

NOVEMBER AND DECEMBER 2007

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NOVEMBER AND DECEMBER 2007

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Secretary of Labor, MSHA v. Twentymile Coal Company, Docket No. WEST 2007-892-E.
(Judge Manning, October 16, 2007)

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

Solar Sources, Inc. v. Secretary of Labor, MSHA, Docket Nos. LAKE 2007-37-R, et al.
(Chief Judge Lesnick, November 6, 2007)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 13, 2007

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

Docket No. CENT 2008-21-M
A.C. No. 39-01477-106913

v.

L.G. EVERIST, 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 October 10, 2007, the Commission received from L.G. Everist, Inc. ("Everist") a letter 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).

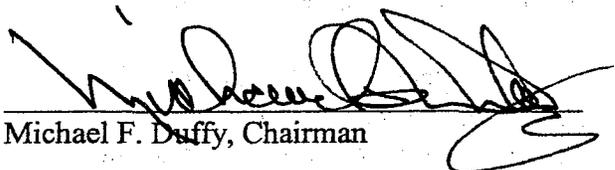
On October 18, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued eight citations to Everist. Everist filed contests of six of the subject citations at issue, which are currently pending before Administrative Law Judge Richard Manning (Docket Nos. CENT 2007-054-RM, CENT 2007-055-RM, CENT 2007-056-RM, CENT 2007-057-RM, CENT 2007-058-RM, CENT 2007-059-RM). Subsequently, MSHA issued a proposed penalty assessment to Everist, covering the eight citations.¹ In its letter, Everist states that upon receiving the proposed assessment, it checked the six citations that it had intended to contest and remitted a check for the two citations that did not wish to contest. Everist further asserts that it mistakenly

¹ Neither party has submitted the proposed penalty assessment. Consequently, we are unable to determine exactly when the penalty assessment was issued.

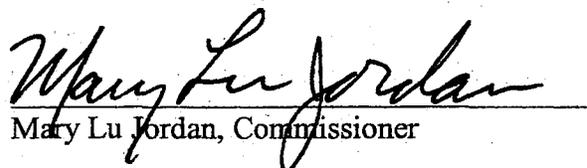
failed to send the proposed assessment form to MSHA with the payment. Everist additionally submits that MSHA applied the partial payment to two of the citations that it had intended to contest. In response, the Secretary states that she does not oppose reopening the proposed penalty assessments.

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).

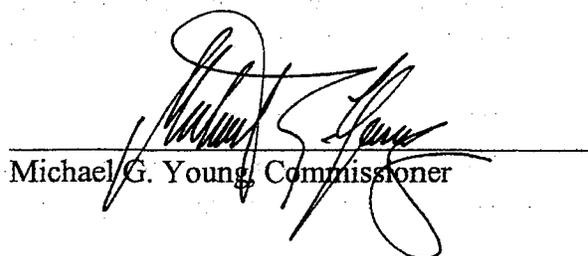
Having reviewed Everist’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Everist’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is 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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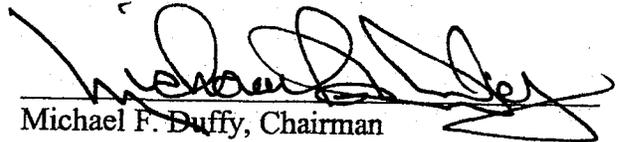
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received the proposed assessment form and that the first time he learned of the proposed assessment was when he received on or about September 4, 2007, a delinquency notice from MSHA dated August 13, 2007, stating that the proposed penalty assessment had become a final order of the Commission. On October 3, 2007, counsel for Shabrach sent a letter to MSHA contesting the penalty assessment. The Secretary states that she does not oppose Shabrach's request to reopen the penalty assessment.

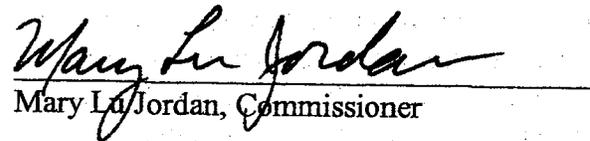
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On the basis of the present record, we are unable to determine when the proposed penalty assessment was issued, to whom it was sent, and how it was addressed. We are also unable to determine from this record when Shabrach received the second notice and whether his counsel's letter of contest qualified as a timely notification to the Secretary of a contest of the proposed penalty. If counsel timely contested the proposed penalty assessment, it would not be a final order of the Commission. *See Stech, emp. by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005).

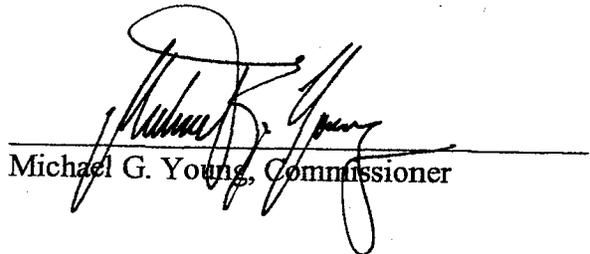
Having reviewed Shabrach's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Shabrach failed to timely contest the penalty proposal and, if so, whether good cause exists for granting relief from the final order. If it is determined 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. The Chief Administrative Law Judge shall also determine whether this case should be consolidated with Docket No. YORK 2007-66-M.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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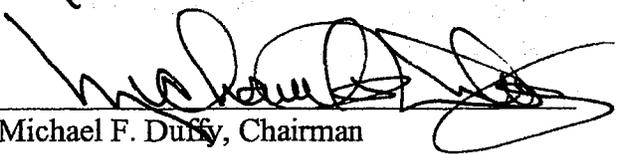
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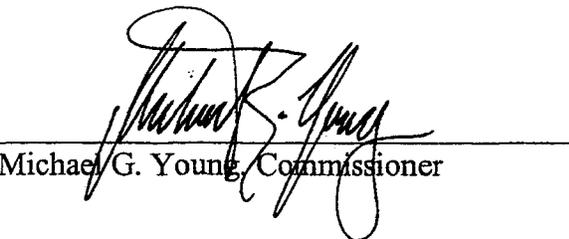
Having reviewed TK’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether TK failed to timely contest the penalty proposal and, if so, whether good cause exists for granting relief from the final order. See *D.A.S. Sand and Gravel, Inc.*, 23 FMSHRC 1031, 1033 (Sept. 2001) (remanding to determine whether relief from final order was appropriate where operator alleged that it never received copy of the proposed penalty assessment). 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.



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curiae from the National Stone, Sand & Gravel Association (“NSSGA”) and the Institute of Makers of Explosives (“IME”). For the reasons that follow, we affirm the judge.

I.

Factual and Procedural Background

McGeorge Contracting Company (“McGeorge”) operates the Granite Mountain Quarry No. 2 in Pulaski County, Arkansas. 29 FMSHRC at 274. Austin Powder is an independent contractor at the quarry. *Id.* Austin Powder delivered and stored explosive materials but did not engage in any blasting activities. *Id.*

Austin Powder stored several types of detonators at the quarry, including Electro-Star and Rock Star detonators. *Id.* at 275; Tr. 31-32. Austin Powder utilized metal, welded freight containers, similar to those used to transport cargo, for storing the detonators. Tr. 38, 150-151. The unit at issue in this proceeding, container No. 8, was covered by plywood on the interior sides and floor, but the metal ceiling was not covered, which provided a sparking surface inside the storage area. 29 FMSHRC at 275; Tr. 38-39. The plywood on the sides covered up vents that would have controlled dampness and alleviated excessive heating inside. Tr. 38-40, 46, 150; G. Exs. 9-1 and 10-1.

On December 6, 2005, MSHA Inspector Steve Medlin conducted an inspection at the quarry. 29 FMSHRC at 274. Medlin issued Citation No. 6250692, charging Austin Powder with a violation of 30 C.F.R. § 56.6132(a)(5). *Id.* The citation stated:

The vents in the cap magazine number: 8 was [sic] covered up. This hazard exposes miners to the possibility of receiving injuries, should the explosives become over-heated. The foreman stated, new wood had been installed in the magazine, and was not aware the vents had been covered.

G. Ex. 5-1. The citation alleged moderate negligence. *Id.*

Medlin also issued Citation No. 6250695, charging Austin Powder with violating 30 C.F.R. § 56.6132(a)(4). 29 FMSHRC at 275. The citation stated:

The top of magazine number: eight was not covered with non-sparking material. This hazard exposes miners to the possibility of receiving injuries, should the electric blasting caps become [sic] set off. This area is traveled on a daily basis, to get supplies for the days shot.

G. Ex. 6-1. The citation alleged moderate negligence. *Id.* The Secretary proposed penalties of \$60 for each citation. 29 FMSHRC at 275.

Austin Powder challenged the proposed penalty assessments and a hearing was held. Thereafter, the judge issued his decision in which he stated that the parties did not dispute the existence of the conditions that MSHA cited. *Id.* Further, the judge noted that the parties agreed that the products stored in the magazine were “detonators,” as that term is defined in the regulations.² *Id.* Based on the plain language of the regulation, the judge concluded that explosives and detonators must be stored in magazines that are “bullet-resistant, theft resistant, fire-resistant, weather-resistant, and ventilated.” *Id.* at 276. The judge stated that, in contrast, “blasting agents” may be stored in a “storage facility,”³ which corresponds to a Bureau of Alcohol, Tobacco and Firearms (“BATF”) Type 4 or 5 facility that does not satisfy MSHA’s definition of “magazine.” *Id.* at 276-77.

The judge rejected Austin Powder’s arguments that MSHA had incorporated into its regulations BATF’s “entire enforcement structure,” which allows detonators such as those used at the quarry that do not mass detonate,⁴ to be kept in a storage facility that is not a “magazine” as defined by MSHA. *Id.* at 277-78. The judge also concluded that the preamble to the final rule governing explosives supported MSHA’s position, rather than Austin Powder’s, because the regulations do not distinguish between types of detonators, i.e., between mass detonating detonators and non-mass detonating detonators. *Id.* at 278-80. Based on the clear language of the regulations, the judge also concluded that Austin Powder was provided with fair notice of the

² “Detonator” is defined as:

Any device containing a detonating charge used to initiate an explosive. These devices include electric or nonelectric instantaneous or delay blasting caps and delay connectors. The term “detonator” does not include detonating cord. Detonators may be either “Class A” detonators or “Class C” detonators, as classified by the Department of Transportation in 49 CFR 173.53, and 173.300. . . .

30 C.F.R. § 56.6000.

³ Section 56.2 of MSHA’s regulations defines “storage facility” as, “[T]he entire class of structures used to store explosive materials. A ‘storage facility’ used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility.” 30 C.F.R. § 56.2.

⁴ Regulations issued by the Department of Transportation define “mass explosion” as “one which affects almost the entire load instantaneously.” 49 C.F.R. § 173.50(b)(1). A minor explosion is one where the “effects are largely confined to the package and no projection of fragments of appreciable size or range is to be expected.” *Id.* at § 173.50(b)(4).

requirements for detonator storage. *Id.* at 280-81. Finally, the judge found that Austin Powder's negligence was "low," and, based on his analysis of the penalty criteria, he assessed a penalty of \$40 for each of the citations. *Id.* at 282.

II.

Disposition

Austin Powder's main argument on review is that MSHA has improperly applied the "magazine" requirements for explosives in section 56.6132 to non-mass detonating detonators. A.P. Br. at 11. Austin Powder continues that the judge erred when, based on the language of the regulation, he concluded that the regulation does not distinguish between types of detonators. *Id.* at 11-12. Austin Powder argues that the judge further erred when he ignored MSHA's intent expressed in the preamble to the publication of the final rule in the Federal Register. *Id.* at 13-18. Austin Powder also argues that the Secretary cannot deviate from BATF regulations on storage of explosives without engaging in additional rulemaking. A.P. Reply Br. at 4-6. Austin Powder contends that the citations are a reversal of MSHA's position that was published in the preamble to the rule, and that due process requires notice to operators before the regulation can be enforced in such a manner. A.P. Br. at 18-22; A.P. Reply Br. at 2. Finally, Austin Powder argues that, even if the regulatory requirements are ambiguous, the Commission should not defer to the Secretary's interpretation of the regulations because her interpretation has been newly articulated in an enforcement proceeding. A.P. Br. at 22-24.

The IME, whose members include manufacturers of commercial explosives and entities that transport and store such materials at customer sites, filed a brief in support of Austin Powder. IME argues that the judge essentially imposed the requirements for BATF Type 1 and Type 2 magazines to Type 4 storage facilities, which are used to store non-mass detonating detonators. IME Br. at 2. IME claims that, if the judge's decision is allowed to stand, it would require replacing over 500 Type 4 storage facilities with Type 1 and Type 2 magazines at a cost of over \$90,000 per magazine. *Id.* at 2-3. IME argues that the judge ignored language in the preamble to the final rule; that the decision is contrary to industry practice and MSHA's enforcement for over 14 years; and that Austin Powder lacked fair notice of MSHA's intent to alter the rule. *Id.* at 3-6. Finally, IME contends that MSHA is effecting a major change in regulatory practice without adhering to due process. *Id.* at 8-9.

The NSSGA argues that the economic impact of the judge's decision will be "substantial" because it will require retrofitting or replacing many Type 4 storage facilities with no corresponding safety benefit. Mot. at 3.⁵ The NSSGA further contends that the preamble of the 1993 final rule expressly permits non-mass detonating detonators to be stored in Type 4 storage

⁵ The NSSGA did not file a brief with the Commission, despite being given the opportunity to do so. Therefore, the summary above is from arguments made in its motion to participate as an amicus curiae.

facilities. *Id.* The NSSGA concludes by arguing that MSHA is changing a longstanding enforcement position without fair notice to operators. *Id.* at 3-4.

In response, the Secretary argues that the plain meaning of the regulations compels the conclusion that all detonators must be stored in magazines that are constructed in compliance with section 56.6132(a). S. Br. at 6-12. The Secretary further argues that Austin Powder's contention that the regulation is ambiguous is unsupported by the language of the regulation. *Id.* at 12-13. Moreover, the Secretary contends that the regulatory history of the explosives standards, when read as a whole, supports the plain language reading of the regulation. *Id.* at 14-22. The Secretary urges the Commission to reject the argument that MSHA had not cited operators for violating the standard because of lack of proof. *Id.* at 22-24. Finally, the Secretary contends that Austin Powder had adequate notice of the standard because of its plain language, that the regulatory preamble could not lead to a different interpretation, and that Austin Powder had actual notice of the standard's requirements from prior litigation and a prior citation. *Id.* at 25-29.

The primary issue on review is whether the structural requirements for magazines in section 56.6132 apply to the metal container used at the Granite Mountain Quarry to store Electro-Star and Rock Star detonators. Resolution of these issues requires a close reading of the definitions and standards in Subpart E of Part 56, which addresses the use of explosive materials at metal and nonmetal mines, and a review of the regulatory history. In addition, because MSHA's rules also refer to regulations of the Department of Transportation and the BATF, consideration must also be given to any impact of those regulations on the Secretary's regulatory scheme.

A. Language of 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.*; *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)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face." (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984))). The Commission has held that the meaning of a broadly-worded regulation may be determined from its plain language. *Nolichuckey Sand Co., Inc.*, 22 FMSHRC 1057, 1060 (Sept. 2000).

Section 56.6130(a) states that “[d]etonators and explosives shall be stored in magazines.” 30 C.F.R. § 56.6130(a). As the judge correctly concluded, “[t]his standard could not be written more clearly.” 29 FMSHRC at 281. Moreover, on its face, with the exception of detonator cord, the regulatory definition of “detonator” encompasses *all* types of detonators, including the detonators at issue in this proceeding. The Secretary defines “explosive materials” as “explosives, blasting agents, and *detonators*.” 30 C.F.R. § 56.2 (emphasis added).⁶ In section 56.6100, the Secretary defines “detonator” as “[a]ny device containing a detonating charge used to initiate an explosive.” 30 C.F.R. § 56.6100. The only exclusion from the broad definition is “detonating cord.” *Id.*⁷ The definition further specifies that detonators may be *either* Class A or Class C, as determined by the Department of Transportation (“DOT”). *Id.* DOT, in turn, has included in the first category, Class A, explosives with a mass explosion hazard and in the second category, Class C, explosives with a minor explosion hazard. 49 C.F.R. §§ 173.50(b)(1), 173.50(b)(4), 173.53.⁸ These divisions appear to be generally consistent with the Secretary’s references to two categories of detonators: mass-detonating (or sympathetic detonators) and non-mass detonating detonators. *See* n.4, *supra*. Thus, relying on DOT regulations, the Secretary has broadly defined “detonators” to include all types of detonators without regard to their explosive capacity.

In subpart E, addressing the use of explosives, the Secretary defines “magazine” as “[a] bullet-resistant, theft-resistant, fire-resistant, weather-resistant, ventilated facility for the storage of *explosives and detonators* (BATF Type 1 or Type 2 facility).” 30 C.F.R. § 56.6100 (emphasis added).⁹ Section 56.6132, the regulation at issue in this proceeding, describes with even greater

⁶ The definitions at § 56.2 apply to all of Part 56 – Safety and Health Standards – Surface Metal and Nonmetal Mines. 30 C.F.R. § 56.2. In addition, the subparts of Part 56 also contain definitions applicable to the respective subpart and, if inconsistent with the general definitions, “the definition in the subpart will apply in that subpart.” *Id.*

⁷ There is also a definition of “detonator” at 30 C.F.R. § 56.2, but in this instance the definition in Subpart E (Explosives) at § 56.6100 applies. *See* n.6, *supra*.

⁸ As the judge noted, 29 FMSHRC at 276 & n.1, DOT regulations provide that Class A explosives are now classified as “Division 1.1,” and Class C explosives are classified as “Division 1.4.” 49 C.F.R. § 173.53. The specification sheets for the Electro-Star and Rock Star detonators state that they are Division 1.4 explosives. 29 FMSHRC at 276; A.P. Exs. 6 and 7. (The judge inadvertently referred to “Class C” explosives as “Class B” explosives in explaining that Class C detonators are now classified as Division 1.4 explosives. 29 FMSHRC at 275-76. *See* 49 C.F.R. § 173.53.)

⁹ There is a broader, less precise definition of “magazine” in the general definitions of Part 56, 30 C.F.R. § 56.2, that is superceded by the definition at 30 C.F.R. § 56.6100. *See* n.6, *supra*. The preamble to the final rule publication indicated that the definition in section 56.2 was to be deleted and replaced by the new definition in Subpart E (section 56.6100). 58 Fed. Reg.

specificity the construction requirements for magazines, including the use of “nonsparking material on the inside” and being “ventilated to control dampness and excessive heating within the magazine.” *Id.* at § 56.6132(a)(4), (a)(5). Part 56 broadly defines a “storage facility” as “the entire class of structures used to store explosive materials.” 30 C.F.R. § 56.2.

We must also read these regulations in context.¹⁰ *See Morton Int’l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) (“[R]egulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions.”). The Secretary refers in the definition of “magazine” to “BATF Type 1 or Type 2 facility.” 30 C.F.R. § 56.6100. BATF regulations, in turn, describe “types of magazines” at 27 C.F.R. § 555.203 and specify that Type 1 magazines are permanent magazines for the storage of high explosives, while Type 2 magazines are mobile and portable indoor and outdoor magazines for the storage of high explosives. *Id.* at (a) and (b). The construction requirements for Type 1 and Type 2 magazines are consistent with the MSHA requirements for magazines, including requirements for non-sparking material in the interior and for ventilation. *See generally* 27 C.F.R. §§ 555.207, 555.208.

The judge concluded that a reading of the plain language of the Secretary’s regulations in the context in which they appear leads to the conclusion that all detonators and explosives must be stored in magazines that are bullet-resistant, fire-resistant, weather-resistant, and ventilated. 29 FMSHRC at 276. The judge’s reasoning and conclusion are correct.

Contrary to Austin Powder’s position in this proceeding, nothing in MSHA’s regulations exempts non-mass detonating detonators (Class 1.4 explosives) from the magazine storage requirement. In addition to the reference in the definition of “magazine” at section 56.6100 to a BATF Type 1 or Type 2 facility, the Secretary has further referenced BATF’s classification of magazines to specify the requirements for the storage of “blasting agents,” the third category of explosive materials that is covered in the Secretary’s regulations.¹¹ Thus, section 56.2 provides that a “‘storage facility’ used to store blasting agents corresponds to a BATF Type 4 or 5 storage

69596, 69597 (Dec. 30, 1993). However, as the judge noted, this has not occurred, apparently due to oversight. 29 FMSHRC at 278 n.4.

¹⁰ “In order to discern a standard’s plain meaning, the standard must be read in context.” *RAG Shoshone Coal Corp.* 26 FMSHRC 75, 80 n.7 (Feb. 2004), citing *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 45 (D.C. Cir. 1990) (“If the first rule of . . . construction is ‘Read,’ the second rule is ‘Read on!’”); *Borgner v. Brooks*, 284 F.3d 1204, 1208 (11th Cir. 2002), *cert. denied sub nom. Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080 (2002) (stating that in discerning a statutory provision’s plain meaning, court must construe the statute in its entirety).

¹¹ The Secretary defines “explosive material” to include “explosives, blasting agents, and detonators.” 30 C.F.R. § 56.2.

facility.”¹² By its terms, the provisions in section 56.2 that allow the use of a BATF Type 4 or 5 storage facility apply *only* to “blasting agents,” not to detonators. *See also* 30 C.F.R. § 56.6130(b) (“Packaged blasting agents shall be stored in a magazine or other facility.”).

In sum, there is no provision in MSHA’s regulations that supports Austin Powder’s position that using a Type 4 storage facility to house Class 1.4 non-mass detonating detonators is permissible. However, Austin Powder would have the Commission read the regulatory history associated with the Part 56 regulations and give precedence to language in the preamble that, it argues, overrides the plain language of the regulations. Commission precedent does not support Austin Powder’s position that language in the preamble to a regulation can override the plain language of the regulation. *See Morton Int’l*, 18 FMSHRC at 539 (“operators should not be held to examining regulatory history to learn the meaning of a standard that appears to be clear on its face”). *See also Pfizer, Inc. v. Heckler*, 735 F.2d at 1509 (in rejecting reliance on inflation impact statement accompanying issuance of rule that was clear, court noted, “Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.”) (quoting *Assoc. of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)). Despite the clear language of the regulation, we now review the regulatory history of the provisions at issue in part because Austin Powder and the amici claim that they lacked sufficient notice of the magazine storage requirements for non-mass detonating detonators.

B. Regulatory History

In evaluating Austin Powder’s position and the impact of the regulatory history,¹³ prior to the publication of the proposed rule in 1988, the Secretary made clear that the “existing standard . . . states that detonators and explosives other than blasting agents shall be stored in

¹² BATF regulations provide that Type 4 magazines may be used for storage of “low explosives” and further state, “Detonators that will not mass detonate may also be stored in type 4 magazines” 27 C.F.R. § 55.203(d). In contrast, MSHA’s regulations do not use the term “low explosives,” nor do they allow for the storage of non-mass detonating detonators in Type 4 magazines or storage facilities. The *only* exception to the general requirement for storage of explosives in Type 1 or Type 2 magazines is for blasting agents.

¹³ The issuance of the final regulations in 1993 addressing explosives at metal and non-metal mines was preceded by several Federal Register publications. On November 10, 1988, the Secretary proposed changes to the safety standards for explosives at metal and nonmetal mines. 53 Fed. Reg. 45487. On January 18, 1991, the Secretary published a final rule. 56 Fed. Reg. 2070. On April 10, 1991, the Secretary stayed the effective date for several provisions of the final rule and reopened the rulemaking record to allow further comment. 56 Fed. Reg. 14470. On October 16, 1992, the Secretary issued a new proposed rule. 57 Fed. Reg. 47524. Finally, on December 30, 1993, the Secretary issued a final rule, fully reflecting the safety standards now in effect. 58 Fed. Reg. 69596.

magazines.” 53 Fed. Reg. at 45491. *See* 30 C.F.R. § 56.6001 (1988).¹⁴ In 1988, the Secretary did not propose any change to the magazine storage requirement for detonators. In the January 31, 1991 final rule publication, the Secretary modified the definition of “detonator” to include language that “detonators may be either ‘Class A’ or ‘Class C.’” 56 Fed. Reg. at 2072. In the explanatory material accompanying the final rule, the Secretary emphasized that “*detonators and explosives must be stored in a magazine and . . . blasting agents may be stored in a magazine or other facility.*” *Id.* at 2075 (emphasis added).

Thereafter, the Secretary issued a Program Policy Letter (PPL No. P91-IV-1) to provide interpretations of, *inter alia*, “magazine” and “storage facility” in 30 C.F.R. Parts 56 and 57, which became effective on November 1, 1991.¹⁵ The PPL addressed in particular whether the new standards prohibited the use of “Type 4 storage facilities.” In stating that the new standards did not prohibit their use, the PPL stated:

In the final rule, “storage facility” . . . refers to the entire class of structures used to store explosive materials. “Magazine” refers to a type of storage facility for highly volatile explosive materials. 56/57.6130 requires that detonators and explosives, not explosive materials, be stored in magazines because they are highly volatile and subject to sympathetic detonation. Blasting agents were specifically excluded from this provision because they are less volatile and thus can be stored in structures other than magazines.

Id. at 1-2 (emphasis added). Thus, section 56.6130(a), then in effect, continued to provide that “[d]etonators and explosives shall be stored in magazines.” 30 C.F.R. § 56.6130(a) (1992).

¹⁴ Austin Powder was previously cited under the old pre-1993 standard for storing detonators in magazines that did not comply with the requirements in the regulations. *Austin Powder Co.*, 14 FMSHRC 620, 627 (Apr. 1992) (ALJ). In the same proceeding, Austin Powder also contested a citation in which MSHA cited it for failing to properly ventilate a magazine in which explosives were stored. *Id.* at 628. The judge affirmed the citations in both instances. *Id.* at 629.

¹⁵ As noted above, the Secretary stayed implementation of parts of the final rule, primarily for reasons unrelated to the instant case, because MSHA wanted comments on the safety aspects of requiring ventilation of facilities or magazines used for storing blasting agents. 56 Fed. Reg. at 14470-71. Various other stays were issued thereafter, although most of the provisions of the final rule that had been published were allowed to go into effect. *See* 57 Fed. Reg. 47524. *See generally* 30 C.F.R. Subpart E (1992).

On October 16, 1992, the Secretary proposed to issue new definitions of “magazine” and “storage facility” to clarify usage of the terms in MSHA regulations. “The result is to make clear that MSHA’s use of the term ‘magazine’ corresponds to BATF’s use of Type 1 and Type 2 storage facilities.” 57 Fed. Reg. at 47526. MSHA further proposed to define “storage facility” as “the entire class of structures used to store explosive materials” and, when used specifically to store blasting agents, it referred to a BATF Type 4 or 5 structure. *Id.* In further explaining the differences between magazines and storage facilities, the Secretary stated that “‘magazine’ refers to a type of storage facility for highly sensitive explosive materials such as explosives and detonators which are subject to sympathetic detonation.” *Id.* The Secretary concluded by stating that “because *blasting agents* are not as highly sensitive as detonators and explosives,” they did not have to be stored in magazines or facilities that met the construction and housekeeping criteria of magazines. *Id.* (emphasis added). Nowhere in the Federal Register publication of the proposed rule did the Secretary state that he was proposing to change the existing standard, 30 C.F.R. § 56.6130(a) (1992), which required that all detonators, including non-mass detonating detonators, be stored in magazines.

In the 1993 final rule publication, consistent with the 1992 proposed rule, the Secretary added a definition of “magazine” to section 56.6000 “for the storage of explosives and detonators (BATF Type 1 or Type 2 facility).” 58 Fed. Reg. at 69598. The Secretary responded to several commenters that MSHA had previously used the terms “magazine” and “storage facility” synonymously. *Id.* In distinguishing between a magazine and storage facility, the Secretary clearly stated that “paragraph (a) of §§ 56/57.6130 requires that detonators and explosives, not blasting agents, be stored in magazines; while . . . blasting agents may be stored either ‘in a magazine or other facility.’” *Id.* While the Secretary further explained that the reason for differing treatment of blasting agents was because explosives and detonators were “highly sensitive explosive materials . . . subject to sympathetic detonation,” *id.* at 69599,¹⁶ there is no statement in the preamble that the Secretary sought to revise the well-established magazine storage requirement for explosives or detonators, including ones that are not mass-detonating.

Further, in the preamble to the 1993 final rule, the Secretary noted that several commenters objected to the use of the term “storage facility” because it precluded the storage of non-mass detonating detonators, as permitted by BATF regulations. *Id.* Accordingly, those commenters suggested deleting use of the term. In response, the Secretary emphasized that MSHA’s final rule “conforms to BATF’s construction criteria.” *Id.* However, the Secretary noted differences in MSHA’s regulations and those of BATF because MSHA utilizes the term “storage facility,” which corresponds to BATF Type 4 and 5 facilities. *Id.* In contrast to BATF’s more limited use of Type 1 and 2 facilities for storage of “highly sensitive explosives,” “MSHA’s definition of ‘magazine’ does not prevent the use of magazines to store the full range of

¹⁶ Although Austin Powder relies on this reference to detonators “which are subject to sympathetic detonation,” we agree with the judge’s conclusion that this language simply offers an additional explanation as to why detonators and explosives must be stored in magazines meeting rigorous construction criteria. 29 FMSHRC at 279.

explosive materials.” *Id.* Significantly, in the following section addressing explosive materials storage facilities (sections 56/57.6130), the Secretary stated that the rule in effect, by virtue of the 1991 final rule publication, “required detonators and explosives other than blasting agents to be stored in magazines.” *Id.*¹⁷

In agreement with the judge, 29 FMSHRC at 280, we conclude that nothing in the regulatory history indicates that the Secretary’s rules distinguish between mass-detonating detonators and detonators that are not subject to mass detonation. Rather, the Secretary clearly delineated the storage requirements for explosives and detonators versus blasting agents, with the latter category of explosive materials being subject to the least stringent storage requirements. Moreover, neither the storage requirements for detonators in section 56.6130(a) nor the magazine construction requirements in section 56.6132(a) were under consideration for amendment when the preamble language appeared in the Federal Register publication upon which Austin Powder relies. In short, we cannot agree that the regulatory history leads to the conclusion that Austin Powder was not required to store the Electro-Star and Rock Star detonators in magazines. Even if the preamble were unclear as to the regulations at issue, that language cannot override the clear requirements of the regulations. *See* cases cited p. 8, *supra*.

C. Fair Notice of the Requirements of the Regulation

The heart of Austin Powder’s due process argument is that “the company lacked fair notice of the Secretary’s intention to depart from the [BATF’s] explosive storage standards and definitions . . . that she indicated in the 1993 rulemaking were being adopted.” A.P. Reply Br. at 2. However, based on our determination that the language of the standard is plain, we conclude that Austin Powder had adequate notice of the storage requirements for detonators. In this regard, the Commission has held that when “the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements.” *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998); *see also Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that adequate notice provided by unambiguous regulation). Nor can we conclude that, based on the regulatory history of the explosive standards in Part 56, Austin Powder could reasonably believe that section 56.6130 was being revised to eliminate the requirement that all detonators be stored in magazines that met the criteria in section 56.6132(a).

Further, Austin Powder contends that the enforcement history of the magazine storage requirement for detonators supports its position that the citations at issue represent a change in MSHA’s enforcement of section 56.6130 and that it lacked fair notice of MSHA’s position. Austin Powder’s contention is essentially an estoppel argument that it sought to bolster by trial

¹⁷ The preamble further noted that the intervening stays of the rule only affected the first sentence of section 56/57.6130(b), which addressed the storage requirements for packaged blasting agents. 58 Fed. Reg. at 69599. *See* 30 C.F.R. § 56.6130(b) (1992) (accompanying note).

testimony that it had undergone prior inspections and had not been cited for storing detonators in similar storage facilities. However, the Commission has long held that an inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding under an application of the standard that it concludes is correct. See *Nolichuckey Sand*, 22 FMSHRC at 1063-64 (citations omitted).¹⁸ Thus, even if the record supported the assertion that MSHA had failed to enforce section 56.6130 as written,¹⁹ the Secretary should not be prevented from proceeding to enforce the regulation as she has in the present case.

D. Other Arguments

In addition to notice, Austin Powder raises other arguments in response to the judge's decision. Austin Powder and the amici challenge MSHA's enforcement of the magazine requirements in section 56.6132 to storage facilities containing detonators because of the costs involved. However, there is a lack of evidence to support any specific cost figure.²⁰ Moreover, the Commission has generally rejected economic reasons as grounds for failing to comply with regulatory requirements. See *Consolidation Coal Co.*, 22 FMSHRC 328, 333 (Mar. 2000) (operator engaged in aggravated conduct when it subordinated its responsibility to clean up coal accumulation to its desire to complete construction); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997) (stating that aggravated conduct was shown when an operator decided to avoid

¹⁸ Austin Powder's reliance on the Commission's decision in *Alan Lee Good*, 23 FMSHRC 995, 1005 (Sept. 2001), to support its position that the Commission should consider MSHA's enforcement history to determine whether an operator had fair notice of the requirements of a standard, A.P. Reply Br. at 11, is misplaced. In *Good*, the Commission, in applying the "reasonably prudent person standard" to the Secretary's interpretation of an *ambiguous* regulation, remanded a case for an examination of MSHA's enforcement history in order to determine whether the operator had adequate notice of the regulatory requirements. 23 FMSHRC at 1000, 1004-06, 1010. Here, in contrast, the language of the regulation is plain.

¹⁹ The testimony of Kris Bibey, an Austin Powder safety official, that Austin Powder had numerous other storage facilities for detonators that had been inspected and not cited was conclusory at best. Tr. 109-10. Location manager John McCloy testified that BATF, not MSHA, had previously inspected container No. 8 and had no problem with the way it was constructed. Tr. 148-52.

²⁰ IME's statement in its brief that "the total cost of compliance" would be in excess of \$90,000 per magazine has no record basis. IME Br. at 2. Indeed, there was testimony from an Austin Powder official that the storage facilities were freight containers that had been retrofitted. Tr. 150-51. See G. Exs. 9-1 to 9-7. Because of this and other evidence, the monetary estimate in IME's brief appears to be without foundation. See also S. Resp. Br. at 24-25 n.9, citing G. Ex. 5 at 3 (MSHA inspector stating in citation that it was terminated when "[h]oles were drilled in the plywood that covered the vents in magazine [No.] 8").

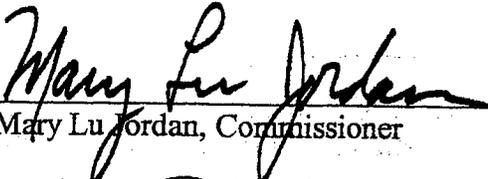
compliance with the standard in order to continue production). Austin Powder's and the amici's economic defense stands on no better foundation in this proceeding.

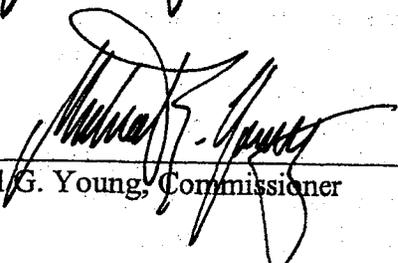
Finally, Austin Powder argues in its reply brief that the BATF regulations preempt MSHA regulations in the area of explosives. A.P. Reply Br. at 10-11. However, Austin Powder's preemption argument is a new theory in the case that was not raised before the judge. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992). See 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass."). In any event, Austin Powder failed to raise the issue in its petition for discretionary review. "Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition and by the Commission *sua sponte*." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994), *aff'd*, 81 F.3d 173 (10th Cir. 1996) (table) *citing* 30 U.S.C. §§ 823(d)(2)(A)(iii) and (B); 29 C.F.R. § 2700.70(f) (1993). In these circumstances, we cannot consider the issue on review.²¹ However, we note that Austin Powder is not foreclosed from raising the preemption issue in a future case or requesting that MSHA undertake rulemaking to address that issue.

III.

Conclusion

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


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

²¹ The Secretary filed a motion to strike this portion of Austin Powder's brief. Mot. at 3. Commissioner Jordan would grant the Secretary's motion. Commissioner Young would hold that it is not necessary to rule on the motion, because, based on the Commission's procedural rules, the argument is not properly before us and has not been considered in disposing of the instant case.

Chairman Duffy, concurring:

I concur with my colleagues in affirming the judge's decision, however, I do so with great reluctance. At the Commission's decisional meeting I indicated that I would dissent in this case and hold that the judge erred in finding a violation of the standard. Since that time I have concluded that court and Commission precedent, particularly the decisions in *Pfizer, Inc. v. Heckler*, 735 F. 2d 1502, 1509 (D.C. Cir. 1984), and *Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996), argue strongly for the proposition that the clear language of the standard trumps contradictory language in the preamble.¹

While I agree with my colleagues that the regulations themselves do not distinguish between mass-explosion detonators and non-mass explosion detonators, I disagree that the preamble to the 1993 final rule supports the proposition that class 1.4 explosive materials, i.e., non-mass explosion detonators, must be stored in Bureau of Alcohol, Tobacco and Firearms ("BATF") Type 1 or Type 2 storage facilities. Indeed, as I read the preamble, the opposite is true.

Regulatory agencies are loath to admit error, particularly in the rulemaking process. They are especially reluctant to modify the language of a proposed rule even in light of expert public comment supporting a change. This is understandable; an agency puts a great deal of time and effort into the preparation of a proposed rule and would not issue a rule it believed to be defective. However, it seems clear to me that when MSHA proposed in 1988 to drop the definition of "magazine" in its regulations and began to use the terms "magazine" and "storage facility" interchangeably (53 Fed. Reg. 45487, 45490 (Nov. 10, 1988)), the agency set in motion a wealth of confusion that persists to this day.

¹ My change of opinion will come as something of a surprise to my colleagues since under the dual constraints of the Government in the Sunshine Act, and a reduced roster of Commissioners, we are not allowed to discuss cases unless we do so at an open meeting. Under the Mine Act, the Commission is intended to be composed of five members, with three members constituting a quorum. 30 U.S.C. § 823(a), (c). Under those circumstances any two Commissioners can discuss the merits of a case without invoking the public meeting requirements of the Sunshine Act, 5 U.S.C. § 552b. However, when the Commission is reduced to three members as it is currently, any two Commissioners constitute a quorum. 30 U.S.C. § 823(c). Accordingly, the Sunshine Act constraints take effect, and substantive discussions among any two members must be carried out in a public meeting with advance notice of its time and place. 5 U.S.C. § 552b(b), (e)(1). The Commission has not been at full strength since the expiration of Commissioner Beatty's term in August of 2004, and has been reduced to three members since the expiration of Commissioner Suboleski's term in August of 2006. Needless to say, these circumstances severely restrict, indeed foreclose, the opportunity for the informal give and take necessary to reach consensus among the Commission's members.

From the time that proposed rule was issued in 1988, the regulatory history demonstrates that commenters consistently warned MSHA that its new regulatory approach was inconsistent with longstanding policy adopted by BATF, the vanguard federal agency for the regulation of explosives. As I understand it, the confusion arose because BATF defines “magazines” in terms of what can be stored in them (Types 1 through 5), while MSHA began to define various classes of “storage facilities” in terms of their construction characteristics as specified by BATF criteria.

MSHA framed the issue in the agency’s preamble to the final rule issued in 1993:

A few commenters objected to the use of the term “storage facility.” These commenters found the use of the term “storage facility” confusing in that it precluded the storage of non-mass detonating detonators as permitted by 27 CFR part 55, subpart K of the BATF regulations. They suggested deleting the term “storage facility” to be consistent with BATF regulations.

58 Fed. Reg. at 69596, 69599 (Dec. 30, 1993).

What follows in the preamble cannot be read for anything other than an attempt by MSHA to counter the accusation that its standards were inconsistent with those adopted and enforced by BATF:

BATF Type 1 facilities are permanent magazines used for the storage of high explosives; . . . BATF Type 4 facilities are magazines used for the storage of low explosives, blasting agents and non-mass detonating detonators; . . . MSHA’s final rule does not require BATF Type 4 storage facilities to be bullet-resistant. The only storage facilities that need to be bullet-resistant are magazines (BATF Type 1 and 2 facilities) used for the storage of highly sensitive explosive material such as explosives and detonators which are subject to sympathetic detonation.^[2]

....

In summary, MSHA believes that the definition of “storage facility” as clarified by this final rule, provides mine operators and miners with objective criteria, consistent with BATF, relative to storage requirements, for the entire range of explosive materials.

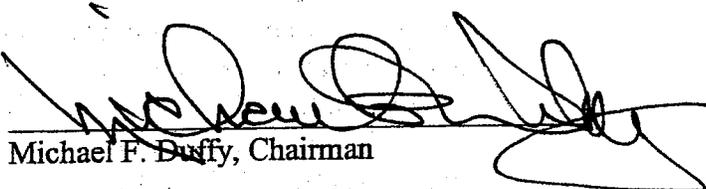
Id.

² “Sympathetic detonation” and “mass-detonation” are synonymous.

Thus, if the BATF standards allow non-mass detonation detonators to be stored in the Type 4 magazines, and MSHA's standards are "consistent" with BATF standards, it is easy to understand why Austin Powder and others could have concluded that the detonators referred to in section 56.6130(a) are mass explosion detonators and not non-mass explosion detonators.

Moreover, on the basis of the brief submitted on review by the Institute of Makers of Explosives ("IME"), I strongly suspect that the position articulated by MSHA in this proceeding constitutes an abrupt departure from longstanding policy regarding the storage of non-mass detonating detonators. If anyone can attest to how explosives have been regulated under BATF, MSHA, and Department of Transportation standards, it is IME.³ Nevertheless, since the standard refers to "detonators" without clarification, I must reluctantly agree that Austin Powder and IME have relied upon the contradictory evidence in the preamble of the rule to their detriment.⁴

Lastly, as to Austin Powder's argument that BATF regulations pre-empt MSHA's regulations as they apply to explosives, I, too, note that the argument was not raised before the judge nor in the operator's petition for review. I would, however, take judicial notice of the fact that MSHA's sister agency, the Occupational Safety and Health Administration, recently declared that it was ceding the field of explosives regulation and enforcement to BATF. *See* 72 Fed. Reg. 18792, 18796 (Apr. 13, 2007). I would encourage MSHA to consider a similar path if for no other reason than to assure that standards are consistent and enforced by the federal agency with preeminent expertise in this area.



Michael F. Duffy, Chairman

³ In its October 16, 1992, notice of proposed rulemaking, MSHA referred to IME as an association "created to provide technically accurate information and recommendations concerning explosive materials and to serve as a source of reliable data about their use." 57 Fed. Reg. 47524, 47525 (1992) (quoting favorably from the self-description of IME).

⁴ The phrase "regulatory bait and switch" comes to mind. If this issue had been raised in a court of appeals' review of the rulemaking proceeding, the regulation may have been invalidated because of the inconsistency between its language and the preamble. *See Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1220 (D.C. Cir. 1996).

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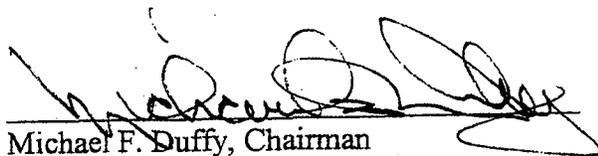
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Walter Res., Inc., 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could 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).

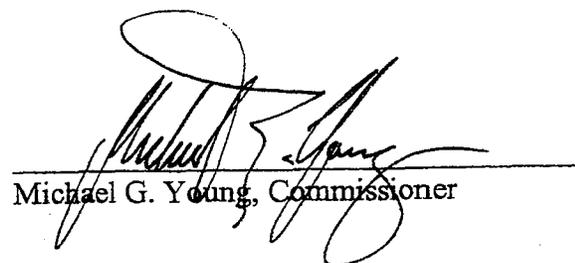
Having reviewed Lanier’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Lanier’s failure to timely contest the penalty proposals and whether relief from the final order should be granted. If it is 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 14, 2007

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

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Docket No. CENT 2008-22-M
A.C. No. 16-00358-119151

v.

NORTH AMERICAN SALT 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 24, 2007, the Commission received from North American Salt Company ("North American Salt") 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).

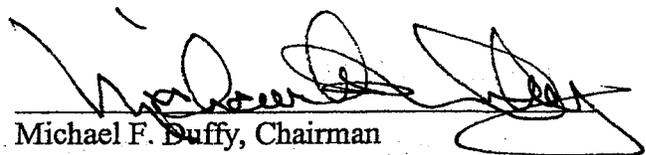
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On May 30, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to North American Salt covering 31 citations. In its letter, North American Salt states that it attempted to contest one of the citations, No. 6240760, by checking the pertinent box on the assessment form. It also submits a letter allegedly sent to an MSHA official dated June 11, 2007, stating that it wanted to contest the citation. In response, the Secretary states that, although she has no record of receiving the assessment form, she does not oppose reopening the proceeding.

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).

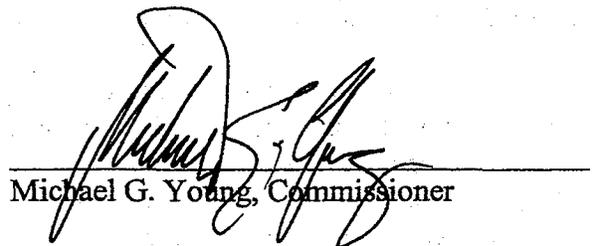
Having reviewed North American Salt’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for North American Salt’s failure to timely contest the penalty proposal and whether relief from the final order should 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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WASHINGTON, DC 20001

December 14, 2007

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

v.

CHEVRON MINING, INC.

:
:
: Docket No. CENT 2008-40
: A.C. No. 29-00096-121569
:
:
:

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 7, 2007, the Commission received from Chevron Mining, Inc. ("Chevron") a motion 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).

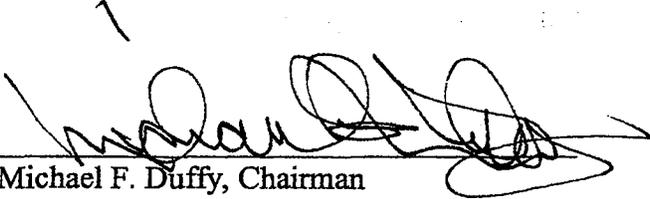
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On March 29, 2007, following an inspection, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation and order which Chevron challenged by filing a notice of contest on April 26. On July 10, 2007, MSHA issued proposed penalty assessments for the citation and order. In its motion, Chevron states that its safety manager mistakenly thought that, because Chevron had contested the citation and order, it did not need to contest the proposed penalties. Chevron further states that due to its safety manager's mistake, it did not

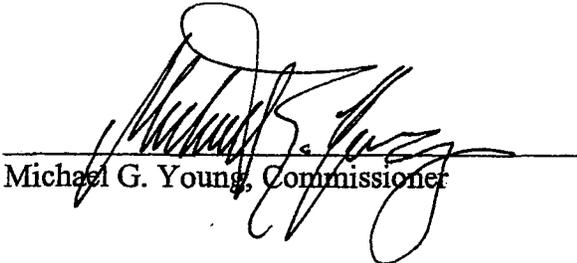
timely process the assessment form. On October 26, Chevron was notified of its delinquency in paying the proposed penalties, and it filed this motion. In response, the Secretary states that she does not oppose Chevron's request to reopen the proposed penalty assessment proceeding.¹

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 Chevron'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 Chevron'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

¹ The Secretary states that the contest proceedings involving the underlying citation and order were docketed as CENT 2007-189-R and 2007-190-R.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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December 14, 2007

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

v.

MANALAPAN MINING COMPANY

Docket No. KENT 2008-65
A.C. No. 15-18267-115559

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, 2007, the Commission received from Manalapan Mining Company ("Manalapan") 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).

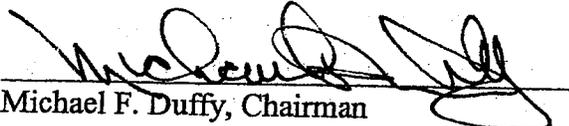
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

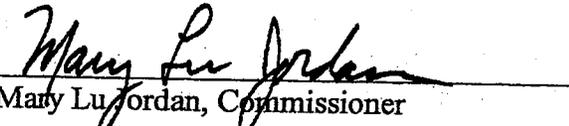
On April 13, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Manalapan. In its letter, Manalapan asserts that it failed to submit its contest within 30 days of receipt because the assessment form "may have been misplaced" or there was "some confusion with the mail." Although the Secretary does not oppose reopening the proposed penalty assessment, she offers mailing receipts that appear to indicate that Manalapan contested the penalty assessment beyond the 30-day time limit.

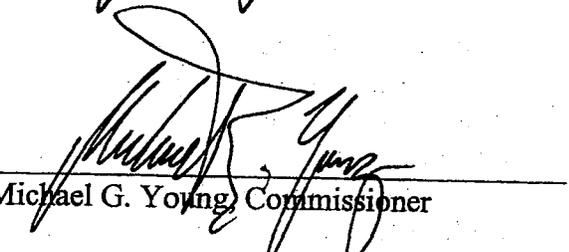
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the 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 Manalapan’s request, we are unable to determine from the record whether reopening this matter is warranted. In the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Manalapan’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. We direct Manalapan to provide a detailed explanation to the judge setting forth the reasons for its failure to timely contest the proposed penalty proposal. If it is determined that reopening 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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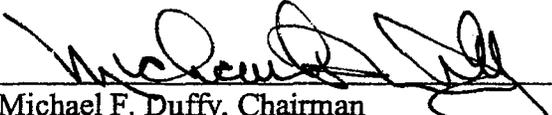
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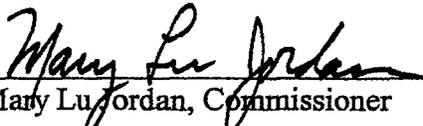
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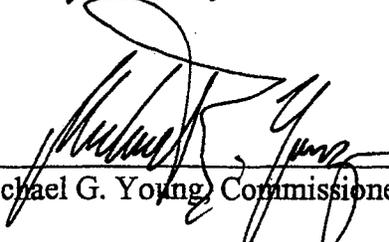
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We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating 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).

On the basis of the present record, we are unable to evaluate the merits of Consol’s position. It is unclear from the record whether the proposed civil penalties at issue became final orders because MSHA erred in processing Consol’s contest or because of some inadvertence on the part of Consol. In the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Consol failed to timely contest the penalty proposal and, if so, whether good cause exists for granting relief from the final order. See *Penn American Coal, L.P.*, 23 FMSHRC 1021 (Sept. 2001) (remanding to determine whether relief from final order was appropriate where operator alleged a processing error by MSHA). 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


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 19, 2007

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

Docket Nos. LAKE 2005-129
LAKE 2006-28

v.

THE AMERICAN COAL COMPANY

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY THE COMMISSION:

In these consolidated civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), Administrative Law Judge Jerold Feldman upheld two citations against The American Coal Company ("American"), for violations of the underground bituminous coal mine escapeway requirements of 30 C.F.R. § 75.380(a).¹ 29 FMSHRC 252 (Mar. 2007) (ALJ). American petitioned for review of the judge's decision, which the Commission granted.²

¹ Section 75.380(a) requires that underground coal mine operators designate and provide as escapeways at least two separate and distinct travelable passageways that meet the extensive requirements of section 75.380.

² American also moved for oral argument in this case. That motion is hereby denied.

I.

Factual and Procedural Background

In 2005, American was mining its Sixth and Seventh North longwall panels at its Galatia Mine in Saline County, IL. *Id.* 254; Tr. 22; Jt. Stip. 8 & 9. The panels of coal, approximately 6-1/2 feet high and 1,000 feet long, were cut by the longwall's shearer, which would cycle from the longwall headgate to the tailgate and back again. 29 FMSHRC at 255. Coal would fall on to the longwall pan line, also known as the face conveyor, which ran parallel to the face and moved the coal towards the headgate. *Id.*; Gov't Ex. 3.

Access to the panels was provided by three parallel entries at the headgate and three parallel entries at the tailgate of the longwall. 29 FMSHRC at 255. The headgate entries of the Sixth North longwall panel later became the tailgate entries for the Seventh North longwall panel. *Id.* at 254; Tr. 362. Each entry was approximately 18 feet wide and 7 feet high. 29 FMSHRC at 255; Tr. 383.

For each panel, the entry farthest from the longwall was headgate Entry No. 1, the intake air entry. Tr. 104, 107; Gov't Ex. 4. Pursuant to section 75.380, American had designated Entry No. 1 as the secondary of the two passageways to be used to exit the section in emergencies. 29 FMSHRC at 255; Tr. 104, 106; Gov't Ex. 4. The primary escapeway was the middle headgate entry, Entry No. 2. 29 FMSHRC at 255; Tr. 106-07; Gov't Ex. 4.

The closest entry to the longwall was headgate Entry No. 3, also called the belt entry. Tr. 107-08; Gov't Ex. 4. While Entry No. 3 was not a designated escapeway, it would nevertheless be used by workers leaving the face via the headgate to reach the other entries via crosscuts. Tr. 101-05, Gov't Ex. 4. On one side of Entry No. 3 was the coal intersected by those crosscuts (hereinafter "the rib side"), while on the other was the solid block of coal to be cut by the shearer on subsequent longwall cycles (hereinafter "the block side"). Gov't Exs. 3, 4.

Much of the width of the No. 3 entry heading immediately outby the face was occupied by essential longwall equipment, specifically and in order: (1) the end of the pan line that connected perpendicularly to the stage loader, and from which the coal from the face was deposited into the stage loader; (2) the stage loader, which would crush the coal and move it outby the entry, depositing it onto the conveyor belt; and (3) the conveyor belt to transport the coal to the surface. 29 FMSHRC at 255; Tr. 91-94; Gov't Ex. 4. The pan line was approximately 3 feet wide where it connected to the tailpiece of the stage loader, while the width of the stage loader varied according to its component parts. 29 FMSHRC at 255; Tr. 388, 423. At its widest point, the stage loader was 13 feet wide, including the motor connected to it on the rib side, which powered the pan line. 29 FMSHRC at 255; Tr. 109, 117-19, 388; Gov't Ex. 4. The stage loader reached a height of 4-1/2 feet, approximately 2-1/2 feet below the roof of the entry. 29 FMSHRC at 255-56.

The stage loader would normally remain stationary in the middle of the entry, and thus leave pathways on either side of it that narrowed to no less than 2-1/2 feet. *Id.*; Tr. 382; Gov't Ex. 5. Because the pan line where it connected to the stage loader obstructed access between the face and the block side of the stage loader, use of the pathway on the opposite side of the stage loader, the rib side, was necessary for unobstructed travel around the stage loader. 29 FMSHRC at 258; Gov't Exs. 4, 5.

A stage loader, however, does not always remain stationary and may migrate due to the alignment of the longwall shearer while it is cutting coal. 29 FMSHRC at 255; Tr. 136-37. Here, cutting coal deeper at the tailgate area of the Sixth and Seventh North longwall panels would gradually cause the stage loader to migrate, over the course of several shifts, from the center of the No. 3 entry, farther away from the block side and closer to the rib side of the entry. 29 FMSHRC at 255, 256.

The adverse effect such migration could have on miner travel through the No. 3 entry was noticed by MSHA on May 11, 2005, when Inspector Steven Miller issued Citation No. 7581075 to American. 29 FMSHRC at 256-57. The citation, charging a violation of section 75.380(a), alleged that the migration of the stage loader to near the rib prevented "[a] safe egress route . . . off or on" to the longwall face, as miners could only access or leave the face by climbing over the stage loader. Gov't Ex. 11. In order to terminate the citation, American had to make longwall adjustments. 29 FMSHRC at 257. Citation No. 7581075, which is not at issue in this case, was terminated seven days later.³ Gov't Ex. 11. American did not contest the citation. 29 FMSHRC at 257.

On June 7, 2005, MSHA Inspector Arthus Wooten witnessed a miner climb over the top of the stage loader in the vicinity of the pan line motor, while the motor was running, in order to access the Sixth North longwall face. *Id.* at 257; Tr. 121-22, 128. In that instance the stage loader had again migrated towards the rib, such that it was only 3 to 5 inches away from it. 29 FMSHRC at 257; Tr. 117, 148. Thus, the stage loader prevented any miner from traveling around it on that side of the entry. 29 FMSHRC at 257; Tr. 241-42.

Consequently, Inspector Wooten issued Citation No. 7581904 to American, again alleging a violation of section 75.380(a) because the stage loader migration had prevented "[a] safe egress/escape/travelway . . . on and off the 6th[] North long wall face as required." 29

³ To counteract stage loader migration from centerline to rib, the longwall shearer must be adjusted to cut deeper into the headgate area to cause the stage loader to migrate toward the solid block of coal until it has returned to the center of the entry. 29 FMSHRC at 256. Just as the initial migration of the stage loader will take place gradually over several shifts, so too does the redirection back to the center. *Id.*

FMSHRC at 257; Gov't Ex. 2. The citation was designated significant and substantial ("S&S"),⁴ due to the muddy conditions in the headgate area, which the inspector believed made it more likely that a miner would slip and fall while climbing over the stage loader. 29 FMSHRC at 257. In addition, at that time the tailgate was not considered a travelable alternative route to the designated escapeways because of unsupported roof in the tailgate area. *Id.*; Tr. 132.⁵

By September 8, 2005, the longwall had moved to the Seventh North section, where Inspector Miller witnessed a miner climbing over the stage loader, this time over its crushing mechanism. 29 FMSHRC at 258; Tr. 273-74. Again, the miner could not have gone around the stage loader on the rib side of the entry, because the stage loader had migrated towards the rib side, with the pan line motor being within 10 inches of the rib. 29 FMSHRC at 258; Tr. 279-80. Consequently, Inspector Miller issued a third citation to American for a violation of section 75.380(a), No. 7581788, alleging that "[a] safe egress route was not provide[d] off or on the 7th North Longwall Face as required." 29 FMSHRC at 258; Gov't Ex. 10, at 1. This citation was also designated as S&S because of muddy conditions in the headgate area. 29 FMSHRC at 258; Tr. 286-87; Gov't Ex. 10, at 1.

The Secretary proposed a penalty of \$375 for Citation No. 7581904 and a penalty of \$524 for Citation No. 7581788. 29 FMSHRC at 257, 258. American contested both penalties on the ground that it had not violated section 75.380(a). *Id.* at 258.

At trial, Paul Kraus, American's Manager of Health and Safety, explained that the coal seam at the longwall sections in the Galatia Mine not only rolls, but dips from the headgate to the tailgate. *Id.* at 256. Kraus explained that, consequently, the longwalls there are normally aligned by American to mine the headgate approximately 50 feet further ahead than the tailgate, so that the deeper cuts at the headgate keep the stage loader in the center of the entry. *Id.* At the time of the citations, however, there were adverse roof conditions in the tailgate area of the sections being mined. *Id.* Roof falls there required that American make deeper cuts in the tailgate area in order to create a clear tailgate entry as quickly as possible. *Id.* Kraus thus attributed the stage loader migration to American's having to make those deeper cuts. *Id.*

⁴ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." Because Inspector Miller did not observe any miner near the stage loader at the time of the first citation, he did not designate that violation as S&S. 29 FMSHRC at 256-57; Tr. 279.

⁵ If both passageways designated by an operator as escapeways run from the headgate, as was the case here, and conditions at a longwall face make it impossible for miners working there to exit via the headgate of the longwall, miners are supposed to use the tailgate as an alternative route to reach a designated escapeway pursuant to 30 C.F.R. § 75.384. 29 FMSHRC at 257; Tr. 213, 333, 367.

In his decision, the judge viewed this case as one in which he needed to decide the point at which, under the terms of section 75.380, the designated escapeway off the longwall section began. *Id.* at 254. The judge ruled that the escapeway started at the face in this instance. *Id.* at 260-62. He did so by applying what he understood to be the plain meaning of the standard's requirement that escapeways are to run "from each working section." *Id.* He concluded that the language meant that escapeways were required to run not only from the loading point of a working section, as American argued, but were to also include the remainder of the working section. *Id.* at 261. He further concluded that in both instances when the stage loader migrated to within less than one foot from the rib, miners were denied the "assurance of passage" section 75.380(d)(1) requires. *Id.* at 259.⁶ The judge held that American's receipt of an earlier citation provided it with notice that section 75.380(a) applied in the later instances, further found that both violations were S&S, and assessed the \$899 in total penalties requested by the Secretary for the two citations. *Id.* at 262-63.

II.

Disposition

American has limited its appeal to the findings of violation. As it did below, American argues that the area in which the stage loader sat was not within the scope of the escapeway requirement. According to American, under the plain meaning of section 75.380, an operator is only obligated to provide an escapeway "from each working section," and "working section" is defined in the Mine Act to start at the loading point of the section, so any point in by the loading point is not within the ambit of the escapeway requirement. Am. Br. at 2-6. Since the loading point was the belt tailpiece, and the stage loader was in by it, American argues that it was inappropriate to cite it for a violation of section 75.380 because the stage loader had migrated and blocked the rib side pathway. *Id.* at 6-7.

The Secretary responds that in order to give effect to the purpose of section 75.380, the standard must be interpreted to require that the route to entries necessary to access designated escapeways must not be blocked or impeded to such an extent that the escapeway is rendered inaccessible. S. Br. at 11-12. The Secretary relies on the regulatory requirement that the designated escapeways be "travelable" to support this interpretation. *Id.* at 14-15. She also maintains that, although the judge's approach to interpreting section 75.380 is slightly different than hers, both approaches are consistent with the language and purpose of section 75.380. *Id.* at 12-23.

⁶ The judge also noted American's failure to report the migration for correction in its pre-shift or on-shift reports. 29 FMSHRC at 263.

A. Interpretation of Section 75.380

The requirement that underground bituminous coal mines have designated escapeways was imposed by section 317(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), and was carried over without change to section 317(f) of the Mine Act, 30 U.S.C. § 877(f). With regard to the requirement, section 75.380 states in pertinent part:

(a) Except in situations addressed in §75.381, §75.385 and §75.386, at least two separate and distinct travelable passageways shall be designated as escapeways and shall meet the requirements of this section.

(b)(1) Escapeways shall be provided from each working section, and each area where mechanized mining equipment is being installed or removed, continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface.

(2) During equipment installation, these escapeways shall begin at the projected location for the section loading point. During equipment removal, they shall begin at the location of the last loading point.

30 C.F.R. § 75.380(a)-(b). The term "working section" is defined as "all areas of the coal mine from the loading point of the section to and including the working faces." 30 U.S.C. § 378(g)(3); 30 C.F.R. § 75.2. Here, the loading point was where the stage loader dumped the crushed coal onto the conveyor belt. Tr. 297, 301; Gov't Ex. 4.

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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of her regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). In determining whether a standard is plain or ambiguous, the "language of a regulation . . . is the starting point for its interpretation." *Dyer*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

The Secretary argues that the narrowing of the pathway around the stage loader from 2-1/2 feet to less than a foot violated section 75.380(a)'s requirement that the passageways designated under the regulation as escapeways be "travelable," based on the dictionary definition of that term as "capable of being traveled: PASSABLE." S. Br. at 15 (citing Webster's Third New Int'l Dictionary 2433 (2002)). According to the Secretary, under this definition an inaccessible escapeway cannot be considered "travelable."

Resort to the dictionary definition of "travelable" is appropriate here, because neither the Mine Act nor MSHA's regulations define the term. In the absence of a regulatory definition or technical usage of a word, we apply the ordinary meaning of the word. See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table).

However, we do not agree with the Secretary that the term "travelable" as it applies to an escapeway necessarily encompasses whether the escapeway is accessible. Whether a route is "passable" or "travelable" generally refers to the internal qualities of the route itself, from end to end, and not whether someone can get to the route from outside it. For instance, during snowy conditions, main roads are often described as "passable," with the qualifier that it is difficult to get to the road because of the condition of connecting secondary roads. The inaccessibility of a main road due to snow on the connecting road is thus not considered to render the main road "impassable." The concept of accessibility as applied to a route is a different concept from passability or travelability.⁷

Furthermore, the extensive regulatory history to section 75.380 does not support the Secretary's specific interpretation. See, e.g., 57 Fed. Reg. 20868, 20904-06 (1992); 61 Fed. Reg. 9764, 9810-20 (1996). At no point did MSHA indicate that, in using the term "travelable," it meant to extend the meaning of the term beyond its normal usage to include the concept of accessibility. Consequently, we cannot agree that the Secretary's interpretation of section 75.380(a) is supported by the plain meaning of the term "travelable."

While we would normally next examine whether the Secretary's proffered interpretation of section 75.380(a) should nevertheless be upheld as reasonable, in this instance we need not because other language in the standard plainly addresses the issue raised by the citations. Section 75.380(a) provides that the two designated escapeways "shall meet the requirements of this section," and one of those requirements is that "[e]scapeways shall be provided from each working section." 30 C.F.R. § 75.380(b)(1) (emphasis added). To "provide" is not an

⁷ Moreover, while the requirement that escapeways be "travelable" appears in both the Coal Act and the Mine Act, there is nothing in the legislative history to resolve the issue presented by this case. See S. Rep. No. 91-411, at 83 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 209 (1975) ("Legis. Hist.").

ambiguous term as it is employed in this instance, as it is defined to mean “to supply for use.” Webster’s Third New Int’l Dictionary 1827 (1993).

An operator thus violates section 75.380(b)(1)’s requirement to “provide” escapeways from a working section when its miners are substantially hindered or impeded from accessing designated escapeways, as in such an instance the escapeways are not being supplied for the use of the miners. There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is “to allow persons to escape quickly to the surface in the event of an emergency.” S. Rep. No. 91-411, at 83, *Legis. Hist.*, at 209 (1975). While escapeways themselves may be, from end to end, in total compliance with the requirements of section 75.380 as to the conditions of the escapeways, the inability of miners on a working section to quickly reach the escapeways constitutes a violation of the standard’s basic requirement that the escapeways be “provided” to miners on the working section.

Such an interpretation of section 75.380(a) & (b) is also consistent with the remainder of the standard. Section 75.380 contains extensive requirements as to the location and physical attributes of escapeways so that miners, including those disabled in a mine accident and needing assistance, can quickly and safely get from the start of the escapeway to the surface. Moreover, section 75.380 obligates operators to continually maintain the condition of escapeways so that such passage is not hindered. *See generally Maple Creek Mining, Inc.*, 27 FMSHRC 555, 559-61 (Aug. 2005). Interpreting section 75.380(a) to require that escapeways be accessible is consistent with the standard as a whole.

To hold otherwise, and to conclude that an escapeway that is not readily accessible nevertheless still qualifies as an escapeway “provided” under section 75.380, would be contrary to Commission precedent. In numerous cases, we have taken the purpose of a standard into account in determining how it should be interpreted and whether it was in fact being met. *See RAG Cumberland Res., LP*, 26 FMSHRC 639, 647-48 (Aug. 2004), *aff’d sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished) (rejecting literal interpretation of coal mine ventilation standard that would not accomplish the standard’s purpose in favor of interpretation that took that purpose into account); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998-99 (June 1997) (reversing ALJ’s determination that standard requiring that conveyor be equipped with slippage and sequence switches was satisfied even though switches were inoperable); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (rejecting, *sub silentio*, operator’s claim that 30 C.F.R. § 56.14101(a)(1) did not require brakes, once installed, to be maintained in functional condition); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991) (construing 30 C.F.R. § 77.507 to require that switches be installed with functioning lockout devices). Because American was required by section 75.380 to “provide” two escapeways to miners from the working section, finding that it complied with the standard when escapeways that otherwise met the standard could not be readily or safely accessed by miners needing to use them in an emergency would exalt form over substance.

While American contends that the Secretary is arguing that the pathway around the rib side of the stage loader was part of the escapeway subject to the requirements of section 75.380, that is plainly not the case. The Secretary has consistently maintained throughout this proceeding that the citations were issued because the migrating stage loader greatly hindered *access* to the escapeways American had designated pursuant to section 75.380, not that the stage loader was located in an escapeway. In each of the citations at issue, it is alleged that American failed to “provide” safe egress from the face. Gov’t Exs. 2, 10.⁸ The Secretary did not deviate from that position in the proceeding below. Tr. 167, 226, 288, 292; S. Post-Hearing Br. at 19-23.

Consequently, the judge erred in reaching the issue. Given the express requirement of section 75.380 that escapeways be “provided,” it was not necessary for him to address the extent to which, if at all, the escapeway requirements applied in by the loading point of the section.⁹

⁸ Citation No. 7581904 charged a violation of section 75.380(a) because:

A safe egress/escape/travelway was not provided on and off the 6th[] North long wall face as required. The longwall equipment was allowed to migrate to the head gate end rib preventing safe travel on and off the face area where miners are required to travel. The only access to the face is to climb over parts to the stage loader and a miner was observed traveling over top of the head gate conveyor motor top plate while the machine was running coal.

Gov’t Ex. 2, at 1. Citation No. 7581788 charged a violation of section 75.380(a) because:

A safe egress route was not provide[d] off or on the 7th North Longwall Face as required. The stage loader has been allowed to migrate to the headgate rib preventing safe travel in this area. The only access to the longwall face or off the longwall face is to climb over the stage loader or the belt conveyor.

Gov’t Ex. 10, at 1.

⁹ Chairman Duffy and Commissioner Young note that the Commission addressed the factors that go into determining the geographical and temporal scope of a “working section” as that term is used in the escapeway requirements when it decided a case involving the predecessor to section 75.380. *See Bethenergy Mines, Inc.*, 11 FMSHRC 1445, 1453-54 (Aug. 1989) (affirming as consistent with the four identified factors the judge’s decision vacating three citations alleging violations of 30 C.F.R. § 75.1704 (1986)). They also recognize that MSHA in section 75.380 has since adopted extensive standards regarding the characteristics and conditions of escapeways, and it is clear from the terms of the standard that it was not written to include the narrow confines of the face area of a working section, particularly in a longwall section. For instance, under section 75.380, escapeways are normally expected to be at least 6 feet wide, and

B. Substantial Evidence

The judge did not explicitly address whether the evidence regarding the extent to which miners would have been impeded or hindered from reaching a designated escapeway during the periods when the rib side pathway was blocked because of stage loader migration established that the miners at the face were not being “provided” the two escapeways required by section 75.380. Remand for him to do so is not necessary, however, because, based on the record in this case, the only conclusion that can be reached is the miners were not being “provided” an escapeway under section 75.380. *See American Mine Svcs.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993) (remand unnecessary where record supports only one conclusion).

American argues that there were two acceptable alternatives to using the rib side pathway when it was blocked: miners could either climb over the stage loader, or take the block side pathway, which would have been wider than normal after the stage loader had migrated over to near the rib. Am. Br. at 13; Am. Reply Br. at 2. As for the feasibility of climbing over the stage loader, American points out that the inspectors witnessed miners doing it successfully. Am. Br. at 13. As we held in *Maple Creek*, however, the test with respect to the use of an escape route is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners’ ability to expeditiously escape a dangerous underground environment in an emergency. 27 FMSHRC at 560 (citing 61 Fed. Reg. at 9810). That same reasoning applies in determining whether a designated escapeway has been “provided” within the meaning of section 75.380.

The evidence shows that even the miners climbing over the four and one-half foot high stage loader going to and from the face as part of their normal duties had a difficult time doing so. Inspector Wooten testified that the miner he saw was “having trouble” pulling himself up the stage loader. Tr. 141. Once atop it, the miner had to crawl and “scoot” across it, in the 2-1/2 foot clearance between the stage loader and the roof. Tr. 148-49. That he did so with mud up to the tops of his boots because of ground conditions at the face increased the difficulty of his

never so narrow that four people carrying a stretcher would be unable to pass through that part of the escapeway. 30 C.F.R. § 75.380(d)(4). Yet the face area is where many miners will be working when the need to evacuate the mine arises, and mining operations there may interpose obstacles to the start of an evacuation. Consequently, Chairman Duffy and Commissioner Young believe the mining community may be well served by an MSHA rulemaking in which more detailed standards regarding access to escapeways are developed and adopted.

Commissioner Jordan notes that her colleagues fault the judge for reaching the issue of how far the escapeway extended. They agree that, given the clear mandate of section 75.380 that escapeways be provided, it was not necessary for him to rule on whether all escapeway requirements applied in by the loading point. She does not believe that such a determination is necessary to resolve this case. Moreover, nowhere in the language of section 75.380 does she read such an explicit finding.

climbing and crawling. Tr. 122, 138. Inspector Miller's testimony regarding the problems he observed when a miner passed over the stage loader was not as detailed. However, Miller testified that, while it was "humanly" possible for miners to make it over the stage loader, he did not consider it a safe practice. Tr. 325-26. He also confirmed the wet and muddy conditions, which likely made climbing and crawling over the stage loader even more dangerous. Tr. 286-87.

If individual miners were having difficulty going over the stage loader, it is reasonable to infer that it would be unsafe to expect miners to do so as a group, which is what would occur in the event of an emergency requiring access to one of the designated escapeways. *See Maple Creek*, 27 FMSHRC at 560. As many as 11 miners would have been exiting the face in the muddy conditions, and each would have to climb up the slippery stage loader and crawl over its top, in the limited space between it and the roof, and down again, to reach an escapeway. Tr. 137-39, 140-41, 150. Inspector Miller concluded that, in such an event, the miners would have "had very little chance to get out of there without a whole lot of effort" because of the stage loader migration. Tr. 286. In light of the foregoing, the only conclusion that can reasonably be reached is that if the sole access to the designated escapeways involved climbing up and crawling over a stage loader under the conditions that were present at the time of the two citations, the escapeways were not being "provided" as required by section 75.380.

The evidence regarding the other alternative route that American alleges existed — use of the block side pathway around the stage loader — similarly indicated that ready access to the escapeway was not being provided. It was established at the hearing that, in order for miners to exit the face using the block side pathway, component parts of the longwall would need to be de-energized, in order to stop the pan line and the conveyor belt tailpiece. Miners would then have to cross over the pan line, walk through the block side pathway, and get past the belt to access one of the designated escapeways through one or more crosscuts. 29 FMSHRC at 258; Tr. 419-20.

While American's Health and Safety Manager, Paul Kraus, testified that miners taking such a route would simply be "stepping" across the pan line and belt (Tr. 420), the judge found that significantly greater effort on the part of miners would have been necessary to do so. 20 FMSHRC at 259. Our review of the record indicates that the judge's conclusion is supported by substantial evidence,¹⁰ particularly given the dimensions of the pan line and conveyor belt.

¹⁰ 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)).

The judge accurately described the pan line as 3 feet deep, and ranging in width from 3 to 5 feet. *Id.*; Tr. 421-22. The judge also properly took into account that the belt tailpiece that the miners would have to cross was not only 3 feet wide but also at least 3 feet high. 29 FMSHRC at 259; Tr. 424. Thus, as summarized by Inspector Miller, to use the block side pathway, miners would have to climb over into the pan line, climb out of it, walk alongside the stage loader, and then climb over the belt line. Tr. 290-91. In the opinion of Inspector Wooten, such an alternative would be too time-consuming during an emergency evacuation. Tr. 229-30.

The judge rejected the block side pathway as an alternative route because the significant effort miners would need to expend in using it in an emergency situation was not consistent with the purpose or spirit of section 75.380. 29 FMSHRC at 259. The judge's findings as to the difficulty miners would have in using the block side pathway support the conclusion that requiring use of the block side pathway to access the designated escapeways is not consistent with the requirement that miners exiting the face be "provided" escapeways. Consequently, we affirm in result the judge's findings of violation with respect to both citations.

Finally, in interpreting and applying section 75.380 here, we cannot ignore that the applicable statute and its legislative history emphasize the need for miners on a working section to exit a mine expeditiously in emergency situations. Furthermore, Congress recently passed and the President signed into law the Mine Improvement and New Emergency Response Act of 2006, Pub. L. 109-236, 120 Stat. 493 ("MINER Act"), which amended the Mine Act in several respects. Among other things, the Mine Act now contains provisions which require mine operators to submit for MSHA's approval emergency response plans, and those plans must, among other things, "provide for the evacuation of all individuals endangered by an emergency." 30 U.S.C. § 876(b)(2)(B)(i). Ready access to escapeways for all miners is a key component of an effective evacuation of a mine.¹¹ Plainly, that access was not being provided by American at the times it was cited for violating section 75.380.

C. Notice

Separate from the issue of regulatory interpretation is whether the regulated party has received fair notice of the Secretary's interpretation of the regulation. Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). The notice requirement is satisfied when a party receives actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard against the

¹¹ As Inspector Miller testified, "[i]f you can't get to an escapeway, you don't have an escapeway." Tr. 292.

party. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996); *see also General Elec.*, 53 F.3d at 1329 (reasoning that agency's pre-enforcement warnings to bring about compliance with its interpretation may provide adequate notice to regulated party).

In order to avoid due process problems stemming from an operator's asserted lack of notice, the Commission has adopted an objective measure (the "reasonably prudent person" test) to determine if a condition is violative of a broadly worded standard. That test provides:

[T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (Dec. 1982); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), "in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement," but whether a reasonably prudent person, familiar with the protective purposes of the standard, would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The reasonably prudent person is based on an "objective standard." *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

American maintains that it did not have adequate notice that the Secretary was interpreting section 75.380 so that the designated escapeways included the working sections of the Galatia Mine longwall sections. Am. Br. at 15-18. However, as discussed above, *supra*, at 7, 9, the citations MSHA issued were not based on the notion that the escapeways began at the face. Instead, the Secretary interpreted the standard to require that miners have safe, ready access to designated escapeways. The fact that the Secretary based her interpretation on the word "travelable" rather than the language stating that "escapeways shall be provided" — the language that we have concluded is dispositive — has no bearing on whether American had adequate notice of what it was required to do.

As for the Secretary's actual interpretation requiring safe access to designated escapeways, Inspector Miller's May 11, 2005, citation provided American actual notice that stage loader migration that prevented miners from using the rib side pathway around the stage loader constituted a violation of section 75.380. The citation specifically stated that such migration meant that "[a] safe egress route was not [being] provide[d] off or on the" longwall face. Gov't Ex. 11. Furthermore the citation mentioned that the miners' only alternative was to climb over the stage loader, thus indicating MSHA's belief that this was not an acceptable method of travel to reach the escapeway. *Id.* In addition, shortly after issuing the May citation, the inspector met

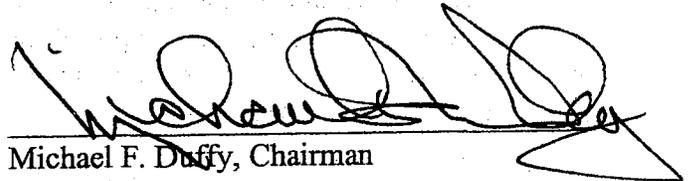
with the operator's management and hourly employees and expressed MSHA's concern about the hazards associated with stage loader migration. 29 FMSHRC at 257.

Moreover, even without the earlier citation, a reasonably prudent person would have recognized that the failure to provide miners ready access to an escapeway constituted a violation of section 75.380. The obvious purpose of requiring that escapeways always be available is to permit miners to quickly exit the mine. An operator such as American should have known that a time-consuming route to access an escapeway runs counter to this purpose and thus the standard itself. Consequently, for all of the reasons above, we conclude that American had adequate notice that the conditions cited constituted violations of section 75.380.

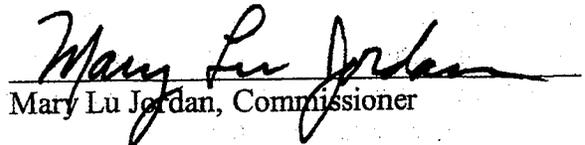
III.

Conclusion

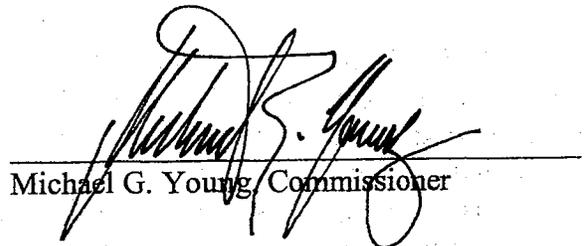
For the foregoing reasons, we affirm in result the judge's decision that American violated section 75.380(a).



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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December 21, 2007

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. PENN 2007-251-E
ADMINISTRATION (MSHA) :

v. :

EMERALD COAL RESOURCES, LP :

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. PENN 2007-252-E
ADMINISTRATION (MSHA) :

v. :

CUMBERLAND COAL RESOURCES, LP :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Jordan and Young, Commissioners

These consolidated cases are before the Commission on referrals of emergency response plan disputes by the Secretary of Labor pursuant to Commission Rule 24(a), 29 C.F.R § 2700.24(a), and section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), as amended by the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”), 30 U.S.C. § 876(b)(2)(G), 120 Stat. 493, 495-96. This proceeding involves citations issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Emerald Coal Resources, LP (“Emerald”) and Cumberland Coal Resources, LP (“Cumberland”) (collectively referred to as the “Operators”).¹ Administrative Law Judge

¹ Emerald and Cumberland are affiliated companies of Foundation Coal Group. 29 FMSHRC at 544 n.3. Each operator submitted its own emergency response plan to MSHA, but

Michael Zielinski affirmed the citations at issue and directed the Operators to submit purchase orders for refuge chambers with their emergency response plans within 10 days of his decision. 29 FMSHRC 542, 556 (June 2007) (ALJ). The Operators filed a petition for discretionary review that the Commission granted. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

A. The Statutory and Regulatory Backdrop

Section 2 of the MINER Act, which became effective on June 15, 2006, amends section 316 of the Mine Act, 30 U.S.C. § 876, to require underground coal mine operators to develop and submit for MSHA approval² and periodic review an emergency response and preparedness plan ("Emergency Response Plan" or "ERP"). 29 FMSHRC at 543; *see* 30 U.S.C. § 876(b)(2)(A). The basic goals of an ERP are twofold: to evacuate miners who are endangered by a mine emergency; and to maintain miners who are trapped underground and are not able to evacuate. 30 U.S.C. § 876(b)(2)(B)(i) and (ii). The MINER Act specifies that operators develop ERPs and submit them for approval by the Secretary within 60 days after the date of the statute's enactment

their efforts to comply with the MINER Act and their interactions with MSHA "have been substantially identical." *Id.*

² Section 316(b)(2)(C) provides:

- (C) PLAN APPROVAL. – The accident response plan . . . shall be subject to review and approval by the Secretary. In determining whether to approve a particular plan the Secretary shall take into consideration all comments submitted by miners or their representatives. Approved plans shall —
- (i) afford miners a level of safety protection at least consistent with the existing standards, including standards mandated by law and regulation;
 - (ii) reflect the most recent credible scientific research;
 - (iii) be technologically feasible, make use of current commercially available technology, and account for the specific physical characteristics of the mine; and
 - (iv) reflect the improvements in mine safety gained from experience under this Act and other worker safety and health laws.

30 U.S.C. § 876(b)(2)(C).

(June 15, 2006). *Id.* § 876(b)(2)(A), (C). Thus, mine operators were required to submit ERPs to MSHA by August 14, 2006.

In an effort to enhance the chances of survivability of miners who are trapped underground following a mine accident, the MINER Act specifies that all ERPs must contain, *inter alia*, provisions addressing post-accident communications, tracking of miners, lifelines, and breathable air. *Id.* § 876(b)(2)(E)(i) – (vi). With regard to post-accident breathable air, the MINER Act specifies:

- (iii) POST-ACCIDENT BREATHABLE AIR. – The plan shall provide for –
 - (I) emergency supplies of breathable air for individuals trapped underground sufficient to *maintain such individuals for a sustained period of time. . . .*

Id. § 876(b)(2)(E)(iii) (emphasis added).

As required by the MINER Act, on August 14, 2006, the Operators submitted initial ERPs for MSHA approval. 29 FMSHRC at 544-45. The Operators addressed the breathable air requirement by proposing to provide caches of self-contained self-rescuers (SCSRs) sufficient to allow for five or six hours of air for each miner. *Id.* at 546.

On August 30, 2006, MSHA published a “Request for Information” in the Federal Register in which MSHA sought information from the mining community on the topic of post-accident breathable air that would be sufficient to maintain miners for a sustained period. *Id.* at 546; Gov’t Ex. 2. Thereafter, on February 8, 2007, the Secretary issued a policy directive specifying her interpretation of the quantity of air necessary to maintain trapped miners for “a sustained period of time,” until a mine rescue team could reach them. Program Information Bulletin, No. P07-03, at 1-2 (Feb. 8, 2007) (hereafter “PIB”) (Gov’t Ex. 5). The PIB directed mine operators to include in their ERPs a provision specifying how breathable air will be maintained. *Id.* at 2. In addition, the PIB specified several “options that may satisfy the breathable air requirement,” including that “each miner should be provided a 96-hour supply of breathable air located within 2,000 feet of the working section.” *Id.* The PIB concluded by stating that operators “must submit” the portion of their ERPs relating to breathable air within 30 days. *Id.* at 3.

Prior to the deadline for the submission of ERPs established in the PIB, the West Virginia Office of Miners’ Health, Safety & Training had issued a list of “approved shelters” that would provide 96 hours of breathable air. 29 FMSHRC at 547; Resp’t Ex. 109. MSHA adopted a policy of accepting operators’ use of these state approved shelters or chambers. 29 FMSHRC at 547.

B. Events Leading to the Citations

On March 12, 2007, the Operators submitted revised ERPs to MSHA for its approval as specified in the February 8 PIB. Their ERPs stated that refuge chambers or rescue shelters, rather than SCSRs, would be used to provide breathable air to trapped miners. 29 FMSHRC at 547. Officials of Foundation Coal, the parent company of Emerald and Cumberland, believed that prefabricated refuge chambers could be more effectively used by miners in an emergency situation than barricades that would have to be constructed by the miners during an emergency. *Id.* On March 28, Cumberland submitted a further revised ERP that specified that refuge chambers that could provide up to 96 hours of breathable air would be maintained within 2,000 feet of each working section. *Id.* at 547, Gov't Ex. 9 par. 3.a. Emerald submitted a substantially similar revised plan on April 2. 29 FMSHRC at 547; Gov't Ex. 22 III.1.

Both Cumberland's and Emerald's revised ERPs provided that the refuge chambers would be ordered within 60 days of MSHA's approval of the plans. 29 FMSHRC at 547. At the time of the submission of the revised ERPs, the manufacturing companies that had successfully tested models of refuge chambers had none in production. *Id.* In contrast, all the materials necessary to provide a sustained supply of breathable air in barricade-type shelters were readily available with the exception of carbon dioxide scrubbing materials that had some delivery problems. *Id.* at 553.

MSHA responded to the Operators' submissions by indicating its approval of the use of refuge chambers to protect miners from a hazardous environment and to provide breathable air. *Id.* at 547-48. However, MSHA indicated that it would not approve the ERPs without a purchase order for the refuge chambers. *Id.* at 548. Thereafter, Foundation Coal solicited bids on an expedited basis from three companies that could provide the chambers. *Id.*

On April 18,³ the Operators submitted revised ERPs in which they stated that they were ordering refuge chambers and specified a model number. *Id.* Cumberland also submitted with its ERP a memorandum explaining that it was still working out terms of its order with the manufacturer and that a purchase order would be written as soon as an agreement could be reached. *Id.* MSHA believed that a purchase order would be supplied within a few days. However, by May 3 Cumberland had not supplied a purchase order, and MSHA requested Cumberland to supply one, along with a scheduled delivery date, within five working days. *Id.*; Gov't Ex. 16.

Beginning in mid-April, while the Operators were submitting their ERPs for approval, concerns arose regarding use of the carbon dioxide scrubbing systems in refuge chambers. 29 FMSHRC at 548. Carbon dioxide scrubbing systems can be either active (where air is fan driven

³ The judge inadvertently referred to the date of submission as April 28 (29 FMSHRC at 548); however, the ERPs are clearly dated April 18, as is the cover memorandum from Cumberland. See Gov't Exs. 10, 15, and 23.

across chemicals) or passive (where chemicals are laid out and exposed to air), but both use a chemical compound, either soda lime or lithium hydroxide, to absorb carbon dioxide from the air. *Id.* The chemical compounds are caustic, and MSHA became concerned that handling the chemicals in a closed environment might pose an unacceptable risk to miners. *Id.* By April 25, MSHA advised its district managers not to approve any post-accident breathable air provisions in ERPs that used bulk soda lime for carbon dioxide scrubbing. *Id.*; Resp't Ex. 47. Within seven to ten days, manufacturers promptly responded to MSHA's concerns by encapsulating the soda lime, thereby eliminating the bulk handling problem.⁴ 29 FMSHRC at 548-49; Gov't Ex. 37

The Operators also became concerned about the temperature in the refuge chambers. 29 FMSHRC at 549. MSHA had determined that the temperature in shelters should not exceed 95 degrees. *Id.* Lithium hydroxide gives off heat, and the Operators believed that such heat generation might lead to excessive temperatures in the chambers. *Id.* However, testing did not substantiate this concern. *Id.* Heat was not an issue in a larger barricaded area. *Id.* at 554.

In light of the issues that arose with regard to the carbon dioxide scrubbing systems, the Operators reevaluated their plans to purchase refuge chambers from a manufacturer that used bulk soda lime. *Id.* at 549. On April 19, the State of West Virginia requested that the National Institute of Occupational Safety and Health ("NIOSH") conduct tests on shelters that the state had approved.⁵ *Id.*; Resp't Ex. 126. Foundation Coal decided to conduct its own testing of the carbon dioxide scrubbing systems. 29 FMSHRC at 549 & n.8.

On May 9, Cumberland submitted a revised ERP in which it stated that it was testing and evaluating rescue chambers from three manufacturers, and that once testing of the carbon dioxide scrubbing systems had been completed it would complete a purchase order to procure the chambers. *Id.* at 549; Gov't Ex. 11 3.a. MSHA viewed the ERP as a retreat from Cumberland's earlier plan in which it committed to purchase specified refuge chambers. 29 FMSHRC at 549. Other mine operators in MSHA District 2 where the Operators were located had submitted purchase orders with their ERPs, if the plans provided for refuge chambers. MSHA believed that the Operators should as well. *Id.*

By letter dated May 14, MSHA advised Cumberland that its ERP would not be approved and that it had to be revised "to explicitly provide that you will purchase and install designated rescue chambers." *Id.*; Gov't Ex. 17. MSHA rejected Cumberland's intent to test the carbon dioxide scrubbing systems, stating: "MSHA has reviewed these issues and has determined that

⁴ It is not apparent from the record when the Operators became aware of this. 29 FMSHRC at 549. *See* Tr. 317.

⁵ Section 13 of the MINER Act also requires NIOSH to conduct research and testing into refuge chambers and submit a report to the Secretary by December 2007. 120 Stat. at 504. Within six months thereafter, the Secretary must determine what action, if any, to take in light of the report. *Id.*

scrubbing systems that efficiently remove carbon dioxide . . . are currently commercially available.” *Id.* The letter concluded by asking Cumberland to submit a revised ERP by May 18. *Id.* On May 16, MSHA made a similar request to Emerald. 29 FMSHRC at 549.

On May 18, the Operators submitted revised ERPs in which they stated that they were evaluating shelters and that they would submit purchase orders within 60 days of MSHA’s approval of the plans. *Id.* at 550. In the cover letters that accompanied the ERPs, the Operators requested information on carbon dioxide scrubbing systems and objected to the requirement for submission of purchase orders. *Id.*; Gov’t Exs. 14, 29. The Operators also noted that NIOSH testing of refuge chambers was not scheduled to be completed until December 2007 and that the Secretary would subsequently issue a report on proposed regulatory changes.⁶ Gov’t Exs. 14, 29. The Operators concluded that MSHA was “pushing the envelope by requiring purchase orders for rescue chambers from operators.” *Id.*

On May 22, MSHA advised Cumberland that an impasse may have been reached on the post-accident breathable air requirement in its ERP. 29 FMSHRC at 550. On the same day, Cumberland submitted a revised ERP that contained the provision for obtaining a purchase order for refuge chambers 60 days after plan approval. *Id.* Emerald had similar communications with MSHA that culminated with Emerald submitting, on May 24, a revised ERP with a similar provision for obtaining a purchase order for refuge chambers 60 days after plan approval. *Id.*

On May 23 and 25, MSHA notified Cumberland and Emerald, respectively, that the post-accident breathable air provisions in their revised ERPs were approved with the exception of the section providing for obtaining purchase orders for refuge chambers 60 days after approval of the plans. *Id.* Instead, MSHA requested that the period for obtaining purchase orders be shortened to two days. *Id.* Neither Cumberland nor Emerald would agree to this proposal. *Id.*

On May 25, 2007, MSHA issued citations to the Operators arising from their failures to submit approved ERPs that timely provided for supplies of post-accident breathable air. *Id.* at 543, 545 & n.4. On May 30, the Secretary filed referrals with the Commission, pursuant to Commission Procedural Rule 24,⁷ in which she asked the judge to affirm her refusal to approve

⁶ Foundation Coal ceased efforts to test the carbon dioxide scrubbing systems when it encountered delivery problems for materials used in the system. 29 FMSHRC at 549 & n.8.

⁷ The MINER Act provides for referral to the Commission of disputes arising over ERPs, and Rule 24 implements the referral process by providing for the expeditious resolution of disputes that come before the Commission. Briefly, if there is a dispute between an operator and the Secretary over a plan provision, the Secretary must issue a citation. 30 U.S.C. § 876(b)(2)(G)(ii). Thereafter, Rule 24 provides for the filing of a referral of the citation with the Commission within two days. 29 C.F.R. § 2700.24(a). The rule further provides for the submission of materials relevant to the dispute, or a hearing, within 15 days of the referral. *Id.* § 2700.24(e). Within 15 days of the judge’s receipt of materials or hearing testimony, he or she

the breathable air provision within the 60-day period for providing purchase orders and to order the Operators to provide for a 10-day period within which to obtain and provide purchase orders. S.'s Ref. of Emerald Dispute at 4-5; S.'s Ref. of Cumberland Dispute at 4-5. The Operators filed a motion to consolidate the two referrals and a request for a hearing, which were both granted. Order of Consolidation, Notice of Hearing, June 4, 2007. On June 12, a hearing was held in Pittsburgh, Pennsylvania. 29 FMSHRC at 543.

On June 27, the judge issued his decision in which he affirmed the citations. In affirming the citations, the judge ruled that the Secretary had carried her burden of showing that the refusals to approve the disputed ERP provisions were not arbitrary and capricious.⁸ *Id.* at 543, 555-56. The judge also rejected consideration of the Operators' constitutional challenge to the MINER Act, which was based on lack of notice of the statute's requirements, and their challenge to MSHA's issuance of the PIB, which the Operators argued involved improper rulemaking. *Id.* at 551. The judge held that the Operators had actual notice of MSHA's requirement for purchase orders. *Id.* at 551 n.11.

In his opinion, the judge noted that the Secretary bore the burden of proving that MSHA's refusals to approve the ERPs and its requirement that the citations be abated by providing purchase orders within 10 days were not arbitrary and capricious. *Id.* at 551. The judge reviewed the history of the MINER Act and noted that a main purpose of the legislation is to increase the amount of post-accident breathable air available to trapped miners. *Id.* at 552-53. The judge noted that mine operators essentially had to choose to provide breathable air in either barricaded areas or refuge chambers and that the Operators chose to use chambers, which were a newer development with no production models then available. *Id.* at 553. The judge further noted that, in light of the delivery delays with the refuge chambers, the MSHA District Manager decided to make purchase orders for the chambers a part of ERPs to ensure that plans were fully implemented.⁹ *Id.* Other operators in the district where the Operators were located had complied with the request. *Id.* at 553-54. The judge further found that questions concerning the carbon dioxide scrubbing systems that would be used in either barricades or refuge chambers had been

must issue a decision. *Id.* § 2700.24(f)(1). Thereafter, if the judge rules in the Secretary's favor, the disputed provision must be included in the ERP unless the judge or the Commission grants a stay. *Id.* § 2700.24(f)(2). Following issuance of the judge's decision, a party may seek review of the judge's decision by filing a petition for discretionary review. *Id.* § 2700.24(g).

⁸ The judge did not address special findings sought by the Secretary in the event that penalties were imposed in separate proceedings resulting from the citations issued. 29 FMSHRC at 550. In rejecting the Secretary's request to impose penalties, the judge stated that the MINER Act limited the hearing to expeditiously addressing disputes over the contents of the ERPs. *Id.*

⁹ The judge noted that MSHA had followed a similar procedure in requiring purchase orders when manufacturers were overwhelmed with orders for self-contained self-rescuers with ensuing delivery problems. *Id.*

resolved. *Id.* at 554. The judge noted that, in light of the delay since the March 12 submission of the ERPs and the fact that 14 other operators within MSHA District 2 had submitted purchase orders with their plans, the District Manager's insistence on the submission of ERPs with purchase orders was reasonable and not arbitrary or capricious. *Id.* at 555-56.

The judge affirmed the citations and ordered that the Operators include purchase orders for refuge chambers in their ERPs by July 9, 2007, the next business day following 10 days from the date of the decision. *Id.* at 556. Finally, the judge stated that he would not grant a stay of the order in light of the time that had passed since the last submission of the ERPs but that the 10-day period to submit ERPs with purchase orders would provide the Operators ample time to seek a stay from the Commission. *Id.* & n.16.

II.

Disposition

Before the Commission, the Operators argue that the judge erred when he applied an "arbitrary or capricious" standard of review in upholding the Secretary's insistence that the Operators submit a purchase order for refuge chambers in order to obtain approval of their ERPs, rather than within 60 days of plan approval. O. Br. at 12; O. Reply Br. at 8-9. The Operators contend that other MSHA districts do not require a similar provision in ERPs submitted to those offices, that MSHA is acting arbitrarily in requiring such a submission, and that the requirement is inconsistent with the MINER Act. O. Br. at 13-15. The Operators further argue that technological changes in the carbon dioxide scrubbing systems used in refuge chambers resulted in the Operators' reevaluating plans to buy the chambers that they had initially ordered and that they wanted more time to wait for the completion of testing. *Id.* at 15-20. The Operators challenge the judge's finding that carbon dioxide scrubbing systems are effective on grounds that there is no substantial evidence to support it and also challenge his holding that it was not reasonable for the Operators to wait until testing was completed. *Id.* at 20-21. The Operators finally contend that the MINER Act provision addressing the requirement of breathable air is unconstitutionally vague because it fails to give operators fair notice of what is required in ERPs. *Id.* at 21-28. In further support of this position, the Operators argue that the Secretary should have engaged in rulemaking because the MINER Act failed to define fundamental terms necessary to its implementation.¹⁰ O. Reply Br. at 2-7.

¹⁰ The Operators do not directly challenge the requirement of the PIB that ERPs provide for four days of breathable air, but rather they challenge the Secretary's insistence on the Operators' submission of purchase orders with their ERPs without engaging in rulemaking. See PDR at 8; O. Br. at 14-17; O. Reply Br. at 4-7; see also 29 FMSHRC at 551 n.12 ("[T]he disputed plan provisions do not implicate the PIB."). Moreover, in this proceeding, the Operators do not seek review of whether the PIB constituted improper rulemaking. PDR at 7 n.4.

In response, the Secretary argues that the breathable air provision of the MINER Act is not unconstitutionally vague. S. Br. at 14. The Secretary points to MSHA's efforts to provide guidance in complying with the statutory requirement and notes that the Operators engaged in extensive negotiations over the submission of their ERPs and thereby received actual notice of what was required. *Id.* at 15-18. The Secretary argues that MSHA was not required to engage in notice-and-comment rulemaking to implement the breathable air requirements of the MINER Act because nothing in the statute mandates it and the time frames for submission of ERPs did not permit it. *Id.* at 18-19. The Secretary contends that the judge's approval of the District Manager's refusal to approve the Operators' ERPs without purchase orders was not unreasonable. *Id.* at 19-20. In support, the Secretary argues that MSHA's actions involve agency discretion that should be reviewed under an arbitrary and capricious standard. *Id.* at 20-29. The Secretary also contends that the Operators cannot raise an equal protection argument because it was not raised before the judge. *Id.* at 29-30. Finally, the Secretary argues that the proceeding is not moot in light of the pending underlying merits proceedings. *Id.* at 33-34.

The central issue in this proceeding is whether, in enforcing the breathable air requirements of the MINER Act, MSHA's requirement that the Operators submit purchase orders within two days¹¹ of plan approval and MSHA's refusal to approve provisions in the Operators' ERPs that provided for the acquisition of purchase orders for refuge chambers within 60 days of plan approval were arbitrary and capricious. The Operators also challenge section 316(b)(2) of the amended Mine Act as being impermissibly vague and therefore unconstitutional because the provision fails to provide operators notice of what is required.

A. Legislative Background

Passed in response to the tragic loss of life in several mine accidents in 2006, the MINER Act took a multi-faceted approach to enhancing safety and managing risk in underground coal mines. S. Rep. No. 109-365, 109th Cong., at 1-2 (Dec. 6, 2006) (hereafter "*S. Rep.*"). Section 2 of the MINER Act requires that each underground coal mine operator adopt a written Emergency Response Plan. 30 U.S.C. § 876(b)(1), (2). Thus, the MINER Act requires the development of plans, "which must provide for the evacuation of miners who may be endangered in an emergency or, if miners cannot evacuate, provide for their maintenance underground." *S. Rep.* at 2. The MINER Act further specifies certain minimum requirements in each plan, including a provision for post-accident "breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time." 30 U.S.C. § 876(b)(2)(E)(iii)(I).

¹¹ In reviewing the reasonableness of MSHA's actions, the judge used the ten-day period within which MSHA allowed the Operators to abate the citations and provide purchase orders. 29 FMSHRC at 552. However, during negotiations between MSHA and the Operators, MSHA requested that the Operators provide purchase orders at the time of plan approval. In the final week prior to the citations, MSHA was willing to give the Operators a two-day period in which to present purchase orders following plan approval. *Id.*

With regard to the drafting and approval of ERPs, the legislative history of the MINER Act states, "In order to facilitate implementation of the [MINER] [A]ct's revisions, the [Senate Committee] decided to make use of the 'plan' model since all parties were familiar with its use in other contexts." *S. Rep.* at 2. Thus, Congress intended that the principles governing the process of formulating ERPs be similar to those governing other mine plans under the Mine Act. With regard to mine plans, the Commission has long held, "[M]ine ventilation or roof control plan provisions must address the specific conditions of a particular mine." *Peabody Coal Co.*, 15 FMSHRC 381, 386 (Mar. 1993) ("*Peabody I*"). However, in addition to mine-specific provisions in plans, the MINER Act provides for the inclusion in ERPs of six "areas of concern that have universal applicability and are therefore susceptible of more generalized regulation." *S. Rep.* at 3. See 30 U.S.C. § 876(b)(2)(E)(i) - (vi). One of these areas of general applicability is post-accident breathable air. *Id.* (iii).

B. General Legal Principles – Standard of Review

One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996).

While the contents of a plan are based on consultations between the Secretary and the operators, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *Id.* at 1746. As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), quoting S. Rep. No. 181, 95th Cong., 25 (1977), reprinted in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary's part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("*Peabody II*"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining*, 18 FMSHRC at 1746; see also *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable).

Below, the Operators challenged the judge's use of an arbitrary and capricious standard to review the Secretary's refusal to approve the 60-day purchase order provision in the ERPs and her requirement for purchase orders within two days of plan approval. 29 FMSHRC at 550. On review, the Operators continue to argue against an arbitrary and capricious standard, stating that "such standard ignores the statutory criteria and is too weighted in the Secretary's favor." PDR at 10 n.5. However, in their briefs, the Operators offer no alternative standard of review or

Commission precedent that would support a different standard of review. O. Br. at 12-21; O. Reply Br. at 8-9.

We conclude that the judge's framing of the standard of review of the Secretary's actions as "arbitrary and capricious" is in accordance with Commission precedent. The standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process. In this regard, the Commission's decision in *Monterey Coal* is instructive. In affirming a citation for failing to supply data relating to impoundment pond construction, the Commission applied the "arbitrary and capricious" standard in reviewing MSHA's withdrawal of its approval of an impoundment plan:

We cannot conclude that MSHA's use of the Table [of recommended minimum design storm criteria] or its act of withdrawing the plan approval was arbitrary and capricious. . . . [P]rior to issuance of the citation Monterey was given unequivocal notice of and a reasonable opportunity to comply with MSHA's interpretation and use of the Table. In sum, we find the course of action taken by MSHA to have been a reasonable approach, and not arbitrary or capricious.

Monterey Coal, 5 FMSHRC at 1019 (citation and footnote omitted); *accord Peabody II*, 18 FMSHRC at 692 n.6 (in reviewing the Secretary's refusal to approve a ventilation plan provision, Commission noted that the plan approval process involves an element of judgment on the part of the Secretary that is reviewed under an arbitrary and capricious standard). This standard appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test.¹² See *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) ("abuse of discretion" has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law") (citations omitted). We therefore affirm the judge's application of the arbitrary and capricious standard to the plan review.

C. Whether MSHA's Decision Was Arbitrary, Capricious, or an Abuse of Discretion

The relatively narrow disagreement between the Operators and MSHA presented on review essentially concerns whether purchase orders should be provided in two days or 60 days after

¹² 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)).

approval of the ERPs. This dispute does not involve any substantive provisions of the ERPs or the question of whether the Operators had agreed to enter into purchase orders at some point.

Based on our review of the record, it is apparent that MSHA's refusals to approve the Operators' ERPs were not arbitrary, capricious, or an abuse of discretion. Rather, we conclude that the record amply demonstrates adequate notice and discussion by MSHA regarding the disputed ERP provisions, that the negotiations were conducted in good faith, and that MSHA's decision not to approve the ERPs as submitted was supported by the circumstances before the MSHA District Manager.

Beginning with the February 8, 2007 issuance of the PIB, the Operators submitted no fewer than six plans addressing the breathable air requirement over a three-month period. As the judge noted, MSHA's District Manager determined to require submission of purchase orders "to secure assurance that the operator was actually proceeding to implement the plan" because refuge chambers were commercially unavailable at that time. 29 FMSHRC at 553. The record reflects notice of MSHA's position with regard to breathable air, communication between MSHA and the Operators over the disputed provisions in the ERPs, and discussion of the differing positions. MSHA was responsive to the Operators' expressed concerns as to the effectiveness of both the refuge chambers and carbon dioxide scrubbing systems. Finally, in an apparent effort to accommodate the Operators' need for additional time to obtain purchase orders, MSHA modified its initial position requiring purchase orders at the time of the submission of the ERPs, to two days after plan approval.¹³ As the Commission noted in *C.W. Mining*, "We discern in these events adequate notice and discussion by MSHA officials. Nothing in the record suggests bad faith by MSHA, and we perceive no course of arbitrary conduct." 18 FMSHRC at 1747.

In contrast to MSHA's conduct, the Operators retreated from their April agreement to provide purchase orders at the time of submission of the ERPs, to proposing submission 60 days after plan approval. As the judge noted, in any event, the additional 60-day period that the Operators sought was insufficient to conduct testing into carbon dioxide scrubbing systems or the

¹³ Our dissenting colleague finds troublesome that four operators in District 2, including the Operators in this case, were not required to submit purchase orders prior to plan approval. His concerns stem from MSHA's insistence that all other operators in that district submit purchase orders prior to plan approval. Slip op. at 20. We view this as reasonable flexibility on the part of MSHA. The record before us does not explain why the other two operators were not required to submit their purchase orders prior to plan approval. The record does show that a "grace period" was offered to the Operators in this case to allow them additional time to obtain purchase orders. The District Manager, in pursuit of a reasonable assurance that the required equipment would be ordered as soon as possible, was satisfied with this proposal. Tr. 75. Accordingly, we do not find that MSHA's failure to treat every operator in the same district identically rises to arbitrary and capricious action by the agency. This is particularly true when mine-specific factors and differences in the substance and timing of negotiating processes are taken into account.

refuge systems themselves. 29 FMSHRC at 555; Tr. 276; *see also* Oral Arg. Tr. 20. Nor was it likely that NIOSH, which had greater access to demonstration models, could begin and complete its testing on shelters during this period. 29 FMSHRC at 549, 555. Indeed, as the judge found, NIOSH did not submit a protocol for testing refuge chambers until June 1, 2007, after these proceedings were initiated. *Id.* at 549 n.8. Moreover, as previously noted, NIOSH was not statutorily mandated to complete its testing of refuge chambers until the end of 2007.¹⁴ *See* n.5, *supra*. In addition, the Operators seemingly began to question the efficacy of the refuge chambers that they had chosen to use by indicating that they wanted to delay the purchase of the chambers until after testing had been completed later in 2007. *See* 29 FMSHRC at 549. In response to Cumberland's position, MSHA stated that it would not approve its ERP, which committed to "purchase . . . essential protective mechanisms at an undetermined and distant future date." Gov't Ex. 17.

We agree with the judge's observation that "[t]here is no question that Congress intended to promptly secure a substantial increase in the amount of post-accident breathable air available to trapped miners." 29 FMSHRC at 553. Accordingly, we must review MSHA's disapproval of the Operators' final revised ERPs in light of this Congressional purpose, the 60-day deadline for submitting ERPs, and the expedited process contained in the statute.

In determining whether MSHA's determinations were arbitrary and capricious, we examine the circumstances before the MSHA District Manager when he considered the Operators' final revised ERPs in late May. The discussions and negotiations between the Operators and MSHA had extended from March 14 (when revised ERPs addressing the 96-hour breathable air requirement were submitted) until May 25 (when MSHA disapproved the ERPs) and had involved changes in position by the Operators. We note that this period itself was longer than the 60-day statutory period for submitting ERPs after enactment of the MINER Act. During this period, the Operators raised certain potential problems concerning the safety and efficacy of refuge chambers, and those problems had been resolved. Although the Operators requested 60 days from plan approval in which to enter into purchase orders so that additional testing could be conducted, it was unlikely that any meaningful test results would become available until much later in 2007.

At the time MSHA disapproved the Operators' ERPs, 31 of the 33 underground coal mine operators in District 2 had already had their ERPs approved—the only exceptions being Emerald and Cumberland. Significantly, 14 of the 31 approved ERPs proposed the use of refuge chambers, and all 14 of those operators had agreed to submit purchase orders with their ERPs or within a few days afterwards. Tr. 74-75. According to Donald Foster, MSHA's lead reviewer of ERPs for District 2, the MSHA District Manager wanted the Operators to enter into purchase orders without a substantial additional delay to ensure that the Operators "were going to follow through with"

¹⁴ Trial testimony from Foundation Coal's vice president for safety indicated that NIOSH testing might be completed as early as August 31 (Tr. 249-50), still well beyond the 60-day period in which the Operators sought to execute purchase orders.

their statements that they would obtain refuge chambers. Tr. 75.¹⁵ His concerns were based in part on the amount of time that had already elapsed and the fact that the Operators had backtracked in certain respects on their commitment to obtain particular refuge chambers. Tr. 104.

Based on the totality of these circumstances, we conclude that MSHA's response to the Operators' desire for more time to put purchase orders in place was reasonable.¹⁶ See *Monterey Coal*, 5 FMSHRC at 1019. We cannot conclude that the Secretary's insistence on a plan provision that is designed to enhance miner safety is indicative of bad faith, or arbitrary and capricious conduct, particularly in light of the circumstances surrounding the passage of the MINER Act.¹⁷

¹⁵ We note that MSHA's use of purchase order requirements to implement new safety devices has been approved by the courts. In *Consolidation Coal Co. v. Donovan*, 656 F.2d 910 (3d Cir. 1981), the Court heard a challenge to MSHA's failure to amend regulations governing the use of self-contained self-rescue devices (SCSRs). It observed that "operators had been reluctant to place orders [for the SCSRs] so long as there was a possibility of delaying the rule. As a result, the manufacturers lacked the incentive to increase production." 656 F.2d at 912 n.2 (citing *Council of Southern Mountains v. Donovan*, 653 F.2d 573, 579 n.24 (D.C. Cir. 1981)). Nonetheless, the Court, in addressing MSHA's requirement that operators obtain purchase orders for SCSRs, ruled that "mine operators will be impelled to supply whatever devices are available and order additional devices." 653 F.2d at 915 (quoting *Council of Southern Mountains*, 653 F.2d at 578 n.10).

Although the factual situation in that case was different, with MSHA requiring use of a specific technology for SCSRs by rule, the decision recognizes purchase order requirements as an appropriate inducement for operators and equipment manufacturers to develop and install new safety technology expeditiously. In fact, the Court acknowledged that "[a]lthough the SCSRs now available are neither the perfect nor the final solution to the problem, all studies indicated that they represent a substantial improvement over the filter-type rescuers. Such a development, with its significant life-saving potential, must be hailed, despite its shortcomings." 656 F.2d at 916-17.

¹⁶ Our dissenting colleague notes that the Operators "have provided sound reasons for their concerns as to the ultimate feasibility of underground refuge chambers." Slip op. at 22. However, our review in this proceeding is directed at the reasonableness of the *Secretary*, in refusing after three months of negotiations with the Operators, to approve a plan whereby purchase orders were submitted some 60 days later. Moreover, if the Operators doubted the efficacy of refuge chambers, they could have simply replaced chambers with barricades, which were readily available, or some other proven technology.

¹⁷ Commissioner Young notes that at no time did it appear that the Operators were engaged in delay for delay's sake. See Oral Arg. Tr. 38. To the contrary, the Operators appear to have been pursuing what they believed to be the best solution for the breathable air portion of its mines' ERPs. However, it did not appear that they would be able to conclusively resolve that

In defense of their position, the Operators additionally argue that the Secretary should have undertaken notice-and-comment rulemaking to implement the ERP provisions of the MINER Act to require purchase orders at the time of plan approval. However, there is no requirement in the MINER Act that mandates the use of rulemaking in this instance, such as there is in the Mine Act for certain other matters. *See, e.g.*, 30 U.S.C. § 825(d) (requiring Secretary to promulgate training regulations). Indeed, the short time period provided for the submission of ERPs following the passage of the MINER Act suggests that Congress did not intend for MSHA to proceed by rulemaking. Further, to the extent that Congress indicated that the development of ERPs should make use of the “model” for ventilation and roof control plans, *S. Rep.* at 2, the provisions of those plans are not limited to provisions in the Mine Act or the Secretary’s regulations. *See Peabody II*, 18 FMSHRC at 691-92 (judge did not rest his determination on an assumption that ventilation of deep cuts during roof bolting was required by mandatory standards). The Operators’ position that the Secretary can only proceed in implementing the MINER Act by rulemaking, and not through the present referral proceeding, is at odds with basic tenets of administrative law. *See Int’l Union, UMW v. MSHA*, 920 F.2d 960, 964 (D.C. Cir. 1990) (“[T]he courts have always accorded agencies broad discretion in choosing between rulemaking and adjudication as a means of addressing issues . . .”).

Finally, the Operators contend that substantial evidence does not support certain of the judge’s findings that he made in connection with his determination that MSHA did not act arbitrarily or capriciously. In particular, the Operators challenge, as contrary to the record, the judge’s finding that MSHA had no reason to doubt the effectiveness of the carbon dioxide scrubbing systems. O. Br. at 19. However, MSHA’s representative, Donald Foster, who dealt with Cumberland and Emerald on their ERPs, testified without contradiction that MSHA’s sole concern with the scrubbing systems was the caustic nature of the chemicals involved. Tr. 85-87; *see also* Tr. 168-75 (MSHA engineer Walter Slomski). As the judge found, the concerns over handling of the chemicals used in the carbon dioxide scrubbing systems were “quickly resolved.” 29 FMSHRC at 554; Tr. 86-87; Gov’t Ex. 37. In these circumstances, it cannot be said that the judge’s findings lack record support.

In sum, we conclude that the Secretary’s actions in adhering to a position of requiring purchase orders within two days after plan approval and refusing to approve the Operators’ ERPs with a provision for submission of purchase orders 60 days after approval were neither arbitrary and capricious nor unreasonable.

question within the strictures of the MINER Act, as the Secretary has reasonably interpreted it.

D. Constitutional Issues

1. Void for Vagueness

The Operators assert that the breathable air provisions in the MINER Act, 30 U.S.C. § 876(b)(2)(E)(iii), are unconstitutionally vague.¹⁸ O. Br. at 21-27; O. Reply Br. at 2-7. The Operators assert that “due process” precludes the application of a law or regulation that fails to give fair warning of the conduct that it prohibits or requires.

In addressing the Operators’ arguments, we must assume that Congress legislated in light of constitutional limitations. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). As the Supreme Court has noted, “The strong presumptive validity that attaches to an act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain . . . offenses fall within their language.” *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Thus, the Operators carry a heavy burden to show that the MINER Act is unconstitutionally vague. *See Langston v. Johnson*, 478 F.2d 915, 919 (D.C. Cir. 1973).

Under well-established principles regarding notice, the Operators had actual notice of what is required under the breathable air provisions of the MINER Act. In this regard, the due process requirement is satisfied when an agency gives actual notice of its interpretation prior to enforcement. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996) (holding that actual notice was provided by MSHA prior to issuance of citation); *see also General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that agency’s pre-enforcement warnings to bring about compliance with its interpretation will provide adequate notice). In this proceeding, the events fully support that there was adequate notice of MSHA’s position with regard to the submission of purchase orders for refuge chambers. MSHA provided written notification to the Operators as to the deficiency of their plans. *See, e.g.*, Gov’t Exs. 16, 17, 18, 19, and 20. Indeed, the record evidence that MSHA acted in good faith in the plan approval process by engaging the Operators on outstanding issues and providing them feedback is also indicative of actual notice.

2. Equal Protection

The Operators argue that MSHA’s treatment of operators in requiring purchase orders at the time of plan approval differed from one district to another and, therefore, violated principles of equal protection. O. Br. at 13-14. The Secretary responds that the issue of constitutional equal protection was not raised before the judge. S. Br. at 29-30. We agree with the Secretary’s position. *See* 30 U.S.C. § 823(d)(2)(A)(iii) (“Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had

¹⁸ The Commission has long held that it has the authority to address constitutional challenges to the Mine Act. *Kenny Richardson*, 3 FMSHRC 8, 18-21 (Jan. 1981), *aff’d*, 689 F.2d 632 (6th Cir. 1982).

not been afforded an opportunity to pass.”). In addition, we also note that the Operators did not timely raise the issue in their petition for discretionary review. “Under the Mine Act and the Commission’s procedural rules, review is limited to the questions raised in the petition and the Commission *sua sponte*. 30 U.S.C. §§ 823(d)(2)(A)(iii) and (B); 29 C.F.R. § 2700.70(f) (1993).” *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994), *aff’d*, 81 F.3d 173 (10th Cir. 1996) (table). In these circumstances, the Commission cannot reach the Operators’ equal protection argument.¹⁹

E. Mootness

In the Commission’s order granting review in this proceeding, we asked the parties to address the issue of mootness. Our concern arose because of the Operators’ full performance of the action at issue—presentation of purchase orders with the ERPs—following the judge’s order in a referral proceeding under the MINER Act.

Our review of the MINER Act and its legislative history indicates that the present proceeding before the Commission, which occurs at a time when the Operators have complied with the judge’s order and supplied the purchase orders, was the type contemplated when the legislation was passed. Section 2(b)(2)(G)(i) to (iii) of the MINER Act clearly provides for the issuance of a citation when a plan provision is disputed; referral to the Commission and litigation before an administrative law judge on an expedited basis; and then “inclusion of the disputed provision in the plan” unless relief is requested by the operator and permitted by the judge. 30 U.S.C. § 876(b)(2)(G)(i) to (iii).

Moreover, our review of the legislative history of the MINER Act also leads us to the conclusion that MINER Act proceedings should not be treated differently from Mine Act proceedings for purposes of mootness. The Senate Report notes that the approach to resolving disputes under the MINER Act will be similar to those used in resolving disputes under the Mine Act.

Thus, where a dispute regarding the approval or content of a plan arises between the Secretary and operator, the Secretary will issue a citation with regard to the underlying issue. Use of a “technical violation” and accompanying citation is the means by which roof and ventilation plan disputes are traditionally reviewed. . . . The same process is anticipated with regard to safety plan disputes.

S. Rep. at 2.

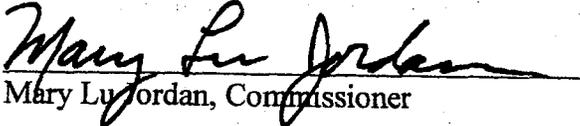
¹⁹ We also note that our prior conclusion that the MSHA’s conduct in the plan approval process in requiring the Operators to submit purchase orders was not arbitrary and capricious largely militates against a conclusion that the same conduct contravened principles of equal protection.

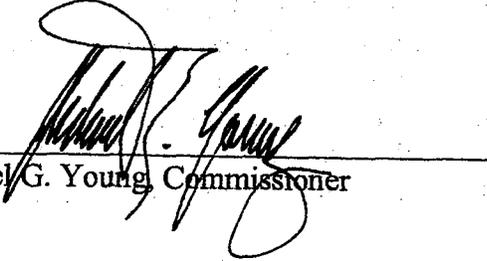
In light of the foregoing, we agree with the Operators and the Secretary that the present proceeding is not moot, notwithstanding that the Operators have already entered into purchase orders in compliance with the judge's order.²⁰

III.

Conclusion

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


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

²⁰ The parties also state that the instant case is not moot because of implications of its disposition on proceedings initiated by the Operators to challenge, under section 105(a) of the Mine Act, 30 U.S.C. § 815(a), the citations that were the basis for the referrals and certain findings contained in those citations. While we express no opinion on the merits of those challenges or the appropriateness of those proceedings, we do note that our decision in this referral proceeding may have legal and factual impacts on issues likely to be raised in the citation contest proceedings.

Chairman Duffy, dissenting:

In the wake of disasters such as those that occurred in January of 2006 in West Virginia and that which occurred most recently in Utah, public shock is understandably followed by a Congressional demand that more be done by industry and its regulators to ensure that such tragedies will not recur. That is the impetus for passage of the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”) signed into law by the President on June 15, 2006, and the resultant accelerated implementation of the law by the Mine Safety and Health Administration (“MSHA”) over the past 18 months.

As is usual in these circumstances, Congress adopts a technology-forcing regulatory framework and demands that the regulators and the regulated bring that framework into prompt fruition. Congressional pressure is brought to bear through oversight hearings and demands for status reports.

Over the years prior to passage of the MINER Act, this paradigm has produced extraordinary results with respect to the coal industry: self-contained self rescuers (“SCSRs”), a substantially reduced respirable coal dust standard, cabs and canopies on underground face equipment, improved monitoring systems, and stricter permissibility standards. It may well be that enlightened self-interest among coal operators and aggressive federal and state regulation would have produced these improvements eventually, but there is no dispute that Congressional impetus brought about these changes much more rapidly.

That is the context within which this case arises. In section 2 of the MINER Act, which amended section 316 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 876, Congress declared that within 60 days after enactment of the legislation, each underground coal mine operator was to submit an Emergency Response Plan (“ERP”) for MSHA approval, and that those plans provide “emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time.” 30 U.S.C. § 876(b)(2)(E)(iii). Congress also specified, however, that in reviewing these plans, MSHA was to ensure that they “reflect the most credible scientific research[,] be technologically feasible, make use of currently commercially available technology, and account for the specific physical characteristics of the mine.” *Id.* § 876(b)(2)(C)(ii) & (iii).

Those, then, are the somewhat countervailing Congressional parameters within which MSHA and the operators were to develop ERPs. By August 14, 2006, Emerald and Cumberland had complied with the requirement to submit their ERPs, but over the next several months MSHA deliberated as to what constituted an acceptable level of breathable air sufficient to maintain trapped miners for a sustained period of time. 29 FMSHRC 542, 545-47 (June 2007) (ALJ). On February 8, 2007, MSHA determined that level to be 96 hours per miner, a level well in excess, by a factor of 16, of what these operators had originally submitted in August. *Id.* at 547; Program Information Bulletin P07-03 (“PIB”).

Consequently, from March 12 of this year, MSHA District 2 and the operators negotiated toward agreement over this element of the ERPs until MSHA announced an impasse on May 25, 2007. 29 FMSHRC at 547-50. It is important to note that the agency and the operators, from the beginning, had no dispute over the substantive contents of the plans. MSHA, in its February 8, 2007 PIB, indicated that operators could meet the 96-hour requirement by installing underground refuge chambers within 2,000 feet of working faces. Gov't Exs. 4, 5, 7. Emerald and Cumberland, in their first submissions and in each submission thereafter, indicated that, on the basis of greater safety and efficiency, they would meet the requirement by installing underground refuge chambers.¹ 29 FMSHRC at 547-50. The only dispute between the parties was whether purchase orders for the chambers had to be submitted before or after MSHA approval of the ERPs themselves. *Id.* at 548-50.

In fact, it is fair to say that MSHA, from the beginning until May 25, made purchase orders a condition precedent to its approval of these operators' ERPs, but that was not a consistent agency position within District 2. As the Secretary's brief indicates, two other operators in District 2 were allowed to submit purchase orders after MSHA had approved their ERPs. S. Br. at 7. Admittedly, those purchase orders were provided in less than 60 days—one day and one week, respectively, after MSHA's approval of the operators' ERPs. *Id.* That, however, does not refute the point that an unexplained inconsistency infected the approval policy in District 2. That inconsistency does not necessarily support the operators' equal protection argument (O. Br. at 13-14), but it does weigh heavily with me as to whether the MSHA District 2 Manager acted arbitrarily or unreasonably with respect to Emerald and Cumberland.

The Secretary argues that “[w]ithout the equipment, or a purchase order for the equipment, the District Manager could not be assured that an operator was attempting to implement the breathable air provision of the ERP.” S. Br. at 24. It would seem to me that the same rationale would also apply to the two operators whose plans were approved without the preapproval submission of purchase orders. This inconsistency within District 2 supports a conclusion of unreasonableness on the part of the Secretary.²

¹ While it is true the operators could have selected barricades instead of refuge chambers (*see slip op.* at 14 n.16), they rejected that choice on the grounds that miners may not have the time or physical capability to construct barricades in the midst of an emergency. 29 FMSHRC at 547.

² The record also discloses that in most MSHA districts, purchase orders for refuge chambers are not required as a precondition for approval of an ERP, but that if, subsequent to approval of an ERP, an inspector finds that a purchase order has not been executed, the operator can be cited for failure to comply with its approved plan. *Jt. Stip. No. 26; Resp't Ex. 45.* In any event, it is the inconsistency within District 2 that more clearly raises the issue of unreasonableness.

Likewise, on May 22, Cumberland submitted a revised plan with the 60-day purchase order proposal. 29 FMSHRC at 550. MSHA responded on May 23 that the plan would be approved if the purchase order were provided within two days, i.e., May 25. *Id.* On May 24, Emerald submitted a similar proposal, and MSHA responded that the ERP would be approved if Emerald provided a purchase order by May 26. *Id.* Nevertheless, on May 25 the agency issued citations to both operators. *Id.* at 545. I would think that the agency could have postponed issuing citations at least until the new deadlines had passed.³

Similarly, the citations indicated that they could be abated if the operators submitted purchase orders within 10 days, which would have been June 4. *Id.* That abatement period is apparently the source of the juxtaposition of 10 days allowed by MSHA for producing purchase orders versus the operators' consistent proposal to provide them within 60 days of approval. That is really not the case, however; for by June 4, the citations had been issued, negotiations had ceased, and the case had moved on to the adjudicative stage pursuant to section 2 of the MINER Act.

We cannot treat those 10 days as some new grace period for providing a purchase order since approval was still being withheld. In other words, the condition precedent was back in play. The judge indicates that "[t]he referrals pray that the citations be affirmed and that Respondents be ordered to amend their ERPs to establish a 10-day period within which to provide purchase orders." 29 FMSHRC at 544. In effect, then, the Secretary is only allowing a 10-day post-approval period for obtaining a purchase order if she prevails before the Commission. That option was never realistically on the table prior to the citations being issued.

Unlike my colleagues (slip op. at 14 n.15), I do not believe the decisions in *Consolidation Coal Co. v. Donovan*, 656 F.2d 910 (3d Cir. 1981), and *Council of Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981), provide guidance in this case. The circumstances surrounding those decisions are not analogous to those presented here. In *Consolidation Coal* and *Council of Southern Mountains*, the courts upheld MSHA's demand for purchase orders for SCSRs that were mandated through rulemaking and specifically approved by MSHA.⁴ The only issue remaining was the speed with which the devices would be manufactured in sufficient numbers to be placed in all underground coal mines. Under the circumstances, the requirement for purchase orders served as a market incentive to ensure that the manufacturers of *approved* SCSRs would begin production on an expedited basis, so as to hasten the implementation of the rule. In those cases the operators were not

³ I part company with my colleagues' characterization of the disagreement between MSHA and the operators in this case: "whether purchase orders should be provided in two days or sixty days after approval of the ERPs." Slip op. at 11-12. That would only be the case if MSHA had approved the ERPs on May 25, 2007. Then if the operators had not submitted the purchase orders within two days, MSHA could have filed for review of the matter. Here, MSHA was still withholding approval until the purchase orders were produced, so no post-approval grace period was being provided.

⁴ See generally 30 C.F.R. § 75.1714.

being asked to buy a pig in a poke, or at least submit a purchase order for one. The SCSRs had been fully vetted through the rulemaking and equipment approval processes of MSHA and the National Institute of Occupational Safety and Health ("NIOSH") before the cases arose.

In contrast, in this case the vetting of underground refuge chambers is still a work in progress. Here, without a rulemaking that would have determined the feasibility of refuge chambers and would have established criteria for MSHA approval, the agency has by policy memorandum authorized the use of refuge chambers to meet the MINER Act's mandate solely on the grounds of West Virginia's hasty approval, an action which that state now appears to be reconsidering. *See* 29 FMSHRC at 547, 549.

The operators have provided sound reasons for their concerns as to the ultimate feasibility of underground refuge chambers during the period of negotiation:

- (1) none of the chambers was approved by MSHA (Jt. Stip. No. 28);
- (2) for at least a week during the period between late March and late May, MSHA ordered its District Managers not to approve ERPs that utilized refuge chambers equipped with carbon dioxide ("CO₂") scrubbing systems (Resp't Ex. 47);
- (3) as cited by the judge, the operators may not have been advised by MSHA that questions regarding the safety of the scrubbing systems had been resolved (29 FMSHRC at 548-49);
- (4) notwithstanding the judge's dismissal of the operators' concern about excessive heat being produced by a lithium hydroxide CO₂ scrubbing system as "theoretical" (*id.* at 549), only one test had been performed (Tr. 242), and MSHA could only state that heat was not a problem in large barricaded areas but could not say the same for the more confined space of a refuge chamber (Tr. 280-81); and
- (5) West Virginia had second thoughts about its hasty approval of such systems as evidenced by its request to NIOSH for further testing (29 FMSHRC at 547, 549).

The 60-day grace period sought by the operators was not unreasonable and was understandable given the unsettled circumstances set forth above. There were sound reasons for trying to determine whether the promised benefits of underground refuge chambers were real and not theoretical. The operators were understandably concerned about certain problems associated with the chambers that MSHA itself had identified. Thus, the operators undertook to perform their own tests of the chambers but were stymied by a lack of a system to test. Tr. 264-65. Instead, they sought more time to determine how the NIOSH tests were progressing.

In that regard, it must be emphasized that NIOSH does not operate like the College of Cardinals electing a new Pope. MSHA, the industry, and miners do not sit around clueless while waiting for the white puff of smoke signifying a final decision. On the contrary, NIOSH's mine safety and health research is exceedingly transparent—necessarily so—because much of the research has to be conducted in mines under actual conditions. Therefore, the results of the tests are immediately known to the operators and miners in the mines where the testing is taking place. Presumably, that information gets passed on to others.

It was not necessary, therefore, that the NIOSH testing be completed before the testing could provide valuable information to the operators that would enable them to make more informed decisions on whether to utilize refuge chambers to comply with the breathable air requirements. In retrospect, as my colleagues correctly note (slip op. at 13), the research did not begin until June, slightly beyond the 60 days originally sought by the operators, but the operators had no way of knowing that back in March. Finally, as counsel for the Secretary stated at oral argument, MSHA does not believe the operators' requests for additional time to secure the purchase orders were made in bad faith. Oral Arg. Tr. 38.

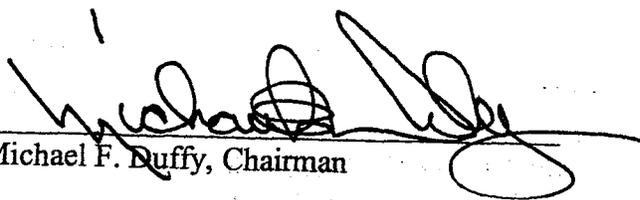
Underlying all of this are what I view as mixed signals sent by Congress in the amended section 316 of the Mine Act and section 13 of the MINER Act, which orders NIOSH to conduct research and testing into refuge chambers and submit a report to the Secretary of Labor by December 2007. As counsel for the Secretary responded to my question at oral argument, "It almost makes you wonder whether Congress intended that that [refuge chambers] actually be part of what would be required to be submitted." Oral Arg. Tr. 35.

In sum, my basis for reversing the judge comes down to the reasonableness or lack thereof in MSHA's negotiation of ERPs with these particular operators. I find the agency to have been inconsistent, even within District 2; precipitous with respect to the issuance of the citations at issue, and dismissive of legitimate concerns, including some of which were raised by its own personnel.

Moreover, counsel for the operators acknowledged that if the plans had been approved, and even if testing had not been completed during the 60-day grace period, the operators would have secured purchase orders lest they be cited for not following their plans. Oral Arg. Tr. 19-20. That, ironically, appears to be the way it is being enforced throughout most of the country.

So we end up with a situation where both mines would have been in compliance 10 days before the hearing below if MSHA's approval had been issued in the first place. Returning to my observations at the outset of this opinion, Congress has spoken loudly and clearly in the words of the MINER Act, but urgency should not foreclose reasonableness and consistency in carrying out that mandate.

Accordingly, I would reverse the judge.



Michael F. Duffy, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

December 26, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2007-228-M
	:	A.C. No. 29-01899-114181
	:	Docket No. CENT 2007-230-M
v.	:	A.C. No. 29-01899-102372
	:	Docket No. CENT 2007-232-M
JAMES HAMILTON CONSTRUCTION	:	A.C. No. 29-00708-99064 AB8

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 23, 2007, the Commission received from James Hamilton Construction ("Hamilton") an amended motion by 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). On July 12, 2007, the Commission had denied without prejudice Hamilton's first request to reopen penalty assessments that had become final orders. *James Hamilton Construction*, 29 FMSHRC 569.¹ The Commission instructed that if Hamilton chose to refile the motion to reopen, it should set forth an explanation to justify its failure to timely contest the proposed penalty assessments and to disclose with specificity what citations and associated penalties are included in the request for relief. 29 FMSHRC at 570-71.

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).

¹ In our July 12, 2007 order, we also consolidated docket numbers CENT 2007-228-M, CENT 2007-230-M, and CENT 2007-232-M, along with docket numbers CENT 2007-229-M and CENT 2007-231-M. Docket numbers CENT-229-M and CENT 2007-231-M are apparently not at issue in the present proceeding, and we therefore unconsolidate those two cases.

During 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued numerous citations to Hamilton.² In Hamilton's amended motion to reopen and attached affidavit, Hamilton states that it failed to timely contest the citations and proposed penalties at issue because its safety director was engaged in air quality compliance matters that required his immediate attention and, when he turned to the penalty proposals, he discovered that the time to respond had passed.³ In response, the Secretary states that she does not oppose reopening the proposed penalty proceedings. She also states that penalties in CENT 2007-232-M have been paid.

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).

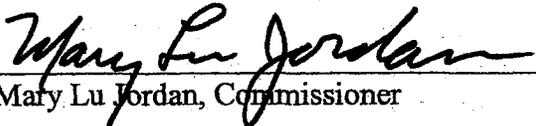
² Because neither party has submitted the proposed penalty assessments at issue, we are unable to determine how long Hamilton waited before bringing a motion to reopen the penalty assessments. If Hamilton brought its motion more than a year after the proposed penalty assessments became final Commission orders, its request may be untimely. Under Federal Rule of Civil Procedure 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. *E.C. Voit & Sons*, 29 FMSHRC 957, 958 (Dec. 2006).

³ We note wording problems with the motion and affidavit because the operator states at various points that it seeks to re-open the "citations" at issue. However, at this juncture in the proceedings, Hamilton is actually seeking to re-open the proposed penalties that are associated with the citations. Additionally, the reasoning provided in the motion and affidavit is problematic because the operator seeks to re-open citations that were issued from April 2006 to September 2006. Presumably the associated penalty proposals also were issued over a number of months, and we question whether Hamilton's safety director could have been solely occupied with one matter for such a long period of time.

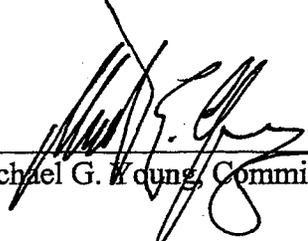
Having reviewed Hamilton's amended motion to reopen, in the interest of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Hamilton's failure to timely contest the penalty proposals and whether relief from the final orders should 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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WASHINGTON, DC 20001

December 26, 2007

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

v.

JAMES HAMILTON CONSTRUCTION

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:
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: Docket No. WEST 2008-111-M
: A.C. No. 02-00024-123320 AB8
:
:

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 23, 2007, the Commission received from James Hamilton Construction ("Hamilton") 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).

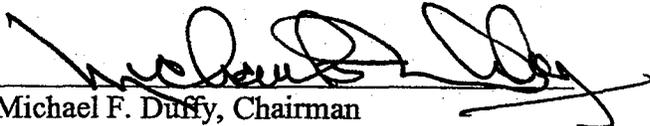
On July 26, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Hamilton. In Hamilton's motion to reopen, it asserts that it responded to MSHA within 30 days of receipt of the proposed penalty assessment. It claims that it received the proposed assessment form on August 10, 2007,¹ and that the final day to respond fell on September 9, which is a Sunday. Accordingly, Hamilton asserts that it mailed its contest on Monday, September 10, which would have been timely. In response, the Secretary states that she does not oppose reopening the proposed penalty

¹ We note that the Assessment Form, which is attached as an Exhibit to Hamilton's motion, is stamped "Received August 6, 2007."

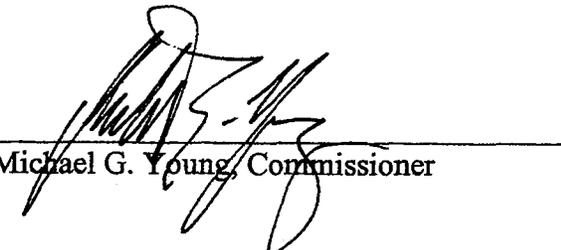
proceeding.

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).

On the basis of the present record, we are unable to evaluate the merits of Hamilton’s position. In the interest of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Hamilton failed to timely contest the penalty proposal and, if so, whether good cause exists for granting relief from the final order. 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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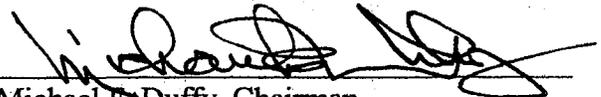
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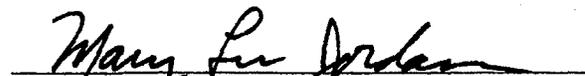
Chief Administrative Law Judge Robert J. Lesnick
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We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 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 Canyon’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 Canyon’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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WASHINGTON, DC 20001

December 26, 2007

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

v.

MAMMOTH COAL COMPANY

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Docket No. WEVA 2008-78
A.C. No. 46-06051-120049

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 23, 2007, the Commission received from Mammoth Coal Company ("Mammoth") a motion 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).

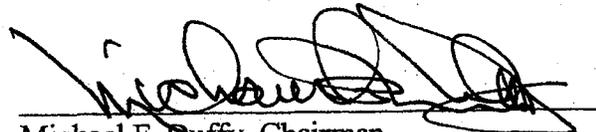
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On June 12, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Mammoth covering a number of citations including Citation No. 7254427. In its motion, Mammoth states that its administrative personnel misplaced the proposed penalty assessment form and, as a result, mistakenly failed to fill out the form to contest the penalty for Citation No. 7254427. Mammoth further asserts that it learned of its mistake upon receiving a delinquency letter from MSHA. In response, the Secretary states that she does not oppose Mammoth's request to reopen the proposed penalty assessment proceeding.

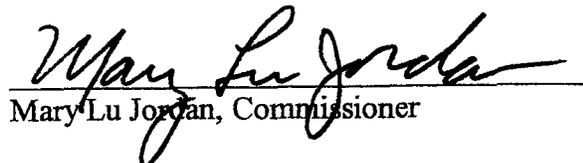
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim*

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).

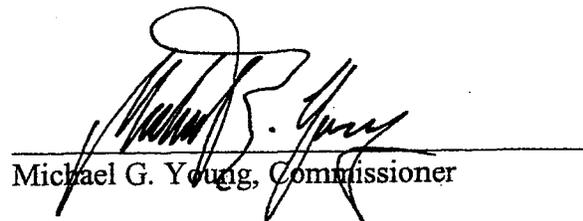
Having reviewed Mammoth’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Mammoth’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is 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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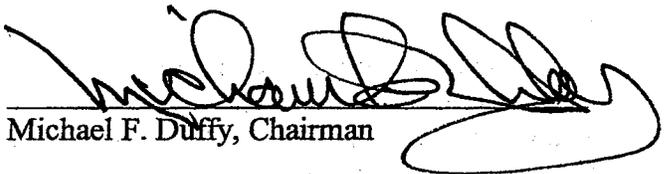
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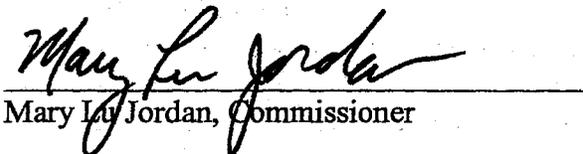
Chief Administrative Law Judge Robert J. Lesnick
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We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 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).

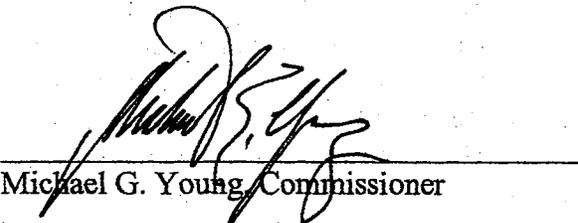
Having reviewed Mammoth’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Mammoth’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is 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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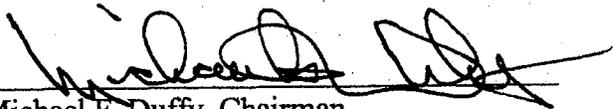
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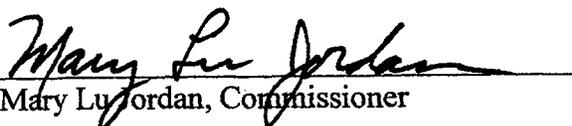
of the penalty. On November 21, Presley filed this motion and notified the Secretary of his desire to contest the penalty assessment. The Secretary states that she does not oppose the motion to reopen the assessment.

The record before us indicates that Presley moved his residence, and that the proposed assessment was apparently sent to the wrong address. Consequently, we conclude that Presley was never notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until at least October 26, 2007, the date of the delinquency letter from the Secretary. In his motion to the Commission, filed with the Commission on November 21, Presley clearly states his intent to contest the proposed penalty assessment against him. We conclude from this that Presley timely notified the Secretary that he wished to contest the proposed penalty, once he had actual notice of the proposed assessment. *See Stech, emp. by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005).

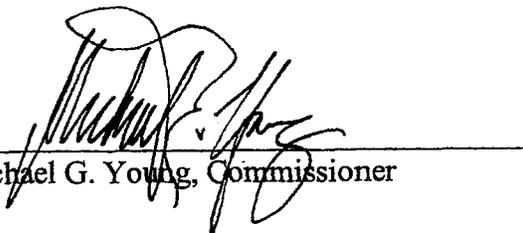
Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



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, D.C. 20001-2021

December 28, 2007

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

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Docket No. LAKE 2006-60-RM

v.

EMPIRE IRON MINING PARTNERSHIP

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Jordan and Young, Commissioners

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involves the contest of a citation issued to Empire Iron Mining Partnership ("Empire") upon investigation of a fatal accident that occurred after a miner attempted to free a stuck equipment part. Administrative Law Judge David Barbour concluded that the Secretary of Labor properly alleged alternative violations in the citation, and affirmed the violation of 30 C.F.R. § 56.14105.¹ 29 FMSHRC 317, 331 (Apr. 2007) (ALJ). He

¹ Section 56.14105, entitled "Procedures during repairs or maintenance," provides:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

30 C.F.R. § 56.14105.

did not reach the alleged violation of 30 C.F.R. § 56.12016.² *Id.* at 329. For the reasons that follow, we affirm the Judge’s decision.

II.

Factual and Procedural Background

The relevant facts are largely undisputed. Empire operates the Empire Mine, an open pit mine where taconite ore is mined and processed into ore pellets for use in the steelmaking industry. 29 FMSHRC at 319; Jt. Ex. 6, Stip. 1. After extraction, taconite ore is taken to an ore concentrator, where iron is separated from rock and then concentrated. 29 FMSHRC at 319. After the ore is filtered and concentrated, it is sent to the pellet plant, where it is fed into balling drums. *Id.* In the drums, the ore concentrate is combined with a binding agent, Bentonite, which fixes the concentrate. *Id.*; Tr. 130. The material is further formed into balls or pellets in the drums. 29 FMSHRC at 319. The pellets then travel into a kiln, where they are heated so that the binding agent fuses with the concentrated ore. *Id.* The hot pellets are then transferred to a cooler. *Id.*

A cooler is a ring-shaped machine that has a moving floor frame comprised of 30 segments, or “pallets,” that rotate around the cooler’s circumference. 29 FMSHRC at 319; Jt. Ex. 1, Stip. 16. The drive motor of the cooler is powered by electricity. 29 FMSHRC at 319. A dump arm with a wheel is attached to each pallet. *Id.* The hot pellets are deposited onto the pallets, where they cool as the pallets rotate. *Id.* The pellets are deposited so that most of the load of the pellets is on one side of the pallet. *Id.* A rail above the wheel on a pallet prevents the off-centered pallet from tipping over and dumping the pellets. *Id.* Each pallet eventually rotates to a dumping point, where the rail changes from a horizontal position to almost a vertical position. *Id.* With the rail no longer holding down the dump arm and pallet, the pallet moves into an almost vertical position, and the pellets fall off the pallet into a hopper. *Id.* Gravity causes the pallet to dump. *Id.* at 320.

² Section 56.12016, entitled “Work on electrically-powered equipment” provides:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

Occasionally a pallet sticks in the horizontal position and will not move into a vertical position to dump the pellets. *Id.* When a pallet sticks, the “sure dump system” is initiated. *Id.* Under that system, a hydraulic cylinder attached to the dump arm is compressed. *Id.* The cylinder applies force to the arm of the pallet and usually frees it. *Id.*

If the sure dump system does not free the stuck pallet, the cooler continues to travel until the dump arm contacts a limit switch. *Jt. Ex. 6, Stips. 20, 21.* The dump system has two limit switches: the alarm switch and the stop switch. 29 FMSHRC at 323. The alarm switch sends a signal to the cooler control room operator. *Id.* at 320, 323. The stop limit switch opens an electrical circuit that must be closed in order for the cooler to run. *Id.* at 323; *Tr. 67.* The stop switch does not turn off electricity to the circuit. 29 FMSHRC at 323.

When the cooler’s circuit is disrupted, the control room operator will attempt to start the cooler by pressing the start button in the control room. *Tr. 53, 185.* When he or she does so, that start command stays in the system for five seconds. *Tr. 185.* During that five-second period, the system examines whether the cooler’s drive motor circuit is complete. *Tr. 82-83.* If the pallet becomes unstuck during that five-second period, the cooler will start. *Tr. 185.*

On November 6, 2005, a pallet on Empire’s No. 4 cooler became stuck. 29 FMSHRC at 317. After the pallet stuck and the cooler stopped, the control room operator made 22 attempts in approximately three minutes to restart the cooler. *Id.* at 322-23. All of the attempts were unsuccessful. *Id.* at 323. Two assistant plant operators, Chad Weston and Jeremy Ring, were instructed to free the stuck pallet. *Id.* at 317, 320-21. Weston tried to position a porta-power³ correctly under the stuck pallet’s dump arm. *Id.* at 321. Weston was unable to position the porta-power after trying twice to do so. *Id.* Ring then tried to position the porta-power and, as he did so, the pallet arm released by itself. *Id.* Weston had moved between the dump arm and the guide rail. *Id.* When the pallet became unstuck and moved on its own, Weston was caught in the pinch point between the dump arm and the guide rail and was fatally injured.⁴ *Id.*

MSHA Inspector William Dethloff investigated the accident. *Id.* He stated that placing a porta-power under the dump arm of a pallet usually is not dangerous. *Id.* at 321-22. The inspector explained that a miner steps back once the porta-power has been placed and before the dump arm frees the pallet. *Id.* at 322. If the pallet is freed before the miner steps back, the pallet swings away from the miner’s hand. *Id.*

³ A porta-power is a portable hydraulic pump used to add force to the stuck pallet arm. 29 FMSHRC at 320.

⁴ At 11:49:01, a start command was given. *E. Ex. 4.* During the following five-second interval, the stuck pallet released while Weston was positioned in the pinch point. 29 FMSHRC at 321. It is undisputed that at the time of the accident, the stop switch operated as designed, and that the accident was not caused by the drive motor unexpectedly starting up while Weston was trying to free the stuck pallet. *Id.* at 323.

Shortly after the accident, Empire requested and received MSHA's approval to guard the area involved in the accident. *Id.* at 324. MSHA later issued a citation to Empire for its failure to have in place guards on the day of the accident, and Empire did not contest the citation. Tr. 34, 37.

On February 21, 2006, Inspector Dethloff issued Citation No. 6192002 to Empire. Jt. Ex. 6, Stip. 8. The citation alleged violations of 30 C.F.R. § 56.12016 for the failure to deenergize and lock out the cooler before mechanical work was performed on it *and/or* 30 C.F.R. § 56.14105 for the failure to turn off power and block against hazardous motion before performing repairs or maintenance. *Id.*, Stip. 9. The citation alleged that the fatal accident was the result of the operator violating either or both of the standards. 29 FMSHRC at 318 n.1. The inspector testified that, because the guarding was already in place by the time that the citation was issued, miners were protected from hazardous motion. *Id.* at 324. MSHA determined that the only appropriate measures that remained to be taken to abate Citation No. 6192002 were to establish new policies and procedures to require cooler drives to be deenergized and locked out and to post a warning sign at the switch before a miner could begin work to free a stuck pallet. *Id.* In addition, Empire was required to implement plans to train miners who worked on stuck pallets. *Id.* The citation also alleged that the violations resulted from the operator's significant and substantial ("S&S") failure to comply with the standards. *Id.* at 318.

On April 26, 2006, the Secretary moved to amend Citation No. 6192002 from stating that the operator violated section 56.12016 "and/or" section 56.14105, to stating that the operator violated only one of the two standards. Jt. Ex. 6, Stip. 10. In addition, she moved to amend the citation to state that the cited conditions were not a cause of injury on November 6, 2005. *Id.*, Stip. 11. Empire took no position on the motion, and the Judge granted it. 29 FMSHRC at 318 n.1. On May 31, 2006, MSHA issued the amended citation to Empire. *Id.* Empire challenged the amended citation, and the matter proceeded to hearing.

The Judge affirmed Citation No. 6192002 to the extent it alleged that Empire violated section 56.14105. *Id.* at 331. He first determined that the Secretary was permitted to allege violations in the alternative in the citation. *Id.* at 326. Rejecting the operator's argument that analogy to the Federal Rules of Civil Procedure was inappropriate, the Judge reasoned that administrative pleadings are liberally construed and easily amended as long as adequate notice is provided and there is no prejudice to the opposing party. *Id.* He found that Empire had adequate notice of the alternative standards and was not prejudiced by the charge that it violated one of them. *Id.* He further determined that the operator was able to prepare for the hearing, and that it knew what to do to abate the citation. *Id.* at 326-27. The Judge concluded that Empire had violated section 56.14105 because freeing the stuck pallet involved the "repair or maintenance" of the cooler within the meaning of the standard, and the cooler had not been deenergized or locked out, nor had the dump arm been blocked against hazardous motion. *Id.* at 329. He did not reach the issue of whether Empire violated section 56.12016. *Id.* The Judge affirmed the S&S designation and dismissed Empire's contest. *Id.* at 329-30, 331.

Empire petitioned for review of the Judge's decision, and the Commission granted the petition.⁵

II.

Disposition

A. Alternative Violations

Empire argues that the Judge erred in permitting the Secretary to allege alternative violations in the citation. E. Br. at 7-13. It asserts that alternative allegations violate the particularity requirements of section 104(a) of the Mine Act, 30 U.S.C. § 814(a). *Id.* at 7-8. Empire further contends that it did not know what to do to abate the citation because sections 56.14105 and 56.12016 set forth distinct and contradictory requirements. *Id.* at 11-12.

The Secretary responds that the Judge correctly concluded that a citation may allege alternative violations. S. Br. at 7-14. She contends that section 104(a) of the Mine Act does not limit her ability to cite violations in the alternative. *Id.* at 11-12. The Secretary submits that she cited alternative violations because, although she believes that section 56.12016 applies to mechanical work being performed on electrically-powered equipment even when the hazard posed is equipment movement rather than electrical shock, the Ninth Circuit held to the contrary in *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). The Secretary explains that citing violations in the alternative allowed her to advance her disagreement with the holding in *Phelps Dodge*, while avoiding being left without an enforcement action if the Judge followed that holding in this case, which arises in the Sixth Circuit. *Id.* at 7-8; Tr.14. The Secretary further contends that Empire was not prejudiced by abating both violations alleged in the citation. S. Br. at 13-14.

We conclude that the Secretary's citation of alternative violations of section 56.14105 and 56.12016 in this instance did not violate the particularity requirements of the Mine Act. Section 104(a) of the Act provides in part that, "[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. § 814(a). The Commission has previously recognized that the purpose of this particularity requirement is to "allow[] the operator to discern what conditions require abatement, and to adequately prepare for a hearing on the matter." *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993).

⁵ In addition, Empire filed a motion requesting oral argument. The Commission hereby denies the request.

Substantial evidence supports the Judge's determination that Empire was able to discern what conditions required abatement and to prepare for a hearing on the matter.⁶ First, Empire does not deny that it was able to prepare for a hearing. See E. Br. at 12. Second, we find no evidence that the operator was unable to discern what conditions required abatement. 29 FMSHRC at 327. The abatement actions included implementing new policies and procedures that required miners working to free a stuck pallet to deenergize and lock out the cooler drive and post a warning notice, and providing training for miners working to free stuck pallets. Gov't Ex. 3. It is undisputed that the operator adequately abated the citation.

Moreover, we find unpersuasive Empire's argument that it did not know what to do to abate the citation because sections 56.14105 and 56.12016 set forth different requirements for compliance. As Empire argues, section 56.12016 requires that, before work is done on electrically powered equipment, the equipment must be locked out or other measures taken to prevent the accidental re-energization of the equipment, while section 56.14105 does not specifically require that equipment be locked out. The requirements of the standards overlap, however, in that section 56.12016 requires that equipment must be deenergized before mechanical work is performed on the equipment, while section 56.14105 provides that repairs or maintenance of equipment must be performed after the power is off. Empire's abatement action involving implementing procedures for deenergizing and locking out the cooler abated in part both alleged violations. 29 FMSHRC at 397. Thus, Empire was not presented with a situation in which it could abate only one of the violations and did not know which to abate.⁷

Furthermore, we disagree with the operator that the language of section 104(a) prohibits the Secretary from alleging alternative violations in this instance. Section 104(a) refers to "the provision of the . . . standard," in the singular, to be set forth in a citation. However, as noted by the Secretary, Congress has stated in the Dictionary Act that, "In determining the meaning of any act of Congress, unless the context indicates otherwise, words importing the singular include and apply to the plural." S. Br. at 11 (quoting 1 U.S.C. § 1). We see nothing in the context of the section 104(a) language referred to by Empire that indicates that only a single provision may be

⁶ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁷ We further reject Empire's assertion that it was prejudiced by being required to comply with "two distinctly contradictory allegations requiring different abatements" (E. Br. at 10), since, even accepting that the standards required distinctly different abatement actions, the Secretary could have required such abatement through the issuance of separate citations. In fact, as the Secretary stated, because the inspector issued one citation alleging alternative violations, the operator faces the possibility of receiving only one civil penalty rather than two. S. Br. at 14.

described in Citation No. 6192002. In fact, considering that language in context, it is the “nature of the violation” that must be described with particularity. Here, as the Judge found, “the alternatively charged violations were based on the same underlying facts” and involved standards with similar requirements. 29 FMSHRC at 326. Thus, even though the citation set forth alternative violations, we conclude that the nature of the violation was described with sufficient particularity.

We emphasize that our holding is limited to the facts of this case. Although it was cited for alternative violations in a citation, Empire was able to prepare for a hearing and knew what to do to abate the citation. Furthermore, as the Secretary states, the Ninth Circuit’s decision in *Phelps Dodge* created some legal doubt regarding which of the two standards applied.⁸ We caution the Secretary that circumstances may exist in other cases that would make improper the citation of alternative violations.

B. Alleged Violation of Section 56.14105

Section 56.14105 requires in part that “[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.” 30 C.F.R. § 56.14105. Empire contends that the Judge erred in finding a violation of section 56.14105 because unsticking a pallet is not repair or maintenance within the meaning of the standard. E. Br. at 14-16. It argues that even if that activity may be considered repair or maintenance, unsticking a pallet falls within the standard’s exception that “Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected by motion.” 30 C.F.R. § 56.14105; E. Br. at 14-16. Empire explains that movement of the arm was essential to unsticking the pallet and that it had provided effective protection from hazardous motion by means of training, warning against proximity to the pinch point, and the location of the pinch point itself. E. Br. at 17.

The Secretary responds that the Judge properly concluded that the operator violated section 56.14105 because the operator had been engaged in repair or maintenance work while attempting to free the stuck pallet, and the power was not completely removed from the drive motor. S. Br. at 14-19. She asserts that the Commission should reject Empire’s argument that the exception contained in section 56.14105 applied. *Id.* at 19-20.

The Commission has defined the term “repair” to mean “to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state.”

⁸ We agree with the dissenting Judge in *Phelps Dodge* that the language of section 56.12016 “is clear and unambiguous.” 681 F.2d at 1193 (Boochever, dissenting). As Judge Barbour noted below, “the standard means exactly what it says – to wit, that “[e]lectrically powered equipment shall be de[-]energized before mechanical work is done on such equipment.” 29 FMSHRC at 328 (alterations in original).

Walker Stone Co., 19 FMSHRC 48, 51 (Jan. 1997), *aff'd*, 156 F.3d 1076 (citations omitted). Quoting in part the Dictionary of Mining, Mineral, and Related Terms, it further defined “maintenance” 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.” *Id.* In *Walker Stone*, the Commission noted that obstructing rock caused the crusher’s drive motor to stall, rendering the crusher defective or inoperable until the rock was removed. *Id.* Accordingly, it concluded that breaking up rocks to unclog a crusher constituted “repair” or “maintenance” within the meaning of section 56.14105. *Id.* It explained that the removal of rock was necessary to restore the crusher to a sound state or to keep it in a state of repair or efficiency, and that a malfunctioning condition had been remedied by restoring the crusher to the same condition it was in before it became clogged. *Id.*

The Judge’s conclusion that Empire was involved in the “repair or maintenance” of machinery when miners worked to free the stuck pallet (29 FMSHRC at 329) is consistent with Commission precedent. A malfunctioning condition on the cooler had to be remedied by restoring the cooler to the same condition it was in before the pallet became stuck.⁹ Thus, freeing the stuck pallet of the cooler was necessary to restore the cooler to a sound state or to keep it in a “state of repair or efficiency.” *Walker Stone*, 19 FMSHRC at 51.

Moreover, substantial evidence supports the judge’s determination that the pallet was not deenergized or blocked against motion.¹⁰ First, it is undisputed that the dump arm was not

⁹ We reject Empire’s argument that the Judge’s conclusion did not focus on industrial realities, i.e., that such work was not considered in the industry to be repair or maintenance. Although Empire’s witnesses testified that they considered freeing the stuck pallet to be operational work rather than repair or maintenance (Tr. 147, 198), Inspector Dethloff testified that freeing the stuck pallet was maintenance (Tr. 76). The Judge, having noted such conflicting testimony (29 FMSHRC at 323 & n.14, 324 n.15), found that freeing the stuck pallet involved repair or maintenance. *Id.* at 329. The Commission has repeatedly recognized that a judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). We see no reason to overturn the judge’s finding. In any event, the Tenth Circuit rejected the operator’s similar argument in *Walker Stone* that breaking up rocks to unjam machinery was not recognized in the industry as repair or maintenance of such machinery. 156 F.3d at 1081. The Court noted that in defining maintenance, the Commission had appropriately relied on a dictionary specifically focused on the mining industry. *Id.*

¹⁰ Our dissenting colleague attempts to transform this case into a violation of a guarding standard. Slip op. at 14-16. However, the guarding standard, 30 C.F.R. § 56.14107(a), and section 56.14105 impose separate and distinct duties upon the operator. The latter standard not only requires that equipment be blocked against hazardous motion, but also that the power must be off. The dissent also discredits the additional abatement required by MSHA in this case, including new policies and procedures requiring the cooler drive to be de-energized and locked

blocked against hazardous motion, as evidenced by the unencumbered motion that killed Weston. 29 FMSHRC at 329. As to whether the cooler was deenergized, we reject Empire's argument that the cooler was "turned off" by the operation of the limit switch. E. Br. at 14, 16 & n.6. It is undisputed that, although the stop switch shut down the cooler by opening the electrical circuit necessary to run the cooler, the switch did not turn off electricity to the circuit. 29 FMSHRC at 323, 329; Tr. 44, 67, 77-78, 82. The judge therefore correctly held that the cooler drive motor was not "off" within the meaning of the standard because the stop limit switch did not de-energize or lock out the power. 29 FMSHRC at 329.

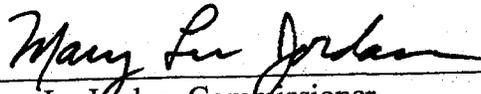
The Judge erred, however, by failing to examine whether Empire's actions in working to free the stuck pallet fell within the exception that machinery motion is permitted to the extent that adjustments cannot be performed without motion, provided that persons are effectively protected from hazardous motion. As argued by Empire, it would appear that movement of the pallet dump arm was integral to the work of releasing the arm. E. Br. at 17. Nevertheless, even if adjustments could not be performed without motion of the dump arm, we, along with our dissenting colleague, slip op. at 14, disagree with Empire that it provided adequate protection against hazards. *Id.* Contrary to Empire's assertions, the position of the pinch point clearly did not provide adequate protection to Weston from hazardous motion. Moreover, the warnings and training provided by Empire were not adequate protection. As the Tenth Circuit has recognized, the fact that an employee failed to comply with company policy does not mean that the company provided effective protection within the meaning of the exception. *Walker Stone*, 156 F.3d at 1085. Thus, although the Judge erred by failing to consider the exception, we consider such error to be harmless and affirm in result the Judge's determination that Empire violated section 56.14105.

out with a warning notice at the switch, and additional training of miners.

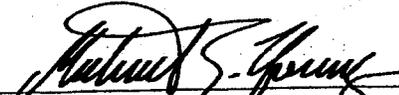
III.

Conclusion

For the foregoing reasons, we affirm the Judge's determination that the Secretary properly alleged alternative violations in Citation No. 6192002 and that Empire violated section 56.14105.¹¹



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

¹¹ We do not reach the issue of whether Empire violated section 56.12016.

Chairman Duffy, dissenting:

Three mandatory safety standards were cited in this case, only one of which is implicated in the fatal accident that occurred in the cooling facility of Empire's taconite plant. The Secretary cited the first standard three months after the fatality, on January 30, 2006, when she issued citation number 6175971. Tr. 34, 37. The citation alleged a violation of 30 C.F.R. § 56.14107(a), which provides that "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." See Mine Safety & Health Admin., Data Retrieval System ("MSHA DRS"), <http://www.msha.gov/drs/drshome.htm> (Empire Iron Mining Partnership ("Empire Iron"), Violations).

By the time the citation was issued, Empire had already installed guarding around the pinch point between the dump arm and the guide rail which caused the death of Mr. Weston so that the citation was, in effect, abated upon issuance. 29 FMSHRC 317, 324 (Apr. 2007) (ALJ); Tr. 33, 143; E. Ex. 9. Empire did not contest that citation and it appears that the operator paid the penalty of \$35,500. See MSHA DRS, <http://www.msha.gov/drs/drshome.htm> (Empire Iron, Violations).

On February 21, 2006, three weeks after the guarding citation was issued, the Secretary issued a citation alleging that Empire had also violated 30 C.F.R. § 56.12016 and/or 30 C.F.R. § 56.14105. 29 FMSHRC at 317-18 & n.1; Jt. Ex. 6, Stip. 9. Finally, on April 26, 2006, five and one-half months after the fatal accident, the Secretary successfully moved to amend the February 21, 2006, citation to allege that Empire had violated either section 56.12016 or section 56.14105, but not both. 29 FMSHRC at 318, n.1; Jt. Ex. 6, Stip. 10. In my view, the matter should have ended with the issuance of the earlier guarding citation, for I believe that the standard set forth in section 56.12016 does not apply in this case, and that Empire complied with the standard set forth in section 56.14105 to the extent that the standard was not duplicative of section 56.14107(a). Accordingly, I would reverse the judge and vacate the citation on review. In so doing, I take exception to the judge's and my colleagues' conclusion that the Secretary may allege violations of alternative standards in the same citation.

I have highlighted the time line in this case in recognition of the fact that in the aftermath of a serious accident or fatality, it is not uncommon for the Secretary to take weeks, months, or even years to issue citations or orders for the underlying violations alleged to have been found after extensive investigation. The vast majority of enforcement actions, however, are taken contemporaneously with an inspector's discovery of what he deems a violation. Whatever position the Commission takes, therefore, on the issue of whether section 104(a) of the Act authorizes the Secretary to allege violations of alternative standards in the same citation, will apply to on-the-spot enforcement actions, where abatement is immediately required, as well as to enforcement actions taken after extensive deliberation by the Secretary's inspectors and solicitors, and long after abatement measures have been taken to address the conditions giving rise to the accident or fatality.

Thus, notwithstanding the majority's disclaimer that its holding "is limited to the facts of this case" (slip op. at 7), they have embraced the proposition that the Secretary can allege violations of separate standards in the same citation. I believe this to be a troublesome precedent because it will result in mixed signals to operators regarding the measures necessary to abate citations.

In approaching the issues presented here, it is helpful to consider how the Mine Act is designed to operate. First, the Secretary, under section 101 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), sets mandatory safety and health standards for mining and mineral processing that, if followed, will reduce, if not eliminate, accidents, injuries, and fatalities. 30 U.S.C. § 811. Then, pursuant to section 103 of the Act, the Secretary's representatives inspect mines to determine whether the conditions and practices they encounter comport with the standards. *Id.* § 813. If those conditions or practices do not meet the standards, enforcement action is taken in the form of citations and orders issued pursuant to section 104 of the Act. *Id.* § 814. The consequences of those enforcement actions are twofold. First, under risk of a mine closure order and prior to the opportunity for a hearing to determine the legitimacy of the Secretary's enforcement action, the operator must abate the citation or order by correcting the conditions or practices so as to conform, once again, with the standard. *Id.* § 814(b). Second, sanctions are imposed—civil penalties, or, in more egregious cases, closure orders or criminal penalties. *Id.* §§ 814, 815, 820.

For purposes of deciding this case, I find that the ultimate method of abatement provides the starting point for determining which standards Empire was appropriately charged with violating. In other words, what corrective actions was Empire required to take in order to re-establish compliance with the standards and were those actions warranted *by the terms of the standards cited*? When all is said and done, the operator was required to provide guarding around the hazardous area, which constitutes abatement of the citation issued for the violation of section 56.14107(a), and to de-energize, lock out, and tag the circuit supplying power to the cooling facility, which constitutes abatement of the citation issued for a violation of section 56.12016.

As noted above, the guarding citation has been conceded by Empire and is not before us. As for the citation requiring de-energizing and locking out the circuit supplying power to the cooling facility, there is a fundamental question regarding its application in these circumstances owing to the Ninth Circuit Court of Appeals' decision in *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982), which held that what is now 30 C.F.R. § 56.12016 is aimed only at protecting against electrical shock, not against unexpected hazardous motion during repair or maintenance work.

I fully concur with the Court's decision in *Phelps Dodge*. The purpose of the lockout/tagout requirement of section 56.12016 is to insure that only the person working on an

electrical circuit can re-energize it.¹ The Secretary would have the Commission arrive at an interpretation of section 56.12016 different from that reached by the Ninth Circuit because this case arose in a different circuit. I decline, however, to accept the Secretary's invitation for the Commission to engage in non-acquiescence with the Ninth Circuit's opinion; doing so would balkanize mine safety and health enforcement when a fundamental purpose for federal primacy in mine safety and health matters is uniformity across the several states.

As for the violation of section 56.14105, I agree with the majority that the standard generally applies in this case, inasmuch as the actions taken to free the stuck pallet constitute "repair and maintenance" for purposes of the standard. Slip op. at 8. I part company with my colleagues, however, with respect to the degree to which Empire was not in compliance with the standard.

First, the stop switch effectively removed power from the cooler for purposes of the standard, since the standard says nothing about de-energizing and locking out the entire circuit. While it is true that the stop switch does not de-energize the entire circuit, it does shut down the cooler assembly. Tr. 177-78, 197. The switch was entirely under the control of the control room operator who had dispatched Weston and Ring to the cooler. 29 FMSHRC at 320-21. The judge found that the stop switch was functioning properly. *Id.* at 323.²

Second, the conditions relating to the stuck pallet and the efforts of Mr. Weston and Mr. Ring to free it bring the circumstances under the exception set forth in the standard, that is, machinery or equipment motion or activation is permitted to the extent that "adjustments . . . cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion." 30 C.F.R. § 56.14105. As the judge found, after all other measures failed, the porta-power had to be brought in to release the dump arm. 29 FMSHRC at 321-23. Moreover, there was no feasible means to block the dump arm against movement. *Id.* at 329

¹ The decision in Phelps Dodge is now twenty-five years old. During that period the Secretary has not seen fit to amend section 56.12016 to specify that it applies to the circumstances presented here. On the other hand, the Secretary did revise section 56.14105 in 1988, six years after the Phelps Dodge decision, but did not elect to incorporate into that standard the requirements to de-energize, lock out, and tag an electrical circuit prior to commencing repair or maintenance. 53 Fed. Reg. 32,496, 32,508, 32,523 (Aug. 25, 1988).

² Even if section 56.14105 could be read to require de-energizing and locking out the circuit, the judge found that there was "no testimony establishing the dangers faced by miners if the cooler drive motor unexpectedly started up while a miner was trying to free a stuck pallet. Nor was there evidence of other electrical hazards compliance would prevent." 29 FMSHRC at 328 n.22.

n.23. Indeed, the whole point of Weston and Ring's efforts was to cause the dump arm to move so as to free up the stuck pallet.³ *Id.* at 320-21.

In any event, the judge concluded that Empire ultimately achieved compliance by installing guarding around the cooler to prevent miners from gaining access to the pinch point. *Id.* at 324. That, however, was precisely the means used to abate the section 56.14107(a) guarding violation.

Given my view that the power was off for purposes of the standard, and that the actions taken to free up the stuck pallet fell within the exception allowed for under the standard, the only element of the standard that Empire failed to meet was "effectively protect[ing]" Weston "from hazardous motion." That failure also provides the basis for Empire's violation of section 56.14107(a). As such, citing Empire under both section 56.14107(a) and section 56.14105 was duplicative. Duplicate citations for the same violative condition are foreclosed under well-established case law holding that the Secretary cannot issue separate citations under two different standards unless those standards "impose separate and distinct duties on the operator." *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997); *see also Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993).

In sum, as I view this case, the single cause of the fatality was the lack of proper guarding. I believe that the guarding citation captures the violative conditions adequately—particularly when it is tied to the ultimate means of abatement accepted by the Secretary.

As to the Secretary's argument that she can allege violations of alternative standards in the same citation (S. Br. at 7-14), I do not believe section 104(a) permits that type of enforcement action. I view section 104(a) of the Act as clear and unambiguous: one violation per citation. The "particularity" criterion expressed in the provision relates directly to the nature of the violation which, in turn, includes "a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. § 814(a).

The Secretary's recourse to the Dictionary Act, endorsed by the majority (*see slip op.* at 6), is unavailing. That statute does not apply when the "context indicates otherwise." 1 U.S.C. § 1. Here, the context provided by the Mine Act clearly indicates that the use of the singular in 104(a) is intentional. For example, section 110(a)(1) of the Mine Act provides:

³ The judge indicated that lack of feasibility of compliance is not a defense to a citation. 29 FMSHRC at 323. That may not necessarily be true. In *Sewell Coal Co.*, 3 FMSHRC 1380 (June 1981), *aff'd*, 686 F.2d 1066 (4th Cir. 1982), the Commission acknowledged that impossibility of compliance might be a defense to a citation and cited to Interior Board of Mine Operations Appeals decisions under the 1969 Coal Mine Health and Safety Act where citations were vacated "because of the unavailability of required equipment in the marketplace." 3 FMSHRC at 1381 n.5.

The operator of a coal or other mine in which *a violation* occurs of a mandatory safety and health *standard* or who violates any other *provision* of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$[6]0,000 *for each such violation*.

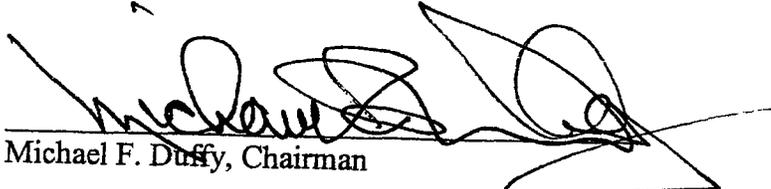
30 U.S.C. § 820(a)(1) (emphases added).⁴ See also 30 C.F.R. § 100.3(a).

As a practical matter, allowing the Secretary to allege violations of alternative standards in the same citation serves to muddy the distinctions between the two standards, both as to their discrete requirements and the means by which they are to be abated. That is certainly the case here, for it seems to me that what the Secretary, the judge, and my colleagues have done is to treat section 56.14105 as a kind of hybrid of sections 56.14107(a) and 56.12016 and ascribe to it requirements that it does not possess on its own.

The problem with that approach is that it does not adequately take into account the exception provided in section 56.14105, i.e., that removing the power and blocking the equipment against hazardous motion is not required if “adjustments or testing cannot be performed without motion or activation,” a circumstance that clearly exists in this case. Moreover, it results in Empire’s having to comply with section 56.14105 by undertaking the abatement measures required by section 56.12016, even though Empire has not been found to have violated that standard. Lastly, it results in Empire’s being cited twice for the same offense: failing to guard the pinch point.

Finally, when the Secretary argues that the Commission can find a violation of section 56.14105 or section 56.12016, but not both, she is presenting the Commission with what logicians call a false dichotomy. If someone tells me that black is black and white is white, I have no trouble following him. If he says, however, that if black is black, then white cannot be white or if white is white, then black cannot be black, I have a great deal of trouble following him.

Therefore, to avoid such confusion, the Secretary should have chosen which standard to pursue or chosen to pursue both standards by way of separate citations. In either case I would not have found a violation, but such a litigation strategy would not have stretched section 104(a) of the Mine Act beyond logical comprehension.



Michael F. Duffy, Chairman

⁴ It is obvious from the precise language of section 110(a) that Congress did not intend to allow the Secretary to assess one civil penalty for two separate violations cited in the same citation. Slip op. at 6 n.7.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Washington, D.C. 20001-2021
Telephone No.: (202) 434-9958
Fax No.: (202) 434-9949

November 6, 2007

SECRETARY OF LABOR,	:	CONTEST PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2007-37-R
Respondent,	:	Citation No. 7493853; 10/27/2006
	:	
v.	:	Docket No. LAKE 2007-38-R
	:	Citation No. 7493854; 10/27/2006
	:	
	:	Docket No. LAKE 2007-39-R
	:	Citation No. 7493855; 10/27/2006
	:	
	:	
SOLAR SOURCES, INC.,	:	Mine ID: 12-01732
Contestant,	:	Mine: Craney Mine

ORDER OF DISMISSAL

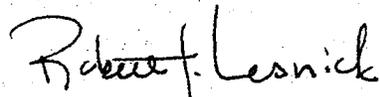
On January 5, 2007, Counsel for Solar Sources, Inc. ("Solar Sources") filed notices of contest with the Commission in the above captioned cases for three violations that were issued against Solar Sources on October 27, 2006, by Mine Safety and Health Administration ("MSHA") inspectors.

On January 16, 2007, the Commission received the Secretary's Motion to Dismiss on the grounds that Solar Sources failed to file its notices of contest within the 30-day period prescribed by Commission Rule 20(b), 29 C.F.R. § 2700.20(b). Sec'y Mot. 2. In its response to the Secretary's motion, Solar Sources asserts that two successive documents issued by MSHA titled "Mine Citation/Order Continuation" led them to believe that MSHA had extended the time to file its Notices of Contest. Solar Sources Mot. 1-2. It further contends that, "[e]ven if Solar Sources' Notice of Contest was untimely filed, the Commission should accept the filing because its untimeliness was a result of [its] mistake and/or excusable neglect." Solar Sources Mot. 2. The Secretary maintains that the aforementioned documents were issued to Solar Sources, but she disputes Solar Sources contention that the MSHA inspectors' subsequent actions to modify the abatement time extended the time to file its Notices of Contest. Sec'y Mot. 3.

A long line of cases dating back to the Interior Board of Mine Operation Appeals have held the late filing of notices of contest of citations is not permissible under the Mine Act nor under its predecessor, the Federal Coal Mine Health and Safety Act of 1969. *Consolidation Coal Co.*, 1 MSHC 1029 (1972); *Old Ben Coal Co.*, 1 MSHC 1330 (1975); *Alexander Brothers*, 1 MSHC 1760 (1979); *Island Creek Coal Co. v. Mine Workers*, 1 FMSHRC 989 (Aug. 1979); *Amax Chemical Corp.*, 4 FMSHRC 1161 (June 1982); *Industrial Resources, Inc.*, 7 FMSHRC 416 (Mar. 1985); *Allentown Cement Company, Inc.*, 8 FMSHRC 1513 (Oct. 1986); *Rivco Dredging Corp.*, 10 FMSHRC 889 (July 1988); *Big Horn Calcium*, 12 FMSHRC 463 (Mar. 1990); *Prestige Coal Co.*, 13 FMSHRC 93 (Jan. 1991); *Costain Coal Inc.*, 14 FMSHRC 1388 (Aug. 1992); *Diablo Coal Co.*, 15 FMSHRC 1605 (Aug. 1993); *C and S Coal Co.*, 16 FMSHRC 633 (Mar. 1994); *Asarco, Inc.*, 16 FMSHRC 1328 (June 1994); *See also, ICI Explosives USA, Inc.*, 16 FMSHRC 1794 (Aug. 1994).

The late filing of a contest of a citation or order has been allowed where the Secretary's own conduct is responsible for the operator's delay in filing a notice of contest. *Blue Diamond Coal Co.*, 11 FMSHRC 2629 (Dec. 1989); *See also, Consolidation Coal Co.*, 19 FMSHRC 816 (April 1997); *Freeman Coal Mining Corp.*, 1 MSHC 1001 (1970). However, I agree with the Secretary that the present situation does not warrant an exception to the general rule because the late filing was not due to the actions of the Secretary. In addition, Solar Sources has the benefit of Counsel, as shown by the certificate of service on the notice of contest dated January 5, 2007, and Counsel should have been aware of the strict 30-day rule. Moreover, Solar Sources has been before the Commission in other matters and should be familiar with Commission rules.

Accordingly, the Secretary's motion to dismiss is **GRANTED**. The operator should note, however, that the failure to properly contest the citations does not preclude it from challenging in a subsequent civil penalty proceeding the violations and findings alleged in the citations.



Robert J. Lesnick
Chief 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

November 13, 2007

MARTIN COUNTY COAL CORPORATION, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent. Preparation Plant. Docket No. KENT 2002-42-R Citation No. 7144401: 10/17/01. Docket No. KENT 2002-43-R Citation No. 7144402: 10/17/01. CIVIL PENALTY PROCEEDING. Docket No. KENT 2002-262 A.C. No. 15-05106-03571. Preparation Plant. MARTIN COUNTY COAL CORPORATION, Respondent.

DECISION

Appearances: James B. Crawford, Esq., Melissa Bowman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary of Labor; Marco M. Rajkovich, Jr., Esq., Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, on behalf of Martin County Coal Corporation.

Before: Judge Zielinski

These cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalties 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. The violations at issue here arose out of the Secretary's investigation of the October 11, 2000, slurry spill and breakthrough at Martin

County Coal's ("MCC") Big Branch Slurry Impoundment, near Inez, Kentucky. These violations and several others, including violations alleged against Geo/Environmental Associates, were the subject of a January 14, 2004, Decision by an Administrative Law Judge. *Martin County Coal Corp.*, 26 FMSHRC 35 (Jan. 2004) (ALJ). By Decision dated May 30, 2006, the Review Commission vacated portions of that Decision and remanded the cases. *Martin County Coal Corp.*, 28 FMSHRC 247 (May 30, 2006). With the exception of the two violations at issue here, all other issues involved in the earlier proceedings have been resolved by the ALJ Decision, the Commission Decision, or through settlement. Remaining at issue are Citation No. 7144401 and Order No. 7144402, alleging significant and substantial ("S&S") and unwarrantable failure violations of 30 C.F.R. § 77.216(d) for MCC's failure to follow its approved Impoundment Sealing Plan.

Supplemental hearings were held in Pikeville and Louisville, Kentucky on January 16-18 and February 23, 2007.¹ The parties filed briefs after receipt of the transcripts. For the reasons set forth below, I find that the Secretary has not proven the alleged violations, and vacate the citation and order.

Findings of Fact - Conclusions of Law

Background

For a full discussion of the history of the impoundment and related developments, see the Review Commission Decision. Briefly, in May 1994, slurry and water from the impoundment broke through into MCC's adjacent and largely inactive 1-C (Coalburg Seam) mine. Over 100 million gallons of material, mostly water, was discharged and flowed out of the mine at three locations, including the South Mains Portal. MCC hired a geotechnical engineering consulting firm, Ogden Environmental & Energy Services, and submitted plans designed to reduce the potential for future breakthroughs and to enable MCC to use the impoundment for the foreseeable future. The Secretary's Mine Safety and Health Administration ("MSHA") approved MCC's Impoundment Sealing Plan ("Plan") on October 20, 1994, after additional information was provided clarifying certain aspects of the Plan.²

The Plan called for construction of a "seepage barrier," around the perimeter of the impoundment above the outcrop of the Coalburg Seam, in areas where the 1-C mine workings

¹ Transcripts of the various hearings are referred to as follows: "Tra." – hearings of June 2003; "Trb." – hearings of August 2003; "Trc." – hearing of January 16, 2007; "Trd." – hearing of January 17, 2007; "Tre." – hearing of January 18, 2007; and "Trf." – hearing of February 23, 2007.

² A "Short Term Plan," to allow re-commencement of operations, was submitted in May of 1994. In August 1994, a plan intended to govern future operation of the impoundment was submitted. The plans are referred to collectively as the "Impoundment Sealing Plan."

posed the potential for another breakthrough. The barrier was intended to reduce seepage into the 1-C mine and to provide bulk that would fill and plug any breakthrough that might occur. It was constructed using spoil material generated from surface mining of the Stockton Seam, MCC's 1-S mine, which lay about 100 feet above the Coalburg Seam. That material consisted largely of highly permeable shot sandstone. The Plan contemplated that fine refuse would be deposited on the barrier to decrease its permeability. As actually constructed, the barrier was approximately 40 feet thick, measured horizontally, and extended 1.4 miles along the perimeter of the impoundment. Construction of the seepage barrier was completed in late 1995 or early 1996. The Plan also called for monitoring of outflow at the South Mains Portal of the 1-C mine, and the reporting to MSHA of any unusual changes in flow quality or quantity that would indicate possible impoundment leakage. In February 1996, MCC retained Geo/Environmental Associates ("Geo") to perform weekly impoundment monitoring.

On October 11, 2000, another breakthrough into the 1-C mine occurred. More than 300 million gallons of slurry-laden water rushed out through the mine and into adjacent streams. An extensive investigation was conducted by MSHA. The violations at issue here allege that MCC failed to comply with the Plan in two respects.

Order No. 7144402

Order No. 7144402 was issued on October 17, 2001, in conjunction with the release of MSHA's Report of Investigation of the October 11, 2000, impoundment failure. The Order was issued pursuant to section 104(d)(1) of the Act, and alleges a S&S and unwarrantable failure violation of 30 C.F.R. § 77.216(d), which requires that operators of mines with slurry impoundments implement the design, construction and maintenance of such facilities in accordance with plans approved by the MSHA District Manager. As described in the "Condition or Practice" section of the Order, the violation is based upon MCC's failure to "periodically direct the fine refuse slurry discharge along the 'seepage barrier,'" as required in the Plan. Ex. Jt-4B.

The Order was vacated in the original ALJ decision, upon a finding that the Secretary had failed to establish a prima facie case. The Commission reversed. Two of the three Commissioners that heard the case concluded that, "[b]ased on its plain language, the plan provision requires the operator to place or cause to move fine refuse over the length of the seepage barrier by regularly changing the course of the slurry discharge."³ 28 FMSHRC at 256. The Commission found that "MCC does not sufficiently comply with the impoundment plan by merely pumping fine slurry into the impoundment without ensuring that the fines have accomplished the stated purpose, which is to adequately cover the seepage barrier 'to reduce, to

³ Commission Chairman Duffy also voted to reverse, but found that the Plan's language was ambiguous, and that under Commission precedent, the Secretary was obligated to establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement. 28 FMSHRC at 273-75.

the extent practical, seepage from the impoundment that could contribute to the occurrence of another breakthrough.” 28 FMSHRC at 257. It remanded the case for a determination of “whether MCC provided effective coverage of the seepage barrier under the terms of the Impoundment [Sealing] Plan.” 28 FMSHRC at 257.

The Plan

As the Commission emphasized, the Plan must be read as a whole. 28 FMSHRC at 256-57. There are several provisions of the Plan that bear on the question of whether MCC provided effective coverage of the seepage barrier. Some were included in MCC’s original August 1994 submission, and others were included in its October 5, 1994, letter forwarding revisions in response to concerns that had been raised by MSHA. Pertinent provisions include:

Following completion of the “seepage barrier” fine refuse shall be directed along the barrier by periodically redirecting the discharge of fine refuse slurry. As fine refuse settles and consolidates along the surface of the “seepage barrier,” seepage should be further reduced due to the low permeability of consolidated fine refuse. Also, to further reduce the seepage from the impoundment, the pool level in the impoundment should be maintained as low as possible, thereby, reducing the quantity of clear water in the impoundment and the hydraulic head. As the fine refuse deposit progresses up the slope of the “seepage barrier,” the quantity of seepage in the area of the mine workings in the Coalburg seam should progressively reduce. After the impoundment level has increased to a level above the Stockton mine bench, we believe the potential for a “breakthrough” in the future is reduced considerably.

Ex. G-2 at 7, MCC-A1 at 012297.

The purpose of the “seepage barrier” is twofold. The primary purpose for the barrier will be to reduce, to the extent practical, seepage from the impoundment that could contribute to the occurrence of another “breakthrough.” Secondly, the barrier will provide bulk that will collapse into the subsided area in the event another “breakthrough” occurs and should form a “plug,” limiting the amount of fine coal refuse and water entering the mine.

Ex. G-2 at 4, MCC-A1 at 012294.

The function of the spoil material placed in the seepage barrier is to provide bulk and sealing in the event of a collapse or breakthrough. The primary seepage control is provided by fine refuse deposited in the impoundment against the fill as operations progress. This control reduces the potential for piping of material from the fill into openings and seams. A distinction should be made between flow through a seam and flow through an opening. Water traveling through the barrier

into seams that intersect with the mine rooms is an expected event. Water traveling through the barrier and openings in the natural ground is only a problem if the flow carries fill material or fines with it into the mine. Over time, this piping action could result in instability of the fill slope. It is intended that any instability resulting from a collapse or breakthrough be "choked off" given the expected gradation of the fill material.

Ex. G-2A.

The Parties' Contentions

The Secretary argues that, because the seepage barrier consisted of highly permeable material, in order to "reduce seepage from the impoundment," a layer of fine refuse, which provided "the primary seepage control," had to be maintained at all times between any water in the impoundment and the barrier.⁴ The only way that could have been accomplished was by discharging slurry onto the barrier at various points ("redirecting") to establish a layer of fine refuse *above* the pool level, so that as the pool rose water could not come into direct contact with the barrier. The Secretary maintains that MCC did not provide effective coverage of the seepage barrier because it did not discharge slurry onto the seepage barrier, which allowed water at the top of the pool to come into contact with the barrier, i.e., where there was no primary seepage control device in place. As a result, seepage was not reduced, and the October 2000 piping related failure occurred.

MCC argues that over 99% of the seepage barrier was coated with settled and consolidated fine refuse, thereby reducing seepage "to the extent practical," and that once the pool level "increased to a level above the Stockton mine bench," the seepage barrier would have been encapsulated with fine refuse, and "the potential for a 'breakthrough' in the future [would have been] reduced considerably."⁵ It further contends that discharging slurry directly onto the seepage barrier would not have been practical for a number of reasons: 1) it would have contravened established impoundment management practices and Phase III of its impoundment plan, which required that the slurry discharge line be located at the embankment; 2) there was not enough fine refuse to both coat the seepage barrier above the pool level and the embankment; and 3) placement of fine refuse on the seepage barrier above the impoundment level would not have formed an effective barrier to seepage because the fine refuse would have shrunk and cracked as it dried out, and it would have been eroded by rain, wind and wave action.

⁴ Quoted material is from the Plan.

⁵ Quoted material is from the Plan.

Discussion

There is virtually no dispute that MCC redirected the flow of slurry into the impoundment, and that the result was a fairly uniform deposit of settled fines throughout the impoundment, including along the seepage barrier. The slurry discharge pipe was positioned at different locations on the embankment. Trc. 41 (Fredland),⁶ Trd. 47 (Betoney),⁷ Trd. 363-63 (Bellamy);⁸ ex. G-3. The pipe also had a pivot point about eight feet from the end, and was occasionally rotated to change the direction of the slurry discharge. Trd. 435-36 (Muncie)⁹. As MSHA inspector Robert H. Bellamy testified, “[t]here are ways of directing slurry without moving the pipe, and a lot of it will be done naturally.” Trb. 640. As fines settle and create a restriction to flow, the flow will change and slurry will be transported elsewhere. “So you can manipulate the slurry placement from the embankment to a certain extent.” Trb. 640. Fine refuse could be directed along the seepage barrier “by the natural deposition of the slurry . . . basically what they were doing. And the thing they were doing was they were moving the pipe from side to side of the embankment.” Trd. 362-63.

MCC and Geo personnel testified that it was apparent during their inspections of the impoundment, both during its operation and after the breakthrough, that fine refuse was deposited along the seepage barrier. Trb. 477, Trd. 404-06 (Johnson),¹⁰ Trd. 208-09, 225-30 (Ballard),¹¹ Tra. 1170-73, Trd. 256, 271 (Muncie). Pictures taken shortly after the breakthrough depict a uniform coating of fine refuse along the seepage barrier. Trb. 47 (Ballard); ex. MCC-O.

⁶ John Fredland is a civil engineer employed at MSHA’s Pittsburgh Safety and Health Technology Center. From 1980 to 2000, he was in charge of MSHA’s Mine Waste and Geotechnical Engineering Division, which was responsible for reviewing impoundment plans.

⁷ Theodore P. Betoney, Jr. is a mining engineer employed at MSHA’s District 3 impoundment group since 1989.

⁸ Robert H. Bellamy is a mining engineer employed by MSHA as an impoundment instructor and inspector since 1987.

⁹ Larry Muncie was MCC’s preparation plant superintendent. He has over thirty years of experience in dealing with and managing impoundments and has been certified as an impoundment inspector by MSHA.

¹⁰ Robert Johnson is MCC’s chief engineer. He has been involved in mining engineering in various capacities, generally supervisory, since 1982.

¹¹ Scott Ballard is Geo’s senior project manager on MCC impoundment work. He was the chief author of the Plan. He is a registered civil engineer specializing in water resource engineering, a certified impoundment instructor, and has been involved in the design of impoundments since 1985.

By October 2000, consolidated fine refuse in the impoundment pool extended 85-90 feet above the Coalburg seam. Trc. 129 (Fredland). MCC's expert, Christopher Lewis, testified that as slurry was distributed throughout the impoundment, the layer of settled fine refuse rose progressively, created a plug in the bottom of the impoundment and covered over 99% of the seepage barrier, and progressively reduced seepage into the 1-C mine.¹² Tre. 20-21, 42 (Lewis).

MSHA's witnesses agreed that fine refuse had been deposited along the length of the seepage barrier, but not up to the top of the pool level, and that water at the top of the pool had been in direct contact with the seepage barrier. Tra. 555 (Betoney); Tra. 963 (Owens).¹³ The Secretary's expert, Richard G. Almes, agreed that the traditional method of pumping fines into the impoundment would result in a layer of fines all over the impoundment, but that there would be water against the seepage barrier.¹⁴ Trb. 312-13. Approximately one month after the breakthrough, Owens attempted to ascertain how much water had been in contact with the barrier by measuring the vertical distance between what appeared to be a "high water mark" and the top of the fine refuse cake. Using a ruler and a level, he determined that there had been 22 inches of relatively clear water above the settled refuse. Trc. 258-59. He roughly calculated, using a three-to-one slope, that about six feet of the barrier had been in contact with water, which amounted to .42 of an acre. Trc. 260-61.

MCC disputes Owen's finding. Muncie testified that he was at the impoundment the day before the breakthrough and there was "no chance" that there was two feet of water above the fines cake. Trd. 268-69. MCC's engineering department conducted regular surveys of the impoundment pool level. A comparison of the October 9, 2000, survey of the pool level with a December 2002 survey of the level of the top of the fines cake showed that the level of the settled fine refuse was one inch below the surface of the pool two days before the breakthrough.¹⁵

¹² Christopher J. Lewis is Principal Engineer at D'Appolonia Engineering Division of Ground Technology, Inc. He has extensive experience in the design of coal slurry impoundments that are in proximity to underground mine workings and, at the time of his most recent testimony, was involved in updating and re-writing MSHA's design manual for coal refuse disposal facilities. Ex. MCC-AAA.

¹³ Harold L. Owens testified as a supervisory civil engineer with twenty-five years of experience as head of MSHA's District 4 impoundment group.

¹⁴ Richard G. Almes testified, originally, as Chairman and Principal Engineer of Almes & Associates, Inc., Consulting Engineers. He has extensive experience in the design of coal slurry impoundments, and is a technical reviewer for the re-writing of MSHA's design manual for coal refuse disposal facilities. Ex. G-13.

¹⁵ MSHA checked MCC's regularly conducted surveys during the investigation and determined that they were accurate. Tra. 778. As Owens stated, MSHA had "no reason to doubt the accuracy of MCC's survey data." Trc. 380.

Trb. 476, 481-83, 497 (Johnson); ex. MCC-BB, MCC-O. Bellamy, who normally inspected the impoundment for MSHA, testified that the fines cake was close to the top of the water during his inspections, and that there was slurry in different consistencies above the fines cake and against the seepage barrier. Trd. 371-73. He also testified that it would have been a problem if .42 of an acre of the seepage barrier had been in contact with water, but that he never found such conditions. Trd. 377-78. He was also "pretty well satisfied" with the water levels MCC maintained in the impoundment, "as far as them pumping out what they could."¹⁶ Trd. 341.

It is doubtful that there was nearly two feet of clarified water in contact with the seepage barrier, certainly not for any appreciable length of time. The difficulty of ascertaining a high water mark, independent of wave action, one month after the breakthrough brings into question Owens' measurements.¹⁷ Nevertheless, there would have been some amount of water in contact with the seepage barrier. Experts testified, and common sense dictates, that the upper surface of the slurry mixture, as it rose along the seepage barrier at the back of the impoundment, would be almost entirely water. The slurry being pumped into the impoundment consisted of approximately 20% solids. The coarser particles settled out first, helping to form a delta against the embankment. Tra. 964. Coarser particles would continue to progressively settle as the natural flow of the slurry traveled the 2,500 or so feet to the rear of the impoundment. The slurry reaching the back bank would have contained a relatively small percentage of solids, the finest particles, which according to the experts, would stay in suspension for a long time. Tra. 110, Trc. 38 (Fredland), Tra. 561 (Betoney), Trc. 113 (Lewis), Trb. 500, 509 (Johnson). Johnson agreed that there would be some water against the seepage barrier, that would have some fines in it. Trd. 418. Muncie indicated that there was a high water mark above the fines level. Trd. 272.

The Secretary's witnesses testified that in order to provide effective coverage of the seepage barrier, a layer of fine refuse had to be maintained between the seepage barrier and any water in the impoundment. Trc. 33-35, 42, 139; Tra. 46, 53 (Fredland); Tre. 199-201; Tra. 894 (Owens). The seepage barrier was composed of shot-rock, relatively course material, that is highly permeable. As Betoney explained, it was not a barrier to seepage, but more of a seepage drain. Trd. 38, Tra. 486. Water contacting the seepage barrier, saturated it, and transmitted the hydrostatic pressure created by the impoundment to the natural soil cover over the 1-C mine.¹⁸

¹⁶ As noted above, the Plan required that the pool level be maintained as low as possible. This was accomplished by pumping water from the surface of the impoundment back to the preparation plant.

¹⁷ Owens also relied on the fact that the decant pump's intake was almost two feet below the water mark on its floatation pontoons. Trc. 360. However, the pump creates a depression in the settled fines, such that the depth of water at the pump's location would typically be greater than in surrounding areas. Trb. 501-02, 511-12 (Johnson).

¹⁸ MSHA used a computer program, "seep-w," to perform a seepage analysis. It showed that, with two feet of water in direct contact with the top of the barrier, the hydrostatic pressure at

MSHA concluded that with water in contact with the barrier, seepage into the 1-C mine was not significantly restricted, nor was the potential for piping.

Several witnesses testified that the only way to maintain a layer of fine refuse between impoundment water and the seepage barrier would have been to discharge slurry onto the seepage barrier at various points, such that a layer of fine refuse was created *above* the impoundment pool level – so that as the pool level rose water would not have any direct contact with the seepage barrier. Trc. 43, 142-44, Tra. 201-02, 210 (Fredland); Trd. 40 (Betoney); Trd. 103, 150-53, Trb. 308, 322, 452-53 (Almes).

As the Secretary's witnesses described the process, slurry would have to be discharged onto the seepage barrier at various points along its entire length. The discharge point would be kept in one location until a delta of settled fines developed.¹⁹ The slurry would flow "from the top down" into the pool, where it would settle out and form a base, from which a delta would build back up the slope to the discharge point. Tra. 201-02, Trc. 139-46, 334-36 (Owens). The fines delta would be built up to about ten feet (vertical distance) above the pool level, or approximately 35 feet along the slope of the barrier from the pool.²⁰ The discharge point would then be moved to an adjacent location, and another delta would be deposited, abutting the first

the level of the 1-C mine would have been four times higher than if a three foot thick layer of settled and consolidated fine refuse had been between the water and the barrier. Trc. 166-76 (Owens). There is no evidence of how the difference in computer-modeled pressures would have varied if only a few inches of water were in contact with the barrier, which most likely was the case. There is also no explanation of whether or how this analysis reflected the fact that the seepage barrier did not extend down to the level of the Coalburg seam outcrop. When the seepage barrier was constructed in the area of the breakthrough, there was slurry and settled fines approximately 40 feet above the floor of the Coalburg seam. The seepage barrier material settled into that fine refuse to some extent. But there would have been a thick coating of fine refuse against the natural soil surface for as much as twenty or more feet, measured vertically, above the Coalburg seam. Ex. G-1, at 16, fig. 29, fig. 31.

¹⁹ MSHA's Coal Impoundment Inspection Procedures Handbook warns that slurry must be discharged into the pool, not on the embankment, because erosion could substantially weaken the structure. Tra. 173-74 (Fredland); ex. MCC-U. Muncie also explained that slurry must be discharged into the pool, not on the embankment, because of concerns about erosion. Trd. 304. It is doubtful that erosion would have "weakened" the seepage barrier. But the effects of erosion were apparently not addressed in the Secretary's analysis.

²⁰ In calculating the surface area of the seepage barrier that would have been in contact with water, Owens figured that 22 inches of water would have covered a horizontal distance of about six feet, a ratio of slightly over 3-to-1. Trc. 260. To coat the barrier, the intersection point of the adjoining deltas would have had to have been ten vertical feet above the pool level, and the discharge point would have had to have been some distance above that.

one. The discharge point would then be progressively moved around the 1.4-mile seepage barrier, until the entire length of the barrier had a coating of settled and consolidated fine refuse extending above the pool level. Trc. 255, 319-20, 330-31, Tra. 964, 1096 (Owens); Tra. 488, Trd. 40 (Betoney); Trd. 103, 150-53, Trb. 308, 452-53 (Almes); Trc. 43, 142-44, Tra. 201-02, 210 (Fredland). This process would be repeated as the pool level rose, until the entire barrier had been coated.

Estimates of the time required to apply one 10-foot high coating of refuse varied. Betoney believed it would take "somewhere over a year, a year or two years max." Tra. 488. Owens estimated one year. Trc. 255, Tra. 1096. The estimates were very rough. As Owens explained, the only way to determine the spacing and number of discharge points would have been to "do a couple of them . . . to see how it spread and how far apart they'd have to be to get coverage." Trc. 330-31. His estimate was based on a rough calculation of how long it would take to accumulate a sufficient volume of fines to coat the entire length of the barrier to a vertical height of ten feet above the pool level, assuming the slurry was 30% solids.²¹ Trc. 319. There are a number of unknowns about the calculation. Owens did not specify a thickness for the fines layer. He first described a six-foot average thickness. Trc. 319. However, he then indicated that the fines layer would have to have a minimum thickness of one-to-two feet, which he conceded was a "little arbitrary [because a]s far as I know there was never any definitive analysis made to set the required dimension of the thickness of the fines."²² Trc. 322. Also unknown is what assumption, if any, was made as to the percentage of available solids that would be deposited, as opposed to those remaining suspended and flowing out into the impoundment pool. Lewis opined that it would be impossible to establish and maintain a coating of fine refuse above the pool level, in part because there was a high percentage of very fine particles in MCC's slurry, and they would stay in suspension for lengthy periods of time. Tre. 43-44.

MCC's arguments as to the impracticality of the Secretary's position have considerable persuasive value. There is no dispute that, in general, the most critical element of maintaining an impoundment is to assure that the man-made portion, the dam or embankment, retains its structural integrity. To that end, generally accepted engineering principles required that slurry refuse be discharged at the embankment, so as to build and maintain a coating or delta of refuse. Trc. 254 (Owens). A Department of Interior Engineering and Design Manual for Coal Refuse Disposal Facilities describes discharging slurry at the upper end of an impoundment as being "incorrect." Ex. MCC-T. MSHA's Coal Impoundment Inspection Procedures Handbook also discourages depositing slurry at locations other than the embankment. Ex. MCC-U. MCC's plan

²¹ The 30% solids assumption is open to question. Betoney first testified that slurry discharges were typically 10-15% solids (Tra. 559), and later estimated that they were 15-20% solids (Trd. 28-29). Muncie also offered two estimates. Tra. 1140 (25-35% solids), Trd. 310 (10-20% solids).

²² Almes testified that a minimum of three feet of consolidated and settled fines would have been necessary, based upon a previous design of a slurry trench cut-off. Trd. 136-37.

for Phase III of the impoundment, which was approved by MSHA in 1998, specifies that slurry discharge should be at the embankment. Ex. MCC A-2; Trd. 343 (Bellamy), Tra. 155-56 (Fredland).

MSHA's witnesses testified that there was enough fine refuse being pumped into the impoundment to both coat the seepage barrier above the pool level and protect the embankment. Trc. 255 (Owens), Trc. 71 (Fredland). However, that testimony is not convincing. As previously noted, there are many uncertainties surrounding MSHA's estimate that it would take about one year to coat the barrier to a vertical height of ten feet. Assuming that that estimate is accurate, it is doubtful that slurry could also have been directed at the embankment. The pool level rose about ten feet each year. Trb. 445 (Almes). Consequently, by the time a 10-foot high band of fine refuse had been established over the length of the barrier, the pool level would have risen to the top of the ten-foot fine refuse deposit at the first slurry discharge positions.²³ The process would then have to have been immediately repeated. If not, water would come into contact with the seepage barrier as it rose above the band of fine refuse coating. Trd. 197-99 (Ballard).

MCC's witnesses also challenged the feasibility MSHA's proposed establishment of a fines layer above the pool level. Ballard testified that even though the slurry discharge pipe was kept on the embankment, there were times when the pool level was higher than the fines delta, which was normal for most impoundments. Trd. 196-97. Owens confirmed that MCC's impoundment inspection reports, at times, indicated that the pool level was above the delta. Trc. 285-86. Ballard strongly questioned how a fine refuse deposit could be maintained above the pool level around the 1.4 mile seepage barrier, when it couldn't be maintained at the embankment, which was a fraction of the length of the barrier. Trd. 197. Moving the slurry discharge around the impoundment would also have created other problems, principally interfering with the ability to recycle water by pumping it back to the plant. Muncie testified that moving the discharge point around the seepage barrier would create agitation and prevent pumping of clean water back to the plant. Trd. 272. Owens opined that by moving the pump around the middle of the pool, pumping of clean water could be done. Trc. 267-68. Bellamy testified that with slurry being discharged around the seepage barrier water could not be pumped from the back of the impoundment, but if the pump was moved to the middle of the impoundment, water could be pumped, although it would have been harder to do. Trd. 345-48.

In addition, it is highly questionable that a coating of fine refuse above the pool level would have had the desired result of decreasing the permeability of the barrier. MCC presented evidence that if fine refuse, saturated with water, had been placed above the pool level, it would

²³ Owens did not claim that his estimate was based upon depositing slurry on the embankment as well as on the seepage barrier during the one-year period. It is unlikely that it was, because a high priority was placed on coating the seepage barrier which, in the Secretary's opinion, was not functional unless and until it was coated with fine refuse. Fredland testified that there would be a "period of risk" until the entire seepage barrier could be coated. Trc. 122-24.

have dried out and cracked, rendering it ineffective as a barrier to seepage. A picture of the fine refuse deposit in the impoundment, taken in September 2002 shows persistent cracking. Ex. MCC-Z; Trd. 431 (Johnson), Tra. 950-51 (Owens), Tre. 27 (Lewis). As Lewis explained, "as [the fines cake] dries, it tends to lose moisture and shrink, reduce in volume." Tre. 27. Geo's expert, Donald J. Hagerty, professor of civil engineering at the University of Louisville, was more descriptive.²⁴ "If you deposit this material [fines saturated with water] above the water level on the sides of the impoundment, it's going to dry up Inevitably it cracks. So as soon as . . . the water drains down into the coarser materials around the impoundment, the water leaves the slurry, the fines that are left behind don't occupy nearly as much volume, there's shrinkage and cracking." Trf. 37. "That 70 years of experience we've had with dams and impoundments and piping problems, that pretty much says that if you try to stop a seepage problem by making a barrier, the barrier has to be virtually perfect for it to really work." Trf. 65. "If you have a moisture content of 80 percent, when it dries out it shrinks and cracks, the same thing that happens to the bottom of a farm pond. When it dries up, the mud cracks because of shrinkage. Same mechanism." Trf. 71. "I think as long as we had these fines deposited in a cake or layer that had cracks in it, the cracks make any notion of a barrier simply nonsense." Trf. 70.

I find this evidence persuasive. The photograph confirms that the fines cake shrank and cracked as it dried out. While the picture was taken two years after the breakthrough, it seems likely that significant drying would have occurred within days or weeks of creation of the fines layer, certainly well within one year. I also accept Hagerty's opinion that a barrier has to be virtually perfect in order to restrict seepage, and that a dry, cracked fines layer would not be a virtually perfect barrier. While the dried-out fines cake may have been restored somewhat as it became re-saturated, as Lewis noted, there is no direct evidence rebutting Hagerty's opinion that it would not have performed effectively as a barrier to seepage.²⁵

I find that MCC effectively covered the seepage barrier with fine refuse under the terms of the Plan. I accept the testimony of the Secretary's witnesses to the effect that, in the absence of a coating of fine refuse above the pool level, there would not have been a major reduction in overall seepage. However, that condition would have ended when the pool level rose above the Stockton bench, at which time the seepage barrier would have been completely coated and, as the Plan stated, there would have been a "considerable reduction" in seepage and the potential for a breakthrough. As the pool level rose, and the layer of fine refuse covered a greater area and became thicker, reducing seepage through the bottom of the impoundment. The uniform deposit of fine refuse in the impoundment created a "plug" that effectively restricted seepage in all areas

²⁴ Donald J. Hagerty has a Phd. in geotechnical engineering and has taught engineering for more than thirty-four years. He was accepted as an expert in piping. Trb. 940; ex. Geo-15.

²⁵ Owens mentioned that MCC's was the second impoundment that required the seepage barrier to be coated with slurry. Trc. 333. The other facility was not identified and there is no further mention of it, no explanation of how the coating was applied, or any other information that might have been responsive to questions raised by MCC.

of the pool, including 99% of the seepage barrier. In testifying on Citation No. 7144401, Owens and Fredland agreed that the thickening layer of settled fines did reduce seepage. *See* n. 35, *infra*. It was only the few inches (measured vertically) of the seepage barrier nearest the top of the pool that were not coated with refuse. While this small area permitted seepage, it would have been highly impractical to have further reduced it in the “only way” it could have been done, i.e., to have established a layer of fine refuse above the pool level, as the Secretary’s witnesses described.

The Secretary argues that impracticality of complying with a mandatory standard or plan provision is not a defense to non-compliance. Sec’y Br. at 16-17. While this may be an accurate statement of law, MCC does not advance impracticality as a justification for non-compliance. Here, the phrase “to the extent practical” is actually part of MCC’s Plan. Consequently, consideration of practicalities must be included in determining whether MCC provided effective coverage of the seepage barrier.

The Secretary also argues that expectations about reaching the Stockton bench should not have diminished MCC’s efforts to comply with the primary purpose of the Plan in the intervening years, i.e., to reduce seepage into the 1-C mine. Sec’y Br. at 8. She also argues that, since a significant reduction in breakthrough potential was not anticipated until then, MCC should have been especially careful to assure maintenance of fines coverage on the barrier.²⁶

The Secretary’s argument seems to bifurcate the various provisions of the Plan, and does not address how the subject sentence²⁷ affects the reading of the Plan. What must be determined is the significance of this language in deciding whether MCC effectively covered the seepage barrier under the terms of the Plan as a whole. As Ballard explained, MCC’s approach to distribution of fine refuse over the seepage barrier appears to be consistent with virtually all of the provisions of the Plan, including the subject sentence. On the other hand, the Secretary’s position appears inconsistent with the sentence. If effective coverage meant, as she contends, depositing a layer of fine refuse above the pool level such that water in the impoundment was never in contact with the seepage barrier, then the barrier would always have been completely

²⁶ The Secretary closed the argument by stating: “Therefore, once the impoundment pool rises to the Stockton seam, it would be above the areas most vulnerable to breakthrough potential for, by then, fine refuse would cover the complete barrier if effectively distributed.” Sec’y. Br. at 8. The closing sentence is difficult to understand, and appears to be largely consistent with Ballard’s point. The only areas susceptible to breakthrough were the entries closest to the outcrop of the 1-C mine. As explained in MSHA’s Report of Investigation, that outcrop was at an elevation of 960 feet. The pool had risen above that level well before the 1994 breakthrough, when it was at an elevation of 992 feet, and it remained above the Coalburg seam level after the breakthrough. Ex. G-1.

²⁷ “After the impoundment level has increased to a level above the Stockton mine bench, we believe the potential for a ‘breakthrough’ in the future is reduced considerably.” Ex. G-2 at 7.

encapsulated as to any water in the impoundment, and no additional protection would have been realized when the pool level rose above the Stockton bench.

It also strikes me that MCC's position is more consistent with other provisions of the Plan, i.e., "The primary seepage control is provided by *fine refuse deposited in the impoundment against the fill as operations progress*. . . . As fine refuse *settles* and consolidates along the surface of the seepage barrier As the fine refuse deposit *progresses up the slope* of the seepage barrier" While the Secretary's position can also be viewed as consistent with these provisions, I find such constructions considerably more strained than when compared to what MCC was doing to comply with the Plan.

I found Ballard's testimony, as principle author of the Plan, particularly informative. He explained MCC's compliance with the Plan as follows:

[A]n impoundment fills up with slurry as it comes up, okay. So what I'm discussing here is, okay, you've got the barrier. And the fact that the bulk material was put there reduces seepage to some degree. It's called a seepage barrier. Then the fine refuse will progressively come up as you pump fines in there. That's what the word progressively means as the operations continue. As those progressively come up, you're gradually reducing the seepage because fine refuse is a smaller part[icle] and will have a lower permeability. And what I meant here by the last statement after impoundment level increases to a level above the Stockton [seam], once that fine refuse [in the] impoundment got above the Stockton level, then the entire barrier is encapsulated by the fine refuse. And at that point, that's what the statement means, that once it's reached that point, we believe the potential [for a] breakthrough [in the] future is reduced considerably, but that's after it's totally encapsulated.

Trd. 194-96.

I find that, reading the Plan as a whole, MCC effectively covered the seepage barrier with fine refuse.²⁸

²⁸ While I am constrained by the Commission's remand as to Order No. 7144402, the determination of whether MCC provided effective coverage of the seepage barrier under the terms of the Plan involves interpreting various related, and not entirely consistent, provisions of what appears to me and to some witnesses to be an ambiguous Plan. Were I deciding these issues in the first instance, I would have found the Plan to be ambiguous, and followed the established Commission precedent cited by the Chairman. The difference of opinion over the proper approach to resolving plan ambiguities seems to have been resolved. *See Jim Walter Resources Inc.*, 29 FMSHRC 579, n. 8 at 589 (Aug. 1996). I would have concluded that the Secretary failed to establish her intended meaning by presenting credible evidence as to the history and purpose of the provisions, or evidence of consistent enforcement. It is apparent that

Citation No. 7144401

Citation No. 7144401 also was issued on October 17, 2001, pursuant to section 104(d)(1) of the Act, and alleges an S&S and unwarrantable failure violation of 30 C.F.R. § 77.216(d). As described in the "Condition or Practice" section of the Citation, the violation is based upon MCC's failure to "immediately report to the MSHA District Manager any unusual change in flow quantity or quality from the South Mains Portal that would indicate possible impoundment leakage," as required by the Plan. Ex. Jt-4A. The Order was upheld in the original ALJ decision, but the Commission vacated that portion of the decision because the conclusion that the Plan had been violated was not adequately supported. 28 FMSHRC at 259-63.

The South Mains entry was the primary exit point for water and slurry released during the 1994 breakthrough. For that reason, monitoring of the flow from the South Mains entry was included in the May 1994, or Short Term Plan, which provided:

Flow from the South Mains entry will be monitored daily, until remedial work at the seepage point is completed. Monitoring will be done during regular impoundment inspections after that. Any unusual change in flow quantity or quality that would indicate possible impoundment leakage will be reported immediately to MSHA and the appropriate mine management. All necessary remedial measures will be implemented.

MCC Ex. A1, App. 1. MCC challenged whether the monitoring requirement continued in effect. However, its argument was rejected in the original ALJ decision, and the Commission agreed, holding that the "requirement to monitor the South Mains and to report any unusual changes in flow quality or quantity that would indicate possible impoundment leakage to MSHA was part of the permanent Impoundment Sealing Plan." 28 FMSHRC at 261.

The flow from the South Mains Portal of the mine was a few inches deep and ran through a rocky shallow ditch into a sediment control pond located near the portal. Trd. 305 (Muncie). That pond, which was designated Pond 200, and several others at the mine site, were covered by a permit issued by the Kentucky Pollutant Discharge Elimination System ("KPDES"). A corrugated steel pipe, 18 inches in diameter, set at a slightly descending angle, drained the pond once its surface rose above a certain level. Ex. MCC-W. MCC retained Geo to conduct weekly

no one who was involved in writing the Plan, implementing it, or monitoring its implementation, including experienced engineers and plant operators at MCC and Ogden/Geo, and numerous MSHA inspectors, interpreted the Plan as the Secretary now urges. Her interpretation represents a radical departure from well-established impoundment management practices which, even in hindsight, are only hinted at in the Plan.

“regular impoundment inspections.”²⁹ The South Mains outflow was monitored, indirectly, by observation and measurement of the outflow from Pond 200.³⁰ The measurement taken was the depth of flow at the intake end of the drainage pipe, measured in inches from the bottom of the pipe opening. The clarity of the outflow, the depth measurement, and several other readings and observations made during the inspections, were recorded on “Refuse Impoundment Site Visit” forms.³¹ Ex. G-6, MCC-G. Once completed, the form was delivered to the preparation plant, where the plant superintendent or a foreman in charge would sign it. Copies were given to MCC’s engineering office, and to the Geo project manager. Pond 200 was also subject to KPDES monitoring and reporting requirements. MCC retained Blackburn Contracting to perform that function. Blackburn inspected the pond twice a month, measured or estimated the quantity of outflow at the discharge end of the pipe and collected samples for further analysis, including the amount of suspended solids. Blackburn’s inspection results were reported on a monthly basis, and were forwarded to KPDES quarterly. Trd. 383 (Johnson); ex. MCC-L.

The Parties’ Positions

The Secretary contends that the impoundment site visit reports show that there was a sustained doubling of the outflow from Pond 200 in September 1999, which occurred during a period of drought, that there was no other explanation for the increase other than possible impoundment leakage, and that it was an unusual change in flow quantity that indicated possible impoundment leakage that was required to be reported under the Plan. MCC contends that the

²⁹ As recognized in the Plan, MCC was obligated to conduct regular impoundment inspections. Under the Secretary’s regulations, operators must examine impoundments at least every seven days for “appearances of structural weakness and other hazardous conditions,” and must “immediately” notify MSHA’s District Manager whenever a “potentially hazardous condition develops.” 30 C.F.R. § 77.216-3(a) and (b).

³⁰ Seepage from the impoundment was one of three components of the Pond 200 outflow. The others were surface drainage from ten acres surrounding the pond, and ground water that had infiltrated the 1-C mine, which joined with the impoundment seepage and flowed out of the South Mains entry. A substantial portion of the 1-C mine was not under the impoundment and there was a lot of natural drainage into the mine, all of which flowed out the South Mains entry. Tra. 605-07 (Betoney); Trc. 99 (Fredland). It was impossible to determine what portion of the South Mains entry outflow, or what portion of the Pond 200 outflow, was seepage from the impoundment. Tra. 1001, Trb. 1004-05 (Owens); Trc. 180 (Fredland).

³¹ Impoundment monitoring included measurements of the pool surface elevation and the elevation of deposited fines; estimates of flow volume at various drains, seeps and other openings; readings of piezometers located in the dam; and visual observations of the slopes, pool, and other aspects of the impoundment to check for sloughing, bulging, erosion, and surface disturbances, such as swirls, that might indicate leakage or some other problem. Trb. 93 (Ballard); ex. MCC-G.

Secretary's arguments are based upon misleading averages of flow data, that the Pond 200 outflow quantity was well within the range of flows that would have been expected for the impoundment as the pool level rose, and that the fluctuation in flow was not indicative of possible impoundment leakage because it was not substantially dissimilar to prior fluctuations and there were no other indications of possible leakage.

The Secretary's "Averages" Argument

The Secretary's argument on this alleged violation is based primarily on a chart included in the Report of Investigation, Figure 38 ("Fig. 38"). Ex. G-1, fig. 38. The chart covers the period from mid-1994 through October 2000, and shows the Pond 200 outflow depths, the impoundment pool level, and monthly averages of rainfall in the general area.³² Also displayed are two average flow depths, represented by horizontal lines. One represents the average flow for the period from August 1994 to September 1999, which was 5.5 inches. The other represents the average flow for the period from September 1999 to October 2000, which was 8.6 inches. Virtually all of the Secretary's arguments on outflow quantity changes are based on comparisons of the average flows displayed on Fig. 38, and the claim that the average flow increased by 56%, which represents at least a doubling of flow volume. Sec'y Br. at 30, 33; Reply Br. at 17, 18, 20. As stated in the Report of Investigation, "[d]uring this period [September 1999 to October 11, 2000] . . . the average flow rate from the South Main Portal more than doubled." Ex. G-1 at 32.

MCC argues that such comparisons are misleading, because natural seepage from the impoundment increased significantly as the pool level rose. Consequently, any comparison of late 1999-2000 flows with the average of flows for the five years preceding September 1999 would be expected to show a significant increase, even if there was no problem at all with impoundment leakage.

The issue was explained by Barry K. Thacker, Geo's president and principal engineer, who had over thirty years of experience in the design of coal slurry impoundments and is a nationally recognized expert in the field. Trb. 685-91. Thacker described a principle known as "Darcy's law," which is referenced in MSHA impoundment design materials, and dictates that seepage from an impoundment will increase naturally as the impoundment pool level rises. The theoretical relationship is discussed in a report he prepared on the breakthrough. Ex. Geo-13 at 6-9. He also prepared a chart, using the Pond 200 flow depicted on Fig. 38, and extended the

³² Fig. 38 shows monthly averages of rainfall recorded at the National Oceanic & Atmospheric Association's National Weather Service station, located at Jackson, Kentucky, for the period from mid-1994 through the October 2000 breakthrough. Owens plotted monthly averages to show a general rainfall pattern in the area, because he was unable to correlate the outflow with available rainfall data. Tra. 1044-47, Trb. 1008 (Owens).

time line back to 1991, when the pool level was just below the Coalburg Seam.³³ Ex. Geo-14. At that point, the seepage from the impoundment into the 1-C mine had to be zero, which he called a critical data point, because it was the only time that the amount of impoundment seepage into the 1-C mine was known for certain. Trb. 699-700. He then observed that the low points of the South Mains flow diagram coincided with a straight line that rose from zero flow in 1991 to 6-inches of flow in October 2000, which, he opined, was the relationship that Darcy's law predicted. Trb. 701-02. He also testified that the 6-inch increase in depth of flow, as the impoundment pool elevation rose nearly 100 feet over nine years, was the type of increase that he had seen at other similar facilities with comparable increases in impoundment pool elevations. Trb. 696-97, 702. He attributed the component of flow represented by the straight line to expected increases in impoundment seepage, and opined that the fluctuations above that line do not indicate unusual changes in flow.

Thacker's analysis convincingly undercuts the Secretary's comparisons of average outflow depths.³⁴ The Secretary's witnesses generally agreed with the proposition that seepage into the 1-C mine would have increased as the impoundment level rose. Tra. 608 (Betoney); Trc. 184, 235-38, Tra. 123, 228-29 (Fredland); Trc. 296-97, Tra. 971, 1006 (Owens).³⁵ The proposition also appears to be reasonable. As the pool level rose, the surface area of the impoundment increased, more ground surface was exposed to water and saturated fine refuse, and increasing hydrostatic pressure forced more water through the various layers of shot rock, soil, sandstone and coal, all of which had some degree of permeability. Water flow would also have increased through any faults or defects in those layers, e.g., hillseams or joints in sandstone or cleats in coal deposits. Trc. 100 (Fredland).

It seems obvious, then, that comparisons of outflows in the late 1999 – 2000 time frame with an average of the previous five years' measurements would yield skewed results, i.e.,

³³ Thacker's charts were originally displayed with an overhead projector during his testimony. Geo submitted paper copies as an exhibit. Ex. Geo-14.

³⁴ Thacker's analysis does have at least one miner flaw, i.e., the assessment of zero flow in 1991. The outflow through the drainage pipe in Pond 200 had two other components beside impoundment seepage. While it is likely that surface runoff into the pond would have produced negligible flow, groundwater infiltration into the 1-C mine, which drained out the South Mains entry into Pond 200, would not have been at a zero level at any relevant time.

³⁵ Owens and Fredland questioned whether the effect would be limited, i.e., seepage would be reduced, due to the increasing thickness of the layer of settled fine refuse. Tra. 1006 (Owens), Trc. 237-38 (Fredland). It should be noted, however, that in the discussion of Order No. 7144402, "I accept[ed] the testimony of the Secretary's witnesses [including Owens and Fredland], to the effect that in the absence of a coating of fine refuse above the pool level there would not have been a major reduction in seepage." *supra*, at 12.

erroneously excessive increases.³⁶ Tre. 51 (Lewis). I have little difficulty in rejecting arguments that are based on comparisons to the 1994-99 average flow.

The Importance of Outflow Quality

The Plan called for monitoring of the South Mains entry outflow and the reporting of any unusual changes in quality or quantity that would indicate possible impoundment leakage. MCC viewed outflow water quality as a more important indicator of leakage because it was a bright line test, i.e., any discoloration or “black water” would be an unmistakable sign of impoundment leakage. It viewed changes in quantity as less reliable indicators of leakage because there was considerable uncertainty as to the influence of the impoundment on the quantity of flow. Tre. 133, 137 (Lewis); Trd. 180-83, 212, Trb. 69, 77, 193 (Ballard); Trf. 51-52, 62, 80 (Hagerty). The Secretary’s expert agreed that discoloration would mean that fines were being picked up somewhere and that quantity changes called for a more subjective evaluation. Trb. 330, 394 (Almes).

Outflow quantity took precedence for MSHA’s investigators. While the Secretary’s “piping” theory of failure is predicated upon particles being eroded by water leaking into the 1-C mine, MSHA’s witnesses testified that, because water from the impoundment would have had to flow some 4,000 feet through the mine before reaching the South Mains portal, and elevation changes in the mine workings created pools, solids eroded by the piping/leaking process would have settled out before reaching Pond 200. Tra. 603 (Betoney); Trc. 78-79, 109, 114, Tra. 130 (Fredland); Trc. 301-04, Tra. 1101 (Owens).

However, as MCC’s expert pointed out, the mere fact that elevation variations were reflected on mine maps did not mean that there was significant pooling of drainage within the mine because it is likely that those depressions would have been filled with material during the 1994 breakthrough. Tre. 177 (Lewis). Betoney agreed that there was a “lot of material in the mine” from the 94 breakthrough. Tra. 602-03. As Ballard stated, “I don’t know the storage capacity of the mine and I don’t think anyone can quantify it.” Trd. 212. Lewis believed that if piping had been occurring, suspended solids, or slurry, would definitely have been visible in the South Mains flow. Tre. 133, Trb. 818-19. Ballard believed that suspended solids from any significant piping would not have settled out, and would have been present in the Pond 200 outflow. Trd. 212. Hagerty also believed that if leakage had been occurring “something should have been seen at South Mains.” Trf. 54. Johnston believed that if piping had been occurring, that significant quantities of suspended solids would have been detected in the highly accurate testing done on the KPDES samples. Trb. 471. Bellamy, MSHA’s impoundment inspector, also believed that if there had been leakage from the impoundment, he would have seen fines or

³⁶ The Secretary acknowledged in her Brief that a gradual increase in flow was expected as the level of the impoundment rose. Sec’y Br. at 30. However, it is not apparent that she took such increases into account in assessing the flow diagram, and continues to urge comparisons to the 1994-99 average flow.

suspended solids in the Pond 200 outflow. Trb. 609.

I find that, while some settlement would have occurred as water from the impoundment flowed through the 1-C mine, it is highly unlikely that all, or virtually all, of the suspended solids resulting from impoundment leakage or piping would have settled out before the flow reached and exited Pond 200. Consequently, the quality of the Pond 200 outflow was an important factor in assessing whether any change in outflow quantity indicated possible impoundment leakage.

Rainfall – Drought

Pond 200 outflow was definitely influenced by rainfall. Tra. 796, 811 (Owens); Tra. 123 (Fredland); Tra. 603-05 (Betoney). Rainfall at the site added water to the impoundment pool, potentially increasing seepage, and could produce surface run-off into Pond 200 from its 10-acre drainage area. Rainfall at the site and, possibly, in a wider area, percolated into the ground and increased ground water infiltration into the 1-C mine. Owens attempted to correlate Pond 200 outflow with rainfall. His efforts were frustrated because there was no rain gauge at the impoundment site, and the flow depth measurements had been taken only every seven days. He plotted rainfall data from five sites in the general area. Ex. G-6B. However, despite preparation of numerous spreadsheets, he was unable to correlate Pond 200 outflow with rainfall. Trc. 373-76.

Referencing Owens' testimony, the Secretary argues that the period from "July to September" was the driest such period on record. Trc. 278; Sec'y Br. at 33; Reply. Br. at 18. However, Owens was relying upon an American Meteorological Society paper discussing state-wide conditions. Trc. 278, Tra. 812; ex. G-6C. While he maintained that the situation in Martin County was described in the paper as severe drought, he acknowledged that weather patterns can be very localized and that there was substantial rainfall in August 1999, including the highest single day total in six years that caused flash flooding. Trc. 339, Tra. 1047-48.

The Appropriate Test

There were no parameters established in the Plan to determine whether a particular change in flow quantity would be "unusual" or "would indicate possible impoundment leakage." Consequently, the determination was left to a subjective assessment of available data. Trc. 198-202 (Fredland). While the Commission agreed with the previous ALJ that information on South Mains entry outflow had to be viewed "with a heightened degree of scrutiny given the prior impoundment failure and the fact that 'as the pool level rose the risk of failure rose,'" it was critical of the fact that neither the test for determining whether the Plan was violated, nor the test's application were "clearly explained." 28 FMSHRC at 261 (*quoting* ALJ decision).

Neither party has articulated a definitive “test” for determining whether the plan was violated. The Secretary cites to a dictionary definition of the word “unusual,”³⁷ and argues that the “doubling” of flow at the only monitoring point designated in the Plan was, “standing on its own, an unusual change in flow signaling a possible impoundment leak.”³⁸ Sec’y Reply Br. at 20. MCC argues that the Secretary’s view is overly restrictive because it focuses solely on changes in quantity, whereas the Plan requires reporting of unusual changes in quantity that *indicate possible impoundment leakage*. MCC contends that any changes in flow quantity had to be considered in light of the totality of conditions at the impoundment, including the outflow history, weather conditions, and other impoundment monitoring information, especially outflow quality.

In construing broadly worded mandatory safety standards, the Commission has employed a “reasonably prudent person” test, i.e., whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the specific prohibition or requirement of the standard. See *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996); *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). While the Plan is applicable only at MCC’s impoundment, the specific provision at issue was intended to apply to a potentially wide variety of conditions. Even though it is a Plan provision, as opposed to a mandatory standard, it appears appropriate to apply a formulation of the reasonably prudent person test. The Commission “agree[d] in large part with the basic approach” taken by the previous ALJ, which included a reference to a “reasonably prudent mining engineer.” 28 FMSHRC at 261.

Several witnesses expressed opinions on factors that should have been considered in evaluating whether changes in flow quantity indicated possible impoundment leakage. The Secretary’s expert, Almes, believed that flow quantity should have been assessed in light of the entire flow history over the years, that rainfall had a lot of relevance, and that other impoundment conditions should have been considered, including flows at seepage outlets, observations of the pool for swirls, and a visual examination of slope stability. Trb. 336-37, 359-60. Ballard agreed, stating that flow should have been evaluated in light of flow over the years, and that he certainly wouldn’t have relied only on South Mains flow data. Trb. 153, Trd. 190. Lewis, too, emphasized that the person making the assessment should be familiar with impoundments in

³⁷ Unusual is commonly defined as “being out of the ordinary” or “deviating from normal.” Webster’s Third New International Dictionary at 2514 (1993). Sec’y Br. at 30.

³⁸ The Secretary initially argued that, since the outflow from the South Mains entry was the only monitoring point specified in the Plan, “it is irrelevant whether [MCC] chose to conduct additional monitoring.” Sec’y Br. at 28-29. While she later acknowledged that “it was important for MCC to look at other indications of possible leakage,” she continued to focus solely on the South Mains outflow, arguing that “the plan called only for monitoring and immediate reporting of unusual changes in the flow from the South Mains and this pipe was the place to measure that.” Sec’y Reply Br. at 21.

general, MCC's impoundment in particular, and all of the pertinent conditions. Trc. 44-47, 168. Fredland testified that a person evaluating the flow information would have to be familiar with the site. Tra. 248-49.

I find that the appropriate test is whether a reasonably prudent mine operator, or mining engineer, familiar with impoundments in general and all of the conditions at MCC's impoundment, both current and historical, should have recognized that a particular change in outflow quantity was outside the range of flows that would have been reasonably foreseeable, such that it indicated possible impoundment leakage. This evaluation had to be made with an awareness heightened by knowledge of the 1994 breakthrough, and the fact that the pool level was approximately 100 feet higher than it was at that time.

Was There an Unusual Change in the Quantity of South Mains Outflow?

Pond 200 outflow measurements were recorded in Geo's impoundment inspection reports. Reports for the period from January 1999 through October 5, 2000, were entered into evidence. Ex. G-6, MCC-G. Evidence of flow measurements prior to 1999 are reflected only on Fig. 38, prepared by MSHA, and charts prepared by Thacker.³⁹ Ex. Geo-14. Thacker prepared two charts that I found helpful in analyzing Pond 200 outflow. One, in which he used the Fig. 38 data, and extended the time line back to 1991, has already been discussed. Because he was critical of MSHA's use of monthly rainfall averages in Fig. 38, he also prepared a chart that displayed weekly Pond 200 outflow measurements, as compared to total rainfall recorded during the seven-day period preceding the measurement.⁴⁰ The flow measurements are depicted as small black squares, and the rainfall totals are depicted as small triangles. Trb. 704-05; ex. Geo-14. He used rainfall data recorded at a weather station located at Paintsville, Kentucky, which was about 15 miles from the impoundment. Ex. Geo 11.

³⁹ The Secretary maintained that MCC should have plotted the flow depth measurements as part of its monitoring responsibilities. Trc. 288-89 (Owens), Trc. 240 (Fredland), Tra. 505, 626, 690 (Betoney), Trd. 128-29 (Almes). MCC's witnesses disagreed that plotting was necessary. Trb. 96, 153, 158 (Ballard), Trf. 82 (Hagerty), Tre. 53-54 (Lewis). While charts can be helpful in assessing the history of flow measurements, the Secretary actually relies on only a few weeks of data in her argument. MCC made no attempt to disclaim responsibility for knowledge of flow history and, in fact, relies on it as evidence that the 1999 flows were not unusual. Bellamy stated that he might have had a concern if he had seen a display like Fig. 38, which included the misleading average flows. Trd. 354-55. However, he admitted that he had seen all of the flow data displayed in the chart, and had found nothing unusual. Trd. 368-69.

⁴⁰ Thacker believed that monthly averages of rainfall had no relationship to when the flow measurements were taken, and that the Jackson site used by MSHA was too far from the impoundment. Trb. 704.

The impoundment inspection reports for September 1999 show a rise in depth of flow from 6.0 inches on September 9 to 8.5 inches on September 30. Ex. G-6. The flow stayed at the 8.5 to 9.0 inch level through February of 2000, dropped to the 7.0 to 7.5 inch range in April – June 2000, and then returned to the 8.0 to 9.0 inch range from July through September of 2000. Ex. G-6, MCC-G. Historically, while flows had been in the 5.5 to 6.5 inch range for most of 1999, the charts show that there had been consistently higher readings, particularly in 1998. Fig. 38 and Thacker's chart show a generally rising pattern of flow measurements over the 1994-1999 time frame that appear to have averaged about 6.0 to 6.5 inches in the mid-1998 to mid-1999 time frame, with a number of readings of 7.0 inches in mid-1998.

More significantly, the charts show substantial fluctuations in outflow quantity. They include occasional sharp spikes, of extremely short duration, which are apparently attributable to rainfall. Trd. 131 (Almes), Trb. 701 (Thacker), Tre. 52 (Lewis). However, they also show periods of increased flow spanning several months, some of which exhibit abrupt onsets, and magnitudes approaching, if not exceeding, 100% increases. Thacker's chart, displaying the Fig. 38 outflow data, with the line slanting upward representing the increase in seepage due to the rise in the impoundment pool level, represents, in my opinion, the context within which the September 1999 data should be evaluated. Ex. Geo-14. Thacker opined that the slanted line depicted the influence of impoundment seepage that was dictated by Darcy's law, and that it is the fluctuations above that line that would have to represent unusual flow increases. Trb. 702. Virtually all witnesses agreed with the proposition that impoundment seepage would increase as the pool level rose. None, except Thacker, attempted to quantify the increase. Accepting the chart's depiction as generally accurate, it is apparent that there were a number of increases in flow measurements that were substantial and lasted for months. In mid-1995, there was an abrupt increase of nearly double the depth of flow, which lasted approximately three to four months. Another abrupt and substantial increase occurred in late 1995, again lasting about four months. There was a more gradual, but substantial, rise beginning in mid-1996 and lasting to mid-1977, and a similar rise extending from the beginning of 1998 until mid-1999.

As Lewis observed in support of his opinion that South Mains outflows were within expected ranges, the charts showed a "two-fold increase in flow" in 1995, "jumps in 1997" and "then it jumped again in 1998. That's more than a two-fold increase." He concluded that "if you really evaluate that step [the September 1999 increase], it's a pretty small step in the grand scheme of the 68-acre impoundment, the 80-plus acres of surface area that drains down into the mine, the seven to ten acres of property drained into Pond 200, [and] the perpetual seeps that drain into Pond 200. . . . [I]t's not a significant step." Tre. 132-34.

The increase in September 1999, from 6.0 inches to 8.5 inches, when viewed in isolation, as the Secretary urges, could be deemed out of the ordinary or significantly different than what had occurred in the immediate past, and could be classified as unusual. However, when viewed in light of the historical fluctuations in flow measurements, it appears much more like another cycle of a repeating pattern of increases in flow depth that lasted for a few months and then returned to lower levels. In fact, the flow depth measurements did drop to the 7.0 inch range

from April to June 2000, although that was well after the Secretary argues that the increase should have been reported. The Secretary's expert, Almes, was of the opinion that it would have been appropriate to wait for some time to confirm the readings and see if the flow decreased. He believed that the increase in flow should have been reported by January 2000. Trd. 158, Trb. 403. Owens believed that it should have been reported after one month. Trc. 311.

MCC maintains that the fact that the flow depth stayed essentially the same from the end of September through December 1999 indicates that no piping or leaking was occurring. If piping had been occurring, there should have been a steady and unabated increase in flow. Tre. 63-64, Trb. 832, 887 (Lewis). While there could have been short term decreases due to plugging of the piping opening, piping generally occurs in a zone and quickly works around obstructions. Decreases or level flows would be relatively brief, certainly not several months. Trf. 48, 58-60, 126, Trb. 970-74 (Hagerty).

The Secretary was highly critical of what she viewed as MCC's failure to evaluate the available flow data, and it was the alleged failure to evaluate the data in a systematic way that was the predicate for the unwarrantable failure designation. Trc. 310-11, Tra. 889 (Owens). It is somewhat remarkable, then, that MSHA did not analyze the earlier increases in flow,⁴¹ and the Secretary offered no explanation of the historical flow patterns, which included several abrupt and substantial increases that subsequently abated. The Secretary focused on a few weeks of data, and did not attempt to show that it was significantly different than previous flow patterns, or to explain why the increase to a depth of 8.5 inches should have been regarded with alarm when there had been numerous readings of 7.0 inches approximately one year earlier when the impoundment level was ten feet lower.

Because of their extensive experience and recognized expertise, I place considerable weight on Thacker's and Lewis' testimony that the amount of flow from the South Mains entry was within expected limits for that size facility and the pool elevation, i.e., there was no unusual change in flow quantity that indicated possible impoundment leakage. Trb. 696-97, 702, 706, 742-43 (Thacker), Tre. 53-54, 70-71 (Lewis). Hagerty also testified that, considering rainfall and the pool level, the increase in Pond 200 outflow was normal, and what would have been expected. Trf. 81.

There is little disagreement that all of the other measures of impoundment performance indicated that there was no impoundment leakage. The pool level had risen steadily. There were no swirls observed that would have indicated a leak. The measurements at the piezometers, seeps and drains, were all within normal limits, and there was no evidence of slope instability. The most significant factor, however, was the virtual absence of suspended solids in the outflow. As noted above, I find convincing the testimony of Lewis, Ballard, Johnson, Hagerty and Bellamy, to the effect that if there had been piping or leakage, there would have been suspended solids in the Pond 200 outflow. MSHA's Owens testified that the September 1999 flow increase

⁴¹ Trc. 187-88, Tra. 249 (Fredland).

was, most likely, evidence that something significant had happened with piping, i.e., the erosion of solids by impoundment leakage. Trc. 296, 366. If so, there definitely should have been suspended solids evident in the outflow. Not only were there no visible signs of suspended solids, the KPDES reports establish that there were virtually no suspended solids in the Pond 200 outflow, from September 1999 through the October 2000 breakthrough.⁴² Trb 471, 474-75 (Johnson); ex. MCC-L.

I find that the Secretary has failed to carry her burden of proof on this issue. For the reasons stated above, I reject comparisons to the 1994-99 average flow figure. The change in quantity of flow that occurred in September of 1999, when viewed in light of the historical pattern of flow measurements and the other conditions at the impoundment site, would not have been viewed by a reasonably prudent mine manager or engineer as an unusual increase in quantity of flow that would indicate possible impoundment leakage, even when viewed with heightened awareness because of the 1994 breakthrough and the increase in impoundment pool elevation.

This conclusion is confirmed by the empirical evidence. As Lewis and MCC's president, Hatfield, pointed out, numerous individuals, virtually all of whom had extensive experience with impoundments and were well aware of the 1994 breakthrough and the potential for another breakthrough, made frequent observations of South Mains and the Pond 200 outflows, and virtually every aspect of the impoundment. The same personnel had been monitoring the impoundment for years, and had experienced the increases and decreases reflected in Fig. 38 and Thacker's charts.⁴³ None of them perceived the increase in Pond 200 outflow that occurred in September 1999 as unusual, or indicative of possible impoundment leakage. Tre. 156-57 (Lewis); Tra. 1257, 1294 (Hatfield).

⁴² By all accounts, the outflow from the South Mains entry and the discharge from Pond 200 were at all times clear water, i.e., there was no evidence of turbidity, cloudiness, or suspended solids. Trb. 604 (Betoney); Trd. 278 (Muncie); Tra. 130 (Fredland); ex. MCC-G.

⁴³ Muncie, the preparation plant superintendent, had over thirty years of experience with impoundments, had been certified as an impoundment inspector by MSHA, and had personally visited the impoundment site two or three times per week. Trd. 242-43, 277-78, Tra. 1175-76. Howard, Geo's inspector, was certified as an impoundment inspector by MSHA, and has conducted some 7,000 impoundment inspections from 1989 to date. Trb. 214-16, 224, 233. Bellamy, MSHA's inspector, has a college degree in mining engineering, over 16 years of experience with impoundments, and had been certified by MSHA as an impoundment instructor. Trd. 338-40, Trb. 535-37.

ORDER

MCC's contests of Order No. 7144402 and Citation No. 7144401 are **SUSTAINED**. Order No. 7144402 and Citation No. 7144401 are hereby **VACATED**, and the petition as to those alleged violations is hereby **DISMISSED**.⁴⁴



Michael E. Zielinski
Administrative Law Judge

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⁴⁴ Although I have not accepted the Secretary's case on these alleged violations, I have the utmost respect for the MSHA personnel to whom fell the difficult task of investigating the breakthrough and determining its causes. There may have been a piping induced failure, as they concluded. However, on the two alleged violations that remain at issue, and after careful consideration of the extensive record, I concluded that the Secretary did not carry her burden of proof.

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, 2007

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2007-307-R
	:	Order No. 7692770; 06/25/2007
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 4 Mine
ADMINISTRATION, (MSHA),	:	Mine ID 01-01247
Respondent	:	

**ORDER GRANTING CONTESTANT'S
MOTION FOR SUMMARY DECISION**

Before: Judge Zielinski

This case is before me on a Notice of Contest filed by Jim Walter Resources, Incorporated ("JWR") pursuant to section 107(e) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 817(e). JWR seeks vacation of Order No. 7692770, an imminent danger order issued pursuant to section 107(a) of the Act. JWR has moved for summary decision. The Secretary has opposed the motion, contending that JWR has failed to establish that there are no material facts in dispute or that it is entitled to summary decision as a matter of law. For the reasons set forth below, the motion is granted.

Facts

Following the Sago and Darby mine disasters, where miners were killed as a result of a methane explosions originating in sealed areas of mines, the Secretary's Mine Safety and Health Administration ("MSHA") took action to require mine operators to monitor the atmosphere in such areas and to address potentially hazardous conditions. MSHA issued Program Policy Bulletin No. P06-16, on July 19, 2006, which required operators to assess the atmosphere behind alternative seals, and to take remedial action if concentrations of methane from 3 percent to 20 percent were present. On May 22, 2007, MSHA issued an Emergency Temporary Standard ("ETS"), pursuant to section 101(b) of the Act. 72 FR 28796-28817 (May 22, 2007). The ETS, which became effective upon publication, amended 30 C.F.R. § 75.335, by increasing strength requirements for newly constructed seals. It also required mine operators to develop and submit for approval protocols for monitoring and maintaining inert the atmosphere in sealed areas,

where the seals were not constructed to withstand 120 psi of overpressure. The ETS further provided:

(4) When oxygen concentrations are 10.0 percent or greater and methane concentrations are from 3.0 percent to 20.0 percent in a sealed area, the mine operator shall take two additional gas samples at one-hour intervals. If the two additional gas samples are from 3.0 percent to 20.0 percent and oxygen is 10.0 percent or greater —

- (i) The mine operator shall implement the action plan in the protocol; or
- (ii) Persons shall be withdrawn from the affected area, except those persons referred to in section 104(c) of the Act.

30 C.F.R. § 75.335(b)(4).

On June 25, 2007, Danny Crumpton, an MSHA inspector, began a quarterly inspection of JWR's No. 4 Mine. He reviewed seal examination records required to be kept under the ETS, and noted several entries reporting levels of methane within the action range specified in the ETS. He called the MSHA District 11 office, and spoke with Johnny Calhoun, the head of the ventilation division, and with Gary Wirth, the assistant district manager. He reported the seal examination record entries and told them he would take gas readings at the seals, which he proceeded to do. Readings at several seals were unremarkable. However, at 11:23 a.m., he conducted a test at seal 31, and measured methane at 10.0 percent and oxygen at 12.6 percent. He took a bottle sample, and waited to take the additional hourly measurements referenced in the ETS. Danny Aldrich, JWR's outby coordinator, who accompanied Crumpton, called for foam packs as a means to abate the condition.¹ Crumpton took another measurement at 12:27 p.m., and obtained the same result as the first test. At 1:27 p.m., Crumpton took the third measurement required by the ETS, and found that the methane concentration was 8.0 percent, and the oxygen concentration was 12.7 percent.

The three successive measurements within the specified ranges satisfied the ETS's requirement for remedial action. Because JWR's protocol/action plan had not yet been approved, the action required by the ETS was withdrawal of persons from the affected area. Crumpton took no immediate action. He continued his inspection, and proceeded to the next seal, seal 24. At 1:50 p.m., Crumpton took a measurement at seal 24, and detected 14.0 percent methane and 10.5 percent oxygen. He then proceeded to the nearest phone, called Wirth, and reported the results of his measurements. Wirth instructed Crumpton to issue an imminent danger withdrawal order at 2:20 p.m.

¹ This was consistent with the proposed action plan in JWR's protocol, which had been submitted to, but not yet approved by, MSHA.

Crumpton issued Order No. 7692770, as directed by Wirth, relying upon Wirth's judgment.² Throughout the course of these events, Crumpton did not conclude that there was, or was not, an imminent danger. Contestant's Statement of Undisputed Facts, #11. The possibility that a roof fall might ignite the gas detected by Crumpton was the only potential ignition source considered by Wirth in making the decision to have Crumpton issue the 107(a) order. *Id.* #13. At no time did Crumpton note any indications that a roof fall was imminent, behind or near seal 31, or in any other area. Nor did he note any other roof hazards. *Id.* #14.

Analysis

Commission Procedural Rule 67, 29 C.F.R. § 2700.67, states that a motion for summary decision shall be granted if there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Secretary argues that there are material facts in dispute, specifically denying item #9 in JWR's statement of undisputed facts, which reads: "The decision to issue 107(a) Order 7692770 was based solely upon the concentrations of methane and oxygen measured at seal 31." The Secretary maintains that Wirth's decision also rested upon a "consideration of roof falls as a possible ignition source." Sec'y Op. at 5. However, in item #13 of its statement JWR asserted: "The possibility that a roof fall might ignite the gas detected by Inspector Crumpton was the only potential ignition source considered by Assistant Director Wirth, in making the decision to have Inspector Crumpton issue 107(a) Order 7692770." While factual statement #9 omits the critical ignition source information, when read together with item #13, the Secretary's objection is obviated. I find that there is no dispute as to any fact material to the issues raised by JWR's motion.

Section 3(j) of the Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Section 107(a) of the Act provides, in pertinent part:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

² The Order, exhibit 3 to Crumpton's deposition, notes the readings at both seals 24 and 31 as explosive mixtures justifying issuance of the order. However, the Secretary has stipulated that the readings at seal 24, which were not within the explosive range, are not relied upon in support of the order.

30 U.S.C. § 817(a).

“Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Mine Act or the Secretary’s regulations. This is an extraordinary power that is available only when the ‘seriousness of the situation demands such immediate action.’” *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991) (“*Utah*”) (quoting from the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the predecessor to the 1977 Act). An imminent danger exists “when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting from *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (“*R&P*”). While the concept of imminent danger is not limited to hazards that pose an immediate danger, “an inspector must ‘find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.’” *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006) (quoting from *Utah*, 13 FMSHRC at 1622). Inspectors must determine whether a hazard presents an imminent danger without delay, and a finding of an imminent danger must be supported “unless there is evidence that [the inspector] had abused his discretion or authority.” *R&P*, 11 FMSHRC at 2164.

While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. An inspector must make a reasonable investigation of the facts, under the circumstances, and must make his determination on the basis of the facts known, or reasonably available to him. As the Commission explained in *Island Creek Coal Co.*, 15 FMSHRC 339, 346-347 (Mar. 1993):

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector’s subjective “perception” that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving [her] case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector’s imminent danger finding is subject to subsequent examination at the evidentiary hearing.

An inspector “abuses his discretion . . . when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners.” *Utah*, 13 FMSHRC at 1622-23.

The critical question in determining whether an accumulation of methane presented an imminent danger is whether there was an ignition source that might reasonably have been expected to cause an explosion resulting in death or serious injury within a short period of time. In *Island Creek*, the Secretary conceded that explosive accumulations of methane in a longwall gob would create an imminent danger only if an ignition source presented a significant danger.³ 15 FMSHRC at 347. Similarly, on the related question of whether a methane accumulation hazard presented a reasonable likelihood of an injury causing event, the Commission has focused on the presence of an ignition source. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988) (critical question for significant and substantial determination is likelihood of explosive concentrations of methane coming into contact with an ignition source). The Commission has held that statements that certain events “could” occur, are not sufficient to support a finding that there was a reasonable likelihood of an ignition of methane for a significant and substantial determination. *Zeigler Coal Co.*, 15 FMSHRC 949, 953-54 (June 1993).

JWR’s motion challenged Crumpton’s decision to issue the order, and the fact that he, admittedly, had not made a determination that an imminent danger existed. The Secretary countered that it was Wirth, who is also an authorized agent of the Secretary, who made the determination to issue the order, and that his exercise of discretion should be sustained. In its reply to the opposition, JWR does not dispute the fact that Wirth made the decision, and that he did not have to be present at the scene to have done so. However, it contends that Wirth must be held to the same “abuse of discretion” standard that would apply had he been on the scene, and that he clearly abused his discretion in this case.

The alleged imminent danger condition, an explosive level of methane in the atmosphere behind seal 31, was confirmed by Crumpton no later than 11:23 a.m.⁴ Crumpton was an experienced inspector who had made determinations on issuance of imminent danger orders in the past. He was aware of potential ignition sources in the sealed area, namely roof falls and electromagnetic field changes. Yet he made no determination that an imminent danger existed at that time. Nor did he make a determination that an imminent danger existed when he confirmed the readings at 12:27 p.m., re-confirmed them at 1:27 p.m., or found similar readings at seal 24 at 1:50 p.m. At 2:20 p.m., when he talked to Wirth, he still had not made a determination that an imminent danger existed.

It is extremely doubtful that Wirth could have been in a better position than Crumpton to assess whether conditions at the mine presented an imminent danger. Crumpton, who was on the

³ The Commission expressly did not reach the issue of whether the Secretary “may support an imminent danger order by showing that an explosive accumulation of methane is present without proving a specific ignition source.” 15 FMSHRC at 348. The Secretary does not claim to take such a position here.

⁴ As noted in the ETS, methane is explosive at concentrations between 5% and 15%, when in the presence of oxygen concentrations of at least 12%. 72 FR at 28799.

scene, had not identified any roof hazards, and never concluded that a roof fall was imminent in the sealed area, or in any other area of the mine. Wirth testified during his deposition that the only potential ignition source that he considered was a roof fall. However, he admitted that, because of “the unknown composition of the atmosphere and the unknown nature of the composition of the rock” in JWR’s mine, it would have been pure conjecture to specify a probability for an ignition from a roof fall.⁵ Cont. ex. 3 at 76. It is clear that he did not instruct Crumpton to issue the order based upon an assessment of the likelihood of a roof fall resulting in an ignition. He testified that he was applying an unwritten rule, or policy, subscribed to by unnamed MSHA officials, to the effect that “atmosphere readings that fell within the ETS numbers of 4.5 to 17 [percent methane], and above 10 percent oxygen, constituted an imminent danger.” *Id.* at 72-73.

The Commission has criticized situations in which an inspector’s exercise of discretion in determining whether an imminent danger exists had been “constrained” by instructions issued by MSHA officials, which “precluded the inspector from conducting a requisite reasonable investigation of the facts and exercising his discretion.” *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555-56 (Aug. 2006). It also found “particularly appropriate” an MSHA policy prohibiting the use of section 107(a) orders for control purposes, where the instructions removed the inspector’s independent judgment in issuing imminent danger orders. 28 FMSHRC 556, n. 14.

Wirth does not appear to have been acting in conformance with instructions from a supervisor. Rather, he decided to adopt a position held by some other MSHA officials. Nevertheless, he was, in essence, using the section 107(a) order for control purposes, i.e., to enforce the withdrawal provision of the ETS.⁶

Under the authorities cited above, it is clear that an actual ignition of the explosive atmosphere behind the seals was, at best, a theoretical possibility, and that issuance of the imminent danger order was not justified. It is apparent that Wirth was enforcing the ETS, rather than making a discretionary determination that an imminent danger existed. The ETS was issued

⁵ In a recent case, MSHA ventilation specialists, one of whom had developed training materials on the subject, essentially conceded that a roof fall was an unlikely ignition source. *Cumberland Coal Resources, LP*, 27 FMSHRC 295, 319-20 (Mar. 2005) (ALJ) (*aff’d in part, rev. in part*, 28 FMSHRC 545 (Aug. 2006)).

⁶ There may have been another avenue available to enforce the ETS. Once the three successive readings within the ETS’s specified range were obtained, JWR was obligated to withdraw persons from the affected area. If it failed to do so within a reasonable period of time, Crumpton could have issued a citation charging a violation of the ETS, and imposed an appropriate time for abatement. If JWR failed to timely abate the violation, and no extension of the abatement deadline was warranted, Crumpton could have issued an order pursuant to section 104(b) of the Act, requiring withdrawal of miners from the affected area.

upon a determination by the Secretary that miners face a grave danger when underground seals separating abandoned areas from active workings fail. 72 FR at 28796. While that determination supports the issuance of the ETS, it does not override the requirements for issuance of an imminent danger order pursuant to section 107(a) of the Act. Moreover, the structure of the ETS, which requires action if concentrations of methane and oxygen that are not necessarily explosive exist for a period of two hours, is inconsistent with the concept of an imminent danger.

ORDER

Based upon the foregoing, Contestant's motion for summary decision is hereby **GRANTED**. JWR's contest of Order No. 7692770 is **SUSTAINED**, and Order No. 7692770 is hereby **VACATED**.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 16, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2006-519-M
Petitioner	:	A.C. No. 04-01299-091434 G861
	:	
v.	:	Docket No. WEST 2007-138-M
	:	A.C. No. 04-01299-101436 G861
MORNING GLORY GOLD MINES,	:	
Respondent	:	Sixteen to One Mine

DECISION

Appearances: John D. Perez, Conference & Litigation Representative, Mine Safety and Health Administration, Vacaville, California, for Petitioner; Michael A. Miller, Morning Glory Gold Mines, Alleghany, California, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Morning Glory Gold Mines ("Morning Glory"), 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"). Morning Glory contested two citations issued by the Secretary under section 104(a) of the Mine Act. An evidentiary hearing was held in Nevada City, California.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Morning Glory is a sole proprietorship owned by Michael Miller. Morning Glory employs the miners who work at the Sixteen to One Mine (the "mine"). Original Sixteen to One Mine, Inc. ("Original Sixteen to One") is the owner of the mine and Mr. Miller is the president of Original Sixteen to One. The mine is a multi-level, underground, high-grade gold mine, located in Sierra County, California. Original Sixteen to One is a public corporation. When it was no longer able to meet its financial obligations, it contracted with Morning Glory for its employment and labor needs. (Tr. 6-7).

A. Contested Citations.

On April 24, 2006, a regular inspection of the Morning Glory Mine was conducted by MSHA Inspector Troy VanWey. He was accompanied by Ian Haley and Kevin McCarthy from Morning Glory. Inspector VanWey issued Citation No. 6393201 under section 104(a) of the Mine Act alleging a violation of section 57.11012 as follows:

No barrier or railings were provided to prevent persons from falling through the opening at the new dry bldg. The 45 inch by 73 inch opening on the river side of the new dry building was adjacent to the travelway used to access the MCC and other storage accessed by the miners as needed. Multiple footprints were noted on the travelway. This condition creates a potential of a fatality to the miner should he fall through the opening to the ground level which is about 20 feet below the floor level of the new dry building.

Inspector VanWey determined that an injury was reasonably likely and that any injury resulting from the violation was likely to be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that Morning Glory's negligence was moderate. The safety standard provides, in part, that "[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers." The Secretary proposes a penalty of \$154.00 for this citation.

Inspector VanWey stated that he inspected the dry building that was under construction and observed the alleged violation. A dry building is an area where miners can change from their street clothes into their work clothes and vice versa. This particular area had only one point of access. Inspector VanWey noticed an obvious opening on the river side of the dry building measuring approximately 45 inches wide by approximately 73 inches high. There was a board that was ten inches high across the opening at the very bottom. He believes that the opening was located adjacent to a travelway in an area that was about 20 feet wide and about 50 feet long. Inspector VanWey felt this area was a travelway after observing a motor control area, lockers, and multiple sets of footprints. However, the Inspector did not observe anyone in the area during the inspection, but noted that a miner did come back later in the day to retrieve his coveralls.

Ian Haley, the mine manager, testified that this area was under construction and was being completed as funding allowed. (Tr. 55, 65). Although miners may enter the room, it was not being used as a change room. Mr. Miller testified that the opening in question was going to be a door for a deck, or a window. (Tr. 74-75). Mr. Miller also felt that this area did not meet the definition of travelway as it was not regularly used and there was no place to go. (Tr. 77; Ex. R-4). He was unable to explain the presence of the footprints, but commented that they could have been from a construction worker who admittedly would be covered by the Mine Act.

The term "travelway" is defined in section 75.2 as a "passage, walk or way regularly used and designated for persons to go from one place to another." The area around the opening in the back of the dry building that was under construction did not fit into this definition. The area was neither "regularly used" nor "designated" to be used for persons to "go from one place to another." The electrical panels (Motor Control Center) were near the entrance to the building and were not near the opening. (Ex. R-4). A miner would not pass by the opening to get to the MCC. Although there may have been some sort of locker or storage bin in the room, there is no indication that anyone would have walked by the opening to get to it. As stated above, the opening was at the back of the room. Although nothing prevented anyone from entering the dry area, it was not being used at the time and miners would not be traveling through the area to get to any other area in the mine. Consequently, I find that the Secretary did not establish that there was an opening "above, below, or near" a travelway and I vacate the citation.

On July 25, 2006, Inspector William Berglof issued Citation No. 6393126 under section 104(a) of the Mine Act alleging a violation of section 57.11012 as follows:

The cover provided over the 31-inch by 24-inch hole located at the 1300 station was not in place to prevent persons or materials from falling through the opening. A fall through this opening would likely be fatal. Miners removed the cover and descended down the ladderway in order to perform an electrical splice. The cover was not put back in place. The exact time the splice was done is unknown per the mine manager. This opening is along a travelway but located in a remote section of the mine. There were no tripping hazards noted.

Inspector Berglof determined that an injury was unlikely but that any injury resulting from the violation was likely to be fatal. He determined that the violation was not S&S and that Morning Glory's negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation. The citation was immediately terminated when the cover was closed.

Mr. Berglof is no longer employed by MSHA and he did not testify at the hearing. Inspector VanWey authenticated the citation. Morning Glory Mines presented the testimony of Ian Haley. The cited hatch cover opens to a raise (winze) that goes down to a pump. The hatch cover measures 24 x 31 inches. The cited opening is not along the travelway but is about eight feet from the middle of the entry that is the travelway. (Tr. 62; Exs. R-1, R-2). The travelway is rarely used and the area is accessed only when a new employee is trained and during monthly inspections. (Tr. 58). Mr. Haley stated that the miners did not have to go down the raise or even near the hatch cover to use the secondary escapeway. (Tr. 61, 63, 65-66). In addition, because the hatch cover was located along the hanging wall, which is at a 45 degree angle, you have to stoop over to open the hatch cover. (Tr. 64). "It's not something you can just walk to." *Id.* Mr. Haley also felt that incorrect language was used in the citation which stated that miners removed the cover. He stated that the hatch cover was opened, not removed.

I find that the Secretary did not establish a violation. I credit the testimony of Mr. Haley. The entry through which miners occasionally pass is eight feet away from the cited opening. The opening is at the end of an eight foot long entry that is perpendicular to the travelway. This perpendicular entry cannot be construed as a travelway. Miners would never travel down that entry except to open the hatch and go down the raise to work on the pump. The opening was at the end of that entry on the left side and was partially protected by the angled hanging wall. Tripping hazards were not present in the area. I find that the entry containing the opening where the hatch cover had been left open was not a travelway, as that term is defined by MSHA. Consequently, I find that the Secretary did not establish a violation of the safety standard and I vacate the citation.

B. Uncontested Citations.

The Secretary agreed to modify Citation No. 6393202 to reduce the gravity and delete the S&S designation. She contends that the penalty should be reduced to \$60.00. The Secretary agreed to vacate Citation No. 6393122. Morning Glory agreed to accept Citation Nos. 6393124 and 6393125 as written.

Morning Glory seeks to have the penalties for Citation Nos. 6393124, 6393125, and 6393202 reduced on the basis of the ability to continue in business criterion. It set forth its financial arguments at the hearing. (Tr. 83-85 ; Ex. R-5). The SEC 10-Q statement of Original Sixteen to One for the quarter ending June 30, 2007, lists its current liabilities as \$1,346,896 and its current assets as \$662,900. *Id.* This statement also lists its loss from operations during the first six months of 2007 as \$228,185. Mr. Miller testified that Original Sixteen to One had a net loss of \$111,490 in 2005 and a net loss of \$405,764 in 2004. He testified that "money is very, very tight." (Tr. 85). Mr. Miller is personally liable for the obligations of Morning Glory.

The Secretary proposes a penalty of \$60.00 for each violation. This is a nominal penalty. It has not been shown that a penalty of \$180.00 will have an adverse affect on Morning Glory's ability to continue in business.

II. APPROPRIATE CIVIL PENALTIES

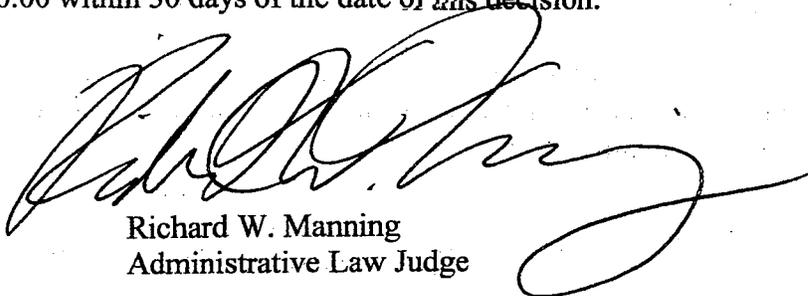
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that Morning Glory had been issued about five citations in the 24 months preceding these inspections. Morning Glory is a small contractor with about ten employees. (Tr. 54-55). The penalties assessed in this decision will not have an adverse effect on Morning Glory's ability to continue in business. The citations were rapidly abated. 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>
WEST 2006-519-M		
6393201	57.11012	Vacated
6393202	57.12032	\$60.00
CENT 2007-138-M		
6393122	57.14112(b)	Vacated
6393124	57.3200	\$60.00
6393125	57.4201(a)(2)	\$60.00
6393126	57.11012	Vacated
TOTAL PENALTY		\$180.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Morning Glory Gold Mines is **ORDERED TO PAY** the Secretary of Labor the sum of \$180.00 within 30 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

John D. Perez, Conference & Litigation Representative, Mine Safety & Health Administration,
2060 Peabody Road, Suite 610, Vacaville, CA 95687-6696 (Certified Mail)

Michael Miller, Morning Glory Gold Mines, P.O. Box 941, Alleghany, CA 95910-0941
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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 16, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2006-29
Petitioner	:	A.C. No. 46-08909-70032 A
	:	
v.	:	
	:	
KENNETH D. BOWLES ,employed by	:	
NEW RIVER MINING COMPANY,	:	
Respondent	:	Mine No. 1

DECISION

Appearances: Karen M. Barefield, Esq., U.S. Department of Labor, Arlington, VA, on behalf of the Petitioner
Kenneth D. Bowles, Princeton, WV, *pro se*

Before: Judge Barbour

This case is before me on a petition for the assessment of civil penalty filed by the Secretary of Labor ("Secretary") on behalf of her Mine Safety and Health Administration ("MSHA") against Kenneth D. Bowles ("Bowles"), an employee of New River Mining Company ("New River" or "the company") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("the Act") (30 U.S.C. §§ 815, 820). The Secretary alleges Bowles, as an agent of New River, knowingly violated one of the Secretary's safety standards for underground coal mines. She also alleges the violation was a significant and substantial contribution to mine safety hazards ("S&S") and was caused by Bowles's high degree of negligence. The Secretary seeks a civil penalty of \$1,500. The alleged violation is set forth in an order issued pursuant to 104(d)(2) of the Act (30 U.S.C. § 814(d)(2)). Bowles denies the Secretary's allegations. The case was tried in Bluefield, West Virginia on August 14, 2007.

The order was issued for the company's alleged failure to comply with its roof control plan ("the Plan") at the company's Mine No. 1 ("the mine"), a bituminous underground coal mine located in Greenbrier County, West Virginia. The company was cited for the violation after slickensides were discovered in the 001-0 Mechanical Mining Unit ("MMU") of the mine without at least two cable bolts per row installed between rows of the section's primary roof

support.¹ Tr.21. The conditions were found during an inspection conducted by MSHA inspectors on August 6, 2004.

THE INSPECTION

Harold Hayhurst ("Hayhurst") is employed by MSHA as an inspector. Hayhurst's job duties include the inspection of coal mines, accident investigations, and the review of roof control plans. Tr. 18-19. Prior to his employment with MSHA, Hayhurst accumulated 21 years of experience in the mining industry as an equipment operator, section foreman, mine foreman, and mine superintendent. Tr. 18. Hayhurst has completed the roof control specialist and accident investigation training provided by MSHA. Tr. 19.

On the evening of August 6, 2004, Hayhurst, along with 3 other MSHA inspectors, arrived at the mine. The inspectors proceeded underground and traveled to the mine's active section. There, Hayhurst observed slickensides in the roof. Tr. 21. Hayhurst described the slickensides as "glassy," "highly polished," "easy to see," (Tr. 24) and "real slippery." Tr. 30. Hayhurst also testified "there hadn't been any cable bolts installed [in the roof] between the rows of bolts as required by the [P]lan." Tr. 21. In Hayhurst's opinion, the presence of the slickensides and the lack of cable bolts was obvious.

Another MSHA inspector took several photographs of the conditions. One of the photographs showed a gray shelf of slickenside and a sandstone slickenside. Tr. 24; Gov't Exh. 4. Another photograph showed a "big drag fold in the roof" that contained slickensides. An additional photograph showed portions of the roof that had fallen and lay next to one of the entry's ribs. Tr. 24; Gov't Exh. 5.

The approved roof control plan, stated "[w]here slickensided formations are present, the primary roof support shall be supplemented with a minimum of 2 cable bolts per row installed between the rows of primary support. These cable bolts shall be a minimum of 8 feet in length." Gov't Exh. 7 at 3. As a result of the slickensides and the lack of cable bolts, Hayhurst concluded the roof control plan had been violated and he issued an order of withdrawal to New River charging the company with a violation of section 75.220(a)(1).²

¹ "Slickensides" are defined as "striations, grooves, and polish on joints and fault surfaces." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 513 (2d ed. 1997). They are frequently indicative of unstable and weak roof. See Tr. 27-28.

²

30 C.F.R. §75.220(a)(1) requires each operator of an underground coal mine to:

develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

Hayhurst testified at the time of the inspection Bowles was the mine superintendent. Tr. 40. Hayhurst discussed the order with Bowles. Tr. 47. He questioned Bowles as to why the cable bolts had not been installed. According to Hayhurst, Bowles replied he didn't feel they were needed. Tr. 48. Hayhurst believed that Bowles, as the mine superintendent, was responsible for ensuring the roof control plan was followed. Tr. 48.

**THE ORDER, THE ALLEGED VIOLATIONS, AND THE PROCEEDINGS AGAINST
NEW RIVER AND AGAINST KENNETH BOWLES**

The subject order, Order No. 7227134, states:

The approved roof control plan was not being complied with on the 001-0 MMU. The mine roof, on the 001-0 MMU contains high angled slips and slickensided formations in the numbers 1, 2, 3, 4, 5, 6, and 7 entries, and adjoining crosscuts, and the primary roof support has not been supplemented with a minimum of 2 cable bolts per row at any of these locations. The approved plan states that where slickensided formations are present the primary roof support will be supplemented with at least 2 cable bolts per row installed between the rows of primary support. These conditions were extensive and obvious to anybody traveling on the section including foremen and examiners. The section started mining in this area of the mine on 7/29/2004. This citation is an unwarrantable failure to comply with the approved roof control plan.

Gov't Exh. 8.

Following issuance of the order, the Secretary proposed the company be assessed a civil penalty of \$3,700 for the alleged violation of section 75.220(a)(1). In addition to the allegation of the violation of section 75.220(a)(1), the Secretary's petition proposed assessments for several other alleged violations. The petition was filed with the Commission as Docket No. WEVA 2005-51. When New River failed to answer the petition, a default order was issued and the company was assessed the proposed penalties. *See Amended Order of Default (November 29, 2005).*

Subsequently, the Secretary brought the subject individual civil penalty case against Kenneth Bowles asserting he, as the agent of New River, knowingly violation the roof control plan as stated in the order.

Section 110(c) states:

Whenever a corporate operator violates a mandatory health
or safety standard or knowingly violates or fails or refuses to comply

with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 105(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

THE ISSUES

The principal issues are whether the alleged violation occurred, whether Bowles was an agent of the operator as defined by the Act, whether Bowles knowingly authorized, ordered, or carried out the violation, and if so, the amount of the civil penalty that must be assessed, taking into consideration the applicable civil penalty criteria as set forth in section 110(i) of the Act. 30 U.S.C. § 820(i).

THE VIOLATION

To establish a violation of section 75.220(a)(1) the Secretary must prove the provision allegedly violated is part of the approved and adopted plan. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). Additionally, the Secretary must prove the cited condition or practice violated the provision. *Id.* "When a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280 (Dec. 1998) (citing *Jim Walter Resources, Inc.* 9 FMSHRC at 907). "The ultimate goal of the [plan] approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord.... "[A]fter a plan has been implemented (having gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed upon meaning." *Id.* (quoting *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981)).

Clearly, the Secretary met her burden as to the first part of the test. The plan states that when slickenside formations are present, the primary roof support shall be supplemented with cable bolts. The plan was in effect on the date of the inspection and the citation alleged a violation of the stated provision of the plan. The second part of the test also was met by the Secretary through testimony and photographs depicting the slickenside formations that were present and the lack of supplemental roof bolts to support the roof in the cited area. Bowles may have believed, as he told Hayhurst, that supplemental bolts were unnecessary (*see, e.g.* Tr. 48, 60, 63), but the plan called for their installation, and the plan had been approved. Therefore, I find the violation existed as charged.

S&S AND GRAVITY

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133,135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of the violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

The first factor was satisfied as I have found the Secretary established a violation of section 75.220(a)(1). The other factors likewise were satisfied. Failing to comply with the roof control plan posed a discrete safety hazard by subjecting miners to the danger of falling rock due to unstable and inadequately supported roof, a hazard which could result in serious injuries to miners working in the 001-0 MMU. The record supports a finding that there was a reasonable likelihood of injury due to the failure to comply with the roof control plan. Slickensides frequently indicate weak and unstable roof making it reasonably likely that debris could fall and injure a miner. As Inspector Hayhurst persuasively testified, the cited roof was brittle and pieces of it were prone to fall between the permanent roof bolts. Moreover, the height of roof (six feet in most areas) meant miners were likely to be cut or even fatally injured by the falling debris. Tr. 30. Therefore, I conclude that there was a reasonable likelihood that failure to comply with the approved roof control plan could result in injury. In addition, the violation was serious as the effect could seriously injure or possibly kill a miner.

SECTION 110(c) LIABILITY

As previously noted, under Section 110(c) of the Act, "whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty." *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 566-67 (August 2005); 30 U.S.C. § 820(c)). Pursuant to Section 110(c), the judge must determine whether the corporate agent knew or had reason to know of a violative condition. *Id.* at 567. In order for a violation to be knowing, it must occur when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Id.*; quoting *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981).

Bowles testified that he was aware of the requirements of the approved roof control plan. Tr. 103. Bowles had discussions with some of the roof bolters and other miners regarding the roof control plan and Bowles told them to "[d]o it like you've always done it." Tr. 109. Bowles stated that when the top was taken down and it was solid, slickenside was not present and no cable bolts were required. *Id.*; see also Tr. 116-119. However, Inspector Hayhurst persuasively testified and presented photographic evidence that slickensides were present, and that they had existed for approximately one week without cable bolts. Tr. 48; Gov't. Exh. 4-5. Therefore, I find that Bowles knowingly violated the standard as he was aware of the requirements of the roof control plan, had reason to know of slickenside conditions, and did not ensure cable bolts were installed.

An agent under Section 3(e) of the Act is defined as "any person charged with the responsibility for the operation of all or a part of any coal or other mine, or the supervision of the miners of a coal or other mine." Bowles testified on August 6, 2004, he was acting as the mine manager. Tr. 100. Bowles also stated that should miners need to be disciplined the mine or section foreman would come to him to determine the proper company procedure. *Id.* Moreover, Bowles said "yes" when asked if he was "the voice of the owner on the property." Tr. 101. Additionally, Bowles had the authority to fire a mine foreman after discussion with the mine owner. Tr. 102. Bowles played a major supervisory role, if not the major supervisory role, at the mine and was therefore an agent of the operator at the time of the violation.

The Commission has held that a "violation under section 110(c) involves aggravated conduct, not ordinary negligence." *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992). Bowles' actions constitute more than ordinary negligence as he knowingly disregarded the approved Plan and made his own determination as to what should be done without regard to miners' safety. Therefore, I conclude Bowles was liable under section 110(c), for the violation of section 75.220(a)(1) cited in Order No. 7227134.

CIVIL PENALTY CRITERIA

This was a serious violation, and Bowles exhibited more than ordinary negligence in failing to comply with the roof control plan because he had reason to know of the slickensides

yet failed to ensure compliance with the Plan. In addition, Bowles had a history of previous knowing violations in that he was previously cited for a knowing violation while employed by another company. *See* Gov't Exh. 10; Tr. 49-51. Finally, there is no evidence in the record to suggest paying the penalty proposed by the Secretary will prevent Bowles from meeting his day-to-day financial obligations. For these reasons, I conclude the penalty of \$1,500.00 proposed by the Secretary is appropriate.

ORDER

Kenneth Bowles **SHALL** pay a civil penalty of \$1,500 within 40 days of the date of this decision, and upon payment of the penalty this proceeding **IS DISMISSED**.³


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

Distribution: (Certified Mail)

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Kenneth Bowles, Rural Route 4, Box 660 P, Princeton, WV 24740

/sf

³

If payment within the time ordered proves onerous, Bowles may wish to try to arrange a structured payment plan with the Secretary.

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 19, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2006-201
Petitioner	:	A.C. No. 36-09274-87087
	:	
v.	:	
	:	
SUMMIT ANTHRACITE, INC.,	:	Brockton Slope
Respondent	:	

DECISION

Before: Judge Bulluck

Appearances: Lynne Bowman Dunbar, Esq., U.S. Department of Labor, Arlington, Virginia, and Ronald M. Miller, CLR, U.S. Department of Labor, Hunker, Pennsylvania, for Petitioner; Michael Rothermel, President, Summit Anthracite, Inc., Klingerstown, Pennsylvania, for Respondent.

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration ("MSHA"), against Summit Anthracite, Incorporated ("Summit"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of \$1,569.00 for 19 alleged violations of the Act and her mandatory safety standards.

A hearing was held in Reading, Pennsylvania. The Secretary's Post-hearing Brief is of record.¹ Respondent waived its right to file a brief. For the reasons set forth below, I VACATE three citations, AFFIRM 16, as AMENDED where indicated, and assess penalties against Respondent.

¹ Two editions of the transcript were issued, identical in text, but distinguishable by configuration of page content and count. The Secretary's Brief references the second, more condensed edition. The citations in this decision are made to the first edition. For purposes of Commission review and any subsequent proceedings, the first edition is the official transcript.

I. Stipulations

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding, pursuant to section 105 of the Mine Act, 30 U.S.C. § 815;
2. Summit Anthracite, Incorporated, was an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the coal mine at which the citations at issue in this proceeding were issued;
3. The operations at Summit Anthracite, Incorporated, Brockton Slope Mine, at which the citations at issue in this proceeding were issued, are subject to the jurisdiction of the Mine Act;
4. The individuals, whose signatures appear in block 22 of the citations at issue in this proceeding, were acting in their official capacities as authorized representatives of the Secretary of Labor when the citations were issued;
5. True copies of the citations at issue in this proceeding were served on Respondent or its agent, as required by the Mine Act; and
6. The total proposed penalty for the citations at issue in this proceeding will not affect Respondent's ability to continue in business.

Tr. 12-13.

II. Factual Background

Michael Rothermel is the president of Summit Anthracite, which owns and operates the Brockton Slope underground coal mine in Schuylkill, Pennsylvania. Rothermel and his business partner operate the mine on an intermittent basis and, at most, employ one to two additional miners. Tr. 459. In the fall and winter of 2005-2006, when the citations at issue were written, Brockton Slope was a relatively new mine, and Rothermel was in the process of installing new systems. Tr. 322. Several inspectors were involved in issuing these citations, pursuant to section 104(a) of the Act.

Inspector Ronald Pinchorski generated Citation No. 7008242 on November 22, 2005, in the Pottsville Field Office, without a physical inspection, charging a violation of 30 C.F.R. § 50.30, for failure to file a quarterly employment and coal production report with MSHA. Tr. 158-63; ex. G-9.

On January 10, 2006, Inspector Jack McGann, accompanied by Pottsville Field Office supervisor, Lester Coleman, conducted an E-18, shaft/slope sinking inspection of the Brockton Slope mine, which encompassed the surface as well as the underground areas. Tr. 22-26. During a conversation with Michael Rothermel while on the surface, McGann observed a Mack haul truck enter mine property and back up, without an audible back up alarm. Tr. 27-28. After verifying that the alarm was not operable, McGann issued Citation No. 7008148, alleging a violation of 30 C.F.R. § 77.410(a). Tr. 34-40; ex. G-2.

The following day, January 11, Inspector Gregory Mehalchick, accompanied by his supervisor, Tom Garcia, conducted a compliance assistance inspection of the Brockton Slope mine because the roof support being utilized was not generally used in District 1. Tr. 61-62. MSHA Inspector Danny Silvers was at the mine as well, conducting a spot electrical inspection of the new installations. Tr. 58, 322. While the three inspectors were underground, accompanied by Rothermel, several citations were issued. Mehalchick observed that the roof control system was performing adequately but, based on measurements he took with Silvers, found that the overall height and width of the entry at the face exceeded the specifications of the mine's Shaft and Slope Sinking Plan. Tr. 65. Accordingly, Mahalchick issued Citation No. 3561179, charging a violation of 30 C.F.R. § 77.1900-1. Tr. 66-67; ex. G-3. Mehalchick also issued Citation No. 3561180, charging a violation of 30 C.F.R. § 77.1914(a), based on his observation of a non-permissible pump in the mine that was being used to maintain the water level at the face. Tr. 75-79; ex. G-5. Silvers issued Citation No. 7008402, alleging a violation of 30 C.F.R. § 77.502, based on his observation of a 110-volt submersible pump located near the continuous miner, with a three-prong grounded cord plugged into a two-prong ungrounded extension cord. Tr. 329-35. When he returned to the top of the slope, Silvers discovered an unused and unplugged standard knockout (3/4 inch hole) in the bottom of the metal disconnect box on the telephone pole located near the mine entrance. Tr. 339-40. Therefore, he issued Citation No. 7008401, charging a violation of 30 C.F.R. § 77.516. Ex. G-26. Finally, while inspecting the electrical trailer that provides power to the underground section of the mine, Silvers discovered two unused and unplugged 2 ½ inch openings in the top of the disconnect box located on top of the trailer. Tr. 344-45. Consequently, he issued Citation No. 7008400, charging a violation of 30 C.F.R. § 77.516. Ex. G-27.

On January 18, Inspector Silvers returned to the Brockton Slope mine, which was not operating that day, to continue his spot electrical inspection. Tr. 349-50, 384. Silvers met with Rothermel and examined the electrical book, which documents the electrical examinations conducted in the mine. Rothermel told Silvers that the mine had been energized since late November. Tr. 355. The first record of an electrical examination, however, was January 13. Tr. 351-53. As a consequence of finding no record of electrical monthly examinations for November and December 2005, Silvers issued Citation No. 7008403, charging a violation of 30 C.F.R. § 77.502. Ex. G-29. As a result of the information that Rothermel gave Silvers about the electrical installations at the mine, Silvers issued two additional citations. First, Rothermel informed Silvers that he, Rothermel, had performed all the electrical work in the mine, and had

not had a qualified electrician examine the work before energizing the mine. Tr. 359-61. While Rothermel reported to Silvers that he had not worked on any energized circuits, he also acknowledged that he had not worked under the supervision of a qualified electrician. Tr. 361-62. Based on his finding that Rothermel was not qualified to perform the electrical installations in the mine without the supervision of a qualified electrician, nor had his work been examined and tested by a qualified electrician prior to energizing the mine, Silvers issued Citation No. 7008404, alleging a violation of 30 C.F.R. § 77.501. Tr. 362-66; ex. G-30. Silvers also learned from Rothermel that the mine's continuous miner had not passed a permissibility inspection underground before it was placed in service in December 2005, as required by regulation, but had been inspected off-site before it was brought into the mine, Tr. 372-75. Consequently, Silvers issued Citation No. 7008405, alleging a violation of 30 C.F.R. § 77.502 for failure to conduct the appropriate electrical exam in December. Tr. 376-77; ex. G-32.

On January 19, Inspector Pinchorski participated in a quarterly health and safety inspection of the underground and surface areas of the Brockton Slope mine. Tr. 164-66. Accompanying Pinchorski were his supervisor, Lester Coleman, supervisor Tom Garcia, Inspector Mehalchick, two MSHA technical support personnel, and Rothermel. Tr. 164-66. As a result of his observations, Pinchorski issued several citations. He issued Citation No. 7008253, alleging a violation of 30 C.F.R. § 77.1605(k), for failure to provide adequate berms along an elevated roadway. Tr. 167; 175-83; ex. G-12, 14. Citation No. 7008254 was issued by Pinchorski for failure to identify the mine office with a sign, in violation of section 109(a) of the Act, 30 U.S.C. § 819(a). Tr. 184; ex. G-15. Citation Nos. 7008255 and 7008256 allege violations of 30 C.F.R. §§ 77.1104 and 77.205(b), respectively, for a combustible materials accumulation and an obstructed travelway in the mine's mobile home-type trailer. Tr. 185-94; ex. G-16, 17. Pinchorski issued Citation No. 7008257, alleging a violation of 30 C.F.R. § 77.400(a), for failure to provide adequate guarding of belts and pulleys in the engine compartment of a Caterpillar haul truck. Tr. 194-99; ex. G-18. Citation No. 7008258 alleges a violation of 30 C.F.R. § 77.1102, for failure to provide a diesel fuel storage tank with signs warning against smoking and open flames. Tr. 199-202; ex. G-19, 20. Pinchorski issued Citation No. 7008259, alleging a violation of 30 C.F.R. § 77.205(b), for failure to make the travelway clear of stumbling hazards in the generator building. Tr. 202-07; ex. G-21. He also issued Citation No. 7008260, charging a violation of 30 C.F.R. § 77.412(a), for failure to equip the compressed air receiver tank with an automatic pressure relief valve and a pressure recording gauge. Tr. 208-15; ex. G-23.

Based on information that Tom Garcia had learned on February 6, about a roof and rib fall at Brockton Slope, Mehalchick and Garcia returned to the mine on February 7 to conduct an investigation. Tr. 81-82. Also present were Rothermel and an inspector from the Pennsylvania Department of Deep Mine Safety. Tr. 84-85. Mehalchick and Garcia, accompanied by Rothermel, traveled underground as far as the collar, and observed that the area inby the collar was unsafe: top rock had fallen, some bolts and roof support were down and the continuous miner was visible, but covered with debris. Tr. 85, 88-96; ex. G-7. Consequently, Mehalchick issued Citation No. 3082100, alleging a violation of 30 C.F.R. § 50.10, for failure to formally

notify MSHA that an accident had occurred. Tr. 86-87, 98-100; ex. G-8. Mehalchick also issued a section 103(k) order (not at issue in this proceeding), requiring Rothermel to submit for MSHA's approval, a plan for retrieving the continuous miner. Tr. 87, 101-02.

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

1. Citation No. 7008242

Inspector Pinchorski testified that, in assigning the Brockton Slope mine to him, his supervisor had called his attention to the fact that the quarterly employment and coal production report had not been timely submitted. Tr. 160. Therefore, Pinchorski issued 104(a) Citation No. 7008242, alleging a non-significant and substantial violation of section 50.30(a).² Citation No. 7008242 describes the hazardous condition as follows:

The operator did not submit MSHA Form 7000-2 quarterly employment and coal production report to the Denver office for the 3rd quarter of 2005.

Ex. G-9. Pinchorski assessed the operator's negligence as moderate because, he reasoned, Rothermel had been in business for a long time and knew or should have known that the report was due in a timely manner. Tr. 158-59. According to Pinchorski, the citation was served on Rothermel by certified mail. Tr. 161. Thereafter, he stated, when the inspectors conducted the health and safety inspection of the mine in February 2006, and the quarterly report had not been submitted by that time, he issued a 104(b) order for Rothermel's failure to abate the citation. Tr. 160-61; ex. G-10. The citation was finally abated on February 23, 2006, when a report was sent to MSHA by facsimile. Tr. 161-63.

Michael Rothermel acknowledged that he had been submitting quarterly reports for 20

² 30 C.F.R. § 50.30(a) requires the following:

Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in § 50.30-1 and submit the original to the MSHA Office of Injury and Employment Information, P.O. Box 25367, Denver Federal Center, Denver, Colo. 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from the MSHA District Office. Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date. You may also submit reports by facsimile, 888-231-5515. To file electronically, follow the instructions on MSHA Internet site, <http://www.msha.gov>. For assistance in electronic filing, contact the MSHA help desk at 877-778-6055.

years, and stated that he had timely submitted the form by regular mail. Tr. 432-33. He admitted that he had failed to maintain a copy of the report, even though section 50.30(a) requires operators to retain copies of such reports for five years. Tr. 473-75. According to him, MSHA inspectors had been more reasonable in the past about minor oversights. Tr. 434-36. He did concede, eventually, that the report was submitted late, and that the company now sends them by facsimile. Tr. 435-36. Accordingly, I find that section 50.30(a) was violated, as alleged.

2. Citation No. 7008148

Inspector McGann testified that he was approximately 70 feet from the Mack haul truck when he observed it backing up without hearing an alarm. Tr. 28. In order to verify his observation, he stood about three feet from the cab, instructed the operator to put the vehicle in reverse so that he could listen for the alarm and, again, it did not sound. Tr. 29-30, 46-47. Consequently, McGann told the truck operator that he would be issuing a citation to his boss, the contractor. Tr. 55-57. He also issued Citation No. 7008148 to Rothermel, charging a significant and substantial violation of section 77.410(a).³ Citation No. 7008148 describes the violative condition as follows:

The Mack haul truck #240 operating in the coal load out area was not provided with an automatic warning device that gives an audible alarm when the truck is put in reverse.

Ex. G-2. McGann testified that at the close-out conference, Rothermel stated that he was not responsible for contractors coming on his property - - that they should have their trucks "up to

³ 30 C.F.R. § 77.410(a) requires as follows:

Mobile equipment such as front-end loaders, forklifts, tractors, graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that--

(1) Gives an audible alarm when the equipment is put in reverse; or
(2) Uses infrared light, ultrasonic waves, radar, or other effective devices to detect objects or persons at the rear of the equipment, and sounds an audible alarm when a person or object is detected. This type of discriminating warning device shall--

(i) Have a sensing area of a sufficient size that would allow endangered persons adequate time to get out of the danger zone.

(ii) Give audible and visual alarms inside the operator's compartment and an audible alarm outside of the operator's compartment when a person or object is detected in the sensing area; and

(iii) When the equipment is put in reverse, activate and give a one-time audible and visual alarm inside the operator's compartment and a one-time audible alarm outside of the operator's compartment.

par.” Tr. 41-42. The citation was terminated on January 30, 2006, by Inspector Pinchorski, who observed that the haul truck had been removed from mine property. Tr. 39-40; ex. G-2.

Inspector McGann explained that he believed it reasonably likely that an injury could occur, that would result in loss workdays or restricted duty, because the truck could back into pedestrians or vehicles behind it and result in injuries to the leg and head and also, the truck driver could be hurt. Tr. 34-35. This assessment, that the hazard affected the safety of the mine operator, the truck driver, and the end-loader operator, formed the basis of his significant and substantial designation. Tr. 36-37. McGann explained that he assessed the mine operator’s negligence as moderate because he was responsible for all equipment on his mine property. Tr. 37.

Rothermel testified that the back-up alarm sounds and increases in volume the closer it comes to an object. Tr. 424. He conceded that he did not hear the alarm sound when the truck backed up, and that a front-end loader was operating in the area. Tr. 467-68. According to him, the back-up alarm did not sound because the driver was not backing toward any object. Tr. 426-27. He admitted that he had not given the inspector this information, and he doubted that the truck driver even knew it. Tr. 426-27. Finally, Rothermel never made the argument during the course of the hearing that he was not responsible for the condition of the independent contractors’ trucks that enter the mine property.

It is clear that the alarm was not audible when the truck backed up and, even if the alarm were activated by detecting echos from the sound of the truck nearing an object, as Rothermel alleges, the standard requires that a one-time audible alarm sound outside the operator’s compartment when the truck is put in reverse. Therefore, section 77.410(a) was violated, as alleged.

B. Significant and Substantial

Inspector McGann determined that the gravity of the violation was “significant and substantial” (or “S&S”). The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that is “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine or safety hazard.” A violation is properly designated S&S “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood

that the injury in question will be of a reasonably serious nature. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). In *U. S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission provided further guidance:

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

This evaluation, the reasonable likelihood of injury, should be made in the context of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (December 2005); *U.S. Steel Mining Co.*, 6 FMSHRC 1573 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding the violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

Applying the *Mathies* criteria to this case, I have found a violation and that failure to maintain a back-up alarm that is audible in the surrounding environment was reasonably likely to result in injuries to unsuspecting pedestrians, equipment operators, and the truck operator, himself. It is also reasonably likely that injuries resulting from an accident with such a large instrumentality, i.e., lacerations, broken bones and trauma to the head and vital organs, would be of a reasonably serious nature. Accordingly, I find that the violation was S&S.

3, 4. Citation Nos. 7008402 and 7008403

Inspector Silvers issued Citation No. 7008402, alleging a non-significant and substantial violation of section 77.502, after he discovered in an underground area of the mine, a small submersible pump (3-pronged cord) plugged into an ungrounded extension cord (2 prongs), so that the bare ground prong was exposed on the exterior of the extension cord.⁴ Tr. 329. According to Silvers, the pump was not running at the time, and the cord extended about 50-60

⁴ 30 C.F.R. § 77.502 requires that “[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.”

feet to within two feet of another extension cord, obviously the connection for energizing the pump. Tr. 327, 329-32. He explained that the pump was set up for ungrounded operation, thereby posing a shock hazard. Tr. 333, 335. The Condition or Practice section of the citation states that:

The 110vac submersible pump located at the end of the track on the slope was not maintained to assure a safe operating condition in that the extension cord the three prong pump cable was plugged into was an ungrounded extension cord. The pump was not energized and the cable supplying power to it was unplugged about 60 foot [sic] away.

Ex. G-25. Silvers testified that he found it unlikely that someone would be injured by the condition, based on the fact that the pump was unplugged and because Rothermel's surprised reaction convinced him that the condition had existed for only a short time. Tr. 333-34. He assessed the operator's negligence as moderate, he explained, because the pump's naked ground prong should have been obvious when it was connected to the ungrounded extension cord. Tr. 334-35. According to Silvers, Rothermel immediately abated the citation by removing the ungrounded extension cord from the mine. Tr. 337.

Rothermel expressed his opposition to the citation by testifying that the pump was not operating and the extension cord was taken out of service as soon as Silvers identified the problem. Tr. 456-57. I am persuaded by the positions of the cords that the pump was ready and available for use, and that it was ungrounded when energized. Therefore, section 77.502 has been violated, as alleged.

Silvers also issued Citation No. 7008403, alleging a non-significant and substantial violation of section 77.502. The citation describes the violation as follows:

There was no record of a monthly electrical examination for the month of November or December 2005.

Ex. G-29. Silvers testified that the first entry in the electrical book was January 13, 2005. Tr. 351-52. He explained that surface operations regulated by Part 77 are required to have monthly inspections of their electrical installations and, therefore, he had expected to see entries for every month that the mine had been energized. Tr. 352-54. According to Silvers, Rothermel told him that the mine had been energized sometime in late November, that he was aware of the requirement, but that he had simply forgotten to have a qualified electrician conduct the periodic electrical examinations. Tr. 355. Because this was a "record" citation, Silvers found it unlikely that an injury would result from the violation, and he assessed the operator's negligence as moderate because Rothermel had been in the business for a long time and knew of the requirement. Tr. 356-57. The citation was terminated by the electrical exam recorded on January 13. Tr. 357.

Rothermel essentially stipulated at the hearing that he had committed the violation, but emphasized that he objected to having been cited where the abatement occurred prior to issuance of the citation. Tr. 462. Therefore, section 77.502 was violated, as alleged.

5, 6. Citation Nos. 7008400 and 7008401

Inspector Silvers issued Citation Nos. 7008400 and 7008401, alleging non-significant and substantial violations of section 77.516, after discovering a 3/4 inch and two 2 1/2 inch unused knockouts in the bottom of electrical disconnect boxes located on the surface.⁵ Tr. 339-40, 344-46. The Condition or Practice section of Citation No. 7008400 describes the violation as follows:

Two unused openings existed in the top of the energized disconnect box marked Miner Disconnect. The openings were 2 1/2 [inches] in diameter. The disconnect was located in the trailer beside the head frame. Reference NEC 370-8.

Ex. G-27. Citation No. 7008401 describes the violation as follows:

An unused opening existed in the energized visible disconnect box mounted on a pole beside the slope fan. The opening was on the bottom right side. The box is marked 480 vac. Reference NEC 370-8.

Ex. G-26. Section 370-8 of the National Electric Code of 1968, as incorporated by section 77.516, requires that openings in electrical boxes be either used or plugged. Tr. 340-41. Silvers determined that an injury would be unlikely to occur respecting both conditions, because the miner disconnect box with the 2 1/2 inch openings at the top was at least 6 1/2 feet off the ground, and the 3/4 inch opening in the other box was too small to allow access to the electrical components. Tr. 342, 347. He explained that his assessment of moderate negligence was based on Rothermel's explanation that the violations were inadvertent, but that he should have known about them at some point in time. Tr. 342, 348. Rothermel promptly abated the citations by plugging the unused openings. Tr. 342.

Rothermel testified that he had purchased electric boxes from a coal company that had gone out of business, and had assumed that they had been inspected by MSHA and were up to code. He essentially conceded that he had violated the standard by acknowledging that there was a problem with the boxes that was fixed probably within 15 minutes of Silvers' discovery. Tr. 457-58, 489-90. He also conceded that the boxes may have been installed for one to two months and that, had a qualified electrician conducted a monthly inspection, as required, the

⁵ 30 C.F.R. § 77.516 states that "[i]n addition to the requirements of §§ 77.503 and 77.506, all wiring and electrical equipment installed after June 30, 1971, shall meet the requirements of the National Electrical Code in effect at the time of installation."

openings would have been detected. Tr. 490-91. Accordingly, in both instances, I find that section 77.516 was violated, as alleged.

7. Citation No. 3561179

Inspector Mehalchick issued Citation No. 3561179, alleging a non-significant and substantial violation of section 77.1900-1, after discovering that Respondent had not complied with the mine's Shaft and Slope Sinking Plan.⁶ Tr. 65. Respondent's Shaft and Slope Sinking Plan was approved by MSHA on July 6, 2005, and required that the entry to the slope have a maximum height and width of eight feet. Tr. 71; ex. G-4. The citation alleges the following:

The operator shall adopt and comply with the shaft or slope sinking plan for the mine. The operator's plan calls for the slope to be a maximum of eight feet high by eight feet wide. The slope was measured approximately 8'3" high by 13'5" wide at the face. Men are required to work and travel in this area.

Ex. G-3. Mehalchick testified that he found that the violation was unlikely to result in an injury because the roof control utilized in the mine appeared to be adequate. Tr.66. He explained that, subsequently, Respondent was permitted to submit a revision of its Shaft and Slope Sinking Plan, and the citation was terminated by MSHA's approval of the Plan. Tr. 67-68.

Although Rothermel argued that there is no procedure in Part 77 regulations for revision of shaft and slope sinking plans, Respondent's Shaft and Slope Sinking Plan includes a Roof Control Plan that incorporates revision procedures set forth in section 75.113. See Tr. 107-109. Furthermore, as a very experienced mine operator, it is reasonable to hold Rothermel responsible for knowing that he should not have deviated from the mine's approved Plan without first contacting MSHA. He stipulated that the dimensions of the slope at the face were "technically" at variance with the Plan and, therefore, a violation. Tr. 70. Accordingly, I find that section 77.1900-1 was violated, as alleged.

8. Citation No. 3561180

Inspector Mehalchick issued Citation No. 3561180, alleging a non-significant and substantial violation of section 77.1914(a), based upon his observation of a non-permissible pump located at the face.⁷ The Condition or Practice is described as follows:

⁶ 30 C.F.R. § 77.1900-1 requires that, "[u]pon approval by the Coal Mine Health and Safety District Manager of a slope or shaft sinking plan, the operator shall adopt and comply with such plan."

⁷ 30 C.F.R. § 77.1914(a) requires that "[e]lectric equipment employed below the collar of a slope or shaft during excavation shall be permissible and shall be maintained in a permissible condition."

Electrical equipment employed below the collar of a slope during excavation shall be permissible and maintained in permissible condition. The sump pump at the face of the slope is not a permissible pump. Men are required to work and travel in this area. Ventilation tubing extended to approximately ten feet of the face, providing approx. 15,000 cfm. No methane was detected. The pump was maintained in good condition.

Ex. G-5. Mehalchick testified that the pump was located near the face of the slope, approximately 150-250 feet from the surface. Tr. 75. He explained that the pump was lacking MSHA identification indicating that the pump was permissible. Tr. 79. Mehalchick found that the violation was unlikely to cause an injury, he explained, because although non-permissible, the pump was maintained in good condition, there was adequate ventilation at the face and, during the inspection, no methane was detected. Tr. 77-78. He ascribed moderate negligence to the operator because Rothermel should have known that equipment used at the face must be permissible. Tr. 78.

During cross-examination of Mehalchick, Rothermel acknowledged that the pump was non-permissible. Tr. 109. It is Rothermel's contention that MSHA unfairly "singled him out," by issuing a letter to other underground anthracite coal operators six months after he was cited, granting them a two-week grace period in which to switch from non-permissible to permissible pumps. Tr. 112-13, 119-23. I am persuaded by the Secretary's argument, however, that, at the time Respondent was cited its operations were inspected under Part 77 of the regulations, and that the notice to which Rothermel referred pertained to slope development under other conditions that are regulated by Part 75. Tr. 114-118. In any case, the distinction is not pivotal, because the mere issuance of the letter six months after the citation was issued to Respondent establishes its irrelevance. Accordingly, I find a violation of section 77.1914(a), as alleged.

9. Citation No. 7008404

Inspector Silvers issued Citation No. 7008404, after learning that Rothermel had performed the electrical installations and had overlooked having them examined before energizing the mine. Tr. 359-61. The citation charged a significant and substantial violation of section 77.501.⁸ The violation is described as follows:

⁸ 30 C.F.R. § 77.501 provides that "[n]o electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

A non-qualified electrician performed electrical work and the work was not examined and tested by a qualified electrician prior to being placed in service.

Ex. G-30. The citation was terminated by the electrical inspection performed by the qualified electrician five days earlier on January 13. Tr. 368. Silvers explained that Rothermel had been authorized to work on de-energized circuits, but only under the direction of an MSHA qualified electrician, and that he had not been authorized to energize the system until it had been examined and tested by a qualified electrician. Tr. 361-63, 365-66. Therefore, because of the extensive nature of the work and the safety risks associated with low, medium and high voltage electricity, unexamined and untested prior to energization, Silvers found it reasonably likely that a permanently disabling injury could occur, and designated the violation significant and substantial. Tr. 364-65. Silvers also testified that he evaluated the operator's negligence as moderate, because he believed Rothermel's explanation that his failure to have the installations inspected prior to powering the mine had been an oversight. Tr. 368.

MSHA records indicate that Rothermel had been certified as a qualified electrician, for both surface and underground installations, through 1999. Tr. 370-71; ex. G-31. Moreover, Rothermel conceded the violation, but objected to the S&S designation and any likelihood of injury, based on the quality of his work. Tr. 70. Accordingly, I find that a violation of section 77.501 has been established.

I do not find, however, that Rothermel's performance of electrical installations was reasonably likely to result in an injury of a serious nature. Silvers testified that Respondent's unsupervised, then unexamined, work could have reasonably contributed to numerous safety hazards: "... bad connections, a flash, a burn, a cable that was going through a panel that may have been cut and would possibly ground out, that the arc itself would injure you." Tr. 366. None of these hazardous conditions existed, however. Silvers acknowledged that "[t]he circuits that I saw, the cable runs I saw I thought was very well, very good." Tr. 405. He also testified that the qualified electrician had reported "no deficiencies found" in the January 13 electrical book entry, and that he, himself, had indicated the same in his field notes. Tr. 408. Therefore, I find that the violation was not S&S.

10. Citation No. 7008405

Inspector Silvers issued Citation No. 7008405, after discerning that Respondent's continuous miner had not passed a permissibility inspection prior to being placed into service, alleging a significant and substantial violation of section 77.502-2. It is clear, however, as the Secretary points out, that the evidence conforms to the broader standard, 77.502, which requires that electric equipment be frequently examined, tested, and properly maintained by a qualified person, rather than the narrower substandard, 77.502-2, which requires that those tests be

performed at least monthly.⁹ Sec'y Br. at 36-37. Accordingly, this citation will be analyzed under section 77.502. *See Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (August 1997) (permitting adjudication of issues actually litigated by the parties irrespective of pleading deficiencies).

Citation No. 7008405 describes the violation as follows:

The monthly electrical examination and tests required under provision 77.502 were not conducted for the month of December 2005.

Ex. G- 32. Silvers testified that Rothermel informed him that the continuous miner had been put in service the last week of December, and that the permissibility inspection had been conducted "at the breaker before it was loaded and moved to the mine site." Tr. 372-73. Silvers explained that permissibility must be established by a qualified electrician at the site where the equipment is to be used. Tr. 373-75, 377. He assessed the violation as reasonably likely to result in a permanently disabling injury and, therefore, significant and substantial, primarily because transporting the machine - -loading and off-loading the machine and cables, bouncing on the highway - - has the potential of damaging its components, including sensitive instruments like the methane monitor, and damage to the cables could result in burn injuries. Tr. 376-79. He explained that, in charging the operator with moderate negligence, he had taken into account that anthracite miners are relatively inexperienced with permissible equipment, and that Rothermel had made some effort to comply with the regulations by having the continuous miner inspected off-site. Tr. 379-81. The citation was terminated by the January 13 electrical inspection and calibration performed by a qualified electrician. Tr. 381.

Rothermel conceded that he had violated the standard, but disagreed with the S&S designation. Tr. 462. Accordingly, I find that the Secretary has established a violation of section 77.502. Without evidence of any damage to the components of the continuous miner, however, I do not find that the violation was reasonably likely to result in an injury of a serious nature. Accordingly, I find that the violation was not S&S.

11. Citation No. 7008253

Inspector Pinchorski issued Citation No. 7008253, alleging a significant and substantial

⁹ 30 C.F.R. § 77.502-2 provides that "[t]he examinations and tests required under the provision of this § 77.502 shall be conducted at least monthly."

30 C.F.R. § 77.502 provides that "[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept."

violation of section 77.1605(k), for Respondent's failure to provide adequate berms along elevated roadways.¹⁰ The Condition or Practice is described as follows:

The elevated roadways located on the mine property were not adequately bermed on the outer bank to prevent accidental overtravel at the following locations: for a distance of approximately 35 feet from the hoist building in a southerly direction along the creek with a drop of approximately 40 feet; to the northeast of the mine hoist building on the main haul road leading to the tipple area, for a distance of approximately 20 feet with a drop off of approximately 15 feet; the main haul road leading to the tipple area where the road crosses over the creek on both sides for a distance of approximately 20 feet with a drop off of approximately 40 feet; in the area of the mine settling pond on [the] south side of the pond for a distance of approximately 40 feet with a 10 foot drop off; and on the elevated road leading past the mine generator building for a distance of approximately 65 feet with a drop off of approximately 65 feet.

Ex. G-12. Pinchorski testified that, in the areas cited, mine personnel and inspectors were present, and that water company personnel drive through. Tr. 176. In his opinion, a truck or car or loader could have a mechanical problem, or a vehicle operator could make a mistake, causing a vehicle to travel over the roadside down to a ditch, creek or pond. Tr. 177. Pinchorski explained that some areas were entirely without berms, while others cited were bermed with "little piles of dirt that were nowhere near mid-axle high." Tr. 229-34. According to Pinchorski, the dirt piles that he observed, no more than 3-4 inches high and a few inches wide, may have been a barrier for a bicycle, but could not have prevented a car from overtravel. Tr. 235-36, 240-41. He determined that the violation was significant and substantial based on the reasonable likelihood that serious injury, i.e., broken bones and head trauma, could result from overtravel, and that the likelihood of occurrence becomes "more likely when the activity becomes more prevalent at the mine." Tr. 176, 178. Pinchorski assessed the operator's negligence as moderate because of Rothermel's years of experience in the mining industry and his familiarity with berm requirements in mine construction. Tr. 179. Pinchorski further testified that Respondent timely abated the citation, except for one cited area. Tr.180-81. Consequently, he issued 104(b) Order No. 7008277, as a result of Respondent's failure to berm the roadway near the generator building, where there is a 65-foot drop down to the lower mine property. Tr. 180-82; ex. G-13, 14. According to Pinchorski, as of the date of the hearing, because that area remained unbermed, the citation had not been completely abated. Tr. 180, 436.

Rothermel testified that the mud berms, initially four feet high, had settled to 1 ½ feet high by two feet wide, with "at least 10 foot of mud between the road and what was left of the berm." Tr. 437-38. According to him, all areas of roadway cited were flat, except the remaining unbermed area, and no vehicles could overtravel because they would get stuck in the mud.

¹⁰ 30 C.F.R. § 77.1605(k) provides that "[b]erms or guards shall be provided on the outer bank of elevated roadways."

Tr. 436-39, 476. He testified that he bermed the areas within two days of the citation, except that he did not construct berms or guardrails along the roadway elevated 30 feet above the others, because the deep miners never use that segment for fear of rupturing the township waterline that runs under it. Tr. 476-82. He further explained that the roadway continues off mine property for about three miles and extends across a number of other properties. Tr. 478-79.

The Commission has held that “the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard.” *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (January 1983). The Commission explained that “[t]he definition of berm in section 77.2(d) makes clear that the standard’s protective purpose is the provision of berms and, by implication, guards that are “capable of restraining a vehicle.” *Id.* (citing 30 C.F.R. § 77.2(d)).

By his own testimony, Rothermel conceded that the berms were inadequate due to substantial settlement over time and that, at some point, they should have been built up. Tr. 238-40. While he argued that the cited segments are only slightly sloped, he did not discredit Pinchorski’s estimation of the drop-off distances to the ditch, pond and creek noted in the citation. Moreover, respecting the elevated segment that has remained unbermed, Respondent does not dispute that it is on deep mine property.

I find that the cited segments of roadway were elevated above dangerous drop-offs, that the existing berms were incapable of restraining vehicles used at the mine, and that the segment near the generator building, bordered by a 65 foot drop-off, was required to be bermed also, especially because it was accessible for travel. Accordingly, I find that section 77.1605(b) was violated, as alleged. Furthermore, because the drop-off distances from the cited areas of roadway ranged from 10 to 65 feet, I find it reasonably likely that serious injuries would occur in the event of a vehicle overtraveling and, therefore, that the violation was S&S.

12. Citation No. 7008254

Inspector Pinchorski issued Citation No. 7008254, alleging a non-significant and substantial violation of section 109(a) of the Mine Act, for Respondent’s failure to identify the mine office with a sign.¹¹ The Condition or Practice is described as follows:

There was no conspicuous sign at the mine site that designates the location of the mine office.

Ex. G-15; tr. 169. Pinchorski testified that he assessed Respondent’s negligence as moderate,

¹¹ Section 109(a) of the Mine Act states, in part, “[a]t each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. . . .” 30 U.S.C. § 819(a).

based on Rothermel's years of experience in the mining industry and his conclusion that Rothermel knew or should have known of the requirement, based on his ownership of other mines. Tr. 184. He also noted that the citation was timely abated. Tr. 184-85. Rothermel's contention that there is only one building at the mine site, the hoist building, does not exempt Respondent from posting a conspicuous sign, as required by the standard. Tr. 246-48. Pinchorski's testimony that he and Coleman observed that there was no sign on either the hoist building or the mobile home trailer was not rebutted by Rothermel. Tr. 298. Accordingly, I find that section 109(a) of the Act was violated, as alleged.

13. Citation No. 7008255

Inspector Pinchorski, upon inspecting the mobile home trailer on site, issued Citation No. 7008253, alleging a significant and substantial violation of section 77.1104,¹² describing the Condition or Practice as follows:

Combustible materials were allowed to accumulate where they could create a fire hazard along the south wall of the mobile home trailer used as a change house on mine property. These materials consisted of various types of motor and hydraulic oils to include a container of kerosene and a kerosene torpedo type heater with spillage of kerosene on the (carpet) floor.

Ex. G- 16. According to Pinchorski, Rothermel told him that the trailer was part of the surface strip mine, but Pinchorski inspected it, nonetheless, because it appeared to him to be situated on deep mine property. Tr. 169. Pinchorski observed that the kerosene heater, apparently used for miners changing clothing, was leaking and, contrary to Rothermel's explanation that the moisture was rain from the leaking roof, determined that the carpet was saturated with a combination of strong-smelling kerosene and water. Tr. 169-70, 185. Pinchorski, a volunteer fire chief for 27 years, testified that he designated the violation significant and substantial primarily because of the fire hazard caused by the strong fumes that could easily ignite, for example, if someone entered the trailer with a lit cigarette. Tr. 186. Pinchorski also testified that the heater was off at the time of inspection, but that a miner could have set the trailer on fire by turning it on. Tr. 186-87. In his opinion, serious second and third degree burns could reasonably be expected to result from an ignition, depending upon where a person would be situated. Tr. 187. Pinchorski ascribed moderate negligence to Respondent based on general common sense that kerosene is flammable and should have been removed or diluted. Tr. 188-89. He also testified that Respondent timely abated the citation by cleaning up the spillage. Tr.189.

Rothermel maintained throughout the hearing that two mines occupy the property, and that the sole building on deep mine property is the hoist building. Tr. 440. He explained as follows:

¹² 30 C.F.R § 77.1104 provides that "[c]ombustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

“There are two mines. There’s the surface mine and the deep mine. That’s where the problem’s arising here. . . . The surface mine overlaps the deep mine. So the deep mine is actually just a postage stamp. The other building that was there [mobile home trailer], if you want to call it a building, was the office for the surface mine. The equipment for the surface mine was parked by that building. You know, there was like a - - someone with mining knowledge would know that a fluorescent orange truck 14- foot high, 14-foot wide, 40-foot long does not belong at the deep mine. That was part of the surface mine.”

Tr. 440-41; see 250-256. Rothermel also testified credibly that he pointed out to Pinchorski the bulletin board for the surface mine in the trailer. Tr. 258-59, 443-44.

The Secretary bears the burden of establishing that the mobile home trailer was part of the underground mine. Her insistence on placing it on deep mine property is not substantiated by any concrete evidence, but rather Pinchorski’s conjecture that “without a map, without an engineer or survey marks or some kind of identification, I have to go with my gut feeling as far as I have to do my job.” Tr. 257-58. Additionally, while Rothermel acknowledged that the trailer was formerly used as the underground mine office, that fact alone, without any proffer from the Secretary of the mine boundaries, is insufficient to carry the Secretary’s burden of establishing that the mobile home trailer was part of the Brockton Slope mine and properly inspected by Pinchorski. Consequently, I find that the Secretary has failed to prove a violation of section 77.1104, as alleged, and vacate the citation.

14. Citation No. 7008256

Inspector Pinchorski issued Citation No. 7008256 for stumbling hazards that he observed in the mobile home trailer, alleging a significant and substantial violation of section 77.205(b).¹³ The Condition or Practice was described as follows:

The travelway in the mine mobile home trailer used for a change house facility is not being kept clear of extraneous materials and other stumbling hazards. I observed various 5 gallon cans of motor oils [sic], hose, equipment parts, and personnel [sic] items in the travelway.

Ex. G-17. Pinchorski testified that he designated the violation significant and substantial because, based on the clutter that he observed, and his determination that the area was frequently used for storage and changing clothes, it was reasonably likely that someone could trip and fall into any of the sharp edges and objects in the trailer, and suffer serious injury such as cuts,

¹³ 30 C.F.R. § 77.205(b) requires that “[t]ravelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or tripping hazards.”

broken bones, and head injuries. Tr. 190-93. In his opinion, the operator was moderately negligent based on Rothermel's experience in the mining industry and common knowledge that travelways should be kept uncluttered and free of tripping hazards. Tr. 193-94.

Rothermel's primary defense was essentially the same as that offered regarding the kerosene spillage in the mobile home trailer- - that the inspector did not observe any deep miners entering the trailer because it was on surface mine property. Tr. 250-260, 446. Based on my finding that the Secretary has failed to prove that the mobile home trailer was situated on deep mine property, I find no violation of section 77.1104.

15. Citation No. 7008257

Inspector Pinchorski issued Citation No. 7008257, based on his observation of a haul truck parked on mine property, alleging a significant and substantial violation of section 77.400(a).¹⁴ The Condition or Practice is described as follows:

The Caterpillar Model 769B haul truck located on the mine property was not provided with adequate guarding to prevent persons from coming into contact with moving parts in that the engine cooling fan belts and pulleys were exposed.

Ex. G- 18. Pinchorski opined that the truck was probably operated at the surface mine. Tr. 171, 195. According to Pinchorski, however, the truck was parked on underground mine property, plugged into an engine block heater overnight to facilitate an easier start-up in the morning, and it was not tagged out of service, but readily available for use at the deep mine. Tr. 195-96, 300. Pinchorski testified that the violation was significant and substantial based on the fact that the truck's motor oil can be checked with the engine running, so that it is reasonably likely that an operator performing maintenance or a pre-shift examination could come in contact with the exposed pulleys and belts and get caught up in the moving parts. Tr. 196-97. Pinchorski opined that contact with the unguarded moving parts would be reasonably likely to cause serious injuries ranging from severe lacerations to loss of hands or fingers. Tr. 197-98. He assessed the operator's negligence as moderate because Rothermel knew or should have known that exposed belts and pulleys must be guarded and because, as part of its outreach to the mining industry, MSHA places great emphasis on the seriousness of guarding. Tr. 198-99. He also testified that the citation was timely abated. Tr. 199.

Rothermel, again, argued that the truck was not on deep mine property by explaining that "[t]he demarcation between the surface and the underground mine is the road that traveled through the property. Anything to the right of the road belonged to the surface mine. Anything

¹⁴ 30 C.F.R. § 77.400(a) requires that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

to the left of the road belonged to the deep mine. And it was parked to the right of the road.” Tr. 484. While he confirmed that, six months prior to being cited, the truck had been used to haul dirt for the underground mine, he insisted, nevertheless, that it was parked on surface mine property. Tr. 484. Based on my finding that the Secretary has failed to carry her burden of establishing the boundaries of the Brockton Slope mine and, therefore, that the truck was properly inspected as part of that mine, I find that the Secretary has failed to prove a violation of section 77.400(a).

16. Citation No 7008258

Inspector Pinchorski issued Citation No. 700258, for failure to provide a sign warning against smoking and open flame on a diesel fuel storage tank, alleging a non-significant and substantial violation of section 77. 1102.¹⁵ The Condition or Practice is described as follows:

The diesel fuel tank located in the mine generator building was not provided with signs warning against smoking and open flames that could readily be seen by all persons.

Ex. G- 19. Pinchorski testified that there was a sign on the 500-gallon fuel tank located in the generator building, but that it was not readily apparent upon entering the building, because it was located on the far end of the tank. Tr. 200-01, 264; ex. G-20. He stated that it was necessary to look in the 12-inch space between the fuel tank and the generator in order to see the sign. Tr. 276. The Respondent’s level of negligence was moderate, he explained, because “everybody in the mining industry knows that you have to - - gasoline, fuel tanks, and so on - - you are required to label them as far as warning against no smoking or . . . contents flammable, and so on.” Tr. 202. He also testified that the citation was timely abated. Tr. 202.

Rothermel testified that the fuel tank was brand new and manufactured with a “no smoking” sign painted on it. Tr. 446-47. He opined that number 2 diesel fuel poses no explosion hazard and that it is impossible to light the vapors with a cigarette. Tr. 447-49. His opinions were unsubstantiated, however, and, in addition to warning against smoking, the standard requires warning against exposure to open flames. Beyond the lack of explosion and ignition argument, Rothermel simply stands on the fact that the manufacturer provided a sign at the end of the fuel tank, even though he did not attempt to argue that it was readily visible. Accordingly, I find that section 77.1102 was violated, as alleged.

17. Citation No 7008259

Inspector Pinchorski issued Citation No. 7008259, alleging a significant and substantial violation of section 77.205(b), for failure to maintain the travelway in the generator building free

¹⁵ 30 C.F.R. § 1102 requires that “[s]igns warning against smoking and open flames shall be posted so they can readily be seen in areas or places where fire or explosion hazards exist.”

of stumbling hazards.¹⁶ The Condition or Practice is described as follows:

The travelway leading from the entrance of [the] mine generator building past the fuel tank to the front of the generator was not clear of stumbling hazards in that the 8 inch I-beams were positioned on end approximately 2 feet apart from each other for a distance of approximately 8 feet. This is the only entrance to the generator for persons to check and provide maintenance which is performed at least two times per day to start and stop the generator.

Ex. G-21. Pinchorski described the generator building as a series of enclosed I-beam frames with the base rails rising approximately eight inches above the concrete floor, and a fuel tank and generator welded to the I-beams. Tr. 203-05, 277; see 278-89; ex. G-22. He explained that travel from the entrance to the front of the generator required stepping over each I-beam, and that eventually someone was going to fall; were they to fall onto the concrete, or into the generator, fuel tank or I-beams, injuries could occur. Tr. 203-04. He assessed the violation as significant and substantial because the area was traveled daily to check the generator and oil, and to start and stop the generator, and it was reasonably likely that a miner could stumble and fall, sustaining broken bones, a concussion, lacerations, or burns. Tr. 205-06. He ascribed moderate negligence to the operator, based on the owners' extensive mining experience and because they could have done a better job of preventing the condition. Tr. 207. Respondent abated the citation in good faith by installing a flat walking surface of boards over the I-beams. Tr. 207.

Rothermel's argument that miners are accustomed to walking on I-beams may be true, but does not allow for any missteps or moments of inattentiveness that are bound to occur from time to time. See Tr. 280-81, 287-88.

It is evident that the raised I-beams presented a stumbling hazard that could reasonably be expected to result in injuries of a serious nature. Therefore, I find a violation of section 77.205(b), as alleged, and that the violation was S&S.

18. Citation No. 7008260

Inspector Pinchorski issued Citation No. 7008260, alleging a significant and substantial violation of section 77.412(a).¹⁷ The Condition or Practice is described as follows:

The compressed air receiver tank located adjacent to the mine tippie is not

¹⁶ 30 C.F.R. § 205(b) requires that "[t]ravelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

¹⁷ 30 C.F.R. § 77.412(a) requires that "[c]ompressors and compressed-air receivers shall be equipped with automatic pressure-relief valves, pressure gauges, and drain valves."

equipped with an automatic pressure relief valve and a pressure recording gauge.

Ex. G-23. Pinchorski testified that the air compressor was equipped with a pressure-relief valve and gauge, but that the compressed-air receiver tank was not. Tr. 208-09. He explained that the gauge indicates the amount of air pressure in the system, and that the pressure-relief valve is a safety mechanism to prevent an explosion. Tr. 210. In his opinion, the importance of having a gauge and valve on both pieces of equipment is that the mechanisms on the one act as a check against failure of the mechanisms on the other. Tr. 291. The gravity of the violation was assessed as significant and substantial because, according to Pinchorski, without a safety device to check the continuation of air pumped from the compressor, an explosion is reasonably likely to occur. Tr. 209-12. He further testified that “you could have shrapnel like a hand grenade or something. I mean, air lines have busted before, and they’ll bust at the weakest point. And if it would happen to burst . . . next to where somebody might be working . . . you could have pieces of aluminum coupling flying.” Tr. 211. The Respondent was charged with moderate negligence because, he reasoned, mines that have an air compressor usually have an air receiver tank with a “pop off” valve and gauge either underground or on the surface, and the operator knew or should have known that the safety devices were required. Tr. 213-14. Pinchorski also noted that the citation was timely abated. Tr. 214.

Rothermel testified that the air receiver tank had been installed at the end of the previous day, that the installation was incomplete at the time of inspection, and that the valve and gauge were 30 miles away at the preparation plant. Tr. 452-53. According to him, the compressor started leaking oil into the compressed air line, and the compressor was not run for a week or two thereafter, until the appropriate replacement parts arrived. Tr. 453-54. His own rendition of the facts, then, establishes that the compressor and air receiver tank had been running the prior day until the oil leak occurred, without the proper safety mechanisms on the tank, and the system could have been energized at any time thereafter. Therefore, I find a violation of section 77.412(a) and that there was a reasonable likelihood that, should the safety mechanisms installed on the compressor fail to detect a hazardous concentration of air, an explosion could have occurred that could seriously injure a miner. Accordingly, I find that the violation was S&S.

19. Citation No. 3082100

Inspector Mehalchick issued Citation No. 3092100 during his investigation of the roof and rib fall at the face of the Brockton Slope mine, alleging a non-significant and substantial violation of section 50.10, after concluding that Respondent had failed to report the accident.¹⁸ The Condition or Practice reads as follows:

¹⁸ 30 C.F.R. § 50.10 requires that “[i]f an accident occurs, an operator shall immediately contact the MSHA District Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District Office, it shall immediately contact the MSHA Headquarters Office in Arlington, Virginia by telephone, at (800) 746-1553.”

If an accident occurs, the operator shall immediately contact the MSHA district office having jurisdiction over the mine. If the operator cannot contact the district office, it shall immediately contact the MSHA headquarters office in Arlington, Virginia. An accident occurred at the operation on or about 04/06/06 when an unplanned roof/rib fall occurred in active workings that impaired ventilation and impeded passage. The operator failed to contact MSHA of this event.

Ex- G-8. At the time of the investigation, the operator was required to contact MSHA within 30 minutes of the accident. Tr. 99. Mehalchick estimated the fall to have occurred on or before February 6 at 11:30 a.m., and noted that MSHA was not properly notified until February 7 at 9:30 a.m. when the inspectors were on-site. Tr.86-87; ex. G-6.

Rothermel testified that the roof of the slope “squeezed” over the course of a month, rather than fell, that the miners reported to work on Monday morning, observed the result of the squeeze, and met Tom Garcia when they came up to the surface. Tr. 431-32; see 130-33. Rothermel admits that the accident was never called in to District 1 but, according to him, that should not have been necessary because the inspector was at the mine. Tr. 432. This testimony is wholly unconvincing, because it is rebutted by the credible testimony of Mehalchick that the accident investigation was initiated by information about the fall brought to Garcia’s attention the day before. Nevertheless, the standard requires that Respondent timely contact the District Office directly, and it failed to do so on the day of occurrence within the time permitted. Accordingly, I find a violation of section 50.10, as alleged.

Mehalchick did not explain the basis for ascribing high negligence to the operator for failing to timely notify the MSHA District Office. In support of the inspector’s assessment, the Secretary notes that Respondent challenged a violation of the same standard five years ago. *See Summit Anthracite, Inc.*, 24 FMSHRC 720, 735-36 (ALJ) (finding no violation of section 50.10 where the Secretary failed to prove that Summit had exceeded the time limit required for contacting MSHA). Therefore, it is evident that Respondent knew or should have known of its responsibility in contacting District 1. I do not find any aggravating factors, however, that would elevate the operator’s actions beyond ordinary negligence, and conclude that the violation was due to moderate negligence.

IV. Penalty

A. 110(c) Criteria

While the Secretary has proposed a total civil penalty of \$1,569.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff’d*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Summit is a small operator and, as a new mine in

the midst of starting production, its history of assessed violations is minimal. See Pet. for Assessment of Civil Penalty, ex. A (MSHA Form 1000-179). As stipulated by the parties, the total proposed penalty will not affect Respondent's ability to continue in business. Tr. 13, stip. 6. I also find that, with the exception of two citations (7008242 and 7008253), Summit demonstrated good faith in achieving rapid compliance, after notice of the violations.

The remaining criteria involve consideration of the gravity of the violations and Summit's negligence in committing them. These factors have been discussed fully respecting each citation. Therefore, considering my findings as to the six penalty criteria and, considering that Summit has not established any conduct that could be viewed as mitigating factors, the penalties are set forth below.

B. Assessment

1. Citation No. 7008242

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 50.30(a), that it was due to Summit's moderate negligence, and that Summit failed to timely abate the citation. Applying the civil penalty criteria, I find that a penalty of \$109.00, as proposed by the Secretary, is appropriate.

2. Citation No. 7008148

The Secretary has established a violation of 30 C.F.R. § 77.410(a), that it was significant and substantial, due to Summit's moderate negligence, and that the citation was timely abated. Applying the civil penalty criteria, I find that a penalty of \$91.00, as proposed by the Secretary, is appropriate.

3. Citation No. 7008402

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.502, that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of \$60.00, as proposed by the Secretary, is appropriate.

4. Citation No. 7008403

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.502, that it was due to Summit's moderate negligence, and that the citation was timely abated. Applying the six civil penalty criteria, I find that a single penalty assessment of \$60.00, as proposed by the Secretary, is appropriate.

5, 6. Citation Nos. 7008400 and 7008401

The Secretary has established non-significant and substantial violations of 30 C.F.R. § 77.516, that they were due to Summit's moderate negligence, and that Summit timely abated the citations. Applying the civil penalty criteria, I find that a single penalty assessment of \$60.00 for each violation, as proposed by the Secretary, is appropriate.

7. Citation No. 3561179

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.1900-1, that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of \$60.00, as proposed by the Secretary, is appropriate.

8. Citation No. 3561180

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.1914(a), that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of \$60.00, as proposed by the Secretary, is appropriate.

9. Citation No 7008404

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.501, that it was due to Summit's moderate negligence, and that the citation was timely abated. Applying the civil penalty criteria, I find that a penalty of \$60.00 is appropriate.

10. Citation No. 7008405

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.502, that it was due to Summit's moderate negligence, and that the citation was timely abated. Applying the civil penalty criteria, I find that a penalty of \$60.00 is appropriate.

11. Citation No. 7008253

The Secretary has established a violation of 30 C.F.R. § 77.1605(k), that it was significant and substantial, due to Summit's moderate negligence, and that Summit timely abated the citation, except for a portion of roadway for which it refuses to construct berms. In fact, as of the date of this proceeding, Summit had refused to correct the condition. I have taken note of Summit's justification for its failure to act and, while the legitimacy of the argument has not been proven by the operator, I find that it is acting on a good faith belief. For that reason, and also because I credit Summit's testimony that the miners do not use the segment of road in question, I decline to raise the penalty and, applying the civil penalty criteria, find that a penalty of \$221.00, as proposed by the Secretary, is appropriate.

12. Citation No. 7008254

The Secretary has established a non-significant and substantial violation of 30 U.S.C. § 819(a), that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of \$60.00, as proposed by the Secretary, is appropriate.

13. Citation No. 7008255

The Secretary has failed to establish a violation of 30 C.F.R. § 77.1104 and, therefore, the

citation shall be vacated and no penalty shall be assessed.

14. Citation No. 7008256

The Secretary has failed to establish a violation of 30 C.F.R. § 77.205(b) and, therefore, the citation shall be vacated and no penalty shall be assessed.

15. Citation No. 7008257

The Secretary has failed to establish a violation of 30 C.F.R. § 77.400(a) and, therefore, the citation shall be vacated and no penalty shall be assessed.

16. Citation No. 7008258

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.1102, that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of \$60.00, as proposed by the Secretary, is appropriate.

17. Citation No. 7008259

The Secretary has established a violation of 30 C.F.R. § 77.205(b), that the violation was significant and substantial, due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a penalty of \$72.00, as proposed by the Secretary, is appropriate.

18. Citation No. 7008260

The Secretary has established a violation of 30 C.F.R. § 77.412(a), that it was significant and substantial, due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a penalty of \$72.00, as proposed by the Secretary, is appropriate.

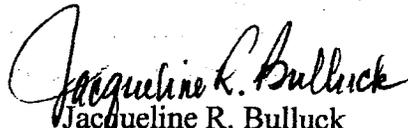
19. Citation No. 3082100

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 50.10. Contrary to her charge that the violation was due to high negligence, however, I find that Summit's negligence was no more than moderate. Applying the civil penalty criteria, I find that a single penalty assessment of \$60.00, as proposed by the Secretary, is appropriate.

ORDER

Accordingly, it is **ORDERED** that Citation Nos. 7008255, 7008256 and 7008257 are **VACATED**, that the Secretary **MODIFY** Citation Nos. 7008404 and 7008405 to reduce the level of gravity to "non-significant and substantial," and Citation No. 3082100 to reduce the level of negligence to "moderate," that Citation Nos. 7008242, 7008148, 7008402, 7008403, 7008400, 7008401, 3561179, 3561180, 7008253, 7008254, 7008258, 7008259 and 7008260 are **AFFIRMED**, as issued, and that Summit Anthracite, Incorporated, **PAY** a civil penalty of

\$1,225.00, within 30 days of this Decision.


Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

Lynne Bowman Dunbar, Esq., U.S. Department of Labor, Office of the Solicitor, Division of
Mine Safety and Health, 1100 Wilson Boulevard, Arlington, VA 22209-2296

Michael Rothermel, Summit Anthracite, Inc., 196 Vista Road, Klingerstown, PA 17941

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 26, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2007-194
Petitioner	:	A.C. No. 01-00851-109935
v.	:	
	:	
OAK GROVE RESOURCES, LLC,	:	Oak Grove Mine
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Robert H. Beatty, Jr., Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition 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 "Act," charging Oak Grove Resources, LLC (Oak Grove) with two violations of the mandatory standards and proposing civil penalties for the violations. The general issue before me is whether Oak Grove violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

Citation No. 7691351

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.503 and charges as follows:

The battery powered 602 scoop, company number 69, located on the 10 East section (MMU0280) was not being maintained permissible. There is a[sic] opening in excess of .005 inch between the lid and electrical box (plane flange) off operator side. This mine liberates over 6,000,000 cubic [sic] feet of methane gas in a 24 hour period. This scoop is operated in by the last open crosscut in the faces. The mine operator removed the scoop from service immediately.

The cited standard requires that “[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.”

It is undisputed that the cited scoop was electric face equipment required to be permissible under the cited standard and that the cited opening was in excess of that permitted. Indeed, Oak Grove does not dispute the violation as alleged but contests only the Secretary’s gravity, “significant and substantial” and negligence findings. The issues are therefore accordingly limited.

Danny Lee Crumpton has been an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA) for five years. He holds an MSHA electrical certification and has 13 years industry experience as an underground coal miner including work as an electrician and supervisor. According to the credible expert findings of Inspector Crumpton, the gap in excess of .005 of an inch between the lid and the electrical box of the cited 602 battery powered scoop would permit methane to enter the electrical box and, should the methane be within the explosive range of 5 to 15%, it could or would be ignited by the electrical contact points when power on the scoop would be engaged and could also ignite methane within that range outside the electrical box.

According to the undisputed testimony of Inspector Crumpton, the cited scoop operates in face areas where methane is liberated. The mine is also on a “section 103(i)” spot inspection regimen as a “gassy mine” because it liberates more than 1,000,000 cubic feet of methane within a 24-hour period and, indeed, liberates over 6,000,000 cubic feet of methane in a 24-hour period. While it is also undisputed that no more than .2% methane was detected in any part of the mine tested on the day of the inspection, methane levels are unpredictable and can rise to explosive levels at any time. This is corroborated by the fact that the subject mine has, in the past, had methane ignitions and is, indeed, rated as a “gassy mine”. Clearly, should methane in the mine atmosphere ignite or explode, reasonably serious injuries and fatalities are reasonably likely to occur.

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

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

Within the above framework of law and evidence, I have no difficulty finding that the violation at bar was “significant and substantial” and of high gravity. In reaching these conclusions, I have not disregarded the arguments in Respondent’s brief based primarily on the testimony of Oak Grove’s safety supervisor Larry Pasquale, who is not an electrician, that there was only a remote chance of an explosion and that, while it could occur, so long as the ventilation is maintained, there would not be a problem. Pasquale testified that he did not see any ventilation problems that day.

While Mr. Pasquale was no doubt sincere in his beliefs, I cannot give his testimony significant weight. He did not sufficiently consider that, in evaluating the “significant and substantial” criteria, continuing mining operations must be taken into account. I also attribute the greater weight to the opinions of the witness with the greater expertise established on the record i.e. Inspector Crumpton.¹

I also find that the Secretary has met her burden of proving that the violation was the result of Oak Grove’s moderate negligence. The evidence is undisputed that the lid on the electrical box was placed over dirt and grit thereby causing the cited gap. According to the inspector’s undisputed testimony, the electrician who replaced the lid was also responsible for performing a permissibility test after reinstalling it. Requiring a rank-and-file miner to perform such an electrical examination makes that miner an agent of the operator for that limited purpose. *Secretary v. Mettiki Coal Corporation* 13 FMSHRC 760, 772 (May 1991); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189 (February 1991). The fact that a “section 103(g)” complaint made nine days before the inspection herein included a specific complaint that Oak Grove was operating electrical equipment in a non-permissible condition in the 10 East Section also reflects, in itself, at least a moderate degree of negligence in the maintenance of its electrical equipment.

Citation No. 7691352

The instant citation alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 75.604(b) and charges as follows:

¹ *Texas Gulf Inc.*, 10 FMSHRC 498 (April 1988), cited by Respondent, is also inapposite. The mine therein, unlike the Oak Grove mine at issue, had no history of methane ignitions or ignitable levels of methane and was not under a “section 103(i)” inspection regimen for gassy mines.

A permanent splice in the trailing cable (2 AWG) 480 VAC on the Shuttle Car company number 19 located on the 10 East section (MMU-0280) was not effectively insulated and sealed to exclude moisture. The splice was deteriorated to the point where the insulation has broken apart and rolled back exposing the phase leads. This condition creates an electrical shock hazard of 480 VAC to the miners on this section. The mine operator immediately removed the shuttle car from service.

The cited standard provides in relevant part that “[w]hen permanent splices in trailing cables are made, they shall be...effectively insulated and sealed so as to exclude moisture....”

Oak Grove does not dispute the instant violation and contests only the Secretary’s gravity, “significant and substantial” and negligence findings. Inspector Crumpton found that the violation was “significant and substantial” on the basis of his alleged observation of exposed bare copper wiring in the phase leads in the cited trailing cable. The inspector’s conclusion that the violation was “significant and substantial” was based upon his testimony that miners handling the energized trailing cable could come into contact with the bare copper wiring suffering burns and even electrocution. I find significant however that the inspector did not allege, in charging the violation, that the bare copper wiring was exposed and did not, in his contemporaneous notes, indicate such exposure. Oak Grove’s safety supervisor, Larry Pasquale, who accompanied the inspector and was present to observe the cited condition testified that he was sure that no bare copper wires were exposed on the cited trailing cable. I am therefore constrained to conclude, in light of this conflicting evidence, that the Secretary has not sustained her burden of proving that the violation was “significant and substantial” or of high gravity.

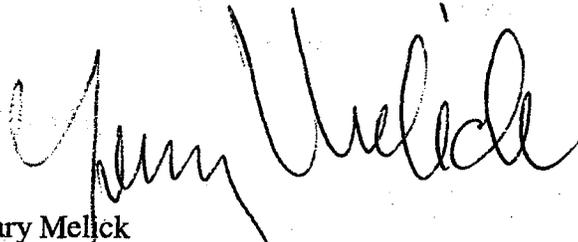
The Secretary also alleges that the violation was the result of “moderate negligence” based on the inspector’s opinion that the condition had existed for two hours or more. The inspector reached this conclusion based only on his observation that the splice was worn. In light of the lessened gravity finding and the fact that the Secretary has failed to establish that an agent of the operator knew or even should have known of the violative condition, I do not find that the Secretary has met her burden of proving anything greater than low negligence.

Civil Penalties

Under Section 110(i) of the Act the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator’s ability to continue in business. The record shows that the Oak Grove mine is a large mine and has a significant history of violations. The record indicates that the violative conditions charged herein were abated in a timely manner. There is no evidence that the penalties imposed herein would affect the operator’s ability to continue in business. The gravity and negligence findings have previously been discussed. Under the circumstances, I find that penalties of \$1,096.00 for Citation No. 7691351 and \$250.00 for Citation No. 7691352 are appropriate.

ORDER

Citation No. 7691351 is affirmed and Citation No. 7691352 affirmed but without "significant and substantial" findings. Oak Grove Resources, LLC, is hereby directed to pay civil penalties of \$1,096.00 and \$250.00 respectively for the violations charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

Robert H. Beatty, Jr., Esq., Dinsmore & Shohl, LLP, 215 Don Knotts Blvd. Ste. 310, Morgantown, WV 26501

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

December 14, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION,	:	DOCKET NO. PENN 2007-4
Petitioner,	:	A.C. No. 36-08766-098223
	:	
v.	:	
	:	
HAZLETON SHAFT CORPORATION,	:	Mine: Hazelton Shaft
Respondent.	:	

DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Hazleton Shaft Corporation, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a single violation of the Secretary's mandatory health and safety standards and seeks a penalty of \$60.00. The parties stipulated to the facts in the case, filed briefs and requested a decision on the stipulated record. For the reasons set forth below, I vacate the citation.

Background

The following are the stipulated facts in narrative format. The Hazleton Shaft is an underground, anthracite, coal mine, owned and operated by the Hazleton Shaft Corporation. It is located near Hazleton, Pennsylvania.

On August 10, 2006, an MSHA inspector was inspecting the preparation plant at the mine. He observed a Dewalt four inch grinder on a work bench on the second floor of the plant. The grinder was equipped with a pressure sensitive trigger requiring constant finger pressure to operate it. It also had a trigger lock that when engaged allowed the grinder to operate without constant finger pressure. The grinder was manufactured with both the pressure sensitive switch and the trigger lock, and both were functional. The grinder was not tagged-out of service or otherwise marked to indicate that it should not be used.

As a result of this observation, the inspector issued Citation No. 7009131, alleging a violation of section 77.402 of the Secretary's rules, 30 C.F.R. § 77.402.¹ The citation alleged that:

A Dewalt four inch hand grinder, located on the work bench outside the MCC room, on the second floor, was found to have a lockable trigger. The repairmen were picking up tools and finishing repairs. It was obvious the grinder had been used during the shift. The foreman and miners stated they did not know it was a violation to use a trigger lock.

The operator contested the citation.

Findings of Fact and Conclusions of Law

It is the position of the Secretary that "by requiring that hand held power tools be operated through constant hand or finger pressure" section 77.402 prohibits trigger locking devices like the one in this case. (Sec. Br. at 2.) The Respondent asserts that the "regulation is silent on whether the tool can or cannot be equipped with a trigger lock." (Resp. Br. at 3.) I find that the operator did not violate the rule in this instance.

In applying this regulation in connection with the facts in this case, it is important to keep in mind that the grinder was not observed in use by the inspector. It was merely lying on a work bench as described. Consequently, this decision will decide only whether a hand-held power tool that is equipped with controls requiring constant hand or finger pressure to operate it and also equipped with a trigger lock, violates section 77.402. No opinion concerning whether the rule would be violated if the grinder had been observed in operation with the trigger lock engaged will be rendered.

Clearly, the grinder complies with the plain meaning of this rule. It is equipped with a trigger requiring constant hand or finger pressure to operate it. There is nothing in the rule to indicate that it cannot also be equipped with a trigger locking device. The rule is plain and unambiguous, and the Respondent has not violated it in this case.

Notwithstanding that the rule is plain and unambiguous, the Secretary suggests that there are Commission cases establishing that a trigger locking device, like the one on this grinder, is prohibited by the rule. There are several problems with this argument. The first problem is that all of the cases are decisions issued by Commission judges, which do not have any precedential value. 29 C.F.R. § 2700.69(d). The second, and more significant, problem is that it is not apparent from any of the cases that the argument was made that a hand-held power tool equipped

¹ Section 77.402 provides, in pertinent part, that: "Hand-held power tools shall be equipped with controls requiring constant hand or finger pressure to operate the tools"

with both a pressure sensitive trigger and a trigger lock complies with the rule. Certainly if such an argument was made, there is no discussion of it in any of the cases. *Justis Supply & Machine Shop*, 22 FMSHRC 544, 550-51 (Apr. 2000) (ALJ); *Faith Coal Co.*, 17 FMSHRC 1146, 1171-72 (Jul. 1995) (ALJ); *Mettiki Coal Corp.*, 4 FMSHRC 1635, 1642 (Sep. 1982) (ALJ); *Pittsburgh & Midway Mining Co.*, 2 FMSHRC 311, 317, 326 (Feb. 1980) (ALJ).

It is somewhat surprising that the Secretary is arguing that trigger locks are prohibited, even if not being used, in view of her statements when adopting a similar rule for metal and nonmetal mines. When section 77.402 was first adopted in 1971, there was no discussion of the rule at all. Mandatory Safety Standards, Surface Coal Mines and Surface Work Areas of Underground Coal Mines, 36 Fed. Reg. 9364 (May 22, 1971). However, when announcing the final rules for metal and nonmetal in 1988 there was considerable discussion. Like section 77.402, the new rule was entitled "Hand-held power tools" and provided that: "(a) Power drills, disc sanders, grinders and circular and chain saws, when used in the hand-held mode shall be operated with controls which require constant hand or finger pressure. (b) Circular saws and chain saws shall not be equipped with devices which lock-on the operating controls." 30 C.F.R. § 56/57.14116. The wording is somewhat different than section 77.402, but the meaning is the same.

In explaining the new rule, MSHA stated the following:

Under the proposed rule, the standard would have prohibited the presence, as well as the use, of lock-on devices for each of these classes of power tools. . . .^[2]

The final standard recognizes that many power drills, sanders, and grinders are manufactured with lock-on devices as a standard feature. . . . Although the lock-on devices need not be removed, the standard continues to prohibit their use when the tool is operated in the hand-held mode. . . .

Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32496, 32511 (Aug. 24, 1988).

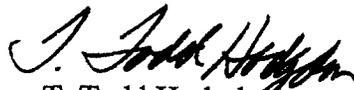
The grinder in this case was manufactured with a trigger locking device. There is nothing in section 77.402 which prohibits a trigger locking device. The grinder was not in use, so this is not a case where it was being used with the trigger lock engaged. In its most recent pronouncement on this issue MSHA has stated that trigger locks need not be removed from

² The proposed rule stated: "Hand-held power drills, disc sanders, grinders, circular saws, and chain saws shall be equipped with operating controls requiring constant hand or finger pressure. Such tools shall not have any lock-on devices." Safety Standards for Machinery and Equipment at Metal and Nonmetal Mines, 49 Fed. Reg. 8375, 8383 (March 6, 1984).

hand-held tools that are manufactured with them. There does not appear to be any reason why hand-held power tools would be treated differently for metal and nonmetal mines than they are in surface coal mines and surface areas of underground coal mines. The grinder complies with the plain meaning of the rule. Accordingly, I conclude that the operator did not violate section 77.402.

Order

In view of the above, it is **ORDERED** that Citation No. 7009131 is **VACATED** and that this case is **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Patrick M. Boylan, Conference and Litigation Representative, MSHA, U.S. Department of Labor, The Stegmaier Building, 7 North Wilkes-Barre Boulevard, Wilkes-Barre, Pennsylvania 18702

George M. Roskos, III, President, Hazleton Shaft Corporation, P.O. Box 435, Hazleton, Pennsylvania 18201

/sr

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, DC 20001

November 2, 2007

ALEX ENERGY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2007-497-R
	:	Order No. 7267047; 05/02/2007
	:	
	:	Docket No. WEVA 2007-498-R
v.	:	Order No. 7267048; 05/02/2007
	:	
	:	Docket No. WEVA 2007-499-R
	:	Order No. 7267049; 05/02/2007
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2007-500-R
MINE SAFETY AND HEALTH	:	Order No. 7267051; 05/03/2007
ADMINISTRATION, (MSHA)	:	
Respondent	:	Superior Surface Mine

ORDER GRANTING SECRETARY'S LEAVE TO FILE ANSWER
AND
STAY ORDER

The Contestant filed its Notices of Contest in the above captioned matters on May 31, 2007. Commission Rule 20(f), 29 C.F.R. 2700.20(f), specifies that the Secretary shall file an answer to a notice of contest within twenty days. The Secretary filed an Answer and Motion to Stay on August 2, 2007. The Secretary's answer was filed thirty-eight days beyond the twenty day filing period contained in the Commission's Rules.

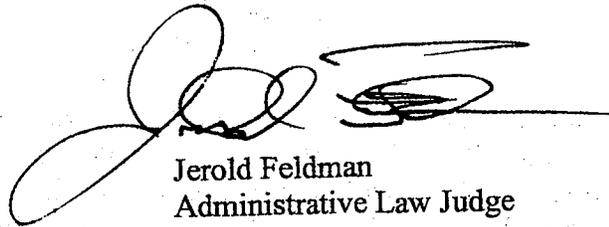
Concurrently filed with its answer, the Secretary filed a Motion for Leave to File her untimely answer as well as a Motion to Stay these contests pending the docketing of the related civil penalty matter. The Secretary claims the untimely filing occurred as a result of routing delays in the Secretary's mail delivery system.¹

¹ Also before me for consideration is the Secretary's Motion to Dismiss the contest of Order No. 7267051 in Docket No. WEVA 2007-500-R, filed with the Commission on June 5, 2007, because the Secretary avers that she did not receive the contestant's Notice of Contest. Obviously, the Secretary's mail routing in these matters has been less than exemplary. Consequently, the Secretary's Motion to Dismiss WEVA 2007-500-R is denied. However, the Secretary's response to the Notice of Contest in WEVA 2007-500-R shall be held in abeyance pending the pertinent civil penalty case.

On August 14, 2007, the Contestant filed an opposition to the Secretary's Motion for Leave to File her untimely answer. The Contestant has not shown any cognizable prejudice by the Secretary's delay that is a prerequisite to any relief that the contestant is seeking. *Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 6 FMSHRC 905, 908-09; (June 1984); *Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905 (June 1986); *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov.1994); *Sec'y of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1325 (Aug. 1996).

Processing guidelines generally are intended to "spur the Secretary to action," rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Sec'y of Labor v. Twentymile Coal Company*, 411 F.3d 256, 261 (D.C.Cir. 2005). Moreover, filing periods under the Federal Mine Safety and Health Act of 1977 are not considered jurisdictional. *See, e.g., Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F2d 1093 (D.C. Cir. 1984).

In view of the above, in the absence of a showing of identifiable prejudice, the late filing of the Secretary's answer does not exempt the contested cited violative conditions from Mine Act jurisdiction. Accordingly, the Secretary's Motion for Leave to File her untimely answer **IS GRANTED**. In the interest of judicial efficiency, the Secretary's Motion to Stay the captioned contests pending the assignment of the related civil penalty matter **IS ALSO GRANTED**.



Jerold Feldman
Administrative Law Judge

DISTRIBUTION:

Ronald Gurka, U.S. Department of Labor, 1100 Wilson Blvd, 22nd Floor West,
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Charleston, WV 25339

/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

November 21, 2007

VURNUN EDWURD JAXUN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2007-811-DM
v.	:	RM MD 2006-06
	:	
ASARCO, LLC	:	
Respondent.	:	San Mission Mine
	:	Mine ID 02-00135

AMENDED
ORDER DENYING REQUEST FOR REASSIGNMENT
ORDER DENYING STAY OF ASSIGNMENT ORDER
ORDER TO FILE COMPLAINT

My November 8, 2007 order is amended as follows (amended language is in bold italics):

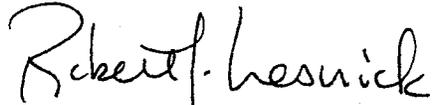
Jaxun's request for reassignment is **DENIED**, and, as Jaxun has provided no basis for a stay, the request for stay of the Order of Assignment is also **DENIED**. This case will proceed pursuant to the Mine Act and the Commission's Procedural Rules.

In addition, as Docket No. WEST 2007-811-DM is a new case before the Commission, Jaxun is **ORDERED** to submit the following within 30 days of the date of this order:

1. A copy of the original complaint to the Mine Safety and Health Administration (MSHA).
2. A copy of the return receipt (green card) from delivery of the complaint to the mine operator. If he has not done so already, Jaxun must send the complaint to the operator by certified mail, return receipt requested. A note to the operator should be enclosed indicating Jaxun's disagreement with MSHA's **determination** and **stating that he is** requesting the Commission's review of the case.
3. A statement of the relief sought, such as reinstatement, back pay, etc.

4. A copy of the letter from MSHA stating that its investigation determined that a discrimination did not occur.

Jaxun's 30-day time period begins from the date of this order rather than the date of the November 8 order.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Hugh Thatcher, Esq., Patton Boggs, LLP, 1801 California Street, Suite 4900, Denver, CO 80202

Vurnun Edward Jaxun, 5357 N. Fort Yuma Trail, Tucson, AZ 85750-5030

/mvw

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, 2007

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEVA 2007-662
v. : A.C. No. 46-04387-121572
: :
DANA MINING COMPANY, INC., :
Respondent : Prime No. 1 Mine

ORDER DENYING LEAVE TO INTERVENE

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). It concerns an alleged violation of section 75.202 of the Secretary's rules, 30 C.F.R. § 75.202. Gena Elliot, Administratrix of the Estate of John Elliot, who was killed in a roof fall at the Respondent's mine, seeks to intervene in this civil penalty proceeding. For the reasons set for the below, the motion for intervention is denied.

On October 29, 2007, Mrs. Elliot, filed a motion pursuant to Commission Procedural Rule 4, 29 C.F.R. § 2700.4, to achieve party status by seeking to intervene in this proceeding. In the motion, Mrs. Elliot argues that she has a legally protectable interest directly relating to the events that are the subject of any review of this citation. Both the Secretary and the Respondent oppose the motion.

In her motion, Mrs. Elliot does not specify whether she is seeking intervention pursuant to Rule 4(b)(1), 29 C.F.R. § 2700.4(b)(1), or Rule 4(b)(2), 29 C.F.R. § 2700.4(b)(2). However, entitling her motion "Notice of Intervention" and referring to herself as the "representative of an affected miner pursuant to 29 C.F.R. § 2700.4" suggests that she is relying on the language of Rule 4(b)(1).¹ Nonetheless, she is neither a "miner" nor "a representative of an affected miner." The act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Mrs. Elliot is not working in a coal mine and she is not representing anyone working in a coal mine. Furthermore, the term "representative of miners" is a term of art which means "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." 30 C.F.R. § 40.1(b)(1). She clearly does not come within this definition. As a result, Mrs. Elliot may not proceed under Rule 4(b)(1).

¹ Rule 4(b)(1) provides, in pertinent part, that: "Before a case has been assigned to a Judge, affected miners and their representatives shall be permitted to intervene upon filing a written notice of intervention. . . ."

Rule 4(b)(2) provides that a motion for intervention by other persons shall set forth:

(A) The interest in the movant relating to the property or events that are the subject of the proceeding;

(B) The reasons why such interest is not otherwise adequately represented by the parties already involved in the proceeding; and

(C) A showing that intervention will not unduly delay or prejudice the adjudication of the issues.

Although, according to her motion, Mrs. Elliot's pending civil action against Dana Mining Company alleges a violation of federal mining regulations as an element of her claim, she has not set forth any reasons why her interests will not be adequately represented by the parties. The issues in this proceeding are whether the alleged violation occurred, and, if so, whether it is properly characterized as "significant and substantial." If her interest is in having it determined that the Respondent violated the regulation, that interest can be adequately addressed by the Secretary, who not only has the same interest, but also has an expertise in prosecuting these cases which Mrs. Elliot or her representative lacks. Furthermore, permitting her party status may result in unforeseen delay or prejudice, as the victim's interest concerning resolution of an issue may conflict with the interests of the Respondent and/or the Secretary.

Finally, Rule 4(b)(2) provides that, "[i]ntervention is not a matter of right but of the sound discretion of the Judge." In addition to not qualifying under Rule 4(b)(1) or Rule 4(b)(2), there is nothing in the legislative history of the Act, the rule or the case law which indicates that the rule contemplates the conferment of party status on the estates of victims of accidents. Thus, there is no basis on which the motion can be granted.

Accordingly, the request for intervention **IS DENIED**.



T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

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