather it stated that the order would remain in effect until the mine rescue plan had been approved by the district office.

Respondent does not contend that Downs specifically lifted the order. Rather, Miller testified that he dealt with the MSHA official that he was directed to deal with and assumed that that person had the authority to approve the plans and documents that he submitted in response to the May 12, 1999, modification. He was told by that official that the documents satisfied the itemized requirements of the May 12, 1999 modification and was told something to the effect "you're good to go." He acted on that statement and allowed the underground operation to resume and further allowed the resumption of operations to be openly broadcast on a television program. He further testified that no additional documentation or information was submitted to MSHA between 8:00 p.m. June 1, when the citation was issued, and 8:47 a.m. on June 2, when it was terminated after Downs verified to Petty that the documents satisfied the requirements of the May 12, 1999, order.

I accept Miller's testimony on these points. He obviously did not try to conceal the fact that miners were working underground and believed in good faith that the requirements of the May 12, 1999, order had been satisfied. He was, in fact, correct. Downs, the MSHA district official responsible for approving the mine rescue plan, had done so, and — by the terms of the order itself — it no longer remained in effect.

The Secretary argues that § 104(b) of the Act specifies that only "an authorized representative of the Secretary [can determine] that such violation has been abated." The

Secretary further asserts that Downs, who was not an inspector, could not lift the order and that Downs, in fact, did not lift the order, based upon a statement he allegedly made to Petty.

These arguments miss the mark. The Secretary, like Petty, focused upon the original order's notation that only an MSHA inspector could lift it. However, Petty lifted that order on May 7, 1999. While it is true that reinstated order, referred to as the order "issued on May 12, 1999," in the citation, had not been lifted by an inspector, until Petty did so on June 2, that order did not contain a requirement that it be lifted by an inspector. Rather, its effectiveness was conditioned upon approval of the mine rescue plan by the district office, which occurred a day or two after documentation had been submitted on May 13, 1999. Consequently, the May 12 order, by its own terms, was no longer effective.

The Secretary has failed to carry her burden of proof on Citation No. 7969947, and it will be vacated.

Order No. 7969514

Order No. 7969514 was written by Inspector Allard on August 27, 1999. It was one of ten alleged violations of mandatory health and safety standards cited for conditions he observed while inspecting the secondary escapeway and adjoining areas. This order alleges a violation of 30 C.F.R. § 57.11051(a), a failure to maintain the escapeway in a "safe [and] travelable condition." The conditions that led him to issue the order, barring access to "all areas of the underground mine affected by the secondary escapeway," were noted on the order as:

> The secondary escapeway from the surface to the 2200 level was not maintained in a safe, travelable condition. Hazards in the escapeway included but were not limited to the following: there were only two landings from the surface to the 1500 [level]. Below the second landing there was a steep slope without a ladder or stairs that ended at a ladder which did not project above the ground level. Air and water pipes crossed over the ladder restricting access. Several ladders were offset from the ladders below. Some ladders had rotten and cracked rungs. An area below the 1500 level did not have ladders, stairs or other means of making travel safe. Loose rock had been allowed to accumulate behind ladders in some areas. Several areas had restricted toe clearance. There were several open, unguarded holes along the travel ways on the 1700 level and the 2200 level. The escapeway must be used on a regular basis for inspection purposes. With continued use of the escapeway in this condition, it is reasonably likely that serious injuries could occur. The operator engaged in aggravated conduct constituting more than ordinary negligence in that [it] had been cited for this condition and had not repaired the escapeway before working below the 800 level. (Reference citation # 796922) This violation is an unwarrantable failure to comply with a mandatory standard.

Allard issued separate orders or citations for seven of the specific conditions referred to

above and also attributed them to high negligence by the operator and concluded that all but one was S&S. The standards alleged to have been violated, however, were applicable to underground *travelways*, not to escapeways. Those citations and orders were vacated by the Secretary. Allard also took no measurements of slope angles or openings, at least at the time he issued the citations.[10]

Allard concluded that it was reasonably likely that an injury would occur that would result in lost work days or restricted duty and that one person was affected by the violation. He further concluded that the violation was S&S and was attributable to the unwarrantable failure of Respondent.

These are essentially the same conditions and/or types of conditions, that Petty had cited on April 1, 1999. Respondent, likewise, presented essentially no direct evidence that the conditions noted by Allard did not exist as he observed them. I find that Allard accurately described conditions that existed in the escapeway at the time of his inspection. As noted previously, I accept the testimony regarding the measurements taken by Burke and Witkopp and find that they accurately describe the slopes of the stopes from the 1700 level to the surface.

I find that the overall condition of the secondary escapeway, as in the case of the citation issued by Petty, was in violation of the cited standard. As in that instance, while each individual condition was not violative of any standard in itself, the combination of conditions, each of which incrementally increased the risk of injury, resulted in the escapeway not being maintained in a safe and travelable condition.

Significant and Substantial

For the same reasons that I found that the violation alleged in Citation No. 7969922 was not S&S, I hold that the violation alleged in this citation was not S&S. Allard, like Petty, was concerned about landings that, as noted above, were not required, even under the regulations governing travelways.

Unwarrantable Failure

The Secretary's argument on unwarrantable failure with respect to this violation is considerably stronger than that advanced with respect to Citation No. 7969922. Here, many of the same conditions that had been noted by Petty on April 1, 1999, continued to exist. Petty had terminated that citation, allowing the conditions to remain, on the specific condition that no work be done below the 800 level. Respondent was specifically warned that allowing work below the 800 level without making the escapeway safe and travelable would amount to aggravated conduct. Work was done below the 800 level, without any apparent effort to address the

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[10] He later measured slopes in two areas and found that they were essentially consistent with the measurements taken prior to the hearing by Burke and Witkopp.

inadequacies noted by Petty. Two miners had been down to the 1500 level to change a pump and other miners had been at the 1700 level attempting to locate ore deposits and marking areas for future mining. Respondent characterizes this latter effort as exploration or development and notes that a second escapeway is not required during the exploration or development of an ore body. 30 C.F.R. § 57.11050(a). While that work may properly be characterized as exploration, it did not absolve Respondent of the responsibility to maintain the escapeway, which had been designated as an escapeway on Respondent's escape and evacuation plans, safe and travelable. Respondent also protests again that citations that it has contested and have not yet been adjudicated should not be used against it in an unwarrantable failure analysis. That argument is again rejected. I find, based upon the nature and duration of the conditions and the prior specific notice to Respondent, through Petty's 1998 survey and April 1, 1999 citation, that efforts were needed to address the conditions of the escapeway, that the violation was the result of Respondent's unwarrantable failure.

Citation No. 7955049

Citation No. 7955049 was issued by Allard on August 26, 1999, as he inspected the secondary escapeway. He observed conditions, as described on the citation as:

> A draw raise on the 1700 level by survey tag number 17-50 had a hang-up of material which could fall to the travelway below. The timbers for the chute and supports had rotted or fallen away. The adjacent travelway is part of the secondary escapeway submitted to MSHA on 5/1999. The area is not often used but was going to be used during the week of 8/30/1999.

He determined that the conditions violated 30 C.F.R. § 57.3200,[11] that the conditions were unlikely to result in an injury requiring lost work days or restricted duty, that the violation was not S&S and that the operator's negligence was moderate.

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[11] 30 C.F.R. § 57.3200 states:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

Respondent's defense to this citation is that the material did not present a hazard because it was cemented together and that the area in question was not active. While the area may not have been an active work area, the 1700 level had been designated as part of the secondary escapeway on Respondent's escape and evacuation plans. Respondent originally questioned the accuracy of MSHA's plans which showed that area was part of the escapeway. However, its plans also showed the area as being part of the escapeway. There was also evidence that men had been working in the area. Freshly painted markings on the walls indicated areas where mining was to occur. I find that miners had recently been in the area and that the area was part of the designated secondary escapeway. I also find that the material presented a hazard. Allard had observed rubble on the floor of the 1700 level that had fallen from the raise and he determined that there was a possibility of additional material falling. Timbers had rotted away, reducing support for the material. Respondent's witnesses confirmed the presence of the fallen rubble and the rotted timbers. Witkopp opined that material in the mine can become cemented together and Billy Joe Van Meter, who accompanied Allard, felt that the material was "pretty well cemented" together. His judgment was based solely upon his visual observations. There was no attempt to explain why additional material would not fall, in light of the fact that some had already fallen.

I find that the conditions cited violated the standard and that Allard correctly assessed the gravity and negligence factors.

Citation No. 7969519

Citation No. 7969519 was issued by Inspector Allard on September 1, 1999, after he inspected the amalgamation/refinery area of Respondent's mill. It alleged a violation of 30 C.F.R. § 56.18002(a), which requires that a competent person designated by the operator perform a workplace examination at least once each shift and that conditions that may adversely affect safety or health be corrected promptly. The conditions which lead to the issuance of the citation were what Allard described as high levels of mercury contamination on gloves, tools and a handrail. In response to an inquiry, he was told that Respondent did not test for mercury contamination and had no equipment at the site to perform such tests. He concluded that a person being unknowingly exposed to such contamination could suffer serious illness and determined that it was reasonably likely that a miner could suffer an illness resulting in lost workdays or restricted duty. He concluded that the violation was S&S. The degree of operator negligence was assessed as "moderate" because, even though the exposure would be infrequent, there had been a prior citation for mercury contamination.

Farrell was the only person handling mercury at the time and he did not conduct tests for mercury contamination either daily or prior to working in that area. MSHA's personnel had come to the mine in the past and had done some testing and helped establish proper procedures for handling mercury. The individual who had worked in that area when the mine was operating with a full crew had undergone blood testing on occasion and those tests were negative for mercury, leading Farrell to conclude that Respondent's procedures for handling mercury were appropriate. Farrell conceded, however, that Respondent itself did not test for mercury contamination in the amalgamation facility prior to the issuance of the citation and he could have

been unknowingly exposed to excessive levels of mercury, e.g., that found inside of the gloves that he would have used. Shortly thereafter, Farrell began testing for mercury contamination.

The use of mercury, a toxic substance, in the amalgamation/refinery area dictates that appropriate steps be taken to assure that miners working in that area are not exposed to excessive levels of mercury. A proper workplace examination of the area, per Allard, would include testing to ascertain whether a miner would be exposed to mercury. Respondent was not performing such testing prior to the issuance of the citation. Consequently, the violation has been proven.

I find, however, that the Secretary failed to prove that the violation was S&S. The evidence introduced in support of that allegation consisted of the test results and an anecdotal account by Allard of a fellow inspector who had suffered an "extreme" case of mercury poisoning. While it is beyond dispute that exposure to mercury can result in serious illness, an assessment of the risk of serious illness should be based upon some quantitative evidence of the actual degree of exposure and the length of time over which a person was exposed to it. The test results established the concentrations of mercury at various locations. However, the Secretary does not point to a standard that demonstrates the degree to which those concentrations exceeded allowable limits. More significantly, it is undisputed that only one person, Farrell, worked in that fenced off, locked and posted area and that he worked there on a "very irregular basis" such that there was "little" or "infrequent" exposure. On the facts presented here, it has not been established that infrequent exposure to the levels of mercury present in the area would be reasonably likely to result in a serious illness and the Secretary's S&S designation cannot be sustained.

Citations No. 7969525 and No. 7969526

Citations No'd. 7969525 and 7969526 were issued by Allard on October 27, 1999, after he discovered explosives, blasting agents and detonators stored in cardboard boxes in a dead-end drift at the 1700 level of the mine. The materials had apparently been left in that location when the miners were called out of the mine and laid off on February 12, 1999. Since no ore extraction had occurred in that area of the mine since that time, the materials had lain, undisturbed, until discovered by Inspector Allard. Citation No. 7969525 alleged a violation of 30 C.F.R. § 57.6161, which provides:

> § 57.6161 Auxiliary facilities.
>
> (a) Auxiliary facilities used to store explosive material near work places shall be wooden, box-type containers equipped with covers or doors, or facilities constructed or mined-out to provide equivalent impact resistence and confinement.

Citation No. 7969526, cited a violation of 30 C.F.R. § 57.6302, which requires that explosives and blasting agents "shall be kept separate from detonators until loading begins." He based the alleged violation in the fact that a fifteen foot piece of detonating cord was stored in the

same box with 15 blasting caps. For each citation, Allard concluded that fatal injuries affecting two miners were reasonably likely to occur and also found the violations "Significant and Substantial." As noted in the citations, those conclusions were based, in part, on the fact that he observed "several large rocks on the floor [of the drift] which had apparently fallen from the back rib." He concluded that a large rock falling on the explosive materials could result in an explosion. His assessment of the potential for injury was based upon information that there had been a proposal to locate a rescue chamber in the area, which was adjacent to an area that may, in the future be designated as a secondary escapeway and that miners were going to be working there in the future. However, he rated the operator's negligence as "Low" because area had not been mined since February of 1999.

Respondent does not dispute the accuracy of Allard's observations. It does, however, challenge his determination that a falling rock could cause an explosion, as well as his assessment of the potential for injury based upon possible future operations. Farrell testified that the explosives were very stable and difficult to detonate, that he was familiar with all reported fatal accidents in the district and had never heard of an explosion caused by an impact to explosives. He further testified that no-one had worked in that area of the mine since February of 1999, that the area had been posted to prohibit entry without authorization and that, while there had been proposals to establish a secondary escapeway and refuge chamber, they were made after the citations were issued and had never been approved. As to the projection of miners' exposure in the event that future mining operations were conducted in the area, Respondent relies on its intentions to conduct a proper workplace examination before any work would be done in an area of the mine and that all defects and hazards would be corrected.

That Respondent violated the provisions of the regulations cited in the subject citations is apparent. The explosive materials clearly were not stored in compliance with those regulatory requirements. It is equally clear, however, that the gravity determinations made by Allard were excessive and that the violations were not S&S. On the basis of Allard's and Farrell's testimony, I conclude that there was a possibility of an explosion, though remote, due to falling rock. The possibility of such an explosion injuring a miner was also quite remote. While no miners had been working at extracting ore in that area of the mine, there had been some exploration at the 1700 level and miners had been down in the south end of the mine to replace a pump. It is possible that, in the unlikely event of an explosion caused by a falling rock, a miner could be in close enough proximity to be injured as a result. Projections of possible injuries based upon potential future mining operations, where there has been no formal commitment to actually conduct those operations and the conditions are of a nature that they should be identified in a proper work place examination and corrected prior to the actual commencement of mining efforts directed at extraction of ore, cannot support the S&S designation here. There is no reasonable likelihood that the hazard contributed to would result in a serious injury. I find that the inspector's assessment of the operator's negligence as "Low" was accurate, that the possibility of injury was unlikely, that the nature of a possible injury was lost work days or restricted duty and that two miners would be affected.

Citations No. 7969532 and No. 7969533

Citation No. 7969532 was written by Allard on November 2, 1999, for an alleged violation of 30 C.F.R. § 57.6101(a), which provides:

> § 57.6101 Areas around explosive material storage facilities
>
> (a) Areas surrounding storage facilities for explosive material shall be clear of rubbish, brush, dry grass, and trees for 25 feet in all directions, except that live trees 10 feet or taller need not be removed.

He observed brush growing within 6 feet of the side and back and dry grass within 6 feet of the back of the surface explosives storage magazine. The grass was thin and short and the bushes were green. The magazine was constructed of steel with an internal wood liner. He determined that a fire in the area would not be likely to spread to the magazine, but if it did, it could present a hazard to persons fighting the fire. He assessed the possibility of injury as "unlikely," but fatal to one miner if it occurred and rated the operator's negligence as "moderate."

Citation No. 7969533 cited a violation of the same standard based upon similar conditions existing around the blasting cap storage magazine. In addition to dry grass and brush, including a blackberry bush, there was a small tree, approximately 3 feet in height, within 15 feet of that magazine. He assessed the potential for a injury as "unlikely" and the operator's negligence as "moderate."

Respondent contends that there was no realistic possibility of a fire or any threat to the magazines because there was very little potentially combustible material in the areas, that any grass and brush that may have been there was sparse and wet due to recent rainfall and that precipitation at that time of year generally kept things from being combustible. While Farrell testified that the areas were clear of combustible material, he acknowledged that the broken rock that the magazines were constructed upon did support a small amount of vegetation, Miller too acknowledged that there was a small amount of grass in the area, some dead and some growing, and that blackberry bushes grow in the area, and both admitted the presence of the tree. The standard is specific, the area within 25 feet of an explosive storage magazine must be kept clear of brush and dry grass. While the likelihood of a fire that could have threatened the magazine may have been extremely low, the Secretary was not required to prove a specific threat of fire. I find that brush and dry grass was within 25 feet of the magazines and that a tree less than 10 feet in height was within 25 feet of the blasting cap storage facility. While, I agree with Respondent's assessment that combustion was highly unlikely and that virtually no threat was posed to the magazines, the presence of a 3 foot tree evidences a failure to assure compliance with the standard for at least a few months.

Allard appropriately assessed the potential for injury for both citations as "unlikely" and the operator's negligence as "moderate." I disagree with his assessment that the injury that might result from the violation cited in Citation No. 7969532 would have been fatal. The small amount of combustible material in the vicinity of the steel cased magazine posed no threat to ignite the

contents of the magazine. The potential injury is more accurately categorized as "no lost workdays."

Citation No. 7969536

On November 3, 1999, Inspector Allard observed that copies of citations that he had issued as early as October 27, 1999, and served on Farrell on October 28, 1999, had not been posted on the mine's bulletin board. He issued Citation No. 7969536, alleging a violation of § 109(a) of the Act, which provides, in pertinent part:

> A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

Respondent does not dispute that copies of the citations were not posted on the bulletin board until November 3, 1999, when this citation was issued. It contends that the "spirit" of the Act was satisfied because each of the citations had been discussed with the small crew of miners then working, such that they were aware of the substance of the citations. While the discussions may have served the notification purpose, at least in part, they do not substitute for, or establish compliance with, the Act. The violation was clearly proven and the gravity factors appropriately assessed as no likelihood of injury. Operator negligence was appropriately classified as moderate.

The Appropriate Civil Penalty

The Original Sixteen to One Mine, is a small operation, with 19,546 hours worked in 1999 and 17,401 hours worked in 2000. The evidence is somewhat inconsistent on Respondent's violation history. The Secretary introduced a report showing that Respondent had been issued a total of 157 violations over the period January 1, 1990 to January 1, 2001, only 42 of which had been paid. Many, including those at issue in these cases, had not yet been adjudicated. The assessment control sheets generally show that Respondent has been issued one violation for every two inspection days in the 24 month period preceding these violations. I find that Respondent has a relatively good history of violations. Respondent introduced evidence of its financial condition, financial statements for 1996, 1997, 1998 and 1999. They show that Respondent has operated at a net loss for all of those years, but retained assets of $2,013,884.00 at the end of 1999, including $308,420.00 in inventory. Included in that inventory was a large gold nugget, referred to as the "whopper," which was exhibited at the hearing. That nugget contained some 141 ounces of gold, valued at approximately $40,000 at the time of the hearing. Respondent did not argue in its brief that payment of the proposed civil penalties would threaten its ability to continue in business. In light of these facts, I find that neither payment of the proposed civil penalties, nor payment of the reduced civil penalties imposed by this decision, will impair Respondent's ability to continue in business. I also find that the civil penalties imposed below are appropriate to the size of Respondent's business.

The proposed civil penalty for Citation No. 7969922 was $400.00. The violation was sustained. However, the violation was held to be neither S&S nor the result of Respondent's unwarrantable failure. Taking into consideration all of the factors required to be assessed under § 110(i) of the Act, I impose a civil penalty of $100.00 for this violation.

The proposed civil penalty for Order No. 7969514 was $800.00. That violation, the result of Respondent's unwarrantable failure, was sustained. However, I did not find the violation to have been S&S. I impose a civil penalty of $500.00 for that violation.

The proposed civil penalty for Citation No. 7955049 was $55.00. That violation was sustained in all respects and I impose a civil penalty of $55.00.

The proposed civil penalty for Citation No. 7969519 was $113.00. That violation was sustained. However, I did not find the violation to have been S&S. I impose a civil penalty of $100.00 for that violation.

The proposed civil penalties for Citations No'd 7969525 and 7969526 were $122.00 each. Those violations were sustained. However, the gravity assessments were found to have been not as serious as alleged in the citations and they were not found to be S&S. I impose a civil penalty of $55.00 for each of those violations.

The proposed civil penalties for Citations No'd 7969532 and 7969533 were $55.00 each. Those violations were sustained in virtually all respects, the only exception being a slight reduction in the gravity factor for No. 7969523. I impose a civil penalty of $55.00 each for those violations.

The proposed civil penalty for Citation No. 7969536 was $55.00. That violation was affirmed in all respects and I impose a civil penalty of $55.00.

The total of the civil penalties imposed on the contested citations and order is $1,030.00

Settlement

As noted above, at the commencement of the hearing, Respondent withdrew its contest as to Citation No. 7969507 in Docket No. WEST 2000-63 and Citations No's. 7969524, 7969527, 7969528, 7969529, 7969530 (which it is proposed be modified to reflect that the operator's negligence was "Low") and 7969534 in Docket No. WEST 2000-195 and has agreed to pay the full amount of the proposed penalties. During the hearing, Respondent also withdrew its contest of Citation No. 7969537, in Docket No. WEST 2000-195. The parties have requested that the negotiated resolution of the petitions as to those citations be approved as a settlement. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

The Secretary's motion to strike inappropriate matter is **DENIED**.

With respect to the citations that the Secretary has vacated, Citations No's. 7955042, 7955043, 7955044, 7955045, 7955046, 7955048 and 7955050 in Docket No. WEST 2000-78, and Citation No. 7955047 in Docket No. WEST 2000-195, the respective petitions are hereby **DISMISSED.**

With respect to the citations as to which Respondent has withdrawn its contest, Citation No. 7969507 in Docket No. WEST 2000-63 and Citations No's. 7969524, 7969527, 7969528, 7969529, 7969530, 7969534 and 7969537 in Docket No. WEST 2000-195, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Citation No. 7969530 is hereby modified to reflect that the operator's negligence was "low," and that Respondent pay a total civil penalty of $569.00 for the settled citations within 45 days.

With respect to the contested citations, Citation No. 7969947 is hereby **VACATED** and the petition is hereby **DISMISSED**. The remaining citations and order are **AFFIRMED** and Respondent is **ORDERED** to pay a total civil penalty of $1,030.00 for the contested violations within 45 days.

Michael E. Zielinski
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 31, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2000-543-M A.C. No. 10-01827-05514
v.	:	Docket No. WEST 2000-544-M A.C. No. 10-01907-05511
BECO CONSTRUCTION COMPANY, INC., Respondent	:	Docket No. WEST 2000-545-M A.C. No. 10-01907-05512 CH1 and CH2 Crushers

DECISION

Appearances: Jay Williamson, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Merrily Munther, Esq., Penland Munther Goodrum, Boise, Idaho, 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 Beco Construction Company, Inc., ("Beco Construction"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Idaho Falls, Idaho. The parties filed post-hearing briefs.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background and Discussion of General Issues Raised by Beco Construction

Beco Construction operates the CH1 and CH2 portable crushers in Bonneville County, Idaho. MSHA Inspectors Curtis Chitwood and Robert Montoya inspected the CH1 crusher on May 18, 2000. The CH1 crusher is a portable crusher and screening plant that produces sand and gravel. This crusher operates two shifts a day, five days a week and employs three miners each shift. On May 16, 2000, Inspector Chitwood inspected the CH2 crusher. This facility also includes a crusher and screening plant that produces sand and gravel. It has the same shift schedule but employs four miners on each shift.

Beco Construction raised a number of general issues at the hearing and in its post-hearing brief. First, it argues that the Secretary failed to demonstrate that MSHA safety standards were violated because she did not establish that accidents could result from the cited conditions. It contends that an injury could only result from "an intentional act and it is impossible for an employer to guard against intentional acts." (B. Br. 2). Furthermore, Beco Construction maintains that the Secretary failed to establish that there was any likelihood of an injury to employees as a result of the cited conditions.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great. The risk of injury and the appropriate penalty for each citation is discussed below.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by an unguarded tail pulley at Beco Construction's operations is not a defense because there is a history of such injuries at crushing plants throughout the United States. Fatal accidents have occurred at small operations as a result of inadequately guarded tail pulleys. *See Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000) (ALJ). The likelihood of injury for each citation is discussed below.

Beco Construction also correctly notes that the Secretary bears the burden of proving that a violation occurred. In this regard, it argues that where "discretion is involved in determining whether a standard was violated, the relative experience of the inspector and employer are reasonable considerations, as is the company's history of work injuries." (B. Br. 2). I agree that the relative degree of knowledge and experience of a witness is a factor I must consider when determining how much weight to give to that witness's testimony. Nevertheless, I cannot vacate citations on the basis that Beco Construction has not had any serious workplace injuries.

Beco Construction also argues that "[t]raining is a valid means of abating some working conditions." *Id.* All of the citations in these cases were rapidly abated in good faith. The method used to abate the citations was not at issue at the hearing. Employee training may be relevant when considering the negligence of the mine operator when assessing reasonable penalties.

Finally, Beco argues that "MSHA should not be allowed to cite an employer for a condition which was not cited in a previous inspection and which has not changed, until notice and an opportunity to correct the condition has been provided." *Id.* The argument is that the Secretary should be equitably estopped from applying a safety standard to a particular condition if the condition has existed for a period of time without being cited by MSHA, unless prior notice is given. The Commission has held that equitable estoppel does not apply to the Secretary in Mine Act cases. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981). In *King Knob*, the Commission stated that "approving an equitable estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act." *Id.* The Commission further analyzed the issue, as follows:

> Such a defense is really a claim that although the violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate civil penalty.

Id. at 1422.

The Commission recently provided additional guidance on this issue in the context of guarding citations in *Allen Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001). In that case, the mine operator contended that it did not have adequate notice of the requirements of 30 C.F.R. § 56.14107(a) because the language of the safety standard "does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years." *Allen Good* at 1002. The moving machine parts were guarded, but the MSHA inspector determined that the guarding was insufficient. The Commission stated that, in determining whether a mine operator has received fair notice of the Secretary's interpretation of a broadly written safety standard, the judge should consider a number of factors. In addition to prior enforcement by MSHA

inspectors, the judge should consider "the language of the standard, its purpose, its regulatory history, whether MSHA has published notices informing the regulated community of its interpretation of the standard, and the facts of each violation to determine whether [the mine operator] would have had notice that the standard required the moving machine parts to be guarded entirely." *Allen Good* at 1006 (opinion of Commissioners Jordan and Beatty).

Both the CH1 and CH2 crushers are portable and have been moved to different locations in the recent past. As a consequence, although the crushers are set up in the same basic configuration at each location, moving machine parts may be more or less accessible at the different locations. Thus, the fact that a citation was not previously issued for the failure to guard a particular moving part may not be decisive in evaluating whether adequate notice was provided. This issue is evaluated in more detail below with respect to each applicable citation.

B. Citations Issued at the CH1 Crusher, WEST 2000-543-M

Citation No. **7982112** alleges a violation of section 56.14107(a), because a protective guard was not provided for the return roller located on the discharge conveyor belt under the Pioneer shaker screen. The citation states that the roller was 45 inches above the existing ground level. Inspector Chitwood determined that the violation was significant and substantial ("S&S") and was the result of Beco Construction's moderate negligence. 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 $90 for this alleged violation.

The inspector testified that the return roller was running when he observed it. He measured the distance above the ground as 45 inches. (Tr. 29; Exs. P-1, R-1). He stated that if anyone were cleaning out accumulations near the roller, his clothing could become entangled in the pinch point, and he could be pulled into the moving parts and suffer serious injuries. (Tr. 28-34). He determined that it was reasonably likely that someone would be seriously injured as a result of this violation. He observed footprints within two feet of the roller. (Tr. 31).

Harvey Herbertson, the crusher supervisor, testified that an employee will shovel out accumulated material in the vicinity of the roller about once a day. (Tr. 232). A backhoe is then used to remove the shoveled material. He stated that the only way a person could come in contact with the moving belt or roller is if he crawled on his hands and knees under the shaker screen. (Tr. 233). Doyle Beck, president of Beco Construction, testified that an employee would not come in contact with the moving machine parts unless he intentionally crawled under the shaker screen. (Tr. 262). He stated that the area is shoveled on a daily basis. Mr. Beck testified that the employee who shovels up the material "would have to reach to the other side of the roller to collect all the material." (Tr. 264-65). Mr. Beck also stated that this area of the crusher has been previously inspected by MSHA at least three or four times and has never been cited. (Tr. 266). Finally, he testified that there have been no injuries caused by the cited condition.

There is no dispute that the return roller was not guarded and that it was about 3.75 feet above a working surface. It is also clear that the roller was a moving machine part. I credit the testimony of Inspector Chitwood that if someone were to come in contact with the roller or the belt where it feeds into the roller, he could be pulled between the belt and the roller. Such an event could cause a serious injury. Beco Construction contends that such an injury could only occur if someone were to crawl under the shaker screen. I disagree. An employee shovels in the area while the belt is running. There is no dispute that the area where this employee works is an uneven surface. (Exs. P-1, R-1). He must reach to the other side with his shovel. An employee could lose his footing or stumble while in the area. He could then accidentally get his hand or clothing caught in the pinch point as he attempted to catch himself. These types of accidents have occurred at other sand and gravel operations.

The first issue is whether the cited condition is covered by the requirements of the safety standard. The language of the standard states that moving machine parts that can cause injury, including drive, head, tail, and take-up pulleys, must be guarded. The language is quite broad, but return rollers are not specifically included. In the preamble to the final rule, the Secretary emphasized the broad construction of this safety standard. The preamble states:

> [T]he final standard requires the installation of guards to protect persons from coming into contact with hazardous moving machine parts. The standard clarifies that the objective is to prevent contact with these machine parts. The guard must enclose these moving parts to the extent necessary to achieve this objective.

53 Fed. Reg. 32496, 32509 (Aug. 25, 1988). The preamble further provides:

> Under the final rule, the standard applies where the moving machine parts can be contacted and cause injury. Some commenters believed that guards should provide protection against inadvertent, careless, or accidental contact but not against deliberate or purposeful actions. They consider guards which totally enclose moving parts as counter-productive to other safety considerations such as proper work procedures, training, and general attention to hazardous conditions.

Id. In rejecting these comments, the Secretary stated that most injuries caused by moving machine parts occur when persons are "performing deliberate or purposeful work-related actions with the machinery" and that the installation of a guard would have prevented these injuries. *Id.* The Secretary stated that "[g]uards provide a physical barrier, which offers the most effective protection from hazards associated with moving machine parts." *Id.* Thus, the Secretary provided notice to the regulated community that she would interpret this safety standard vary broadly to protect persons from coming into contact with moving machine parts and that the standard covers deliberate actions by employees.

The Secretary's Program Policy Manual ("PPM") provides additional information to the public about the Secretary's interpretation of safety standards. The PPM provides, in part, as follows:

> All moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection. The use of chains to rail off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard.
>
> Conveyor belt rollers are not to be construed as "similar exposed moving machine parts" under the standard and cannot be cited for the absence of guards and violation of this standard where skirt boards exist along the belt. However, inspectors should recognize the accident potential, bring the hazard to the attention of the mine operators, and recommend appropriate safeguards to prevent injuries.

IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56/57.14107 (2000) ("PPM"). Although the PPM is not binding on the Secretary it does provide the mining community with notice of MSHA's interpretation of her safety standards. The PPM explains that using chains to rail off exposed moving parts is not acceptable. This provision indicates that MSHA does not require that conveyor belt rollers be equipped with guards if skirt boards are present. Conveyor belt rollers are generally understood to be the rollers that support the belt where the material is being transported. The roller cited in this instance was a return roller which was under the conveyor and kept the belt from sagging as it returned to the head pulley.

I find that the Secretary established a violation. The language of the safety standard makes clear that moving machine parts must be guarded. Although return rollers are not specifically mentioned, I find that the return roller in this case was covered by the safety standard because it could easily be contacted. The language of the standard is broad enough to include this return roller. In addition, the regulatory history states that the "standard applies where the moving machine parts can be contacted and cause injury." 53 Fed. Reg. at 32509. Employees must shovel accumulations in the vicinity of the roller while standing on uneven ground while the roller is in motion. It is foreseeable that someone could slip and come in contact with the roller while trying to brace himself to prevent a fall.

The most difficult issue is whether the Secretary provided fair notice that the requirements of the safety standard applied to the cited roller. The language of the standard, its purpose, and the regulatory history support the Secretary's interpretation and support the application of the standard to the cited roller. They provided sufficient notice of the Secretary's interpretation to the regulated community. The only factor that supports Beco Construction's

position is its allegation of prior inconsistent enforcement. Mr. Beck testified that this "same piece of equipment I know has been at least through three or four inspections and has never been cited." (Tr. 266). I credit this testimony. The record establishes, however, that the CH1 crusher is moved around. Although the violation was readily visible when Inspector Chitwood inspected the crusher, it is not clear how visible it was during previous inspections. The fact that this roller was not previously cited does not establish that Beco Construction was not provided with sufficient notice of her interpretation of the safety standard given the clear direction given by the Secretary in the regulation, the preamble, and the PPM. This determination must be made on a case by case basis. I find that sufficient notice was provided by the Secretary in this instance.

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).

In this instance, the exposed moving parts were about 3.75 feet above the walking surface. A measure of danger to safety was present that was contributed to by the violation. Assuming continued mining operations, it was reasonably likely that someone would come in contact with the moving machine parts while cleaning accumulations in the area. Such contact would contribute to a reasonably serious injury.

The fact that the Pioneer shaker screen had been inspected by MSHA at least three times and that the roller was not cited significantly reduces Beco Construction's negligence. It was reasonable for Beco Construction to rely on MSHA's past inspections. A penalty of $60 is appropriate.

Citation No. **7982113** alleges a violation of section 56.11012, because a section of metal flooring was missing from the walkway on the south side of the Cedar Rapids shaker screen. The citation states that the opening was eight feet long and eleven inches wide. Inspector Chitwood

determined that the violation was not S&S and was the result of Beco Construction's moderate negligence. The safety standard provides, in part, that "[o]penings above, below, or near travelways through which persons or objects may fall shall be protected by railings, barriers, or covers." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that employees would be on the walkway a few times a week for scheduled maintenance. (Tr. 40). Employees would gain access to the walkway by using a ladder. He testified that an employee could accidentally fall into the opening or drop tools through the opening. (Tr. 43-45). He testified that an accident of this type was unlikely. Mr. Beck testified that the opening was partially protected by its location. (Tr. 268). He stated that it was unlikely that anyone would accidentally injure himself at that location. Beck testified that the missing piece had fallen the day before the inspection and was scheduled to be repaired. (Tr. 269, 272). The ladder had been removed to keep people off the walkway until it was repaired. *Id.*

I find that the Secretary established a violation. The opening was present and, although the ladder had been removed, someone could retrieve the ladder to gain access to the area. The violation was not serious. Beco Construction's negligence was low because it was aware of the problem; it had removed the ladder; and it had scheduled it for repair. A penalty of $25 is appropriate.

Citation No. **7982115** alleges a violation of section 56.14107(a) because the head pulley on the cone discharge conveyor belt was not properly guarded to prevent accidental contact with the moving head pulley. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that Beco Construction had placed plastic fencing about two feet away from the head pulley to barricade the area in lieu of guarding the moving machine parts. (Tr. 51-52; Ex. P-4, P-4). He further testified that moving parts were present that, if contacted, could injure anyone who came in contact with them. (Tr. 49-51). The moving machine parts were about 39 inches above the ground. The inspector testified that the plastic fencing was not adequate because it was attached with wire so that if someone were to trip and fall into the fence, it would not protect him from the moving machine parts. (Tr. 52). He also indicated that someone could lean over the fence and come into contact with the moving pulley. Inspector Chitwood determined that an injury was unlikely, but that Beco Construction's negligence was high. He based his high negligence finding on the fact that he saw brackets on the frame supporting the pulley that indicated to him that the pulley had been guarded in the past. (Tr. 55-56,162-63).

Mr. Beck testified that no employees would have any reason to work in the vicinity of the head pulley and that the plastic fencing was put there to keep them away (Tr. 277; Ex. R-8). He stated that the plastic fencing was about 30 to 35 inches from the head pulley. (Tr. 278).

Because the cited pulley was a head pulley, no shoveling would be required in the area. Beck further testified that the brackets were present on the frame for the pulley because rods are sometimes attached to support the frame if it is suspended from the equipment above it. (Tr. 279). He stated that this pulley was never guarded. Indeed, Beck testified that Beco Construction received a citation for its failure to have a guard present and the plastic fencing was installed as a barricade in response to the citation to keep people away from the area.. (Tr. 280). Beck testified that the fence was accepted by the MSHA inspector in lieu of a guard to abate the citation. *Id.* I credit Mr. Beck's testimony with respect to this citation.

Based on the Commission's decision in *Allen Good*, I vacate this citation. Although the safety standard was broadly written to include head pulleys, the Secretary did not provide adequate notice to Beco Construction that the fence it had installed to barricade the pulley was no longer sufficient to meet the requirements of the safety standard. One of the fundamental principles of due process requires that when "a violation of a regulation subjects private parties to criminal or civil penalties, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Allen Good* at 1004 (citations omitted). In this instance, although the intent of MSHA is reasonably clear in the safety standard and regulatory history, the agency directly misled Beco Construction as to what is required. By accepting the fencing to abate a previous violation, MSHA gave notice to Beco Construction that the fence met the requirements of the safety standard. To determine whether an operator received fair notice of the agency's interpretation, the Commission asks "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Id.* (citation omitted). In Citation No. 7982112, above, I found that such a reasonably prudent person would have recognized that the standard required the cited roller to be guarded. With respect to the present citation, however, such a person would not have realized that a guard was required at the cited head pulley because MSHA previously accepted the fence to abate a guarding citation. MSHA is required to provide notice that fencing is no longer acceptable under the standard before a civil penalty can be assessed for the failure to have a guard at the cited location. Consequently, Citation No.7982115 is vacated.

Citation No. **7982116** alleges a violation of section 56.14108 because the overhead drive belts on the El Jay feed Conveyor were unguarded. The citation states that someone could walk under the drive and could be injured by the belt if it were to break. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's low negligence. Section 56.14108 provides that "[o]verhead drive belts shall be guarded to contain the whipping action of a broken belt if that action could be hazardous to persons." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the drive belt was about 13 feet above the ground. (Tr. 62; Ex. P-5). The overhead drive was about seven feet above the walkway of the Cedar Rapids shaker screen. (Tr. 62-63). The inspector believes that if the belt were to break while it was operating, it could come off with a great deal of force and hurt an employee in the vicinity. Inspector Chitwood believes that the drive belt was about six feet long. Thus, he concluded that

if anyone were on the walkway performing routine maintenance when the belt broke, he could be seriously injured by the whipping action of the belt. (Tr. 64). The inspector believed that such an event was not very likely because Beco Construction shuts the system down before anyone gets up on the walkways. (Tr. 66). He determined that the operator's negligence was low for the same reason and because the drive belt may not have been in the same position when the crusher was set up at other locations. In the notes that Inspector Chitwood took at the time of the inspection, he noted that "the power to the plant is turned off when employees work on the screen." (Tr. 164-65; Ex. R-2). He also wrote that "access to the area is removed till the plant is shut down for repairs." *Id.* The access referred to in the note is the ladder used to get to the walkway.

Mr. Beck testified that when this drive belt has broken in the past it has merely fallen onto the screen. (Tr. 283). He stated that employees are not allowed onto the walkway on the shaker screen when it is operating and that the subject drive motor never operates when the shaker screen is shut down. (Tr. 284). Beck testified that, because it is dangerous and somewhat frightening to be on the walkway when the screen is operating, it is unlikely that anyone would go up there. The access ladder was not at the shaker screen. He also stated that the drive belt has been observed during previous MSHA inspections and has never been cited for not having a guard present. (Tr. 285-86). MSHA inspectors have told him that a guard would be required if employees work or walk on the shaker screen walkway while the crusher is operating. *Id.*

In rebuttal, MSHA inspector Montoya testified that he has been at other crushers owned by different mine operators and has observed employees on walkways of operating shaker screens. (Tr. 361). He stated that it is very common to see employees on such walkways and that the vibration of the screen does not prevent people from being there. He has also observed drive belts whipping around when they break. Finally, Montoya testified that when a crusher is moved, the configuration can change significantly so it is possible that the drive belt was higher above the shaker screen's walkway when it was previously inspected by MSHA. (Tr. 363).

I conclude that this citation should be vacated for two reasons. First, the language of this particular safety standard requires that the Secretary establish that the cited condition created a safety hazard. Section 56.14108 states that an operator violates the safety standard only "if the whipping action of a broken belt . . . could be hazardous to persons." Thus, not all drive belts are required to be guarded, only those that are located where the whipping action of a broken belt could injure someone. The Secretary established that this drive belt could break and whip around. She did not establish that such whipping action could injure anyone. The testimony of the inspector and Mr. Beck, as well as the inspector's notes, make clear that employees do not work or walk on the deck of the shaker screen while it is in operation. The ladder had been removed to prevent anyone from getting up onto this walkway. There was no danger to employees on the ground. The Secretary's belief that someone might go up on the walkway while the crusher is operating is too speculative to establish a violation.

Second, I credit Mr. Beck's testimony that another MSHA inspector advised Beco Construction that a guard is required if employees walk or work on the shaker screen when the plant is operating. It was reasonable for Beck to conclude that a guard was not required because of this statement and the fact that the drive belt was not previously cited by MSHA. In reviewing the language of section 56.14108, its regulatory history, and the enforcement history at Beco Construction, I find that the Secretary did not provide fair notice of the requirements of the standard. *Allen Good* at 1006. Consequently, Citation No. 7982116 is vacated.

Citation No. **7982608** alleges a violation of section 56.14107(a) because the alternator v-belt drive and sheaves on the Detroit diesel engine were unguarded. This engine powered the generator and was in a semi-trailer. The citation states that employees working around this equipment were exposed to the possibility of injury from the moving machine parts. Inspector Montoya determined that the violation was not S&S and was the result of Beco Construction's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood, who was with Inspector Montoya, testified that the pulley system for the alternator and the fan pulley were not guarded. (Tr. 70; Ex. P-6). He stated that the moving machine parts, which were about 2.5 feet above the floor of the trailer, presented a safety hazard to employees in the area. An employee would only be in the trailer to service the engine, to check the batteries, or to check the fluid levels. (Tr. 72). If he were to slip, his hand or clothing may come in contact with the moving machine parts and he could be seriously injured as a result. *Id.* He believes that an injury was unlikely because the moving parts were partially guarded by location in that the metal framework of the engine shielded the area to a limited extent. Inspector Chitwood also believed that the engine was usually shut down before it was serviced. Inspector Montoya's testimony is consistent with Chitwood's testimony. (Tr. 204-09). He stated that there was no reason for an employee to be in the area of the moving machine parts other than when he started and stopped the engine, "maybe [when he performed] some maintenance checks," or if someone were walking by the engine. (Tr. 206, 213-16).

Mr. Beck testified that maintenance is performed from the other side of the engine. Oil and radiator fluid are checked and added on the opposite side of the engine. (Tr. 288; Ex. R-14). He stated that the oil level and radiator fluid are never checked or supplemented when the engine is operating. Maintenance is performed by mechanics on the weekends when the generator is not operating. (Tr. 292). The controls for the engine are at the opposite end of the engine. (Ex. R-14). In addition, Mr. Beck stated that, even if someone were walking in the area adjacent to the alternator and tripped, the chance that he would get caught in the moving machine parts is "absolutely zero." (Tr. 292). Finally, he testified that he has used the cited engine and generator for about eight years. (Tr. 293). Beck testified that this generator has been inspected by MSHA on a number occasions and he is not aware of any citations being issued for lack of a guard at the alternator v-belt drive. *Id.*

The Secretary recognizes that the cited condition did not create a serious safety hazard to Beco Construction's employees because an accident was unlikely. She contends, however, that

because a serious accident was possible, the v-belt drive was required to be guarded under the standard. Section 56.14107(a) is ambiguous, because "its language is broad and does not specify the extent of the guarding required or explain how moving parts should be guarded." *Allen Good* at 1004. The generator trailer has been in the same condition for eight years and it has been inspected by MSHA on numerous occasions. The moving machine parts were not readily accessible and were on the opposite side of the engine from where it is serviced. I find that Beco Construction was not given sufficient notice that additional guards were required on the engine. Consequently, Citation No. 7982608 is vacated.

Prior to the hearing, Beco Construction withdrew its contest of Citation Nos. 7982114, 7982605, 7982606, and 7982607. I assess the Secretary's proposed penalty of $231 for these violations.

C. Citations Issued at the CH2 Crusher

WEST 2000-544-M

Citation No. **7982098** alleges a violation of section 56.15004 because an employee was observed working around the tail section of the C-5 conveyor belt without wearing safety glasses. The citation states that the belt was in operation and that loose material was being fed onto it from the conveyor belt above, exposing the employee to a possible eye injury. Inspector Chitwood determined that the violation was S&S and was the result of Beco Construction's moderate negligence. Section 56.15004 provides, in part, that "[a]ll persons shall wear safety glasses . . . when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes." The Secretary proposes a penalty of $90 for this alleged violation.

Inspector Chitwood testified that material from the shaker screen was dropping in the vicinity of the employee he observed. (Tr. 81; Ex. P-7). The employee appeared to be securing a nut on a guard at the tail section of the conveyor belt when Chitwood saw him. (Tr. 83). The employee was not wearing safety glasses. Another belt was dumping "sand and small gravel" onto the C-5 belt from a height of about four to five feet. (Tr. 84). The employee was about two feet from this dumping point. Inspector Chitwood stated that he was concerned that small particles of rock, dust, or sand could get into the employee's eyes. He believed that the employee could suffer a serious eye injury if a piece of rock flew into one of his eyes. (Tr. 87). He could also have suffered a scratched cornea. The inspector determined that it was reasonably likely that he would suffer a serious injury if he continued to work in the area without eye protection.

Mr. Herbertson, who was with Chitwood, testified that he did not see any rocks or dust flying out of the discharge conveyor. (Tr. 248). He further stated that the employee at the belt had safety glasses in his pocket at the time of the inspection and that Beco Construction requires employees to wear them when there is a hazard but that there was no hazard in this instance. Herbertson testified that the material that was being discharged near the cited employee was wet and that it was falling from a height of about 18 inches. (Tr. 255). Mr. Beck also testified that

the cited employee was not required to wear safety glasses at that tail pulley because there was "no possible way that there could be any flying objects that could damage or harm his eyes." (Tr. 298). The discharge conveyor moves at a slow rate of speed, the material was falling a short distance; and the material was quite wet to keep the dust down. He testified that a belt discharging larger rock would pose a hazard because a piece could fly off from the impact and strike someone in the eye. (Tr. 301-02, 302). Beck believes that there was no possibility that the employee would sustain an eye injury at the cited location. (Tr. 303).

The language of this particular safety standard requires that the Secretary establish that the cited condition created a safety hazard. Section 56.15004 states that all persons shall wear safety glasses "where a hazard exists which could cause injury to unprotected eyes." The Secretary is not required to prove that an injury will occur but that a hazard exists which "could" cause injury. In this instance, I find that the Secretary established that an eye injury was possible at the tail section of the C-5 belt. I also find that the preponderance of the evidence shows that it was not likely that the individual would be injured. I credit Mr. Beck's testimony in this regard. I note that the photograph introduced by the Secretary does not indicate that any dust or debris was being kicked up at this location. (Ex. P-7). Consequently, I affirm the citation, but find that the Secretary did not meet the third element to the Commission's S&S test. The negligence was moderate. A penalty of $50 is appropriate.

Citation No. **7982099** alleges a violation of section 56.20003(a) because poor housekeeping conditions were observed at the oil storage trailer. The citation states that fiberglass insulation, electrical motors, steel, and other debris was scattered all over the floor. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's low negligence. The standard provides, in part, that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the conditions in the trailer created a slipping and tripping hazard. (Tr. 94-95; Ex. P-8). He stated that he also observed hydraulic hoses and other material in the trailer. He believed that any injuries would be minor. He stated that there was a clear two-foot wide path without a tripping hazard on one side of the trailer that employees could use to walk through. (Tr. 177; Ex. R-3). Mr. Beck testified that there was a walking path through the trailer to the oil barrels. (Tr. 306). He stated that employees do not travel beyond these barrels.

I find that the Secretary did not establish a violation. The photograph taken by the inspector shows a trailer that is relatively clean and orderly. (Ex. P-8). Spare hoses and belts are hung from hooks on the wall; other hoses are coiled along one side; various cans, including oil barrels, are located along that same side; and a pathway leads into the area. The only slightly cluttered area is at the back of the trailer, but even that area is rather clear of impediments to walking. There are long pieces of metal along one side, but the floor is clearly visible along the path that both Chitwood and Beck testified about. The PPM does not provide any interpretive

guidance on this standard. I credit the testimony of Mr. Beck as to how this trailer is used. The Secretary did not establish that the operator failed to keep the trailer "clean and orderly." Citation No. 7982099 is vacated.

Citation No. **7982101** alleges a violation of section 56.11001 because safe access was not provided to the cone crusher work platform. The citation states that the steps and work platform had a build-up of loose rock and that several 480-volt electrical conductors were on the steps to the platform. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. Section 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that he observed loose rock on the deck of the cone crusher and on the stairs leading up to the deck. (Tr. 97-98; Exs. P-9 & P-10). He believed that if there were a "plug-up" in the crusher or if the crusher needed to be serviced, an employee would face a tripping hazard. Chitwood testified that the employee might have to gain access quickly in the event of an emergency. He stated that an employee would need to be able to walk all around the cone crusher. (Tr. 101-03). He felt that the rock had been present for at least several days. Although Inspector Chitwood believed that an employee would receive a serious injury if he tripped and fell, he did not believe that such an occurrence was likely because there was a handrail all around the deck. He also took into consideration the fact that employees do not enter the area until the plant is shut down. (Tr. 179). He believed that Beco Construction's negligence was high because the condition had existed for several shifts and workplace examinations should have detected the problem. (Tr. 105-06). The inspector testified that the deck should have been cleaned off whenever loose rock accumulated, which he estimated to be necessary about every other shift. (Tr. 180-82).

Mr. Beck testified that no employees are allowed to walk onto the deck of the cone crusher while the plant is operating. (Tr. 308). He stated that the material accumulates on the deck as part of the normal operation of the crusher. The material is overflow that spills on the deck from the crusher "and we don't know if there is going to be an overrun five times an hour or not for two days." (Tr. 309). As a consequence, Beck testified that employees clear off the deck before they do any work at the crusher. He testified that he believes it is pointless to clean it off at the end of each shift because an employee would not need to get up on the deck every day. (Tr. 310, 314). He disputed the inspector's testimony concerning an emergency that would require an employee to rush on the deck before he had the opportunity to clean off the accumulations. Beck testified, as follows:

> I cannot for the life of me figure out what type of emergency may come up that would induce a man to . . . go up there on an emergency basis. There just isn't any. The operator of the crusher and the control man is the emergency shutdown guy and, if there is an emergency, he goes over and hits the shut-off button.

(Tr. 311-12). The shut-off button is not on the deck.

The safety standard is broadly written to be applicable to many situations. The term "working place" is defined as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. Inspector Chitwood was concerned that someone might walk up the stairs to the deck without cleaning them off in an emergency situation. He was also concerned about the electrical cables that were on the steps. There was no testimony that the area was entered during on-shift examinations required under section 56.18002 or that an employee would use the deck as a travelway to reach another area at the crusher. Mr. Beck testified, without contradiction, that an employee would typically be on the deck every few days to make adjustments and that his first order of business would be to clean up the accumulations.

I find that the cited area was not a travelway but that it was a working place. Given that the working place was cleaned of accumulations before anyone entered the area, I find that the presence of rocks on the deck at the time of the inspection did not establish that a safe means of access was not being provided by Beco Construction. The safety standard does not require that all working places be kept clear of rock at all times, but requires that a safe means of access be provided. I credit Mr. Beck's testimony that employees would not work on the deck in an emergency situation without first cleaning off the rocks.

The electrical cables on the stairs did present a minor tripping hazard. (Ex. P-9). I find that these wires were in violation of the requirement that safe access be provided. The violation was not serious. I find that Beco Construction's negligence was moderate. A penalty of $40 is appropriate.

Citation No. **7982102** alleges a violation of section 56.14112(b) because the protective guard for the v-belt drive on the discharge conveyor under the cone crusher was not securely in place. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's moderate negligence. Section 56.14112(b) provides, in part, that "[g]uards shall be securely in place while machinery is being operated." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that a guard was present but that it was loose because two bolts were missing. (Tr. 111; Ex. P-11). The v-belt drive was in the area where employees use a loader to scoop up material that has fallen from the deck of the cone crusher. The inspector noticed that the screen was shaking with the vibration of the crusher. He believed that the guard "could possibly have fallen off at any time." (Tr. 111, 186-87). Inspector Chitwood testified that if the guard fell off, someone could become caught in the moving machine parts. He determined that an accident was unlikely because a guard was present but "it just wasn't secure." (Tr. 113). In addition, he did not observe any footprints in the area and the accumulations are cleaned out with a loader that is equipped with an overhead cab.

Mr. Beck testified that the guard was attached with bailing wire. (Tr. 317). He testified that it was attached with wire because about once a week an employee must remove the guard, while the plant is shut down, to inspect the underside of the cone crusher. Consequently, he believes that the guard was vibrating because it was attached with wire not because it was insecure. Other MSHA inspectors have inspected the cone crusher and some inspectors have questioned the use of bailing wire to secure the guard. (Tr. 319). He could not remember if any citations had been issued in the past for this guard.

I find that the Secretary did not establish a violation. The cited condition would create a hazard only of the guard fell off the crusher. Inspector Chitwood testified that it "possibly could have fallen off." I credit the testimony of Mr. Beck that it was secured with bailing wire. The guard would naturally vibrate when the crusher was operating because of the way in which it was installed. (Ex. R-11b). The Secretary did not meet her burden of showing that the guard was not securely in place. Consequently, this citation is vacated.

Citation No. **7982103** alleges a violation of section 56.14107(a) because the tail pulley on the stacker conveyor was not properly guarded to prevent serious injuries. The citation states that the front and both sides of the pulley were not guarded. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. The Secretary proposes a penalty of $55 for this alleged violation.

The cited tail pulley was protected by a partial guard. (Tr. 116; Ex. P-12). The openings were in the vicinity of the shaft for the pulley and in the front of the tail pulley. Inspector Chitwood was concerned that if anyone were in the area shoveling accumulated material, he might get his hand or clothing into the moving machine parts if he tripped and fell. (Tr. 118). The moving parts were about two feet above the ground. He determined that an accident was not likely because he did not see any footprints in the area. (Tr. 122). In addition, the tail pulley was under another conveyor belt. (Tr. 189; Ex. P-12). He determined that Beco Construction was highly negligent because there are other tail pulleys at the plant that are fully guarded.

Mr. Beck testified that the opening on each side of the tail pulley was about four by eight inches. (Tr. 320). He said that the moving machine parts were more than amply guarded because the openings were very small and the other conveyor belt kept employees from getting close to the tail pulley. "It's absolutely inconceivable to me that someone could walk up there and trip and, at the same time, get their hand or their foot or something through that opening." (Tr. 322). Mr. Beck also testified that another MSHA inspector previously inspected this tail pulley in the same condition and did not issue a citation. (Tr. 324). He believes that the likelihood of anyone being injured by the tail pulley was "zero." (Tr. 326).

Based in part on the Commission's decision in *Allen Good*, I find that Beco Construction did not receive fair notice that the condition violated the safety standard. I credit Beck's testimony that another inspector had inspected the same condition without issuing a citation. Consequently, Beco Construction was given notice by an authorized representative of the

Secretary that the guard on the tail pulley met the requirements of the safety standard. The openings that Inspector Chitwood cited were very small and inaccessible. Although the language of the safety standard is broad, as discussed above, a reasonable prudent person familiar with the mining industry and the protective purposes of the safety standard would not have recognized that the standard required additional guarding. The Secretary is required to provide notice that additional guarding is required before a civil penalty can be assessed. Consequently, this citation is vacated.

Citation No. **7982104** alleges a violation of section 56.14107(a) because a protective guard was not provided for several idler rollers on the El-Jay discharge belt. The citation states that the cited area was about 57 inches above the ground. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the idler rollers on the belt were not properly guarded. (Tr. 125; Ex. P-13). He stated that these rollers can create a pinch point especially if the belt is full of material. If a person stumbled while walking in the area, he could get his hand caught between the belt and the rollers. *Id.* The conveyor assembly was not equipped with a skirt board. (Tr. 126). The idlers along part of this conveyor were protected by plastic fencing. The inspector did not believe that an accident was likely because it did not appear to be in a heavily traveled area. (Tr. 128). He also testified that employees do not work along this conveyor until the system is shut down. (Tr. 190; Ex. R-6). Inspector Chitwood believed that the negligence was high because the operator had installed plastic fencing along part of the conveyor and the fact that all of it was not protected should have been detected during on-shift examinations.

Mr. Beck testified that about 15 feet of safety netting was placed along the conveyor to abate the citation. (Tr. 326). He said that employees work at the head pulley and tail pulley but not along the belt because there is nothing to do there. "You can't adjust, you can't fix, you can't repair" at the cited area. (Tr. 327). The belt would need to be shut down to replace a roller. Although this conveyor has been previously inspected by MSHA, Mr. Beck was not sure whether any citations had been issued because he did not know the configuration it may have been in at the time. (Tr. 329).

I find that the Secretary established a non-S&S violation, but that the negligence was not high. Because a skirt board was not present, that part of MSHA's PPM that instructs inspectors to provide a verbal warning does not apply. I credit Mr. Beck's testimony that the company provided protection along part of the conveyor because that section was near another conveyor where employees could be walking or working. (Tr. 327-28). Consequently, the fact that Beco Construction guarded that area does not establish high negligence in this citation. Beco Construction believed that guarding was unnecessary at the cited location because employees do not work or travel in that area. I find that Beco Construction's negligence was moderate. A penalty of $50 is appropriate.

Prior to the hearing, Beco Construction withdrew its contest of Citation No. 7982100. I assess the Secretary's proposed penalty of $55 for this violation.

WEST 2000-545-M

Citation No. **7982105** alleges a violation of section 56.12005 because several power cables were on the ground between the control trailer and the cone crusher that had been run over by a vehicle. The citation states that the outer jacket and insulation around the power conductors could be damaged from the weight of the vehicle. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. Section 56.12005 provides, in part, that "[m]obile equipment shall not run over power conductors . . . unless the conductors are properly bridged or protected." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the cables were near the control trailer, that they provided power for the crusher, and that they were energized at the time of his inspection. (Tr. 130; Exs. P-14 & P-15). He observed tire tracks going over the cables where there was no bridging. He believes that the tracks were made by a pickup truck. Rubber mats were in the area but they did not cover the power conductors where he observed the truck tracks. (Tr. 134). Inspector Chitwood testified that the violation would create an electric shock hazard if the outer jacket and insulation were damaged by truck traffic. Because the outer jacket was in good condition when he issued the citation, he determined that such an accident was unlikely. He believes that the negligence is high because the violation was obvious and in an area where management would frequently travel. Both Inspector Chitwood and Inspector Montoya testified that the rubber mats would provide adequate protection for pedestrian traffic but would not meet the standard for truck traffic. (Tr. 134, 211).

Mr. Beck testified that pickup trucks do not travel in the cited location because it is a dead end. He stated that the tracks that the inspector observed were from a trailer-mounted welder. (Tr. 331). It weighed about 200-250 pounds and it was pushed around by hand. The mats were present to reduce the tripping hazard and to keep dirt from building up on the cables. Beck did not know when the mats became separated from the cables. He does not believe that the power conductors would be damaged by the weight of the welder. (Tr.333).

I find that the welding trailer was mobile equipment, as that term is used in the safety standard. MSHA's standards regulating machinery and equipment defines "mobile equipment" as "[w]heeled . . . equipment capable of moving or being moved." 30 C.F.R. § 56.14000. Another similar definition of the term includes "all equipment that is self-propelled or that can be towed on its own wheels . . . ." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 352 (2d ed. 1997). The Secretary established a violation. Mr. Beck testified that other MSHA inspectors had observed unprotected power cables during previous inspections and no citations were issued. (Tr. 335). Beck did not state whether these inspectors observed vehicles crossing the cables or tire tracks in the vicinity of the cables. Consequently, Beco

Construction did not establish that it was not provided with fair notice of the application of the safety standard.

I find that the violation was not serious. The cables were not damaged. In addition, it is unlikely that the welder trailer would damage the cables. I also find that Beco Construction's negligence was moderate. The fact that the violation was easily observed by plant management does not establish a high degree of negligence. Mr. Beck did not believe that the cables had been run over by trucks and testified that welder trailer would not damage the cables. A penalty of $50 is appropriate.

Citation No. **7982106** alleges a violation of section 56.12032 because the cover plate on the heater control power switch in the operations trailer was not properly closed and secured. The citation states that the cover plate was cracked open because the screws holding it down were loose. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's low negligence. Section 56.12032 provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the cover plate on an unenergized electrical box was not completely closed. (Tr. 140-41 ; Ex. P-16). The cover plate was loose because several of the screws were not tight. The inspector was concerned that if a miner tripped and fell against the electrical box, "it could possibly pop that cover open even more, exposing him to the electrical conductors inside." (Tr. 143). He believed that someone could be severely injured as a result, but that such an accident was unlikely. Inspector Montoya testified that an electrical arc could escape from the box. (Tr. 364). Inspector Chitwood marked the negligence as low because the company was not using that junction box at the time.

Mr. Beck testified the cited junction box was "out of commission at the time." (Tr. 337). This junction box was not being used while the crusher was being operated in the present configuration because it was not needed. (Tr. 339).

Although the Mine Act is a strict liability statute, there comes a point when a cited condition creates a hazard that is so speculative or insignificant that the citation must be vacated. The photograph shows that the cover plate was in place but it was not screwed down at the lower right hand corner. A slight opening was present. The box was not only not energized, it was locked out because it was not being used at all at this plant site. To be a hazard, someone would have to take off the lock, energize the box, fall against it causing the cover to pop open, and then get his hand inside the box as he fell. This scenario is highly unlikely. The citation is vacated.

Citation No. **7982108** alleges a violation of section 56.20003(a) because poor housekeeping conditions were observed on the work platform of the Nordberg cone crusher. Loose rock and other debris had accumulated. The citation states that the material covered an area of about 8 feet by 5.4 feet, which exposed employees to a slip, trip, and fall hazard.

Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that poor housekeeping conditions on the work platform. (Tr. 145; Ex. P-17). He testified that employees would need to use the platform to gain access to the crusher and the controls on the platform. Loose rock, tools, and other debris were scattered over the platform. The presence of the tools convinced him that employees had been working on the platform without first cleaning the area up. (Tr. 148-49). The material presented a tripping hazard. Inspector Chitwood believed that an accident was unlikely because it was a small work platform that was surrounded by handrails.

Mr. Beck testified that employees of Beco Construction are required to clean the platform whenever they use it. (Tr. 340). He stated that the controls that the inspector saw are not used because there are hydraulic controls in the van. Beck further stated that the crusher was less than a year old and that employees did not have to go onto the work platform to make any adjustments. He testified that the chain across the entrance was to prohibit employees from entering the work platform. (Tr. 341). Finally, he stated that this crusher has been inspected by MSHA in the past and no citations were issued.

I find that the Secretary established a violation. Although it was not used frequently, the platform was a workplace. The presence of tools on the platform establishes that at least one employee had been in the area. The record does not reveal how quickly rock accumulates in the area. The photograph shows very little rock. (Ex. P-17). The other material that was lying about on the platform created a greater tripping hazard. If the area contained only the amount of rock shown in the photograph and nothing else, I would have vacated this citation. The fact that other MSHA inspectors did not issue any citations is irrelevant because there is no evidence as to the condition of the work platform at the time of these inspections. The violation is not serious. Beco Construction's negligence was moderate. A penalty of $40 is appropriate.

Prior to the hearing, Beco Construction withdrew its contest of Citation Nos. 7982107, 7982109, and 7982110. I assess the Secretary's proposed penalty of $223 for these violations. I granted the Secretary's motion to vacate Citation No. 7982111 at the hearing. (Tr. 7).

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. With respect to the history of paid violations, I find that eleven citations were issued at the CH1 crusher and no citations were issued at the CH2 crusher in the 24 months preceding these inspections. (Tr. 217-21). Beco Construction is a small operator that worked about 5,871 man-hours at the CH1 crusher in 1999 and 6,148 man-hours at the CH2 crusher in 1999, for a total of 12,019 hours at all Beco Construction facilities. (Tr. 6). All of the violations were abated in good faith. The penalties assessed in this decision will not have an

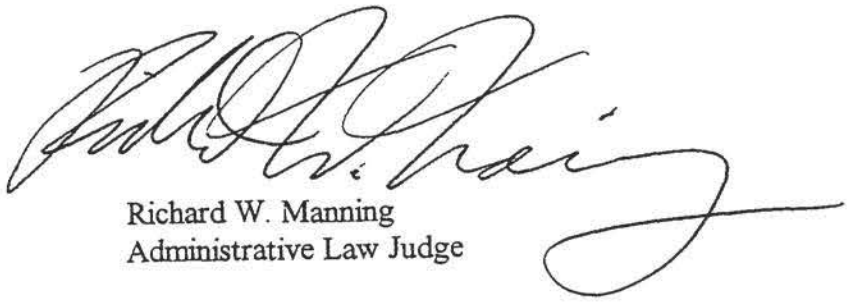
adverse effect on Beco Construction's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate. The reduction in the penalties is based on the small size of the operator and, where noted above, the gravity and negligence criteria.

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 No.	30 C.F.R. §	Penalty
WEST 2000-543-M		
7982112	56.14107(a)	$60.00
7982113	56.11012	25.00
7982114	56.14107(a)	55.00
7982115	56.14107(a)	Vacated
7982116	56.14108	Vacated
7982605	56.12004	66.00
7982606	56.12008	55.00
7982607	56.12025	55.00
7982608	56.14107(a)	Vacated
WEST 2000-544-M		
7982098	56.15004	50.00
7982099	56.20003(a)	Vacated
7982100	56.4101	55.00
7982101	56.11001	40.00
7982102	56.14112(b)	Vacated
7982103	56.14107(a)	Vacated
7982104	56.14107(a)	50.00
WEST 2000-545-M		
7982105	56.12005	50.00
7982106	56.12032	Vacated
7982107	56.4101	55.00
7982108	56.20003(a)	40.00
7982109	56.14112(b)	55.00
7982110	56.14107(a)	113.00
7982111	56.14107(a)	Vacated

Accordingly, the citations contested in these cases are **AFFIRMED, MODIFIED,** or **VACATED** as set forth above and Beco Construction Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $824.00 within 30 days of the date of this decision.



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
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041
October 9, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2001-24-D
ON BEHALF OF	:	NORT CD 2000-04
DONNIE LEE LOWE,	:	
Complainant	:	
v.	:	
	:	
ISLAND CREEK COAL COMPANY,	:	VP #8 Mine
Respondent	:	Mine ID 44-03795

ORDER GRANTING, IN PART,
AND
DENYING, IN PART, MOTION TO COMPEL

This case is before me on a Complaint of Discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Respondent filed a request for production of documents with the Secretary. Citing the "work product" and "informant's" privileges, the Secretary declined to furnish MSHA's investigative report as well as 21 exhibits which accompanied the report. Consequently, the Respondent has filed a Motion to Compel disclosure of the documents. Relying on the privileges previously asserted, the Secretary opposes the motion. For the reasons set forth below, the motion is granted, in part, and denied, in part.

The Secretary has provided the disputed documents for my *in camera* review. In addition, counsel has furnished suggested redactions to documents, should I order their disclosure. At the outset, the following general observation is made. This case, which could involve a substantial civil penalty, is being brought by the U.S. Government.[1] Clearly, the parties are not equal in terms of resources. With that in mind, the Secretary would be better served by erring on the side of disclosure than by claiming every possible privilege. Nonetheless, while the Secretary can choose not to assert a privilege, I cannot, but must apply the law as it is invoked.

[1] The civil penalty could be as high as $55,000.00. The Secretary has not yet filed the amended complaint, promised in the original complaint filed on April 20, 2001, to state the amount of civil penalty being sought in the case.

The Commission has held that in order for material sought in discovery to be protected by the "work product" privilege, it must be: (1) tangible documents and 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. *Asarco, Inc.*, 12 FMSHRC 2548, 2558 (December 1990) (*Asarco I*). Island Creek argues that the documents in question were not prepared in anticipation of litigation, but rather were prepared in the ordinary course of business as required under the Act.[2] The Company further asserts that the one year delay between MSHA's investigation and the filing of the complaint with the Commission indicates that the investigation was not in anticipation of litigation. Contrary to these claims, however, I find that the "work product' privilege does apply to MSHA's investigation.

In *Asarco I*, the Commission held that a 110(c) special investigation, 30 U.S.C. § 820(c), is undertaken in anticipation of litigation. *Id.* at 2559. In so holding, the Commission stated that:

> A major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) or (d) of the Mine Act. 30 U.S.C. § 820(c) & (d). A special investigator does not know at the outset of his investigation whether charges will be filed in that particular case. Nevertheless, the purpose of his investigation is to allow the Secretary to determine whether a case should be filed.

Id. Similarly, in this case, a major function of an MSHA investigation is to determine whether litigation should be commenced under section 105(c). At the beginning of the investigation, the investigator did not know whether charges would be filed in the case. Nevertheless, the purpose of her investigation was to allow the Secretary determine whether a case should be filed.

Accordingly, I find that MSHA's investigation was carried out in anticipation of litigation. Further, I do not find that the delay between the investigation and the filing of the complaint changes that conclusion. Therefore, I conclude that the "work product" privilege applies to the 105(c) investigation in this case.

Turning to the documents themselves, I find that the Final Report of Discrimination Investigation and the accompanying chronology are clearly covered by the "work product" privilege as they are documents prepared in anticipation of litigation by the Secretary's investigator.

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[2] Section 105(c)(2), 30 U.S.C. § 815(c)(2), requires that once the Secretary receives a complaint of discrimination, she "shall cause such investigation to be made as [s]he deems appropriate."

Exhibits 4-10, 14-18 and 25-27 are statements of miner witnesses.[3] These statements, taken by the investigator during the investigation, are also covered by the "work product" privilege. *See Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 303 (8th Cir. 1974); *Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 159 (E.D.N.Y. 1986).

Exhibits 13, 19-22 and 24 are each entitled "Memorandum of Interview" and consist of memoranda of statements of miner witnesses prepared by the investigator "after refreshing [her] memory from notes made during and immediately after the interview." These, too, clearly come with the "work product" privilege. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997).

Having found that all of the documents are entitled to "work product" immunity, "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." Fed. R. Civ. P. 26(b)(3)." *Asarco I*, 12 FMSHRC at 2558. While the company may meet the first part of the test, it has failed to demonstrate that the second part is applicable.

Island Creek has not specifically claimed, much less made any attempt to show, that it has a substantial need of these materials in preparation of its case. Nonetheless, it is apparent from the statements that they go directly to the alleged discrimination in this matter. Therefore, I will assume for the purposes of this order, that the Respondent meets the substantial need prong of the test.

The company has failed, however, to demonstrate, that it cannot obtain, without undue hardship, the substantial equivalent of the materials by other means. It asserts that: "In this case, Ms. Hall conducted an investigation over discreet events that occurred over a year and a half ago. Island Creek has no way to obtain the same or substantially similar information to that collected by Ms. Hall in her routine, contemporaneously-conducted investigation." (Motion at 3.) If all that is necessary to obtain documents that are otherwise not discoverable is to show a lapse of time between the preparation of the document and the time it is sought, the privilege would be eviscerated. Clearly, more is required.

The Respondent has access to the same individuals with knowledge of the alleged discrimination as did Ms. Hall and can question them in the same manner, under *subpoena*, if necessary. *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (August 1992) (*Asarco II*). Other than a lapse in time, Island Creek has made no showing that it attempted to question witnesses and they could not remember what happened, that some witnesses are not longer available, that it would have to

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[3] Counsel for the Secretary's states, in his reply, that: "None of the Exhibits at issue contain a statement which was either prepared or signed by a witness." (Sec. Reply at 2.) This is plainly incorrect.

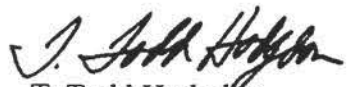
go to unusual expense to obtain the information contained in the documents or that some other *actual* reason prevents the company from obtaining this information.

The courts have held that "broad unsubstantiated assertions of unavailability or faulty memory are not sufficient" to meet the undue hardship test. *In re Intl. Systems & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1240 (5th Cir. 1982). Island Creek has not even made that specific of a claim. Accordingly, I conclude that it does not meet the undue hardship test and that the documents, with the exception of Exhibits 14-18, need not be disclosed.[4]

With regard to Exhibits 14-18, which are statements of Island Creek managerial employees, as the Respondent has correctly pointed out, Fed. R. Civ. P. 26(b)(3) provides that: "A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party." Since Island Creek, the party, is a corporation, it follows that it may obtain statements of its agents without the required showing of substantial need and undue hardship.

Order

As discussed above, the Motion to Compel is **GRANTED** to the extent that the Secretary is **ORDERED** to provide to the Respondent Exhibits 14-18. In all other respects, the Motion to Compel is **DENIED** and the Secretary need not disclose the investigative report and chronology and Exhibits 4-10, 13, 19-22 and 24-27.[5] It is **FURTHER ORDERED** that the documents provided for my *in camera* review shall be sealed subject to review only by the Commission or other appellate body.[6]



T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

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[4] Having found that the "work product" privilege applies to all of the documents at issue, I do not reach the Secretary's assertion of the "informant's privilege."

[5] The Respondent will be receiving the names of the Secretary's miner witnesses on December 11, 2001. At that time, counsel for the company should also receive all statements made by those miners who will be witnesses. *Asarco II*, 14 FMSHRC at 1331.

[6] The redacted copies of the exhibits will be returned to counsel for the Secretary.

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