

NOVEMBER AND DECEMBER 2006

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ADMINISTRATIVE LAW JUDGE ORDERS

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NOVEMBER AND DECEMBER 2006

Review was granted in the following case during the months of November and December:

Marfork Coal Company, Inc. v. Secretary of Labor, MSHA, Docket Nos. WEVA 2006-788-R, et. al. (Judge Feldman, September 27, 2006)

No case was filed in which Review was denied during the months of November and December:

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 2, 2006

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

v.

JIM WALTER RESOURCES, INC.

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: Docket No. SE 2007-8
: A.C. No. 01-01401-87100
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BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On October 9, 2006, the Commission received from Jim Walter Resources, Inc. (“JWR”) a letter by counsel seeking 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).

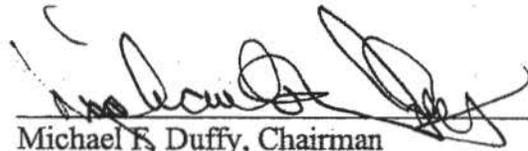
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On May 15, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to JWR for Citation No. 7686228. JWR had previously contested the underlying citation, and that proceeding had been stayed by the assigned judge pending issuance of the civil penalty assessment. JWR states that when it received the proposed penalty assessments, it inadvertently omitted to contest the assessment relating to Citation No. 7686228 and paid that assessment along with other assessments relating to citations that JWR had not challenged. JWR states that it became aware of its mistake, when, on September 13, the Secretary moved to dismiss Citation No. 7686228 because JWR had paid the

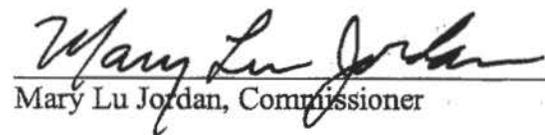
civil penalty assessment, thereby mooted the contest of the citation. The Secretary states that she does not oppose JWR's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

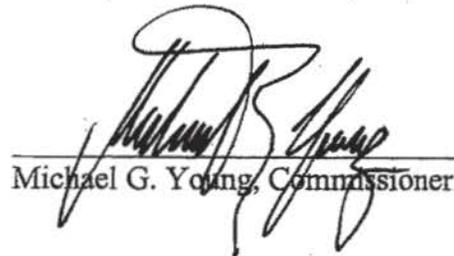
Having reviewed JWR's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for JWR's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 13, 2006

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

v.

ASH GROVE CEMENT COMPANY, INC.

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: Docket No. CENT 2007-2-M
: A.C. No. 25-00002-90499
:
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BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On October 10, 2006, the Commission received from Ash Grove Cement Company, Inc. ("Ash Grove") a motion by counsel seeking 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).

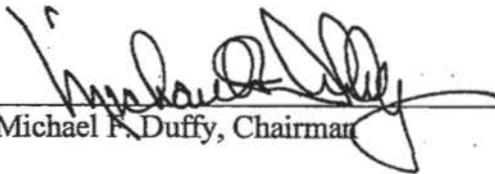
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On June 8, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Ash Grove that included ten citations that Ash Grove states it intended to contest, as well as other citations it did not intend to contest. Ash Grove sent a check to MSHA for the assessments relating to the uncontested citations. However, Ash Grove further states that, due to an administrative error in its accounting department, the notice of contest was filed internally rather than mailed to MSHA. On September 8, Ash Grove received a notice that it was delinquent in paying the assessed penalties arising from the citations that it had intended to contest. Upon conducting an administrative investigation, Ash Grove

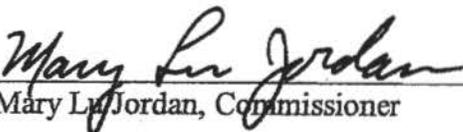
ascertained that the contest form had never been mailed to MSHA. The Secretary states that she does not oppose Ash Grove's motion to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

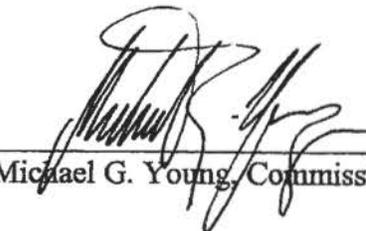
Having reviewed Ash Grove's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Ash Grove's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 2006

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

v.

MOSAIC PHOSPHATES COMPANY

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Docket No. SE 2007-10-M
A.C. No. 08-01117-91378

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On October 12, 2006, the Commission received from Mosaic Phosphates Company ("Mosaic") a motion by counsel seeking 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).

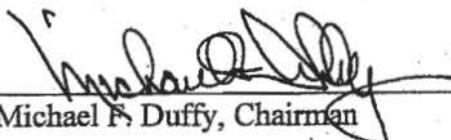
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On June 19, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Mosaic for Citation Nos. 6073698 and 6073705. On July 17, 2006, Mosaic mailed to MSHA the penalty contest form. On the form, Mosaic's assistant vice president for safety and health checked the box next to Citation No. 6073705, indicating that it wished to contest the penalty for that citation, but did not check the box next to Citation No. 6073698. However, Mosaic states that it actually intended to contest the assessments relating to both citations, as indicated by also checking a box on the contest form

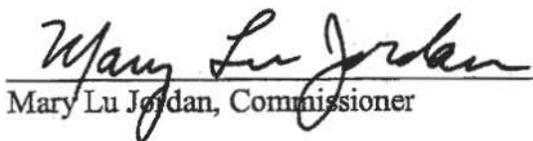
stating that it wanted "to contest and have a formal hearing on all violations listed in the Proposed Assessment(s)." MSHA did not open a contest on the assessment arising from Citation No. 6073698. The Secretary states that she does not oppose Mosaic's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

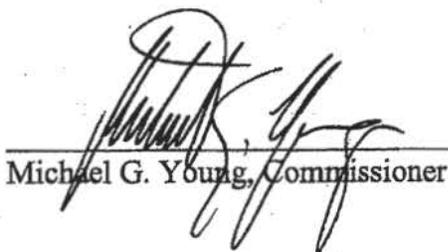
Having reviewed Mosaic's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Mosaic's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 2006

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

v.

CAM MINING, LLC.

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: Docket No. WEST 2007-37
: A.C. No. 05-03013-95774
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BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

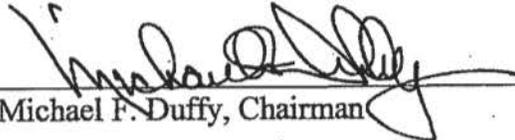
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On October 19, 2006, the Commission received from Cam Mining, LLC. (“Cam”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

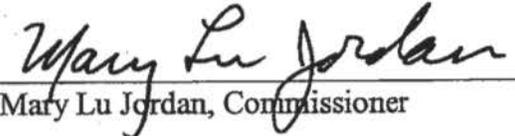
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On August 15, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Cam resulting from eight citations and orders. Cam states that, due to a miscommunication between company personnel and counsel, the proposed assessment was not sent to counsel until after the deadline for filing a penalty contest had passed. Cam further states that, because of this inadvertence or mistake, it was unable to file the assessment form in a timely manner. The Secretary states that she does not oppose Cam’s motion to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed Cam’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Cam’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 27, 2006

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

v.

STOUDT’S FERRY PREPARATION CO.

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: Docket No. PENN 2007-15
: A.C. No. 36-07892-90452
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BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On October 19, 2006, the Commission received from Stoudt’s Ferry Preparation Company (“Stoudt’s Ferry”) a motion from counsel seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

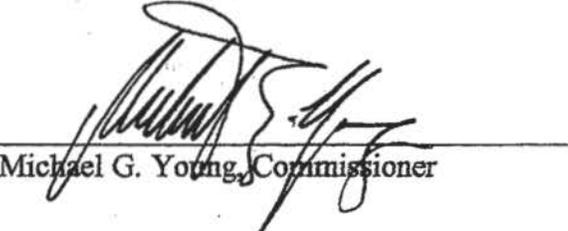
On June 8, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment, A.C. No. 000090452, to Stoudt’s Ferry for several citations, two of which Stoudt’s Ferry had previously contested and which had been stayed by an administrative law judge. However, Stoudt’s Ferry states that it inadvertently failed to contest the penalties due to confusion over the pending contest proceedings involving the citations on stay before the judge. The Secretary states that she does not oppose Stoudt’s Ferry’s request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed Stoudt’s Ferry’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Stoudt’s Ferry’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 27, 2006

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

v.

BUTLER SAND COMPANY

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: Docket No. SE 2007-26-M
: A.C. No. 09-00267-87157
:
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BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On October 20, 2006, the Commission received from Butler Sand Company (“Butler”) a letter from its assistant manager seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On May 9, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment, A.C. No. 09-00267-87157, to Butler for several citations that Butler received in March 2006. Butler states that its assistant manager met with MSHA representatives on May 12, 2006, to resolve the citations. Butler received the proposed assessment at approximately the same time, but took no action with regard to it because Butler’s assistant manager was waiting to hear the results of that conference. In June and August, Butler received from MSHA’s Civil Penalty Compliance Office letters regarding the unpaid penalties. Butler states that it contacted MSHA officials regarding the letters. The

Secretary states that she does not oppose Butler's request to reopen the penalty assessment, A.C. No. 09-00267-87157.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed Butler's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Butler's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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 2700.¹



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

¹ Butler's letter also appears to request relief from a second proposed assessment, Case No. 000100059. However, Butler has timely contested that penalty assessment; therefore, we do not address it in this order.

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 27, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEST 2006-548-M
	:	WEST 2006-549-M
v.	:	WEST 2006-550-M
	:	
LAKE VIEW ROCK PRODUCTS, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").¹ On August 24, 2006, the Commission received from Lake View Rock Products, Inc. ("Lake View") three motions made by counsel 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).

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

A. Docket Nos. WEST 2006-548-M and WEST 2006-549-M

On August 17, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessment A.C. No. 42-01975-34633 (WEST 2006-548-M)

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. WEST 2006-548-M, WEST 2006-549-M, and WEST 2006-550-M, all captioned *Lake View Rock Products, Inc.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

to Lake View, which was received on August 24, 2004, and became a final order on September 23, 2004.² Mot. Attach. A; S. Resp. Attach. A. In addition, MSHA issued proposed assessment A.C. No. 42-01975-39951 (WEST 2006-549-M) to Lake View on October 12, 2004, which was received on October 25, 2004, and became a final order on November 24, 2004. S. Resp. Attach. A. Lake View alleges that it failed to timely contest these two assessments due to “excusable neglect” resulting from a change in counsel within the same law firm. Mot. at 2, 4; Aff. Lake View also requests that the Commission reopen the penalty assessments so that it can seek to reach a settlement of the violations. Mot. at 4-6.

The Secretary states in her response that she opposes the Commission’s granting Lake View’s motion under Rule 60(b)(1) of the Federal Rules of Civil Procedure on the grounds that it was not filed within one year after the proposed penalty assessments in Docket Nos. WEST 2006-548-M and WEST 2006-549-M became final Commission orders. S. Resp. at 1-2. The record reveals that Lake View did not file its request to reopen until more than one year and eleven months after a final Commission order in Docket No. WEST 2006-548-M and more than one year and nine months in Docket No. WEST 2006-549-M.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure. 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.

We have been presented with Lake View’s failure to timely contest the proposed penalty assessments because of the neglect or inadvertence of its counsel. This is the type of error that falls squarely within the ambit of Rule 60(b)(1). However, under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. Fed. R. Civ. P. 60(b).

Because Lake View waited well over a year to request relief with regard to these two proposed assessments, its motion is untimely. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, Lake View’s motion is denied as to Docket Nos. WEST 2006-548-M and WEST 2006-549-M.

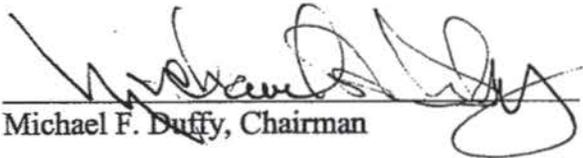
² Lake View had already contested the underlying citations in A.C. No. 42-01975-34633. That contest is the subject of Docket Nos. WEST 2004-387, WEST 2004-388, and WEST 2004-389 and is currently on stay before Commission Administrative Law Judge Jerold Feldman pending the assessment of penalties.

B. Docket No. WEST 2006-550-M

Lake View also requests the Commission to reopen another proposed assessment, A.C. No. 42-01975-72172 (WEST 2006-550-M), which was issued November 15, 2005, and became final on December 30, 2005. As in the previous two dockets, Lake View asserts that its failure to timely contest the proposed assessment resulted from circumstances relating to its change of counsel, and it requests reopening so that it can seek to reach a settlement. Mot. at 2-6. The Secretary has no objection to reopening this case because the request is within one year after the proposed assessment became a final order.

In the interests of justice, we remand Docket No. WEST 2006-550-M to the Chief Administrative Law Judge for a determination of whether good cause exists for Lake View's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.

Accordingly, we deny Lake View's request to reopen the penalty assessments in Docket Nos. 2006-548-M and WEST 2006-549-M, and those proceedings are hereby dismissed. We remand Docket No. WEST 2006-550-M for further proceedings as appropriate.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 30, 2006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. KENT 2006-469
 : A.C. No. 15-17587-90922
v. :
 :
OHIO COUNTY COAL COMPANY :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On August 25, 2006, the Commission received from Ohio County Coal Company ("Ohio County") a motion from counsel seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On June 14, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment, A.C. No. 000090922, to Ohio County for several citations. Ohio County states that, due to a clerical error on its part, it inadvertently failed to contest the penalties. The Secretary states that she does not oppose Ohio County's request to reopen the penalty assessment.

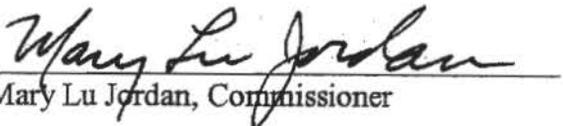
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim*

Walter Res., Inc., 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed Ohio County’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Ohio County’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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November 30, 2006

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

:
:
:
:
:
:
:

v.

Docket No. PENN 2007-30
A.C. No. 36-02945-90937

SHAMOKIN FILLER CO., INC

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 1, 2006, the Commission received from Shamokin Filler Company, Inc. ("Shamokin") a letter seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

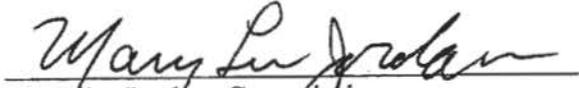
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment, A.C. No. 36-02945-90937, to Shamokin for several citations that Shamokin received in April 2006. Shamokin states that it promptly mailed to MSHA its contest of the proposed penalty assessment, that it received no response, and that now the case is closed. The Secretary responds that she has no record that the penalty contest form was received by MSHA's Civil Penalty Compliance Office, but that she has no basis for questioning that the form was sent. Consequently, the Secretary states that she does not oppose Shamokin's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

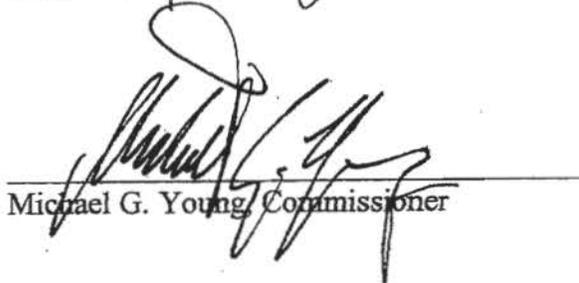
Having reviewed Shamokin’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Shamokin’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 4, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2007-37-M
	:	A.C. No. 41-03510-92607
v.	:	
	:	Docket No. CENT 2007-38-M
UPPER VALLEY MATERIALS, INC.	:	A.C. No. 41-03510-94926

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”).¹ On November 2, 2006, the Commission received from Upper Valley Materials, Inc. (“Upper Valley”) a request from its safety director seeking 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).

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

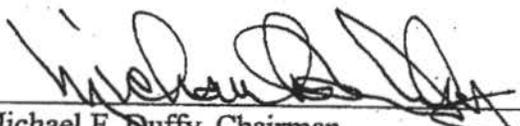
On July 5, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment, A.C. No. 41-03510-92607, to Upper Valley for citations issued in April 2006. In addition, MSHA issued proposed penalty assessment A.C. No. 41-03510-94926 on August 8, 2006, for a citation issued in April 2006. Upper Valley states that

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2007-37-M and CENT 2007-38-M, both captioned *Upper Valley Materials, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

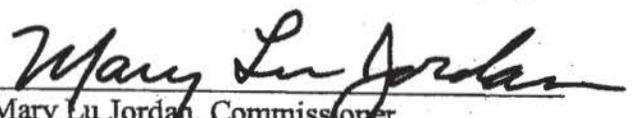
it did not receive the proposed penalty assessments until they were faxed to it on October 30, 2006. The Secretary states that she does not oppose Upper Valley's request to reopen the penalty assessments.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

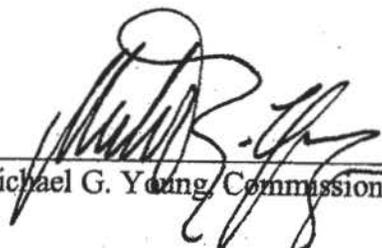
Having reviewed Upper Valley's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Upper Valley's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined 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.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 4, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2006-311-M
	:	A.C. No. 40-02513-71042
v.	:	
	:	
UNIMIN CORPORATION	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On August 28, 2006, the Commission received from Unimin Corporation ("Unimin") a letter seeking 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).

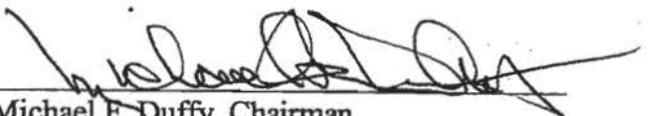
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On November 2, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment, A.C. No. 000071042, to Unimin for several citations. Unimin states that it inadvertently sent the contested penalty assessment to the MSHA office in Pittsburgh, Pennsylvania, instead of the MSHA office located in Arlington, Virginia. Unimin attached the return receipt allegedly indicating that the notice of contest was received by MSHA at its office in Pittsburgh. The Secretary states that she does not oppose Unimin's request to reopen the penalty assessment.

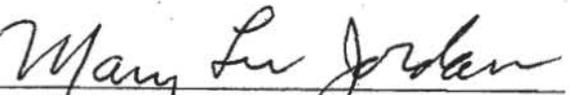
We have held that in appropriate circumstances, we possess jurisdiction to reopen

uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed Unimin’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Unimin’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 5, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2007-125-M
v.	:	A.C. No. 46-00016-72428
	:	
GREER LIMESTONE COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On November 13, 2006, the Commission received from Greer Limestone Company (“Greer”) a motion from its counsel seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

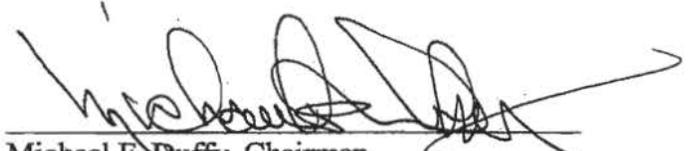
On August 10, 2005, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 6034410 to Greer. MSHA subsequently sent the operator correspondence dated November 2, 2005, stating that MSHA had conducted a special investigation related to Citation No. 6034410, that it had “decided not to pursue further investigative action at th[e] time and [that] the case [wa]s closed.” Mot., Ex. 4. MSHA later sent a proposed assessment dated November 16, 2005, to the operator proposing penalties for Citation Nos. 6034410 and 6024363. Greer states that it paid the penalty associated with

Citation No. 6024363 and, approximately on December 2, 2005, returned to MSHA the notice contesting the penalty proposed for Citation No. 6034410. MSHA later tried to collect as delinquent the penalty associated with Citation No. 6034410. Greer requests that the Commission reopen the proceedings, conclude that "this matter [is] officially closed," and remove any assessment relating to Citation No. 6034410 from all future invoices. Mot. at 5.

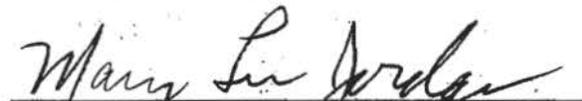
The Secretary responds that she has no record that the penalty contest form was received by MSHA's Civil Penalty Compliance Office, but that she has no basis for questioning that the form was sent. Consequently, the Secretary states that she does not oppose Greer's request to reopen the penalty assessment. The Secretary further states that she does oppose the request that the proceedings be closed, however. She explains that the MSHA letter dated November 2, 2005, merely announced the closing of the special investigation, and that the letter did not purport to "close" the citation itself. Resp. at 1.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

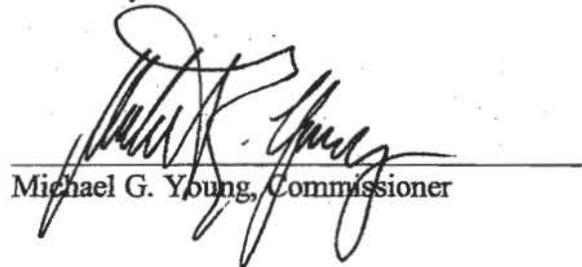
Having reviewed Greer's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Greer's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N.W., Suite 9500
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 8, 2006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. LAKE 2007-13-M
: A.C. No. 47-00811-05508
: :
E.C. VOIT & SONS :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On October 19, 2006, the Commission received from E.C. Voit & Sons ("Voit") a letter seeking 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). On November 9, the Secretary of Labor filed a response to Voit's request.

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

On July 31, 2002, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Voit for Citation Nos. 6143000, 6144201, 6144203, 6144204, 6144205, 6144206, and 6144207. The operator filed a notice contesting only the proposed penalty assessment for Citation No. 6144206. That citation was ultimately vacated, and the proceedings were dismissed in Docket No. LAKE 2002-155-M. The operator now seeks to reopen the remaining citations that were the subject of that proposed penalty assessment.

The Secretary states in her response that she opposes the Commission granting Voit's request under Rule 60(b) of the Federal Rules of Civil Procedure on the grounds that it was not filed within one year after the proposed penalty assessment became a final Commission order. S. Resp. at 1-2. The Secretary states that Voit's request should also be denied because Voit fails to offer an explanation for its failure to take timely action. *Id.* at 2.

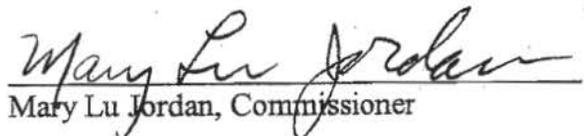
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure. 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.

We have been presented with Voit's failure to timely contest the proposed penalty assessment. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. Fed. R. Civ. P. 60(b).

Because Voit waited more than four years to seek relief, its request is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004)). Accordingly, Voit's request is denied.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 13, 2006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. KENT 2007-69
v. : A.C. No. 15-118370-99620
 :
PREMIER ELKHORN COAL COMPANY :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On November 6, 2006, the Commission received from Premier Elkhorn Coal Company (“Premier”) a motion by counsel seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

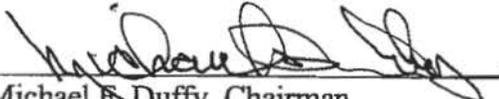
On October 4, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment, A.C. No. 000099620, to Premier for Citation No. 7436024 and other citations.¹ Premier had previously contested Citation No. 7436024. Premier states that when it received the proposed penalty assessment, it inadvertently neglected

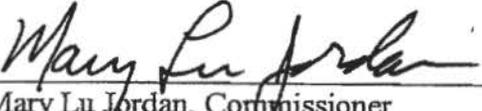
¹ Counsel for Premier filed a notice to correct the case number referred to in its motion from Case No. 00095453 to Case No. 000099620. The correct case number is reflected in this order’s caption.

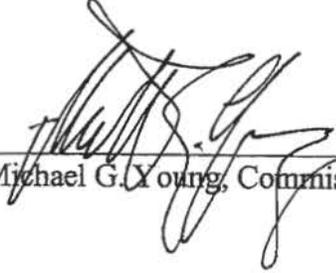
to contest the assessment relating to Citation No. 7436024 and paid that assessment along with other assessments relating to citations that Premier had not challenged. The Secretary states that she does not oppose Premier's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed Premier's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Premier's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 13, 2006

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

v.

ADVENT MINING, LLC

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: Docket No. KENT 2007-58
: A.C. No. 15-18547-97399
:

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 13, 2006, the Commission received from Advent Mining, LLC ("Advent") a motion by counsel 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).

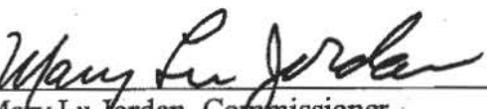
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

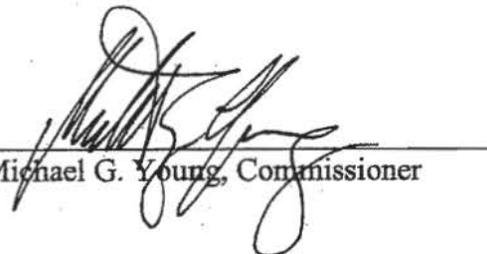
On August 31, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment, A.C. No. 15-18547-97399, to Advent for several citations, one of which Advent had previously contested. Advent states that it timely mailed to MSHA its contest of the proposed penalty assessment, but that MSHA's Civil Penalty Compliance Office has indicated that it did not receive the contest. The Secretary responds that she has no record that the penalty contest form was received by MSHA's Civil Penalty Compliance Office, but that she has no basis for questioning that the form was sent. Consequently, the Secretary states that she does not oppose Advent's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed Advent’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Advent’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 13, 2006

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

v.

MOLTAN COMPANY, LP

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: Docket No. SE 2006-315-M
: A.C. No. 40-02968-85077
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BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 6, 2006, the Commission received from Moltan Company, LP ("Moltan") a letter seeking 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).

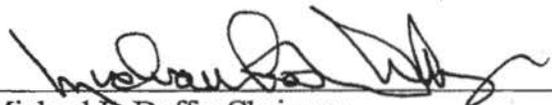
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

In February 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued several citations to Moltan. MSHA subsequently assessed penalties against Moltan for these citations in proposed assessment A.C. No. 000085077. Moltan states that it timely contested the proposed assessment and disputes the date claimed by the Secretary for Moltan's receipt of the proposed assessment. Moltan alleges that it has requested a proof of delivery for the proposed assessment from MSHA, which had not been produced by the time of its letter seeking to reopen. Neither Moltan nor the Secretary has submitted the penalty assessment at issue or any documentation concerning its receipt by Moltan. The Commission has not been provided with the date of the penalty assessment and has no basis for determining

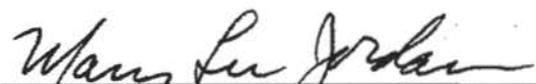
whether Moltan actually received the assessment and, if so, whether it contested the proposed assessment in a timely manner. The Secretary states that she does not oppose Moltan's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

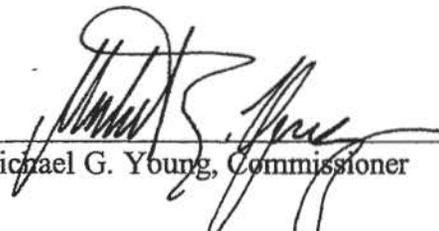
Having reviewed Moltan's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Moltan failed to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 19, 2006

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

v.

STILLHOUSE MINING COMPANY

:
:
:
: Docket No. KENT 2006-488
: A.C. No. 15-17165-88720
:
:

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 13, 2006, the Commission received from Stillhouse Mining Company ("Stillhouse") a motion by counsel seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

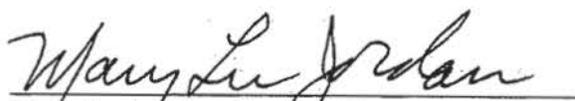
On May 19, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Stillhouse for several citations. Stillhouse had previously contested the underlying citations, and those proceedings had been stayed by the assigned judge pending issuance of penalty assessments. Stillhouse states that it intended to contest the proposed penalty assessment but inadvertently failed to do so. The Secretary states that she does not oppose Stillhouse's request to reopen the penalty assessment. The Secretary also adds that, although Stillhouse's motion failed to explain specifically why the failure to timely contest the proposed assessment was due to inadvertence, it is her understanding that

when Stillhouse received the proposed assessment, it mistakenly believed that the proposed assessment had been sent to its counsel, who would handle the matter.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed Stillhouse’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Stillhouse’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 20, 2006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. WEST 2006-592-M
: A.C. No. 48-00639-89435
FMC CORPORATION :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 25, 2006, the Commission received from FMC Corporation ("FMC") a motion by counsel 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).

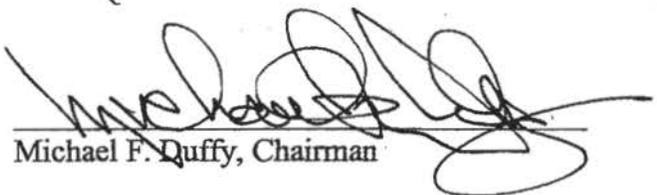
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

In March 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued several citations to FMC. MSHA subsequently assessed penalties against FMC for these citations in proposed assessment A.C. No. 000089435. FMC states that the proposed penalty assessment was dated May 30, 2006, but not received by it until the week of July 24, 2006. Neither FMC nor the Secretary has submitted the penalty assessment at issue or any documentation concerning its receipt by FMC or the date when FMC contested the proposed assessment. The Commission thus has no basis for determining whether FMC contested the proposed assessment in a timely manner. In addition, FMC asserts that it requested an informal conference with MSHA regarding the citations at issue. According to FMC, MSHA advised it

after the conference in June 2006 that it need take no action until the conference process was completed, and, as of the date of the motion, FMC had not been informed of the conference results. FMC claims that it delayed filing the penalty contest because it was still involved in the conference process. The Secretary states that she does not oppose FMC's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed FMC's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for FMC's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined 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.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 20, 2006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. LAKE 2006-152-M
v. : A.C. No. 21-01600-60300
 :
HIBBING TACONITE COMPANY :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 20, 2006, the Commission received from Hibbing Taconite Company ("HTC") a motion by counsel seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On June 28, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to HTC for two citations. HTC submitted payment for one, Citation No. 6175445, and allegedly indicated on the assessment form that it wished to contest the proposed penalty assessment for the other, Citation No. 6175063. HTC asserts that it intended to contest the penalty within the 30-day time period, and "it is unclear at this point on what date MSHA received the notification of contest." In her response to HTC's motion, the Secretary states that although she "has no record that the penalty contest form . . . was received by MSHA," she further states that she "has no basis . . . for questioning that this

form was sent to MSHA in a timely manner as asserted.” Accordingly, the Secretary does not oppose HTC’s motion to reopen.

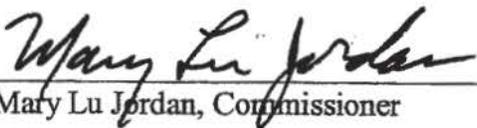
On the record before us, we are unable to determine whether HTC timely contested the proposed penalty assessment. If the company did so, the proposed assessment has not become a final order of the Commission and the company’s request for relief would be moot. *DS Mine & Development LLC*, 28 FMSHRC 462, 463 (July 2006). However, if HTC failed to timely contest the proposed assessment, we would not be able to grant the relief requested. *Id.* Under Rule 60(b) of the Federal Rules of Civil Procedure,¹ any motion for relief from a final order must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Here, HTC has requested reopening of a proposed assessment more than one year after it became a final Commission order if the company did not file a timely contest. See *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying request to reopen filed more than one year after penalty proposals had become final orders).

¹ We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *Id.* at 787.

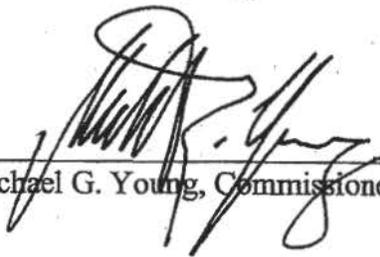
Accordingly, we remand this matter to the Chief Administrative Law Judge for a determination of whether HTC timely contested the proposed penalty assessment at issue. If it is determined that the company did file a timely contest, the Chief Judge shall order further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If it is determined that HTC failed to timely contest the proposed assessment, the Chief Judge shall dismiss this proceeding.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 20, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2007-40
ADMINISTRATION (MSHA)	:	A.C. No. 46-08801-84568
	:	Docket No. WEVA 2007-41
	:	A.C. No. 46-08801-82207
	:	Docket No. WEVA 2007-42
	:	A.C. No. 46-08801-94139
v.	:	Docket No. WEVA 2007-43
	:	A.C. No. 46-08801-87351
	:	Docket No. WEVA 2007-44
	:	A.C. No. 46-08801-90231
ARACOMA COAL COMPANY	:	Docket No. WEVA 2007-45
	:	A.C. No. 46-08801-90239

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").¹ On October 16, 2006, the Commission received from Aracoma Coal Company ("Aracoma") a motion from counsel seeking 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 Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Numbers WEVA 2007-40, WEVA 2007-41, WEVA 2007-42, WEVA 2007-43, WEVA 2007-44, and WEVA 2007-45, all captioned Aracoma Coal Company and all involving similar procedural issues. 29 C.F.R. § 2700.12.

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

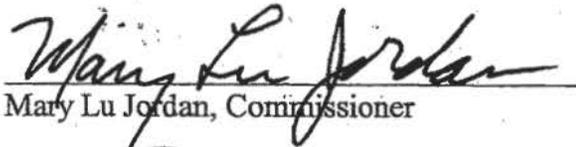
In February and March, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued approximately 220 citations to Aracoma as a result of an investigation of a fatal mine fire. Aracoma timely filed notices of contest of the citations, and the cases were stayed by the assigned judge. Aracoma states that, sometime thereafter, its safety director mistakenly paid the proposed assessments for approximately 75 citations that Aracoma previously had contested and did not intend to pay. By letters dated July 13 and July 20, 2006, Aracoma notified the Secretary that it had paid the penalties by mistake. The Secretary states that she does not oppose Aracoma's request to reopen the penalty assessments.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

Having reviewed Aracoma's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Aracoma's failure to timely contest the penalty proposals and whether relief from the final order should be granted.² If it is determined 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 2700.³



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

² On October 6, 2006, the judge assigned to the related contests of the underlying citations dismissed those contests after Aracoma failed to comply with an order requiring it to move to reopen the instant penalty proceedings by September 25, 2006. Aracoma now requests in this proceeding that the Commission also reopen those contest cases. Request to Reopen Penalty Assessments at 2, n.2. We decline to do so. To appeal the judge's decision in the underlying citation contests, Aracoma was obliged to timely file a petition for discretionary review. 30 U.S.C. § 823 (d)(2)(A) (ii); Commission Procedural Rule 70. This it failed to do. In any event, if these penalty proceedings are reopened, Aracoma will still have the right to challenge the fact of violation and any special findings contained in the underlying citations. Commission Procedural Rule 21(b).

³ Because Aracoma has not included with its motion to reopen the six penalty assessments that it seeks to reopen, or a precise listing of the citations associated with the individual penalties within each of the assessments from which it seeks relief, it is impossible to know with certainty the particular penalties that were mistakenly paid, or the related citations. On remand, Aracoma must submit sufficient supporting materials (such as the proposed penalty assessments) to the judge, in order that he can ascertain those penalties (and the related citations) that are included in the penalty assessments from which Aracoma seeks relief.

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I.

Factual and Procedural Background

JWR operates the No. 7 Mine, an underground coal mine in Brookwood, Alabama. 28 FMSHRC at 134. Electrically-powered conveyor belts transport coal through the mine to the surface, where rock is separated from coal, which is further processed. *Id.* The belts stand about 45 to 60 inches above the mine floor. Tr. 128, 188. Initially, at the face, coal is dumped onto the North Main belt, which goes to the North Main chute, or header, at the outby end of the belt. 28 FMSHRC at 134. The chute is 40 inches wide and 20 inches long. Tr. 186-87. From the chute, the coal falls onto the West A belt.² 28 FMSHRC at 134. While on that belt, the coal goes through another chute at the end of the West A belt and is dumped onto the Mother belt, which transports the coal to the surface of the mine. *Id.*; Tr. 286-87. On the surface, the coal goes into a bunker where skips pick up the coal and carry it into the preparation plant where the rock is separated from the coal. Then the rock is placed on a refuse belt which carries the rock outside the plant onto a refuse pile. Tr. 286-87. A radial stacker is used to distribute the refuse evenly on the pile. Tr. 287.

At the intersection of the North Main belt and West A belt, there is a series of buttons, or switches, each of which controls power to one of the belts.³ 28 FMSHRC at 134. In addition, a television camera is stationed on the east side of that intersection to transmit pictures of the area, including the North Main discharge chute, to the control office on the surface. *Id.* at 135. Catwalks parallel either side of the North Main belt, and there is a “crossover” on the West A belt in front of the discharge chute. *See* JWR Ex. 1-A (attached).

On April 22, 2004, evening-shift laborer Gary Keeton was assigned to the area around the West A belt and the North Main belt. 28 FMSHRC at 135. His duties included keeping the surfaces around the belts clean of coal spillage and clearing any obstructions from the chutes. *Id.* It was not unusual for material to clog the chutes, and the North Main chute generally became clogged more frequently than the West A chute, which fed the Mother belt. *Id.* One way to remove rock that was blocking a chute was to use a steel bar to pry the rock loose. *Id.* at 137. At around 10:35 p.m., miner Carlos Maynor saw Keeton washing the discharge chute at the West A belt roller. *Id.* at 135.

At 10:57 p.m., power to the West A and North Main belts was cut off. *Id.* From 10:57:22 to 11:26 p.m., electric power to the North Main belt was turned off by one of the

² In the proceedings below, the West A belt was sometimes referred to as the West Main belt.

³ Attached to the decision is a schematic drawing of the layout of the conveyor belts, chutes, and the buttons or switches. Switches with an R designation control the West A belt, and switches with a B designation control the North Main belt. 28 FMSHRC at 134 n.1. The drawing was used as an exhibit at trial and was designated as JWR Ex. 1-A.

switches at the intersection.⁴ *Id.* The log also showed that, for 32 seconds, from 10:57:38 p.m. to 10:58:10 p.m., power to the West A belt was turned off. *Id.* The computer log recorded these times based on a signal from one of the remote switches that controlled power to the belts, but the log did not identify which of the switches was used to deactivate the belts. *Id.* See JWR Ex. 1-A. Also at approximately 10:57 p.m., an individual in the mine control office on the surface observed a transmission from the North Main intersection on the television screen that showed the boots of an unidentified figure on the east catwalk in front of the chute on the North Main belt. 28 FMSHRC at 135 (citing Tr. 212).

Ned Martin worked as a laborer performing the same duties as Keeton on the owl shift, which followed Keeton's shift. *Id.* Generally, when Martin arrived at the beginning of his shift, he would meet with Keeton near the west catwalk at the North Main chute, because a bench was located there where they kept their lunch boxes. Tr. 156-57. When Martin arrived at the chute on the night of April 22, he observed that the West A belt was running but that the North Main belt was not. 28 FMSHRC at 135. Martin looked for Keeton but did not see him. Tr. 157-58. He looked up the chute on the North Main belt and saw a rock, about three to four inches in diameter that was rounded and shiny. 28 FMSHRC at 135, 138. Someone from the control office called him and asked him why the North Main belt was not running, and Martin turned the power back on. Tr. 157-58. He did not try to dislodge the rock from the chute, but sometime later he observed that the rock was no longer in the chute. 28 FMSHRC at 135.

Keeton remained unaccounted for, and a comprehensive search was initiated. Gov't Ex. 4 at 3-4. At around 4:00 a.m., his body was found on the surface of the mine. 28 FMSHRC at 136. His body was located in a bunker where rock that had been separated from coal in the coal preparation plant was dumped after leaving the plant. *Id.* & n.2. Also on the surface, a drill steel bar, similar to one used by Keeton to unclog the chutes, was found inside the preparation plant in the duct work above the rotary breaker. *Id.* at 136. During MSHA's investigation into the accident, a ladder was found on the east catwalk about two feet away from the chute leaning against the frame of the conveyor belt. *Id.*; Tr. 193-95.

Following its investigation, MSHA issued a citation alleging a violation of 30 C.F.R. § 75.1725(c). Gov't Ex. 7. The citation stated in pertinent part:

[M]aintenance was being conducted on April 22, 2004 between 10:57 PM and 11:15 PM at the North Main Belt Header and West "A" belt conveyor without removing power and blocking the West "A" belt from motion. As a result, a miner contacted the moving belt conveyor while attempting to perform assigned belt maintenance, that included removing blockages, and was fatally injured as he contacted the moving belt or as he was subsequently

⁴ The power was not turned back on until 11:26 p.m. when Keeton's replacement, Ned Martin, came to the area at the start of his shift. Tr. 157-58.

transported on the belt 9000 feet through belt transfers and a rock breaker to the surface mine refuse pile.

Id. at 1. The violation was designated S&S. *Id.*

JWR filed a notice of contest regarding MSHA's proposed penalty assessment, and the case was assigned to a judge. Prior to the hearing, the parties entered into joint stipulations of fact that formed part of the record in the proceeding.

On March 9, 2006, the judge issued a decision in which he affirmed the violation alleged in the citation. The judge found that, based on the existence of the "*combination of all the facts* relied on by the Secretary," it was reasonable to infer that Keeton turned off power to the belts about 10:57 p.m. and then started to use a steel bar to remove a rock or rocks that were stuck in the North Main chute. 28 FMSHRC at 138 (emphasis in original). The judge further found that power at the West A belt was off only briefly, indicating that power was on and the belt was not blocked against hazards when Keeton was trying to clear the chute. *Id.* at 139. In so concluding, the judge stated that JWR "has not set forth any plausible theory based upon any facts in the record to support a reasonable inference that Keeton was not involved in clearing the chute." *Id.* at 138-39. The judge also rejected JWR's argument that, even if Keeton had been trying to remove a rock from the chute, the work did not constitute "maintenance" within the meaning of the regulation. *Id.* at 139-40. Relying on the criteria in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the judge also determined that the violation was S&S. *Id.* at 140-41. In assessing a penalty for the violation, the judge examined the penalty criteria and concluded that a penalty of \$32,500 was appropriate. *Id.* at 141-42.

II. Disposition

JWR argues that the judge's findings that supported his inference that Keeton was performing maintenance work without removing power from the West A belt and blocking it against motion are not supported by substantial evidence. PDR at 3; JWR Br. at 6-8, 18-19. JWR attacks the inferences drawn by the judge from the facts because they are not "reasonable." *Id.* at 9-14. JWR argues that the judge erred by placing the burden of proof on it to show what happened to Keeton. *Id.* at 14-17. JWR challenges the judge's conclusion that unclogging or clearing a chute is "maintenance" as contemplated by section 75.1725(c). *Id.* at 17. JWR argues that the present case is distinguishable from the decision in *Walker Stone Co.*, 19 FMSHRC 48 (Jan. 1997), upon which the judge relied. *Id.* at 17-18. JWR also asserts that the Secretary is seeking to enforce a new definition of "maintenance" to include unclogging a chute, without giving fair notice of the interpretation. *Id.* at 19-22.

JWR further argues that the judge's S&S determination is incorrect because there was no violation and that there was a lack of evidence to support the second, third, and fourth elements of the *Mathies* test. *Id.* at 22-23. With regard to the penalty, JWR notes that this was its first

violation of the regulation during the two-year period prior to the citation and maintains that the judge erred when he concluded that JWR's negligence level was "moderate." *Id.* at 23-25.

In response, the Secretary argues that the judge's finding that JWR violated section 75.1725(c) is supported by substantial evidence. S. Br. at 9-10. The Secretary further argues that the judge's inference that Keeton was trying to unclog the North Main chute when he came into contact with the West A belt was reasonable. *Id.* at 11-19. The Secretary disagrees that the judge required JWR to prove facts that would support an alternate theory to the inference that Keeton was involved in clearing the chute. *Id.* at 19-22. The Secretary asserts that, based on its plain meaning, section 75.1725(c) applies to dislodging rocks from the chute and rejects JWR's argument that it did not have notice of the regulation's terms. *Id.* at 23-30. The Secretary states that substantial evidence supports the judge's S&S determination. *Id.* at 30-32. Finally, the Secretary argues that the judge properly assessed the penalty, noting that the record supported the judge's finding of moderate negligence. *Id.* at 32-34.

The facts in this proceeding are generally not in dispute; however, the inferences drawn from those facts are. Further, JWR challenges the judge's reading of section 75.1725(c), which it is charged with violating. We address first the meaning of the regulation.

A. Meaning of section 75.1725(c)

Section 75.1725(c) provides that "repairs or maintenance shall not be performed on machinery" until the power is off and the machinery is blocked against motion. Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. See *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. See *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

As always, the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. See, e.g., *Thompson Bros. Coal Co.*, 6 FMSHRC 2091, 2096 (Sept. 1984). "Repair" means "to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state: renew, revivify . . ." *Webster's Third New Int'l Dictionary, Unabridged* 1923 (1986). "Maintenance" has been defined as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . ." and "[p]roper care, repair, and keeping in good order." *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), quoting *Webster's* at 1362, *aff'd*, 156 F.3d

1076 (10th Cir. 1998); see Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 328 (2d ed. 1997). See also *Sedgman*, 28 FMSHRC 322, 329 (June 2006) (in reading 30 C.F.R. § 77.200, which requires that all mine structures “shall be maintained in good repair to prevent accidents,” the Commission applied the ordinary meaning to “maintain,” in the absence of a technical usage).

The judge properly relied on the Commission’s decision in *Walker Stone* in concluding that Keeton’s work involving clearing obstructions from the chute was repair work or maintenance within the meaning of section 75.1725(c). In *Walker Stone*, the Commission concluded that the “repair or maintenance” language in a similarly worded regulation⁵ “clearly and unambiguously reaches the facts presented in this case, i.e., the breakup and removal of rocks clogging the crusher.” 19 FMSHRC at 51. There, the equipment at issue was a rock crusher at a quarry that was fed by a chute or hopper. When a rock became lodged inside the crusher, it prevented the crusher from operating until the rock was removed. *Id.* at 49. While there are factual distinctions between the crusher in *Walker Stone* and the coal chute at JWR’s mine, the Commission’s rationale in applying the regulation in *Walker Stone* is highly relevant to the instant case.

As the Commission explained in *Walker Stone*, “[I]t is undisputed that the obstructing rock caused the crusher’s drive motor to stall, rendering the crusher defective or inoperable until the rock was removed. . . . In our view, the removal of rock to restore the crusher to working condition is clearly covered by the broad phrase ‘repairs or maintenance of machinery or equipment.’” *Id.* at 51. The Commission’s rationale as to why freeing a rock from the crusher was “repair or maintenance” within the scope of the regulation is persuasive. See also *Sec’y of Labor v. Ohio Valley Coal Co.*, 359 F.3d 531, 535-36 (D.C. Cir. 2004) (where the court held that section 75.1725(c) broadly applied to a miner’s assessment of a mechanical problem with a running conveyor belt because the assessment was part of the task of keeping equipment in a state of repair).

In sum, we rely on the plain meaning of the “repair or maintenance” language in section 75.1725(c). Moreover, the Commission’s *application* of the repair or maintenance language in an analogous regulation to a similar piece of equipment in *Walker Stone* is controlling here. Therefore, we reject JWR’s argument that section 75.1725(c) does not apply to clearing the chute on the North Main belt.⁶

⁵ The regulation at issue in *Walker Stone*, 30 C.F.R. § 56.14105, applies to surface mining equipment at metal and nonmetal mines and states, “[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion.”

⁶ Because we conclude that the meaning of the standard is clear from the regulation’s plain language, it follows that the standard provided the operator with adequate notice of its requirements. See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that

B. Whether a violation of section 75.1725(c) occurred

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

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.* Finally, the Commission has noted, "The possibility of drawing either of the two inconsistent inferences from the evidence [does] not prevent [an agency] from drawing one of them" *Id.* (quoting *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942)).

The Secretary's theory of violation in the case is built on the following allegations: between 10:57 p.m. and 11:15 p.m., Keeton was performing maintenance work at the North Main and West A belts that included removing blockages from the North Main chute. The Secretary further maintains that Keeton attempted to unclog the chute without removing power and blocking the West A belt from motion. As a result, the Secretary concludes that Keeton was fatally injured as he contacted the moving belt or as he was subsequently transported out of the mine on the moving belt. 28 FMSHRC at 136; Gov't Ex. 7.

In evaluating the Secretary's case, the judge considered a number of facts that were based on record testimony and evidence, as well as the stipulations entered into by the parties. The judge enumerated nine facts that he considered as support for the Secretary's position that section 75.1725(c) was violated. 28 FMSHRC at 136-37. Thus, the judge initially found that, on April 22, 2004,⁷ Keeton was the only evening shift miner assigned to the North Main and West A belts

adequate notice is provided by unambiguous regulation). Therefore, we reject JWR's argument, Br. at 19-22, that it did not have fair notice of the regulation's application to clearing obstructions from the chute.

⁷ JWR correctly notes that several of the judge's references in his findings to "April 23" should be to "April 22." JWR Br. at 8. See 28 FMSHRC at 136-37. In addition, the reference in the judge's decision, 28 FMSHRC at 138, as to when the drill steel bar was found on the surface

and that among his duties was clearing any obstructions from the chute that dumped coal from the North Main belt to the West A belt.⁸ *Id.* Further, there was testimony from another laborer, Ned Martin, that the chutes on the belts can become clogged and that the North Main chute became clogged more frequently than the West A chute. *Id.* at 137. The judge also found that, when Martin arrived for work on April 22, he saw that the North Main belt was not running and that he observed a large round rock in the top of the chute and that the rock appeared shiny, as if it had been smoothed off. *Id.* Martin also testified that one way to remove a rock obstructing a chute is to use a steel bar to pry it loose. *Id.* The judge also found that, on April 23, at about the same time at which Keeton's body was found, a steel bar similar to the one Keeton used to pry rocks loose from the chute was found on the surface in the preparation plant. *Id.* & n.4.

The judge noted further that Martin testified that, although miners are not allowed to climb onto a belt to clear a chute, he has done so by using a bar to dislodge a rock from the chute while standing on the West A belt below. 28 FMSHRC at 137. The judge held that, during MSHA's investigation, it was determined that a television camera was transmitting pictures from the area where Keeton was working to the control office, and that at 10:57 p.m. the screen showed an unidentified figure on the catwalk in the front of the North Main chute. *Id.* Further, the judge found that at 10:57:38 p.m., power was turned off to the North Main belt and stayed off for about one half hour, and for approximately thirty seconds power was turned off to the West A belt. *Id.* Finally, the judge noted that, at 4:23 a.m. on April 23, Keeton's body was found on the surface in a pile of rocks that had been conveyed out of the mine. *Id.*

Substantial, largely uncontradicted, record evidence fully supports these findings. JWR challenges several of the facts that the judge relied on. JWR Br. at 6-8. However, we conclude that those challenges lack merit, because the facts that the judge relied on in drawing in his inferences all have record support.⁹

should be "April 23," rather than "April 24." Tr. 213.

⁸ JWR asserts that the judge's finding that it was one of Keeton's duties to clear obstructions from the North Main chute is not supported by the record because Ned Martin's testimony, upon which this finding was based, did not refer to the belt in its configuration at the time of the accident. JWR Br. at 8 (citing Tr. 144-45). However, Martin identified the configuration of the belts and chutes from a picture that was taken just after the accident as being an accurate depiction of the area about which he was testifying. Tr. 143. Thus, there is nothing in Martin's testimony that would indicate that it referred to a changed or more recent belt configuration. In any event, as the Secretary notes, Br. at 11 n.1, the parties stipulated that one of Keeton's assigned tasks "included clearing any obstruction from the North Main belt head roller chute at the West A belt." Jt. Stip. 13.

⁹ JWR claims that one of the "facts" relied upon by the judge in drawing his inference — that "the West A belt was not blocked against motion" — is unsupported by the record. JWR Br. at 6. This argument misses the mark. This aspect of the judge's decision is an inference drawn

Based on these facts, the judge concluded that it was “reasonable to infer” that Keeton turned off the power to the belts at about 10:57 p.m. and then started to use a steel bar to remove a rock that was stuck in the North Main chute. 28 FMSHRC at 138-39. The judge further concluded that, although Keeton had removed power from the North Main belt with the remote control button, power was only removed from the West A belt for a brief period, and the belt remained in motion and had not been blocked during the relevant period. *Id.* at 139.

While it is possible that other inferences could have been drawn from the facts surrounding Keeton and his fatal accident on April 22, it is for the trier of fact to decide among reasonable inferences. Moreover, it is not necessary that the inference drawn by the judge be more likely correct than other permissible inferences. *See generally* 9A Wright & Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995). “In cases where more than one reasonable inference could have been drawn from the record, it is for the trier of fact to decide between those inferences.” *Sec’y of Labor on behalf of Jackson v. Mountain Top Trucking Co.*, 23 FMSHRC 1230, 1236 (Nov. 2001). *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 13 n.10 (Jan. 1997) (“[T]he possibility that two inconsistent conclusions may be drawn from the evidence does not mean that the [fact finder’s] findings are unsupported by substantial evidence considering the record as a whole.”) (quoting *NLRB v. Vincent Brass & Aluminum Co.*, 731 F. 2d 564, 567 (8th Cir. 1984)). We conclude that the judge’s inferences are reasonable and rationally connected to the facts on which the judge based them.¹⁰ Therefore, we do not disturb them.¹¹

Before the judge, JWR argued that there was no evidence that Keeton was trying to remove a rock from the chute; that there was no spillage around the North Main belt that would have indicated the chute was clogged; that the rock that Ned Martin saw in the chute moved out of the chute when power was restored to the North Main belt, indicating that the rock had not been obstructing the chute; and that there was no evidence establishing that the steel bar found on

from facts, was identified as such by the judge (28 FMSHRC at 136), and was not included in the factual statements supporting his inferences. *See id.* at 136-37. Thus, as an inference, it should be reviewed under a reasonableness standard. *Mid-Continent Res.*, 6 FMSHRC at 1138.

¹⁰ JWR repeatedly argues that there is an absence of direct evidence supporting the judge’s inferences, including that Keeton was performing maintenance when he came into contact with the belt. JWR Reply Br. at 4. However, as the Commission has recognized, inferences are used when it is difficult or impossible to obtain direct evidence on the fact to be inferred. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284 (Dec. 1998).

¹¹ Even if certain details of Keeton’s activities at the end of his shift are unknown, the facts as found by the judge can cumulatively be found to indicate that Keeton was actively involved with maintaining the belts and chute and trying to correct an apparent problem when he came into contact with a moving belt at a time when the power should have been off and the belt blocked against motion. This would suffice to establish a violation under the D.C. Circuit’s decision in *Ohio Valley*, 359 F.3d at 535-36.

the surface had been used by Keeton. 28 FMSHRC at 137-38. While the judge acknowledged that these facts tended to weaken the nexus between certain individual facts and inferences that the Secretary wanted drawn, nevertheless, the judge considered it critical to consider “the existence of the *combination of all the facts*.” *Id.* at 138 (emphasis in original). In rejecting JWR’s assertion that these facts undercut the inferences that he drew from other facts, the judge concluded that the facts relied on by JWR “are insufficient to rebut the inferences drawn from the Secretary’s case-in-chief.” *Id.* We see no basis for disturbing the judge’s conclusion.¹²

Before the Commission, JWR argues that the judge improperly placed the burden of proof on it to show a “plausible theory based upon any facts in the record to support a reasonable inference that Keeton was not involved in clearing the chute.” JWR Br. at 14-15, quoting 28 FMSHRC at 138-39. JWR asserts that the judge did not require the Secretary to prove her case by a preponderance of the evidence but rather required JWR to prove that Keeton was not performing maintenance work when he contacted the belt. *Id.* at 15. However, in agreement with the Secretary, we conclude that the judge’s decision clearly indicates that the Secretary was required to carry her burden of proof and prevail in the case by a preponderance of evidence.

In that part of the decision immediately preceding the judge’s statement that JWR had not shown “any plausible theory” as to what Keeton was doing, the judge clearly evaluated the facts elicited by the Secretary and the inferences that she requested him to make. 28 FMSHRC at 136-37. The judge then weighed the facts and arguments supporting JWR’s position, referring to this as JWR’s “rebuttal of the Secretary’s case.” *Id.* at 138. Later in the decision, the judge again noted that the facts shown by JWR “are insufficient to rebut the inferences drawn from the Secretary’s case-in-chief.” *Id.*; *see also id.* at 139 (“I find that the arguments and evidence relied on by [JWR] to be too speculative to support any reasonable inference that Keeton fell on the belt but not while engaged in clearing the chute.”). Finally, the judge concluded by stating that “the Secretary has established by a preponderance of evidence” that Keeton was engaged in attempting to move a rock that was lodged in the North Main chute. *Id.*

The foregoing analysis makes clear that the judge required the Secretary to carry her burden of proof in sustaining a violation of the regulation. Therefore, JWR’s argument that it had to independently prove an alternate plausible theory as to what Keeton was doing, rather than to rebut the Secretary’s case, lacks merit when the decision is read in its entirety. *See Twentymile Coal Co.*, 26 FMSHRC 666, 681 (Aug. 2004) (judge’s several uses of word “could” in his S&S determination were not grounds for reversal when it was clear that judge adhered to criteria in

¹² In any event, it is not essential that all of the judge’s findings of fact be affirmed, as long as the facts that are upheld on review are supported by the record and are sufficient to sustain the ultimate conclusion. *See Sec’y of Labor on behalf of Kaczmarczk v. Reading Anthracite Co.*, 21 FMSHRC 572, 581 n.11 (June 1999) (affirming the judge’s conclusion, based on the record evidence as a whole, that the operator established its affirmative defense in a discrimination case, even if the judge had erred concerning certain evidentiary findings related to that defense).

Mathies Coal Co.), rev'd on other grounds, 411 F.3d 356 (D.C. Cir. 2005). See also *In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838-42 (Nov. 1995) (judge's reference in his decision to the Secretary having failed to show that the "only reasonable explanation" for the allegedly violative conduct did not indicate that he misapplied the preponderance of evidence standard but rather that he required an examination of other possible causes of the violation), *aff'd sub nom. Sec'y of Labor v. Keystone Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Further, JWR argues that inadequate consideration was given to a toxicology report, JWR Ex. 4, which indicated that Keeton's blood contained the drug orphenadrine, which has possible side effects of drowsiness, dizziness, and fainting. JWR Br. at 4 n.3, 13. However, the judge found a lack of record support regarding the "medical effects of the medication . . . , its quantity, or the length of time that it had been in his blood stream." 28 FMSHRC at 139. In this regard, the only evidence in the record regarding the side effects of the drug was a document printed off an internet web site. There was no testimony on the drug's effect on Keeton. JWR Ex. 5; Tr. 303-06. Thus, substantial evidence supports the judge, and we agree that there is a lack of record evidence upon which to base any further findings regarding the drug and its effect on Keeton.

Finally, JWR contends that the judge ignored evidence that Keeton was a safe worker. JWR Br. at 10. With regard to Keeton's record as a safe worker, the Commission has previously held that such general evidence that a miner is "careful" is insufficient to contradict or impeach more specific evidence of a violation. See *Steele Branch Mining*, 15 FMSHRC 597, 600 n.5 (Apr. 1993). Therefore, we reject JWR's argument.

In short, we conclude that substantial evidence supports the judge's factual findings. We further conclude that the inferences that he drew from the facts were reasonable and logically connected to the facts from which they were drawn.

C. The S&S determination

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further 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.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

JWR's argument that the judge should not have found that the violation of section 75.1725(c) was S&S essentially reargues that there was no underlying violation. JWR further argues that there was no substantial evidence to support the second, third, and fourth *Mathies* factors. PDR at 20-21; JWR Br. 22-23. For the reasons stated in support of the violation, substantial record evidence fully supports that there was a violation that created a discrete safety hazard. Further, as the judge found, because the hazard resulted in a fatality, it is evident that the third and fourth *Mathies* factors have been met. 28 FMSHRC at 141. We, therefore, affirm the judge's S&S determination.

D. The penalty calculation

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.¹³ *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). In reviewing a judge's penalty

¹³ 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.

assessment, we must determine whether the judge's findings with regard to the penalty criteria are in accord with these principles and supported by substantial evidence. Here, JWR takes issue with the judge's consideration of two of the criteria: violation history and level of negligence.

In his decision, the judge considered JWR's history of violations to be a neutral factor in assessing the penalty. 28 FMSHRC at 142. JWR argues that the judge erred in failing to consider that the violation of section 75.1725(c) was its first violation of that regulation during the two prior years. However, in arguing that the judge should have treated its violation history more favorably, JWR errs. The Commission has previously held that the reference in section 110(i) to an "operator's history of previous violations" refers to the operator's general history of previous violations, not just to violations of a kind similar to the one giving rise to the penalty assessment. See *Jim Walter Res., Inc.*, 18 FMSHRC 552, 556-57 (Apr. 1996).

Further, in assessing the penalty, the judge considered JWR's level of negligence to be "moderate." JWR takes issue with that determination because, JWR asserts, the judge failed to adequately consider JWR's training of its miners in general and Keeton's training in particular. JWR Br. at 23-24; JWR Reply Br. at 16-17. In support, JWR argues that miner Ned Martin testified regarding the training he received on belt safety and that the safety director of the mine adopted MSHA's "best practices" for belt safety and integrated them into its training. *Id.* However, the judge's decision indicates that he fully considered these facts. In this regard, the judge noted that, although JWR generally trained its workers not to straddle a moving belt while trying to remove a rock from the chute, there was no evidence that Keeton received this training. 28 FMSHRC at 141. Substantial evidence supports the judge's finding that there was a lack of record evidence as to what training Keeton received.¹⁴ Finally, it is apparent from the judge's decision that he fully considered the training that miners received¹⁵ and Keeton's record as an experienced and safe worker. 28 FMSHRC at 141. We see no basis for setting aside the judge's determination of moderate negligence as an abuse of discretion. See *U.S. Steel Corp.*, 6 FMSHRC at 1432. We, therefore, affirm the judge's penalty of \$32,500.

¹⁴ JWR's assertion, JWR Br. at 24, that the judge precluded it from placing into evidence testimony regarding Keeton's training is not supported by the transcript pages that it cites.

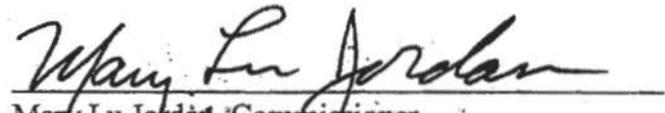
¹⁵ In support of the judge's determination of moderate negligence, the Secretary argues that JWR's training of miners with regard to procedures in performing maintenance or repairs on the belt system was not consistent with the requirements of section 75.1725(c), because the remote control switches did not remove power from the belts; nor did activation of the switches meet the blocking requirement. S. Br. at 33-34. In light of the fact that the judge did not address this point in analyzing the negligence factor in section 110(i), it is not necessary for the Commission to reach it in reviewing the judge's penalty assessment.

III.
Conclusion

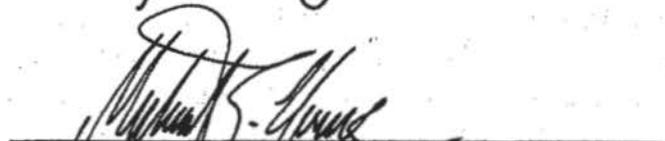
On the basis of the foregoing, we affirm the judge's decision in all respects.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

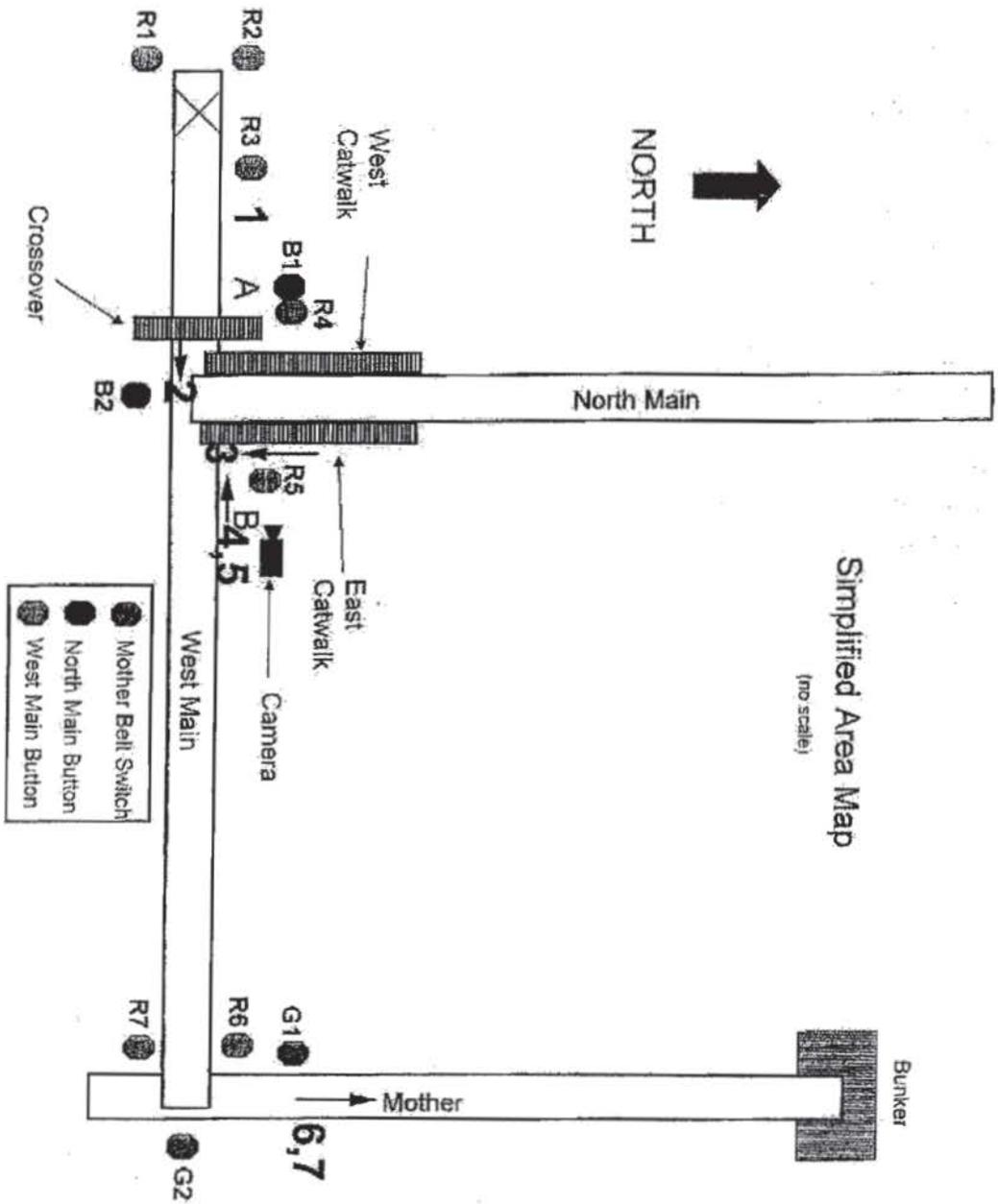
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

December 21, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 2007-144
	:	A.C. No. 46-01456-85356
EASTERN ASSOCIATED COAL, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

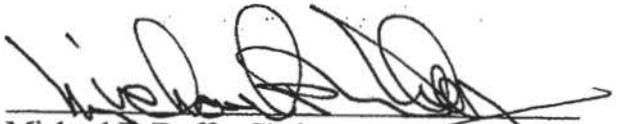
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 13, 2006, the Commission received from Eastern Associated Coal, LLC ("Eastern") a motion from its counsel requesting to reopen a penalty assessment that had become a final 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

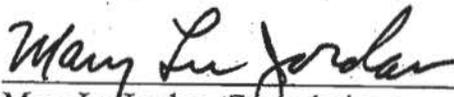
On March 9, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued three citations to Eastern. Eastern contested those citations, and that proceeding was stayed by the assigned judge. MSHA subsequently sent Eastern a proposed penalty assessment relating to the citations. The company offers no explanation for its failure to timely contest that proposed assessment. The Secretary filed a response to Eastern's motion to reopen in which she responds that a party must provide an explanation that constitutes adequate or good cause for its failure to take required action, but that Eastern identifies no grounds for requesting that the proposed penalty assessment be reopened.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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.

Because Eastern’s request for relief does not explain the company’s failure to contest the proposed assessment, and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. See *Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006).



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

December 21, 2006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2007-99-M
v. : A.C. No. 02-01138-81209 FF6
 :
PARSONS STEEL ERECTORS, INC. :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 22, 2006, the Commission received from Parsons Steel Erectors, Inc. ("Parsons") a letter seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On February 23, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment, A.C. No. 000081209, to Parsons proposing penalties in the sum of \$184.00 for Citation Nos. 6311286 and 6311287, and requesting the payment of an unrelated outstanding balance. Parsons states that, on approximately March 8, 2006, it sent payment for the outstanding balance and returned the form to MSHA, contesting the proposed penalties for Citation Nos. 6311286 and 6311287. The operator later received a letter from MSHA dated June 5, 2006, requesting payment in the amount of \$184.40 for the two citations. On approximately June 20, 2006, Parsons paid MSHA the amount of \$184.40. On approximately September 25, 2006, Parsons received from MSHA a refund in the amount of

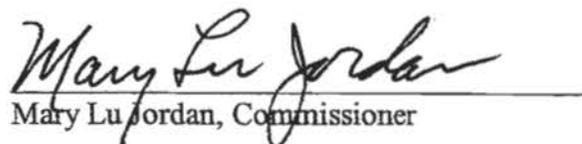
\$184.40. Parsons requests that the Commission reopen the proposed penalty assessment. The Secretary responds that she does not oppose Parsons' request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. 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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

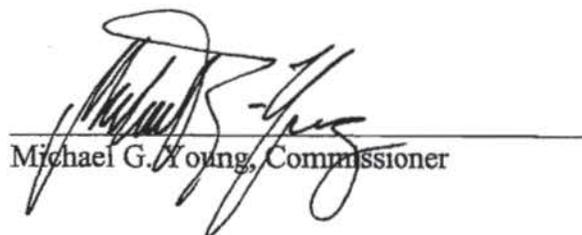
Having reviewed Parsons' request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Parsons failed to timely contest the penalty proposal and, if so, whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Michael P. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
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303-844-3577/FAX 303-844-5268

November 9, 2006

SPENCER QUARRIES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. CENT 2005-123-RM
	:	Citation No. 7938295; 03/01/2005
v.	:	
	:	Docket No. CENT 2005-124-RM
	:	Citation No. 7938296; 03/01/2005
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2005-145-RM
ADMINISTRATION (MSHA),	:	Citation No. 7938298; 03/18/2005
Respondent	:	
	:	Docket No. CENT 2005-146-RM
	:	Citation No. 7938299; 03/18/2005
	:	
	:	Spencer Quarries
	:	Id. No. 39-00024
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2004-227-M
Petitioner	:	A.C. No. 39-00024-33174
	:	
	:	Docket No. CENT 2004-245-M
	:	A.C. No. 39-00024-36233
	:	
	:	Docket No. CENT 2005-182-M
v.	:	A.C. No. 39-00024-55582
	:	
	:	Docket No. CENT 2005-215-M
	:	A.C. No. 39-00024-58174
	:	
	:	Docket No. CENT 2005-256-M
	:	A.C. No. 39-00024-65865
SPENCER QUARRIES, INC.,	:	
Respondent	:	Docket No. CENT 2006-056-M
	:	A.C. No. 39-00024-71018
	:	
	:	Spencer Quarries

DECISION

Appearances: Jennifer Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, Denver, Colorado for Petitioner; Jeffrey A. Sar, Esq., Baron, Sar, Goodwin & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

These cases are before me on four notices of contest and six petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Spencer Quarries, Inc., ("Spencer"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve eleven citations issued at the quartzite quarry operated by Spencer in Hanson County, South Dakota. An evidentiary hearing was held in Sioux Falls, South Dakota. The parties presented testimony and documentary evidence.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. MSHA Inspection of May 12-13, 2004.

On May 12-13, 2004, MSHA Inspector John King inspected the quarry. He was accompanied by his field office supervisor, Joe Steichen. Bob Weber, the mine superintendent, also accompanied the inspector. The quarry is a full-time operation subject to semi-annual inspections by MSHA. (Tr. 19). King described the quarry as a "multiple bench open pit quartzite quarry with crushing and screening and wash plants." (Tr. 20). The quarry was operating at the time of his inspection.

1. Citation No. 7915361

Inspector King issued Citation No. 7915361 under section 104(a) of the Mine Act alleging a violation of section 56.15005 as follows, in part:

Two (2) employees were observed changing screens on the screen deck of the Deister tower without wearing safety harnesses with safety lines secured. There was a potential for one or both of them to fall nearly ten feet (10') on the inside and nearly forty feet (40') on the outside.

Inspector King determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that Spencer's negligence was moderate. The safety standard provides, in part, that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling." The Secretary proposes a penalty of \$165.00 for this citation.

Inspector King testified that when the inspection party approached the Deister tower, he could see two employees on the screen deck changing out the screens at the top and that neither employee was provided with fall protection. (Tr. 23). These employees were on their hands and knees the entire time that he observed them. (Tr. 78). Crushed rock passes over vibrating screens on the Deister tower to sort the rock by size. The screens are about six by eight feet and the screen deck is sloped at about a 20 percent angle. There are side walls around the screen deck that are about 18 to 24 inches high. (Tr. 27; Ex. G-4). Two employees are required to remove the screens. Safety belts and lines were available at the quarry. (Tr. 25; Ex. G-4). Inspector King estimated that a miner could fall about 40 feet to the ground on the south side of the screen deck and 10 feet on the north side. *Id.* Because these miners would be required to move heavy, awkward screens when performing this function, "common sense would tell you that you have to have fall protection to preclude someone from accidentally going over." (Tr. 73).

The men gained access to the screen deck via a manlift and had just started working when the inspection party arrived. Inspector King estimated that it takes about 30 minutes to remove an old screen and replace it with a new one. (Tr. 28). MSHA has issued guidance to mine operators concerning the falling hazards associated with changing screens. (Tr. 30; Ex. G-5). The only structure that Inspector King observed that could be used as a tying off point was the handrails for the manlift. (Tr. 66). In addition, Spencer could install handrails around the edge of the screen deck in lieu of using safety belts. (Tr. 31). Brackets would need to be welded to the frame and removable guardrails could be fabricated. (Tr. 72). Brackets could also be installed at each end of the deck and piping could be inserted into the brackets with a wire stretched between them. The wire could be used by the miners when tying off their lanyards. (Tr. 79-80, 125-26).

Inspector King testified that it was reasonably likely that the conditions he observed would result in a serious injury. He took into consideration the fact that the working surface was sloped at a 20 percent angle and there were significant drop-offs around the deck. (Tr. 32). Inspector King stated that he has investigated fatal accidents where miners have fallen from screen decks. (Tr. 128-29). He admitted that he is not aware whether any miner has ever fallen from a Deister tower. (Tr. 69-70).

Richard Waldera, Spencer's general manager, testified that MSHA conducted a compliance assistance visit ("CAV") in 1998 soon after the company updated its plant. (Tr. 607). Waldera testified that the MSHA inspector thoroughly examined the Deister tower during the CAV and he did not suggest that fall protection was necessary. Waldera further testified that using safety belts and lines is not practical for the tower because there is nothing that a miner can tie off to. (Tr. 609-10). When changing the screens, one miner is between the first and second deck and the other miner is on the top. The man on top is on his hands and knees. (Tr. 609-10, 612). There are side walls around the top of the screen deck that are 18 inches high. (Tr. 613). He also stated that it is not practical to install a guardrail around the screen deck because of the heavy vibration during operation. (Tr. 610-11). After the citation was issued, the company welded eyelets along the top of the side walls on the screen deck that can be used by miners to attach their lanyards. (Tr. 669). A crane is used to remove the old screens and to bring up new

screens. The miners must stand on the screen deck to maneuver the screens to get them in the correct position for removal by the crane and when new screens are brought up with the crane. (Tr. 672). There are four screens on each deck. (Tr. 673).

Spencer argues that there was no evidence that anyone has fallen from a Deister tower when screens are changed. (Tr. 543-44). In addition, there was nothing for a miner to hook a lanyard up to and the miners were working on their hands and knees. The inspector who conducted the CAV on the tower did not mention the need for fall protection. Spencer also argues that the miners on the tower at the time of King's inspection had years of experience changing screens without any accidents or injuries.

I find that the Secretary established a violation. There was a danger that one of the miners would fall when he was removing the old screen and getting it ready to be lifted by the crane or when the crane operator was bringing in a new screen. Miners must stand up at least part of the time while changing the screens. Falling from a screen deck is a known hazard. (Ex. G-5). MSHA has issued safety alerts to mine operators about this hazard. *Id.*

I also find that the violation was S&S. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). I credit the testimony of Inspector King on this issue. It was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature, assuming continued mining operations. One of the miners would be maneuvering screens in and out of the screen deck via the crane while standing on the deck. The chance of falling is relatively great. Given the height of the tower, any injury would be reasonably serious.

I find that Spencer's negligence was moderate. The hazard was obvious and the fact that no miner had ever been injured does not obviate that fact. A penalty of \$200.00 is appropriate for this violation.

2. Citation No. 7915362

Inspector King issued Citation No. 7915362 under section 104(a) of the Mine Act alleging a violation of section 56.11001 as follows, in part:

A safe means of access was not provided for the two (2) employees working on the screen deck of the Deister tower. One was observed climbing on the hand rails and then stepping up onto the frame to access the work area. There was a potential for a slip and fall of about ten feet (10') to the deck or nearly forty feet (40') to the ground.

Inspector King determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that Spencer's negligence was moderate. The safety standard provides, in part, that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of \$165.00 for this citation.

Inspector King testified that he issued this citation because he observed one of the two employees working on the Deister tower climb over the side of the screen deck down to the frame where King and Steichen were standing. (Tr. 35-36). Climbing over the side was not safe because "it was not designed as a means of access either to or from the top of the Deister tower." (Tr. 37). The employee could have fallen while climbing down from the deck. (Tr. 38). If he had lost his grip while climbing down, he could have fallen a sufficient distance to sustain fatal injuries. *Id.* The other Spencer employee used the manlift to come down from the screen deck. King testified that the safety standard is violated if a safe means of access is provided but a miner uses an unsafe means of access because the company has the responsibility to ensure that employees use the safe means of access. (Tr. 131-32).

Mr. Waldera testified that Spencer provides a safe means of access to the top of the tower. Employees are required to use the manlift to access the screen decks. (Tr. 611-12, 670-71). Spencer installed a ladder on the tower after the inspection. Based on this testimony, Spencer argues that it did provide safe access. The miners were required to use the manlift to get to the screen deck and to get down from the screen deck. (Tr. 544-45). Consequently, Spencer states that it complied with the safety standard.

The safety standard provides that safe access to all working places must be "provided and maintained." The Commission has held that the "inclusion of the word 'maintain' in [section 56.11001] incorporates an on-going responsibility on the part of the operator to ensure that a means of access is utilized, as opposed to a purely passive approach in which the operator initially provides safe access and then has no further obligation." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001). Thus, a violation may be established if a mine operator provides a safe means of access to a working place but does not ensure that miners use the safe means that was established. In this case, the evidence establishes that Spencer bought a manlift in large part

to provide miners with a safe means to get up to the screen deck on top of the Deister tower. The miners used the manlift to get up onto the screen deck, but one miner got off the deck by climbing down the structure that supports the tower. This miner climbed down in the presence of the MSHA inspectors and Spencer management. Based in part on his actions, I find that the miners who worked on the tower did not consider it to be a violation of company policy to climb down from the screen deck by scrambling over the side of the tower. Spencer assumed that miners would only use the manlift to access the top of the screen deck. I find that the Secretary established a violation of the safety standard.

I also find that the violation was S&S. It was reasonably likely that a miner would fall and seriously injure himself when climbing down from the top of the tower. I find that Spencer's negligence was less than moderate because it provided the manlift for miners to use. A penalty of \$150.00 is appropriate for this violation.

3. Citation No. 7915363

Inspector King issued Citation No. 7915363 under section 104(a) of the Mine Act alleging a violation of section 56.12004 as follows:

An extension cord was observed in the hydraulic pump room located under the HP 400 Nordberg cone crusher that had the female end pulled loose from the bushing. This exposed the inner insulation and contact points to the elements. A potential electrical shock or burn hazard existed with this condition.

Inspector King determined that an injury was unlikely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that Spencer's negligence was moderate. The safety standard provides, in part, that "[e]lectrical conductors exposed to mechanical damage shall be protected." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector King testified that he observed that the outer jacket around the cord at the female end had pulled loose from the bushing and exposed the inner insulation. This violation would allow moisture to come into contact with the contact points. (Tr. 40, 42). There was also a potential for a short circuit. Someone could also be electrocuted as a result of the violation. (Tr. 43). The cord was an electrical conductor and it was exposed to mechanical damage as a result of the violation. (Tr. 41; Ex. G-9). The cord was not in service at the time of the inspection; it was hanging with other electrical cords in a pump room. (Tr. 87, 90). The inspector does not know when the cord was previously used. (Tr. 88). The copper conductors were not exposed. (Tr. 91).

Waldera testified that the brown tape that was wrapped around the extension cord indicated that the cord had been inspected for defects about 11 months prior to the inspection and that it was due for another inspection. (Tr. 614-15). The cord was only used in the winter for a

portable heater and it would not have been used again until it was inspected. (Tr. 615, 617, 674). Waldera testified that the cord would have been discarded and not used. (Tr. 616). He does not know why the cord was not removed from service at the time it became damaged. Spencer argues that the cited extension cord was out of service. The cord was only used in the winter and it would have been replaced before it was used again. (Tr. 545). The cord would have been inspected for safety defects before use.

There is no dispute that the cited electrical cord was defective in that the outer insulation had pulled away from the inner insulation at one end of the cord. Bare copper conductors were not exposed. The insulated conductors were exposed to mechanical damage and were not protected by the outer jacket. The electrical cord was available for use. I find that the Secretary established a violation. The violation was not serious and Spencer's negligence was low. The cord was due for its annual inspection so it was likely that the damage would have been detected before the cord was used again. A penalty of \$50.00 is appropriate.

4. Citation No. 7915364

Inspector King issued Citation No. 7915364 under section 104(a) of the Mine Act alleging a violation of section 56.14100(b) as follows:

The brake lights were not functional when inspected on the Cat 988-B front end loader, unit B1. This unit is used in all areas of the mine. Defects affecting safety shall be corrected in a timely manner.

Inspector King determined that an injury was unlikely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that Spencer's negligence was moderate. The safety standard provides, in part, that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector King stated that the brake lights were not working on the cited loader and that the standard "requires that mechanical equipment be maintained in a functional and safe condition at all times." (Tr. 43-44). The loader was in the pit loading rock into haul trucks from the most recent shot. (Tr. 44). Two or three haul trucks were operating in the pit. This was the only loader operating. There were no pedestrians in the area. King testified that brake lights are considered to be safety equipment. The operator of the unit, Jim Zens, told Inspector King that he had performed a pre-shift examination on the loader. (Tr. 45, 123-24; Ex. G-11). When the inspector asked Zens to depress the brake, the lights did not operate. (Tr. 46). The inspector testified that he does not know how long the brake lights were not working. (Tr. 47-48). The condition was abated by replacing a fuse. (Tr. 93).

Waldera testified that Spencer requires employees to perform a pre-shift examination of mobile equipment and that checking brake lights is part of the examination process. (Tr. 617-18). Mr. Zens performed his pre-shift examination on the loader about half an hour before the citation was issued. His shift report shows that the brake lights were working at the beginning of his shift. (Tr. 618; Ex. G-11). No vehicles follow behind the loader when it is operating.

Mr. Zens testified that he did a preshift examination on the loader at about 8:00 a.m. (Tr. 782). Another miner stood behind the loader when he tested the brake lights. (Tr. 783). He then drove into the pit to load trucks. He would have no way of knowing if the brake lights stopped working. (Tr. 785). At about 8:25 a.m., Inspector King told Zens that his brake lights were not working. A fuse had to be replaced to abate the citation. (Tr. 786). It is not unusual for a fuse to blow during a shift.

Spencer maintains that the fuse blew in the 25 minutes between the time Zens performed his pre-shift examination and the inspector examined the loader. The record establishes that the brake lights were working at the time of Zens' inspection. (Tr. 545-46). Because no other miners drive vehicles behind the loader, Zens could not have known that his brake lights were no longer working.

I find that a violation was not established. The fuse could have easily blown between the pre-shift examination and Inspector King's inspection. There has been no showing that the defect was not corrected in a timely manner. I credit the testimony of Mr. Zens on this issue. Consequently, I vacate this citation.

5. Citation No. 7915366

Inspector King issued Citation No. 7915366 under section 104(a) of the Mine Act alleging a violation of section 47.41(a) as follows:

The 1000 gallon propane tank located behind the mechanical shop did not have the container labeled. The contents of all hazardous material containers must be labeled to identify the contents.

Inspector King determined that an injury was unlikely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that Spencer's negligence was moderate. The safety standard provides, in part, that "[t]he operator must ensure that each container of hazardous chemicals has a label." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector King testified that he issued the citation because the cited propane tank was not labeled to indicate its contents. (Tr. 49-50; Ex. G-13). The only label on the tank said "Danger" and warned against smoking and open flames. (Tr. 54). He stated that the term "container" in the safety standard covers anything that holds a hazardous substance. (Tr. 51). Excluded from the definition of container at section 47.11 are engine fuel tanks. The inspector testified that

propane tanks are not excluded from the definition of container. *Id.* A hazardous chemical is “anything that could create a hazard to life or limb, or the quality of life of an individual.” (Tr. 52). Inspector King testified that propane qualifies as a hazardous chemical under the definition at section 47.11 because it is highly flammable and explosive in the correct fuel/air environment. *Id.* The inspector agreed that the cited tank is readily identifiable as a large propane tank. (Tr. 98). The propane tank is part of an “in-line” system. (Tr. 98, 104). The citation was terminated when Spencer added a second label which identified the contents as propane. (Tr. 54; Ex. G-13).

Waldera testified that the cited propane tank is behind the maintenance shop and it is used to provide fuel for the heater in the shop. (Tr. 621). The propane tank was present when Waldera started working for Spencer twelve years ago and he was told that the tank has been in the same location since the late 1950s. No MSHA inspector has ever issued Spencer a citation for the propane tank. (Tr. 622). The tank is part of an “in-line system” in that the tank is connected to the burners in the maintenance shop with copper piping. The tank is not used for any other purpose. It has the familiar shape of a horizontal propane tank. It would not be mistaken for anything other than a propane tank by first responders. It is labeled with a sign that reads “Dangerous - No Smoking, No Open Flames.” (Tr. 623; Ex. G-13). Waldera considers the propane tank to be part of an “operating system” as that term is used in the definition of “container” in section 47.11. (Tr. 624).

Spencer argues that the safety standard is vague and ambiguous. (Tr. 546-47). The propane tank was part of an in-line, closed system that is not covered by the safety standard. The cited tank was obviously a propane tank so any label would be unnecessary.

As stated above, the safety standard provides that containers of hazardous chemicals are required to be labeled. The standard goes on to state that “[i]f a container is tagged or marked with the appropriate information, it is labeled.” In this instance, the appropriate information on the label would be the contents of the tank. This standard is part of the Secretary’s hazard communication regulations. Section 47.11 contains definitions that are applicable to this standard. The term “container” is defined as “(1) Any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank or the like; (2) The following are not considered to be containers for purposes of compliance with this part: (i) Pipes or piping systems; (ii) Conveyors; and (iii) Engines, fuel tanks, or other operating systems or parts in a vehicle.” A “hazardous chemical” is defined as “any chemical that can present a physical or health hazard.”

Spencer believes that the second part of the definition of “container” should be read to exclude all “operating systems,” which it interprets to mean closed or in-line systems. Because the propane tank is directly connected to the heater in the shop and propane from the tank cannot be used for any other purpose, it is part of an operating system that is excluded from the labeling requirement in the regulation.

The “language of a regulation . . . is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v.*

GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

I find that the language of subpart (2)(iii) of the definition clearly applies only to containers on vehicles. It provides that fuel tanks and other operating systems or parts in a vehicle are not required to be labeled. Thus, although a gasoline storage tank at a mine would have to be properly labeled, the gas tank on a front loader at the mine would not require a label. Likewise, the tank holding transmission fluid on a truck would not be required to be labeled under the standard. I hold that under the plain language of the definition, the term "other operating system" in subsection (2)(iii) in the definition of "container" in section 47.11 applies only to operating systems in vehicles. This interpretation of the plain language of the definition is consistent with that offered by the Secretary through Inspector King. (Tr. 101, 113). Spencer's interpretation of the term "operating system" in subsection 2(iii) to apply to containers that are not on vehicles is illogical and is inconsistent with the plain language of the definition.

Spencer also relies on the testimony of Inspector King indicating that MSHA inspectors are not entirely clear about how the cited regulation should be interpreted. (Tr. 136, 141-44). King testified that he has discussed the application of section 47.41(a) with his peers at the Mine Safety and Health Academy when he was there for a training course and discovered that other inspectors have differing interpretations of its application. (Tr. 143-44). Nevertheless, Inspector King testified that he believes that the standard applies to the cited propane tank.

I take note of the fact that, as a general matter, MSHA inspectors prefer to work in an environment where the regulations they are enforcing have been interpreted by MSHA or the Commission. It is quite natural that MSHA would like to know the parameters of a regulation's requirements. The Secretary's hazardous communication regulations only became effective in 2002. I was unable to find any Commission decisions on this issue. MSHA inspectors are not legally trained. I find that the plain language of the definition of the term "container" makes clear that fuel storage tanks at mine sites are not excluded from the definition, even where these tanks are part of a closed in-line system. My finding is consistent with regulatory history and the Secretary's interpretation. *See 67 Fed. Reg.* 42314, 42328 (June 21, 2002). Indeed, the regulatory history makes clear the pipes and piping systems were excluded from the definition of container because labeling all pipes would be impractical and because a pipe carries the chemicals stored in the container that it is connected to. *Id.* Thus, in a closed system, the tank that holds the chemical needs be labeled under the standard.

I agree with Inspector King's determination that the violation was not S&S because an accident or injury was unlikely. I find that Spencer's negligence was low because it genuinely believed that the labeling on the propane tank was sufficient to meet MSHA's standards. A penalty of \$50.00 is appropriate.

6. Citation No. 7915368

Inspector King issued Citation No. 7915368 under section 104(a) of the Mine Act alleging a violation of section 47.41(a) as follows:

The hydraulic fluid tank near the tail pulley in the Supply Conveyor Belt Conveyor did not have the contents labeled. Hazardous material containers shall be labeled to identify the contents.

Inspector King determined that an injury was unlikely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that Spencer's negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector King testified that the cited hydraulic fuel tank was not labeled. (Tr. 56; Ex. G-15). The tank contained automatic transmission fluid. He stated that this tank was required to be labeled because automatic transmission fluid is a known carcinogen. *Id.* Inspector King testified that when he examined the tank, nobody indicated that it was labeled. The condition was abated by writing the letters "ATF" on the side of the tank. (Tr. 58). The tank is directly connected to a pump that is used to operate the door to the tunnel and, as such, it is part of a closed system. (Tr. 105). The transmission fluid recirculates and the tank is not used for any other purpose. (Tr. 106). The pump and tank are located in a tunnel under the conveyor. The area is extremely dusty. (Tr. 109).

Waldera testified that the cited tank is located at the far end of the tunnel under the surge pile. (Tr. 624). The tunnel is 110 feet long. The tunnel is not a work area and the tunnel is very noisy and dusty. The hydraulic fluid is part of an operating, recirculating system. (Tr. 626). The tank containing the hydraulic fluid is directly below the motor that pumps the fluid to the cylinder that controls the door. (Tr. 627; Ex. G-15). The cited container was labeled on the top with the letters "ATF" prior to the inspection. The letters "ATF" stand for automatic transmission fluid. The writing was covered with dust at the time of the inspection. (Tr. 627-28, 682). The pump and container have been in the same location for 12 years. Waldera testified that he did not tell Inspector King that the tank was labeled because he did not enter the tunnel with him and he did not know that King was going to issue a citation until much later.

Ward Tuttle, production foreman, testified that the pump and hydraulic fluid container is a closed system. (Tr. 770). Because the system operates the doors to the tunnel, it is only used for a short time twice every workday. Because considerable dust drifts down from the belt, it only takes a short period of time for the pump and container to become covered with dust. The transmission fluid in the container has never been changed. (Tr. 771). Tuttle was not with the inspector during the examination of the tunnel. Tuttle remembers labeling the top of the tank with the letters "ATF" before the inspection because he was told to do so. (Tr. 778). Later that day he went into the tunnel, wiped dust off the container, and saw that it was labeled with the

letters "ATF." (Tr. 772-73). He did not know that a citation was issued for this condition until a few days later.

This citation was terminated after someone wrote the letters "ATF" on the side of the container. I find that this container is subject to the requirements of section 47.41(a) for the reasons set forth with respect to the previous citation. The container contained a hazardous chemical that was required to be labeled. I credit the testimony of Waldera and Tuttle that the container had been marked on the top but that the marking was covered with dust. The environment was extremely dusty in the tunnel under the conveyor. Consequently, I vacate this citation.

7. Citation No. 7915369

Inspector King issued Citation No. 7915369 under section 104(a) of the Mine Act alleging a violation of section 56.14100(b). At the hearing, Spencer withdrew its contest of this citation. (Tr. 548-49). I find that the Secretary's proposed penalty of \$60.00 is appropriate.

B. The Highwalls at the Quarry.

1. Background Evidence on the Highwalls

On March 31, 2004, Eric J. Gottheld and Donald T. Kirkwood visited the quarry to examine the highwalls. Mr. Gottheld is a civil engineer with MSHA's Mine Waste and Geotechnical Engineering Division at the Pittsburgh Safety and Health Technology Center. Mr. Kirkwood is the supervisory civil engineer at the same facility. They were accompanied by Joe Steichen, MSHA's field office supervisor. The purpose of the site visit was to "assess the general conditions of the highwalls and to make recommendations that might improve safety with respect to highwalls." (Ex. G-17 p. 2; Tr. 154). Gottheld, Kirkwood, Steichen, and Bob Weber of Spencer traveled throughout the quarry looking at the highwalls. Gottheld was told that the footprint of the quarry itself is about 45 acres and that Spencer owns or leases about 450 acres. (Tr. 160). Some of the highwalls were active in March 2004 and others had not been mined in some time. The active face is marked as the "Outside Corner" in the diagram prepared by Gottheld. (Tr. 161; Ex. G-17 p. 12). The highwall was about 35 feet high at that location and there was shot material piled against it that was being loaded out. Gottheld testified that he was at the mine to examine the highwalls that were going to be mined in the near future that were higher than 35 feet. The section of the highwall south of the outside corner ranged between 80 and 94 feet high. Gottheld estimated that in a few months, once the "jaw level" was mined out, the highwall labeled the "Western South Highwall" on the diagram would be up to 125 feet in height. (Tr. 164). The material mined at the quarry is Sioux quartzite, which is a hard metamorphic rock. (Tr. 165).

Gottheld prepared a report that sets forth his concerns about the highwalls. (Ex. G-17). The north highwall and the northern west highwall were old, relatively rough with "lots of fractures in them and loose material." (Tr. 165). The youngest highwalls were the southern west

highwall and the western south highwall. They were relatively smooth and nearly vertical. The eastern south highwall was not as old as the north highwall but it was rough with fractures.

Gottheld testified that there are two hazards associated with highwalls: mass instability and localized rock fall hazards. (Tr. 166). He found localized mass instability problems in several areas at outside corners where the highwall changed direction and some areas where vertical fractures were intersecting. (Tr. 168). He also observed overhanging rock in some locations. Gottheld testified that the upper left corner of photo 3B in his report shows an area of mass instability. (Tr. 168; Ex. G-17 p. 14). Photo 3C shows the same area from the other side. The top right corner of photo 3B shows an area that he considers to be overhanging rock. (Tr. 169). Photo 3D shows more of what Gottheld considered to be mass instability. He testified that he was concerned that additional cracking would occur in areas of mass instability causing rock to separate from the other rock in the area. (Tr. 174). The resistance to sliding is greatly reduced where there is cracking in the rock structure.

Areas of mass instability feature highly broken rock with "cracks propagating up to the top of the highwall," especially where the cracks widen at the top. (Tr. 182). Gottheld testified that there are two ways to address this problem. One technique is to remove the areas of mass instability back to solid material. The other solution is to make sure that mining operations are away from those areas to limit the exposure of miners. (Tr. 182, 190-91). Isolated loose rock can be scaled. (Tr. 187-88, 189-90). Gottheld testified that he was concerned that miners working at or near the base of the highwalls could be injured or killed by falling rock. (Tr. 185; Ex. G-17 p. 7). Benching the highwalls can also reduce the risk that rock will injure miners. (Tr. 194).

At the conclusion of his visit to the pit, Gottheld made several recommendations to Spencer. He recommended that Spencer incorporate scaling in their normal mining cycle and that the highwalls be regularly inspected from many angles to look for areas of mass instability. (Tr. 199-200; Ex. G-17 p. 9). He also recommended that miners not work at the base of a highwall when drilling operations are occurring at the top of that area of the highwall.

Daniel J. Kuper testified on behalf of Spencer. Mr. Kuper is the production and safety manager for L.G. Everist, a mining company that operates three quartzite mines in the area. Kuper has worked at Everist for over 30 years. He testified that scaling highwalls is neither necessary nor desirable at quartzite mines. (Tr. 557). He said that quartzite is inherently hard and compressed and that scaling would create safety hazards. Kuper testified that, on the Mohs scale used to measure the hardness of rock, diamond is rated at 10 and talc is rated at 1. Quartzite is rated in the range of 7 to 8, granite is rated at 6 to 7, and limestone is rated at 4 to 5. (Tr. 558). He testified that quartzite is 98 to 99 percent silica, which is very abrasive. Kuper said that nobody has ever been injured by rock falling from a highwall at any of Everist's three mines. (Tr. 559). Everist also has not sustained any equipment damage from falling rock. The highwalls at one of these mines are 200 feet high. The highwalls are 42 feet and 30 feet high at its other two mines.

Kuper testified that quartzite is not subject to sloughing, crumbling, or flaking. He stated that the "material is so hard and it's so dense that [if a rock was protruding from the face], something would have to make it move . . . the material itself it just . . . doesn't move." (Tr. 561). "It was built by heat and pressure and it's tight in the face." *Id.* Kuper also testified that the freeze-thaw cycle will not cause rock to fall from the highwall. Quartzite does not absorb much water, as compared to limestone, so there is very little moisture present that is subject to freezing. (Tr. 561). More importantly, water does not collect in the cracks and crevices in the rock; it simply dissipates. (Tr. 561-62). All quartzite mines have cracks in the highwalls, but those cracks do not present a safety hazard. Kuper testified that Mr. Gottheld visited one of Everist's pits and determined that one area was very unstable. Kuper testified that the particular area of concern had been in the same condition for at least 33 years. (Tr. 568-69).

Kuper further testified that he is in contact with other quartzite operators through trade associations. He stated that he knows of no instances where a miner was injured by falling rock at a quartzite mine or where equipment was damaged by falling rock. (Tr. 563).

Austin Powder Company performs the blasting at Spencer. It blasts after holes have been drilled at the top of the highwall by another contractor. The holes are about five inches in diameter and are drilled to the depth of the highwall. (Tr. 586). Ronald J. Hermansen, a salesman and technical manager with Austin Powder Company, testified that it is very tough to blast quartzite. He has been blasting at the quarry for about 15 years. (Tr. 584-85). He is unaware of any problems at the quarry with loose rock falling from the highwall, sloughing rock, or walls collapsing. (Tr. 585). Quartzite tends to interlock with itself so it does not fall or slough without being blasted. (Tr. 585, 591). He blasts at a number of quartzite mines in South Dakota and no problem of sloughing or falling rock has been reported to him. (Tr. 588). There are always visible cracks and fissures in highwalls at quartzite mines. (Tr. 591).

2. Highwall Citations, March 1, 2005

MSHA Inspector Shane Julien inspected the quarry on March 1, 2005. The quarry was operating at the time of his inspection. He issued two citations for conditions along the highwalls.

a. Citation No. 7938295

Inspector Julien issued Citation No. 7938295 under section 104(a) of the Mine Act alleging a violation of section 56.3131 as follows:

Hazardous ground conditions, at the south-west highwall, were not corrected. Several cracks, large rocks, and loose unconsolidated material was observed in the area. The highwall is approximately ninety (90) feet high and located in an area where a front end loader operated during the shift. If the highwall were to suddenly

slough off and fall, a fatal crushing injury could occur to the loader operator.

Inspector Julien determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that Spencer's negligence was moderate. The Secretary proposes a penalty of \$154.00 for this citation. The safety standard provides that:

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of a pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

Inspector Julien testified that he issued this citation because he observed ground conditions that he considered to be hazardous. (Tr. 283). He saw cracks, large rocks, and loose, unconsolidated material in the southwest highwall. This highwall was the production face on the day of his inspection. Through discussions with the operator, he determined that the highwall was about 90 feet high. (Tr. 284).

An area selected for mining is first drilled and blasted from the top of the highwall. The holes are drilled to the depth necessary to blast the entire height of the highwall. Spencer contracts this part of the operation out to an independent contractor. After the highwall is shot, a front end loader loads the shot material into haul trucks. The trucks dump the material in the primary crusher, which is a jaw crusher in the pit. From there, the crushed rock is taken by a conveyor to the finishing plant which is up on top of the east highwall near the mine office.

At the time of Julien's inspection, shot material was being loaded into haul trucks. He estimated that about half of the shot material had been removed. (Tr. 287). Inspector Julien testified that "anytime there's loose, unconsolidated material that causes a fall hazard," the material "must be either sloped back to the angle of repose or stripped back for ten feet away from the top of the highwall to prevent any cap rock or loose rock from accumulating at the top of the highwall." (Tr. 288). Loaders had been removing the shot rock in this area an hour before his inspection. Typically just one loader operates at a time and two haul trucks transport the rock to the jaw crusher. (Tr. 289).

Julien testified that he observed loose rock and unconsolidated material on the highwall during his inspection. The inspector stated that unconsolidated material is rock that has separated from the host rock by cracks or fissures. (Tr. 291). Rock is unconsolidated if cracks are present in the rock that are separating the rock from the highwall. *Id.* Loose rock is isolated rock on the highwall that appears to be leaning out rather than "hooked into the highwall." *Id.* He issued the citation because he believed that Spencer violated the second sentence of the safety standard. (Tr. 481). He believed that the conditions he observed created a hazard to persons.

(Tr. 482). Material at the top was also overhanging and could reasonably be expected to fall. (Tr. 485-86).

Inspector Julien took photographs of the highwall to document his citation. (Ex. G-20). He was particularly concerned about the fissures in the rock shown on the upper left side of the photo. (Tr. 292). He was concerned about a crack near the center of the photo that is open further at the top than at the bottom, "which indicates that it is . . . a fall hazard." (Tr. 292-93). Moisture and the freeze-thaw process can easily loosen the rock further and cause it to fall. Finally, Julien described an area of frozen material that was of concern to him. (Tr. 295). He said that there was a "cavern about halfway down [the photo] where the material is falling out." *Id.* Julien was concerned that this material could either slough off or come down in one big section because it was frozen together. The inspector was also concerned about hanging rock at the top of the highwall where there is no support under the rock. (Tr. 300). He believes that the photo shows rock that has fallen from that area.

Inspector Julien determined that the violation was S&S because, during the normal mining cycle, Spencer will be removing the shot rock near the hazardous area, thereby exposing miners to the risk of being injured by falling rock. (Tr. 303). He testified that it is reasonably likely that a serious injury or a fatality will result from such conditions. MSHA has investigated fatal accidents where rocks have fallen from highwalls onto equipment, killing the driver. (Tr. 308, 311-13; Ex. G-21). The rocks could be loosened by the freeze-thaw cycle or by vibrations from equipment or blasting. Spencer abated the citation by blasting the highwall in the cited area, thereby removing the rocks that were of concern to the inspector.

On cross-examination, Inspector Julien admitted that he has no particular expertise in geology and that he has not had any training with respect to the characteristics of quartzite. (Tr. 414). He never inspected the quarry before this inspection. He also admitted that he is unaware of any instance in which a miner has been injured by falling rock in a quartzite mine. (Tr. 417-18). He also does not know if any quartzite mine in South Dakota scales its walls. (Tr. 428). He also admitted that if a miner worked around or under a highwall for 10 to 15 years, he would have a pretty fair knowledge of the characteristics and properties of that highwall. (Tr. 443). He is not aware of any quartzite mines in South Dakota that have berms at the base of their highwalls. (Tr. 445). This citation was abated when Spencer took down the highwall using explosives. (Tr. 448). Inspector Julien disagreed with the proposition that "whether material has fallen [from the highwalls in the past] is an indicator of whether it's likely to fall [in the future]." (Tr. 451). He does not know the angle of repose for quartzite. (Tr. 453-54).

As stated above, Mr. Gottheld visited the pit about a year earlier and the conditions observed by Inspector Julien did not exist when Gottheld was present. (Tr. 203). The working face had moved during the intervening year. Gottheld reviewed this citation and Inspector Julien's photographs during his testimony in these cases. He testified that the top left of the photographs at Exhibit G-20 appear to be an outside corner and it has "similar brokenness, similar vertical cracking and horizontal cracking to the other outside corners that we observed when I was there in 2004." (Tr. 206). He stated that "if that area is unstable, that's a large mass

of rock.” *Id.* Gottheld also expressed concern about the material in the center of the photographs that appears to be frozen. He felt that it was “standing very steeply.” (Tr. 207). He was concerned that as the material below this frozen area is removed, it could fall. He also noted “dislodged and loose rock” along the left side of the photo. He believes that if the area had been scaled, this rock would no longer be present. (Tr. 210).

Mr. Waldera testified that he is unaware of anyone being injured by falling rock at the quarry. (Tr. 606, 630). He also is unaware of any rock falling and damaging equipment. In the 12 years he has worked at the quarry, there was one instance where a miner was concerned about rock in the highwall. Spencer blocked the area off until the area was blasted again. (Tr. 630, 687-88). Waldera disagrees with Gottheld’s characterization that certain areas of the highwalls suffer from “mass instability.” He testified that when the mine tried to shoot down an area that Gottheld believed to be an area of “mass instability,” the rock did not move. (Tr. 631-32, 638-39). Highwalls at the quarry do not slough off and large boulders do not fall from the highwall. (Tr. 632). When quartzite fractures, the surfaces remain very rough and abrasive. (Tr. 633). As a consequence, it is a “binding material, an interlocking material.” *Id.* In areas that are not being blasted, the appearance of the highwalls does not change from day to day. The cracks and fissures in the highwalls give the impression that the rock is leaning, but these rocks have not moved over the years. (Tr. 636-37). He has never measured the cracks to make sure that they are not getting wider. (Tr. 689).

Waldera also testified that the conditions cited by Inspector Julien, as depicted in Exhibit G-20, did not present a hazard. (Tr. 641). The rock that Julien believed to be frozen did not create a hazard. (Tr. 644). In addition, the loader operator was not going to load the shot rock under that area until the area was blasted again. (Tr. 644). On cross-examination, Waldera testified that Spencer has never had a professional engineer or geologist examine its highwalls to ensure that they are stable. (Tr. 685-86). Although he has never seen a rock fall from a highwall at the quarry, he cannot say that a rock has never fallen.

Robert Weber, the quarry superintendent, testified that he has worked at the quarry for 36 years. (Tr. 703). He has also operated a loader at the quarry. He stated that he has never seen rock fall from the highwall and that nobody has ever been injured by falling rock. *Id.* He admitted, however, that he is in the pit only about one hour per day at the present time. (Tr. 720). Weber also testified that rock does not slough off the highwalls at the quarry. (Tr. 704). The quarry has been regularly inspected by MSHA since the Mine Act was passed and the highwalls are usually examined by the inspection team. Although MSHA inspectors have expressed concerns from time to time about specific conditions along the highwall, no citations have ever been issued for these conditions. (Tr. 705). Weber testified that he inspects the highwalls every day prior to the start of shift. He documents his inspections in a log book. (Tr. 706; Ex. R-104). When inspecting the highwalls, Weber looks for rocks overhanging from the top of the highwall and unstable rock. (Tr. 708, 722-25). If he sees unstable rock, he warns the loader operator and Spencer does not load rock from that area. *Id.* He has never seen rock in the face itself that was of concern to him. (Tr. 725-26). If he does see any rock stability problems, he does not berm off the area but “blast[s] through it.” (Tr. 726). The material from the previous shot prevents access

to the area under unstable rock. Scaling is not performed at the quarry and it would not be very effective. Except along the active sections of the highwall where blasting occurs, he has not observed any significant changes in the highwalls. (Tr. 706).

Weber testified that the photographs taken by Inspector Julien do not depict hazardous conditions. (Tr. 710). The rock on the upper left corner of the first photo in Exhibit G-20 had remained in place after the previous blasting. The rock did not move despite the blast. (Tr. 711). Loader operators always load so that their vehicle is perpendicular to the face of the highwall. (Tr. 714). No additional loading was going to take place in the cited area before the area was blasted again. (Tr. 174, 727-28).

Lynn Putzier, a loader operator, has worked at the quarry for about 15 years. Before he starts loading material from a shot, he examines the highwall. (Tr. 733). He looks for overhanging rock or rock that looks like it could come down. If he sees something that looks unsafe, he calls Jim Zens and he does not load in that area. Nobody at the quarry has been injured by falling rock. The loader he uses is about 41 feet long and the distance between the tip of the bucket and the front of the cab on the loader is 21 feet. (Tr. 735). His loader has never been damaged by falling rock.

Putzier loads by operating perpendicular to the wall. He starts loading the blasted material that is the furthest from the wall and then works his way in. (Tr. 738). The shot rock is hard, so the loader operator cannot scoop along the ground as he loads rock. He must scoop up material from the top and works his way down. (Tr. 740). In addition, loader operators do not scoop up rock that is within 15 to 20 feet of the highwall. (Tr. 731, 754, 794). As a consequence, the cab of the loader does not normally get any closer than about 40 feet from the highwall. (Tr. 738). He does not believe that the highwall shown in Exhibit 20 presents a hazard of falling rock. (Tr. 742-46). Putzier was the loader operator on the day of the inspection. Putzier testified that he had removed some shot rock in the area cited by Inspector Julien before the photo was taken. (Tr. 755). The rock that was of concern to the MSHA inspector was at least 30 feet away from his loader. (Tr. 747). On at least one occasion after a blast, he has asked that rock be removed from the top of a highwall because it did not look stable to him. (Tr. 753).

Ward Tuttle, the production foreman, testified that he has worked at the quarry for about 17 years and that he spends about half of his time in the pit. (Tr. 762). He also testified that the rock from the highwalls does not slough and that no equipment has been damaged by falling rock. (Tr. 762). Tuttle further testified that cracks and fissures have always been present in the highwalls at the quarry. (Tr. 763).

Mr. Zens has worked at the quarry for 32 years. He has never seen rocks fall from the highwalls. (Tr. 787). He also is not aware of any injuries or equipment damage from falling rocks. He also testified that cracks have always been present in the highwalls and that these cracks do not change in any significant way over time. (Tr. 788). Occasionally, if there is overhanging rock following a blast, a crew will go to the top of the highwall and use equipment to clear it off. (Tr. 791). If rock lower down on the highwall looks like it could fall, Spencer

would not load any shot rock below the area of concern but would wait until the area is blasted again to remove the shot rock. (Tr. 792-93).

As stated above, the Secretary primarily relied on the second sentence of the standard to establish a violation. The Commission has not issued any decisions on this safety standard. Two recent administrative law judge decisions used the Commission's "reasonably prudent person test" to analyze the cited safety standard. (*Martin Marietta Aggregates*, 26 FMSHRC 847, 848 (Nov. 2004); *Chino Mines Co.*, 23 FMSHRC 223, 226 (Feb. 2001)). As with many standards, the language of section 56.3131 is simple and brief in order to be broadly adaptable to myriad circumstances. Such a broadly written standard must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). The mine operator need not have actual notice of a specific requirement, but the standard must provide adequate notice of prohibited or required conduct. *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991). The Commission developed the "reasonably prudent person test" to be applied in such circumstances. The test is 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.*

The issue here is whether a "reasonably prudent person" would have recognized that the conditions on the highwall cited by Inspector Julien created a fall-of-material hazard. In determining whether a "reasonably prudent person" would have found that the conditions of the highwall were such as to create a hazard, the testimony of "experienced observers" is relevant. *Martin Marietta*, 26 FMSHRC at 848 (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)).

For the reasons set forth below, I find that the Secretary did not establish a violation of the safety standard. Inspector Julien acknowledged that he does not have any special expertise in highwall stability. In addition to high school, Inspector Julien took two years of diesel mechanic training before he started working for MSHA. (Tr. 276, 413). His only work experience in an open pit mine with highwalls was at an aggregates mine. He worked at that mine for a few weeks operating a loader. (Tr. 412). Julien started working for MSHA in 2002. (Tr. 275). He completed the usual new mine inspector training at the Mine Safety and Health Academy before he became an inspector in March 2003. He is also trained to investigate accidents for MSHA. Inspector Julien had never inspected Spencer's quarry before March 1, 2005, but he had accompanied another inspector to quartzite mines in South Dakota prior to this inspection. (Tr. 416). He had never been in the pit at this quarry prior to March 1, 2005.

Quartzite is a very hard, metamorphic rock that is mostly made up of quartz grains that are so completely cemented together that any fracture occurs through the grains rather than around them. (Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 439 (2nd. Ed. 1997)). A highwall in a quartzite mine has different characteristics than a highwall in an aggregates mine or a limestone mine. Inspector Julien had never been in the pit of the quarry

until the day he issued this citation. He saw the cracks that are typical in a quartzite mine and concluded that certain areas of the highwalls were not stable.

Inspector Julien testified that he based his citation on the second sentence of the safety standard, which provides that “[o]ther conditions at or near the perimeter of a pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.” He believed that rock presented a fall-of-material hazard. The citation states that “[s]everal cracks, large rocks, and loose unconsolidated material was observed in the area.” He was concerned because “[i]f the highwall were to suddenly slough off and fall, a fatal crushing injury could occur to the loader operator.” Inspector Julien did not have any experience or specific knowledge of the characteristics of quartzite or of the history of the highwalls at this quarry. Julien’s citation was solely based on his visual observations on the day of the inspection.

The issue is whether a reasonably prudent person would have recognized that the conditions on the highwall cited by Inspector Julien created a fall-of-material hazard. Inspector Julien looked at the rock shown along the top and on the upper left corner of Exhibit G-20 and concluded that it was unstable and could easily fall and hit the loader. Inspector Julien was also concerned about an area in the highwall where it appeared that frozen material could slough and hit the loader. This area is depicted in the center of Exhibit G-20. He reached this conclusion without any knowledge of the pit and its highwalls, without any understanding of the properties of quartzite, and without discussing the matter with management or hourly workers at the quarry. If he were inspecting an aggregates pit or a limestone quarry, such a quick assessment might be warranted, but in this instance the evidence establishes that a more thorough investigation was necessary.

Spencer’s witnesses credibly testified that the highwalls at the quarry do not slough and rock does not have the tendency to fall. Rock that may appear to be loose to an inexperienced eye is actually quite secure. Indeed, Mr. Weber testified that one of the rocks that concerned the inspector, shown on left side of the photograph, remained in place after the area was blasted. (Tr. 710-13). The cracks that the inspector observed in that area were not unusual at the quarry. In addition, the loader had not operated directly below the area that Inspector Julien thought was frozen and no loading was to occur until the area was blasted again. If any hazard existed, no miners were exposed to it.

I credit the testimony of Spencer’s witnesses concerning the nature of quartzite highwalls at the quarry. I also credit their testimony with respect to the lack of history of rock falling from the highwall and striking equipment in the pit. No miners are present under the highwall when an area is drilled and blasted. If there appears to be unstable rock at the top of the highwall, the evidence establishes that it is removed before loading the rock that was shot. If a loader operator observes any rock that he considers to be unstable, he does not scoop up rock under that area until after the highwall is blasted again. I also credit the testimony of Spencer’s witnesses that MSHA’s suggestion that the highwalls be scaled may not be prudent. MSHA’s witnesses suggested that the loader operator drive his vehicle up onto the shot rock and use the scoop to remove loose rock up on the highwall. From the photos that were introduced at the hearing, it

would appear to me that such a procedure would be rather reckless and foolhardy. In addition, Spencer's witnesses creditably testified that the tires on the loader would be cut up by the sharp, hard, quartzite rock. I do not know whether other means of scaling the highwalls would be feasible. Spencer believes that scaling would loosen rock on the highwall and increase the risk that such rock would subsequently fall.

Inspector Julien testified that he reviewed Mr. Gottheld's report before he went out on his inspection. (Tr. 431-33, 435-36). Although I credit his testimony that he did not feel compelled to issue a citation for the highwalls, I believe that he was influenced by the report. Gottheld's testimony on this citation was not very convincing because it was based solely on his review of photographs that are not very clear. He also acknowledges that he did not have any experience with or expertise in highwalls at quartzite mines. In addition, he testified that *if* the area were unstable, there was a large mass of rock that could fall. He could not affirmatively state that the area was unstable because he was only looking at photographs. As to the supposedly frozen area in the center of the photos, I credited Spencer's evidence that the rock under this area was not going to be loaded until the area was blasted again. This blast would have eliminated the area of concern.

To summarize, I find that Spencer's witnesses were "experienced observers" of the highwalls at the quarry and that, because of this experience, they had greater knowledge of the hazards presented by the highwalls than the inspector. Their testimony, summarized above, was both relevant and credible. Lynn Putzier, the loader operator, has worked at the pit for 15 years and, based on his experience, he did not believe that the cited area presented a hazard. The testimony of the quarry superintendent, assistant superintendent, the production foreman, and the general manager are consistent with Mr. Putzier's testimony on this issue. A reasonably prudent person would not have recognized that the conditions on the highwall cited by Inspector Julien created a fall-of-material hazard. In reaching this conclusion, I am relying on all of the evidence presented, not just the fact that, as of the date of the hearing, no miners have been injured and no equipment has been damaged by rock falling from the cited highwall. For the reasons discussed above, this citation is vacated.

b. Citation No. 7938296

Inspector Julien also issued Citation No. 7938296 under section 104(a) of the Mine Act alleging a violation of section 56.3131 as follows:

Hazardous ground conditions, at the highwall next to the Deister screen, were not corrected. A 1-2 foot vertical crack, as well as several large pieces of unconsolidated material, were observed hanging over the area. A front end loader operates in the area several times per shift, piling rip-rap and moving waste material from the edge of the highwall. If the wall were to suddenly slough off and fall, a fatal crushing injury could occur to the loader operator.

Inspector Julien determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that Spencer's negligence was moderate. The Secretary proposes a penalty of \$154.00 for this citation.

The citation was issued for an area near the primary crusher that was not an active highwall. (Tr. 318). There is a pile of waste rock next to the highwall that is deposited from the crusher. This material is loaded into trucks on a periodic basis. Large rocks are also stored next to another area of the highwall that is sold as rip-rap. The highwall is about 40 feet high. (Tr. 321). The Secretary introduced photographs taken by the inspector to illustrate the alleged violation. (Ex. G-23). Inspector Julien pointed out large cracks and fissures in the photos. (Tr. 323). The cracks are larger at the top than at the bottom. The inspector testified that these cracks demonstrate that the rock is moving because it has "leaned itself out from the top." *Id.* He also testified that there was loose rock along the top of the highwall that could fall and injure the loader operator.

Inspector Julien determined that the violation was S&S based on the size of the fissures and the amount of time that a loader operator is in the area each day. (Tr. 327). He determined that, with the loader digging in the waste pile on a regular basis, it was reasonably likely that rocks would fall and hit the loader operator. Spencer abated the violation by installing a berm along the side of the highwall to prevent anyone from getting too close. (Tr. 329).

Inspector Julien does not know how long the large crack that he testified about has existed in the cited area. (Tr. 408). At first, Inspector Julien testified that the large rocks on the floor of the pit in the first photo of Exhibit G-23 fell from the highwall. (Tr. 420-22). He later admitted that the rock was more likely some of the rip-rap shown in the second photo of the exhibit. (Tr. 426). He admitted that he reached his conclusions that the highwall was unstable based on his visual observations on this single visit to the mine. (Tr. 441).

Mr. Waldera testified that in late 1997 and early 1998, Spencer built a new conveyor and the cited bench was used to anchor one of the supports for the conveyor. (Tr. 647; Ex. G-23; Ex. R-101(a)). Waldera also testified that the cited highwall has not changed since the bench was built in 1997 and the conveyor was installed in 1998. (Tr. 650, 653, 694; Ex. R-101). The crack that Inspector Julien was concerned about was present when the conveyor was installed. Indeed, the footing for the support of the conveyor was intentionally placed six feet away from the crack so that when the concrete for the footing was poured, the crack would not become filled with concrete. (Tr. 651, 692-93). Spencer would not have placed a support for the conveyor on the cited bench if the immediately adjacent highwall was not stable. (Tr. 655).

Mr. Weber testified that the cracks and fissures shown on the first page of Exhibit G-23 have been present for at least 10 years. (Tr. 717, 728). These cracks are not unusual in quartzite highwalls and they have not changed in any significant way over that period of time. (Tr. 717-20). He has not measured the cracks to see if they have gotten larger over time.

Mr. Putzier loaded the shot rock when the cited highwall was created in 1997. (Tr. 748). The cracks that were of concern to the MSHA inspector, as shown in Exhibit 23, existed at the time he loaded the shot rock and they have not changed since that time. *Id.* No blasting has occurred in the area since 1997. (Tr. 751).

Mr. Tuttle accompanied Inspector Julien during his inspection of the highwalls. When the inspector pointed out a crack in the highwall near the large conveyor support, Tuttle advised him that the crack had been present for a long time. (Tr. 766-67; Ex. R-105). Spencer would not have used the bench to support the leg for the conveyor if the company thought that the highwall was not stable. (Tr. 768; Ex. G-23). The crack has not changed since the conveyor was constructed.

The cited highwall is really a small finger that protrudes into the pit along the east highwall. (Ex. R-101a). The cited highwall is on both sides of this finger. No extraction occurs at or near this finger. The primary crusher is located close to the highwall. A large conveyor travels over the top of this finger to a finishing crusher that is located at the top of the quarry near the office. One of the supports for this conveyor is on the finger near the crack that was of concern to Inspector Julien.

For many of the same reasons set forth with respect to the previous citation, I find that the Secretary did not establish a violation. Spencer's witnesses consistently testified that the large crack observed by Inspector Julien was present when the conveyor system was built in 1997. These witnesses testified that, while nobody has measured the crack, it appears to be in the same condition as it was in 1997. Apparently, the engineer who designed the conveyor system was going to have one of the supports directly over the crack. Spencer management had the support moved so that concrete would not pour into the crack when the footing was laid. This conveyor system cost at least a hundred thousand dollars when it was installed. It is highly unlikely that Spencer would risk its investment by placing a major support for the conveyor on a highwall that was unstable. There is no question that the point of the finger looks like it is leaning outward. Mr. Waldera testified that the "natural formation of my quarry has a leaning effect, but it does not change from day to day." (Tr. 636).

I credit the testimony of these "experienced observers" that the structure of the highwall has not moved since the finger was created and that the crack observed by the inspector has remained stable. In addition, the large rocks at the corner shown on the first page of Exhibit G-23 is rip-rap, not rock that had fallen off the face. (Tr. 648, 716, 750, 758). The Secretary did not establish that the rocks that Inspector Julien considered to be loose near the top of the highwall created a safety hazard. When Mr. Gottheld visited the quarry a year earlier, he did not closely examine this area of the quarry. He did not take any photos in this area to illustrate the structural problems that he was concerned about and he did not testify about this highwall at the hearing. For the reasons discussed above, this citation is vacated.

C. Silica Dust Citations.

Inspector Julien testified that he has been thoroughly trained to sample for silica dust and that he has sampled air and noise over a hundred times. (Tr. 334). Julien indicated that inspectors in the metal/non-metal division look to a mine's history of citations alleging overexposure to airborne contaminants, as well as the nature of the mine's products to determine which mines to sample during a particular inspection cycle. (Tr. 332, 336). After scheduling a time to perform the sample with the mine operator, the inspector sets up and calibrates the equipment, attaches it to appropriate miners, allows the equipment to run for the entire working shift, and then mails the sample from the test to a lab for analysis. (Tr. 336-38).

The sampling equipment itself is not complex. Pumps are attached to a miner which draw air and any contaminants into a plastic cyclone which collects and spins the dust, allowing anything 10 microns or less to be caught by the sampling cassette. These sampling cassettes are pre-weighed and numbered. The samples are taken in the air closest to the miner's breathing zone. When the sampling is complete, the cassette is sent to MSHA's laboratory for analysis. (Tr. 338-42).

On March 18, 2005, Inspector Julien sampled for silica dust at Spencer Quarries. (Tr. 331). As stated above, the target of his sample was silica dust ten microns and less. (Tr. 336). On the night before he performed the sampling, Julien calibrated the pumps to a level within the allowed 5 percent variation using the 1.70 liters per minute standard. (Tr. 352-53). The purpose of this calibration was twofold: to ensure the pump was operational and to align the pump's intake to that required by the cassette. (Tr. 347). Julien noted that the elevation where he calibrated the pump and the elevation where he performed the test were within allowable requirements. (Tr. 353). He also noted that the environmental conditions were normal. (Tr. 367).

With the pump fully charged and calibrated, Julien hooked the sampling equipment up to two crusher operators at the beginning of their shifts. Jeremy Zens operated the primary crusher and Dave Duba operated the finish crusher. Julien chose these operators because they worked in areas suspected of high respirable dust exposure. (Tr. 355-56). Once Julien hooked the equipment to the miners, he explained how it functioned and told the miners that they should not allow the pump to tip over, as doing so might void the sample. (Tr. 357-58). Sampling was conducted on the miners from 7:00 a.m. until 4:30 p.m. During the sampling period, Julien checked the equipment on each miner about every two hours to make sure everything was functioning properly. (Tr. 360). Julien testified that nothing unusual occurred during the sampling period. (Tr. 361).

At the conclusion of the shift, Julien removed the sampling equipment from each miner and sealed the cassettes to be mailed to the lab for analysis. Along with the sample cassettes, Julien also shipped an empty cassette, which is the "control blank," to the lab, so that the weight of the empty cassette can be compared to the weight of the sampled cassettes. He chose an empty cassette from the same lot as the sample cassettes. (Tr. 362-64). Julien prepared the

required paperwork and mailed the sealed cassettes to MSHA's laboratory at the Pittsburgh Tech Center. (Tr. 365-66).

When the lab sent the silica analytical report back to Julien, he determined that the two miners had been overexposed to silica dust and that citations should be issued. He based his conclusion on the laboratory report. (Ex. G-27). Julien double checked for any possible errors, but found none. (Tr. 367-69). Julien compared the shift-weighted average value for each sample, which had been prepared by the lab, to the threshold limit value (TLV) for each sample, and adjusted upward by a 20% error factor to ensure the samples were at least 95% accurate. (Tr. 374-76).

James Polizzano, a physical scientist technician with MSHA's Pittsburgh laboratory, testified in detail as to the procedures used by MSHA to test for silica dust. (Tr. 493-534). Polizzano specializes in X-ray powder diffraction. Because he was also the technician who tested the dust samples submitted by Inspector Julien in this instance, he testified as to the steps he took in performing his analysis. *Id.*

1. Citation No. 7938298

Inspector Julien inspected the quarry on March 18, 2005, and issued Citation No. 7938298 under section 104(a) of the Mine Act alleging a violation of section 56.5001(a)/5005 as follows, in part:

The primary crusher operator was exposed to a shift weighted average of .423 mg/m³ of silica bearing dust on 3/18/2005. This exceeded the threshold limit value (TLV) of .14 mg/m³, times the error factor (1.20 for respirable free silica dust sampling and analysis). A respiratory protection program, meeting all the requirements of ANSI Z88.2-1969 was in place, but the crusher operator was not wearing a respirator while in the control booth.

Inspector Julien determined that an illness was reasonably likely and that any illness could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that Spencer's negligence was moderate. The safety standard provides, in part, that "exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists. . . ." Section 56.5005 provides, in part, that when "engineering control measures have not been developed or when necessary by the nature of the work involved . . . , employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment." The Secretary proposes a penalty of \$124.00 for this citation.

Julien determined that the primary crusher operator was overexposed. By multiplying the TLV for the sample (.14 mg/m³) by the error factor for respirable free silica dust sampling and

analysis (1.20), the maximum amount the primary crusher operator would have been permitted to be exposed to during his shift was .168 mg/m³. The shift weighted average of exposure of the primary crusher operator was calculated by the lab to be .423 mg/m³, two and a half times the permissible TLV multiplied by the error factor. (Tr. 374-78; Ex. G-27).

Julien testified that mine operators are expected to know to comply with the TLVs set forth in the 1973 publication of the American Conference of Governmental Industrial Hygienists as adopted by the Secretary in section 56.5001(a). (Tr. 378). At the time of his inspection, Julien noted that several engineering controls were in place, including a respirator program, water sprays, enclosed operator booths, an ion filter, and self-contained air conditioning and heating units. (Tr. 379-84). Following this inspection, Spencer Quarries added double doors to the operator's booth for the primary crusher operator, and the water sprays were put back into operation. (Tr. 383-85).

Inspector Julien determined that the violation was S&S because the crusher operator was only wearing his respirator when working outside of the control booth and the measured overexposure to the silica could lead to permanently disabling illnesses, such as silicosis. (Tr. 396-97).

After issuing the citation, Julien contacted Richard Waldera and discussed ways to eliminate the problem, including changing the insulation in the operator's booth. In July of 2005, Julien took another sample at Spencer Quarries, following the same procedures he followed during his March 2005 sample. This time, the water sprays were in operation. In this sample, the primary crusher operator was again found to be overexposed. (Tr. 399-404). A month later, in August of 2005, Julien performed another sample on the primary crusher operator, following the same procedures as he had before. This time, the primary crusher was within the TLV limits. (Tr. 406-09).

Mr. Waldera testified that from 1997 until March of 2005, Spencer Quarries did not receive any respirable silica dust citations. Waldera testified that he did not test for silica dust in this time period. He also testified that upon receiving the dust citations from MSHA, he conducted his own silica dust tests. (Tr. 656, 697-98). Waldera obtained testing equipment from Energy Laboratories, followed the instructions and sent results back to their laboratory. (Tr. 657-58). Waldera testified that some samples failed, indicating an overexposure, while at least one sample passed. (Tr. 695). He also testified that he has since placed additional engineering controls in effect, such as the installation of new insulation in the control booth, a new self-contained air conditioning unit and a new air purifier. (Tr. 661). New double doors were also installed to keep dust out.

I find that the Secretary established a violation. I credit the testimony of Inspector Julien as to the procedures he used to sample for silica dust. I also credit the testimony of James Polizzano on the analytical methods he used at the MSHA laboratory. Based on this testimony and the exhibits presented, I find that the results of the sampling performed on March 18, 2005, accurately represent the amount of respirable silica dust that was present in the breathing zone of

the primary crusher operator that day. Spencer Quarries did not seriously dispute these results at the hearing. The primary crusher operator was overexposed to silica dust and he was not wearing a respirator.

I find that it was appropriate for MSHA to issue this citation based on a single-shift silica dust survey. I reach this conclusion based on the Commission's decision in *Asarco, Inc.*, 17 FMSHRC 1 (1995), and former Commission Administrative Law Judge Maurer's subsequent analysis in *Asarco, Inc.*, 19 FMSHRC 1097, 1130-1136 (1997). Based on the evidence presented, Judge Maurer concluded that "MSHA's use of single-shift sampling is a reasonable means of ascertaining, to the requisite degree of accuracy, whether the enforcement concentration level standard in section 57.5001(a) has been exceeded." *Id.* at 1136. See *Excel Mining, LLC.*, 22 FMSHRC 318, 319-20 (Mar. 2000) ("We have held that the legal basis for rejecting the use of single-shift sampling in coal mines does not apply to metal/non-metal mines."). See also *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1 (DC Cir. 2003).

I also find that the violation was S&S. The Commission has held that there is a presumption that the violation of the respirable coal dust standard is S&S. *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd sub nom. Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071 (D.C. Cir. 1987); *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274 (September 1986); *Twentymile Coal Co.*, 15 FMSHRC 941 (June 1993). In those cases, the mine operator violated 30 C.F.R. § 70.100 or §70.101, which apply only to coal mines. The Commission reached this conclusion because an analysis of the four elements of the S&S test would be essentially the same in each instance in which the Secretary proves a violation of the health standard. This presumption was based, in large part, on the legislative history of the Mine Act. The Commission noted that "prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act." 8 FMSHRC at 895. The Commission has not directly applied this presumption to silica dust violations. Consequently, I have not relied on the presumption in reaching my S&S findings.

I find that a violation occurred that contributed to a discrete health hazard. I also find that the evidence establishes that there was a reasonable likelihood that the hazard contributed to by the violation would result in an illness of a reasonably serious nature. As stated above, the primary crusher operator was exposed to more than two times the level of silica dust permitted under the TLV. The water sprays were not operating on the crusher and the crusher operator was not wearing a respirator while he was in the control booth. Spencer did not have in place a program for monitoring the crusher operator's exposure to silica dust so it had no way of knowing whether the crusher operator was being over exposed. Taking into consideration continuing mining operations, I find that the violation was S&S and very serious.

Spencer Quarries argues that it upgraded the control booth in 1997 to keep dust out. As a consequence, no citations were issued for respirable dust after these renovations were made until the present inspection. It believes that these steps should be "considered as a mitigating factor." (Tr. 552). Spencer believes that its negligence should be low and that the penalty should be reduced to reflect the efforts it has made to protect the health of the primary crusher operator. I

disagree with Spencer's position and find that its negligence was moderate to high based on the evidence summarized above. A penalty of \$300.00 is appropriate.

2. Citation No. 7938299

Inspector Julien also issued Citation No. 7938299 under section 104(a) of the Mine Act which also alleged a violation of section 56.5001(a)/5005 as follows, in part:

The finish crusher operator was exposed to a shift weighted average of .398 mg/m³ of silica bearing dust on 3/18/2005. This exceeded the threshold limit value (TLV) of .13 mg/m³, times the error factor (1.20 for respirable free silica dust sampling and analysis). A respiratory protection program, meeting all the requirements of ANSI Z88.2-1969 was in place, but the crusher operator was not wearing a respirator while in the control booth.

Inspector Julien determined that an illness was reasonably likely and that any illness could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that Spencer's negligence was moderate. The Secretary proposes a penalty of \$124.00 for this citation.

Inspector Julien and Mr. Polizzano followed the same procedures and performed similar calculations as discussed with respect to the previous citation. The results obtained by the MSHA laboratory showed that the crusher operator was exposed to .398 mg/m³, which was about two and a half times higher than the TLV. (Ex. G-27). I find that the sampling performed on March 18, 2005, accurately represents the amount of respirable silica dust that was present in the breathing zone of the finish crusher operator that day.

The evidence and arguments with respect to this citation were the same as with the previous citation. Spencer was able to terminate this citation after he sampled for dust again in July 2005. As with the previous citation, Spencer instituted additional engineering controls to bring the finish crusher into compliance.

I find that the Secretary established a violation for the reasons stated above. I make the same findings with respect to gravity and negligence. The violation was S&S. A penalty of \$300.00 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The quarry has a history of three paid violations in the two years prior to May 12, 2004, and a history of one paid violation in the two years prior to March 1, 2005, excluding the citations at issue in these cases. (Ex. G-1). Spencer is a rather small operator; it had 19 employees in 2004 and 2005 and worked about 38,000 hours each year. All

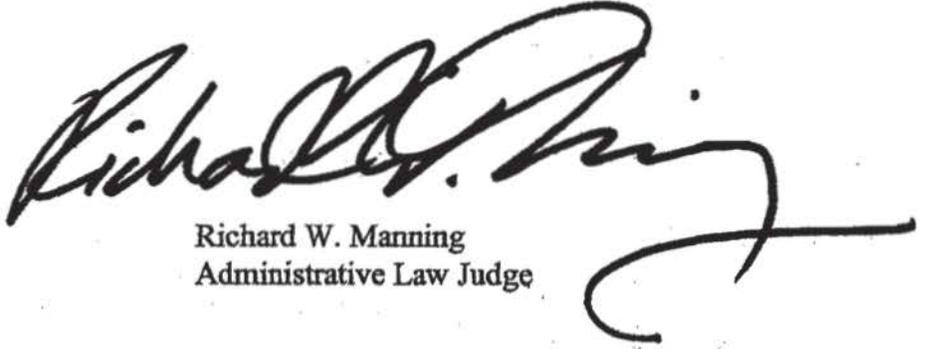
of the violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Spencer's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
CENT 2004-227-M		
7915361	56.15005	\$200.00
7915362	56.1101	150.00
7915363	56.12004	50.00
7915364	56.14100(b)	Vacated
7915366	47.41(a)	50.00
7915368	47.41(a)	Vacated
CENT 2004-245-M		
7915369	56.14100(b)	\$60.00
CENT 2005-182-M		
7938296	56.3131	Vacated
CENT 2005-215-M		
7938295	56.3131	Vacated
CENT 2005-256-M		
7938299	56.5001(a)/.5005	300.00
CENT 2006-056-M		
7938298	56.5001(a)/.5005	300.00
TOTAL PENALTY		\$1,110.00

Accordingly, the citations contested in these cases are **AFFIRMED, MODIFIED, or VACATED** as set forth above and Spencer Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,110.00 within 30 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

November 16, 2006

ARACOMA COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2006-801-R
	:	Order No. 7253508; 06/12/2006
	:	
	:	Docket No. WEVA 2006-808-R
	:	Citation No. 7253521; 06/20/2006
v.	:	
	:	Docket No. WEVA 2006-809-R
	:	Citation No. 7253522; 06/20/2006
	:	
	:	Docket No. WEVA 2006-810-R
	:	Citation No. 7253523; 06/20/2006
	:	
	:	Docket No. WEVA 2006-811-R
	:	Citation No. 7253524; 06/20/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2006-824-R
Respondent	:	Citation No. 7253529; 07/13/2006
	:	
	:	Docket No. WEVA 2006-825-R
	:	Citation No. 7253530; 07/14/2006
	:	
	:	
	:	Aracoma Alma Mine #1
	:	Mine ID 46-08801
	:	
ARACOMA COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2006-892-R
	:	Order No. 7241519; 08/03/2006
	:	
	:	Docket No. WEVA 2006-893-R
	:	Citation No. 7241521; 08/03/2006
v.	:	
	:	Docket No. WEVA 2006-894-R
	:	Citation No. 7241522; 08/03/2006

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

Hernshaw Mine
Mine ID 46-08802

ARACOMA COAL COMPANY, INC.,
Contestant

CONTEST PROCEEDINGS

Docket No. WEVA 2006-895-R
Citation No. 7253541; 08/03/2006

Docket No. WEVA 2006-896-R
Citation No. 7253542; 08/03/2006

Docket No. WEVA 2006-897-R
Citation No. 7253543; 08/03/2006

Docket No. WEVA 2006-898-R
Citation No. 7253544; 08/03/2006

Docket No. WEVA 2006-900-R
Citation No. 7253546; 08/10/2006

Docket No. WEVA 2006-901-R
Citation No. 7253547; 08/10/2006

Docket No. WEVA 2006-902-R
Citation No. 7253548; 08/10/2006

Docket No. WEVA 2006-903-R
Citation No. 7253549; 08/10/2006

Aracoma Alma Mine #1
Mine ID 46-08801

v.

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

ORDER OF DISMISSAL¹

Before: Judge Feldman

¹ These contest proceedings initially involved a response to an Order to Show Cause in Docket Nos. WEVA 2006-824-R and WEVA 2006-825-R. Since all of the captioned contest matters before me involve identical facts concerning their validity, they have all been included in this Order to avoid unnecessary duplication.

I. Statement of the Case

The captioned eighteen (18) Notices of Contest are among 379 Notices of Contest Aracoma Coal Company, Inc., (Aracoma) has filed this year under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d). In all instances, Aracoma has contemporaneously agreed to stay its 379 contests pending its contest of the Secretary's proposed civil penalties.² In fact, Aracoma admits that it has no intention of prosecuting its 105(d) contests because of pending accident and criminal investigations concerning a fatal accident that occurred at its Alma Mine on January 19, 2006. Moreover, Aracoma concedes it is unable to engage in discovery because of the limited availability of Aracoma management personnel who are, or may be, the subjects of the pending investigations. All of the 379 contested citations were issued after the fatal accident and they were not issued as a result of the accident investigation which is still pending. Thus, all of the contested citations do not arise from circumstances that are directly related to the fatal accident. For the reasons discussed below, Aracoma's contests **ARE DISMISSED**.

II. Pertinent Statutory and Rule Provisions and Case Law

An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) of the Mine Act without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979).

Specifically, the Commission stated in *Energy Fuels*:

Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable. As we have said, *affording the operators this opportunity [to litigate] will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, . . . to immediately contest all parts of citations*

1 FMSHRC at 308 (emphasis added).

² On October 6, 2006, Judge Melick dismissed seventy-three (73) of Aracoma's 105(d) contests because Aracoma paid the civil penalties for the contested citations. Aracoma asserts the civil penalties were paid by mistake and it has pending before the Commission a request to reopen the civil penalties.

Alternatively, if the operator does not seek a hearing by immediately contesting a citation after it is issued, the operator may wait to contest the citation in a civil penalty proceeding pursuant to section 105(a) of the Mine Act. 30 C.F.R. § 815(a). Waiting to contest citations until after the civil penalty is proposed facilitates settlement negotiations and limits discovery to citations that can only be resolved through litigation. In addition, postponing a contest until after the proposed civil penalty provides the opportunity for informal settlement conferences between mine operators and MSHA personnel wherein citations frequently are vacated by MSHA without the need for litigation.

Commission Rule 20, 29 C.F.R. § 2700.20, implements the contest provisions of section 105(d). Commission Rule 20(e)(1)(ii) provides that a notice of contest shall provide a plain statement of the relief requested.³

III. Procedural History

On August 25, 2006, Aracoma was ordered to show cause why its Notice of Contest that provided the basis for the contest proceeding in Docket Nos. WEVA 2006-824-R and WEVA 2006-825-R should not be dismissed as a result of its apparent contravention of Commission Rule 20(e)(1)(ii), 29 C.F.R. § 2700.20(e)(1)(ii) because it fails to adequately specify the relief requested given its disinterest in a Commission hearing, and because it is a duplicative and needless consumption of the Commission's resources. 29 FMSHRC 763.

During a subsequent telephone conference, Aracoma was advised to hold its response to the August 25 Order in abeyance pending the disposition of a similar Order to Show Cause in *Marfork Coal Company, Inc. (Marfork)*. See 29 FMSHRC 745 (Aug. 2006). Marfork's 105(d) contest was dismissed on September 27, 2006. See *Order of Dismissal*, 29 FMSHRC 842 (Sept. 2006).

The *Marfork* matter having been resolved, on September 29, 2006, Aracoma was ordered to respond to the Order to Show Cause within fifteen days. 29 FMSHRC 898. On October 11, 2006, Aracoma requested a fourteen day extension, until October 27, 2006, to respond because of the "complex" issues raised in the Order to Show Cause. Letter from David Hardy, Esq., to Judge Feldman (October 11, 2006).

During an October 20, 2006, telephone conference with the parties, Aracoma stated that it was contesting virtually all citations to document its ultimate intention to contest all proposed civil penalties in the event Aracoma seeks to reopen a civil penalty because it was paid in error. During the course of the telephone conference, Aracoma requested that its response to the Show Cause Order be held in abeyance pending the disposition of an anticipated appeal of the

³ The Commission's Rules were amended effective October 3, 2006. 71 Fed. Reg. 44190 (August 4, 2006), and 71 Fed. Reg. 54904 (Sept. 20, 2006). The provisions of Rule 20(e)(1)(ii) were not changed.

Marfork dismissal order. Thus, Aracoma was advised to submit a draft letter explaining why I should stay ruling on its contests pending the Commission's decision in *Marfork*.

After reviewing Aracoma's draft letter, it was apparent that Aracoma's contests may be even more frivolous than *Marfork*'s because, unlike *Marfork*, Aracoma lacked any pretense of discovery as a basis for its contests. Aracoma's only rationale was its purported desire to contest all citations as a precautionary measure to support the reopening of civil penalty cases that may in the future be paid by mistake. Draft letter from David Hardy, Esq., to Judge Feldman (October 23, 2006). Thus, Aracoma's draft letter introduced a new concept in mine safety law – "the precautionary contest."

Consequently, Aracoma's request to hold its response to the Show Cause Order in abeyance was denied on October 24, 2006. 29 FMSHRC 910. At that time, Aracoma was ordered to analyze the circumstances that it believes distinguish its situation from *Marfork*. Aracoma was also requested to explain why one written correspondence to the Secretary and/or to this Commission evidencing its intention to contest all civil penalties, in lieu of the multitude of contests it has and continues to file, would not serve the same purpose it purportedly seeks to achieve.

Aracoma responded to the October 24, 2006, Order but it did not specifically address the questions raised in the Order to Show Cause. Letter from David Hardy, Esq., to Judge Feldman (November 6, 2006). Instead, Aracoma's November 6 letter repeated the rationale in support of its contests that it had previously proffered in its October 23, 2006, draft letter. Aracoma relied on six facts to support its contests in its November 6 letter that will be addressed in turn.

IV. Aracoma's Proffered Basis for its Contests

Fact #1. An accident involving two fatalities occurred at the Alma mine on January 19, 2006, and the Secretary of Labor has not yet released her accident report.

Fact #2. In early March, the United States Attorney for the Southern District of West Virginia confirmed in a *Charleston Gazette* article that his office intends to conduct an investigation of the January accident; as a result of the U.S. Attorney's announcement, eight employees of the Alma mine have engaged personal counsel [sic] are not available to Aracoma's lawyers without counsel's input and permission.

The extensive investigations amplify why Aracoma has no need for an early hearing. In fact, by its own admission, an early hearing is out of the question. Since an early hearing is not requested, Commission Rule 20(e)(1)(ii) requires Aracoma to postpone its contests until the Secretary proposes her civil penalties since Aracoma is not seeking Commission relief at this time. If Aracoma contests the Secretary's proposed civil penalties for post-accident citations

under section 105(a), it may request a stay of civil penalty proceedings involving citations that it believes are related to the pending investigations. However, a pending investigation is not a basis for staying civil penalty proceedings involving more than 300 unrelated citations.

Fact #3. The Dismissal Order entered by the Court in the proceedings involving Marfork Coal Company is distinguishable in that those Notices of Contest were filed with the intention of conducting immediate discovery, without the impediment of limited access to key witnesses;

Fact #4. Aracoma has no intention of conducting discovery at this time, and is unable to answer the Secretary's discovery due to the limited availability of at least eight witnesses who were in supervisory positions.

Aracoma does not want a hearing. Notwithstanding the fact that a desire for discovery is an inadequate basis for filing a 105(d) contest, Aracoma does not even want to engage in discovery. Thus, it is obvious that the filing of Aracoma's voluminous contests under section 105(d) rather than waiting to contest the civil penalties under section 105(a) is frivolous because they are filed for no apparent reason.

Fact #5. The Review Commission has made reference to previously filed Notices of Contest when determining whether it will grant relief from delinquent civil penalty assessments associated with the citations that are under contest. In fact, Aracoma has filed such a request with the Commission in Assessment Case Nos. 84568, 82207, 94139, 87351, 90231 and 90239.

Surely, reference by the Commission to a previously filed Notice of Contest when ruling on a request for relief from a delinquent civil penalty cannot seriously be construed as an invitation by this Commission for *all operators* to contest *all civil penalties* by filing "precautionary contests." Whether the filing of contests for *all citations* ensures a basis for reopening civil penalty cases when civil penalties have been paid goes beyond the scope of this matter. I note, however, that 105(d) contests evidence a past desire to contest a citation, while payment after a penalty is proposed evidences a current desire *not to contest* a citation. Obviously, an operator that filed a 105(d) contest is free to change its mind, and decide to pay a civil penalty, after it learns of the amount being proposed. In the final analysis, the issue of mistake is an independent issue and does not give rise to a statutory right to file "precautionary 105(d) contests." Put another way, the absence of a 105(d) contest has no evidentiary value with respect to whether an operator intended to pay the related proposed civil penalty. In fact, if truth be told, the filing of a 105(d) contest is not material to the resolution of the issue of mistake.

Regardless of the merits of Aracoma's precautionary approach, suffice it to say that Aracoma could achieve its purported goal by sending a letter to the Secretary and/or to this Commission that it intends to contest all future proposed civil penalties. Thus, a one sentence letter could have avoided the needless expense and wasted effort associated with

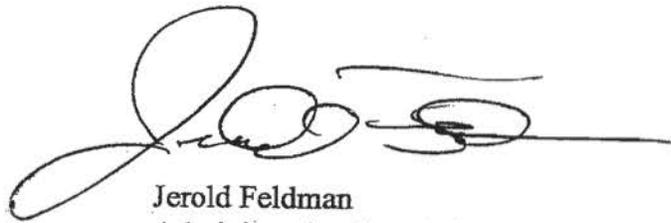
the issuance of 379 meaningless assignment orders, 379 meaningless pre-hearing orders, and 379 meaningless stay orders, not to mention the preparation and storage of 379 contest docket files for no legitimate reason.⁴

Fact #6. The contest proceedings involving Aracoma are a unique situation and the company took the affirmative step of filing the Notices of Contest in response to the active criminal investigation and due to its uncertainty as to the Secretary's findings in the unreleased investigation report.

Unfortunately, accident investigations are not unusual. However, accident investigations are not routinely followed by a multitude of meaningless contests of unrelated citations. Thus, despite Aracoma's assertion to the contrary, there are no unique circumstances that warrant these frivolous contests.

ORDER

In view of the above, and for the reasons stated in *Marfork*, 29 FMSHRC 842, **IT IS ORDERED** that the captioned contests **ARE DISMISSED** because they are contrary to section 105(d) as well as Commission Rule 20(e)(1)(ii), and because they are devoid of relief sought, notwithstanding the abuse of process they create. This abuse of process must stop. If Aracoma persists in filing similar frivolous 105(d) contests after the date of this Order, it may result in the extraordinary sanction of dismissal of Aracoma's contests with prejudice to its filing 105(a) contests of the related civil penalties.⁵



Jerold Feldman
Administrative Law Judge

⁴ I am not suggesting that administrative burden provides a basis for denying an operator the right to file a *bona fide* 105(d) contest. However, administrative expenditures incurred as a result of frivolous filings are wasteful and must not be ignored.

⁵ While the need to impose sanctions would be unfortunate, an abuse of process is a serious matter. Aracoma has been less than forthcoming. It remains unclear why Aracoma continues to file these meaningless contests. Yet Aracoma has failed to address the issues it was directed to specifically address in the August 25, 2006, and September 29, 2006, Orders to Show Cause, and the October 24, 2006, Order denying its request to hold its response in abeyance. See 29 FMSHRC 763, 29 FMSHRC 898 and 29 FMSHRC 910.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 20, 2006

LAUREL AGGREGATES, INC.,
Contestant

CONTEST PROCEEDINGS

Docket No. PENN 2006-217-RM
Citation No. 6038673; 06/07/2006

Docket No. PENN 2006-218-RM
Citation No. 6038638; 06/07/2006

Docket No. PENN 2006-219-RM
Citation No. 6038639; 06/07/2006

Docket No. PENN 2006-220-RM
Citation No. 6038641; 06/07/2006

Docket No. PENN 2006-221-RM
Citation No. 6038643; 05/30/2006

Docket No. PENN 2006-222-RM
Citation No. 6038644; 05/30/2006

v.

Docket No. PENN 2006-223-RM
Citation No. 6038645; 05/30/2006

Docket No. PENN 2006-224-RM
Citation No. 6038646; 05/30/2006

Docket No. PENN 2006-225-RM
Citation No. 6038647; 05/30/2006

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

Docket No. PENN 2006-226-RM
Citation No. 6038648; 05/30/2006

Docket No. PENN 2006-227-RM
Citation No. 6038649; 05/30/2006

Docket No. PENN 2006-228-RM
Citation No. 6038650; 05/30/2006

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: Docket No. PENN 2006-229-RM
: Citation No. 6038651; 05/30/2006
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: Docket No. PENN 2006-230-RM
: Citation No. 6038652; 05/30/2006
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: Docket No. PENN 2006-231-RM
: Citation No. 6038653; 06/07/2006
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: Docket No. PENN 2006-236-RM
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: Docket No. PENN 2006-237-RM
: Citation No. 6038660; 05/30/2006
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: Docket No. PENN 2006-238-RM
: Citation No. 6038661; 05/30/2006
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: Docket No. PENN 2006-239-RM
: Citation No. 6038662; 05/30/2006
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: Docket No. PENN 2006-240-RM
: Citation No. 6038663; 05/30/2006
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: Docket No. PENN 2006-241-RM
: Citation No. 6038664; 05/30/2006
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: Docket No. PENN 2006-242-RM
: Citation No. 6038665; 05/31/2006
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: Docket No. PENN 2006-243-RM
: Citation No. 6038666; 05/31/2006
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: Docket No. PENN 2006-244-RM
: Citation No. 6038667; 05/31/2006
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: Docket No. PENN 2006-245-RM
: Citation No. 6038668; 05/31/2006
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: Docket No. PENN 2006-246-RM
: Citation No. 6038669; 06/01/2006
:
: Docket No. PENN 2006-247-RM
: Citation No. 6038670; 06/07/2006
:
: Lake Lynn Quarry
: Mine ID 36-08891

DISMISSAL ORDER

Before: Judge Feldman

These proceedings are before me based on a Notice of Contest of the subject citations filed with the Commission on June 26, 2006, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d). In its contests, Laurel Aggregates, Inc. (Laurel) denies each and every allegation contained in the contested citations. Laurel identifies the relief sought as a Commission review and declaration that the contested citations are invalid and void. (*Laurel Contest*, p.18). Such a declaration can only be rendered after a hearing on the merits of the contested citations.

The Secretary filed an answer to Laurel's contest on July 17, 2006, at which time the Secretary moved to stay these matters pending the related civil penalty case. Laurel did not oppose the Secretary's motion.

An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) of the Mine Act without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). Thus, the purpose of a 105(d) contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty.

Alternatively, if the operator does not immediately contest a citation after it is issued, the operator may wait to contest the citation in a civil penalty proceeding pursuant to section 105(a) of the Mine Act. 30 C.F.R. § 815(a). Waiting to contest citations until after the civil penalty is proposed facilitates settlement negotiations and limits discovery to citations that can only be resolved through litigation.

Commission Rule 20, 29 C.F.R. § 2700.20, implements the contest provisions of section 105(d). Commission Rule 20(e)(1)(ii) provides that a notice of contest shall provide a plain statement of the relief requested. The relief requested by Laurel is a Commission hearing on the merits of the citations without waiting for the Secretary's proposed civil penalties.

By filing a contest on June 26, 2006, seeking an early adjudication, only to agree shortly thereafter to stay its contest pending the civil penalty case, it appears that Laurel is, in substance, waiting for a disposition on the merits *after* the civil penalty is proposed. In other words, Laurel has not adequately articulated the relief it seeks in its 105(d) notice of contest, since it has elected to wait for the 105(a) civil penalty matter.

Consequently, on October 26, Laurel was ordered to show cause why its Notice of Contest in these matters should not be dismissed as a result of its apparent contravention of Commission Rule 20(e)(1)(ii), 29 C.F.R. § 2700.20(e)(1)(ii) because it fails to adequately specify the relief requested given its disinterest in a Commission hearing, and because it is a duplicative and needless consumption of the Commission's resources. 29 FMSHRC 763.

Laurel responded to the show cause order on November 10, 2006. Laurel stated that it has received the Secretary's proposed civil penalties for twenty-three (23) of the thirty-one (31) citations/orders that are the subject of these proceedings. As a consequence, Laurel concedes that 23 of the captioned contests "are now moot." Letter from David Hardy, Esq., to Judge Feldman (November 10, 2006).

With respect to the remaining eight (8) contested citations, Laurel stated:

This firm, as well as other attorneys that routinely practice before the Review Commission, often files Notices of Contest in certain proceedings. It has generally been the practice of this Firm to file the Notices when there is a need for an expedited hearing and/or discovery, a serious accident has occurred, or the Contestant in the past has due to a mistake or inadvertence failed to timely contest the associated civil penalties. The filing of the Notice evidences the Contestant's intention to contest the subject citations/orders and is relevant if a motion must be filed under Rule 60 for relief due to inadvertence or mistake.

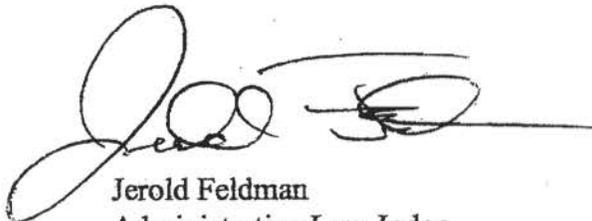
Id.

Laurel does not contend that it filed the subject contest because it wants an early hearing instead of waiting to contest the Secretary's proposed penalties. Discovery, alone, is not relief sought, and it does not provide an adequate basis for filing a 105(d) contest. As discussed in the Order of Dismissal in *Aracoma Coal Company, Inc.*, 30 FMSHRC __ (Nov. 2006) (ALJ), a 105(d) contest has no evidentiary value with respect to whether an operator intended to pay a civil penalty. This is especially true when all citations are contested and there is no uniqueness in the operator's behavior to demonstrate that it strongly objected to a particular citation or group of citations.

The fact that other attorneys, in addition to this law firm, have recently begun to contest all citations without wanting an early hearing, does not legitimize Laurel's defective filing. Although Laurel admits its contest of 23 of the subject citations/orders are now moot, they have *always been moot* along with its contest of the remaining 8 citations because there is no relief sought.

ORDER

In view of the above, and for the reasons stated in *Marfork Coal Co., Inc.*, 29 FMSHRC 842 (Sept. 2006) (ALJ) and *Aracoma Coal Co., Inc.*, 30 FMSHRC __ (Nov. 2006) (ALJ), **IT IS ORDERED** that the captioned contests **ARE DISMISSED** because they are contrary to section 105(d) as well as Commission Rule 20(e)(1)(ii), and because they are devoid of relief sought, notwithstanding the abuse of process they create.



Handwritten signature of Jerold Feldman, Administrative Law Judge.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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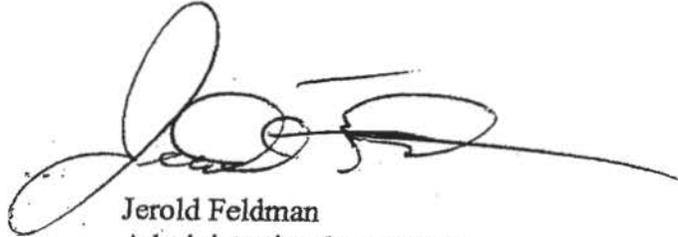
November 21, 2006

ELK RUN COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2006-729-R
	:	Citation No. 7253958; 05/24/2006
	:	
v.	:	Docket No. WEVA 2006-730-R
	:	Citation No. 7253959; 05/24/2006
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2006-731-R
MINE SAFETY AND HEALTH	:	Citation No. 7253960; 05/24/2006
ADMINISTRATION, (MSHA),	:	
Respondent	:	Castle Mine
	:	Mine ID 46-07009

DISMISSAL ORDER

Before: Judge Feldman

The three captioned citations concern the contestant's alleged failure to secure mechanical guards. The contestant filed its contest, and then contemporaneously agreed to stay its contest until the Secretary proposes her civil penalties. By agreeing to stay these matters rather than request an early hearing, the contestant has failed to state the relief it is seeking as required by Commission Rule 20(e)(1)(ii). Consequently, the captioned contests **ARE DISMISSED.**



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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November 30, 2006

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 2006-6-M
Petitioner : A. C. No. 38-00250-67174
: :
v. : :
HANSON AGGREGATES SOUTHEAST, : Anderson Quarry
Respondent :

DECISION

Appearances: Ann Paschall, Esq., Office of the Solicitor, U.S. Department of Labor,
Atlanta, Georgia, on behalf of the Secretary of Labor;
Adele L. Abrams, Esq., Law Office of Adele L. Abrams, PC, Beltsville,
Maryland, on behalf of Hanson Aggregates Southeast.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petition alleges that Hanson Aggregates Southeast ("Hanson") is liable for one violation of the Secretary's regulations applicable to surface, metal and non-metal mines, and proposes the imposition of a civil penalty in the amount of \$228.00. A hearing was held in Greenville, South Carolina, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that the Secretary has failed to prove the alleged violation, and vacate the citation.

Findings of Fact - Conclusions of Law

Hanson operates the Anderson Quarry, a granite mine, located in Anderson County, South Carolina. Scott M. Blair, an inspector employed by the Secretary's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the quarry in July 2005. On July 14, 2005, Blair, accompanied by David Stewart, the quarry's plant manager, inspected the plant and the load-out area. The load-out area was located at the end of the #2 Bench, and was accessed by a haul road approximately 1,000 feet in length. A highwall, approximately 50 feet in height, ran alongside the haul road. It had been created by mining operations conducted five years earlier. The face of the highwall was irregular and exhibited damage from mining process blasting. The focus of the dispute is the condition of the highwall, and whether loose or detached

granite blocks presented a hazard to miners using the haul road.

Blair and Stewart traversed the haul road to the load-out area in Stewart's pickup truck. The highwall was on the right-hand side as they traveled, and the ride was uneventful. Several pieces of equipment were being used at the load-out area. A front-end loader alternatively loaded two Caterpillar 769D haul trucks. There was also an excavator equipped with a hammer which was used to break up larger rocks.

Blair testified that, because of space limitations, the driver of the haul truck that was waiting to be loaded would position it about 200 feet from the loading site, parallel to and within about two feet of the highwall, allowing the other equipment room to operate. After one of the trucks had moved, he was able to approach the highwall and noticed cracks in the highwall's face, indicating that there was loose material above where the truck had been parked. That particular area of the highwall is depicted in one of several photographs taken by Blair, in which the loose material is circled. Ex. G-2. He was concerned that one or more of the rocks would fall onto a truck and cause a fatal injury to the operator. He then walked back down the haul road and examined the highwall more closely. He noticed several areas where cracks in the granite indicated what he believed to be unstable conditions. The vertical cracks were angled toward the load-out area, and any displacement along the cracks was more visible when observed while looking back toward the plant. Tr. 25. Blair felt that vertical cracks were a sign of instability, whereas horizontal cracks were fairly stable. Tr. 42.

Blair notified Stewart that he was going to issue a citation for failure to control hazardous ground conditions. Stewart immediately protested the citation, contending that the ground conditions were stable and did not pose any threat or hazard to persons using the roadway. Citation No. 6113853 alleges a violation of 30 C.F.R. § 56.3200, which provides:

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.

Blair originally described the violation in the "Condition or Practice" section of the citation as follows:

The Bench along the right side of the roadway going to the #2 Bench has loose unconsolidated material hanging from it.

Ex. G-1.

On July 22, 2005, Blair modified the Condition or Practice section of the citation to read:

Loose material was observed on the #2 Bench roadway highwall. The highwall is approximately 50' in height and 1,000 feet in length. The loose material ranges in size from 8' by 6' down to 1' by 2'. Tire tracks are seen below the loose material. There is regularly traveled access within 2' of the highwall. This hazard exposed miners to falling material that could result in serious or fatal injuries.

Ex. G-1.

Blair determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that two employees were affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$228.00 has been proposed for this violation. The alleged violation was abated by Hanson's placement of traffic control cones, and later construction of a berm prohibiting travel within 20 feet of the highwall. The highwall was removed entirely in early 2006.

Hanson protested the citation immediately, triggering a series of conference calls while Blair was at the site. It contends that the highwall face was stable and presented no danger of rock falls. It also contends that a rock falling off the face would not present a hazard because no miners worked or traveled close to the wall where they could be struck by a falling rock.

The Zone of Danger

The haul road and highwall are depicted in photographs taken by Blair on July 14, 2005. Ex. G-11; G-14, photo #7. The outer edge of the haul road was about 60 feet from the highwall. Broken rocks, or riprap, lay irregularly along the base of the wall, in places extending out ten or more feet.¹ The smooth portion of the roadway, where travel normally occurred, was generally no closer than 10 to 15 feet from the wall. However, travel closer to the base of the wall was possible in some areas because distribution of the riprap was not uniform, and the road was less than 60 feet wide in places.²

¹ Hanson placed rocks that were too large for the crusher along the base of the highwall, where an excavator with a rock hammer would break them up. That location was used because there was limited space in the load-out area. The riprap also served to keep traffic away from the highwall, in furtherance of Hanson's policy that no pedestrian or vehicular traffic should be unnecessarily close to any highwall. The riprap is erroneously identified as "riffraff" in the hearing transcript.

² After the cones and berm were emplaced, there were a few areas where two haul trucks could not pass each other. Tr. 325.

Stanley J. Michalek, a supervisory civil engineer employed by MSHA, testified as an expert in rock fall analysis. Tr. 170-71. He testified that the distance a falling rock would land from the base of the wall would be about 25% of the height it fell from, here about 13 feet. Tr. 218. He also observed that a falling rock could be deflected horizontally if it struck a protrusion, the amount of the deflection depending upon its velocity. Tr. 235. However, Michalek and Hanson's expert, Marvin E. Adam, stated that there were no protrusions that could cause significant deflection to rocks falling from the highwall.³ Tr. 237, 303. Michalek also believed that a falling rock might roll out away from the highwall, but generally agreed that the 20-foot set-off established by Blair prohibited travel within the zone of danger and was appropriate for the conditions. Tr. 235-39.

Despite Blair's concerns, falling or rolling rocks presented little hazard to the haul truck operators, because they were located seven-ten feet off the ground and approximately 12-13 feet from the passenger side of the truck, i.e., outside the zone of danger.⁴ Tr. 188-89; ex. R-4. However, the road was also used by smaller vehicles. The person responsible for conducting the daily workplace examination of the highwall typically drove along the road in a pickup truck. Maintenance vehicles would also occasionally use the road. Those vehicles could travel within the zone of danger, and falling or rolling rocks would pose a hazard to operators of a small vehicles, which afford relatively little protection. A front-end-loader and an excavator also used the road. Both pieces of equipment were operated while facing the highwall. The excavator was used to break the larger rocks, and the loaders scooped up the broken rocks for transport to the crusher. While the loader operator was outside the zone of danger, a rock falling on the bucket or arms of a loader could severely jar the operator, and possibly could slide or roll down the loader's arms and strike the operator's compartment. Tr. 189-90.

Because miners were permitted to work and travel within the zone of danger presented by rocks falling from the highwall, and the area was not posted or barricaded, the critical question is whether the highwall posed a hazard to persons, i.e, whether there was a reasonable possibility that rocks would fall from it.

Stability of the Highwall

Both parties introduced expert testimony on the condition of the highwall face. Michalek, the Secretary's expert, did not visit the mine site. His testimony was based upon an examination

³ Both experts agreed that the highwall posed no threat of catastrophic failure, i.e., that the natural joints of the rock formation were positioned and angled such that the rock face was inherently stable.

⁴ In addition to being located outside the zone of danger, the truck operators were protected by a canopy, a reasonably effective barrier to falling objects that might strike the operator's cab. Tr. 125-27, 188. It also appears that the haul trucks were at least five-six feet away from the highwall. Tr. 75, 193-94, 204.

of photographs of the wall and information provided by Blair and his supervisor.⁵ In his opinion, there were fractures that created detached blocks of rock that “may be in a stable condition right now, but with the ongoing weathering process, and vibrations . . . it’s totally unpredictable how long that rock is going to be able to stay up there.” Tr. 179. He testified that it was reasonably likely that environmental factors would cause such rocks to fall at “some time.” Tr. 186. When pressed for a time frame within which rocks could be expected to fall, he stated that it might be likely that nothing would fall for up to six months, but that it couldn’t be predicted with any certainty, and that it was just as likely to fall now as opposed to a year from now, or even later. Tr. 210-11. He also testified that it was not necessary to consider specific information on environmental factors, such as freeze/thaw cycles and the magnitude of vibration or seismic activity generated by nearby blasting, because “that information isn’t significant to there being a rock fall potential.” Tr. 241-42.

Hanson’s expert, Marvin E. Adam, a geological engineer, testified as an expert in mining engineering, specializing in soil and highwall stability. He was called by Hanson the day the citation was issued, visited the quarry the next day, on July 15, 2005, and examined the highwall. In his opinion, the fractures in the rock were caused by blasting when the bench had been mined five years earlier, there was no evidence of movement or instability, and the wall did not present any realistic possibility of rocks falling onto the haul road. Tr. 274. Adam obtained pertinent weather data, including freeze/thaw information for the mine site. He concluded that weather factors would not cause movement of any detached blocks. Tr. 290. He also analyzed data maintained by Hanson that showed the seismic activity generated by nearby blasting, and calculated the amount of seismic activity that would have been generated in the area of the highwall. He concluded that the relatively low amplitude of seismic activity would not have been sufficient to overcome the friction holding the granite blocks in place, i.e., that vibrations from blasting would not cause the rocks to move in the foreseeable future. Tr. 298-301.

The critical difference between Michalek’s and Adam’s opinions is their respective positions on whether the displacements observed, i.e., the widths of the vertical cracks, were the result of the original blasting, or whether they were the product of movement of the blocks over time. In Adam’s opinion, the displacements were the result of the original blasting activity, and weathering factors and blasting vibration were insufficient to overcome the friction holding the blocks in place, i.e., they had not moved and would not move. The sum total of Michalek’s testimony is that rocks that have been detached from the main formation will eventually fall to ground level because they won’t “reattach” and have only one way to move, i.e., away from the wall until they eventually tip and fall. Tr. 185. He candidly admitted that no one can tell

⁵ I accept Michalek’s testimony that formulating an expert opinion on the stability of a highwall through an examination of photographs is an acceptable methodology. Tr. 179-80. However, Adam testified that he could not have properly formed an expert opinion on the stability of the highwall without personally examining it, and without obtaining and analyzing pertinent data on environmental factors. Tr. 272. Michalek’s failure to physically examine the highwall and pertinent environmental data affects the weight accorded his testimony.

whether the rocks have been moving simply by looking at them. Tr. 396. He identified various tests that could have been undertaken that would have established whether the rocks were moving. Tr. 398-99. However, none of those tests were conducted, and there is no objective evidence establishing whether the cracks had remained static or had grown larger, i.e., whether the detached blocks were stable or moving. He testified that, if the cracks had been produced by blasting, they would have been there since the bench was mined, and that they "may" or "may not" have been "open to that degree." Tr. 251. He also stated that the rocks may not have moved in the year before the inspection, and may have been in the same condition when Blair inspected the highwall in November 2004. Tr. 251.

Other evidence indicates that the rocks were stable, as Adam believed. Blair had inspected the highwall in November of 2004, and had not considered it unstable at that time. Tr. 50. Although he believed that the condition of the highwall had changed by July 2005, he was unable to identify any specific changes, or any rocks that had fallen from it.⁶ Tr. 54-55. Blair was also at the mine in October of 2005, and did not note any changes in the condition of the highwall since his July visit, although he may not have carefully inspected it. Tr. 137, 147. Stewart, who has an undergraduate degree in mining engineering, testified that the highwall had been scaled in 2002. Tr. 379. He checked the highwall frequently between July and October of 2005, and did not see any problems with it. Tr. 369-71. He reported to Adam that he had never seen a rock fall from the highwall and was not aware of any rocks having fallen. Tr. 291-92. Gary D. McGaha has worked as an equipment operator for Hanson for five years. He has worked in proximity to the highwall, and shared responsibility for conducting daily workplace examinations of the highwall in and around July 2005. At other times, he would check its condition as part of his duties as an equipment operator. He testified that he had never seen any material sloughing off of the highwall, had not seen any structural problems with it, and had not seen any areas in need of scaling. Tr. 317. Michalek and Adam agreed that freshly fallen granite rocks could be identified because they would be a different color, i.e., less-weathered, and that the place they had fallen from would be similarly identifiable. Tr. 198, 270-72. In his inspection of the highwall, Adam did not see any evidence that rocks had fallen in the past year. Tr. 270-72, 275-76. No other witness contradicted his testimony.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*,

⁶ Blair was a relatively new mine inspector, and had extremely limited experience with granite mines. He had worked with limestone, a sedimentary rock that has different characteristics than granite, an experience that, in Adam's opinion, could lead him to reach erroneous conclusions about the stability of a granite highwall. Tr. 264, 277-78. At the time of his inspection, Blair did not know that Hanson had placed the riprap at the base of the wall. It is highly likely that he erroneously believed that at least some of it had fallen from the highwall. Tr. 140-43.

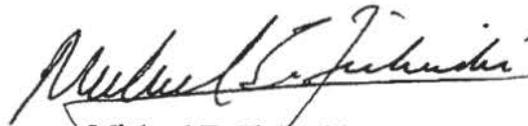
15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

On the whole, the Secretary's evidence tended to establish only that, in theory, detached rocks had the potential to move and might eventually fall at some point in time. There is no evidence that any rocks had fallen from the highwall in the five years since it had been mined. The Secretary did not offer scientific testing or other evidence that could have established whether the rocks had moved or were stable. It may be that the rocks would have eventually found their way to ground level if the highwall had remained undisturbed. But, it appears more likely that the time frame for such activity would have been in the tens of years, as Adam testified, and that there was no realistic possibility of rocks falling from the face of the highwall and presenting a hazard to miners in July 2005.

I find that the Secretary has failed to carry her burden of proof on this violation. Specifically, it has not been established by a preponderance of the evidence that the condition of the highwall was a hazard to persons. See *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 370-73 (March 1993) (finding of violation affirmed on evidence that material on a highwall not only had the potential to move, but was, in fact, moving, and a considerable amount of material had fallen, filled catch benches and reached the bottom of the pit where miners were working).

ORDER

Citation No. 6113853 is hereby **VACATED**, and the petition is hereby **DISMISSED**.



Michael E. Zielinski
Administrative Law Judge
202-434-9981

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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December 7, 2006

ELMORE SAND & GRAVEL, INC.,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
	:	Docket No. EAJ 2006-01
	:	Formerly SE 2005-48-M
v.	:	
	:	
SECRETARY OF LABOR,	:	Mine ID 01-01138
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent.	:	Scott Pit

DECISION

Appearances: George W. Walker, III, Esq., & J. David Martin, Esq, Elmore Sand & Gravel, Inc.,
Montgomery, Alabama, for the Applicant;

Heather A. Joys, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta,
Georgia, for the Respondent

Before: Judge Weisberger

Introduction

This proceeding is before me based upon an Application for Award of Fees and Expenses under the Equal Access to Justice Act, 5 USC § 504 ("EAJA"). On July 19, 2006 a decision was issued in the underlying civil penalty proceeding, *Elmore Sand & Gravel, Inc.*, 28 FMSHRC 631, (July 2006), ("the decision") The decision, *inter alia*, dismissed the citation that had been issued to Elmore Sand & Gravel, Inc. ("Elmore"), alleging a violation of 30 C.F.R. § 56.14100(c). Thereafter, Elmore filed an application for fees and expenses on the basis that it had prevailed in the civil penalty proceeding and that the Secretary's position on the citation at issue was not substantially justified.

I. The Mine Act Civil Penalty Proceeding

On December 20, 2003, Donnie Ziegler, one of Elmore's haul truck drivers informed Derrell Sanders, another haul truck driver, that he was going to check the brakes on the haul truck. Ziegler pulled the truck forward approximately twenty feet with the bed fully raised. The bed on the truck was observed lowering slowly. Sanders saw Ziegler pinned under the dump bed, and immediately went into the cab of Ziegler's truck to raise the dump bed off Ziegler. Sanders moved the joystick¹ inside the cab to the raise position, and raised the dump bed off Ziegler.

Subsequent to the accident, it was observed that the harness containing electric wires that ran from the cab of the truck to the dump bed was not intact; that the end that was connected to the cab appeared to have been severed; that the end attached to the dump bed ended in butt connectors; and that a piece of the harness of indeterminate length was missing between the severed end, and the butt connectors.

On December 20 through 23, MSHA Inspector, Eugene Hennen, conducted an investigation of the accident, and performed various tests on the equipment that was involved. Based on these tests, and on assumptions that the harness was disconnected at the time of the accident and that the joystick was in the hold position, Hennen opined that prior to the accident the wiring harness was disconnected causing the dump bed to not operate properly when the joystick was in the hold position.

On January 12, 2004, subsequent to investigation, the Secretary issued a citation to Elmore alleging a violation of 30 C.F.R. § 56.14100(c). Subsequently, the Secretary filed a petition for assessment of a civil penalty, and an answer thereto was duly filed by Elmore. The matter was heard on November 8 and 9, 2005.

In the penalty proceeding, the Secretary argued that it established the existence of a defect under Section 56.14100(c), *supra*, in that before the accident the wiring harness had come loose, creating an open circuit that disabled the joystick, the body-up switch, and the warning light. In support of this assertion, the Secretary alleged that it established that the wiring harness had come loose before the accident, which disabled the joystick, the body-up switch, and the warning light. The penalty proceeding decision ("the decision") rejected the Secretary's arguments and held that the Secretary ". . . failed to establish, by a preponderance of the evidence (emphasis added), that the harness wires had become loose prior to the accident on December 20." 28 FMSHRC, *supra*, at 640.

¹If the joystick is placed in either the raise or lower position and the operator releases the joystick it will go to and remain in the hold position, and the bed will not come down. If the joystick is placed in the float position and the joystick is released, it will remain in the float position, and the weight of the dump bed will cause the bed to lower.

A. The Secretary's Position in the Civil Penalty Proceeding

In support of its position that the loose wiring disabled the joystick, the body-up switch, and the warning light prior to the accident, the Secretary relied on the testimony of Hennen regarding the relationship between a severed wire, and the failure of the dump bed to operate properly in the hold position. The decision, 28 FMSHRC, *supra*, at 641-644, quoted Hennen's testimony, and found that the testimony was confusing and lacking in clarity and thus lacking in probative value.

In support of its position that the joystick was in the hold position at the time of the accident, but that the bed did not hold in that position, the Secretary relies on the testimony of Sanders. He testified that when he entered the cab immediately after the accident and used the joystick to raise the bed, it was in the hold position. However, the decision accorded little probative weight to Sanders' testimony, due to its lack of clarity and numerous inconsistencies. The Secretary also relied on tests conducted by Hennen relating to the operation of the dump bed, along with discussions the latter had with the manufacture of the truck, which provided the bases for his opinion that a break in the wiring harness prior to the accident, caused the dump bed to not operate properly when the joystick was in the hold position. 28 FMSHRC, *supra*, at 647-648. In the decision, various inconsistencies in the record were noted along with admissions of Hennen elicited on cross-examinations that the bed came down only once when the joystick was in the hold position. It was concluded that the tests were insufficient to support Hennen's opinion that a break in the harness caused the bed to come down when the joystick was in the hold position. Further, it was found that testimony regarding tests performed by Elmore, which were not consistent with Hennen's tests, was not impeached or contradicted, diminishing the weight to be accorded his tests. The decision held that the Secretary had not established a violation under Section 56.14100(c), *supra*, in that it failed to meet its burden of proof of establishing that prior to the accident the harness wire running between the dump bed and truck had become loose, and would have caused the truck bed to come down after it was raised and the joystick was placed in the hold position. 28 FMSHRC, *supra*, at 649. Thus it was concluded that the Secretary failed to establish that prior to the accident a defect existed that made continued operation of the truck at issue hazardous to persons, and the citation at issue was dismissed. 28 FMSHRC, *supra* at 649.

II. The EAJA Proceeding

Elmore's application alleges that its net worth and number of employees is below that required for eligibility for an award under EAJA, and that the Secretary's position was not substantially justified. The application seeks fees and expenses in the amount of \$64,576.87.

The Secretary's response asserts that her position in the civil penalty proceeding was substantially justified. In addition, the Secretary argues that Elmore's affidavit and unsworn uncertified balance sheets are insufficient documentary evidence to meet its burden of establishing that its net worth is below the threshold for eligibility under the EAJA.

A. Elmore's Arguments

As an initial matter, Elmore argues that inasmuch as the decision did not find in the Secretary's favor on any factual issue that was essential to proof of the Secretary's case, it should be concluded that the Secretary's case is lacking in substantial justification. In this connection, Elmore refers to the Secretary's position that a defect existed in the truck prior to the accident, in that the wiring harness had become loose which disabled the joystick, the body-up switch, and the warning light. The validity of this position is dependent upon the existence of the following facts which the decision held were not established: 1) the wiring harness had come loose prior to the accident, 2) the joystick was in the hold position at the time of the accident, and 3) that because of the severed harness, the bed would not hold in the fully upright position even when the joystick was placed in the hold position.

Further, Elmore argues that the Secretary's allegation that the wiring harness had become loose prior to the accident was not substantially justified in fact. Elmore asserts that the Secretary's position was predicated upon repairs made to the harness prior to the accident. In contrast, Elmore cites Sanders' statement in a taped interview with MSHA investigators, that immediately after the accident the wires between the front and back of the dump truck were "connected good". Elmore also alleges that Zeigler did not report any problems with his truck in his inspection reports for December 18 and 19, and that he had told Elmore's Safety Director at the conclusion of the shift on December 19, that everything was running fine. Additionally, Elmore cites the parties' stipulation that tests performed by Hennen to determine whether the previous repairs of the harness caused the wires to become shortened and therefore to pull loose prior to the accident, were inconclusive.

Elmore next refers to the Secretary's sole reliance on Sanders' testimony to establish that the joystick was in the hold position prior to the accident. In this connection, Elmore cites conflicting statements made by Sanders regarding the joystick position. Elmore also refers to the holding in the decision that the Secretary's evidence was insufficient to support this critical element.

Lastly, Elmore refers to the Secretary's reliance on testing by Hennen regarding the operation of the dump truck, which was intended to establish that if the harness is severed and the joystick is in the hold position, that the dump bed would not stay up in the fully raised position. In this connection, Elmore cites inconsistencies in Hennen's tests. Also, Elmore refers to Hennen's admission that the bed came down only once out of twelve times when the joystick was in the hold position, the dump fully raised, and the wiring harness was not intact. Elmore argues that accordingly the results are lacking in significance.

B. The Secretary's Position

In contrast, it is the Secretary's position, that in essence, its reliance on the testimony of Sanders to establish that the joystick was in the hold position at the time of the accident is substantially justified in that Sanders, in statements given to MSHA officials within a few days

of the accident, described the joystick as being in the neutral and not in the float position. Also, that the Secretary could not have been expected to predict that ultimately it would have been found in the decision after trial that Sanders' testimony was lacking in credibility. The Secretary further argues that its reliance on its theory that the wiring harness had disconnected prior to the accident causing the dump bed to fall even if it was in the hold position, was reasonable. In this connection, the Secretary asserts that its reliance on inferences from circumstantial evidence was reasonable. The Secretary notes, in her response in opposition to Elmore's application, that subsequent to the accident it was observed that the wiring harness appeared to have been cut, that investigations after the accident revealed that the wiring harness had been cut or damaged several times in the recent past causing the system to malfunction, and that on the day of the accident Ziegler had said "that the wiring on the truck was messed up". (Secretary's Response, p. 10) Lastly, the Secretary argues that its reliance on the tests performed by Hennen, her expert witness, as well as the latter's opinion based on these tests, was reasonable.

C. Discussion

In *Contractor's Sand & Gravel Company*, 20 FMSHRC 960, 969 (September 1998) the Commission set forth the following regarding a prevailing party's entitlement to attorneys fees under the EAJA:

EAJA provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified. *Cooper v. United States R.R. Retirement Bd.*, 24 F. 3d 1414, 1416 (D.C. Cir. 1994). The Supreme Court has defined a "substantially justified" position as "justified in substance or in the main" or one that has "a reasonable basis both in law and fact." *Pierce*, 487 U.S. at 565. In *Pierce* the court set forth the test as follows: "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n. 3. In EAJA proceedings the agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992) (Emphasis added).

1. Whether the Secretary's Position has a Reasonable Basis in Fact

In the case at bar, Elmore was charged with violating Section 56.14100(c), *supra*, which provides as follows:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall

be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

According to the plain language of Section 56.14100(c), *supra*, to establish a violation the Secretary must prove 1) that a defect existed, 2) that the defect makes continued operation hazardous to persons, and 3) that the defective equipment was not taken out of service.² It is the Secretary's position herein that the truck was defective in that before the accident the wiring harness had come loose creating an open circuit which disabled the joystick, the body-up switch and the warning light. I note that it is not necessary for the Secretary in this EAJA proceeding to prove its position. Rather, she need only demonstrate that her position was a reasonable one. (*Contractor's Sand & Gravel, supra*, at 973).

a. The Wiring Harness Came Loose Prior to the Accident

The Secretary's position that the wiring harness had come loose prior to the accident is based on inferences to be drawn from the testimony of two of Elmore's employees that on two occasions shortly before the date of the accident at issue, they repaired damaged wires within the harness of the truck at issue by reconnecting the wires and placing them in butt connectors which were then crimped. Also, another Elmore employee told MSHA officials in a taped interview a few days after the accident, that when he operated the truck in question on four occasions within the previous week, the bed turned over and he noticed that the wires between the bed and the truck had come loose. He also stated that the bed was slow coming down. Further, in another taped interview an Elmore employee, Tommy Finley, who was working on the same site as Ziegler on the day of the accident, told MSHA officials that the latter had said that the wiring was "messed up" (JX 3 at 1).

The decision applied the standard of preponderance of evidence, and concluded that the Secretary had not established that the wires had come loose prior to the accident.³ However, in

²It is not disputed that, on December 20, 2003, the truck at issue had not been taken out of service.

³The decision took cognizance of various factors in the record that diminished the weight to be placed on the inferences drawn by the Secretary. It was noted that the record did not contain any evidence that the repairs prior to the accident were not done properly, or that the reconnected wire-ends were not secure. Also, it was noted that any statement made by Ziegler to Finley that the wiring was messed up on the date of the accident was hearsay, that Finley's statement as to what Ziegler told him was unsworn, and that Finley was not called by the Secretary to testify. Further, it was noted that Ziegler had not reported any problems with the truck in his inspection reports for December 18 and 19.

this EAJA proceeding, the Secretary need not prove its position by a preponderance of evidence only that it was reasonably justified. (*Contractor's Sand & Gravel*, supra, at 973). I find that the Secretary's position, based upon a combination of facts and inferences, was not unreasonable.

b. The joystick was in the hold position prior to the accident

The only testimony relied on by the Secretary consists of the testimony and statements made by Sanders. Sanders testified that immediately after the accident when he entered the cab, the joystick was in the hold position. However, the decision analyzed the entire record and it was concluded that the Secretary failed to establish by a preponderance of evidence that immediately prior to the accident the joystick was in the hold position.⁴ The decision noted inconsistencies in Sanders' description of the position of the joystick describing it as either in hold or in neutral. Also, it was noted that his testimony regarding the various positions of the joystick was not consistent with the parties' stipulations.

A finding that a preponderance of all the evidence fails to establish that the joystick was in the hold position does not compel a conclusion that the Secretary's reliance on Sanders statements regarding the position of the joystick was not reasonable. In this regard, it is not unreasonable for the Secretary to have relied on Sanders' testimony inasmuch as he clearly indicated on direct examination that the joystick was in the hold position and not in the float position, and agreed that he used the term the "hold" position as being the same as the "neutral" position. Also, the Secretary should not have been expected to anticipate the lack of clarity in the Sanders' testimony that was elicited on cross-examination, or how the decision after hearing would weigh Sanders' testimony.

Thus, I find that the Secretary has established that it was reasonably justified in its position that the joystick was in the hold position.

c. If the wires are severed the bed will not hold in the fully upright position even when the joystick is placed in the hold position.

Elmore argues, in essence, that the reliance by the Secretary on tests performed by Hennen and the latter's opinion, was not substantially justified due to inconsistencies in Hennen's testimony, contradictions between Hennen's testimony regarding the tests and contemporaneous notes taken by MSHA investigators, Walter Turner and Harold Weeks. Also,

⁴The decision referred to Sanders' testimony that the joystick would go into the float position when he released it while powering up or down. The decision found that this testimony was not consistent with the parties' stipulation that if the joystick is released from the lower or raise position, it will spring back to, or remain in the hold position.

that Hennen admitted on cross-examination that of the twelve tests that he performed, the bed came down only once with the harness severed, the joystick in the hold position, and the bed fully raised.

The decision found that the Secretary had not met its burden of establishing that, prior to the accident, the harness wire that ran between the dump bed came loose and would have caused the truck bed to come down after it was raised, and the joystick placed in the hold position. However, the decision, which reasonably could not have been anticipated by the Secretary, resulted from a *de novo* review of all the evidence, and was based upon the standard of the preponderance of evidence. Thus, the decision is not dispositive of the issue as to whether the Secretary's reliance on Hennen's tests was reasonable and substantially justified. Clearly, another fact finder could reasonably have reached a contrary result regarding the weight to be accorded Hennen's tests and his conversations with representatives of the manufacture of the truck at issue. Also, another fact finder could reasonable have reached a contrary result resolving the conflict between Heenen's and Elmore's test results. I thus find that the Secretary's reliance on Hennen's tests, and his opinion was reasonable.

Therefore, for all of the above reasons, I find that the Secretary's position had a reasonable basis in fact.

2. The Secretary's Position Had a Reasonable Basis in Law

a. The Secretary's Position

In essence, it was the Secretary's litigating position that a violation of Section 56.14100(c), is established by proof that the truck in question had a defect that made continued operation hazardous, and that it was not taken out of service. Elmore argues that the requirement of Section 56.14100(c), *supra*, that defective equipment must be taken out of service, is predicated upon an operator's knowledge of the existence of the defect. Elmore asserts that there was not any evidence adduced that it had any knowledge of the defect alleged by the Secretary.

On the other hand, the Secretary relies on a unsworn statement by an Elmore employee, who did not testify, that on the morning of the accident Ziegler had told him that the wiring was messed up. The Secretary argues that Ziegler's knowledge should be imputed to the operator. Further, the Secretary cites *Rushton Mining Co.*, 10 FMSHRC 249, 252 (March 1988), which held that a standard mandating the removal of damaged equipment does not require the operator's knowledge of the defect. Additionally, the Secretary argues that its interpretation of Section 56.14100(c) as not requiring the knowledge of the operator, should be accorded deference, citing *Secretary of Labor v. Excel Mining*, 334 F.3d 1, (D.C. Cir. 2003), *Martin v. OSHRC*, 499 U.S. 144, (1991) and *Energy West Mining, v. FMSHRC*, 40 F.3d 457, (D.C. Cir. 1994).

b. Discussion

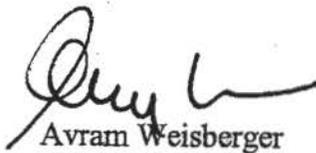
In *Contractor's Sand & Gravel Inc.*, 20 FMSHRC, *supra*, at 972, the Commission provided guidance as follows with regard to the standards to be applied in evaluating under the EAJA whether the Secretary's position had a reasonable basis in law:

. . . when federal courts inquire as to whether the government's position was substantially justified on legal grounds, they generally look to federal court of appeals precedent. *United States v. One 1984 Ford Van*, 873 F.2d 1281, 1282 (9th Cir. 1989) (government did not have a reasonable basis in law because there was no distinction between this case and an earlier Ninth circuit case); *Fraction v. Bowen*, 859 F.2d 574, 575 (8th Cir. 1988) (government's position was not substantially justified because the government's mistakes were "contrary to clearly established circuit precedent"). Similarly, in the administrative law context, Commission decisions serve as legal precedent, since the role of the Commission as a reviewing body is similar to that of a federal circuit court in the judicial setting

There is not any binding precedent in support of Elmore's position that actual knowledge on the part of an operator of a defect is essential to establish a violation of Section 56.14100(c), *supra*. Further, this issue was not addressed and resolved in the decision, inasmuch as the citation was dismissed. Thus, it is concluded that the Secretary's legal position that the doctrine of strict liability applies, is reasonable. Accordingly, I thus find that the Secretary's position had a reasonable basis in law.

D. Conclusion and Order

Therefore, for all of the above reasons, I find that the Secretary's position herein was substantially justified. Based on this finding, I conclude that Elmore has not established entitlement to attorney's fees under the EAJA as a prevailing party. Hence, it is **Ordered** that the application be **Dismissed**.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 2006

MARFORK COAL COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2006-755-R
v.	:	Citation No. 7254911; 06/12/2006
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	River Fork Powellton #1
Respondent	:	Mine ID 46-08914

DISMISSAL ORDER

Before: Judge Feldman

The captioned contest concerns a citation alleging a violation of section 75.1100(2)(b), 30 C.F.R. § 75.1100(2)(b), because of the contestant's failure to provide a fire valve handle necessary for the connection of a fire hose located along the No. 2 beltline. This mandatory safety standard requires functional firehose outlets at 300-foot intervals along the entire length of a belt conveyor.

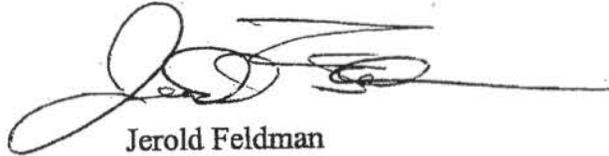
Marfork Coal Company, Inc. (Marfork) filed its contest of Citation No. 7254911 and then contemporaneously agreed to stay its contest until the Secretary proposed her civil penalties.¹ Marfork's agreement to stay its contest immediately after instituting this proceeding is identical to the circumstances that resulted in the dismissal of its contests in Docket Nos. WEVA 2006-788-R through WEVA 2006-790-R, 28 FMSHRC 842 (Sept. 2006) (ALJ), *appeal docketed* (Nov. 3, 2006), because, *inter alia*, it has failed to state the relief it is seeking as required by Commission Rule 20(e)(1)(ii), 29 C.F.R. § 2700.20(e)(1)(ii).

Marfork asserts it has an absolute and unqualified right to file its contest under section 105(d) without being required to wait to file its contest of the proposed civil penalty under section 105(a). *Opening Br.* in WEVA 2006-788-R through WEVA 2006-790-R at p.9. However, Marfork's "contest" elevates form over substance because, although it styles its filing as a 105(d) contest - - by routinely agreeing to stay its "105(d) contests" until the Secretary's civil

¹ Marfork's characterization of its action as a request for continuance of a hearing, rather than a request to stay the proceeding, is a distinction without a difference.

penalty proposal, it indeed is waiting to contest the subject citation in a 105(a) civil penalty proceeding. In other words, Marfork is kicking and screaming over being required to do what it expressly wants to do anyway. Thus, Marfork's contest is frivolous and an abuse of process.

Accordingly, the captioned contest proceeding **IS DISMISSED** because by agreeing to stay this matter rather than requesting an early hearing,² Marfork has failed to state the relief it is seeking as required by Commission Rule 20(e)(1)(ii).³



Jerold Feldman
Administrative Law Judge

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/mh

² The terms "early hearing" and "expedited hearing" should not be confused. An early hearing before the Commission is granted in response to the filing of a 105(d) contest when the operator elects to institute a contest proceeding without waiting for the Secretary's civil penalty proposal. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). An expedited hearing is authorized under Commission Rule 52, 29 C.F.R. § 2700.52, upon a showing of extraordinary circumstances that warrant an expedited adjudication.

³ The September 27, 2006, Dismissal Order currently before the Commission noted that I would stay, rather than dismiss, other Marfork 105(d) contests pending the docketing of the related civil penalty cases. 28 FMSHRC at 847 n.3. While the Commission is not a party to, or bound by, this agreement, my forbearance was based on the September 13, 2006, informal agreement between Massey Energy Company (Massey), Marfork's parent company, and the Secretary. The agreement specified that Massey subsidiaries would refrain, except in unusual circumstances, from routinely contesting, and then agreeing to stay, all significant and substantial citations until after the civil penalty was proposed. However, despite this agreement, Massey subsidiaries, such as Aracoma Coal Company, continue to file a multitude of frivolous 105(d) contests.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 19, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-160
Petitioner	:	A.C. No. 01-01322-00004
	:	
UNITED MINE WORKERS	:	
OF AMERICA,	:	
Intervenor	:	
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	No. 5 Mine

DECISION ON REMAND

Before: Judge Barbour

In this civil penalty proceeding, the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), petitioned for the assessment of civil penalties for eight alleged violations of mandatory safety standards for underground coal mines. The Secretary charged the violations occurred at the No. 5 Mine of Jim Walter Resources, Inc. (JWR) and that they directly contributed to the causes of two explosions and/or the resultant deaths of 13 miners. Because of their contributory natures, the Secretary proposed a civil penalty of \$55,000 each for seven of the alleged violations and a penalty of \$50,000 for the remaining alleged violation. The Secretary's proposals were the result of special assessments. *See* Petition for Assessment of Civil Penalty, Exhibit A.

Following an extensive hearing, I issued a decision in which I found the Secretary failed to prove six of the alleged violations. The findings were not appealed.¹ I further found she in part proved two of the violations, but did not establish the violations contributed to the cause of the accident and/or resulted in the fatalities. I assessed JWR \$2,500 for one of the violations and \$500 for the other. The parties appealed.

After considering the parties' arguments, the Commission ruled that I properly found the two violations existed. The Commission also upheld my findings regarding the civil penalty

¹The lack of an appeal effectively removed from consideration \$325,000 of the Secretary's total proposed penalties of \$435,000.

criteria applicable when assessing penalties for the violations. Nonetheless, it vacated the penalties, instructed me to revisit them, and ordered me to provide a "further explanation" of the bases for new assessments. 27 FMSRHC at 607; see also *Id.* at 580.

Subsequently, I orally requested counsels determine whether they could settle the matter by agreeing to appropriate penalties. After several exchanges of views, counsels advised they could not. Therefore, in compliance with the Commission's directive, new assessments and a more complete explanation of the penalties follows.²

THE ORIGINAL FINDINGS OF VIOLATION AND PENALTIES

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R</u>	<u>Proposed Penalty</u>	<u>Original Assessed Penalty</u>
7328105	12/11/02	75.360(b)(3)	\$55,000	\$2,500

Order No. 7328105 stated as follows:

On September 23, 2001, two separate explosions occurred in 4 Section resulting in fatal injuries to thirteen miners. The accident investigation revealed that an adequate preshift examination was not conducted in 4 Section where persons were scheduled to perform maintenance work and install roof bolts during the oncoming day shift on September 23, 2001. The examination was incomplete in that an examination of the working places was not conducted where miners were scheduled to roof bolt the unsupported face areas. The main mine fan had been off during the previous shift, creating the potential for methane accumulations in the long crosscuts between No. 2 and No. 3 Entries as well as in face areas. The examiner was not made aware of these circumstances and was instructed by mine management to limit the examination to the electrical installations only.

In addition, a hazardous condition consisting of inadequate rock dust existed, but was not identified by

² I am, of course, aware the decision in this matter has been the subject of comment, much of it by those with agendas driven by things other than the facts of the case. This decision will be more detailed and lengthier than is usual on remand so the few who may be interested in the facts can have them at hand.

the examiner. The condition was obvious, widespread and in the areas traveled by the examiner. During the investigation, mine dust samples were collected throughout 4 Section. These band samples were subjected to an Incombustible Analysis. The results revealed that approximately 97% of the sample results did not meet the regulatory requirements for incombustible content of the combined coal dust, rock dust and other dust. . . . The condition contributed to the severity and extent of the second explosion that resulted in fatal injuries. This Order will not be terminated until hazard recognition training is provided for certified mine examiners at the No. 5 Mine.

Gov't Ex. 7.

As a reading of the order reveals, the Secretary alleged JWR violated section 75.360(b)(3) in two ways: (1) by limiting the preshift examination for the oncoming day shift on September 23 to electrical installations, thus ensured an incomplete examination of the No. 4 Section; and (2) by its preshift examiner failing to identify inadequate rock dust applications that existed on the section. I upheld the order with regard to the first allegation, but because I concluded the Secretary did not establish the presence of inadequate rock dust, I vacated the order with regard to the second. 27 FMSHRC at 805-806.

Noting section 75.360(b)(3) requires an examination for hazardous conditions in “[w]orking sections . . . if anyone is scheduled to work on the section . . . during the oncoming shift” (i.e., a preshift examination) and that “working section” is defined as “[a]ll areas of the coal mine from the loading point of the section to and including the working faces” (30 C.F.R. § 75.2), I concluded since the preshift examiner admitted he did not examine the faces, if anyone was “scheduled to work on the section” prior to the preshift examination, the standard was violated. 27 FMSHRC at 808.

I further noted that the maintenance crew supervisor, John Puckett, credibly testified that prior to going underground on September 23, he understood he and his crew were scheduled to work on the No. 4 section and that the work was scheduled prior to September 23. Based on Puckett’s testimony, I found that JWR scheduled miners to work on the No. 4 Section prior to the preshift examination, and I concluded that the preshift examiner’s failure to examine “all areas of [the No. 4 Section] . . . from the loading point of the section to and including the working faces” violated section 75.360(b)(3). 27 FMSHRC at 808.

The order was cited pursuant to section 104(d) of the Act (30 U.S.C. 814(d)), and the Secretary consequently charged the violation was a significant and substantial contribution to a mine safety hazard (S&S) and the result of JWR's unwarrantable failure to comply. I upheld these findings. 27 FMSHRC at 808-812.

Turning to the gravity of the violation and to JWR's negligence in allowing the violation to exist, I found that the hazards to miners from failing to completely preshift examine the entire section were serious indeed. I noted the gassy nature of the mine, the fact the fan had been "down" and the fact electrical and diesel equipment were present. Under these circumstances, exposing Puckett's crew to the hazards of a less than fully-examined section meant exposing it to the hazards of a methane-related accident with resulting serious, even fatal, consequences. 27 FMSHRC at 810. I further noted that although the gravity of the violation was mitigated to some extent by the fact Puckett conducted a "supplemental" examination once he was on the section, the mitigation did not remove the violation from the serious category. 27 FMSHRC at 810-811. The explosions occurred on the shift following Puckett's shift, and I also noted "the inadequate preshift examination did not contribute to the fatalities that resulted from the explosions." 27 FMSHRC at 812 n. 58.

I next found that JWR's failure to ensure the No. 4 Section was completely examined before miners were sent to work on the section was indicative of a serious lack of reasonable care. I observed that Puckett, as a representative of mine management, was held to a heightened standard of care, a standard he did not meet when he lead miners onto the No. 4 Section knowing that the preshift examination was incomplete. I further found that the preshift examiner's supervisor was negligent in restricting the preshift examination, even though he should have known that the No. 4 Section was designated as a place miners were assigned to work. 27 FMSHRC at 811.

In assessing a civil penalty of \$2,500 for the violation, I took account of the statutory civil penalty criteria as follows:

[T]he parties stipulated that the proposed penalties will not adversely affect JWR's ability to continue in business, JWR is a large operator, and the company should be credited with good faith, timely abatement.

27 FMSHRC at 812. In addition, I found the company had a large history of prior violations. *Id.*

I concluded my consideration of the penalty by stating:

I have found the violation was serious in view of the types of injuries . . . it could have engendered. I also have found the violation was due to the high

negligence of JWR management personnel. Given these findings, the company's large size, its large history of previous violations, its good faith, timely abatement, and the fact the assessment will not adversely affect its ability to continue in business, I conclude that a penalty of \$2,500 is appropriate for the violation.

27 FMSHRC at 812. Finally, I stated, "other violations of section 75.360 cited pursuant to section 104(d) of the Act [had] been assessed by the Secretary at similar amounts." *Id.*

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R</u>	<u>Proposed Penalty</u>	<u>Original Assessed Penalty</u>
7328085	12/11/02	75.1101-23(c)	\$55,000	\$500

The order charged a violation of 30 C.F.R. § 75.1101-23(c) in that JWR failed to conduct fire and emergency drills at intervals of not more than 90 days. The order, as modified, stated:

On September 23, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. The accident investigation revealed the operator failed to conduct fire and emergency drills at intervals of not more than 90 days. Interviews of underground miners and a review of mine records indicate that few such drills had been conducted since March 2001. The lack of training and simulation relative to proper evacuation procedures to be followed in the event of an emergency affected the miners' response to the emergency situation of September 23.

Gov't Ex. 4A; *see also* Gov't Ex. 4.

In finding a violation, I looked first to the wording of the standard. I noted that at the time WJR was charged with the violation, section 75.1101-23(c) stated in part:

Each operator of an underground coal mine shall require all miners to participate in fire drills, which shall be held at periods of time so as to ensure that all miners participate in such a drill . . . at intervals of not more than 90 days

(1) The operator shall certify by signature and date that the fire drills were held in accordance with the requirements of this section. Certifications shall

be kept at the mine and made available on request to an authorized representative of the Secretary.

(2) For purposes of this paragraph (c), a fire drill shall consist of a simulation of the actions required by the approved fire fighting and evacuation plan described in paragraph (a)(1) of this section.

30 C.F.R. § 75.1101-23(c). I found this wording clear, and I concluded it required the operator to ensure all of its miners participated in fire drills at least every 90 days and to certify in writing that each miner participated. 27 FMSHRC at 819. I further found that the participation and certification requirements were separate and that non-compliance with the certification requirement did not automatically establish non-compliance with the participation requirement. *Id.*

In addition, I found that when the standard stated a drill “shall consist of a simulation of actions required by the approved fire fighting and evacuation plan,” it mandated an “on-site imitation of action specified by the approved plan to be part of the drill.” 27 FMSHRC at 819.

Extrapolating from the requirements of the mine’s fire fighting and evacuation plan, a plan adopted by JWR and approved by the Secretary, I further concluded “during a fire drill, there must be an on-site simulation of a response to a mine fire” and “the miners must go through the motions of actually carrying out the [fire drill] duties specified in the plan.” 27 FMSHRC at 822. In other words, I held the plan required the on-site simulation of fire fighting activities.

I then noted the various duties specified in the plan (27 FMSHRC at 822), and the credible testimony of eight miners who stated they had not participated in a fire drill simulating fighting a fire. I found the testimony “establishe[d] that JWR violated the standard by failing to ensure [these miners’] participation in the type of simulated fire drills required by the standard at least every 90 days.” *Id.* I also concluded there was a general lack of on-site simulations at the mine. 27 FMSHRC at 823.

The order was cited pursuant to section 104(d) of the Act (30 U.S.C. 814(d)) and the Secretary consequently charged that the violation was S&S and unwarrantable. I did not affirm these findings. 27 FMSHRC at 824-826. Rather, I determined the violation was not S&S because JWR “regularly instructed its miners through other exercises in fire fighting practices and techniques” and the violation did not relate to the company’s failure to conduct all training in how to confront a fire or in how to respond to a fire emergency, but rather related to the company’s failure to conduct the type of on-site, hands-on drills required by the standard and the plan. Because of the other types of fire fighting and evacuation instruction and training received by miners, I concluded it was not reasonably likely failure to conduct the on-site, hands-on drills would result in injuries to the miners. 27 FMSHRC at 825.

Nevertheless, I viewed the violation as a moderately serious one. While I agreed with the company that the record confirmed no miner lost his life on September 23 due to a lack of fire fighting training, I noted that the focus of the gravity criterion was on the effect of a hazard if it occurred and that it was conceivable the effect of not conducting on-site, hands-on fire drills for all miners would be serious in the event of a fire. 27 FMSHRC at 825.

Turning to the unwarrantable finding, I found the record fully supported concluding the company did not exhibit a "reckless disregard" for its compliance responsibilities, in that company personnel honestly believed their fire fighting training and instruction met the requirements of the standard.³ 27 FMSHRC at 826. Weighing the totality of the evidence, I concluded that the company was moderately negligent in failing to comply with the standard.

In assessing a civil penalty of \$500 for the violation, I took account of the statutory civil penalty criteria as follows:

[T]he parties stipulated that the proposed penalties will not adversely affect JWR's ability to continue in business, JWR is a large operator, and the company should be credited with good faith abatement . . . In addition . . . the company has a large history of prior violations.

* * *

I have found the violation was moderately serious and JWR was moderately negligent. Given these findings, the company's large size, its large history of previous violations, its good faith, timely abatement, and the fact the assessment will not adversely affect its ability to continue in business, I conclude that a penalty of \$500 is appropriate for the violation.

27 FMSHRC at 826. Finally, I noted that the assessment was "in a range of other assessments proposed [by the Secretary] for moderately serious violations that resulted from the company's moderate negligence." *Id.* at n. 74.

³ The belief, I noted, was "abetted in no small part" by the Secretary's less-than-clear *Program Policy Manual* guidelines regarding compliant fire drill practices and by her longstanding failure prior to the explosions to cite JWR for not conducting proper fire drills. See 27 FMSHRC at 826; see also 823-824; n. 71.

THE COMMISSION'S REMAND

As previously stated, the Commission upheld my finding of a violation of section 75.360(b)(3). 28 FMSHRC at 598-601. It also upheld my finding that the violation of section 75.360(b)(3) was S&S. It observed, because of the failure of Puckett to conduct a complete preshift examination, "miners . . . who accompanied Puckett and those who did not, were working and traveling through a section that should have been entirely preshifted before they entered it but was not" (28 FMSHRC at 602) and that "miners were on the section for a significant amount of time before it had been entirely preshifted." *Id.* at 603. The Commission recognized, because of the lack of a complete preshift examination, the miners were exposed to the hazards of a possible methane buildup. In addition, because the record indicated the roof on the No. 4 Section was subject to prior roof faults and falls, the Commission concluded the failure to conduct a complete preshift examination also exposed the miners to possible faulty roof conditions. The Commission agreed with me that the violation was serious in nature. *Id.* at 603-604.

On the issue of unwarrantable failure, the Commission divided evenly. The division left standing my finding the violation was due to the company's unwarrantable failure to comply with the standard. The Commission also left undisturbed my finding JWR was highly negligent. 28 FMSHRC at 604-605.

Turning to the violation of section 75.1101-23(c), the Commission concluded substantial evidence supported my finding not all miners participated in the simulated fire drill and fire fighting activities required by the approved and adopted plan. 28 FMSHRC at 592-594. The Commission also affirmed my conclusion that the violation was not S&S, but was moderately serious. 28 FMSHRC at 597. It noted that none of the fatalities that resulted from the explosions were the result of the violation and that although JWR did not provide all miners with on-site simulated fire drills, as required by the standard and its plan, it regularly instructed its miners in firefighting practices and techniques and conducted required quarterly fire drills. 28 FMSHRC at 595-596. The Commission also left standing my finding that the violation was the result of JWR's negligence.

In remanding the matter for reconsideration of the penalties and a more complete explanation of their bases, the Commission reminded me of its longstanding admonition:

When . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves . . . [the Commission's] judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission.

Sellersburg Stone Co., 5 FMSHRC 287, 290-94. (March 1983). The Commission also noted:

If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Id. at 293; 28 FMSHRC at 606-607.

ASSESSMENTS AND EXPLANATION

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty on Remand</u>
7328105	12/11/02	75.360(b)(3)	\$55,000	\$5,000

It is important to again emphasize that the initial proposed penalty of \$55,000 was based in large measure upon the fact that part of the condition cited as an alleged violation, failure by the preshift examiner to recognize a hazardous, obvious and widespread inadequate rock dust application in the areas he traveled, contributed to the severity and extent of the second explosion and resulted in fatal injuries. This allegation was not proven at trial, and my dismissal of this part of the order was not appealed. Thus, the only part of Order 7328105 which constituted a violation was the charge that the preshift examiner failed to conduct a preshift examination of the entire No. 4 Section on September 23. The incomplete examination did not contribute to the explosions and to the resultant fatalities. Had a penalty been proposed by the Secretary as a non-contributory violation, it would have been far, far less than \$55,000, and the fact that the violation was non-contributory is a major reason for the "substantial divergence" between the amount proposed by the Secretary and the amount I originally assessed.

The part of the violation that was proven – the fact that the preshift examination did not "cover" the entire section, even though miners were scheduled to roof bolt the unsupported face areas and to do other work on the section – resulted in miners working in and traveling through a section that should have been entirely preshifted before they entered. 28 FMSHRC at 602. In gauging the nature of the hazard presented by the incomplete preshift examination, I observed the mine was gassy, the fan had been off, and potential ignition sources existed in the section. Taken together, I concluded these factors subjected the miners to the danger of being involved in a methane-related ignition or explosion as normal mining operations continued. 27 FMSHRC at 809-811. The Commission pointed to an additional hazard. It noted evidence of faulty roof in the No. 4 section and concluded, "[r]oof falls posed another hazard." 28 FMSHRC at 603. The roof-fall hazard, added significantly to the gravity of the violation, and I should have considered it when I assessed the penalty.

Further, and as the Commission reminded me in affirming the violation, the preshift examination requirements are “of fundamental importance in assuring a safe working environment underground.” See 28 FMSHRC at 598 (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (January 1995) and 61 Fed. Reg. 9764, 9740 (March 11, 1996)). They are a primary means of detecting developing hazards, such as methane accumulations and bad roof. While all federal health and safety regulations governing conditions and practices in the nation’s mines are designed to protect the miner, some have more important protective functions than others. When, as here, a regulation of “fundamental importance” is violated, the gravity of the violation is increased and, all other things being equal, the penalty assessed should be more than for the violation of a less important standard. I did not adequately consider this factor in evaluating the seriousness of the violation.

With regard to JWR’s negligence, I found that two of JWR’s employees failed to meet the standard of care required of them and that the failure of JWR “to ensure the No. 4 Section was completely examined before miners were sent to work on the section was indicative of a serious lack of reasonable care.” 27 FMSHRC at 811. I, therefore, upheld the inspector’s special finding of unwarrantable failure on the company’s part. 27 FMSHRC at 811. I also found the company’s negligence to be “high.” *Id.* These findings were not changed by the Commission. Nor have there been changes to the other stipulated civil penalty criteria or to my conclusion the company has a large history of previous violations. 27 FMSHRC at 812.

In view of the roof fall hazard, the fundamental importance of compliance with the preshift requirements to miner safety, JWR’s high negligence, and the other penalty criteria, I conclude that a penalty greater than that which I originally assessed is warranted, and I assess a penalty of \$5000.⁴

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty on Remand</u>
7328085	12/11/02	75.1101-23(c)	\$55,000	\$500

Here, too, the Secretary’s proposed penalty of \$55,000 was based upon the fact that the order alleged the violation “affected the miners’ response to the emergency situation on

⁴ While this penalty also “substantially diverges” from the penalty originally proposed, the divergence is primarily explained by the fact that the original proposal was based primarily upon the part of the violation that allegedly contributed to the explosions and the resultant fatalities, an allegation that I again emphasize was not established at trial. It may be of interest to some that the revised assessment conforms with and perhaps exceeds what the Secretary would have proposed for a violation cited under section 104(d), had she believed the violation did not contribute to the explosions or the resultant fatalities. See e.g., *Jim Walter Resources, Inc.*, Docket No. SE 2003-161, Exh. A, Narrative Findings of Special Assessment. (The company’s history of previous violations also is instructive in this regard. See Attachment to Stipulations (printout of previous history)).

September 23" (Gov't Ex. 4) and thus contributed to the fatalities resulting from the explosions. See Narrative Findings of Special Assessment, Docket No. SE 2003-160. I found, however, that although JWR violated the cited standard to the extent of not providing its miners with the on-site, hands-on fire drills required by the standard, the violation did not contribute to the fatalities that resulted from the explosions, and I found that JWR "regularly instructed its miners through other exercises in fire fighting practices and techniques." 27 FMSHRC at 825; *see also* n. 73. As previously stated, I concluded and the Commission affirmed, the violation was not S&S and was but moderately serious. 27 FMSHRC at 825; 28 FMSHRC at 597.

I also found the company did not exhibit "reckless disregard" for the company's compliance responsibilities under section 75.1101-23(c) and the violation was not the result of the company's unwarrantable failure to comply with the standard. 27 FMSHRC at 826. These findings were not appealed; nor was my finding that JWR was moderately negligent in failing to comply with the standard. *Id.*

The assessment of a penalty for the violation must be based on what the Secretary proved, not on what she alleged. Here, her proof was light years from her allegations. The fact that the assessment "substantially diverge[d]" from the proposal, was caused primarily by the Secretary's equally substantial gap in proof.

The resultant penalty of \$500 took into consideration all of the statutory civil penalty. Given the criteria, which remain unchanged, I continue to find the penalty appropriate.⁵

ORDER

JWR is **ORDERED** to pay a total civil penalty of \$5,500 in satisfaction of the violations in question. Payment is to be made to MSHA within 40 days of the date of this proceeding. Upon receipt of full payment, this proceeding is **DISMISSED**.


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

⁵ Again, it may be of interest to some to know the penalty is akin to what the Secretary would have proposed for a moderately serious, non-contributory violation of section 75.1101-23(c) caused by moderate negligence. See 27 FMSHRC at 826 n. 74.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 22, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-264-M
Petitioner	:	A.C. No. 45-03224-22959
	:	
	:	Docket No. WEST 2004-316-M
	:	A.C. No. 45-03224-25667
	:	
v.	:	Docket No. WEST 2004-345-M
	:	A.C. No. 45-03455-20609
	:	
	:	Docket No. WEST 2004-352-M
	:	A.C. No. 45-03224-20531
	:	
	:	Champion Pit #1
	:	
WASHINGTON ROCK QUARRIES, INC.,	:	Docket No. WEST 2004-309-M
Respondent	:	A.C. No. 45-03455-25761
	:	
	:	Docket No. WEST 2005-151-M
	:	A.C. No. 45-03455-44593
	:	
	:	Docket No. WEST 2005-307-M ¹
	:	A.C. No. 45-03455-53752
	:	
	:	King Creek Pit

DECISION

Appearances: Bruce L. Brown, Esq., U.S. Department of Labor, Seattle, Washington, on behalf of the Petitioner;
Paul M. Nordsletten, Esq., Davis Grimm Payne & Marra, Seattle, Washington, on behalf of the Respondent

Before: Judge Barbour

¹ This docket was not included in the consolidated cases, but was included in the parties' settlement of violations addressed as a result of the consolidation. Therefore, the docket is included in the caption.

These cases concern proposals for the assessment of civil penalties filed by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) (the Act). She seeks civil penalty assessments for 35 alleged violations of mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations ("30 C.F.R.").² The violations allegedly occurred at two facilities operated by Washington Rock Quarries, Inc. (WRQ), Champion Pit No.1 (Champion Pit) and King Creek Pit (King Creek). The cases were heard in Tacoma, Washington. At the close of the hearing, the record was left open to accommodate the telephone testimony of a witness. Following the taking of that testimony, the record was closed, and the parties submitted post-hearing briefs.

STIPULATIONS

At the Tacoma hearing, the parties agreed to the following stipulations:

1. [MSHA] has jurisdiction over the mines involved in the citations;
2. [The Administrative Law Judge] has jurisdiction to hear [the] matter[s];
3. Annual hours worked at the mine[s] in each of the years 2002, 2003 and 2004 was over 30,000 hours, but less than 60,000 [³], and;
4. Imposition of the combined proposed assessments will not adversely impact [WRQ's] ability to stay in business.

See Joint Exh. 1 at 1-2; Tr. 16. In addition to the stipulations, the parties agreed to the accuracy of a report containing WRQ's history of previous violations (Tr. 188; Gov. Exh. 29).⁴ They also agreed WRQ timely abated all of the alleged violations. Tr. 15.

² Prior to the hearing, the parties settled 23 of the alleged violations, and I will approve that settlement at the close of this decision. Tr. 11.

³ Counsel for the Secretary stated that the numbers are indicative of a small mine. Tr. 189.

⁴ The report sets forth what counsel for the Secretary describes as a "small to average" history. Tr. 189.

WRQ'S OPERATIONS

Harry Hart, the president of WRQ for the past 15 years, described the two quarries. Hart was involved personally in the design and construction of both facilities. At Champion Pit, basalt is extracted by drilling and blasting. King Creek, on the other hand, is a sand and gravel operation. TR 194-195. Champion Pit opened in 1990. King Creek opened in 1998. *Id.* The land on which the mines are located, and much of the land surrounding the mines, is owned by the International Paper Company (International Paper). WRQ pays International Paper a royalty on each ton of material it removes from the two sites. Tr. 196.

DOCKET NO. WEST 2004-352-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6350795	1/13/04	56.16006 ⁵

Citation No. 6350795 states:

The acetylene, oxygen and [a]rgon mixed gas cylinder valves, on the [F]ord maintenance truck . . . were not protected by covers during transport. The mixed gas valve was about 18 inches above the cab of the pick-up and the acetylene, oxygen valves were about 4 inches off the side and 5 inches above the cab of the truck without being protected. This creates the hazard of the valves breaking when accidentally hit and for serious injuries to occur. The maintenance truck is used on a daily basis for repairing mobile equipment.

Gov. Exh 3.

Ron Jacobsen is a MSHA supervisory mine inspector. He works in the agency's Boise, Idaho office. Prior to taking the position in Boise, Jacobsen worked as an inspector in the

⁵ Section 56.16006 states:

Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by safe location when the cylinders are in use.

agency's Bellevue, Washington, office. He has been employed by MSHA since 2001.

On January 13, 2004, Jacobsen traveled to the Champion Pit to conduct a general inspection of the mine. After arriving at the mine, Jacobsen met Jerry Joliffe, the mine foreman. Jacobsen testified that as he and Joliffe were standing near the mine office, Jacobsen noticed a Ford pickup truck drive up. The truck was carrying compressed gas cylinders. The cylinders lacked protective covers. Tr. 32-33; *see also* Tr. 360. Jacobsen photographed the truck. Tr. 33; Gov. Exhs. 1, 2. Because the cylinders were being transported without covers, Jacobsen believed the cylinders were not protected as required by section 56.16006. Tr. 36.

Jacobsen explained that when cylinders are transported without covers, there is a danger that the valves at the top of the cylinders will be dislodged, which in turn will lead to the cylinders blowing up or to them being propelled like missiles. Tr. 37. Such accidents can cause fatal injuries to the vehicle driver or to anyone standing nearby. However, in Jacobsen's opinion, accidents involving the subject cylinders were unlikely because the cylinders did not have to pass under low clearances at the mine, and there was nothing that might hit the top of the cylinders and damage them. *Id.*, 40, 42. Moreover, Jacobsen had "no doubt" (Tr. 43) the cylinders were securely held in place on the truck because they were placed in semicircular metal cradles. Tr. 39; Gov. Exhs. 1 and 2. Still, in Jacobsen's view, the company violated the standard by transporting the cylinders without covers. Jacobsen spoke with the maintenance mechanic who told Jacobsen that he (the mechanic) never heard of section 56.16006. The mechanic thought that securing the cylinders in the cradles was sufficient. Tr. 38, 40.

As a result of what he saw and was told, Jacobsen issued the subject citation. He believed the violation was the result of WRQ's negligence. The citation was abated when covers were placed over the cylinders' valves. Tr. 40.

Harry Hart explained that WRQ obtained its compressed gas bottles from a welding supplier. When the bottles arrived at WRQ's shop, which is on mine property, they were protected by covers. Tr. 197. He further explained that when the bottles were placed on WRQ's service truck, they were put in the cradles. Hart added that the cradles were bolted to the truck frame and the bottles were secured further with chains "so they can't fall over." *Id.* The cradles were designed for the truck. Tr. 198. Hart described the cylinders as being located "below where anything would hit them." Tr. 201.

Hart added that the bottles remained upright and secured in the truck's cradles until they were used. Tr. 201; *see also* Tr. 200. Once the bottles were taken off the truck, the covers were removed and gauges were installed. When the bottles were empty, the covers were replaced, the bottles were put back on the truck, and they again were chained. Tr. 198.

WRQ used the truck to transport liquid gas cylinders since 1992 or 1993. Tr. 200. Prior to the subject citation, WRQ never was cited by MSHA for any condition relating to the cylinders' transportation. Tr. 198.

THE VIOLATION

I conclude the violation existed as charged. The parties do not dispute that the cylinders contained compressed gases. Section 56.16006 requires the cylinders' valves to be protected by covers when the bottles are transported or stored. Jacobsen testified that the cylinders were being transported on the truck and that they did not have covers. Tr. 37, 360. Hart, who was present, along with Jacobsen and Joliff, stated the truck was parked, and it was "not [his] recollection" the truck was moving and was transporting uncovered cylinders. Tr. 202. However, Jacobsen was certain about what he saw, and I credit his version of the facts. Therefore, I find the cited cylinders were being transported without protective covers in violation of section 56.16006. I also note even if the truck was parked, as Hart maintained, I still would find a violation. Hart's testimony made clear the cited cylinders were stored on the truck until they were ready to be used. Tr. 198-200. The storage of full cylinders without protective covers is also a violation of the standard.

GRAVITY AND NEGLIGENCE

The violation was not serious because there was little likelihood it would result in an injury-causing accident. Both Jacobsen and Hart noted the cylinders were secured in cradles on the truck. Tr. 43, 197-198. Moreover, Jacobsen testified there were no low clearances under which the truck had to pass and, thus, no obstructions that might damage the cylinders' unprotected valves (Tr. 37, 40, 42). The essence of Hart's testimony as to the violation's gravity was consistent with Jacobsen's. Tr. 198-201.

In transporting the uncovered cylinders, WRQ failed to meet the standard of care required of a reasonably prudent mine operator. The lack of protective covers was visually obvious. Management personnel knew or should have known the covers were missing. Therefore, I find the company was negligent in failing to ensure the presence of the required covers.

DOCKET NO. WEST 2004-316-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6350797	1/13/04	56.14112(b) ⁶

Citation No. 6350797 states:

⁶ Section 56.14112(b) states:

Guards shall be securely in place while machinery is being operated, except when testing and making adjustments which cannot be performed without removal of the guard.

The guard of the tail pulley of the #2 feed conveyor was not secure. Nor was there a bottom guard on this conveyor. The guard was not secure on the bottom and was just hanging down over the tail pulley. This exposes miners to entanglement hazards that could cause serious injuries. The area is accessed when the plant is off and clean-up is conducted with a bobcat.

Gov. Exh. 5.

Jacobsen testified when he inspected the No. 2 Feed Conveyor tail pulley, he noticed the guards for the pulley consisted of overlapping pieces of conveyor belt material. Tr. 45. The top piece of material covered the upper part of the tail pulley and the lower piece covered the lower part.

Jacobsen recalled the conveyor belt was moving "at a high rate of speed". Tr. 50, *see also* Tr. 47. He was concerned because the pieces of the guard were "only secured with a bolt at the top" and because the top part of the guard was hanging in such a manner as to create a four-inch wide gap between the inside edge of the top piece of belting and the frame of the pulley. Tr. 47. He also was concerned about the use of belting material as a guard. While he agreed the material was accepted by MSHA for guarding purposes (*id.*), in his view the material did not make "a strong guard." Tr. 46.

Jacobsen stated section 56.14112(b) is designed to prevent persons from contacting moving machine parts. Tr. 49. Jacobsen believed a violation of the standard existed because the top of the guard was "flimsy" and a person could push through the belting if he or she fell toward the pulley. Tr. 55-56. The bottom part of the guard also was "flimsy" and a person shoveling could push through it and the shovel and shoveler could be pulled into the pulley. Tr. 50, 56. Jacobsen further thought the four-inch gap "could be part of the violation". Tr. 56.

Jacobsen acknowledged, however, that an injury was unlikely. Tr. 49-50. Someone told him the area was only accessed by miners when the equipment was not operating. Tr. 58.

With regard to negligence, Jacobsen stated that the condition of the guards "wasn't real obvious" and that WRQ was only moderately negligent in allowing the violation to exist. Tr. 51.

Hart disagreed about the strength of the belting. According to Hart, the material was "extra heavy-duty . . . one inch thick belt, five-ply." Tr. 204. Because the conveyor material from which the guards were constructed was very stiff, he believed if a person pushed or fell against the top guard, the person would not be able to move the guard and encounter any moving machine

parts. Tr. 204, 206.⁷ Hart testified that the cited guards were installed in 2001 at MSHA's suggestion and that they never were previously cited. Tr. 208. He added that miners did not work near the pulley, nor walk within five feet of it while the conveyor belt was running. Tr. 205, 209.

To abate the condition, WRQ secured the top piece of belting with additional bolts and closed the four-inch gap. Tr. 51-52. Jacobsen could not recall what else, if anything, WRQ did. Tr. 52, 58.

THE VIOLATION

The standard requires guards to be "securely in place when machinery is being operated." 30 C.F.R. §56.14112(b). I accept Jacobsen's undisputed testimony that the conveyor belt was moving. Tr. 50. I infer from the fact the four-inch gap was closed by using addition bolts to secure the top piece of belting (Tr. 51-52) that the guard was not "securely in place when the machinery [was being] operated," and I, therefore, find the violation existed as charged. Tr. 51-52. It seems clear to me that if a guard provides access that can be eliminated by better affixing it, it is not "secured in place." Here, tightening the guard to the frame of the tail pulley eliminated the gap that provided access to the pulley's moving parts.

The finding of violation is in no respect based on the material WRQ used for guarding. As Jacobsen and Cain acknowledged, while MSHA has qualms about guards made with conveyor belting, the agency allows its use. Nor is the violation based on an allegation the guards were flimsy. Jacobsen did not physically test the guard.

GRAVITY AND NEGLIGENCE

The violation was not serious. Jacobsen was told, and did not dispute, that shoveling in the vicinity of the pulley took place only when the equipment was not operating. Tr. 58. Hart also testified miners neither walked nor worked adjacent to the pulley when it was operating. Tr. 205, 209. Jacobsen believed, that an injury-causing accident resulting from the violation was unlikely. Tr. 58. Jacobsen's assessment of the situation accurately reflects the testimony, and I accept it.

The violation was visually obvious. An inspection should have revealed the gap. I infer from this that if WRQ had exercised reasonable care, it would have detected and corrected the condition. In failing to do so, it behaved negligently.

⁷ Another view on the merits of the belting material was expressed by supervisory mine inspector Stephen Cain, who explained that although it is permissible to use belting, the material is pliable and does not "offer the same measure of protection as guards made of metal mesh." Tr. II 13.

DOCKET NO. WEST 2004-352-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6350798	1/13/04	56.14112(b) ⁸

Citation No. 6350798 states:

The guard to the tail pulley of the surge tunnel conveyor was not secure on the bottom. This exposed about a 4 inch opening to the tail pulley, and entanglement hazards that could cause serious injuries to a miner. The area is accessed when the plant is off and clean-up is conducted with a bobcat [a small front end loader].

Gov. Exh. 7.

During the inspection, Jacobsen noticed that the tail pulley guard on top of the surge tunnel conveyor belt was "hanging loose." Tr. 59; *see* Gov. Exh. 6. Only the top part of the guard was attached to the frame of the belt, creating a triangular gap between the frame and the guard. Jacobsen measured the gap at the base of the triangle and found it to be four inches. Tr. 60, 66-67. The belt was running. Jacobsen did not attempt to move the guard, but he noticed that the tail pulley was exposed through the gap. Tr. 60-61.

Jacobsen believed the loose guard was a hazard, because a miner could get an arm or a hand through the gap and could be caught by the pulley. Tr. 62, 64. He also noted the area near the guard was muddy and that a miner could slip, fall toward the gap, and his or her arm or hand could pass through the gap into the hazardous area. Tr. 65. Such an accident "would remove [the miner's] arm or hand." Tr. 64.

However, Jacobsen viewed an accident as unlikely. Tr. 62-63. He believed he was told the area near the pulley was not regularly traveled, and his visual observation of the area confirmed this. Tr. 62-63, Tr. 70. He also thought he was told miners were in the area only when the equipment was shut down. Tr. 62-63.

In Jacobsen's opinion, the company was moderately negligent. He again noted the area was not regularly accessed, and he recalled company officials telling him that the condition "may have just happened." Tr. 64, 72.

Hart testified, to his knowledge, bolts never were used to fasten the sides of the guard. The guard had been as Jacobsen found it since 2000, and the condition never was previously cited. Tr.

⁸ The standard is set forth in n. 6 *supra*.

213, 214, 216. Hart agreed that the opening between the guard and the tail pulley frame was approximately four inches at its widest point. Tr. 211-212; *see* Gov. Exh. 6. Because the tail pulley was located approximately one foot behind the guard, Hart did not think it possible for a miner accidentally to contact the pulley if he or she were to fall near the guard. Tr. 214. Access was available only through the widest part of the gap, which was at the bottom of the guard. Because the tail pulley was mounted at an angle, to reach its moving parts from the bottom, "you would have to be on your knees and you would have to stick your arm in and then turn your arm at a 90-degree turn to get to [the] . . . pulley." Tr. 215.

WRQ's expert witness, Kim Redding, a former MSHA inspector and a current private mine safety and health consultant (*see* WRQ Exh. 21), believed the only contact possible was intentional contact. Tr. 308. However, Redding was not present on the date of the inspection and only saw the tail pulley after the alleged violation was abated. Tr. 305.

THE VIOLATION

As I have noted, the standard requires guards to be "securely in place when machinery is being operated." Jacobsen's testimony that the tail pulley was operating when he conducted the inspection was not disputed. Tr. 61. Also essentially undisputed was the existence of the gap, which measured up to four inches between the frame of the tail pulley and the guard. Tr. 60, 66-67, 211-212; Gov. Exh. 6. While contact with the pulley was difficult, it was not impossible, and I find the presence of the gap violated the standard. In this instance, being "securely in place" means that the guard should have been snug against the frame of the tail pulley. To find otherwise would defeat the purpose of the standard by allowing entry to the moving pulley parts.

GRAVITY AND NEGLIGENCE

Like the inspector, I conclude the violation was not serious. The testimony established miners infrequently visited the area. The testimony also permits finding when they visited, the conveyor belt usually was shut down. In addition, as the citation states, miners most often cleaned in the vicinity of the pulley with a bobcat. Nevertheless, common sense dictates that as mining operations continued there would be times when miners were on foot in the area and the belt was running. Belts that are "always" shut off when miners are present sometimes are not, and equipment from which miners "always" work sometimes malfunctions. This stated, there was only a remote possibility a miner who was on foot in the vicinity of the pulley would actually contact its parts. Hart's description of the contortions required for such contact was not refuted (Tr. 214-215), and although the focus of the civil penalty gravity criterion is on the effect of the hazard were to occur (*Consolidation Coal Company*, 18 FMSHRC 1541, 1550 (September 1996)), the criterion also has a "likelihood" component, which in this instance mitigates the seriousness of the possible result.

As for the company's negligence in allowing the violation to exist, I agree with the inspector that the lack of regular travel in the area by management personnel militates against finding more than moderate negligence on the company's part. Tr. 64. In addition, the relatively small size of the gap and the fact that the company never was previously cited for a guarding violation with respect to the subject pulley further lessens WRQ's neglect. Tr. 216.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6350799	1/13/04	56.14107(a) ⁹

Citation No. 6350799 states:

The 2 by 2 belt has an inadequate guard on the tail-pulley. The conveyor is about 4 feet off the ground, has an 8 inch opening on the back, and a 12 inch exposure on the bottom. This creates entanglement hazards to miners that access the area when the equipment is off.

Gov. Exh. 8.

Jacobsen testified that upon examining the tail pulley for the 2 by 2 belt on the ballast stacker, he noticed the pulley was lacking a bottom and a rear guard. Tr. 73; *See* Gov. Exh. 8. In Jacobsen's opinion, the lack of guarding endangered miners because they might contact the moving parts of the pulley. Tr. 74-75. His memory refreshed by contemporaneous notes, Jacobsen recalled that the tail pulley was located approximately four feet off the ground, which, he believed, meant that the pulley's unguarded bottom parts could be "easily accessed." Tr. 75. Jacobsen noted that material occasionally built up under the pulley and to be rid of the material, a miner would "use a shovel to try to clear . . . [it]." Tr. 361; *see also* Tr. 75, 83. Jacobsen feared a miner doing this work accidentally would contact moving parts, which would "grab [the shovel handle] and pull [the miner] up into [the pulley]" (Tr. 361); or, he or she would inadvertently reach up and his or her hand would be caught in the pulley. Tr. 84. In either case, the miner's fingers, hand or arm could be lost. *Id.*

However, Jacobsen did not believe contact was likely because the unguarded openings on the rear and underside of the tail pulley were restricted in size. Tr. 76-77; *see also* Gov. Exh. 8-A. Moreover, Jacobsen was told by management personnel that the tail pulley was not accessed while it was operating and that the area in which the equipment was located was not regularly traveled.

⁹ 30 C.F.R. § 56.14107(a) states:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Tr. 77. In addition, he admitted he never was told miners cleaned with shovels at the mine, nor had he ever seen miners do so. Tr. 361.

Hart testified that access to the pulley was impossible. He emphasized the pulley was one foot behind the guard. He added the opening about which Jacobsen was concerned and which Jacobsen described as measuring eight inches actually was four inches. Tr. 218. Hart did not think a person could contact the tail pulley through the space because he or she would have to reach in and then up about one or two feet. In Hart's view, there was no reason a person would do this. Tr. 219.

While Hart acknowledged there was a 12-inch opening underneath the tail pulley, he maintained if a person traveled under the pulley and stood up, three crossbars would prevent the person from coming in contact with the moving parts. Tr. 220, 222-223. Finally, Hart noted the sides of the tail pulley were fully screened to prevent access. Tr. 224.

Kim Redding, like Hart, also believed the crossbars prevented accidental contact from underneath. Tr. 288. In addition, Redding stated miners most often worked from a bobcat when in the area and usually would not position themselves under the pulley to clean up material. Tr. 289, 295. He acknowledged, however, that if a miner were shoveling under the pulley, his or her shovel could come in contact with the moving pulley, but he thought this would be "pretty hard to do unless . . . [the miner] intentionally [was] trying to scrape something off the pulley." Tr. 295. On the whole, he believed the frame structure around the pulley offered adequate protection. Tr. 291.

With regard to WRQ's negligence, Jacobsen testified that it was high. The lack of adequate guards was obvious. He added that the foreman who supervised the area was not conducting workplace examinations. Jacobsen recalled the foreman stating he was "too busy" to do the examinations and that mine management had not given him the forms required for the examinations. Tr. 86. Although Hart emphasized the openings on the tail pulley had existed since 2000 and never had been cited previously by MSHA (Tr. 224), Jacobsen countered that conditions change constantly and there was no way to be sure the conditions he (Jacobsen) saw had been seen by other inspectors. Tr. 87.

THE VIOLATION

I conclude the violation existed as charged. The standard is designed to prevent miners from accidentally contacting pinch points and/or becoming entangled by moving machine parts.¹⁰

¹⁰ The Commission has held section 56.14107(a) "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling, falling, inattention, or carelessness" (*see, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983)). The Commission also has held applying these concepts requires taking into consideration all relevant exposure and injury variables. *Thomas Brothers Coal Company*,

The tail pulley mechanism contained pinch points and moving parts. They created the possibility of entanglement. As a result, the pulley was required to be guarded. Jacobsen's testimony established the guarding was insufficient because the tail pulley mechanism could be accessed. Tr. 76-77. In this regard, I do not credit Hart's testimony that the gap about which Jacobsen was concerned was four inches. Comparing the gap as depicted in Gov. Exh. 8 with the other pictured parts of the frame described as measuring two inches, I conclude the actual measurement of the gap was approximately eight inches, as stated by Jacobsen. Tr. 76-77; Gov. Exh. 8. Although the location of the pulley mechanism meant that contact with a pulley mechanism through the gap or from below the pulley frame was unlikely, it was not impossible. Cleanup activities under or alongside the belt and travel next to the belt provided the opportunity for such contact, and although Redding indicated miners usually used a bobcat when working around the pulley, the fact that on occasion miners were required to be on foot near the pulley was not refuted by WRQ.

GRAVITY AND NEGLIGENCE

I agree with the inspector that there was a danger to miners cleaning under or around the tail pulley or passing it. As Jacobsen testified, and as Redding agreed, a miner cleaning under the pulley might catch his or her shovel in the pulley's moving parts. Tr. 84, 295. In addition, a miner working under the pulley might reach up and his or her hand or arm might contact the parts. Tr. 84. It also was possible a miner working or traveling around the pulley might trip and enmesh his or her arm or hand in the moving parts. However, and as Jacobsen also testified, miners' access to the pulley was usually restricted while it was operating, travel in the vicinity of the pulley was infrequent, and the openings to the moving machine parts were relatively small. Therefore, I conclude injuries were unlikely and the violation was not serious. Tr. 76-77.

NEGLIGENCE

The testimony establishes that WRQ was moderately negligent. The openings to the pulley were visually obvious. Reasonable care required the installation of adequate guards, which were not installed.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6355401	1/13/04	56.14107(a) ¹¹

Citation No. 6355401 states:

The Seco Screen [¹²] has an inadequate guard on the drive/counter-

Inc., 6 FMRHRC 2094, 2097.

¹¹ The standard is set forth in n. 9, *supra*.

¹² The screen is a portable machine used to sift topsoil. Tr. 233-234.

balance parts. There is about a 7 inch exposure to the fast moving counterbalance that has catch hazards, and the walkway past the balance is about 2 ½ feet. This exposes miners that access this deck as needed to serious injuries, it was stated that this deck would not be accessed while the equipment was in operation.

Gov. Exh. 11.

Jacobson testified that he observed an inadequate guard on the Seco Screen's belt drive. Tr. 88. A two-and-one-half foot wide walkway ran alongside the belt drive and counterbalance. According to the inspector, although an "excellent" (Tr. 89) guard was in place for the front of the belt and although that guard was immediately adjacent to the walkway, a gap of approximately seven inches existed between the back of the screen and the moving parts of the belt drive and counterbalance. Tr. 92; *see* Gov. Exh 10. Jacobsen believed if a miner tripped while using the walkway, he or she would reach across the top of the screen to grab its backside for support. This would subject his or her hand or arm to contact with the moving parts of the belt drive and counterbalance. (The top of the screen was approximately three-and-one-half feet above the walkway.) Tr. 89-90, 92, 96-97; *see* Gov. Exh. 10. However, Jacobsen also believed this scenario was unlikely to happen. He noted the foreman stated miners did not access the area while the plant was operating, and Jacobsen agreed that the narrow nature of the gap and its location limited access to the moving parts. Tr. 92.

Hart testified that a handrail was present along the walkway, opposite the screen. He believed a tripping miner was more likely to grab the handrail for support than to reach across the top of the screen. Tr. 332-333.¹³ Hart also maintained miners did not access the screen while it was operating. Tr. 230-231. In addition, he testified the exposed moving parts of the screen were smooth and did not present a "catch hazard". Tr. 230, *see also* Tr. 391. ("There's no bolts or anything else in the backside of this [equipment]." Tr. 391.)

Kim Redding too was of the opinion existing guarding on the screen prevented access to the screen's moving parts. He stated a "person would have to be a contortionist" to reach across the top of the screen and contact the parts. Tr. 289. Redding reiterated Hart's opinion that should a miner stumble on the walkway, he or she would most likely reach for the handrail, and he also believed no work was required that would put a miner in a position from which he or she could access the parts. Tr. 297-298.

Jacobsen thought the company was negligent. Jacobsen was told that in the past the screen had operated without a guard, and he noted, "the foreman stated that he had not done a workplace

¹³ Jacobsen countered because miners commonly used two handrails, if a miner tripped, he or she would be likely to reach not only for the handrail, but also toward the gap and the moving parts. Tr. 365.

exam on [the screen].” Tr. 93.

THE VIOLATION

I conclude the violation existed as charged. As previously stated, the standard is designed to prevent miners from contacting moving machine parts. Here, Jacobsen’s testimony established that the seven-inch gap existed between the inside edge of the screen guard and the outside edge of the belt drive structure. (The gap is clearly depicted in Gov. Exh. 10.) This gap provided a means of access to the screen’s moving parts. The inspector credibly described how a miner walking down the narrow walkway might slip and reach across the top of the screen guard to steady himself or herself. If the miner’s hand entered the gap, it could contact the moving parts. Even though WRQ established that the moving parts were smooth and contained no protrusions to snag or catch the miner, contact with the moving parts still could have caused an injury. Tr. 89-90, 92, 96-97. Access to the moving parts through the gap should have been prevented by a guard, and it was not.

I recognize that Jacobsen was told miners did not visit the area while the plant was operating (Tr. 92). Even assuming this was true a great majority of the time, the goal of the standard is not only to protect against the hazards of frequent access, but also to protected against aberrant and unusual situations. Thus, restricted access to the belt drive while the screen is operating bears upon the likelihood of injury resulting from the lack of adequate guarding, but does not negate the violation. *See e.g., Tide Creek Rock, Inc.*, 18 FMSHRC 390, 400-401 (March 1996) (ALJ Manning).

GRAVITY AND NEGLIGENCE

I agree with Jacobsen that the violation was not serious. Like Jacobsen, I accept that access while the screen was operating was limited, and I find that a miner who slipped or tripped while using the walkway would be likely to grab the adjacent handrail for support. He or she could, but rarely would, reach across the top of the front part of the drive belt guard in such a way as to contact moving parts. Tr. 92.

I also find that WRQ was negligent. The gap was visually obvious, and it should have been detected. A guard should have been installed. In allowing the unguarded gap to exist, WRQ failed to meet the standard of care required.

DOCKET NO. WEST 2004-309-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6355441	3/16/04	56.11002 ¹⁴

¹⁴ 30 C.F.R. § 56.11002 states in relevant part:

Citation No. 635544 states:

The elevated walkway along the [p]owerscreen was bent, broken, and missing bolts to secure the walkway. There is a piece of the walkway protruding about 1 inch in the air just before the ladder, and the walkway is loose due to lack of a bolt. This exposes miners to a tripping hazard and fall of about 5 feet to the ground below. The walkway is used about 1 time every two months to change screens.

Gov. Exh. 13.

Jacobsen testified that during the course of an inspection on March 16, 2004, he was accompanied by Al Evans, WRQ's pit foreman. Tr. 101. Upon examining the elevated walkway along the power screen (a machine used to screen topsoil), Jacobsen noticed two things that concerned him: part of the walkway was raised about an inch above the rest of the walkway, creating what he maintained was a trip hazard; and a bolt was missing on the edge of the walkway. Tr. 103, 110, 115. Jacobsen thought the bolt was part of the structure that attached the walkway to the frame of the screen. Tr. 115. He believed the walkway was designed so all of its bolts held it in place. Because the walkway vibrated when the screen was operating, Jacobson thought the missing bolt subjected the walkway to added stress, which could cause the walkway to collapse. Tr. 108.

As for the raised portion of the walkway, Jacobsen speculated if a miner were to trip on it, he or she might fall off the walkway because there was an open ladder at the walkway's end. The fall would be approximately five feet to the ground and the result could be fatal. Tr. 105-106. However, Jacobsen did not believe such an accident was likely. He noted there was minimal access to the walkway. Tr. 105-107.

Jacobsen also testified that Evans explained the power screen had been operating for two days before the inspection and he, Evans, had not traveled the walkway. Tr. 107. Therefore, while Jacobsen thought that the company should have known about the condition of the walkway, he believed the company was only moderately negligent. *Id.*

Hart agreed with Jacobsen that the bolt was missing (Tr. 234), but he did not feel the missing bolt functionally affected the walkway. Tr. 237. The power screen was portable and, Hart explained, "when you move the screen, you take the ladder off and fold the walkway." Tr. 234-235. After the screen is moved, the walkway is reinstalled. Hart testified that the bolt did not

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition.

support the walkway. Rather, the walkway was held in place by three sliding steel tubes. Tr. 235-236.

Further, Hart did not agree that one part of the walkway was raised an inch above the other part. Tr. 237. In Hart's view, the difference in elevation was one-eighth inch to one-fourth inch. Tr. 354-355.¹⁵

Redding, too, did not agree the difference in elevation was one inch. Tr. 319-320. In Redding's view, the difference in the levels of the two parts of the walkway was not significant, and a resulting accident was unlikely. Tr. 320-321.

THE VIOLATION

I find the walkway was in violation of section 56.11002. The standard requires walkways to be "maintained in good condition." The evidence supports finding that one part of the subject walkway was elevated above the other. I am persuaded the difference in elevation was such that a tripping hazard was created. Whether the difference was one inch or was one-eighth to one-fourth inch, the walkway was not level, contrary to the reasonable expectations of those using it. Miners would not be "on the lookout" for a protrusion that might catch their feet and cause them to stumble. The regulatory mandate to maintain a walkway in "good condition" requires an operator to maintain it consistent with reasonable expectations of safe use. WRQ failed to meet this requirement and violated the standard.¹⁶

GRAVITY AND NEGLIGENCE

The violation was not serious. The relatively small difference between the walkway levels and the limited number of times miners used the walkway made it unlikely the violation would result in a tripping accident. Moreover, even if a miner were to trip, the fact that there was a handrail on one side of the walkway and the fact that the opening to the ladder was at the end of the walkway meant that he or she was likely to grab the handrail to steady himself or herself or to fall on rather than off the walkway.

¹⁵ Although Hart acknowledged that when answering an interrogatory he stated the difference in elevation between the walkway's two parts was "approximately one inch" (Tr. 323 (*quoting* Petitioner's First Set of Discovery to Respondent and Supplemental Answers Thereto 7, which states, "Respondent admits there was a piece of metal approximately one inch high." Tr. 356.)), Hart explained in making the statement he was only "admitting that the citation says there was a piece of metal protruding one inch high." Tr. 354.

¹⁶ The finding of violation is based solely on the walkway's disparate levels. I conclude that the Secretary failed to establish the missing bolt affected the walkway's condition. Indeed, given Hart's uncontradicted explanation of how the walkway was secured to the frame of the screen, the bolt seems unlikely to have served any purpose affecting safety. Tr. 235-236.

WRQ was minimally negligent in allowing the violation to exist. I note that Evans explained to Jacobsen that the screen had been operating only for two days. Moreover, the difference in the walkway's elevation was such as to be easily overlooked.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6355444	3/16/04	56.11003 ¹⁷

Citation No. 6355444 states:

The ladder to the grizzly hopper tunnel is a wooden pallet stood upright. This creates the hazard of a fall due to a poorly constructed ladder. The ladder is used to access the tunnel for clean-up and servicing duties about 2 times per week.

Gov. Exh. 15.

Jacobsen testified that during the March 16 inspection he noticed a wooden pallet used as a ladder to access a hopper. *See* Gov. Exh. 14. Jacobsen believed the cross pieces of the pallet (the slats) either were secured to the upright pieces (the struts) with pneumatically driven staples or with nails. Tr. 122.¹⁸ The slats were about four to six inches apart, whereas the rungs of a ladder typically are 12 inches apart. *Id.*, Tr. 123. Although Jacobsen acknowledged that the slats and struts were "in good shape" (Tr. 125¹⁹), Jacobsen never had seen a pallet used this way. Tr. 375. He believed the situation created a slip and fall hazard. Tr. 117-118.

Jacobsen was asked by his counsel about the requirements and meaning of section 56.11003. Jacobsen noted that although the standard mandates ladders be "of substantial construction and maintained in good condition," it does not define the word "ladder." Nonetheless, based on his training and experience, Jacobsen believed a "ladder" was "something with rungs that you step on and side rails that you hold on to." Tr. 119. He also believed a ladder must be substantial enough to bear the weight required by the job with which it is associated. Tr. 124. He stated ladders are "rated for the weight that they are to [carry]". *Id.* A pallet has no rating. Therefore, the pallet was "not a ladder." Tr. 119.

¹⁷ 30 C.F.R. § 56.11003 states:

Ladders shall be of substantial construction and maintained in good condition.

¹⁸ Hart testified the slats were secured with nails. Tr. 239.

¹⁹ Hart more than agreed. He described the pallet's condition as "[e]xcellent." Tr. 238.

When he first saw the pallet, Jacobsen did not think a miner was likely to slip or fall while using it. The pallet was sturdy, was accessed only two times a week and there were handholds on the frame of the hopper. Tr. 120. However, Jacobsen changed his mind about the likelihood of injury, and at the hearing testified he believed a miner was reasonably likely to slip or fall. Tr. 117-118, 120. In addition, a miner's foot could be caught in the four- to six-inch space between the slats. As a result, a miner could sprain or break a leg and could lose workdays or be transferred to less demanding duties. Tr. 121. In his revised view, using the pallet as a ladder created a "very high hazard." Tr.123.

To Kim Redding, the pallet was "constructed like a ladder." Tr. 324. It was "very sturdy . . . made of hardwood . . . smooth . . . [and lacking] slivers or anything that would cause injury". *Id.* He added the pallet, "was securely in place." *Id.* In addition, the distance between the slats did not, in his view, create a slip hazard. Tr. 327.

THE VIOLATION

I conclude the Secretary failed to establish the violation. As Jacobsen acknowledged, there is nothing in the regulations that defines a "ladder," there is nothing that otherwise specifies the type of "ladder" an operator must use, and there is nothing that sets forth how a ladder must be constructed. Tr. 124-125. Further, there is no agency program policy memorandum that gives a definition and/or specifications.

A ladder is defined in the mining dictionary as "[a] framework consisting of two parallel, or roughly parallel, posts connected by bars at regular intervals along their length, thus providing a series of steps which enables the ladder to be used as an aid to climbing to different levels." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 620 (2ed. 1997). The pallet functionally met this definition. Moreover, it is clear from the testimony that the pallet/ladder was "substantially constructed" and was in "good condition," as the standard requires. Tr. 125, 139.

For these reasons, the citation will be vacated.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6355477	3/16/04	56.14112(b) ²⁰

Citation No. 6355447 states:

The guard to the gear box and drive assembly of the sand stacker is not secure. This exposes the v-belt drive and couplers to be contacted. Contacting these moving parts would cause serious injuries to a miner [who] enters the area

²⁰ The standard is set forth at n. 6, *supra*.

as needed for cleaning.

Gov. Exh. 16.

Jacobsen testified during the March 16 inspection he noticed the guard for the gearbox drive assembly on the sand stacker conveyor was loose and drooping so that moving parts of the stacker were exposed. (The parts Jacobsen specifically mentioned were the gearbox drive, the V-belt assembly and the couplers. Tr. 126.) As Jacobsen recalled, the wires or "zip ties" holding the gearbox assembly had come loose or broken so that the guard was "hanging off a bit." *Id.* Jacobsen believed that the exposed parts posed "catch hazards" to miners. Tr. 127, 129. A miner who was cleaning in the area could slip, and his or her hand could contact the moving V-belts and couplers. Tr. 128. As a result, the miner could suffer cuts, sprains, or even broken bones, resulting in lost work days. Tr. 128-129. However, Jacobsen recognized such an accident was unlikely because miners cleaned in the area only on an "as needed" basis. Tr. 128-129. Thus, they "weren't in the area very often." Tr.128.

In Jacobsen's view, WRQ was only moderately negligent in allowing the parts to go unguarded, because the defective guard looked secure. One had to come within four or five feet of the equipment to realize it was not. Tr. 129-130. As Jacobsen put it, the violation "was not obvious." Tr. 129.

THE VIOLATION

The standard requires guards to be "securely in place while machinery is being operated." Jacobsen observed the subject guard was loose and drooping and the moving parts of the conveyor were exposed. Tr. 126. Jacobsen's testimony regarding the state of the guard essentially was undisputed, and I find that the violation existed as charged.²¹

GRAVITY AND NEGLIGENCE

The inspector's testimony regarding the "catch hazards presented to miners by the violation (Tr. 127, 129) likewise was not undisputed, nor was his view that an accident resulting from the condition was unlikely. Tr. 128-129. I accept and adopt Jacobsen's belief the violation was not serious.

I further agree that the violation was due to WRQ's negligence. However, like Jacobsen I find that the drooping guard was not so obvious as to be readily noticeable, and I conclude the

²¹ Jacobsen did not photograph the drooping guard. Following the presentation of MSHA's case in chief, counsel for WRQ moved to dismiss the citation, as well as another citation discussed subsequently, because they were based solely on Jacobsen's recollections. I denied the motion, noting that it was not unusual for violations to be established solely through the credible testimony of an inspector. Tr. 192-193.

company was only moderately negligent.

DOCKET NO. WEST 2005-151-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6355596	9/14/04	56.14101(a)(2) ²²

Citation No. 6355596 states:

The parking brake on the Cat 980C Front-end Loader . . . did not hold on the maximum grade it traveled with a loaded bucket. The ramp that the loader was tested on was a feed ramp that is traveled by this loader several times per day. A parking brake is needed to stop equipment from inadvertently moving and running personnel over. The loader is used on a daily basis and generally parks on flat ground.

Gov. Exh. 17.

On September 14, 2004, Jacobsen returned to the mine. During the course of the visit he inspected a front end loader (loader). When he first observed the loader, it was traveling a ramp, and its bucket was full of material. Tr. 132. Jacobsen decided to test the loader's brakes.

First, he tested the service brakes. Finding they worked well, he next tested the parking brakes. He instructed the loader operator to set them. The loader's full bucket was low, but was not touching the ground.²³ The parking brakes did not hold the loader, and Jacobsen issued the subject citation. Tr. 133. Jacobsen acknowledged the grade on which he tested the loader was not

²² 30 C.F.R. §56.14101(a)(2) states:

If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

²³ Jacobsen explained that when parking brakes are tested, the loader should be stationary. Because there is no danger material will spill from the bucket while the loader is at rest, the test is conducted when the loader's bucket is full and raised. Tr. 136-137. By keeping the bucket full, a conclusion can be reached whether the parking brakes can hold the loader "with its typical load." Tr. 139. MSHA supervisory mine inspector Stephen Cain added conducting the test with the bucket in a raised position prevents the bucket from digging into the ground and acting as a *de facto* braking mechanism. Tr. II 20.

the maximum grade at the mine. However, it was a grade the loader frequently traveled, and if the brakes would not hold the equipment on the lesser grade, they would not hold it on the steeper grade. Tr. 137-138.

The inspector noted that the standard is designed to prevent accidental movement of parked equipment and the subsequent serious or fatal injury of miners working around such equipment. Tr. 134-135. However, Jacobsen believed an accident involving the subject loader was unlikely. He emphasized the service brakes worked well and the loader operator told him the equipment was primarily parked on flat surfaces. Tr. 134-135.

WRQ questioned whether Jacobsen correctly tested the brakes. Hart testified when WRQ tests parking brakes, it does so on an incline with the loader's bucket empty and lowered to the ground. Tr. 240. In Hart's opinion, because of stability problems, it is not safe to test brakes with a loaded, raised bucket. Tr. 241, 243.

Kim Redding believed the standard is "designed to hold the equipment when parked in its normal fashion." Tr. 329. He agreed with Hart that when a loader is parked, its blade is lowered to the ground, and that its "typical load" is an empty bucket. Tr. 330. "Otherwise," he stated, "you have spillage." *Id.* Because the test used by the inspector did not simulate how the parking brakes were actually used, the test result did not reflect the true effectiveness of the brakes. Tr. 331-332.²⁴

Redding was asked by counsel for the Secretary whether he agreed with WRQ's statement in a response an interrogatory that the cited front end loader usually carried approximately nine tons of crushed rock. Redding responded the statement "sound[ed] about right." Tr. 335. Further, he acknowledged that in another response the company stated, at the time of the test, the front end loader was carrying "approximately nine tons of crushed rock." Tr. 336.

Turning to the issue of whether the company met its standard of care, Jacobsen believed it did not, and that it was moderately negligent. Jacobsen noted the loader operator had not checked the condition of the parking brakes on his pre-operation check list. Jacobsen also noted that management did not even list "park[ing] brakes" on the check list. Rather, there was a generic reference to the "braking system." Tr. 136.

²⁴ Redding maintained on the very few occasions when a loader is parked on a grade, the bucket is lowered, the transmission is put in gear, the parking brakes are set, chocks are placed under the tires, and the tires are turned into a berm or rib. Parking brakes never are used in and of themselves on a grade. Tr. 343-344.

THE VIOLATION

I conclude the violation existed as charged. The standard is clear. Parking brakes must be capable of "holding the equipment with its typical load on the maximum grade it travels." By testing the loader with its raised bucket carrying a load of approximately nine tons (Tr. 335-336), Jacobsen met the "typical load" requirement of the standard. Tr. 335. By determining the brakes did not hold on a grade that was less than the maximum grade the loader travels, he established by deduction that the brakes would not hold on the maximum grade. Tr. 137-138. Although WRQ takes issue with the way in which Jacobsen tested the brakes, and while there may be other ways to test parking brakes, I conclude the test used by the inspector squarely met the requirements of the standard and, without question, established a lack of compliance.

GRAVITY AND NEGLIGENCE

Jacobsen did not believe the violation was serious, and I agree. Tr. 134-135. He acknowledged the loader's service brakes worked well. He accepted the fact that when the loader was parked, it was usually parked on level ground. *Id.* There is nothing in the record to contradict Jacobsen's testimony in this regard. These factors lead me to conclude that injuries arising from the violation were not likely.

As for negligence, I conclude WRQ failed to meet its mandated standard of care. WRQ was required to ensure that the parking brakes held the loader "with its typical load on the maximum grade it travels." 30 C.F.R. §56.14101(a)(2). Here, the brakes did not do what was required. Had WRQ made sure pre-operational inspection of the equipment included the parking brakes, the violation might not have happened. Tr. 135-136. Reasonable care required the parking brakes be functional, and they were not.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6355597	9/14/04	56.14112(b) ²⁵

Citation No. 6355597 states:

The tail pulley guard to the hopper belt was not secured in place. The bottom of the guard was hanging down and not secure, and about a 8 [inch] by 12 [inch] piece of the guard was lying on the ground. This exposes the hazard of entanglement into the tail pulley and for serious injuries to occur. The area is accessed 2 times per week for clean-up and other duties.

²⁵ The standard is set forth at n. 6 *supra*.

Gov. Exh. 19.

On September 14, Jacobsen also inspected the tail pulley on an operating hopper belt. He noticed that one of the side guards was missing. The missing guard had once been in place, but had slipped or fallen from the pulley structure. As a result, the pulley was exposed, and an opening eight inches wide by twelve inches long provided access to its moving parts. Tr. 141, 144-145, 149-150. In Jacobsen's view, exposure created an entanglement hazard for miners who cleaned up around the pulley.

Jacobsen believed if a miner was caught in the pulley, he or she would suffer cuts or even dismemberment. Tr. 147, 148. However, he did not think such an accident was likely. Tr. 146. He noted the opening to the pulley was relatively small, eight inches by 12 inches, and the area in which the tail pulley was located was accessed by miners only two times a week. *Id.*

He also believed the missing guard was caused by WRQ's moderate negligence. The plant foreman simply failed to notice it had slipped and fallen. Tr. 148-149.

THE VIOLATION

I find the violation existed as charged. Jacobsen's testimony established that moving parts of the tail pulley were not completely guarded, in that the side guard had slipped off, creating an opening through which the moving parts of the pulley could be contacted. Tr. Tr. 141-145; 149. The standard requires moving parts to be guarded to prevent access. As Jacobsen recognized, any miner cleaning up around the pulley was subject to the danger of tripping or falling and having his or her hand or arm pass through the opening and into the moving parts. Jacobsen accurately described such an accident as likely to result in cuts or dismemberment. Tr. 147, 148.²⁶

GRAVITY AND NEGLIGENCE

Because the opening was limited in size and because access to the area also was limited, Jacobsen believed an accident was unlikely. Tr. 146-148. Based on this testimony, I conclude that Jacobsen was correct and that the violation was not serious.

I also find that WRQ did not meet its required standard of care. Even though the area around the guard was not accessed frequently, WRQ had a duty to ensure that all guards on the tail pulley were in place. The opening was visible, and mine management or its agents should have detected and reinstalled the missing guard. In failing to do so, WRQ exhibited its negligence.

²⁶ As with Citation No. 6355447, Jacobsen did not photograph the unguarded pulley. Before he could take a picture, the mine foreman repaired the defect. Tr. 141, 145. Therefore, WRQ's counsel moved to vacate Citation No. 6355597. For the reason stated in n. 21, *infra*, I denied the motion. Tr. 192-193.

DOCKET NO. WEST 2004-316

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6350897	2/24/04	56.9100 ²⁷

Citation No. 6350897 states:

There were no signs stating the mine speed limit, direction of travel or hazard warning signs on the haul road, entrance to the quarry, at or near the scale, or in the quarry stockpile area where there is a large volume of truck and equipment traffic. There is also no sign to tell visitors to stop at the scale for instruction and/or training. The quarry is visited several times daily by company trucks, customer trucks, visitor vehicles and by sales and vendor personnel.

Gov. Exh. 20.

On February 24, 2004, MSHA Inspector Rickie Dance visited Champion Pit. When he arrived at the entrance to the mine, Dance “noticed that they had done some landscaping on the entrance, widened the road a little . . . put up a new sign and . . . a new gate.” Tr. 156. However, once on mine property he also noticed: “[T]here was no signage [sic], as far as speed or direction of travel [rules of the road] or anything to watch for.” *Id.*

Dance identified a photograph he took at the entrance to the pit. Gov. Exh. 21. In the photograph the gate is visible, as is the back of a stop sign at the gate, and about 80 to 100 feet in by the stop sign, on the same side of the road, another sign is seen. The stop sign orders vehicles to stop before they leave the mine road and merge onto a public road. The other sign reads in part, “Washington Rock Quarries, Camp 1 Road.” Tr. 156, 159, 161-162; Gov. Exhs. 21 and 22.

²⁷ Section 56.9100 states:

To provide for the safe movement of self-propelled mobile equipment –

(a) Rules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine; and

(b) Signs or signals that warn of hazardous conditions shall be placed at appropriate locations at each mine.

Continuing past the "Washington Rock Quarries, Camp No. 1" sign for a quarter of a mile, Dance saw no other signs. Tr. 163-164; Gov. Exh. 23. Nor did he see any signs as he proceeded along the same road to the scale, scale house and shop building. Tr. 164-165; Gov. Exh. 24. Although the company's trucks and those of its visitors traveled the road, there were no speed limit or traffic rules signs; nor were there signs instructing visitors to stop and get information. Tr. 165, 168. WRQ offered into evidence photographs of six traffic control signs, but Dance was adamant he saw none of them during his February 24 inspection. Tr. 175, *see* WRQ Exh. 20.

Dance asked Hart how visitors were informed of mine hazards, and Hart replied the scale operator was supposed to give rules of the road instruction to those who passed the scale and scale house. Tr. 165,167; *see also* Tr. 157-158.²⁸ Dance observed, however, that before the scale and scale house, the road branched to the right. The branch lead to the stockpile area and to other parts of the mine. Therefore, it was possible for drivers going to these areas to bypass the scale and scale house. Tr. 165. As Dance put it, "anybody going into that mine does not necessarily go by the scale to enter the hazardous area where the equipment is running. . . . [T]he way the scale is set up, there's no window where the scale operator can see anybody coming into the area, and they can go to the right, around the shop without even going by the scale and enter the mine site." Tr. 179. Dance maintained the only thing posted at the scale was a digital board that registered the weight of the trucks for the scale operator. Tr. 166; Gov. Exh. 25.

Dance agreed that section 56.9100 does not specifically require an operator to post signs that state rules of the road. Tr. 167. Nevertheless, Dance cited WRQ for a violation of the section because, "There has to be some way for people coming onto the mine site to get the information, as far as any hazards at the mine." *Id.* Moreover, in Dance's view, under section 56.91001(a) an operator must establish rules of the road, whether or not there are hazardous conditions. Tr. 180.

Dance was asked if there was a hazardous condition at Champion Pit that required a warning sign. He replied, "When you have heavy equipment running around in the pits . . . and you have haul trucks running around, there's always hazardous conditions." Tr. 177.

Dance feared that with no signs to communicate rules, "a person not knowing what's going on could easily be [run] over". Tr. 168. However, such an accident was unlikely, because drivers at the pit were experienced. ("[T]he people that go out there have visited several operations before, and it's just rare that . . . [an accident] would happen." *Id.*) In addition, the trucks and other

²⁸ Dance testified that Hart also told him there was nothing written regarding rules of the road. Tr. 167. Dance denied anyone from the company showed him a card that stated on its front "All Drivers, Hard Hats, Safety Glass & Steel-Toed Shoes Are Required While Out of Truck on Mine Property" and on its back, "Site Specific Hazard Forms Must Be Completed By All Persons Entering Mine Property. If you have not filled one out stop by the scale house." Tr. 171; *See* WRQ Exh. 19; *see also* Tr. 378.

equipment he saw during the inspection “travel[ed] slow[ly] and [the drivers were] watchful of other traffic.” Tr. 178.

Dance believed WRQ was moderately negligent in failing to comply with the regulation, and he again noted that even if some oral instructions were given at the scale, other drivers could access different parts of the mine before reaching the scale. Tr. 170.

Kim Redding described WRQ’s traffic control rules as consisting of a number of things: including road signs seen by drivers upon entering the property, cards given to drivers containing the traffic control rules, and instructions given to drivers to “sign paperwork saying they understood [the] rules.” Tr. 309; WRQ Exh. 19 at 1 and 2.²⁹

THE VIOLATION

As the parties recognize, the requirements of section 56.9100 are set forth in two parts. 30 C.F.R. § 56.9100(a) is aimed at ensuring the safe movement of self-propelled mobile vehicles by requiring the establishment and following of specified rules of the road. Section 56.9100(b) is aimed at alerting miners and visitors to specific hazardous conditions by requiring the installation of warning signs or signals where the conditions exist. In issuing the citation, Dance’s primary concerns seem to have been that WRQ violated section 56.9100(a) by failing, either through appropriate signs or other effective instructions, to establish rules of the road. I conclude the record supports Dance in this regard, and I affirm the citation to this extent.

While I accept Dance’s testimony that he was told by Hart that instruction in rules of the road was given orally to mobile vehicle operators by the scale operator, there is no credible evidence in the record that such instruction actually took place. Tr. 165, 167. Dance testified without dispute that nowhere along the road he took to the scale house were there signs listing the mine’s rules of the road or signs directing equipment operators to stop at the house for instruction. Tr. 156, 163-164, 168. He also testified without dispute that no one showed him a card on which several instructions regarding traffic safety were printed and that no one showed him a card or statement signed by a vehicle operator acknowledging the driver received such instructions. Tr.

²⁹ Redding later agreed that the signs to which he referred were on the landlord’s property, not on property over which WRQ had authority. Tr. 310; WRQ Exh. 20. Still, in Redding’s opinion, it did not matter because “signs give information” and the signs in question stated “rules governing the property.” Tr. 311. However, although the speed limit at the mine was five miles per hour, Redding admitted none of the signs depicted in WRQ’s exhibit of purported road signs at the pit showed the limit. Tr. 316; *see* WRQ Exh. 20. Redding, who was not at the property during the inspection, also stated that his understanding of the traffic rules was based on what Hart later told him. Tr. 315. The first time Redding saw the cards about which he testified, one of which is depicted in WRQ Exh.19, was approximately two months before the hearing. *Id.* Finally, Redding admitted he never had seen a statement drivers were supposed to sign, such as the statement depicted in WRQ Exh. 19 at 2. *Id.*

171, referencing WRQ Exh. 19.

To defend against a credible allegation of failing to establish rules of the road, an operator must do more than assert it complied. It must present credible testimony and/or physical evidence of compliance. Here, the record contains neither.

In the face of Dance's testimony that on February 24, he heard and saw no evidence – Hart's self-serving assertion aside – of compliance with section 56.9100(a), WRQ offered no rebuttal. It introduced no testimony from drivers affirming they received instructions in rules of the road. It offered no testimony from employees affirming they gave such instructions. It offered no signed statements. I fully agree with Dance, that to be considered "established" the rules must be communicated to all those who operate self-propelled mobile equipment at the mine, and here the record inevitably leads to the conclusion they were not.³⁰

The finding of violation is restricted to subpart (a) of section 56.9100. The Secretary did not establish there were hazardous conditions at the pit requiring the placing of warning signs and/or signals. The kind of "hazard" to which Dance referred, the "heavy equipment [including haulage trucks] running around in the pits," is remedied by the rules of the road established pursuant to section 56.9100(a). Hazards contemplated under section 56.9100(b) are those related to physical features, facilities, and perhaps traffic conditions at the mine and not to the unregulated movement of equipment.

GRAVITY AND NEGLIGENCE

I agree with the inspector that the failure to establish rules of the road at the mine posed a potential hazard to miners. Without drivers knowing the rules governing speed, right of way, use of lights, etc., vehicles might collide or overturn, and drivers could be injured or killed. *See* Tr. 177. However, the record warrants finding that many of the drivers were experienced in operating their equipment both at that pit and at other mines and were knowledgeable about general traffic safety. *See* Tr. 169. In addition, drivers at the pit moved slowly and with care. Tr. 178. The record further warrants finding, as discussed with regard to Citation No. 6350900, *supra*, and as alluded to by Redding (Tr. 309), that there were some rules of the road signs on the landlord's property prior to drivers reaching mine property. Therefore, I agree with the inspector's finding as indicated on the citation that injuries were unlikely to result from the violation, and I find the violation was not serious.

³⁰ As noted, the record does not support finding the scale house operator was charged with the duty of instructing drivers in rules of the road, but assuming he or she was so charged, I agree with Dance that because drivers could bypass the scale house and proceed to other parts of the mine, the duty would not negate the violation. Tr. 167, 176-177.

The lack of signs and/or oral instruction posted by the operator at its mine or given by the operator on mine property were obvious indications of non-compliance. Had WRQ officials met the standard of care required of them, they would have made sure rules of the road were established at the pit. They did not, and the failure reflects the company's negligent lack of care.

DOCKET NO. WEST 2004-309-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6350900	2/24/04	56.9100 ³¹

Citation No. 6350900 states:

There were no signs stating the mine speed limit, direction of travel or hazard warning signs on the mine roads, entrance to the sand pit, at or near the scale, or in the pit stockpile area where there is a large volume of truck and equipment traffic. There is also no sign to tell visitors to stop at the scale for instruction and/or training. The pit is visited several times daily by company trucks, customer trucks, visitor vehicles and by sales and/or vendor personnel.

Gov. Exh. 26.

On February 24, Dance also inspected WRQ's King Creek Pit. Champion Pit is connected to King Creek by a gravel road. Tr. 183. Although Dance noticed "no trespass" signs and speed limit signs along the gravel road, none of the signs were on mine property. *Id.* Moreover, Dance saw no signs on mine property regarding speed limit and direction of travel or signs advising people to stop and obtain rules of the road. Tr. 186.

Dance identified a photograph he took at the pit. Tr. 182, Gov. Exh. 27. Among other things, the photograph depicts the King Creek scale house (Gov. Exh. 27, left³²), a small storage facility (Gov. Exh. 27, center) and piles of material (Gov. Exh. 27, right). Tr. 183. According to Dance, no signs existed between the entrance to the pit and the scale house, and the only sign on the scale house was a sign identifying the rental company that owned the house. Tr. 185. No signs directed visitors to stop and inquire about the mine's rules of the road. *Id.* In addition, Dance testified there was another entrance to the pit, to the left of the entrance depicted in Gov. Exh. 27. Tr. 184.

³¹ The standard is set forth in n. 27.

³² A more detailed view of the house is provided by Gov. Exh. 28. Tr. 185.

For the same reasons as stated with regard to Citation No. 6350897, Dance cited WRQ for a violation of section 56.9100. Dance believed the gravity of the alleged violation and the negligence of WRQ also were the same. Tr. 186. Dance acknowledged that there were no specific hazards requiring placement of warning signs. Tr. 187. He also acknowledged that traffic was moving slowly (in second or third gear) and following normal rules of the road at the pit. *Id.*

Hart countered that WRQ had established traffic rules at both Champion Pit and King Creek, and the same rules applied at both operations. These rules were in writing and were "handed out to . . . anyone that [came] in to the pit". Tr. 245. Hart identified a copy of a card that was "handed out". *Id.*; WRQ Exh. 19. He described the card as "printed on both sides" and "giving some regulations, some rules for driving in the pits." *Id.*; Resp. Exh. 19.³³ According to Hart, these rules were in effect when the inspection took place. Tr. 247. Hart also claimed that drivers were given a written document that addressed issues such as proper speed, right of way, direction of movement, and use of headlights to ensure appropriate visibility. Tr. 247-248.

³³ The following safety rules are listed on the back of the card to which Hart referred:

- Equipment operators and scale house on c.b. channel 3
- Speed limit in pit 5 MPH
- Use approved roads only
- Yield to all equipment
 - Equipment has right of way
 - Know traffic patterns
 - Avoid moving vehicles
- Truck drivers must stay in truck while being loaded
- If out of vehicle hardhat steel-toed boots required
 - Not needed if entering scale house or honey bucket

WRQ Exh. 19. The rules are followed by lines for a truck driver's signature, the number of the truck, the company owning or leasing the truck, and the date. *Id.*

Hart acknowledged the road to King Creek provides access to the pit at both ends of the road. Tr. 252. At one entrance there is a gate where there are signs reading, "no trespassing," "speed limit 10," "slow down speed limit through gate areas is 10 MPH please adhere to posted speed limit if problems continue a large speed bump will be installed," "attention all drivers maximum speed 30 m.p.h. except all curves 15 m.p.h.," "speed limit 30," "lights on for safety," and "lights on for safety warning non-compliance will result in immediate removal from the premises." Tr. 252-253; WRQ Exh. 20. According to Hart, the same signs appear at the other entrance and at both pits. Tr. 253, 255. However, he agreed that none of the signs were posted by WRQ and none specifically referred to WRQ. Tr. 257. Rather, the company has an understanding with its landowner that those entering the landowner's property have to obey the signs posted at the gates to the property, including those on WRQ Exh.19. Tr. 260-262. Hart testified, the day before Dance conducted his inspection, WRQ required all truckers and vendors who came to the property sign the back of the card depicted in WRQ Exh. 19. Tr. 263.³⁴ If the rules were not followed, the person violating them was asked to leave. Tr. 261.

THE VIOLATION

I conclude Dance's testimony established the violation. As previously noted, section 56.9100 is divided into parts. Dance agreed there were no specific hazards related to physical features and facilities at King Creek. Tr. 187. Therefore, section 56.9100(b) was not violated. However, it is clear that section 56.9100(a) was infringed. Dance consistently and credibly maintained he saw no rules of the road signs on mine property. Tr. 183-186. Although WRQ offered photographs of some rules of the road signs (WRQ Exh. 20), virtually all of the signs were at the entrance to the landowner's property and not at the entrance to the property for which WRQ was responsible. Tr. 251, 256-257. Close scrutiny of Hart's testimony reveals the only rule of the road sign he identified as being on mine property was a speed sign posted several hundred feet in by the gate where WRQ's responsibility began. The sign was nailed to a tree and was "kind of . . . bent over." Tr. 259. This single, damaged sign is not sufficient to establish rules governing speed, and there is no testimony that other signs were posted on King Creek mine property.

Nor did the card that Hart testified was given to all who entered mine property establish WRQ's compliance. There is no credible basis to find those entering the mine actually received the card. Drivers did not testify, employees who handed out the card did not testify, and signed copies of the card were not offered into evidence.

Moreover, even if, as Hart testified (Tr. 245), WRQ actually gave the card admitted as WRQ 19 to all persons who entered the mine, the card contains nothing regarding the use of headlights, a specific requirement of section 56.9100(a). Further, the other written document

³⁴ Dance testified he did not recall Hart's saying anything about distributing written rules of the road to all such visitors. Dance also denied that Hart told him visitors were required to sign forms to affirm they were advised of such things. Tr. 377.

addressing the requirements of part (a), a document that Hart maintained was given to drivers entering mine property (Tr. 247-248), was not introduced. Nor did drivers who received that supposed document testify. Noncompliance cannot be refuted by an evidentiary vacuum.³⁵

In sum, the record fully supports finding that WRQ violated section 56.9100(a) at King Creek.

GRAVITY AND NEGLIGENCE

Given the fact that there were some traffic signs at the entrance to the property owner's land, signs that provided notice of traffic rules just before drivers entered the mine, and given Dance's testimony that, once in the mine, traffic moved slowly and followed normal rules of the road, I conclude the violation was not serious. Tr. 186-187.

I also conclude the violation was due to WRQ's negligence. As Dance's inspection showed, the lack of established rules of the road at the mine was obvious. WRQ either knew or should have known that it was required to establish such rules. In not doing so, it failed to meet its required standard of care.

CIVIL PENALTY ASSESSMENTS

The Act requires that I assess a civil penalty for each violation. It also requires that in doing so, I consider the statutory civil penalty criteria. 30 U.S.C. § 820(i). Several of the civil penalty criteria are equally applicable to all of the violations. In this regard, WRQ's history of previous violations (Gov. Exh. 29) was described by counsel for the Secretary as of a "small to average" number. Tr. 189. WRQ did not take exception to this description. Therefore, when assessing penalties I will not increase them on account of WRQ's prior history. Counsel for the Secretary also stated, based on the number of hours worked at WRQ's operations, that the operations are small. Tr. 189. WRQ did not take exception to this characterization. Therefore, when assessing penalties, I will assess lesser amounts than I would for medium or large operations. The parties have stipulated that assessment of the penalties will not adversely affect the ability of WRQ to stay in business. Stip. 4. Therefore, when assessing penalties, I will neither increase nor decrease them on account of this criterion. Finally, the parties have agreed that WRQ timely abated all of the alleged violations. Tr. 15. Timely abatement is expected and is a neutral factor. Finally, I will consider the criteria of negligence and gravity as they individually pertain to each violation.

³⁵ I also find noteworthy and entirely credible Dance's testimony that he did not see a sign telling those operating vehicles to stop at the scale house, and I find the lack of testimony from equipment operators as to the existence of such a sign to be telling. Tr.185.

DOCKET NO. WEST 2004-352-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6350795	1/13/04	56.16006	\$60	\$60
6350798	1/13/04	56.14112(b)	\$60	\$60
6350799	1/13/04	56.14107(a)	\$60	\$60
6355401	1/13/04	56.14107(a)	\$60	\$60

DOCKET NO. WEST 2004-316-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6350797	1/13/04	56.14112(b)	\$60	\$60
6350897	2/24/04	56.9100	\$60	\$60

I have found the violations were not serious. I also have found the violations were the result of WRQ's negligence. Given these criteria, and given the fact WRQ has a small to average history of previous violations and that WRQ's operations are small, I conclude an assessment of \$60 is appropriate for each violation.

DOCKET NO. WEST 2004-309-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6355441	3/16/04	56.11002	\$60	\$50

I have found that the violation was not serious. I also have found that the violation was the result of WRQ's minimal negligence. Given these criteria, and given the fact WRQ has a small to average history of previous violations and that WRQ's operations are small, I conclude an assessment of \$50 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6355444	3/16/04	56.11003	\$60	\$0

I have found the Secretary did not prove the alleged violation.

6355447	3/16/04	56.11003	\$60	\$60
6350900	2/24/04	56.9100	\$60	\$60

I have found the violations were not serious. I also have found the violations were the result of WRQ's negligence. Given these criteria, and given the fact WRQ has a small to average history of previous violations and that WRQ's operations are small, I conclude an assessment of

\$60 is appropriate for each violation.

DOCKET NO. WEST 2004-151-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6355596	9/14/04	56.14101(a)(2)	\$60	\$60
6355597	9/14/04	56.14112(b)	\$60	\$60

I have found the violations were not serious. I also have found the violations were the result of WRQ's negligence. Given these criteria, and given the fact WRQ has a small to average history of previous violations and that WRQ's operations are small, I conclude an assessment of \$60 is appropriate for each violation.

SETTLED VIOLATIONS

The parties agreed as follows:

DOCKET NO. WEST 2004-264-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Settlement</u>
6355403	1/13/04	56.18002(a)	\$60	\$60

DOCKET NO. WEST 2004-309-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Settlement</u>
6350901	2/26/04	50.20(a)	\$ 60	\$60
6355040	3/16/04	56.14107(a)	\$124	\$60
6355442	3/16/04	56.14207(A)	\$ 60	\$60
6355445	3/16/04	56.12004	\$ 60	\$60
6355446	3/16/04	56.14107(a)	\$ 60	\$60
6355448	3/16/04	56.12032	\$ 60	\$60 [See Tr. 11.]
6355449	3/17/04	46.9(a)[see Tr. 13]	\$ 60	\$60

DOCKET NO. WEST 2004-316-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Settlement</u>
6350800	1/13/04	56.12004	\$ 60	\$60
6350896	2/26/04	56.9101	\$228	\$ 0
6350898	2/25/04	46.3(a)	\$ 60	\$60
6350899	2/26/04	50.20(a)	\$ 60	\$60
6355402	1/13/04	56.14110	\$ 99	\$ 0

6355405	1/14/04	62.130(a)	\$ 60	\$60
6355406	1/14/06	62.120	\$ 60	\$60

DOCKET NO. WEST 2004-345-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Settlement</u>
6355409	1/23/06	50.30(a)	\$60	\$0

DOCKET NO. WEST 2004-352-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Settlement</u>
6350796	1/13/04	56.14132(a)	\$ 60	\$ 60
6355404	1/13/04	56.14100(d)	\$ 60	\$ 60
6355407	1/14/04	56.15005	\$165	\$165
6355408	1/23/04	50.30(a)	\$ 60	\$ 60

DOCKET NO. WEST 2004-151-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Settlement</u>
6355598	9/14/04	56.12006	\$60	\$60

DOCKET NO. WEST 2004-307-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>	<u>Settlement</u>
6371231	2/16/05	46.11(b)(4)	\$131	\$60
6371232	2/16/05	14109	\$ 60	\$60

After reviewing and considering the proposed settlement, I find it is reasonable and in the public interest. Pursuant to 29 C.F.R. §2700.31, the parties' stipulations regarding the proposed settlement are accepted and the settlement **IS APPROVED**.

ORDER

WRQ **IS ORDERED** to pay a total civil penalty of \$1955.00 in satisfaction of the violations in question. Payment is to be made to MSHA within 30 days of the date of this decision. Within the same 30 days, the Secretary **IS ORDERED** to modify and vacate all citations referenced in the parties' settlement agreement and stipulations as requiring such actions. Further, in conformance with my findings regarding the contested citations, Citation No. 6350897 (Docket No. WEST 2004-309-M) **IS MODIFIED** to reflect the violation was due to WRQ's low negligence, and Citation No. 6355444 (Docket No. WEST 2004-309-M) **IS VACATED**. Upon

receipt of WRQ's full payment and upon the Secretary's modification and vacation of the appropriate settled citations, these proceedings **ARE DISMISSED**.



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

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/ej

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2006-9-M
Petitioner	:	A. C. No. 30-03254-72284
v.	:	
	:	Docket No. YORK 2006-16-M
	:	A. C. No. 30-03254-74704
DAVID SCHEER,	:	
d/b/a D. A. S. SAND & GRAVEL,	:	Docket No. YORK 2006-31-M
Respondent	:	A. C. No. 30-03254-80332
	:	
	:	Docket No. YORK 2006-45-M
	:	A. C. No. 30-03254-77405
	:	
	:	Docket No. YORK 2006-46-M
	:	A. C. No. 30-03254-85164
	:	
	:	Docket No. YORK 2006-64-M
	:	A. C. No. 30-03254-90790
	:	
	:	DAS Sand & Gravel
	:	

**DECISION DENYING RESPONDENT'S MOTION FOR
SUMMARY DECISION AND GRANTING PETITIONER'S CROSS MOTION FOR
PARTIAL SUMMARY DECISION**

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act," charging, as amended, David Scheer d/b/a D.A.S. Sand & Gravel (DAS) with violations under the Mine Act. DAS answered the Secretary's petitions in these six cases by asserting several jurisdictional defenses. At the request of the parties, these cases were consolidated for an interlocutory decision on the jurisdictional issues.¹

¹ The Respondent filed a pleading on these issues captioned "Motion to Dismiss" and the Petitioner replied to the motion. Since these pleadings were conditioned upon factual assertions that have now been stipulated, they are deemed to be a Motion for Summary Decision and Cross Motion for Partial Summary Decision, respectively, under Commission Rule 67(b), 29 C.F.R. § 2700.67(b).

For purposes of this decision the parties have agreed and stipulated (1) that “David Scheer d/b/a D.A.S. Sand and Gravel” is the successor-in-interest to D.A.S. Sand and Gravel Inc.” and that “privity” exists between these parties; and (2) that the cited facility produced sand and gravel and that such sand and gravel was sold solely within the state of New York at the time of all charging documents at issue in these cases as it was in the cases before Commission Judge Schroeder in *D.A.S. Sand and Gravel, Inc.* 25 FMSHRC 364 (July 2003)(ALJ).² As noted, the parties have agreed that the jurisdictional facts in these cases are the same as presented before Judge Schroeder in *D.A.S. Sand & Gravel Inc.*, 25 FMSHRC 364 (July 2003) (ALJ), *aff’d D.A.S. Sand & Gravel v. Chao*, 386 F.3d 460 (2d Cir. 2004), cert. denied 125 S.Ct. 2294 (2005).

Respondent first argues in its motion to dismiss that the Secretary does not have jurisdiction over the Respondent’s operation because sand and gravel extracted at the subject facility are not “minerals” as that term is used in the Mine Act. While ordinarily resolution of the factual question of whether a material is a “mineral” would require expert testimony presented at hearing, because there is both case law and legislative history supporting Mine Act jurisdiction over sand and gravel operations, there is no need in these cases for such expert testimony.

There is now well-established case law that sand and gravel operations are subject to the jurisdiction of the Act. *Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 592 (3rd Cir. 1979), cert. denied 100 S.Ct. 665; *Marshall v. Cedar Lake Sand and Gravel Company, Inc.*, 480 F. Supp. 171, 173 (E.D. Wis. 1979). In addition, the U.S. Court of Appeals for the Second Circuit in the earlier case involving D.A.S. Sand and Gravel, Inc. in *D.A.S. Sand and Gravel Inc. v. Chao*, 386 F.3d 460 (2nd Cir. 2004) did not question its jurisdiction over that sand and gravel operation as a “mine” under the Mine Act. The Commission and its judges have also continued to exercise jurisdiction over sand and gravel operations. See e.g. *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (April 1994) and *Nicholson, employed by A-Rock, Inc.*, 16 FMSHRC 1967 (September 1994) (ALJ).

As the Secretary also notes, the legislative history of the Act confirms that Congress intended to place sand and gravel operators under Mine Act jurisdiction. The Mine Act repealed and replaced the Federal Metal and Nonmetallic Mine Safety Act of 1966, formerly 30 U.S.C. 721 *et seq.* (the 1966 Act). Both acts use the same words to define “mine” as “an area of land from which minerals [other than coal or lignite] are extracted in nonliquid form or, if in liquid form, are extracted with workers underground”. As several courts have noted, the 1966 Act regulated sand and gravel pits as mines. See *Marshall v. Texoline Co.* 612 F.2d 935,938(C.A. Rex., 1980)(“Although the sand and gravel industry does not have the long history of regulation found in the coal mining industry, Congress clearly found that sand and gravel excavations could be almost as dangerous as underground coal mines and consequently in need of similar supervision.”) (citing U.S. Code Cong. & Admin. News, p. 2851 (1966)); *Marshall v. Nolicheckey Sand Co., Inc.* 606 F.2d 693, 695-696 (6th Cir. 1979) (“statistics before Congress in 1966 [...] ‘conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries.’”)

² Commission Docket Nos. YORK 2001-67-M, 2002-59-M, 2002-30-M and 2003-11-M.

(citing S.Rep.No. 1296, 89th Cong. 2d Sess., reprinted in 1966 U.S.Code Cong. and Admin. News. Pp. 2846-2851); *Marshall v. Halquist Stone Co. Inc.*, 512 F. Supp. 379, 379-380 (E.D.Wis., 1981) (citing U.S. Code Cong. & Admin. News, pp. 2851-2852, 2870 and 2874. In drafting the Mine Act, Congress copied the 1966 Act's definitional language verbatim, thus indicating that the new Mine Act was intended to regulate the same mines (including sand and gravel pits) as the 1966 Act which it superceded.

Both the House and Senate reports on the Mine Act address sand and gravel mines. The Senate report incorporates a chart tallying the number of mining operations in various subgroups, "to assist the Senate in understanding the scope of the industry affected". This chart includes a category labeled "Sand and Gravel", noting that there are 5,368 year-round mines and 2,450 intermittent mines in this category. S. Rep. No. 95-181 (1977). Furthermore, the Senate report acknowledges public statements received from, *inter alia*, the National Sand and Gravel Association. S. Rep. No. 95-181 (1977).

The House report notes that:

A serious problem remains, however, when one views the safety record for metal and nonmetal mining relative to that for coal mining. For the 10 year period since the Metal and Nonmetallic Mine Safety Act was passed, 1967 through 1976, the overall fatality rate for metal and nonmetal miners, including those in underground mines, surface mines (including open pit and sand and gravel mines, and stone quarries) and mills, averaged slightly over half that for coal miners, who work in underground mines, surface mines, and mechanical cleaning plants.

H. Rep. No. 95-312 (1977) (emphasis added). As this legislative history shows, Congress actively considered the scope of the sand and gravel industry, and the hazards posed by that industry, when it passed the Mine Act.

Since the passage of the Mine Act, Congress has frequently revisited the issue of sand and gravel mine regulation. In sixteen appropriation acts dating from 1982 through 1998, Congress specifically restricted the Mine Safety and Health Administration's (MSHA's) expenditures on the "enforcement of any training requirement, with respect to shell dredging, or with respect to any sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mine." (emphasis added).³ These successive enactments confirm that Congress was aware that it had granted jurisdiction over sand and gravel mines to MSHA under the Mine Act.

³ Public Law 105-277, 112 Stat 2681, 2681-345; Public Law 105-78, 111 Stat 1467, 1475; Public Law 104-134, 110 Stat 1321, 1321-217; Public Law 104-208, 110 Stat 3009, 3009-240; Public Law 103-333, 108 Stat 2539, 2546; Public Law 103-112; 107 Stat 1082, 1088; Public Law 102-394, 106 Stat 1792, 1798; Public Law 102-170, 105 Stat 1107, 1112; Public Law 101-517, 104 Stat 2190, 2195; Public Law 101-166, 103 Stat 1159, 1164; Public Law 100-436, 102 Stat 1680; Public Law 100-202, 101 Stat 1329; Public Law 99-178, 99 Stat 1102; Public Law 98-619, 98 Stat 3305; Public Law 98-139, 97 Stat 871; Public Law 97-377, 96 Stat 1830

Thus, Congress actively considered regulation of sand and gravel pits before, during and after the passage of the Mine Act -- in its enactment of the predecessor 1966 Act, in its deliberations over the Mine Act itself, and in subsequent referencing the Mine Act. Therefore, based on both the case law and an analysis of the legislative history of the Mine Act, there can be no doubt that the extraction of sand and gravel is within Mine Act jurisdiction.

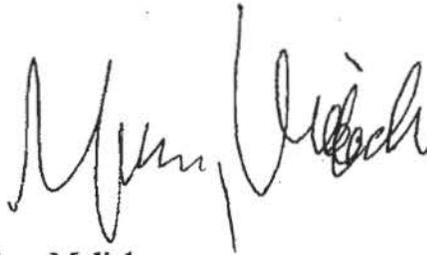
Respondent next argues that the Mine Act does not apply to its operations because its products do not affect or enter interstate commerce as required under Section 4 of the Mine Act. Section 4 of the Mine Act provides that: “[e]ach coal or other mine, the products of which enter commerce or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.” As the Secretary notes, the U.S. Court of Appeals for the Second Circuit directly addressed this issue when it was raised in an earlier Mine Act proceeding brought by the cited facility’s previous owner, D.A.S. Sand & Gravel Inc., in *D.A.S. Sand & Gravel Inc., v. Chao*, 386 F.3d 460 (2nd Cir. 2004), cert. denied 125 S. Ct. 2294. As previously noted, the parties have stipulated that privity exists between that corporation and the present ownership. The Secretary argues that the doctrine of collateral estoppel therefore precludes Respondent from again raising the issue.

A party is collaterally estopped from raising an issue in a proceeding if: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgement on the merits. See e.g., *Interoceanica Corp. v. Sound Pilots, Inc.* 107 F.3d 86, 91 (2nd Cir. 1997), citing *Central Hudson Gas & Elec. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995), *Davis v. Halpern*, 813 F.2d 37, 39 (2d Cir. 1987)(internal quotations omitted). See also *Bethencrgy Mines, Inc.*, 14 FMSHRC 17, 26 (January 1992).

As the Secretary notes, the four elements of the collateral estoppel test are satisfied here. Accordingly, the second circuit decision on the issue at bar constitutes a valid and final judgement on the merits and its holding is binding on the Respondent herein. More specifically the circuit court concluded that “[b]ecause we hold that the Commerce Clause grants Congress the authority to regulate DAS’s mine, and because we hold that Congress intended to wield its regulatory authority to the full extent provided it by the Commerce Clause, the mine is within the scope of Section 4 of the Mine Act, and is therefore subject to regulations promulgated by the Secretary of Labor.” *D.A.S. 2nd Cir.* at 464.

In finding that Respondent’s mine was subject to the jurisdiction of the Mine Act, the second circuit assumed that the materials sold by Respondent did not travel in interstate commerce. *D.A.S. 2nd Cir.* at 461 and 463. Thus, the test for collateral estoppel is fully met i.e. the identical defense asserted here was raised, litigated, and decided in a prior case, and formed the basis of the judgment entered in that prior case. The jurisdictional defense contained in Respondent’s motion must therefore be denied.

Within the above framework of law then, it is clear that Scheer's operations at the cited facility are within Mine Act jurisdiction. Respondent's Motion for Summary Decision (Motion to Dismiss) filed September 19, 2006, is accordingly denied. Petitioner's Cross Motion for Partial Summary Decision is granted. Hearings will accordingly be scheduled in the near future regarding whether the violations alleged in the petitions for civil penalties have been committed and, if so, the amount of civil penalties to be assessed.



Gary Melick
Administrative Law Judge
(202) 434-9977

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 14, 2006

UNITED MINE WORKERS OF AMERICA, LOCAL 1248,	:	COMPENSATION PROCEEDING
Complainant	:	Docket No. PENN 2002-23-C
v.	:	
MAPLE CREEK MINING, INC.,	:	Maple Creek Mine
Respondent	:	Mine ID 36-00970

ORDER GRANTING RESPONDENT'S MOTION TO CERTIFY FOR INTERLOCUTORY REVIEW

This case is before me on a complaint filed pursuant to section 111 of the Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 821. The United Mine Workers of America, Local 1248 ("UMWA"), seeks compensation for miners idled by an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") requiring the withdrawal of miners from the Maple Creek Mine, specifically, Order No. 7060223, which was issued pursuant to section 104(b) of the Act on July 31, 2001. Maple Creek moved for summary decision, contending that Order No. 7060223 was later vacated in conjunction with settlement of a civil penalty proceeding and, consequently, that the prayed-for compensation is not available under section 111. By Order dated May 4, 2006, I found that the subject order had become "final" within the meaning of section 111, and denied the motion. 28 FMSHRC 407.

Maple Creek then moved for reconsideration. The Secretary of Labor was invited to appear as amicus, and filed a brief addressing certain issues. By order dated October 24, 2006, that motion was denied. 28 FMSHRC 904. Maple Creek has now moved for certification of that ruling for interlocutory review, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76. The UMWA has opposed the motion.

Interlocutory review is appropriate where the ruling sought to be appealed "involves a controlling question of law and . . . immediate review may materially advance the final disposition of the proceedings." 29 C.F.R. § 2700.76(a). For the reasons that follow, I find that the ruling at issue, the denial of Maple Creek's motion for summary decision, involves a controlling question of law and that immediate review by the Commission may materially advance the final disposition of the case.

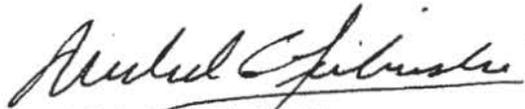
The central issue controlling Maple Creek's liability for compensation is whether the section 104(b) withdrawal order became final for purposes of section 111 of the Act. If it did, as the UMWA contends, then Maple Creek is obligated to pay compensation to miners idled by the

order. If the order did not become final, i.e., was vacated after all interested parties were given an opportunity for a public hearing, then Maple Creek would have no obligation to pay compensation and it would be entitled to summary decision. As noted in the order denying Maple Creek's motion for reconsideration, there has been considerable inconsistency in both the Secretary's position and rulings by Commission Administrative Law Judges on related issues. Moreover, the Commission has identified, but not decided, a jurisdictional issue that could have a substantial impact upon resolution of the ultimate question.

Immediate review could materially advance the ultimate disposition of the proceedings because, if Maple Creek prevails, further litigation of potentially difficult liability issues and numerous potential disputes over entitlement and amounts of compensation owed to individual miners might be avoided. The UMWA seeks compensation, not only for miners directly affected by the withdrawal order, but for miners working at a preparation plant, which operates under a different mine identification number, and whom the UMWA contends were also idled as a result of the order. Maple Creek opposed the UMWA's motion to amend the complaint to add a claim for the preparation plant miners, and contends that they are not entitled to compensation under the Act. If Maple Creek prevailed on appeal, the issue of the preparation plant miners' entitlement would not have to be decided.

As noted in Maple Creek's reply to the UMWA's opposition to its motion, there are approximately 200 miners who may have been directly affected by the order, and an additional 50 preparation plant miners who claim to have been affected. Available records may be sufficient to establish the identities of miners entitled to compensation, and the amount of compensation they would be entitled to. However, the task of examining those records has not yet been completed, and there are numerous potential factual issues that could arise over both entitlement and amount of compensation, particularly as to the preparation plant workers. If Maple Creek prevailed on appeal, performance of those tasks and resolution of those issues would be avoided.

Based upon the foregoing, Maple Creek's motion to certify for interlocutory review the ruling on its motion for summary decision is hereby **GRANTED**.



Michael E. Zielinski
Administrative Law Judge
202-434-9981

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Federal Mine Safety & Health Review Commission

Calendar Year 2006 Index

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