

NOVEMBER AND DECEMBER 2010

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## NOVEMBER AND DECEMBER 2010

### Review was granted in the following cases during the months of November and December 2010:

Secretary of Labor, MSHA v. Mach Mining, LLC., Docket No. LAKE 2009-324-R. (Judge Weisberger, September 27, 2010)

Secretary of Labor, MSHA v. American Coal Company, Docket No. LAKE 2010-408-R. (Judge Weisberger, September 28, 2010)

Secretary of Labor, MSHA v. Twentymile Coal Company, Docket No. WEST 2008-788-R. (Judge Manning, October 18, 2010)

William Metz v. Carmeuse Lime, Inc., Docket No. PENN 2009-541-M. (Judge Feldman, November 8, 2010)

Secretary of Labor, MSHA v. Performance Coal Company, Docket No. WEVA 2008-1825. (Judge Barbour, November 22, 2010)

### Review was denied in the following cases during the months November and December 2010.

Justin Nagel v. Newmont USA, Limited, Docket No. WEST 2010-464-DM. *This order is published following the Commission Orders in this volume.*

Secretary of Labor, MSHA v. Kingwood Mining Company, Docket No. WEVA 2009-210. (Interlocutory Review of Judge Bulluck's unpublished August 10, 2010 order.)

## THE HISTORY OF THE UNITED STATES

The history of the United States is a story of growth, struggle, and progress. It begins with the first settlers and continues through the present day.

The early years of the United States were marked by the struggle for independence from Great Britain. The American Revolution was a turning point in the nation's history.

Following the Revolution, the United States faced the challenge of building a new government. The Constitution was drafted and signed, establishing the framework for the nation's governance.

The 19th century was a period of rapid expansion and growth. The United States acquired vast territories and became a major power on the world stage.

The Civil War was a defining moment in the nation's history. It was a struggle for freedom and equality, and it resulted in the abolition of slavery.

The 20th century was a period of great change and progress. The United States emerged as a superpower and played a leading role in the world.

The present day United States is a nation of opportunity and innovation. It continues to grow and progress, and it remains a beacon of hope for people around the world.

The history of the United States is a story of resilience and strength. It is a story of a nation that has overcome many challenges and emerged as a global leader.

The future of the United States is bright and full of promise. It is a story that continues to unfold, and it is one that we all have a part to play.

**COMMISSION DECISIONS AND ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 10, 2010

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

v. :

PINKY'S AGGREGATES, INC. :

Docket No. CENT 2009-848-M  
A.C. No. 32-00793-188600

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

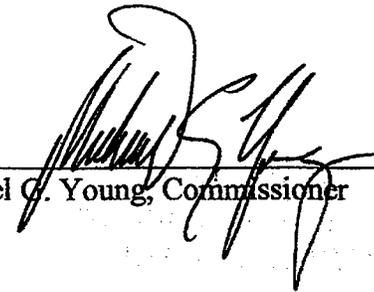
BY: Young, Cohen, and Nakamura, Commissioners

On September 22, 2009, the Commission received from Pinky's Aggregates, Inc. ("PA") a letter seeking to reopen Proposed Assessment No. 000188600, which proposed civil penalties for three citations in the sum of \$463. The proposed penalty assessment had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a), because the operator had failed to contest the proposed assessment within 30 days after receiving it. On January 12, 2010, the Commission denied the motion without prejudice on the basis that PA had not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalties. *Pinky's Aggregates, Inc.*, 32 FMSHRC 1, 3 (Jan. 2010). On January 27, the Commission received a second request to reopen. On July 29, the Commission denied the request, with prejudice, on the basis that the operator had again failed to sufficiently explain its failure to file a timely contest. *Pinky's Aggregates, Inc.*, 32 FMSHRC 790, 791-92 (July 2010).

We have discovered a letter from PA, dated January 25, 2010, explaining its failure to timely file a contest of the proposed penalty assessment, that was intended to be considered with the earlier, timely submission by PA, but was not. Upon consideration of the letter, we find good cause for reopening the proposed assessment.

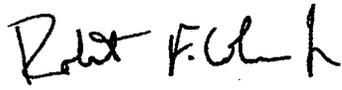
In the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the

Secretary shall file a petition for assessment of penalty within 45 days of the date of this order.  
See 29 C.F.R. § 2700.28.



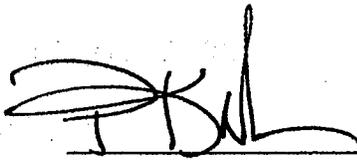
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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner



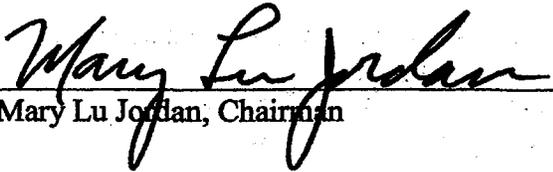
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Patrick K. Nakamura, Commissioner

Chairman Jordan and Commissioner Duffy, dissenting.

As the majority indicates, the Commission received a letter from Pinky's Aggregates, Inc. ("PA") dated January 25, 2010, explaining the untimely filing of the contest of the proposed penalty assessment. The Commission received the January 25 letter by facsimile on August 24, 2010. There are no notations on the letter explaining the discrepancy between the date of the letter and the date it was faxed to the Commission.

We would deem the letter received by the Commission on August 24 to constitute a petition requesting the Commission to reconsider its order of denial issued on July 29, 2010. Pursuant to Commission Procedural Rule 78(a), a petition for reconsideration must be filed within 10 days after a decision or order of the Commission has been issued. 29 C.F.R. § 2700.78(a). Accordingly, we would deny PA's petition for reconsideration as untimely.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

November 16, 2010

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

v.

CULP & SON, LP

Docket No. CENT 2011-16-M  
A.C. No. 41-03971-222096

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

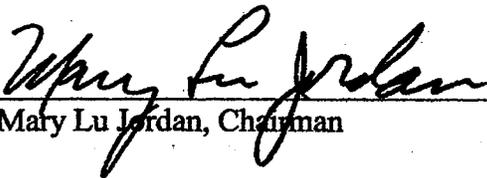
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 1, 2010, the Commission received from Culp & Son, LP, a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On October 27, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

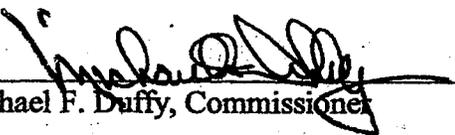
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

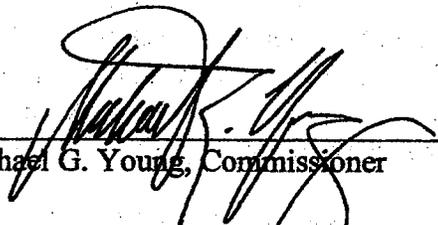
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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

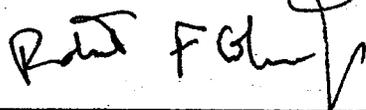
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

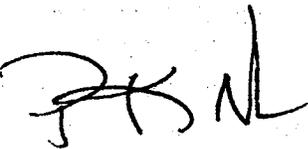
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
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Patrick K. Nakamura, Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
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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 mistake, inadvertence, or excusable neglect. *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 February 18, and July 15, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment Nos. 000177107 and 000191325, respectively, to Parker, proposing civil penalties for numerous citations. In its letter seeking reopening, Parker apologizes for “being negligent in the handling of the citations that we wished to contest and not following the correct MSHA procedures.”

The Secretary opposes Parker’s request to reopen both assessments. As to Assessment No. 000177107, she maintains that Parker did not seek reopening until April 20, 2010, over one year after the proposed assessment became a final order of the Commission on March 27, 2009. The Secretary argues that because the reopening request was filed more than one year after the penalty assessment became a final order, it should be denied. As to Assessment No. 000191325, she asserts that Parker’s explanation lacks sufficient detail as to why it failed to timely contest the assessments and therefore does not provide adequate grounds for reopening. The Secretary also notes that a delinquency notice was sent to the operator on October 8, 2009, but the operator waited more than six months to seek reopening.

Having reviewed Parker’s request to reopen and the Secretary’s responses thereto, we agree that Parker has failed to provide a sufficient basis for the Commission to reopen the penalty assessments. With respect to Assessment No. 000177107, which, according to MSHA’s records, was delivered on February 25, 2009, and became a final order on March 27, 2009, more than a year passed before the operator sought reopening with the Commission. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). The Commission denies requests for reopening that are brought more than a year after the order has become final. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny with prejudice the request to reopen Assessment No. 000177107.

As to Assessment No. 000191325, Parker has failed to adequately explain its failure to timely contest the proposed assessments. Furthermore, Parker has failed to explain the circumstances surrounding its receipt of the October delinquency notice.<sup>2</sup> Accordingly, we

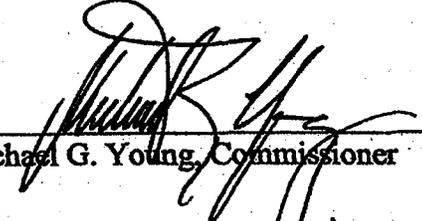
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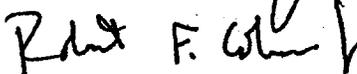
<sup>2</sup> In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009).

hereby deny without prejudice Parker's request to reopen Assessment No. 000191325. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Parker may submit another request to reopen Assessment No. 000191325.<sup>3</sup> Any amended or renewed request by Parker to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

  
Mary Lu Jordan, Chairman

  
Michael F. Daffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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<sup>3</sup> If Parker submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Parker should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Parker should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. Parker should further explain in similar detail why it delayed in responding to MSHA's delinquency notice.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

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November 22, 2010

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

v.

GIANT CEMENT HOLDING COMPANY

Docket No. SE 2009-65-M

A.C. No. 38-00007-165394

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

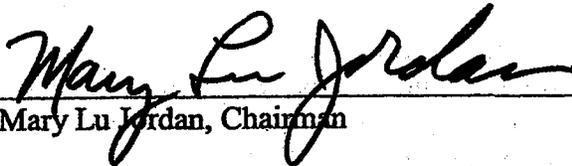
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 9, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000165394 to Giant Cement Holding Company ("Giant Cement"). On December 11, 2008, after Giant Cement had timely contested certain proposed penalties, the Secretary of Labor ("Secretary") filed a petition for assessment of civil penalty with the Commission regarding those contested penalties. On January 13, 2010, Chief Administrative Law Judge Robert Lesnick issued an Order to Show Cause to Giant Cement for failure to file an answer to the Secretary's petition. On October 12, 2010, the judge issued an Order of Default entering judgment for the Secretary and directing Giant Cement to pay the proposed civil penalties immediately. On November 10, 2010, the Commission received a petition for discretionary review from Giant Cement, requesting that the Commission issue an order directing review and vacating the default order.

In support of its petition, Giant Cement states that on December 17, 2008, it timely filed its answer to the petition, but acknowledged that the answer's caption inadvertently referenced Docket No. "SE 2008-1016-M" as opposed to Docket No. SE 2009-65-M. An internal review of the case file for Docket No. SE 2008-1016-M revealed that Giant Cement's answer referencing contested Citation Nos. 6117058 and 6117065 was, in fact, received by the Commission on December 23, 2008. Giant further states that it timely filed an answer to the show cause order on February 1, 2010, explaining that it had timely filed its answer to the Secretary's petition. The

Commission has not received a response from the Secretary.

The Chief Judge's jurisdiction over this case terminated when he issued his default order on October 12, 2010. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We conclude that Giant Cement's petition for discretionary review was timely filed, and we hereby grant it.

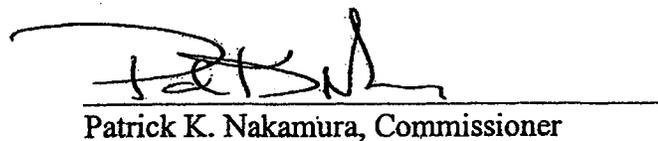
Upon review of the record and an internal review of the case files, in the interest of justice, we hereby vacate the Order of Default and remand this matter to the Chief Judge for further appropriate proceedings. *See REB Enterprises, Inc.*, 18 FMSHRC 311 (Mar. 1996).

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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November 24, 2010

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

v.

WASHINGTON ROCK QUARRIES INC.

Docket No. WEST 2010-1706-M  
A.C. No. 45-03224-199237

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

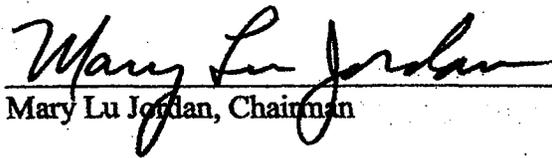
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 20, 2010, the Commission received from Washington Rock Quarries Inc. (“Washington Rock”) a motion by counsel seeking to reopen a penalty assessment that may have become a final 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

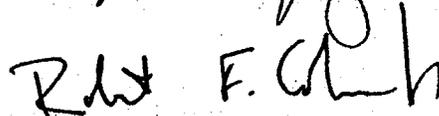
On October 1, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000199237 to Washington Rock. The record indicates that the proposed assessment was delivered to a wrong address and not received at that time by Washington Rock. Washington Rock allegedly only learned of the assessment months later when it was contacted by telephone by a debt collector retained by the U.S. Treasury Department. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Washington Rock's request and the Secretary's response, we conclude that the proposed penalty assessment has not become a final order of the Commission because it was not received by Washington Rock. Accordingly, we deny the request to reopen as moot and remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If Washington Rock has not done so already, it must file a contest of the proposed penalty assessment within 30 days of the date of this order and the Secretary shall file a petition for assessment of penalty within 45 days of the date of its contest. See 29 C.F.R. §§ 2700.26 and 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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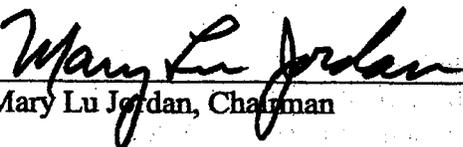
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**Federal Mine Safety & Health Review Commission**  
**601 New Jersey Avenue, N.W., Suite 9500**  
**Washington, D.C. 20001-2021**

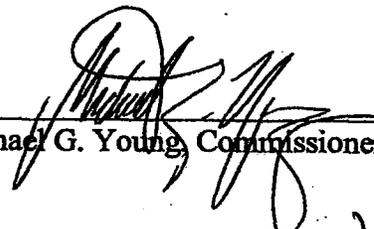


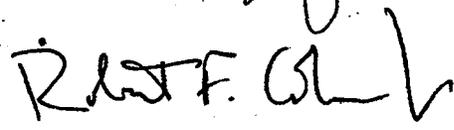
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

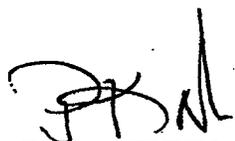
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
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Mary Lu Jordan, Chairman

  
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Michael F. Duffy, Commissioner

  
\_\_\_\_\_  
Michael G. Young, Commissioner

  
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**Chief Administrative Law Judge Robert J. Lesnick**  
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**601 New Jersey Avenue, N.W., Suite 9500**  
**Washington, D.C. 20001-2021**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 24, 2010

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

v.

CUSTOM CRUSHING INDUSTRIES, INC.

Docket No. WEST 2011-98-M  
A.C. No. 04-05367-222547

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

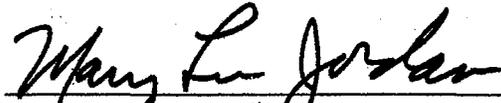
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 15, 2010, the Commission received from Custom Crushing Industries, Inc., a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On November 9, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

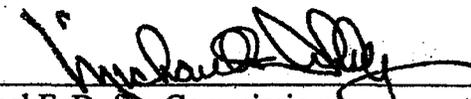
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

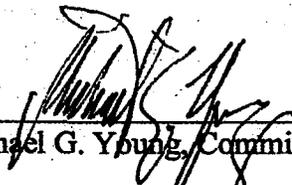
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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

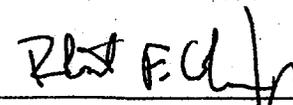
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
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Mary Lu Jordan, Chairman

  
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Michael F. Duffy, Commissioner

  
\_\_\_\_\_  
Michael G. Young, Commissioner

  
\_\_\_\_\_  
Robert F. Cohen, Jr., Commissioner

  
\_\_\_\_\_  
Patrick K. Nakamura, Commissioner

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

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

November 26, 2010

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

v.

COAL COUNTRY MINING, INC.

Docket No. WEVA 2010-918  
A.C. No. 46-08884-203963 X359

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On April 22, 2010, the Commission received a request to reopen a penalty assessment issued to Coal Country Mining, Inc. (“Coal Country”) that became 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 October 20, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued 19 citations/orders to Coal Country. On November 24, 2009, MSHA issued Proposed Assessment No. 000203963 to Coal Country, which proposed civil penalties for three of the citations/orders that were issued on October 20, 2009. On December 22, 2009, MSHA issued Penalty Assessment No. 000206855 covering the remaining 16 citations/orders from the inspection of October 20, 2009. Coal Country asserts that it intended to contest all citations stemming from the inspection on October 20, 2009. It further submits that it successfully contested the penalties for the 16 citations that were contained on the December 2009 penalty assessment. With respect to Assessment No. 000203963, Coal Country submits that it sent the assessment to its representative to contest but that the assessment was never received. The representative further submits that he discovered that Penalty Assessment No. 000203963 had not been contested while reviewing MSHA's website but does not indicate when that occurred.

The Secretary opposes Coal Country's request to reopen because its explanation lacks sufficient detail as to why it failed to timely contest the assessments. She maintains that an inadequate or unreliable internal office procedure does not provide sufficient grounds for reopening. The Secretary notes that a delinquency notice was sent to the operator on February 16, 2010, two months before it filed its reopening request.

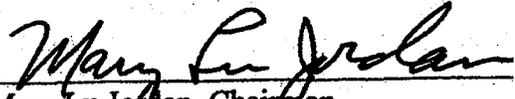
Having reviewed Coal Country's request to reopen and the Secretary's response thereto, we agree that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. In addition, Coal Country has failed to explain why it delayed approximately two months in responding to the delinquency notice sent by MSHA.<sup>1</sup> Accordingly, we hereby deny without prejudice Coal country's request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Coal Country may submit another request to reopen Assessment No. 000203963.<sup>2</sup> Any amended or renewed request by the operator to reopen this

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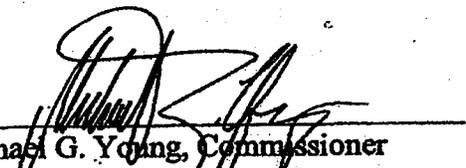
<sup>1</sup> In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313,1316 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

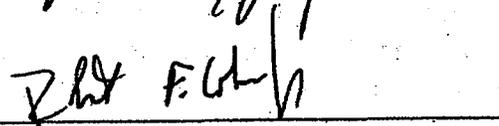
<sup>2</sup> If Coal Country submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or

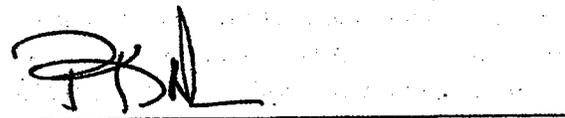
assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Coal Country should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Coal Country should also submit copies of supporting documents with its request to reopen.

**Distribution:**

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**Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 1, 2010

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

v.

PACIFIC POWER & LIGHT COMPANY

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Docket No. WEST 2010-1625-M  
A.C. No. 48-00152-188933 U10

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

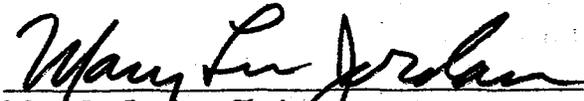
BY THE COMMISSION:

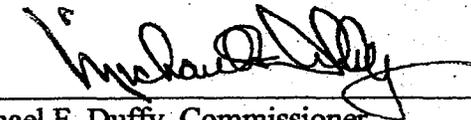
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 30, 2010, the Commission received from Pacific Power & Light Company ("Pacific Power") a request by counsel seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

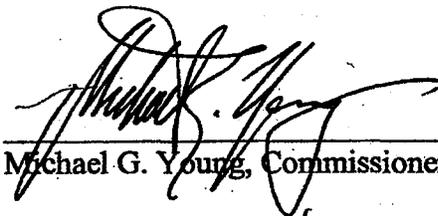
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

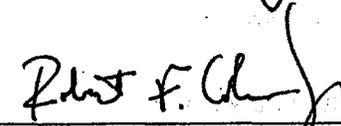
The Secretary submits that upon reviewing the records in this proceeding, she has determined that the underlying citation in this proceeding, Citation No. 6419908, contained on Proposed Assessment No. 000188933, has been vacated. Accordingly, she submits that the request to reopen should be denied as moot.

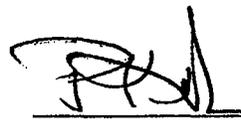
Having reviewed Pacific Power's request and the Secretary's response, we deny the request to reopen as moot because the citation in question has been vacated.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, 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 1, 2010

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

v.

ROCKSPRING DEVELOPMENT

Docket No. WEVA 2010-865  
A.C. No. 46-05121-206639

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On April 6, 2010, the Commission received from Rockspring Development ("Rockspring") 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).

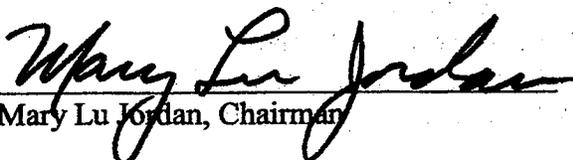
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

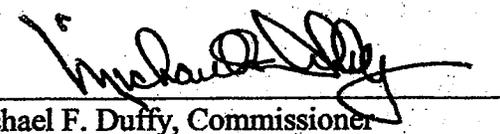
In its letter, Rockspring asserts that it did not timely contest the proposed assessment because it had not been received by its safety manager or accounts payable department. However, the Secretary states that the assessment was received on December 28, 2009 and signed for by a G. Merritt, the name listed on Rockspring's Legal ID Report's Address of Record. She attached to her opposition to Rockspring's motion a copy of a FedEx tracking slip to support this assertion. Rockspring provided no response to this submission. It also failed to indicate which of the 48 violations contained in the assessment it seeks to contest.

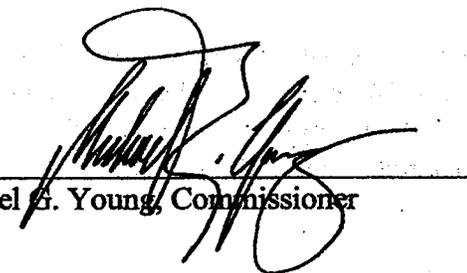
Having reviewed Rockspring's request and the Secretary's response, we conclude that Rockspring has failed to provide an adequate basis for the Commission to reopen the proposed penalty assessment. Rockspring has failed to explain why it did not timely contest the proposed assessment in light of the Secretary's substantiated claim that the assessment had been received by the operator.

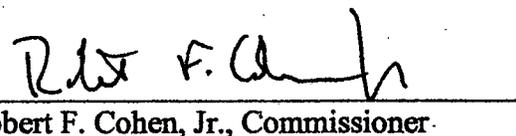
An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. The operator must also identify which specific citations or orders in the assessment it wishes to contest upon reopening. Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen. *Higgins Stone Co.*, 32 FMSHRC 33 (Jan. 2010)

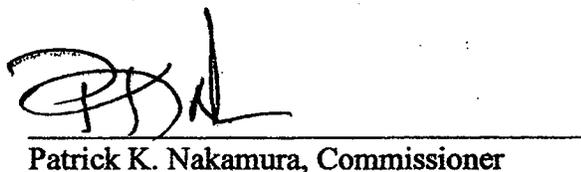
Accordingly, we hereby deny without prejudice Rockspring's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Rockspring may submit another request to reopen the assessment so that it can contest the penalty assessment. Any amended or renewed request by Rockspring to reopen the assessments must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael F. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

**Distribution:**

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**Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick**  
**Federal Mine Safety & Health Review Commission**  
**601 New Jersey Avenue, N. W., Suite 9500**  
**Washington, D.C. 20001-2021**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 2, 2010

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

v.

FREEDOM ENERGY MINING  
COMPANY

Docket No. KENT 2010-174  
A.C. No. 15-07082-189961

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On November 4, 2009, the Commission received a motion by counsel for Freedom Energy Mining Company (“Freedom”) 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).

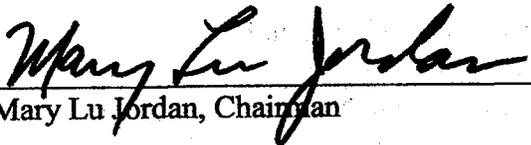
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

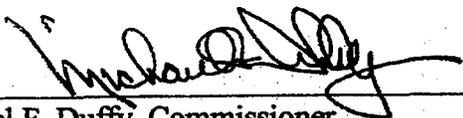
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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

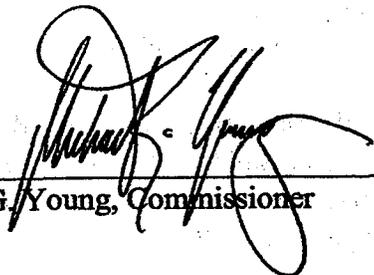
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

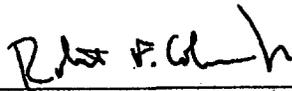
Freedom received Proposed Assessment No. 000189961 from the Department of Labor's Mine Safety and Health Administration ("MSHA") on July 10, 2009. Freedom's safety director stamped the assessment as having been received on July 14, 2009, and on August 11, 2009, the operator filed its notice of contest with MSHA. While Freedom contends that its notice of contest was timely, the Secretary of Labor, who does not oppose reopening, responds that the notice was untimely. The Secretary points out that the 30 days within which Freedom had to respond ran from the operator's July 10 receipt of the assessment, and not the date on which its safety director stamped it in.

Having reviewed Freedom's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.<sup>1</sup> Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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<sup>1</sup> To avoid confusion, and lessen the need to file future motions to reopen, Freedom should ensure that it date stamps any assessment it receives on the date on which it receives the assessment from MSHA, and not the date on which it delivers the assessment to its safety director.

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**Chief Administrative Law Judge Robert J. Lesnick**  
**Federal Mine Safety & Health Review Commission**  
**601 New Jersey Avenue, N. W., Suite 9500**  
**Washington, D.C. 20001-2021**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 3, 2010

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

v.

LARRY D. BAUMGARDNER COAL  
COMPANY, INC.

Docket No. PENN 2010-355  
A.C. No. 36-07561-202650

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

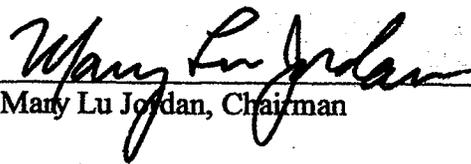
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 3, 2010, the Commission received from Larry D. Baumgardner Coal Company, Inc., a letter requesting to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On March 25, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

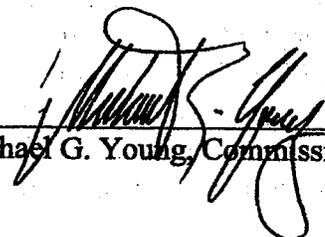
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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

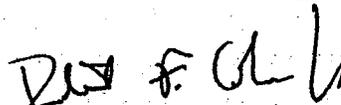
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Dufsy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 3, 2010

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

v.

SANDPOINT SAND & GRAVEL, INC.

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: Docket No. WEST 2010-766-M  
: A.C. No. 10-00792-199073  
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BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

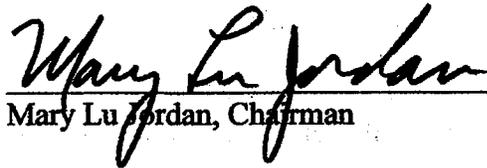
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 3, 2010, the Commission received from Sandpoint Sand & Gravel, Inc., a letter requesting to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On March 18, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

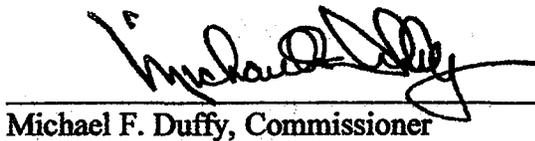
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

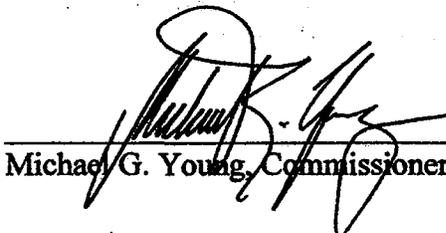
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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

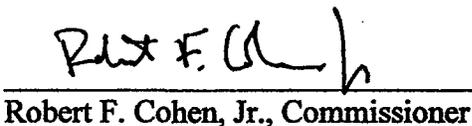
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

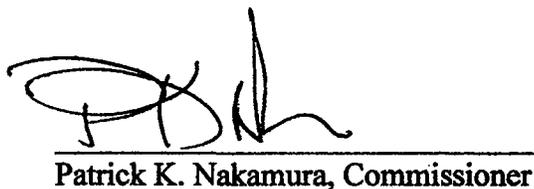
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 10, 2010

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

v.

ELK RUN COAL COMPANY

Docket No. WEVA 2009-1738  
A.C. No. 46-07938-180891

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On July 28, 2009, the Commission received from Elk Run Coal Company a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On August 17, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. 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).

This motion involves Assessment Case No. 000180891, issued to Black Castle Mining Company (“Black Castle”) and served upon Elk Run Coal Company (“Elk Run”) on or about April 1, 2009. The Assessment Case includes 16 citations, of which 13 citations are significant and substantial (“S&S”).<sup>1</sup> All of the citations were issued between February 17 and February 25, 2009. Elk Run filed with its motion an affidavit from Kevin Deaton, the safety director for Black Castle. According to Deaton’s affidavit, Black Castle is a subsidiary of Elk Run, and idled the subject mine on April 9, 2009, leaving only a skeleton crew. The crew stacked the mail during the time the mine was idled and did not date-stamp it. Deaton did not learn that the assessment had been received until July 2009, when the mine was removed from idle status. At this time, Deaton gave the Assessment to counsel, indicating that the company intended to contest the 13 S&S violations.

The Secretary does not oppose the Motion.

The reasons offered by Elk Run do not amount to inadvertence or excusable neglect within the meaning of Fed. R. Civ. P. 60(b), and do not constitute good cause to reopen the assessment, which became a final order of the Commission in May 2009. The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not shown grounds for reopening the assessment. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *see Gibbs v. Air Canada*, 810 F. 2d 1529, 1537-38 (11th Cir. 1987). In this case, the fact that an operator idles a mine does not relieve it of its obligation to open and deal with the mail it receives. To allow three months of mail to stack up unopened, without further explanation of how this was allowed by the management who made the decision to idle the mine, is not inadvertence; it is irresponsibility. Deaton’s affidavit states, “The crew of the mine did not understand the importance of the timing of the filing of the 1000-179 form.” However, this is a failure of training by management, a failure which could have been prevented by the simplest and most basic precautions.

Moreover, Elk Run has demonstrated a pattern of failing to deal adequately with proposed assessments received from MSHA. On July 2, 2007, Elk Run sought reopening of an assessment which had become final because it was “inadvertently lost in the office of the safety director.” *Elk Run Coal Co.*, 29 FMSHRC 613, 613 (Aug. 2007). The Commission remanded the case to the Chief Administrative Law Judge for a determination of good cause, *id.*, and the Chief Administrative Law Judge subsequently reopened the final assessment. Unpublished

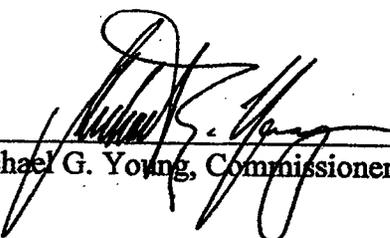
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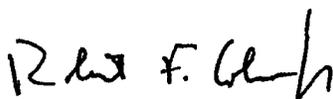
<sup>1</sup> The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

Order dated Sept. 4, 2008. On January 28, 2008, Elk Run sought reopening of three citations within a proposed assessment which its attorney had failed to contest due to an unspecified "clerical error." *Elk Run Coal Co.*, 30 FMSHRC 423, 424 (June 2008). The Commission remanded the case to the Chief Administrative Law judge for a determination of good cause, *id.*, and the Chief Administrative Law Judge subsequently reopened the final assessment. Unpublished Order dated Sept. 4, 2008. On December 19, 2008, Elk Run sought reopening of an assessment which became final because its safety director failed to successfully fax the assessment form to counsel, and did not check whether the fax had been received. *Elk Run Coal Co.*, No. WEVA 2009-511 (motion pending).

Based on the foregoing, we conclude that Elk Run has failed to provide an adequate basis for the Commission to reopen the penalty assessment. See *Pinnacle Mining*, 30 FMSHRC at 1062-63 (denying relief because operator's excuse was insufficient); *Pinnacle Mining*, 30 FMSHRC at 1067-68 (same). Accordingly, we deny Elk Run's request to reopen.

  
Mary Lu Jordan, Chairman

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

**Commissioner Duffy, dissenting:**

**I would grant this unopposed request to reopen.**

  
\_\_\_\_\_  
Michael F. Duffy, Commissioner

**Distribution:**

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Morgantown, WV 26501**

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Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 14, 2010

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

v.

MOSAIC POTASH CARLSBAD INC.

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Docket No. CENT 2010-1226-M  
A.C. No. 29-00802-228600

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

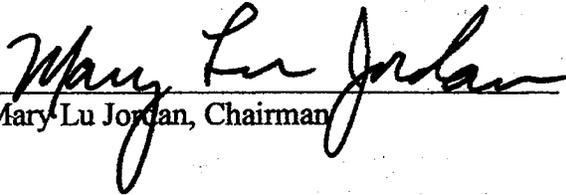
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 10, 2010, the Commission received from Mosaic Potash Carlsbad Inc. ("Mosaic") a motion to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

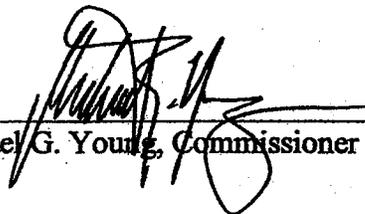
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

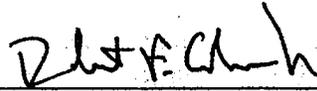
The Secretary submits that upon reviewing the records in this proceeding, she has discovered that the proposed penalty assessment for Citation No. 6571486 was delivered on August 12, 2010, and that the motion to reopen was post-marked September 9, 2010, which falls within the 30-day time period for contesting a proposed assessment. She states that the Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health Administration has accepted Mosaic's motion to reopen as a timely contest and has added the citation to an active civil penalty proceeding (Docket No. CENT 2010-1166-M).

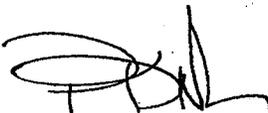
Having reviewed Mosaic's request and the Secretary's response, we find the request to reopen to be moot. The proposed penalty assessment did not become a final order of the Commission. Accordingly, the request to reopen is dismissed as moot.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

**Distribution:**

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**1100 Wilson Blvd. 25th Floor**  
**Arlington, VA 22209**

**Chief Administrative Law Judge Robert J. Lesnick**  
**Federal Mine Safety & Health Review Commission**  
**601 New Jersey Avenue, N.W., Suite 9500**  
**Washington, D.C. 20001-2021**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December, 14, 2010

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

v.

DODGE HILL MINING COMPANY, LLC

Docket No. KENT 2010-197  
A.C. No. 15-18335-193080

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On August 9, 2010, the Commission received from Dodge Hill Mining Company, LLC ("Dodge Hill") a renewed motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

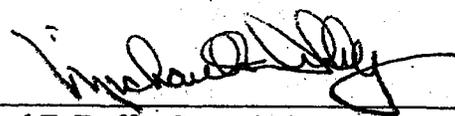
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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).

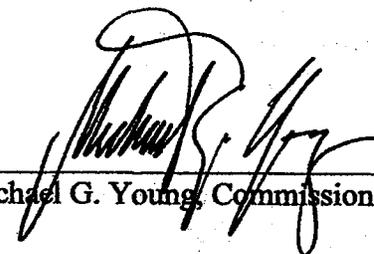
On August 4, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000193080 to Dodge Hill for 16 citations MSHA had issued to the operator in June of that year. However, the operator did not file a timely notice of contest. In its first motion to reopen, filed on November 10, 2009, Dodge Hill stated that it intended to contest six of the proposed penalties, but because of a "clerical error" it failed to return the contest form to MSHA. The Commission subsequently denied the request to reopen without prejudice because of Dodge Hill's failure to provide a sufficiently detailed explanation for its failure to file a timely contest. *See Dodge Hill Mining Co.*, 32 FMSHRC 754 (July 2010).

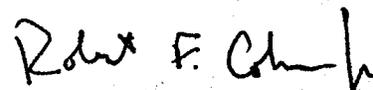
The renewed request to reopen from Dodge Hill includes an affidavit from the Assessment Analyst for its corporate parent, who explains that the assessment was not processed as it normally would have been because she inadvertently misplaced it after the operator had decided which penalties it wished to contest. Dodge Hill also demonstrates that it had requested conferences on the underlying citations. The Secretary of Labor did not oppose Dodge Hill's original motion and has not responded to its renewed motion.

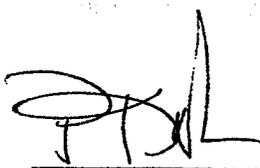
Having reviewed Dodge Hill's requests and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, 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, 2010

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

v.

DITTRICH MECHANICAL &  
FABRICATION, INC.

Docket No. LAKE 2010-407-M  
A.C. No. 21-00057-188834 X380

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Duffy, Young, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 18, 2010, the Commission received from Dittrich Mechanical & Fabrication, Inc. ("Dittrich") a request to reopen a penalty assessment that may have 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).

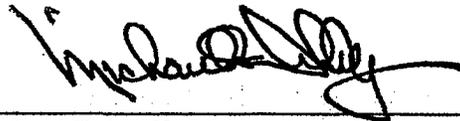
Dittrich states that it never received a copy of the two May 12, 2009, citations that are the subject of the proposed penalty assessment at issue, No. 00018834, which was issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on June 23, 2009. Dittrich attaches a letter dated May 21, 2009, from MSHA informing it of its Contractor Identification Number. It also acknowledges receiving the proposed penalty assessment, but states that a secretary filed the assessment away, which prevented Dittrich from acting upon it. Dittrich also acknowledges receiving a delinquency notice from MSHA.

The Secretary opposes reopening the assessment on the ground that the excuse offered by Dittrich for not responding to the assessment is not sufficiently detailed to justify reopening. The

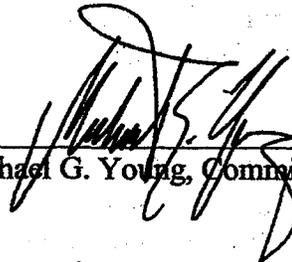
Secretary also states that Dittrich has failed to explain why it did not respond to the delinquency notice, but instead waited until after MSHA had referred the matter to the U.S. Treasury before it made its request to reopen.

The Secretary does not address Dittrich's argument that it never received the citations that are the subject of the assessment. Section 104(a) of the Mine Act requires that MSHA issue citations to operators (and thus also to contractors) in writing. *See* 30 U.S.C. § 814(a). The Mine Act further provides in section 105(a) for proposed penalty assessments for citations and orders issued pursuant to section 104. *See* 30 U.S.C. § 815(a). We do not condone the operator's handling of the proposed penalty assessment in this instance, especially its failure to act upon receiving an MSHA delinquency notice. However, absent evidence that the citations were ever issued to Dittrich,<sup>1</sup> we cannot find that the assessment was ever effective.

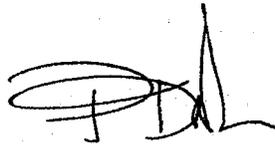
Consequently, we conclude that there is no final order in this case, and we dismiss the operator's request to reopen as moot. MSHA is free to issue another proposed penalty assessment once it has complied with the requirements of section 104(a).



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Patrick K. Nakamura, Commissioner

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<sup>1</sup> We note that the Secretary did not submit copies of the citations with her response in opposition, but rather internal MSHA documentation regarding the violations.

Chairman Jordan and Commissioner Cohen, concurring:

Our colleagues conclude that there is no final order in this case and therefore the request to reopen should be dismissed as moot. We disagree, but would grant relief on alternative grounds.

The majority states that, absent evidence that the citations were delivered to the operator, they cannot find the penalty assessment was ever effective. Slip op. at 2. They note that the Secretary submitted internal MSHA documents regarding the violations but did not submit copies of the citations. Our colleagues suggest that MSHA may issue another proposed penalty assessment once it has complied with the requirements of section 104(a) (which mandates that citations be issued in writing), thus finding, based only on the operator's unsubstantiated assertion, that no written citation was ever issued.

The Secretary, who opposed the motion to reopen, submitted a printout (from an MSHA website) with information identical in almost all respects to that found in the paper version of a citation that MSHA traditionally provides to an operator.<sup>1</sup> Thus, by elevating form over substance, our colleagues find that the Secretary failed to offer evidence that the citations were ever issued to Dittrich because, perhaps out of expediency, the versions of the citations that the Secretary provided to the Commission were not photocopies of the paper citations. This despite the fact that the Secretary's submission contains the same substantive information found on a paper citation (for instance, it contains the citation numbers and states that the citations were issued to Richard Dittrich at 11:30 a.m. on May 12, 2009 and terminated on May 12 and May 28). We conclude that the Secretary's submission is sufficient to rebut the operator's contention that no written citation issued.

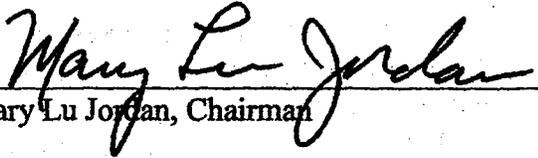
We believe the majority could be setting an unfortunate precedent. It appears that in the future, if an operator claims to have not received a written citation, the Secretary must submit a photocopy of the original form given to the operator, instead of an electronic version that is slightly reconfigured, in order for the rebuttal evidence to be sufficient for the majority. We do not believe the Secretary must go to such lengths to meet her burden of proof. Additionally, based on the record in this case, we do not believe the Commission should order the Secretary to re-serve the citation before she can issue a penalty assessment.

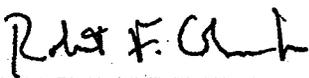
Consequently, we conclude that there was a final order in this case, as the Secretary offered sufficient proof that she issued a written citation and proposed a penalty, but the operator failed to timely contest it. However, we would grant relief because the operator's reason for failing to respond to the proposed penalty (which was that Dittrich's secretary filed it but did not properly inform the operator), constitutes excusable neglect. *See 46 Sand & Stone, 23 FMSHRC*

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<sup>1</sup> The forms submitted by the Secretary (one of which has a website address that includes the term "IssuanceViewForm") may in fact simply be a printout of an electronic version of the same document the majority insists the Secretary submit.

1091-92 (Oct. 2001) (granting request to reopen because the proposed penalty assessment form was misfiled).

  
Mary Lu Jordan, Chairman

  
Robert F. Cohen, Jr., Commissioner

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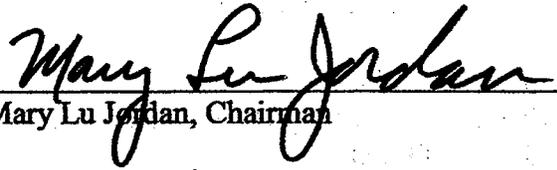
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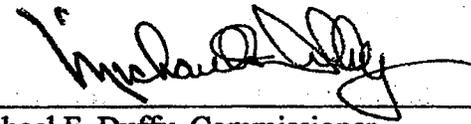
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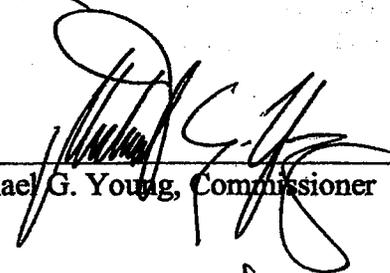


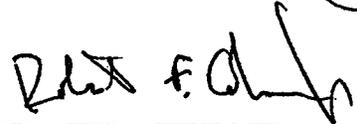
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the contractor's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW  
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December 14, 2010

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

v.

D & H QUARRY, INC.

Docket No. SE 2010-1223-M  
A.C. No. 09-01057-211071

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On September 23, 2010, the Commission received from D & H Quarry, Inc. ("D & H") a motion requesting that the Commission 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).

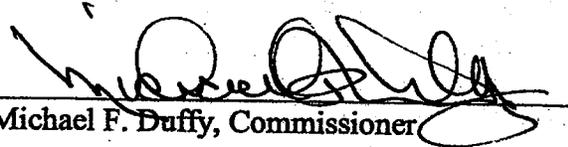
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

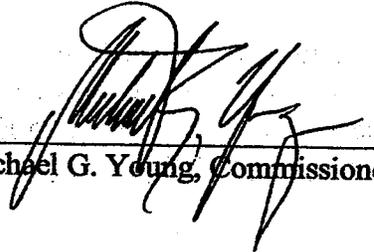
On February 11, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000211071 to D & H. In its request, D & H alleges that its President, who is responsible for overseeing health and safety activities at the mine, had been diagnosed with cancer between the time the citations were issued and the time that the proposed assessment was issued, and was undergoing treatment and surgery at the time the assessment was issued. The President's wife, who is the Secretary of D & H, states that she believed that she had returned the assessment in a timely manner while dealing with her husband's surgery. She further states that she "may have sent [the assessment] to the wrong address or it was lost in the mail." Affidavit of Kathy Addison. D & H further alleges that it was unaware that MSHA had not received the contest of the assessment until it received a delinquency notice dated May 6, 2010, and then sent a letter to MSHA on May 31, 2010, explaining that it believed that the proposed assessment had been timely contested.

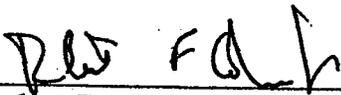
The Secretary does not oppose D & H's request to reopen Assessment No. 000211071.

Therefore, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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December 14, 2010

SECRETARY OF LABOR,	:	Docket No. WEST 2010-1646-M
MINE SAFETY AND HEALTH	:	A.C. No. 10-02141-208356
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 2010-1914-M
	:	A.C. No. 10-02141-179350
	:	
QUALITY SAND & GRAVEL	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On August 6, 2010, and September 27, 2010, the Commission received from Quality Sand & Gravel ("Quality") requests to reopen two 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).<sup>1</sup>

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).

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

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-1646-M and WEST 2010-1914-M, both captioned *Quality Sand & Gravel*, and involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. 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 March 17, 2009, and January 12, 2010, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment Nos. 000179350 and 000208356, respectively, to Quality. In its request to reopen Proposed Assessment No. 000179350, Quality states that it is under new management and that it only learned recently that MSHA did not receive its contest. Quality also asserts that it never received a delinquency letter covering the assessment. The Secretary opposes Quality’s request to reopen because it was filed more than one year and five months after the proposed assessment became a final order of the Commission. She also notes that the assessment was sent to the Treasury Department for collection on October 15, 2009.

In its request to reopen Assessment No. 000208356, Quality alleges that shortly after the citations contained in the assessment were issued in November 2009, it sent a letter to the MSHA district office, disputing all 12 violations. Quality also asserts that it sent a letter to MSHA on February 9, 2010, within the 30-day contest period, informing MSHA of its dispute regarding the 12 violations. Quality also attaches a letter to MSHA dated April 16, 2010, inquiring as to the status of its dispute of these violations. The Secretary states that she does not oppose Quality’s request to reopen Assessment No. 000208356.

Having reviewed the facts and circumstances of these proceedings, the operator’s requests and the Secretary’s responses, we agree that Quality has failed to provide a sufficient basis for the Commission to reopen Assessment No. 000179350, but has provided a sufficient basis for reopening with respect to Assessment No. 000208356.

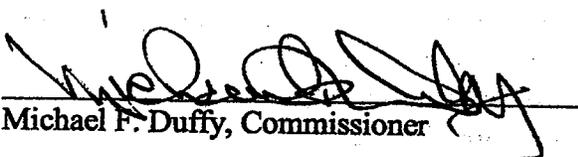
Proposed Assessment No. 000179350 became a final order of the Commission on April 23, 2009, and more than a year passed before the operator sought reopening with the Commission on September 27, 2010. In fact, we note that the reopening request was submitted almost a year after the matter had been referred for collection with the Treasury Department. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). The Commission generally denies requests for reopening that are brought more than a year after the order has become final. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny the request to reopen Assessment No. 000179350.<sup>2</sup>

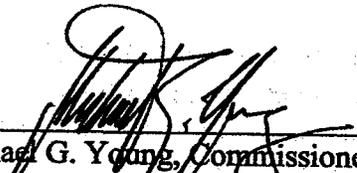
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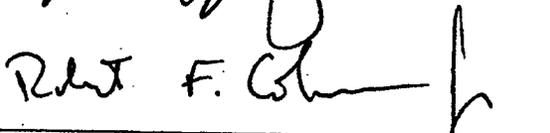
<sup>2</sup> We are mindful of Quality’s concern with the amount of the penalty and its effect on business. We note that MSHA’s Civil Penalty Compliance Office may be able to arrange an installment repayment plan if an operator is unable to pay this debt all at one time. See

With respect to Assessment No. 000208356, we grant the request to reopen the assessment and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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Delinquency Letter dated June 10, 2009.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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December 14, 2010

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

v.

DMC MINING SERVICES

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Docket No. WEST 2010-1888-M  
A.C. No. 26-02286-212068

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

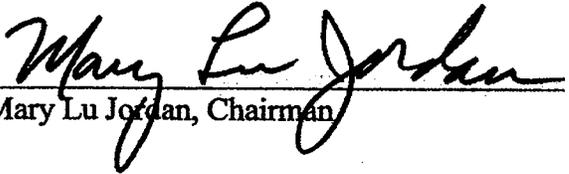
BY THE COMMISSION:

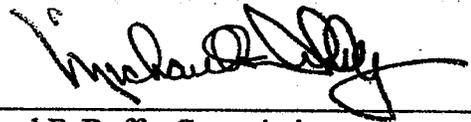
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On September 29, 2010, the Commission received from DMC Mining Services, a motion requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On October 22, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

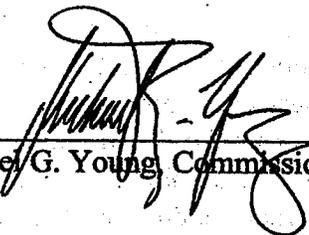
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

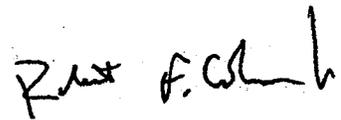
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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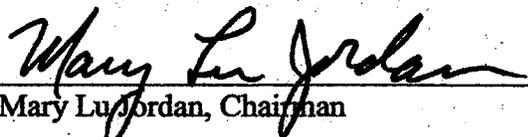
**Chief Administrative Law Judge Robert J. Lesnick**  
**Federal Mine Safety & Health Review Commission**  
**601 New Jersey Avenue, N.W., Suite 9500**  
**Washington, D.C. 20001-2021**

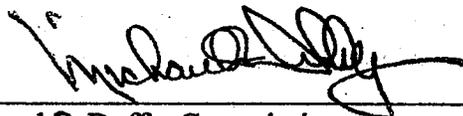


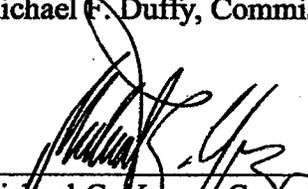
Affidavits submitted by Elk Run stated that the operator intended to contest the proposed penalty assessment and faxed it to counsel. However, the fax allegedly never was received by counsel. When the operator realized that the fax had not been received, it promptly sought reopening.

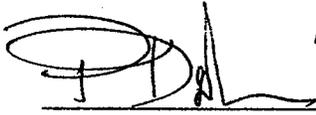
The Secretary states that she does not oppose the reopening of the proposed penalty assessment. However, as our dissenting colleague and the Secretary note, this case represents the fourth time that Elk Run has filed a request to reopen since July 2007. The Secretary urges that Elk Run take whatever additional steps are necessary to ensure that future contests are filed in a timely manner.<sup>1</sup>

Having reviewed Elk Run's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Patrick K. Nakamura, Commissioner

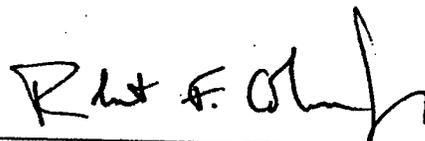
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<sup>1</sup> While the facts of the prior cases are significantly different, in light of this history of motions to reopen, the Commission will employ greater scrutiny in considering whether to grant any requests to reopen filed by Elk Run after the date of this order. *See Elk Run Coal Co.*, 32 FMSHRC \_\_\_\_\_, No. WEVA 2009-1738 (Dec. 10, 2010).

Commissioner Cohen, dissenting:

I cannot agree with my colleagues' determination that Elk Run has established inadvertence or excusable neglect so as to justify reopening the assessment in this case. Elk Run attributes the failure to file its notice of contest to the fact that the Safety Director had "only recently" been transferred to that position and "was in the process of learning her job duties." Mot. at 1-2. The Safety Director attempted to fax the proposed assessment to counsel so that a notice of contest could be filed, but the fax did not go through "due to the large volume of documents being faxed." *Id.* at 2. As Elk Run acknowledges, "[the Safety Director] did not check to make sure that the fax was accepted and a confirmation received." *Id.* The penalties which Elk Run intended to contest total \$75,394. *Id.* at Ex. 1.

In view of Elk Run's history of failing to file timely contests of proposed assessments,<sup>1</sup> I view the Safety Director's failure to successfully fax the proposed assessment to counsel (and, more importantly, the failure to check on whether the fax had gone through) not as an isolated instance of inadvertence but as the result of an inadequate and unreliable internal processing system, which does not justify reopening. *Pinnacle Mining Co.*, 30 FMSHRC 1061 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155 (Sept. 2010); see *Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (District Court did not abuse its discretion for denying Rule 60(b) motion on the grounds that the movant failed to establish minimum procedural safeguards that would have avoided default). Not to check a fax confirmation cannot be justified by relative inexperience, and the fact of a "large volume of documents being faxed" demonstrates the need for greater attention rather than being an excuse for failure, especially given the large amount of money at stake.



Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> This is the fourth time that Elk Run filed a request to reopen within an 18 month period. In at least three of these four instances, including this case, the failure was due to an avoidable mistake on its part. Moreover, since this motion was filed, Elk Run filed another motion to reopen an assessment which had become final because of an avoidable mistake. See *Elk Run Coal Co.*, 29 FMSHRC 613 (Aug. 2007); *Elk Run Coal Co.*, 30 FMSHRC 423 (June 2008); *Elk Run Coal Co.*, 32 FMSHRC \_\_\_\_\_, WEVA 2009-1738 (Dec. 10, 2010).

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 15, 2010

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

v.

EAST TENNESSEE ZINC COMPANY

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: Docket No. SE 2010-177-M  
: A.C. No. 40-00168-175532  
:  
:

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 30, 2009, the Commission received from East Tennessee Zinc Company ("ETZC") 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).

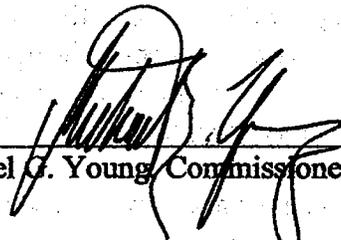
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

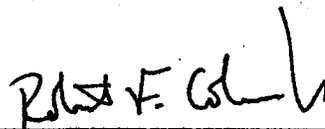
On February 3, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000175532 to ETZC for fifteen citations that MSHA had issued to the operator in December 2008. MSHA also issued Proposed Assessment No. 000175533 to ETZC on February 3, 2009. ETZC states that upon receipt, it forwarded both proposed assessments to counsel to have contests filed as to each, but that "during subsequent administrative handling of the cases, Case No. 000175533 was contested, but inadvertently Case No. 000175532 was not." Mot. at 2. ETZC asserts that it discovered it was delinquent upon consulting MSHA's data retrieval system. *Id.* On December 24, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

Having reviewed ETZC's request and the Secretary's response, we conclude that ETZC has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's explanation that it failed to file a timely contest due to "administrative oversight" by counsel (Mot. at 2), without any further elaboration, does not provide us with an adequate basis to justify reopening the assessment. We note in particular that ETZC fails to provide any explanation for its inaction during the prolonged period of over eight months between the assessment becoming a final order and the filing of the motion to reopen. Accordingly, we deny without prejudice ETZC's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Any amended or renewed request by ETZC to reopen Assessment No. 000175532 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

  
Mary Lu Jordan, Chairman

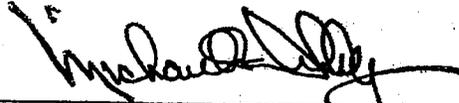
  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

Commissioner Duffy, dissenting:

I would grant this unopposed motion to reopen. In the past the Commission has denied a motion to reopen because of the operator's delay in seeking relief after having been notified by the Secretary of its delinquency. Here, there is no evidence that a delinquency notice was sent prior to the operator's discovery of the delay upon its own investigation. On the basis of that distinction and the Secretary's non-opposition, the motion should be granted



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Michael F. Duffy, Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick**  
**Federal Mine Safety & Health Review Commission**  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 15, 2010

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

v.

B & W RESOURCES, INC.

Docket No. KENT 2010-1080

A.C. No. 15-19008-212909

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On May 18, 2010, the Commission received from B & W Resources, Inc. ("B & W") 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 March 4, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000212909 to B & W proposing a penalty for one order that had been issued to the operator on January 6, 2010. According to B & W, it had moved its office and hired new personnel to manage the office. The operator explains that the recipient's inexperience in promptly delivering mail to the appropriate person, and a change in Safety Director personnel, contributed to the responsible person not receiving the assessment form until April 15, 2010. The operator states that when the appropriate person received the assessment form, the contest was promptly faxed to MSHA. The operator submits that it has since corrected the personnel problem.

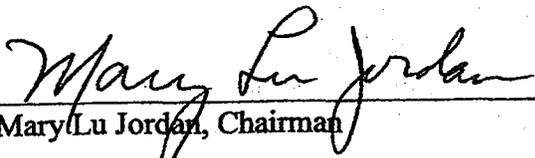
The Secretary opposes the request to reopen. She states that B & W's explanation for the failure to file a timely contest is conclusory and thus insufficient to establish grounds for reopening the assessment. The Secretary notes that the fact of inadequate or unreliable office procedures does not constitute an adequate excuse under Rule 60(b) of the Federal Rules of Civil Procedure. The Secretary also points out that B & W is currently delinquent at this mine with eight separate penalty assessments totaling \$95,984.07, including this case, and has three other mines sites that have an outstanding delinquency totaling \$4,785.39, which she alleges is an indication that the operator has acted in bad faith in seeking to reopen this final order.

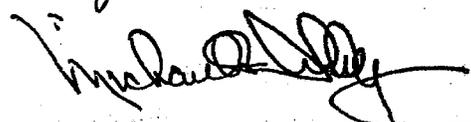
Having reviewed B & W's request and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Without further elaboration on all of the relevant circumstances, including the allegations of delinquent penalties raised by the Secretary, the operator's explanation has not provided the Commission with an adequate basis to reopen. Accordingly, we hereby deny the request for relief without prejudice. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that B & W may submit another request to reopen Assessment No. 000212909.<sup>1</sup>

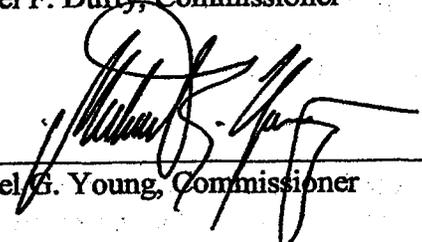
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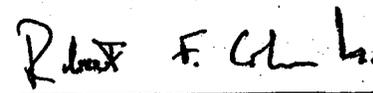
<sup>1</sup> If B & W submits another request to reopen these cases, it must establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. B & W should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen these cases. B & W should also include copies of all documents supporting its request to reopen these cases.

At a minimum, the operator must provide an affidavit satisfactorily responding to the allegations raised in the Secretary's response, an explanation of how it normally contests proposed penalties, and specific information regarding why that process did not work in this instance. Any amended or renewed request by B & W to reopen Assessment No. 000212909 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
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Michael F. Duffy, Commissioner

  
\_\_\_\_\_  
Michael G. Young, Commissioner

  
\_\_\_\_\_  
Robert F. Cohen, Jr., Commissioner

  
\_\_\_\_\_  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 16, 2010

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

B & S TRUCKING COMPANY, INC.

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:  
Docket No. KENT 2011- 161  
A.C. No. 15-17077-229820 Q7G  
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:

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 1, 2010, the Commission received from B & S Trucking Company, Inc., a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On December 1, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

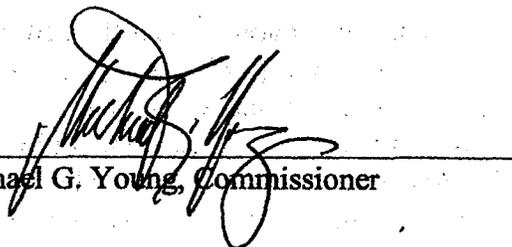
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable

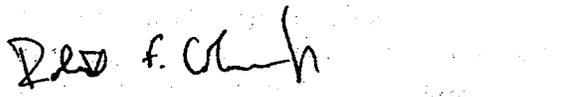
by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

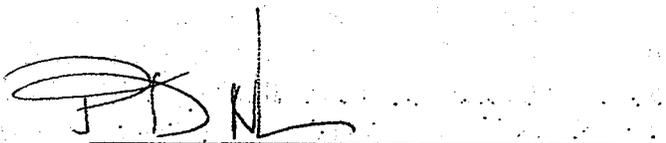
Having reviewed the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, 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 16, 2010

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
 : Docket Nos. WEVA 2006-654, et al.  
v. :  
 :  
ARACOMA COAL COMPANY, INC. :

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen Commissioners<sup>1</sup>

ORDER ON MOTION FOR RECONSIDERATION

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006). On December 18, 2008, the parties filed with the Chief Judge a joint motion to approve settlement of 102 penalty dockets consisting of 1,302 separate citations and orders, covering two mines. The joint motion enumerated the 102 penalty dockets and 1,302 citations and orders in Addendum 1 and Addendum 2 attached to the motion. Chief Judge Robert Lesnick issued a Decision Approving Settlement/Order to Pay on December 23, 2008. 30 FMSHRC 1160 (Dec. 2008) (ALJ). On January 22, 2009, the Commission on its own motion, directed review of the judge's decision approving the settlement.

On January 23, 2009, the parties filed with the judge a Joint Motion to Correct Settlement Order. The motion explained that the enumeration of the penalty dockets and of the citations and orders in Addendum 1 and Addendum 2 of the settlement motion had contained inaccuracies. Specifically, it had inadvertently contained 21 citations which were not part of the settlement, and contained a number of errors in associating citations and orders with the correct penalty docket. In their joint brief filed with the Commission, the parties noted the motion to the judge

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<sup>1</sup> A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Patrick K. Nakamura has elected not to participate in this matter.

and pointed out that pursuant to Commission Procedural Rule 69(c), 29 C.F.R. § 2700.69(c), the judge did not have authority to correct the clerical errors without leave of the Commission. Jt. Br. at 1 n.1.

On November 17, 2010, the Commission issued a decision affirming the judge's approval of the settlement. 32 FMSHRC \_\_\_, Nos. WEVA 2006-654, et. al. (Nov. 17, 2010). On November 24, 2010, the Secretary filed a motion for reconsideration pursuant to Commission Procedural Rule 78(a), 29 C.F.R. § 2700.78(a), on behalf of the parties, which asked the Commission to reconsider its decision of November 17, 2010, so as to address the Joint Motion to Correct Settlement Order previously filed with the Chief Judge.

The parties' joint motion to correct the Chief Judge's Decision Approving Settlement/Order to Pay is granted, and pursuant to the January 23, 2009 letter from the Solicitor of Labor to Judge Lesnick, the Judge's December 23, 2008 Decision shall be corrected as follows:

1. In the caption of the Decision, Docket Nos. WEVA 2007-444 and WEVA 2007-525 shall be deleted;
2. Docket Nos. WEVA 2006-659 and WEVA 2006-661 shall be added to the caption on the first cover page of the Decision;
3. In the first paragraph of the Decision, the reference to "1,302 citations and orders" shall be changed to "1,281 citations and orders;"
4. In both the first paragraph of the Decision and in footnote 1 on page 1 of the Decision, the amount of the total assessment shall be changed from "\$2,806,027 to \$2,803,293;"
5. In relation to Addenda 1 and 2 of the parties' Motion to Approve Settlement, incorporated by reference into the court's December 23, 2008 Decision Approving Settlement/Order to Pay:
  - (a) the 20 citations set forth within Docket No. WEVA 2007-444 on pages 9 and 10 of Addendum 1 (relating to the Aracoma Alma Mine #1) shall be deleted, and
  - (b) the one citation set forth within Docket No. WEVA 2007-525 on page 3 of Addendum 2 (relating to the Hernshaw Mine) shall be deleted;
6. That the following 19 citation numbers previously associated with Docket No. WEVA 2006-660 – set forth on page 3 of Addendum 1 (relating to the Aracoma Alma Mine #1) – shall be associated with Penalty Docket No. WEVA 2006-659:

7241394, 7241396, 7244374, 7244375, 7244376, 7244377,  
7244378, 7244379, 7244380, 7244381, 7249273, 7250537,  
7250538, 7252615, 7252805, 7252808, 7252810, 7252811,  
7252812;

7. That the following 20 citation numbers – set forth on pages 23 and 24 of Addendum 1 (relating to the Aracoma Alma Mine #1) – shall be associated with Penalty Docket No. WEVA 2006-660:

7241398, 7241399, 7241400, 7244382, 7244383, 7244384,  
7244386, 7252618, 7252619, 7252630, 7252640, 7252834,  
7252838, 7252844, 7252845, 7252850, 7252855, 7252857,  
7252858, 7252859;

8. That the following two citation numbers – set forth on page 24 of Addendum 1 (relating to the Aracoma Alma Mine #1) – shall be associated with Penalty Docket No. WEVA 2006-661:

7252866, 7253425;

9. That the following six citation and order numbers – set forth on pages 23 and 24 of Addendum 1 (relating to the Aracoma Alma Mine #1) – shall be associated with Penalty Docket No. WEVA 2008-1577:

6612795, 7182014, 7265918, 7265920, 7273497, 7280540;

10. That the following 30 citation numbers – set forth on pages 5 and 6 of Addendum 2 (relating to the Hernshaw Mine) – shall be associated with Penalty Docket No. 2008-1567:

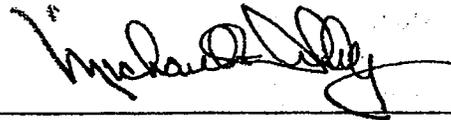
6616651, 6616652, 6616653, 6616654, 6616655, 6616658,  
6616659, 6616660, 6616663, 6616670, 6616672, 6616673,  
6616679, 6616680, 6616681, 6616682, 6616717, 7279591,  
7279594, 7279595, 7279596, 7279599, 7279606, 7279607,  
7279608, 7279609, 7279610, 7279612, 7279615, 7279618.

Accordingly, this matter is remanded to the Chief Judge to correct the settlement order as indicated above to conform to the corrections submitted by the parties.



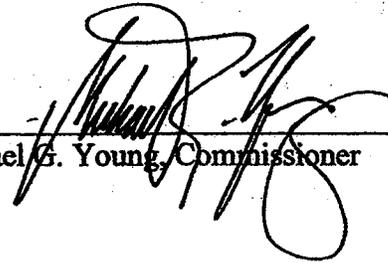
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Mary Lu Jordan, Chairman



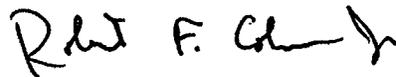
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Michael F. Duffy, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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**Federal Mine Safety & Health Review Commission**  
**601 New Jersey Avenue, N.W., Suite 9500**  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 16, 2010

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
 : Docket Nos. WEVA 2006-654, et al.  
v. :  
 :  
ARACOMA COAL COMPANY, INC. :

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen Commissioners<sup>1</sup>

AMENDED DECISION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 23, 2008, Chief Administrative Law Judge Robert Lesnick approved a settlement agreement between the Secretary of Labor and Aracoma Coal Company (“Aracoma”), which disposed of 102 penalty dockets that encompassed 1,281 citations and orders. 30 FMSHRC 1160 (Dec. 2008) (ALJ).<sup>2</sup> Some of the citations and orders resulted from an investigation by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) into conditions at Aracoma’s Alma No. 1 Mine and the Hernshaw Mine, following a fire at the Alma mine that resulted in two fatalities on January 19, 2006. *Id.* at 1167. Others were alleged violations occurring at the two mines after the fire.

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<sup>1</sup> A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Patrick K. Nakamura has elected not to participate in this matter.

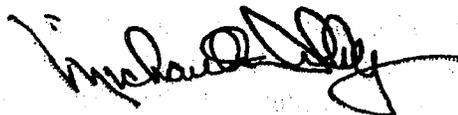
<sup>2</sup> The decision is amended pursuant to the parties’ joint motion for reconsideration, filed November 24, 2010. In that motion, the parties asked the Commission to reconsider its original decision in this matter dated November 17, 2010, in order to address a joint motion to correct the settlement order that had initially been filed with the Chief Judge after the Commission granted review of this case on its own motion.

On January 22, 2009, pursuant to section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(2)(B), Chairman Jordan and Commissioner Cohen voted to order sua sponte review of the judge's decision on the grounds that the decision may be contrary to law and presented a novel question of policy. The Commission direction for review was limited to "the question of whether the provisions of the settlement agreement . . . relating to the pattern of violations procedures are consistent with the provisions and objectives of section 104(e) of the Mine Act, 30 U.S.C. § 814(e)." After receiving permission from the Commission, the Secretary and Aracoma filed a joint brief on the question.

Having considered the judge's decision and the settlement agreement in light of the joint brief, Chairman Jordan and Commissioners Duffy and Young affirm the judge's decision. Commissioner Cohen would vacate and remand the judge's decision approving the settlement. Separate opinions of Commissioners follow.

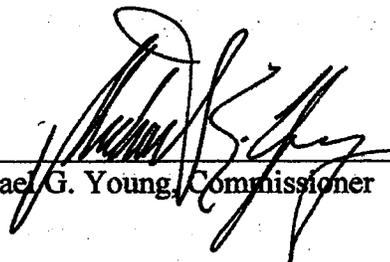
Commissioners Duffy and Young, affirming the judge's decision:

We did not join in ordering sua sponte review because nothing at that time led us to believe that the judge had abused his discretion in approving the settlement. Nothing we have seen since disturbs that conclusion, so we affirm his decision.



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Michael F. Duffy, Commissioner



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Michael G. Young, Commissioner

Chairman Jordan, affirming the judge's decision:

I. Introduction

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), the Commission granted review on its own motion of a decision approving a settlement agreement between the Secretary of Labor and Aracoma Coal Company, Inc. ("Aracoma"). In his decision, Chief Judge Robert Lesnick approved the settlement of proceedings consisting of 102 penalty dockets and 1,281 citations and orders. 30 FMSHRC 1160 (Dec. 2008) (ALJ). Twenty-five of these violations were designated as contributing to the January 19, 2006 fire at Aracoma's Alma Mine No. 1 that resulted in the deaths of two miners. *Id.* at 1167. The proposed penalties totaled \$2,803,293. In the settlement agreement, Aracoma agreed to accept all the violations as written and to pay a penalty of \$1,700,000. *Id.*

In addition to the civil penalties, Aracoma agreed with the United States Attorney for the Southern District of West Virginia to enter a guilty plea to a ten-count information related to the accident, and to pay a criminal fine of \$2,500,000. *Id.* at 1169. The court subsequently accepted this plea agreement. Letter of April 21, 2009, from Jerald S. Feingold, Attorney, United States Department of Labor.

As part of the settlement, the parties also reached an agreement, discussed in detail below, providing Aracoma with an opportunity to voluntarily provide the Department of Labor's Mine Safety and Health Administration ("MSHA") with plans to reduce the rate of significant and substantial ("S&S") violations at both its Alma No.1 Mine and its Hernshaw Mine. Pursuant to the agreement, each mine could remain on the plan as long as it continued to maintain the goals in its plan. MSHA would forego issuing a warning letter that would normally begin the process of designating a mine as exhibiting a "pattern of violations" (or "POV"), pursuant to 30 C.F.R. § 104.4, 30 FMSHRC at 1168, which as explained below, has potentially severe consequences for an operator.

It is this latter portion of the settlement that is the focus of my review. In the Direction for Review, the Commission limited its consideration to "the question of whether the provisions in the judge's settlement order relating to the pattern of violations procedures are consistent with the provisions and objectives of section 104(e) of the Mine Act, 30 U.S.C. § 814(e)." Direction for Review at 8.<sup>1</sup>

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<sup>1</sup> Section 110(k) of the Mine Act provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). In considering settlements, Commission judges must review each proposed settlement in light of the six statutory factors set forth in section 110(i) of the Mine Act. 30 U.S.C. § 820(i).

## II. The Fire at the Alma No. 1 Mine

On January 19, 2006, a fire occurred at the Alma Mine No. 1 which resulted in the deaths of two miners. Jt. Br. at 2. The fire resulted from frictional heating that occurred when the longwall belt became misaligned in the 9 Headgate longwall belt takeup storage unit. Order No. 7435539. This frictional heating ignited accumulations of combustible materials which “were present in the form of grease, oil, coal dust, float coal dust, coal fines and loose coal spillage at numerous locations along the approximate 2,000 feet (sic) length of the 9 Headgate longwall belt conveyor.” Order No. 7435532. “[T]he need for additional cleaning and rock dusting” along the 9 Headgate longwall belt conveyor was noted in the mine record books but not corrected “for 38 of the 56 examinations” between January 2, 2006 and January 19, 2006. Order No. 7435527. Once ignited, the accumulations “quickly grew into the strong flaming fire needed to ignite the flame resistant belt.” Order No. 7435532. The resulting belt fire generated “copious quantities of hot, dense, toxic smoke.” *Id.*

Immediately upon discovery of the fire, the belt examiner notified the responsible person designated by the operator for that shift, but that individual failed to initiate an immediate mine evacuation. Order No. 7435538. The Atmospheric Monitoring System (“AMS”) should have provided a visual and audible signal to all affected working sections when the carbon monoxide concentration reached alarm level. However, the miners at 2 Section did not receive an automatic notification because “[n]o carbon monoxide alarm unit was installed at a location where it could be seen or heard by miners on 2 Section.” Order No. 7435523. Adequate visual examinations of the alarms and sensors, as required by 30 C.F.R. § 75.351(n)(1) would have revealed the lack of an alarm unit on 2 Section, as would have adequate training in the installation of the system components. Order Nos. 7435521 and 7435548. There was an AMS operator who was on duty when the mine fire occurred, but that person “did not promptly notify the appropriate personnel that an alarm signal had been generated.” Order No. 7435529.

During the preceding month, “[t]wo other fires occurred at this mine.” Order No. 7435524. Alarm signals were activated in the dispatcher’s office on the surface but “[i]n both cases, the miners in the affected areas of the mine were not notified of the alarms and were not withdrawn to a safe location.” Order No. 7435524.

When the fire occurred on January 19, 2006, a breach in the separation between the belt and escapeway “allowed smoke and carbon monoxide gas to inundate the primary escapeway used by the miners during the evacuation from 2 Section.” Order No. 7435530. The breach existed because “prior to November 2005 . . . one or more of the permanent stoppings that provided separation between the No. 7 Belt conveyor entry and the primary escapeway in the North East Mains were (sic) removed.” *Id.* This condition should have been detected during preshift exams. Order No. 7435108. An “inaccurate map” also “resulted in the operator not correcting the lack of separation between the primary escapeway and the belt entry.” Order No. 7435537.

Efforts to fight the fire were hampered by several factors. The fire-fighting equipment was inadequate in that “[t]he threads of the female coupling of the fire hose were not compatible with the threads of the male pipe of the fire hose outlet valve.” Order No. 7435534. The pertinent water supply line “was not capable of delivering 50 gallons of water per minute at a nozzle pressure of 50 pounds per square inch.” Order No. 7435533. According to an eye witness, “while attempting to fight the fire, the fire hose outlet valve located near the belt conveyor takeup storage unit was opened and no water was produced.” *Id.* In addition, “[t]he mine operator failed to install the water sprinkler system in accordance with 30 C.F.R. § 75.1101-8(a).” Order No. 7435535.

MSHA issued 25 citations and orders to Aracoma as a result of the fire and resulting deaths of miners Don Bragg and Ellery Hatfield. All were denoted as significant and substantial.<sup>2</sup> Of these, 21 were the result of “reckless disregard” which is defined in 30 C.F.R. § 100.3(d) as “conduct which exhibits the absence of the slightest degree of care.” The remaining four orders were characterized by MSHA as resulting from “high negligence.” MSHA assessed each of the 25 contributory violations the then-maximum penalty of \$60,000.

Aracoma contested the assessments for these 25 citations and orders. In addition to these proposed assessments, Aracoma contested 1,256 other proposed assessments. Indeed, it appears that Aracoma contested every penalty for a citation or order that MSHA issued between January 19, 2006, and May 6, 2008, the inclusive dates of the citations and orders in this case. The citations and orders appended to the In Camera Joint Motion to Approve Settlement (“Settlement”) include 298 proposed assessments for \$60 each and 162 proposed settlements for \$100 each.

### III. Overview of Commission Review of ALJ Decisions on Settlement Agreements

The Commission has recognized that oversight of proposed settlements of contested cases is an important aspect of its adjudicative responsibilities under the Mine Act. *Birchfield Mining Co.*, 11 FMSHRC 1428, 1430 (Aug. 1989). Section 110(k) of the Mine Act, 30 U.S.C. § 821(k), requires the Commission and its judges “to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act’s objectives.” *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981); *see also Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (Dec. 1980) (rejecting judge’s approval of a settlement after directing case for review *sua sponte*). Our own procedural rules also require that all settlements be approved by the Commission. Commission Procedural Rule 31, 29 C.F.R. § 2700.31.

The Commission has acknowledged that, although judges have wide discretion in their oversight of the settlement process, “it is not unlimited and at least some of its outer boundaries

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<sup>2</sup> 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.”

are clear.” *Knox*, 3 FMSHRC at 2479. As it has declared in *Knox*, if a judge’s approval or rejection of a settlement is fully supported by the record, consistent with the statutory penalty criteria and not otherwise improper, the Commission will not disturb it. *Id.* at 2480.

However, the Commission has at the same time cautioned that in reviewing such cases, “abuses of discretion or plain errors are not immune from reversal.” *Id.* We have held that abuse of discretion may be found when “there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” *Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 n.3 (July 1997). Thus, “the abuse of discretion standard cannot be used as a rubber stamp to approve all settlements.” *United States v. City of Miami*, 614 F.2d 1322, 1335 (5th Cir. 1980).

As stated above, the Commission’s review of the judge’s decision approving settlement in this case is limited to the portion of the agreement regarding how notification of potential pattern of violations would occur. In examining the non-financial aspect of the settlement, I take into account the principle set forth in the separate opinion issued by Commissioner Marks and me in *Madison Branch Management*, 17 FMSHRC 859, 867-68 (June 1995), that “[t]he ‘affirmative duty’ that section 110(k) places on the Commission and its judges to ‘oversee settlements,’ . . . necessarily requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects.” Thus, the judge properly took the POV section of the settlement into account in issuing his decision and consequently, the Commission has the authority to review the POV issue in the parties’ settlement agreement.<sup>3</sup>

#### IV. MSHA Procedures for Enforcement of Section 104(e) of the Mine Act

Before proceeding with a discussion of the parties’ agreement relating to the POV process, it is helpful to review the legal authority on which the implementation of this heretofore seldom-used provision of the Mine Act rests.<sup>4</sup> Section 104(e) of the Mine Act states in relevant part:

(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of

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<sup>3</sup> In *Madison Branch* the Commission split evenly on the issue of whether a judge must consider both the monetary and non-monetary aspects of settlement agreements. 17 FMSHRC at 860 n.1. For purposes of this case, the parties have assumed that the law requires the Commission and its judges to consider both monetary and non-monetary aspects of settlements. *Jt. Br.* at 6 n.5.

<sup>4</sup> One administrative law judge has concluded that the POV procedures and policy “are little understood by many in industry and the bar,” and acknowledged the “difficulty comprehending the POV process.” *Rockhouse Energy Mining Co.*, 30 FMSHRC 1125, 1129 (Dec. 2008) (ALJ).

such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

30 U.S.C. § 814(e).

In enacting this provision, Congress explicitly recognized why such a sanction was necessary:

The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster which occurred in March 1976 in Eastern Kentucky. That investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address. The Committee's intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.

....

.... The Committee believes that this additional sequence and closure sanction is necessary to deal with continuing violations of the Act's standards. The Committee views the [pattern of violations] notice as indicating to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards. The existence of such a pattern, should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient.

S. Rep. No. 95-181, at 32-33 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 620-21 (1978).

Despite the insistence of Congress on the need for this enforcement mechanism, implementing regulations were not promulgated until 1990. *See* 55 Fed. Reg. 31,128 (July 31, 1990). The regulations describe MSHA's procedures for determining whether an operator has demonstrated a POV. 30 C.F.R. § 104.1 et seq. They establish a four-step process to designate a POV and to terminate POV status: (1) initial screening (section 104.2); (2) identification by MSHA of mines with a potential POV by applying the regulatory criteria (section 104.3); (3) designation of POV status and issuance of the designation to the operator (section 104.4); and (4) termination of POV status (section 104.5).

The first step includes an initial annual screening (which takes into account, among other factors, the mine's history of S&S violations). 30 C.F.R. § 104.2. If the initial screening indicates that the operator "may habitually allow the recurrence of" S&S violations, the second

step, MSHA's identification of mines with a potential POV, is triggered. 30 C.F.R. § 104.3. The criteria used to make this determination include (1) a history of repeated S&S violations of a particular standard, (2) a history of repeated S&S violations of standards related to the same hazard, or (3) a history of repeated S&S violations caused by unwarrantable failure to comply. 30 C.F.R. § 104.3. By use of the word "or," MSHA indicated that any one of these three circumstances would trigger the next step. Significantly, pursuant to section 104.3(b), only citations and orders which have become final shall be used to identify mines with a potential POV.

Next, pursuant to section 104.4(a), if a potential pattern of violations is identified, MSHA is to notify the operator in writing. The operator then has a variety of ways to respond, including instituting a program to avoid repeated S&S violations at the mine. 30 C.F.R. § 104.4(a)(4). However, if the district manager continues to believe that a potential POV exists at the mine, he or she is to send a report to the appropriate MSHA Administrator, with a copy to the operator. 30 C.F.R. § 104.4(b). The operator has an opportunity to respond to the report. After all of these procedures, the MSHA Administrator decides whether to issue a notice of POV, constituting the third step in the process. 30 C.F.R. § 104.4(c). Finally, the regulations provide for the termination of POV status. 30 C.F.R. § 104.5.

Even after these regulations were in place, however, for many years no enforcement action was taken by MSHA under section 104(e). *U.S. Steel Mining Co.*, 18 FMSHRC 862, 872 (June 1996) (Comm'r Marks, concurring). In fact, the agency only recently has begun to exercise its authority under section 104(e) of the Act. *Rockhouse*, 30 FMSHRC at 1129.

MSHA issued a screening criteria and scoring model to determine if a potential POV exists, and revised it in 2009. MSHA, *Pattern of Violations Screening Criteria and Scoring Model – 2009*, previously available at <http://www.msha.gov/POV/POVScreeningCriteria.pdf>. This document focuses on the initial screening criteria under 30 C.F.R. § 104.2, and lists a number of initial screening factors. It lists a series of eight specific criteria,<sup>5</sup> five of which are triggered by the issuance of citations or orders, while the other three are triggered by citations or orders becoming final orders of the Commission. Significantly, the initial screening criteria provides that unless a mine meets all of the criteria, it will not be considered under the next step of the process, the pattern of violations criteria set forth in 30 C.F.R. § 104.3. One of the eight initial screening factors is that "[t]he mines' (sic) rate of S&S Citations/Orders issued per 100 inspection hours during the 24 month review period is equal to or greater than 125% of the National rate of S&S Citations/Orders issued per 100 inspection hours for that mine type and classification." As described *infra*, this screening factor of 125% of the national average is at the heart of the settlement agreement between MSHA and Aracoma in this case.

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<sup>5</sup> Literally, there are 10 criteria listed. However, four of them are essentially pairs, one being applicable to surface mines and facilities and the other being applicable to underground mines. Thus, effectively, there are eight criteria applicable to any given mine.

## V. The Settlement Agreement Between MSHA and Aracoma

With regard to pattern of violations, the Aracoma settlement agreement focuses entirely on reducing the S&S violation issuance rate to 125% of the national average for underground bituminous coal mines. (According to the agreement, the issuance rate for all underground bituminous mines of S&S violations per 100 inspection hours during the 24 months ending June 30, 2008, was 7.1. During the same period, the Aracoma Alma #1 Mine had an issuance rate of 15.6, while the Hernshaw Mine had an issuance rate of 8.9). It provides that Aracoma may submit a plan to reduce (for the Alma Mine, over two to three calendar quarters) and maintain (for Hernshaw Mine) the rate to 125% of the national average. No other action is required of Aracoma to avoid a POV Notice.

I granted review of the judge's decision approving the settlement because the agreement involved enforcement of section 104(e), the pattern of violations provision in the Mine Act that the Secretary had not enforced against an operator to date. Although this statutory provision has been in effect for over 30 years, the historic lack of enforcement means that both the practical and legal implications of the Secretary's recent decision to breathe life into this once moribund provision are still untested.

The settlement agreement states that "[a]s long as the mine's S&S issuance rate remains at or below 125% of the national average for that quarter, the mine will not be considered as exhibiting a potential pattern of violations. . . . As long as each mine continues to achieve and maintain the goals described above, that mine will be able to remain on its S&S reduction plan indefinitely and MSHA will forego issuing potential pattern warning letters." Settlement at 6-7. The "goals described above" refer to the reduction of overall S&S violations to 125% of the national average. The language in this section suggests that MSHA is agreeing to permanently forego issuing a POV warning letter to Aracoma as long as the mine's S&S violation rate does not exceed 125% of the national average.

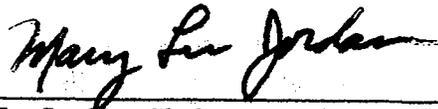
However, the agreement also states that the reduction plan "will remain in effect only as long as the mine remains in immediate jeopardy of receiving a potential pattern warning letter after the plan's adoption." Settlement at 5 n.3. It goes on to state that upon the first POV review in which it is determined that an Aracoma mine "is no longer in jeopardy of receiving a potential POV warning letter because the mine does not meet the screening criteria set forth at <http://www.msha.gov/Pov/POVScreeningCriteria.pdf>, that mine will no longer qualify for participation in the voluntary S&S reduction plan described herein, and will thereafter be evaluated, along with all other mines, under MSHA's normal pattern of violations process." *Id.* This language suggests that the plan, with its reliance on the 125% S&S violation rate, is not permanent, and that Aracoma will be treated just like other companies after it achieves a violation rate of 125% of the national average. Thus, it appears that the language of the settlement agreement is inconsistent with regard to the duration of the reduction plan.

One might ask why the duration of the reduction plan matters, since no mine can be considered as having a potential pattern of violations if its overall S&S issuance rate is within 125% of the national average. My concern was that the Screening Criteria then published on the internet could change in the future. MSHA could reconsider its Screening Criteria in the future, and eliminate the 125% industry-wide norm as a *sine qua non* of POV consideration. In that case, based on the language contained on page 7 of the Settlement, Aracoma might contend that MSHA could never enforce section 104(e) of the Mine Act against it so long as its overall S&S issuance rate was within 125% of the national average. (Indeed, MSHA recently did revise its Screening Criteria and withdrew the criterion regarding the 125% industry-wide norm, <http://www.msha.gov/pov/povsinglesource.asp>, but those revised criteria are not at issue in this case).

The Commission now has the benefit of a joint brief from the parties.<sup>6</sup> The joint brief does not directly address the ambiguity in the settlement agreement regarding its duration, but it states that the agreement would “temporarily remove the Alma #1 Mine and the Hernshaw Mine from the POV screening process and permit them to continue to operate under the voluntary S&S reduction plan as long as the mines continued to achieve the goals set forth in the agreement or until they were no longer in jeopardy of receiving a potential POV warning letter at the time of a subsequent POV review by the Secretary. Thereafter, Aracoma’s mines would be treated precisely like all other mines during a POV review.” (Jt. Br. at 4-5).

#### VI. Conclusion

Although I would have preferred more clarity on the question of the duration of the settlement agreement, it does not appear that the parties intended to permanently insulate Aracoma from any future changes in the screening criteria that may occur. Consequently, I find that the judge did not abuse his discretion in approving the settlement agreement between the parties. Therefore, I would affirm his decision.



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Mary Lu Jordan, Chairman

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<sup>6</sup> The joint brief makes a general assertion that “in practical effect,” Aracoma’s voluntary reduction plan is identical to the one an operator may provide under section 104.4(a)(4), but provides no explanation to support this claim. Jt. Br. at 14; *see also id.* at 18 (Aracoma’s voluntary plan “requires no less than what would be required in plans submitted pursuant to a formal notice issued under Section 104(e)”).

Commissioner Cohen, dissenting:

It is a fundamental function of the Commission to ensure that the public interest is adequately protected before a settlement is approved. *Birchfield Mining Co.*, 11 FMSHRC 1428, 1430 (Aug. 1989). In this case, the Commission took review on its own motion to determine whether this settlement of 1,281 citations and orders, including 24 section 104(d)(2) orders and one section 104(a) citation resulting from the fatal fire at Aracoma's Alma No. 1 Mine on January 19, 2006, met that standard.

My dissent is based on the Secretary's implementation of Section 104(e) of the Mine Act. Section 104(e) is a provision under which Congress gave the Secretary strong powers to take decisive action when an operator displays a "pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards." 30 U.S.C. § 814(e)(1).

At the onset, it is important to recognize that the tragic deaths of Don Bragg and Ellery Hatfield should never have occurred. The Secretary issued 25 citations and orders for violations which contributed to the fire and the deaths of Bragg and Hatfield. 30 FMSHRC 1160, 1167 (Dec. 2008) (ALJ). The Secretary determined that all of these citations and orders showed either "reckless disregard" (defined in 30 C.F.R. § 100.3(d) as "conduct which exhibits the absence of the slightest degree of care") or "high negligence." Aracoma has withdrawn its contests of these citations and orders as part of the settlement agreement, *In Camera* Jt. Mot. to Approve Settlement ("Settlement") at 9-10,<sup>1</sup> and thus the Commission accepts these citations as being accurate and true.

## I.

As Chairman Jordan has described, the fire resulted from frictional heating caused by a misaligned longwall belt. The inspector observed numerous conditions which were "indicative of prolonged operation of the longwall belt conveyor while the belt was misaligned." Order

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<sup>1</sup> The Secretary assessed each of the 25 contributory citations and orders the then-maximum penalty of \$60,000. She assessed a total of \$2,803,293 for the total 1,281 citations and orders included in the settlement. In reducing the total penalties to \$1,700,000, the settlement agreement merely stated that "[t]he civil penalty is to be apportioned in payment of each covered citation and order in the same proportion as \$1,700,000 is to the total assessment of \$2,806,027." Settlement at 4 n.2. (The assessment as subsequently corrected is \$2,803,293). Thus, in terms of the monetary settlement, the judge was informed only that each penalty was being settled for a little less than 61 cents on the dollar. I question how a judge can fulfill his statutory responsibility under section 110(k) of the Mine Act, so as to review a settlement of 1,281 citations and orders, when the judge has been informed only of the total amount of the settlement. However, this issue is not part of the Direction for Review, and so I will not address it.

No. 7435539. The frictional heating ignited accumulations of combustible material in the form of grease, oil, coal dust, float dust, coal fines, and loose coal spillage at numerous locations along the longwall belt conveyor. Order No. 7435532. The hazardous conditions of a misaligned belt and accumulations of combustible material had not been identified in Aracoma's on-shift examinations, Order No. 7435526. Where hazardous conditions, such as the need for cleaning and rock dusting, were recorded in mine record books, they had not been corrected. Order No. 7435527.

The miners on the longwall section were unable to fight the fire effectively because of a number of violations. The water supply line was not capable of delivering the required volume of water. Indeed, when the fire hose outlet valve was opened, "no water was produced." Order No. 7435533. Moreover, the threads of the female coupling of the fire hose were not compatible with the threads of the male pipe of the fire hose outlet valve. Order No. 7435534. Additionally, the water sprinkler system was improperly installed, and failed to provide coverage over the belt takeup storage unit where the fire began. Order No. 7435535. The water sprinkler system, fire hydrants and fire hoses had not been properly examined and tested before the fire. Order Nos. 7435536 and 7435522.

Although the dispatcher was immediately notified of the fire by the mine examiner, mine management failed to initiate and conduct an immediate evacuation despite imminent danger to the miners. Order No. 7435538. Moreover, the Atmospheric Monitoring System ("AMS") operator who was on duty when the fire occurred did not promptly notify appropriate personnel that an alarm signal had been generated. Order No. 7435529. Miners were not promptly evacuated to a safe area in response to AMS alarm signals. Order No. 7435524.

The miners on 2 Section, where Bragg and Hatfield worked, were unaware that a fire existed outby their location. The AMS, which was supposed to provide visual and audible signals at all affected working sections when the carbon monoxide concentration at CO sensors reached alarm level, failed because no carbon monoxide alarm unit had been installed at a location where it could be seen or heard by miners on 2 Section. Order No. 7435523.

When the miners on 2 Section finally attempted to evacuate the mine, their ability to escape was compromised by additional violations. Aracoma had removed permanent stoppings which provided separation between the belt conveyor entry and the primary escapeway in the North East Mains. This lack of separation "allowed smoke and carbon monoxide gas to inundate the primary escapeway used by miners during the evacuation from 2 section." Order No. 7435530. Moreover, adequate escapeway drills had not been conducted as required, Order No. 7435531, the location of personnel doors in stoppings were not clearly marked so that doors could be easily identified to someone traveling in the escapeways, Order No. 7435109, and the mine map did not accurately depict the location of permanent ventilation controls or the designations of escapeways, Order No. 7435537. Preshift and weekly examinations of the entries were inadequate in failing to identify and correct the lack of separation between the belt conveyor entry and the primary escapeway, and the lack of a clearly marked primary escapeway and

location of personnel doors. Order Nos. 7435525, 7435110, 7435108, 6643276, and 7435528. Because of reduced visibility caused by the thick smoke, Bragg and Hatfield were separated from the section crew, and were unable to escape. *Id.*

This was not the first time that Aracoma had reacted to a fire in an improper manner. Two fires had occurred at this mine within a month of this fire, on December 23, 2005, and December 29, 2005, and on both occasions CO sensors had activated alarm signals in the dispatcher's office, but miners in affected areas were not notified of the alarms and were not withdrawn to a safe location. On both previous occasions, MSHA had issued section 104(d)(2) orders. MSHA determined that Aracoma's "repeated lack of proper response to the carbon monoxide alarm signals is an indication of an attitude of indifference" to the requirements of response to AMS alarm signals. Order No. 7435524.

## II.

Chairman Jordan's opinion sets forth the text and legislative history of section 104(e) of the Mine Act, the provision addressing a pattern of violations ("POV"). Slip op. at 6-8. Chairman Jordan also notes that although Congress enacted this provision in 1977, the Secretary did not promulgate implementing regulations until 1990. Her opinion describes the implementing regulations set forth at 30 C.F.R. Part 104, the non-enforcement of those regulations for many years, and the Secretary's issuance several years ago of a Screening Criteria and Scoring Model (hereinafter "Screening Criteria") to determine if a POV exists. *Id.* at 8-9.<sup>2</sup>

The purpose of the Screening Criteria appears to be to screen out all but the most egregious mine operators from even being considered for POV designation. Thus, one of the Screening Criteria provides:

The mines' rate of S&S Citations/Orders issued per 100 inspection hours during the 24 month review period is equal to or greater than 125% of the National rate of S&S Citations/Orders issued per 100 inspection hours for that mine type and classification.

In other words, a mine, during the 24 month review period, can not only have an S&S issuance rate greater than the national average for such mines, but can be up to 25% worse than the national average, and be excluded from consideration for POV, no matter what else is in the mine's violation or accident history.<sup>3</sup>

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<sup>2</sup> On September 28, 2010, MSHA issued a set of revised Pattern of Violations Screening Criteria, which replace the Screening Criteria discussed herein.

<sup>3</sup> The revised Screening Criteria published September 28, 2010, *supra*, do not contain a requirement that a mine's S&S issuance rate be at least 125% of the national average before the mine can be considered as having a pattern of violations. The revised Screening Criteria appear

The Screening Criteria provision that no mine can be considered for POV unless its S&S issuance rate is at least 125% of the national average is contrary to the regulation it purports to implement. Section 104.2 provides:

**§ 104.2 Initial screening.**

At least once each year, MSHA shall review the compliance records of mines. MSHA's review shall include an examination of the following:

- (a) The mine's history of—
  - (1) Significant and substantial violations;
  - (2) Section 104(b) of the Act closure orders resulting from significant and substantial violations; and
  - (3) Section 107(a) of the Act imminent danger orders.
- (b) In addition to the compliance records listed in paragraph (a) of this section, the following shall also be considered as part of the initial screening:
  - (1) Enforcement measures, other than section 104(e) of the Act, which have been applied at the mine.
  - (2) Evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations.
  - (3) An accident, injury, or illness record that demonstrates a serious safety or health management problem at the mine.
  - (4) Any mitigating circumstances.
  - (c) Only citations and orders issued after October 1, 1990, shall be considered as part of the initial screening.

Screening criteria which prevent consideration for pattern of violations status if the operator has an S&S issuance rate no more than 125% of the national average preclude consideration of factors required to be considered under 30 C.F.R. § 104.2, such as a history of section 104(b) closure orders and a history of section 107(a) imminent danger orders. It would not matter if, for example, a mine had an egregious and dangerous history of imminent danger orders, as long as the operator kept its S&S issuance rate within 125% of the national average. Thus, the Screening Criteria are in conflict with 30 C.F.R. § 104.2.

In the preamble to the final rule on POV, MSHA stated that the regulations should focus on the safety and health record of each mine rather than "strictly quantitative comparisons of mines to industry-wide norms." 55 Fed. Reg. 31,128, 31,129 (July 31, 1990). Significantly, when 30 C.F.R. § 104.2 was initially published as a proposed rule, commenters – citing the need for operators to receive adequate notice of the specific factors which would cause them to be identified through initial screening as having a potential POV – suggested that MSHA utilize a

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to be designed to apply all of the factors set forth in 30 C.F.R. § 104.2. Hence, the discussion of the Screening Criteria contained in this opinion does not apply to present MSHA policy.

statistical comparison of a mine's rate of violations with an industry-wide average, and the agency rejected the suggestion:

A number of commenters stated that the initial screening factors do not provide adequate notice to operators of the specific number or combination of citations and orders which would cause an operator to be identified through initial screening as having a potential pattern of violations. Commenters suggested a variety of specific statistical screening mechanisms, including comparison of a mine's rate of violations with an industry-wide average. Although the Agency has considered such a scheme, MSHA believes that the initial screening criteria will allow identification of those mines which are in a recurrent cycle of violation and abatement with no correction of the underlying circumstances giving rise to the violations. Additionally, the final rule is consistent with the legislative history of section 104(e), which stresses that a pattern of violations does not necessarily mean a specific number of violations of any particular standard.

*Id.* at 31,131.

Although the preamble made clear that the POV screening criteria were not to be based on "strictly quantitative comparisons of mines to industry-wide norms," it appears that MSHA did precisely that in providing that any mine within 125% of the industry average for S&S violations will be excluded from further consideration as a mine on POV status. Thus, despite its notice-and-comment rulemaking, MSHA has adopted a strictly quantitative *sine qua non*, contrary to the language of the regulations.

### III.

With respect to Aracoma's POV status, the settlement agreement in this case focuses entirely on whether Aracoma's S&S issuance rate exceeds 125% of the national average. I question the validity of the settlement agreement for that reason, and thus would find that the judge erred in approving the settlement agreement.

The Commission has emphasized that a judge's approval or rejection of a settlement agreement must "be based on principled reasons." *Madison Branch Mgmt.*, 17 FMSHRC 859, 864 (June 1995) (quoting *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (Nov. 1981)). Here, the judge merely recited the terms of the section of the settlement agreement pertaining to the POV provisions. However, the Screening Criteria, with the 125% issuance rate threshold for POV consideration, are in contradiction of 30 C.F.R. § 104.2, which provides for consideration of a variety of factors, and, as explained in the preamble, are not to be based on "strictly

quantitative comparisons of mines to industry-wide norms.” Clearly, a threshold of a 125% S&S issuance rate is a quantitative comparison to an industry-wide norm. Mindful that a judge’s abuse of discretion in approving a settlement is “not immune from reversal,” *Madison Branch*, 17 FMSHRC at 864, I conclude that the judge abused his discretion in approving the pattern of violations aspect of this settlement agreement.

In voting to review the judge’s decision, I also sought to determine whether, in the settlement agreement, the Secretary was enforcing the POV provision of the Mine Act more leniently against Aracoma, as compared with other operators.<sup>4</sup> According to the Settlement, the

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<sup>4</sup> If this were the case, it could be the result of Aracoma’s litigation strategy, which involved contesting every single penalty MSHA assessed for each of the 1,281 citations and orders issued over a period of two years and three months, beginning with the date of the Alma No. 1 fire. In this group of 1,281 citations and orders were 298 assessments for the previous minimum of \$60.00 and 162 assessments for the later minimum of \$100.00. I question whether there is a basis to contest 1,281 consecutive penalties, including 460 minimum penalties, other than an intent to obstruct the enforcement system. Such has been the practice in other industries, such as tobacco. For example, R.J. Reynolds Tobacco Company was able to win dismissal of a case by burying its opponent in paper. In a confidential memo, an attorney for R.J. Reynolds boasted about the strategy: “The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive to plaintiffs’ lawyers, particularly sole [practitioners]. . . . To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds’ money, but by making that other son of a bitch spend all his.” See Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U.L. Rev. 723, 755 (1994). It would be outrageous if an operator was able to ignore mine safety, and then achieve a more favorable settlement of the resulting violations by clogging the appellate system with frivolous penalty contests. From a purely economic standpoint, this would give such an operator a competitive advantage over mine operators which were spending the necessary money to keep their mines safe. More law-abiding operators would have an incentive to change their practices for the worse, calculating that they could similarly stonewall penalties for better than two years, settle everything for 61 cents on the dollar, and walk away with no sanction other than a requirement to bring their S&S rates down to 125% of the national average.

This poses an especially difficult problem in an industry where there have historically been some operators willing to subordinate safety responsibilities to production imperatives. See, e.g., *Consolidation Coal Co.*, 23 FMSHRC 588, 597 (June 2001) (operator subordinated cleanup responsibilities to its desire to complete construction); *Consolidation Coal Co.*, 22 FMSHRC 328, 332 (Mar. 2000) (operator failed to rectify a violative condition so as not to interfere with production); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997) (in order to continue production, operator made a conscious decision to evade a device designed to act as an important preventive safeguard). The January 19, 2006 fire at Aracoma’s Alma No. 1 Mine is consistent with the Supreme Court’s characterization of the mining industry as “industrial

Alma Mine # 1 had a rate of 15.6 S&S citations and orders per 100 on-site inspection hours during the baseline 24 month period ending on the last day of June 2008. Settlement at 5. The Settlement further indicates that the National Average for All Underground Bituminous Mines was 7.1 S&S citations and orders per 100 on-site inspection hours, so that 125% of the national rate was 8.9 S&S citations and orders per 100 on-site inspection hours. *Id.* at 6. Presumably, with an S&S issuance rate which was 220% of the national average, the Alma No.1 Mine was a prime candidate for POV status, at least after the requisite violations had become final.

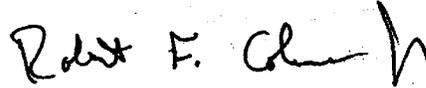
If MSHA had issued a notice of potential pattern of violations for the Alma No. 1 Mine pursuant to 30 C.F.R. § 104.4(a), Aracoma would have had an opportunity to “[i]nstitute a program to avoid repeated significant and substantial violations at the mine” pursuant to 30 C.F.R. § 104.4(a)(4). The record does not indicate what requirements MSHA typically imposes on other operators in their section 104.4(a)(4) programs.

Specifically, assuming hypothetically that an operator has received a section 104.4(a) warning letter because its section 104.3 analysis revealed a history of repeated S&S violations of standards relating to respirable dust hazards, would MSHA require this operator to specifically address respirable dust in its section 104.4(a)(4) program, or would MSHA be satisfied if the operator simply reduced its overall rate of S&S violations to 125% of the national average or less? If it is the latter, then Aracoma is not being treated differently. However, if MSHA normally requires an operator to address specifically the problems which have been identified in the section 104.3 analysis (e.g., respirable dust), then Aracoma is being treated differently from other operators. One could pose similar hypothetical questions based on any of the pattern criteria contained in 30 C.F.R. § 104.3 (i.e., repeated S&S violations of a particular standard, repeated S&S violations relating to the same hazard, or repeated S&S violations caused by unwarrantable failure to comply). The question is whether a section 104.4(a)(4) remediation program requires an operator to focus on the particular issue which brought about the written warning of a potential pattern of violations under section 104.4(a), or whether MSHA is satisfied that an operator brings its S&S issuance rate down to 125% of the national average. There is no information in the record to clarify this point.

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activity with a notorious history of serious accidents and unhealthful working conditions.”  
*Donovan v. Dewey*, 452 U.S. 594, 603 (1981).

Based on the record before us, I would hold that the Chief Administrative Law Judge abused his discretion in approving a settlement agreement which, with respect to the pattern of violations provisions, is based on a principle – that an operator cannot be found to have committed a pattern of violations pursuant to section 104(e) of the Mine Act unless its S&S issuance rate is at least 125% of the national average for similar mines – which is contrary to the regulations, 30 C.F.R. § 104.2. Therefore, I respectfully dissent.



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Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 17, 2010

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

Docket No. WEVA 2009-688  
A.C. No. 46-08693-164121

v.

HIGHLAND MINING COMPANY

Docket No. WEVA 2009-1037  
A.C. No. 46-06558-169988

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Duffy, Young, Cohen, and Nakamura, Commissioners

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 21 and March 25, 2009, the Commission received from Highland Mining Company ("Highland") motions made by counsel to reopen, respectively, Proposed Assessment Nos. 000164121 and 000169888, each of which 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. 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).

In the case of Proposed Assessment No. 000164121, Highland originally explained that it was signed for by the company receptionist but was subsequently lost within the operator's internal mail system and never delivered to that mine's safety director for processing. With respect to Proposed Assessment No. 000169988, Highland stated that the proposed penalty assessment was misplaced on the desk of the safety director for that mine, and that, as a result, Highland inadvertently failed to transmit the proposed penalty assessment to counsel for the filing of a contest. In both instances Highland moved to reopen soon after receiving a notice from the Department of Labor's Mine Safety and Health Administration ("MSHA") stating that payment on the proposed assessment was delinquent. The Secretary did not oppose either of the requests to reopen.<sup>1</sup>

In *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009), a consolidated order that also addressed other Highland motions to reopen, a majority of the Commission denied Highland's requests to reopen Proposed Assessment Nos. 000164121 and 000169988 without prejudice. The Commission stated that should Highland renew its request to reopen, it would need to "fully explain the circumstances" of its failure to timely contest the assessments at issue, and what steps it has taken to ensure both that it does not misplace assessments in the future and that it responds to them in a more timely manner. *Id.*

Highland has now filed renewed motions to reopen the two assessments. With regard to Proposed Assessment No. 000164121, it again states that the proposed assessment was lost in transit between a secretary for Highland and its safety director for the mine. Highland notes that no other persons have knowledge of what happened. In the case of Proposed Assessment No. 000169988, the safety director for that mine received the assessment and marked which penalties Highland intended to contest, but failed to forward it to the operator's counsel to submit

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<sup>1</sup> We consider the Secretary's position in light of the provisions of the Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. That agreement was in effect when the Secretary filed her responses. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary was not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion was filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse. The Commission has been informed that, since the time the Secretary filed her responses, she has rescinded the agreement.

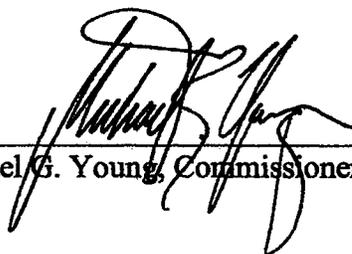
to MSHA. The safety director's affidavit explains in detail what other duties and obligations prevented him from acting on the assessment.

Highland also states that, starting in June 2009, before the issuance of the Commission's order, it began to coordinate its response to proposed assessments with its parent company, Massey, so as to better keep track of assessments. Since then, the process has been further centralized, with MSHA mailing all assessment forms issued to Massey subsidiaries directly to Massey, which then consults with the subsidiary in responding to the assessment.

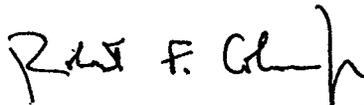
Having reviewed Highland's renewed requests to reopen, in the interests of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



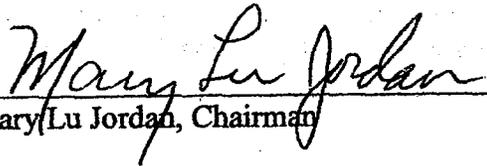
Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Chairman Jordan, dissenting:

In my dissent from the prior Commission order in this case, I stated that I would deny the motions at issue with prejudice. I concluded that "indifference, as opposed to inadvertence, would appear to more accurately describe the underlying reason for Highland's pattern of untimely contests." *Highland Mining Co.*, 31 FMSHRC 1313, 1318 (Nov. 2009). Highland's renewed motions to reopen fail to provide a sufficient rationale for revising this determination. Accordingly, I conclude that relief is not warranted and would deny the renewed motions with prejudice.

  
Mary Lu Jordan, Chairman

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**Federal Mine Safety & Health Review Commission**  
**601 New Jersey Avenue, N.W., Suite 9500**  
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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).

Highland's original request stated that the proposed penalty assessment, No. 000167069, was misplaced on the desk of the operator's safety director, and that, as a result, Highland inadvertently failed to transmit the proposed penalty assessment to counsel for the filing of a contest. The operator further stated that, after discovering the mistake, it immediately transmitted the matter to counsel, who submitted the contest to the Department of Labor's Mine Safety and Health Administration ("MSHA") that same day. After MSHA rejected the submission as untimely, the operator filed its motion to reopen. The Secretary stated that she did not oppose the reopening of the proposed penalty assessment.<sup>1</sup>

In *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009), a consolidated order that also addressed other Highland motions to reopen, a majority of the Commission denied Highland's request to reopen Proposed Assessment No. 000167069 without prejudice. The Commission stated that should Highland renew its request to reopen, it would need to "fully explain the circumstances" of its failure to timely contest the assessments at issue, and what steps it has taken to ensure both that it does not misplace assessments in the future and that it responds to them in a timely manner. *Id.*

Highland has filed a renewed motion to reopen Proposed Assessment No. 000167069. Its safety director explains that he received the assessment and marked those penalties Highland intended to contest, but the interruption of other job duties led to the form remaining on his desk. The safety director further states that, over time, the form got intermingled with other documents, and consequently was not forwarded in a timely manner to operator's counsel, as it otherwise would have been.

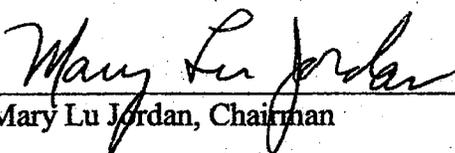
Highland also states that, starting in June 2009, it began to coordinate its response to proposed assessments with its parent company, Massey, so as to better keep track of assessments.

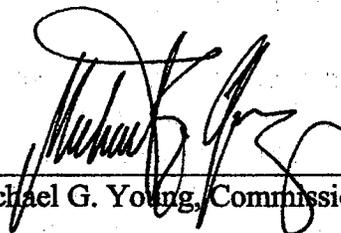
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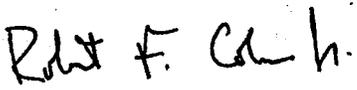
<sup>1</sup> We consider the Secretary's position in light of the provisions of the Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. That agreement was in effect when the Secretary filed her response. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary was not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion was filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse. The Commission has been informed that, since the time the Secretary filed her response, she has rescinded the agreement.

Since then, the process has been further centralized, with MSHA mailing all assessment forms issued to Massey subsidiaries directly to Massey, which then consults with the subsidiary in responding to the assessment.

With regard to Proposed Assessment No. 000167069, we find Highland's explanation for why it did not respond in a timely manner to be insufficient, especially in light of our previous order. The safety director's excuse that other job duties interrupted him from forwarding the assessment on a timely basis cannot be accepted without further details regarding what those duties were, whether those duties were extraordinary, and the amount of time devoted to those duties. Consequently, we again deny Highland's request, this time with prejudice.

  
Mary Lu Jordan, Chairman

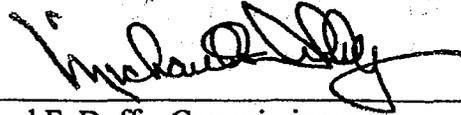
  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

Commissioner Duffy, dissenting:

While the explanation Highland provided in its renewed motion for why it was delinquent in responding to the proposed penalty assessment was not as detailed as it could have been, the renewed motion explains how Highland had begun to improve its assessment response procedures even before we issued our earlier order denying its motion to reopen. Moreover, Highland has not moved to reopen a default in over 20 months. Consequently, I would deem Highland's renewed motion as sufficiently responsive to our earlier order, and grant its request to reopen.<sup>1</sup>



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Michael F. Duffy, Commissioner

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<sup>1</sup> My colleagues' reference to a now-defunct agreement between the Solicitor of Labor and counsel for the operator may not be relevant here. *See supra*, at 2 n.1. While that general agreement not to oppose certain motions to reopen did not allow one to determine whether the Secretary's non-opposition was substantive or not, the Secretary ultimately rescinded that agreement in May of 2009, six months prior to our initial denial of Highland's request to reopen and ten months before this renewed motion was filed. The Secretary did not respond to the renewed motion, so one could just as easily presume that her prior notice of non-opposition was a substantive rather than a pro forma position.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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SUITE 9500  
WASHINGTON, DC 20001

December 22, 2010

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

v.

WOLF RUN MINING COMPANY

: Docket Nos. WEVA 2006-853  
: A.C. No. 46-08791-090341-01

: Docket No. WEVA 2006-854  
: A.C. No. 46-08791-090341-02

: Docket No. WEVA 2007-666  
: A.C. No. 46-08791-121866

BEFORE: Jordan, Chairman; Duffy, Young, and Nakamura, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

These consolidated civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”), involve five citations issued to Wolf Run Mining Company (“Wolf Run”) for violations of 30 C.F.R. 75.521.<sup>2</sup> Judge

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<sup>1</sup> Commissioner Robert F. Cohen, Jr., is recused in this case.

<sup>2</sup> Section 75.521 states:

[1]Each ungrounded, exposed power conductor and each ungrounded, exposed telephone wire that leads underground shall be equipped with suitable lightning arresters of approved type within 100 feet of the point where the circuit enters the mine.

[2]Lightning arresters shall be connected to a low resistance grounding medium on the surface which shall be separated from neutral grounds by a distance of no less than 25 feet.

30 C.F.R. § 75.521. The regulation as it pertains to power conductors originated as section 305(p) of the Federal Coal Mine Health and Safety Act of 1969 (“Coal Act”), and was carried over as the same section of the Mine Act, 30 U.S.C. § 865(p). The statutory language was promulgated as section 75.521 after the enactment of the Coal Act. 35 Fed. Reg. 17,890, 17,910

Jerold Feldman affirmed three citations that alleged violations of the standard but vacated two others. 31 FMSHRC 640, 666 (June 2009) (ALJ). He also concluded that the Secretary of Labor had established that one of the violations he affirmed was significant and substantial (“S&S”), but that she had failed to establish as S&S the other violation that the Department of Labor’s Mine Safety and Health Administration (“MSHA”) had designated as such.<sup>3</sup> *Id.* The Commission subsequently granted cross-petitions for discretionary review filed by Wolf Run and the Secretary challenging the judge’s determinations.

## I.

### **Factual and Procedural Background**

In early January 2006, 12 miners died and one was seriously injured as a result of an explosion caused by lightning at Wolf Run’s Sago Mine, an underground coal mine in Upshur County, West Virginia. 31 FMSHRC at 641, Jt. Ex. 2, at 2 (stipulations). MSHA’s inspection of the mine as part of its subsequent accident investigation resulted in the agency issuing a total of 149 citations and orders to Wolf Run, including the five citations now before the Commission, though none were alleged to have contributed to the explosion. *See* Jt. Ex. 2, at 3, 5, 6, 7, 8, 9.<sup>4</sup>

MSHA’s investigation included a complete inspection of all electrical equipment at the mine, which resulted in the issuance of many citations and orders to the operator. 31 FMSHRC at 641-42; Jt. Ex. 2, at 3. In these three dockets, Wolf Run contested 36 of the electrical citations and orders and their associated penalties. 31 FMSHRC at 640. The Secretary and Wolf Run settled 31 of the citations and orders, with the operator agreeing to pay \$25,257 of the \$28,339 that MSHA had initially proposed in penalties for those violations. *Id.* The judge approved the settlement as part of his decision. *Id.* at 640, 666-67. The remaining five citations, all alleging a violation of the requirements of section 75.521 regarding the use of lightning arresters, went to hearing.

By way of background, a lightning strike from as much as a mile away can cause a surge of energy on a power conductor. *Id.* at 645. Even when it does not hit the conductors directly,

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(1970). It was revised in 1973 to include ungrounded, exposed telephone wires. *See* 38 Fed. Reg. 4974, 4975 (1973).

<sup>3</sup> 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.”

<sup>4</sup> According to MSHA’s investigation, the lightning ignited methane in an inactive portion of the mine. 31 FMSHRC at 641 & n.1; Jt. Ex. 2, at 3. This destroyed seals separating that area of the mine from its active portion, which permitted toxic levels of carbon monoxide to enter a portion of the active mine. 31 FMSHRC at 641 & n.1.

such a strike can induce thousands of volts and amps of electric current into a power conductor. Tr. 238-40. The purpose of a lightning arrester required by section 75.521 is to minimize the amount of such energy entering into the underground portions of the mine. 31 FMSHRC at 643.<sup>5</sup>

Unless a power conductor entering a mine from the outside is protected by a lightning arrester, the excess energy from a lightning strike on the conductor would not be dissipated into the ground, but could instead travel into the mine via the conductor. *Id.* at 645. This could energize the frames of equipment, resulting in a shock or electrocution hazard, and the energy could cause an arcing that would pose a fire hazard and an ignition source for methane. *Id.*

Four of the five citations at issue here involve the same type of allegation: a lightning arrester was required but not provided for a power conductor or communications wire that was located in whole or part aboveground on the surface at the Sago Mine, and either ran to, or originated in, an underground portion of the mine.<sup>6</sup> In Citation No. 7582485, MSHA charged that the lack of arresters on a 120-volt cable running from the fan house on the surface, through the track entry, to a water pump underground, constituted a non-S&S violation of the standard. Gov't Ex. 1, 11, 12, 14, 16. Citation Nos. 7583316 and 7583317, which were both designated S&S, each involved the lack of arresters on two 575-volt cables, both of which originated at a power center underground and powered separate battery cable chargers located on the surface. Gov't Ex. 2, 3, 13, 20, 21. Citation No. 7335233, also designated S&S, charged Wolf Run with violating the arrester requirement with respect to telephone paging and trolley phone system wires that ran from the Dispatcher's Office and entered the mine through the track entry. Gov't Ex. 5.

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<sup>5</sup> The parties stipulated as follows regarding lightning arresters:

A lightning arrester is a device that limits the overvoltage of lightning or other electrical surges by providing an electrical path between an ungrounded conductor and earth which is used as the grounding medium. A simple lightning arrester consists of two contacts that are separated by an air gap. One contact is connected to the transmission line and the other is connected to earth. The normal voltage of the circuit cannot bridge the gap. When an overvoltage occurs it sparks the gap between the contacts. This creates an electrical path for the excess energy to discharge to earth.

Jt. Ex. 1, at 3.

<sup>6</sup> Apparently it is rare for a mine to have equipment on the surface directly powered from an underground source, or underground equipment directly powered from a source on the surface. 31 FMSHRC at 659 n.4. Both types of situations occurred at the mine.

The fifth citation in this case, referred to herein as the “grounding medium citation,” involves the second sentence of section 75.521, which states that “[l]ightning arresters shall be connected to a low resistance grounding medium on the surface which shall be separated from neutral grounds by a distance of no less than 25 feet.” When an arrester directs overvoltage from lightning into the ground on the surface of the mine, an electrical field is created there, and serves as the grounding medium for that arrester. That area cannot be too close to the separate area serving as the neutral ground for a mine’s underground electrical equipment,<sup>7</sup> otherwise electrical current from a lightning strike could travel along the neutral grounding medium to the underground equipment. To reduce the likelihood of such an event occurring, the second sentence of section 75.521 requires that the grounding medium for a lightning arrester must be at least 25 feet away from the neutral grounding medium for the underground equipment. Tr. 344, 398-400; Gov’t Ex. 8 (MSHA Program Policy Manual (“PPM”) excerpt for section 75.521 stating that “[t]his distance prevents lightning surges from being transmitted to the neutral field where they could momentarily energize the frames of equipment grounded to the neutral ground field”).

The 25-foot distance was originally maintained at the Sago Mine, as there was a neutral resistance ground field located more than 25 feet away from the electrical substation at the mine. Tr. 333-35, 380; Jt. Ex. 1, at 2; Gov’t Ex. 9. A ground wire ran to the field from the underground portion of the mine, first in a high-voltage shielded cable running from the power center to a pole outside the track portal and then as an overhead bare ground wire via another pole. Tr. 333-34, 339-40, 383-88.

The surface area around the substation was considered to be part of the grounding medium for the arresters in question in this instance because the arresters were connected to the substation. Tr. 325-26, 335, 340-46, 380-82, 397-98. Specifically, running from the substation, along a series of power poles, were three high voltage power lines and a “static wire” above the lines, which was there to provide “umbrella” type protection from lightning for those lines. Tr. 333-37, 348-49, 357, 364, 367-68, 374, 517-19; Gov’t Ex. 9, 11, 23. Attached to one of the poles were a phone line ground wire, three transformers, and multiple lightning arresters for the power lines. Tr. 326-27, 347, 350, 355-56; Gov’t Ex. 9, 23. The arresters and the static line had a common grounding to earth via a copper wire running down that pole, known as a “butt ground,” designed to transfer the energy from any lightning strike down to the earth. Tr. 327, 331, 337-38, 347-48, 356, 358-59, 378-79, 535-36; Gov’t Ex. 9, 23.

Intermingled with the high voltage lines was a cable that included a ground wire, and that cable powered the stacker belts, which were entirely above ground. Tr. 335-37, 359-60, 520-23; Gov’t Ex. 9, 23. That ground wire was also attached to the butt ground. Tr. 335-37, 359-60, 369-73. The Secretary alleges in Citation No. 7583340 that the ground wire in the cable did not extend all the way to the stacker belts, but rather terminated early by connecting to the metal

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<sup>7</sup> The area designated to serve as the neutral ground for the underground equipment is a low resistance ground bed, which would serve to dissipate electricity from the frames of that equipment in the event of an electrical fault in the system. Tr. 383-84.

frame of the conveyor belt structure, thus resulting in the neutral ground becoming common with the lightning arrester ground, because that belt ran underground. Tr. 360, 366-67, 369-70, 375-77, 379-80, 398-99, 523-24, 540-43; Gov't Ex. 4, 9.

After the hearing, the judge found that for the four citations alleging the lack of one or more required lightning arresters, the Secretary's interpretation of the term "exposed" was reasonable and thus deserved deference. 31 FMSHRC at 656. He further concluded, however, that it was impossible to install a lightning arrester on a cable that is connected underground because it would defeat the 25-foot separation requirement required by the second sentence of the standard. *Id.* at 657. Consequently, he held that power conductors containing such cables are not subject to the provisions of section 75.521 because they are not "ungrounded," while "power cables, telephone wires and trolley wires that are not grounded are subject to section 75.521." *Id.* at 659.

Turning to the individual citations, the judge started by addressing the grounding medium citation, holding that it

was issued because the lightning arrester ground for the overhead high voltage lines was connected to a ground wire for the power cable supplying the surface belts which in turn was connected to the conveyor belt frame on the surface. The problem arose because the underground portion of the conveyor frame was the medium used to connect the underground equipment to the neutral grounds. This condition clearly constitutes a violation of the 25 feet separation required in section 75.521. Citation No. 7583340 exemplifies why section 75.521 does not apply to power conductors in cables that are connected through the neutral ground medium.

*Id.* at 660. The judge also upheld the designation of the violation as S&S and the Secretary's proposed penalty of \$963. *Id.* at 661-62.

As for the two citations alleging violations of the arrester requirement with respect to the battery charger cables (Citation Nos. 7583316 and 7583317), the judge vacated the citations. *Id.* at 649, 662. The judge found that the power center was grounded through the metal frame of the belt conveyor to the neutral ground field on the surface, and that, consequently, lightning arresters could not be used on the power conductors contained in the cables under the second sentence of section 75.521. *Id.* at 662. Accordingly he vacated the two citations, and thus did not reach the issue of whether the violations were S&S. *Id.*

With regard to the water pump cable (Citation No. 7582485), the judge found that the cable was not connected to the conveyor frame or otherwise connected to neutral grounds, and could not be considered grounded as its ground wire was conducting electricity. *Id.* at 663. The

judge consequently found that the cable was subject to the lightning arrester provisions of section 75.521, upheld the citation, and assessed the \$60 penalty requested by the Secretary. *Id.*

Finishing with the citation alleging the lack of lightning arresters on the communication wires (Citation No. 7335233), the judge held the grounding of one of the trolley wires at issue to the track at the track entry constituted adequate grounding for purposes of section 75.521, as the Secretary had conceded. *Id.* at 664. He also held that the grounding of the second trolley wire, at the far end of the track, after it ran along the roof, complied with section 75.521 as well. *Id.* Nevertheless, the judge concluded that there was a violation of section 75.521 because neither of the two conductors in the cited telephone wires was grounded. *Id.* He refused to uphold the designation of the violation as S&S, however, because of his finding that any electrical surge from lightning would destroy the 12-volt telephone wires before the wires entered the mine portal. *Id.* Consequently, the judge did not assess the penalty at \$440 as requested by the Secretary, but rather at \$60. *Id.* at 663, 665.

## II.

### Disposition

Both parties filed petitions for discretionary review which the Commission granted. The Secretary seeks review of the following: (1) whether the judge erred in finding that section 75.521 did not apply to the cables supplying the battery chargers because of the ground wires within the cables and that to require the operator to ground the other conductors contained within the cable would result in a violation of the second sentence of the standard; and (2) whether the judge erred when he found that the violation of the standard posed by the telephone wires was not S&S.<sup>8</sup> Wolf Run's PDR challenges: (1) the judge's decision to the extent that it upheld the citations charging that the power conductors were subject to section 75.521 because they were "exposed" under the standard; (2) the judge's determination that the grounding medium violation had been established; and (3) the judge's conclusion that the grounding medium violation was an S&S violation.

#### A. The Grounding Medium Citation (No. 7583340)

We begin with the grounding medium violation, even though it involves the second sentence of section 75.521, because the judge employed his understanding of the basis for this citation in determining that two of the four other alleged violations, involving the lightning arrester requirement in the first sentence of the standard, could not be established.

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<sup>8</sup> While the Secretary's petition for review included the question of whether the judge erred in concluding that the grounding of the trolley wire at the far end of the track constituted effective grounding for purposes of section 75.521 (S. PDR at 18-19), in her brief she withdrew her request for review of that issue. S. Br. at 4.

## 1. Violation

Wolf Run argues that a violation of the second sentence of section 75.521 was not established and thus that the judge's finding should be reversed. WR Br. at 35-38. According to Wolf Run, the Secretary's witness acknowledged that the violation hinged on whether the ground wire among the power cables was attached to the belt structure, and the evidence does not establish that it was. *Id.* at 35-36. Wolf Run submits that the judge failed to resolve this key factual dispute and to address its arguments that, even if there was a solid connection between the ground wire and the belt frame, there was not necessarily a violation of section 75.521 in this instance. *Id.* at 36-38.

The Secretary agrees with Wolf Run that the judge erred by not resolving the factual dispute of whether the ground wire was connected to the structure, and thus urges the Commission to vacate and remand the finding of violation. S. Br. at 28-29. The Secretary further agrees that the judge failed to address Wolf Run's additional arguments, previously set forth in the operator's PDR, and states that on remand the judge should be instructed to do so. *Id.* at 29.

We agree with Wolf Run and the Secretary that the judge committed a fundamental error in concluding that there was a violation in this instance. Arthur Wooten, the MSHA inspector who issued the grounding medium citation, was the Secretary's primary witness at the hearing. Tr. 158-60, 325. He stated early in his testimony regarding the citation that, if the ground wire in the power cable had not been attached to the frame of the conveyor belt that led underground, no citation would have been issued. Tr. 341. He explained that the grounding field for the three arresters would have been the butt ground and the substation from which the cable originated, and thus the 25-foot distance requirement of section 75.521 would have been maintained. Tr. 380-81, 560-61, 570-71.

Throughout his testimony, Wooten referred to the ground wire in the power cable as having been attached not only to the butt ground wire (Tr. 335-37, 359-60, 369-73), but also to the conveyor belt structure, thus defeating the separation requirement. Tr. 360, 366-67, 369-70, 375-77, 379-80, 398-99, 523-25; Gov't Ex. 9, 23. However, Wolf Run's safety manager, John Semple, denied that the wire was attached to, and terminated at, the conveyor belt structure. Tr. 727. He instead described the wire as bypassing the conveyor belt and ultimately being attached to a control box for the surface stacker belts. Tr. 726-29, 761-65. Another member of the MSHA electrical inspection team, James Honaker, was called as a rebuttal witness to Semple. Tr. 828-31. Honaker confirmed Wooten's account and disputed part of Semple's, testifying that he had observed a solid connection between the ground wire at issue and the conveyor belt structure. Tr. 831-32.

The judge essentially accepted as true the citation as written (*see* 31 FMSHRC at 660), but at the hearing Wolf Run had clearly challenged the factual predicate of the citation. *See also* WR Post-Hearing Br. at 13 (one issue in matter was "[w]hether the ground wire for the cable conveying power to the surface conveyor equipment was attached to the underground conveyor

structure”).<sup>9</sup> Without resolution of the dispute over whether the ground wire was attached to the conveyor belt structure, it is impossible to determine whether the Secretary has established the condition that she alleges violated section 75.521 in this instance, and thus whether substantial evidence supports the judge’s decision to affirm the grounding medium citation.<sup>10</sup> Resolving the dispute over whether the ground wire was so attached is primarily a matter of deciding which witness or witnesses to credit, and is thus within the province of the judge in the first instance.<sup>11</sup> Consequently, we vacate the judge’s affirmance of the grounding medium citation and remand it for a resolution of whether the ground wire was attached to the belt structure. *See Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (remand appropriate when judge has failed to analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision).

Should he find that the ground wire was so attached, the judge on remand must then also address Wolf Run’s remaining arguments as to whether the Secretary had established a violation of the second sentence of section 75.521. Wolf Run made these arguments in the brief that it submitted after the hearing (at 38-40), but the judge did not address them. It preserved these

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<sup>9</sup> Citation No. 7583340 states:

The lightning arresters grounding medium was not separated from the neutral grounds by a distance of 25 feet. The arresters were wired in a manner that would not prevent the frames of the equipment being used underground which are connected to the neutral grounding field from becoming energized in the event of a strike on the surface. *The arrester ground was connected to the frames of the surface belt structure which are entering the mine and are connected to the mine track and all underground electrical equipment.*

Gov’t Ex. 4 (emphasis added).

<sup>10</sup> 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)).

<sup>11</sup> Because the judge “has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

issues in its PDR (at 19-21) and its opening brief here (at 36-38). Consequently, the judge is required to address the arguments on remand. *See Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1941 (Nov. 1982) (instructing the judge on remand to address arguments he had, in error, failed to address originally).

## 2. S&S

Vacating the judge's decision affirming the citation means that the judge's finding upholding the violation as S&S is also vacated.<sup>12</sup> In addition to that ground for vacating and remanding the S&S finding, the parties again agree that there are other grounds on which to do so.

Wolf Run argues that the conclusion that a violation is S&S requires a finding that there was a reasonable likelihood that the hazard posed by a violation would result in an injury, and that therefore the judge applied the wrong legal standard for S&S when he stated that an electrical surge "could" result in a fire or explosion. WR Br. at 39-40 (quoting 31 FMSHRC at 661). The operator also takes issue with the judge's conclusion that the electricity from a lightning strike would have necessarily been conveyed underground, or even if it was, whether it would have been of sufficient voltage to be hazardous. *Id.* at 40-42.

The Secretary agrees that the judge misstated the legal standard for S&S in this instance, and that he should have determined whether the evidence was sufficient to establish that there was a reasonable likelihood that a lightning strike would result in an event causing injury. S. Br. at 30-31. The Secretary would have the Commission remand the case to the judge to apply the proper standard. *Id.* at 31. According to the Secretary, there is substantial record evidence to support an S&S finding under existing law. *Id.* at 31 n.18.

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

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

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<sup>12</sup> In affirming that the violation was S&S, the judge found that, while lightning is unpredictable and random, it was dangerous to expose miners underground to the significant electrical surge that could result from a lightning strike on the high voltage lines. 31 FMSHRC at 661. The judge further found that this created both an electrocution hazard with respect to those miners in the vicinity of the underground equipment and an ignition source that could result in a fire or explosion. He concluded that the Sago tragedy demonstrated the serious hazard posed to miners by lightning. *Id.* at 661-62.

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

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

Should the judge conclude on remand that a violation of section 75.521 was established, he will need to apply the *Mathies* factors to determine whether the violation was properly designated S&S. We note that in past cases we have not agreed that it is sufficient that a violation “could” result in an injury. See *Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995). Accordingly, on remand the judge should be more precise when discussing the potential for various injuries in the context of the *Mathies* analysis.

Moreover, the judge’s decision does not reflect that he fully considered the evidence proffered by the parties and mentioned in their briefs regarding the likelihood of dangerous levels of electricity surging underground in the event of a lightning strike. See 31 FMSHRC at 661-62. His decision on remand should reflect that he considered the specific evidence that the parties submitted on that key issue.

**B. The Arrester Requirement Citations (Nos. 7583316, 7583317, 7582485, 7335233)**

Only those power conductors that run in part underground and are both “exposed” and “ungrounded” on the surface are subject to the lightning arrester requirement contained in the first sentence of section 75.521. Therefore, to establish a violation, the Secretary had to prove that at least one conductor contained in the cable or wire at issue in a citation was both “exposed” and “ungrounded” as those terms are used in the standard. The judge held that the conductors were uniformly “exposed” for purposes of the regulation, but that only some of the conductors could be considered “ungrounded,” and thus only those were subject to the arrester requirement. 31 FMSHRC at 655-59.

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 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary’s reasonable interpretation of the 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 & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)).

The Secretary’s interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation[] and . . . serves a permissible regulatory function.” *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission’s review, like the courts’ review, involves an examination of whether the Secretary’s interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Sec’y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); see also *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary’s interpretation was reasonable).

### 1. Whether the Power Conductors Were “Exposed”

Below, the parties stipulated that, for each of the power cables cited, certain wires within the cables were the “power conductors” at issue, and that none of those wires were bare, as all were insulated and were contained within an outer protective jacket covering the cable. *Jt. Ex. 2*, at 5, 6-7, 7-8. The telephone wire and the trolley phone wires were also covered by insulation. *Id.* at 9. Wolf Run contended that this established that the conductors could not be considered “exposed” and thus the operator could not be found in violation of section 75.521 with regard to any of the four citations. *WR Post Hearing Br.* at 16-19.

The Secretary disputed that the presence of the insulation and outer jacket established that the conductors were not “exposed” under section 75.521. Inspector Wooten testified that the insulation simply serves to keep the electrical current confined within, thus protecting anyone who may come in contact with the live copper leads inside the wires from the hazard of electrical shock. *Tr.* 218-220. He further explained that the outer jacket was merely designed to provide mechanical protection for the inner leads and to prevent them from being damaged. *Tr.* 218. According to the Secretary’s witnesses, neither the insulation nor the outer jacket protected the conductors from the atmospheric effects of lightning, and thus MSHA considered the conductors “exposed” under section 75.521. *Tr.* 218, 222-23, 276, 632.

At the hearing, the Secretary’s witnesses also explained that, well prior to 2006, the PPM for section 75.521 provided a comprehensive illustration of the various ways in which a conductor could be protected from the effects of lightning, and thus not be considered “exposed” under the standard. *Tr.* 244-59. The PPM states that with regard to the first sentence of section 75.521:

Conductors that are (1) provided with metallic shields; (2) jacketed by a ground metal covering or enclosure; (3) installed under grounded metal framework; (4) buried in the earth; or (5) made of triplex or quadraplex that is supported by a grounded

messenger wire, are not considered exposed for the length so protected.

Gov't Ex. 8 (emphasis added). The parties stipulated that none of the conductors at issue in the four citations had the shielding referred to in the PPM (Jt. Ex. 2, at 5, 7, 8, 9), and it was established at the hearing that none of the cables or wires at issue met any of the four other qualifications. Tr. 258-59 (water pump cable), 289-91 (battery charger cables).

As it did below, Wolf Run maintains that the ordinary meaning of the term "exposed" is "bare," as in lacking insulation or otherwise uncovered, and that the conductors at issue in each of the four citations here were not bare. WR Br. at 9-19; WR Reply Br. at 8-10.<sup>13</sup> The Secretary responds that "exposed" is an ambiguous term and that her interpretation of it to mean "exposed to the effects of lightning" is a reasonable one, given that it is used in the context of a regulation designed to protect against the dangers of lightning. S. Br. at 20-25; S. Resp. Br. at 11-14.

To establish its asserted "ordinary" meaning of the term "exposed" in relation to conductors, Wolf Run relies upon *Merriam-Webster's Online Dictionary*, <http://www.merriam-webster.com/dictionary/exposed> (as accessed Oct. 13, 2008), which defines the term to mean "not shielded or protected; also: not insulated <an exposed electric wires>." WR Br. at 10; WR Ex. 1. However, a number of other dictionary definitions of "exposed" support the Secretary's interpretation of the term to mean "subject to the atmospheric effects of lightning."<sup>14</sup> Under those definitions, to "expose" a conductor can mean to put it in a position in which it is subject to the effects of lightning.

Where dictionary definitions must be relied upon to establish the meaning of a term, and those definitions show that a term as it is used in a regulation is open to alternative interpretations, the Commission has found the term to be ambiguous. See *Island Creek Coal Co.*, 20 FMSHRC

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<sup>13</sup> This argument is thus offered by Wolf Run as both as a basis on which it is appealing the judge's decision affirming the water pump cable and telephone wire citations, and as an alternative basis on which the Commission can uphold the judge's decision to vacate the battery charger cables citations, which the Secretary is challenging on appeal. As the party defending the judge's decision with respect to the battery charger cable citations, Wolf Run can argue in support of the judge's vacatur of those citations a basis for vacatur that the judge rejected – that the conductors cannot be considered "exposed" under the terms of section 75.521. See *Sec'y on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1552 n.2 (Sept. 1992).

<sup>14</sup> For instance, one definition of "expose" is "to lay open (as to attack, danger, trial, or test): make accessible to something that may prove detrimental: deprive of shelter, protection, or care." See *Webster's Third New Int'l Dictionary Unabridged* 802 (1993). Another dictionary defines "expose" to mean "to lay open to something specified." See *The Random House Dictionary of the English Language Unabridged* 682 (2d ed. 1987).

14, 19 (Jan. 1998). Consequently, while the term “exposed” can be used to describe a wire that is not insulated or otherwise not covered, that is by no means the only meaning of the term.

Moreover, we ascertain the meaning of regulations not in isolation, but rather in the context in which those regulations appear. *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004). As the Secretary points out (S. Br. at 22), MSHA’s Part 75 electrical regulations demonstrate that when the agency refers to uninsulated wires, it uses the term “bare.” See 30 C.F.R. §§ 75.516 (“bare or insulated ground or return wires”), 75.517 (“bare signal wires”). Accordingly, if MSHA had meant to limit the scope of section 75.521 to uninsulated wires, it would have made more sense to use the term “bare” than the term “exposed.”

Further, the terms of section 75.521 must be read in the context of a regulation clearly designed with protection from the effects of lightning in mind. Consequently, interpreting the term “exposed” as referring to those effects makes much more sense than the interpretation offered by Wolf Run. We thus agree with the judge’s reasoning upholding the Secretary’s interpretation of the term:

section 75.521 seeks to mitigate, by means of lightning arresters, the hazard posed by the high[-]powered transmission of electrical energy from a lightning strike from the surface to the underground mine. Thus, the focus of the cited standard is on power cables that are situated on the earth’s surface and “exposed” to lightning. It naturally follows that the term “exposed conductors” refers to the location outside the underground mine, rather than their method of insulation and protection from human contact.

31 FMSHRC at 656.<sup>15</sup>

Finally, and perhaps most importantly, the meaning of “exposed” in section 75.521 is best understood by the equivalent regulation that applies to underground metal and nonmetal mines. Using more precise language, that regulation states:

Each ungrounded conductor or telephone wire that leads underground and is *directly exposed to lightning* shall be equipped with suitable lightning arrester of approved type within 100 feet of the point where the circuit enters the mine. Lightning arresters shall be connected to a low resistance grounding medium on the surface

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<sup>15</sup> We also agree with the judge that this case can be decided without relying on the PPM. *Id.* at 655-56. The purpose of the PPM is to explain to operators the different methods they can employ under the regulation to protect power conductors from “exposure,” and the citations in this instance would have been justified even in the absence of the PPM.

and shall be separated from neutral grounds by a distance of not less than 25 feet.

30 C.F.R. § 57.12069 (emphasis added). There is no logical reason why underground coal mines would be subject to a regulation designed to be less protective with regard to the effects of lightning than the regulation governing other mines, and it would make little sense for MSHA or its predecessor agency to have intended such a result. Consequently, we uphold the Secretary's interpretation of the term "exposed" as eminently reasonable in this instance.

Wolf Run argues that even if we accept the Secretary's interpretation of the term "exposed," there remains the issue of whether the operator had been provided adequate notice of that interpretation. WR Br. at 19-21. 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 *Gen. Elec.*, 53 F.3d at 1333-34; *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982).

The Commission's test for notice under the Mine Act is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors is relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002); see *Island Creek*, 20 FMSHRC at 24-25; *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); see also *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997).

As discussed, the Secretary's interpretation is practically a self-evident one, given the context of the regulation. In addition, the PPM clearly indicates that "exposed" was being used in section 75.521 in the context of protection from the effects of lightning. Finally, as the Secretary points out in her brief, there is record evidence from Wolf Run's own witness that it attached lightning arresters to insulated cables running from the surface to underground locations. S. Br. at 24-25 (citing Tr. 823). We therefore conclude that Wolf Run had adequate notice of the Secretary's interpretation of the term "exposed" as it appears in section 75.521.

## 2. Whether the Power Conductors Were “Ungrounded”

The Secretary argues that, in vacating the two battery charger cable citations, the judge failed to properly understand the concept of grounding as it is used in section 75.521. She submits that the judge confused the concept of the grounding of a “conductor” with the grounding of the cable or wire in which it is contained. S. Br. at 14-15, 16-19; S. Resp. Br. at 2-5, 7-11. The Secretary further contends that the judge also erred in concluding that connecting a lightning arrester to a cable that was connected to a power source underground would necessarily result in a violation of the 25-foot separation requirement set forth later in the standard. S. Br. at 15-16; S. Resp. Br. at 5-7. Wolf Run’s position is that the judge had numerous grounds to reject the Secretary’s arguments that the battery charger cables should be considered ungrounded for purposes of section 75.521. WR Br. at 24-31, WR Reply Br. at 1-8.<sup>16</sup>

The judge found that the cables that originated underground from the underground power source and ran to the surface to the battery chargers were connected to the neutral grounding medium. He further concluded that if Wolf Run had installed lightning arresters on those cables, as MSHA alleges that it should have, the operator would have violated the 25-foot separation requirement with respect to the grounding fields. 31 FMSHRC at 657-59.

Because the judge concluded that it would have thus been impossible for the operator to comply with both sentences of section 75.521 in this instance, he vacated the two battery charger citations, as they were connected to the underground power center. *Id.* at 662.<sup>17</sup> In so doing, the judge misapprehended the record evidence with respect to this issue. Consequently, substantial evidence in the record does not support the judge with respect to this basis for his vacatur of the two battery charger cable citations.

The judge apparently concluded that installing an arrester on any cable that ran to the underground power center would result in the same violation of the second sentence of section 75.521 that is alleged in the grounding medium citation. With regard to the grounding medium citation, however, as discussed *supra*, slip op. at [4-5, 7], the record establishes that the butt ground wire connected the arresters *and* a grounding wire that ran to the belt conveyor (which, if connected to that structure, defeated the 25-foot separation requirement). Tr. 335-37, 359-60, 369-73.

With regard to all the cables or wires at issue in the four arrester requirement citations, the arresters would only have been installed on the ungrounded *conductors* within the cables or wires,

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<sup>16</sup> The judge found that neither the water pump cable nor the telephone wires were grounded, which led him to affirm the citations. 32 FMSHRC at 663, 664. Wolf Run did not appeal those findings.

<sup>17</sup> The judge also noted this issue when discussing the water pump cable citation, but found that the cable was not connected to the neutral ground medium. *Id.* at 663.

as they carried current to the equipment. Tr. 199-201, 206-07, 276-77, 844, 861. The arresters would not have been connected to any ground wires in the cables, because such wires do not normally carry such current. Tr. 201-02, 207, 842, 844, 860-61. The lack of a connection between a ground wire and an arrester thus makes the two situations quite different. Consequently, the judge erred in concluding that it would have been impossible to comply with the first sentence of section 75.521 with respect to the two battery charger cables without violating the second sentence of the standard.<sup>18</sup>

The judge also considered the issue of grounding in the context of whether the cables or telephone wires at issue contained a properly functioning ground wire. In the judge's view, if such a ground wire were present, as was the case with the battery charger cables, the cable would not be considered "ungrounded" under section 75.521. 31 FMSHRC at 658-59. Conversely, the judge held that those power conductors that were within cables that did not include a properly functioning ground wire were "ungrounded," so he affirmed the water pump cable and telephone wire citations. *Id.* at 659.

We agree with the Secretary that the judge erred in focusing on whether the cables at issue contained a ground wire. Section 75.521 plainly states that it is directed at ungrounded "conductors," and not the cables which contain the conductors. Compare 30 C.F.R. §§ 75.516-2, 75.517, 75.517-1, 75.517-2 (nearby regulations regulating the use of "cables"). Moreover, throughout the hearing, the Secretary was clear that the violation occurred in each instance to the extent that one or more wires, contained in the cable or wire that was the subject of the citation, were serving as a "power conductor." Tr. 199-201 (two phase conductors in water pump cable); 212-13 (improperly connected ground wire in water pump cable), 276 (three phase conductors in each battery charger cable), 621-22 (trolley wires), 622-24 (telephone wires). Indeed, the parties' stipulations contain multiple references to one of the issues being whether "conductors" were ungrounded. *Jt. Ex. 2*, at 4, ¶¶ 13, 15. Thus, even if a proper functioning ground wire was present in a cable, the proper inquiry was whether any of the power conductors contained in the cable was itself "ungrounded."

As to the term "ungrounded," we agree with the judge that the term is ambiguous as it applies to "conductors." There is no applicable regulatory definition of the term, and while Subpart H of Part 75 governs grounding (*see* 30 C.F. R. § 75.700 et seq.), it does not address the grounding of "conductors."

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<sup>18</sup> We note that Wolf Run did not argue to the judge that complying with the arrester requirement for cables powered from underground would result in a violation of the second sentence of section 75.521; the judge apparently arrived at that conclusion on his own. *See* S. Br. at 15. On review, Wolf Run argues in defense of the judge's opinion that the proximity within a cable of the ground wire to the conductors supports the judge's conclusion, but cites no record evidence in support of this view. *See* WR Br. at 28-29; WR Reply Br. at 4-5.

The only reason the judge gave for holding that the Secretary unreasonably interpreted “ungrounded” in applying it to conductors in cables containing a properly functioning ground wire is the definition of “grounded power conductor” contained in the *Dictionary of Mining, Minerals, and Related Terms* (2d ed. 1997) (“*DMMRT*”). See 31 FMSHRC at 658. There a “grounded power conductor” is defined as “[a]n insulated or bare cable that constitutes one side of a power circuit and normally is connected to ground. It differs from a ground wire in that a grounded power conductor normally carries the load current while the equipment it serves is in service.” *DMMRT* at 247.

The Secretary objects to the judge’s consideration of this definition because it was not included in the record, and the Secretary did not have an opportunity to address it during the hearing. S. Br. at 16-17. While this is true, we do not hold that the judge necessarily erred in looking to the *DMMRT* definition. The technical usage of a term is quite relevant in determining its meaning,<sup>19</sup> and the *DMMRT* is a recognized authority for such usage.

However, we cannot hold that the *DMMRT* definition in question is dispositive in this instance. The definition essentially treats a “conductor” as the equivalent of a “cable,” but in this case the cables at issue were composed of multiple conductors, some of which connected to ground and thus did not power the equipment, but others of which were not connected to ground and carried current to the equipment. Tr. 200-04; Gov’t Ex. 16. Consequently the judge, in deciding whether the Secretary’s interpretation was reasonable, should have considered more than the *DMMRT* definition.

As with the entire standard, there is no regulatory history that could assist in understanding section 75.521’s use of the term “ungrounded” as it applies to conductors. Consequently, we look to the explanation provided at hearing by the Secretary’s witnesses as to why the conductors themselves would have had to be grounded to not fall within the scope of the regulation, and why it was not sufficient that they were contained in a cable that contained a ground wire.

The Secretary’s witnesses explained that to escape the purview of the arrester requirement of section 75.521, the conductors themselves must be grounded, given the amount of electricity that could surge through them in the event of a lightning strike. The ground wire in a cable is designed merely to protect against a fault, short circuit, or damage to the cable. Because of the considerably greater danger posed by the energy from lightning, in the absence of lightning arresters MSHA would require any exposed conductor to be grounded to direct that energy to the earth, where it will dissipate. Tr. 276-79, 284, 873-74.

As the Secretary notes, Wolf Run’s witnesses did not contradict her witnesses on this issue. S. Br. at 15. Rather, Wolf Run has argued that the Secretary’s evidence establishes that the

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<sup>19</sup> If there is no regulatory definition of a term, the Commission will look to its technical usage. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff’d*, 111 F.3d 963 (table), 1997 WL 159436 (D.C. Cir. 1997).

grounding of a conductor prevents electricity from flowing to the equipment it serves, and that therefore the Secretary's interpretation of the standard is not entitled to deference because it would lead to the absurd result of preventing a power conductor from serving its intended purpose. WR Br. at 25.

Wolf Run correctly characterizes the testimony, as MSHA electrical engineer Honaker testified that a grounded conductor will not provide power to the equipment to which it is connected. Tr. 861, 873. However, this does not establish that the Secretary's interpretation of "ungrounded" is absurd in this instance. Honaker stated that it is rare to have an underground source for surface equipment and vice-versa (Tr. 862), so section 75.521 is rarely applicable. Moreover, he attempted to explain that, at the time the standard originated, it was common at small mines for there to be direct current ("DC") electrical systems which had grounded conductors, but references to the "grounding" of a conductor now make less sense with the predominance of alternating current ("AC") systems throughout mining. Tr. 848-50.

Thus, it is true that time has likely rendered the standard's reference to "ungrounded" with respect to conductors superfluous, as Wolf Run argues. WR Br. at 26; WR Reply Br. at 7. However, the obsolescence of a single term in the standard does not make continued application of the entire standard "absurd." The lightning arrester requirement only applies to ungrounded conductors that are "exposed." Accordingly, while it may be impossible for a conductor to provide power while grounded, and thus an operator cannot ground a conductor to avoid the arrester requirement, an operator has control over the design of its mine's electrical system, and can still avoid the arrester requirement as to that conductor by not having an "exposed" power conductor running between the surface and underground.

In light of the foregoing, we cannot agree with the judge that the Secretary's interpretation of "ungrounded conductor" to include the conductors at issue here is unreasonable and thus not deserving of deference. Accordingly, we vacate the judge's determination that section 75.521 was not violated as alleged in the two battery charger cable citations.

On remand, the judge needs to decide one or more additional issues with respect to the battery charger cable citations which he did not reach because he vacated the citations: (1) whether Wolf Run had adequate notice regarding the Secretary's interpretation of the term "ungrounded" as it applies to a power conductor contained in a cable that has a properly functioning ground wire (*see* S. Post-Hearing Br. at 39-41; WR Post-Hearing Br. at 36-37);<sup>20</sup> and if Wolf Run had such notice, (2) whether it was established that the two violations of section 75.521 were S&S, as alleged in the citations, and (3) the penalties for the citations.

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<sup>20</sup> Because Chairman Jordan believes that a reasonably prudent person familiar with the mining industry and the protective purpose of lightning arresters would have recognized that the presence of a ground wire in a cable does not comply with the requirement in section 75.521 that an exposed power conductor in such a cable must itself be grounded, she does not join in including the issue of notice in the remand.

### 3. The Telephone Wire Non-S&S Finding

The telephone and trolley wires citation was designated by MSHA as S&S as to the violation of section 75.521 posed by the two-conductor telephone wire, and not the trolley wires. The judge, however, concluded that the energy from a lightning strike would be unlikely to enter the mine via the telephone wires, because the wires have a relative low voltage capacity of 12 volts. 31 FMSHRC at 664. Because the surge from a lightning strike can exceed one million volts, the judge reasoned that the telephone wire likely would be destroyed by such a surge before the energy entered the mine. *Id.* Consequently, the judge modified the citation to delete the S&S designation. *Id.* at 664-65.

The Secretary urges the Commission to reinstate the S&S designation and remand the case for a recalculation of the penalty on the ground that the judge confused the figure cited for the normal voltage *carried* by the telephone wire – 12 volts – with the wire’s *capacity* to conduct electricity. S. Br. at 26-27. The Secretary also argues that the judge erred in assuming that electricity from a lightning strike would not be conducted into the mine via the wires before the wires were destroyed. *Id.* at 27.

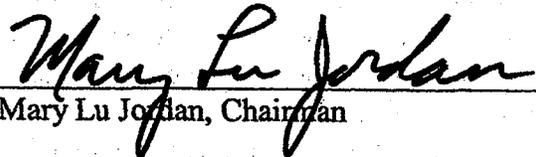
Consistent with the position it takes with respect to whether the battery charger cable citations could properly be found to be S&S (WR Br. at 42), Wolf Run argues that there are too many variables to predict what would happen in the event any of the cables or wires at issue in this case were affected by a lightning strike. WR Br. at 43-45; WR Reply Br. at 11. Wolf Run maintains that in the case of the telephone wires, there is a lack of evidence to support an S&S finding. WR Br. at 45-46; WR Reply Br. at 11.

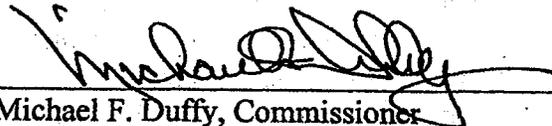
We agree with the Secretary that the judge’s conclusion regarding the capacity of the telephone wire is not supported by substantial evidence, in that MSHA Engineer Kevin Hedrick only testified regarding the voltage *normally carried* by Wolf Run’s telephone wires, and did not discuss the *capacity* of such wires. Tr. 622, 624, 644. We also agree with the Secretary that it was error for the judge to fail even to acknowledge Hedrick’s statement that a surge of electrical energy from lightning could enter a mine via the wire before that energy destroyed the wire. Tr. 654. While Wolf Run makes a number of possibly valid points regarding the quality of the Secretary’s evidence on the S&S issue, this is an issue that is best decided by the judge on remand. Consequently, we vacate and remand the judge’s non-S&S finding for his consideration of the overall record with regard to whether the violation of section 75.521 was S&S in this instance.

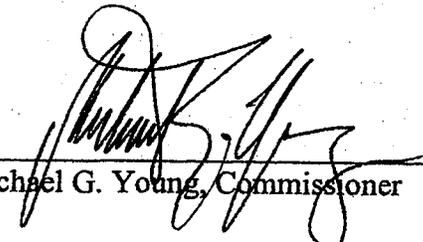
III.

Conclusion

For the foregoing reasons, we (1) vacate and remand the judge's determination that an S&S violation of section 75.521 was established with regard to the grounding medium (Citation No. 7583304); (2) reverse the judge's determinations that violations of section 75.521 were not established with respect to the two battery charger cables (Citation Nos. 7583316 and 7583317), and remand for a determination whether the operator had adequate notice of the term "ungrounded" with respect to those cables, and, if there was such notice, the further determinations of whether the violations were S&S and the appropriate penalties for the violations; (3) affirm in result the judge's determination that a violation of section 75.521 was established with respect to the water pump cable (Citation No. 7582485); and (4) affirm in result the judge's determination that a violation of section 75.521 was established with respect to the telephone wire (Citation No. 7335233), and vacate and remand the judge's finding that the violation was not S&S.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 29, 2010

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

v.

LONG BRANCH ENERGY

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Docket No. WEVA 2010-992  
A.C. No. 46-04955-212816

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On May 6, 2010, and November 15, 2010, the Commission received from Long Branch Energy ("Long Branch") motions 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).

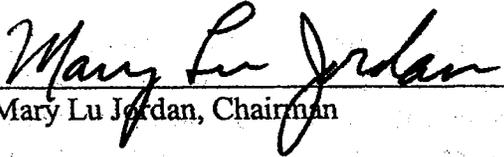
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

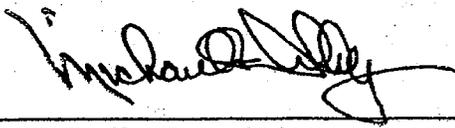
On October 21, 2010, the Commission denied without prejudice Long Branch's request on the basis that the operator had failed to provide a "sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment." *Long Branch Energy*, 32 FMSHRC 1220, 1221 (Oct. 2010). The Commission stated that at a minimum, Long Branch "must provide an explanation of how it normally contests proposed penalties and specific information regarding why that process did not work in this instance," and file any amended or renewed request within 30 days of the date of the order. *Id.* at 1222.

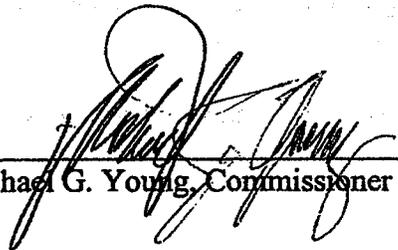
On November 12, 2010, Long Branch filed a second motion to reopen the penalty assessment with an affidavit and documentation that explain the reason for its delay in contesting the assessment in much more detail. Long Branch explains that, after receiving the proposed assessment on March 8, 2010, it gathered information about the citations and placed the proposed assessment form on the desk of its president/general manager during the week of March 31 to April 2, 2010. The operator's president/general manager intended to contest Citation Nos. 8078978, 8078979, and 8078980. However, on April 5, 2010, an explosion occurred at the Upper Big Branch mine, which is close to one of Long Branch's mines. The president/general manager became engaged in answering multiple questions regarding how the explosion would impact Long Branch's mine and, as a result, the president/general manager mistakenly failed to timely contest the citations.

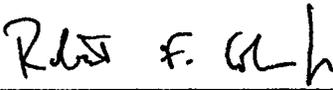
The Secretary has not opposed Long Branch's second request to reopen.

Having reviewed Long Branch's requests and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

  
Mary Lu Jordan, Chairman

  
Michael F. Duffy, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 23, 2010

JUSTIN NAGEL

v.

NEWMONT USA LIMITED

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Docket No. WEST 2010-464-DM

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

On January 5, 2010, Justin Nagel, acting *pro se*, filed a complaint of discrimination against Newmont USA Limited (“Newmont”) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2006). The case had a complex procedural history before the Administrative Law Judge (“the judge”), which culminated on October 27, 2010, when the judge issued an order entitled, “Order Certifying Interlocutory Discovery Ruling to the Commission; Order Granting Respondent’s Motion to Dismiss for Failure to Comply with Discovery Orders and Repeated Lack of Candor with Tribunal; Order Staying Dismissal Pending Commission Ruling on Certified Interlocutory Discovery Order.” We will refer to this combined order as the “October 27 Dismissal Order.” In this Direction for Review and Order, the Commission will consider whether to address two issues which Mr. Nagel has raised before the Commission, and will also address the legal implications of the Judge’s attempt to stay the October 27 Dismissal Order.

I.

Factual and Procedural Background

On September 24, 2010, the judge orally granted Newmont’s oral request that it be allowed to hire private security guards for the scheduled September 28, 2010 deposition of Mr. Nagel, and that all participants in said deposition submit to a reasonable search upon entry. This oral order was confirmed by a written Order Granting Respondent’s Request for Security on October 13, 2010. Mr. Nagel filed a document entitled “Petition for discretionary review” with the Commission on October 26, 2010. In his October 27 Dismissal Order, the judge treated this

submission as a motion to certify this interlocutory ruling<sup>1</sup> under Commission Procedural Rule 76, 29 C.F.R. § 2700.76. He declined to certify the issue for interlocutory review, stating that the order did not materially advance the final disposition of the proceeding and was moot because the deposition had already occurred. Oct. 27 Dismissal Order at 17.

In addition, after a protracted discovery dispute involving recordings Mr. Nagel had made of conversations with representatives of Newmont management, the judge on October 18, 2010 issued an order partially granting Newmont's motion to compel production of the recorded conversations. Although the judge ordered Mr. Nagel to produce copies of the audio tapes of in-person conversations with Newmont management (but not tapes of telephone conversations), Mr. Nagel did not comply with this order. Oct. 27 Dismissal Order at 5-6. On October 19, 2010, Newmont filed a motion to dismiss, arguing that Mr. Nagel had demonstrated a pattern of unwillingness to comply with direct orders from the judge. Oct. 27 Dismissal Order at 6. During a conference call on October 21, 2010, the judge issued an order to show cause why the case should not be dismissed due to Mr. Nagel's failure to comply with the discovery order to produce the tapes. This was followed by a written show cause order issued on October 22. *Id.* at 11. Mr. Nagel responded to the motion to dismiss, stating that he intended to appeal the discovery order to the Commission. *Id.* at 10.

On October 25, 2010, Mr. Nagel filed a Petition for Discretionary Review, asking the Commission to review the judge's order requiring him to turn over copies of the audio recordings. As with the petition relating to the hiring of private security guards, the judge treated this document as a motion for certification of his interlocutory discovery ruling. Unlike the issue of the private security guards, however, the judge ruled that the order to turn over the tapes involved a controlling question of law that would materially advance the final disposition of the proceeding, and certified the question to the Commission for interlocutory review. *Id.* at 16-17.

In his October 27 Dismissal Order, the judge discussed whether dismissal of the case as a

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<sup>1</sup> An interlocutory ruling is an order issued during the pendency of a lawsuit, prior to the final decision in the case. Generally, the Commission is reluctant to review interlocutory rulings because such review is inefficient, and interferes with the flow of the case before the judge. Interlocutory rulings can generally be reviewed after the judge has issued a final decision as part of an overall appeal to the Commission. For this reason, the Commission has enacted separate regulations addressing review from a judge's final decision and review from a judge's ruling prior to his final decision. Thus, Commission Procedural Rule 70, 29 C.F.R. § 2700.70, addresses "Petitions for discretionary review," which is the procedure used to obtain review of a judge's final decision. Where a party seeks review of a judge's interlocutory ruling, it may file a "petition for interlocutory review" under Commission Procedural Rule 76, 29 C.F.R. § 2700.76. However, petitions for interlocutory review are granted only under very narrow circumstances. Piecemeal appeals are usually not favored, as they often result in additional costs to the parties and the judiciary. Certification of an interlocutory order is considered an exception, not a rule. 20 James Wm. Moore et al., *Moore's Federal Practice* ¶ 305.03 (3d ed. 2010).

discovery sanction was appropriate. He held that it was appropriate, due to Mr. Nagel's "repeated failure to comply with discovery Orders and lack of candor with the tribunal, which has interfered substantially with a fair hearing in this matter, unduly burdened the record, and caused additional work, delay, and expense through refusal to comply with discovery Orders and Commission rules." *Id.* at 18. He dismissed the case but stayed the dismissal pending the Commission's ruling on the certified interlocutory discovery ruling. *Id.* at 23.

## II.

### Disposition

Before considering Mr. Nagel's two petitions, we must first consider the legal implications of the judge staying the October 27 Dismissal Order. In *Capitol Aggregates, Inc.*, 2 FMSHRC 1040, 1041 (May 1980), the Commission held that a judge who had issued a stay of his decision lacked the authority to issue the stay. *See also Sec. of Labor on behalf of Pasula v. Consolidation Coal Co.*, 1 FMSHRC 25 (Apr. 1979) (neither the Mine Act nor the Commission's Interim Rules of Procedure provide for a stay of the effective date of a judge's decision once the decision is issued).<sup>2</sup> Thus, if the judge in the present case lacked the authority to issue the stay, the effect is that the October 27 Dismissal Order was a final decision which commenced the running of the 30-day period in which a party may file a petition for discretionary review under section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and Commission Procedural Rule 70(a), 29 C.F.R. § 2700.70(a). Because of the stay, Mr. Nagel is not on notice that his time for filing a petition for discretionary review from the October 27 Dismissal Order is running.

For this reason, the Commission will, on its own motion pursuant to Commission Procedural Rule 71, 29 C.F.R. § 2700.71, review the October 27 Dismissal Order. Our review is limited to the issue of whether the judge had the authority to stay the effect of his decision. We conclude that he did not have this authority. *Capitol Aggregates, Inc.*, *supra* at 1041. Therefore, we must vacate the October 27 Dismissal Order.

We have before us Mr. Nagel's two petitions. Although these are styled as petitions for discretionary review under Rule 70, they are really – as the judge recognized – petitions for interlocutory review under Rule 76. Although the judge certified to the Commission, pursuant to Rule 76(a)(1)(i), the issue involving the partial granting of Newmont's motion to compel production of audio tape recordings, which was appealed by Mr. Nagel in one of his petitions, we conclude that review of these issues is not appropriate at this time. We note that the Commission usually does not grant interlocutory review of discovery orders. *See Asarco, Inc.*, 14 FMSHRC 1323, 1328 (Aug. 1992) ("unless there is a 'manifest abuse of discretion' on the part of a judge, discovery orders are not ordinarily subject to interlocutory appellate review") (citations omitted);

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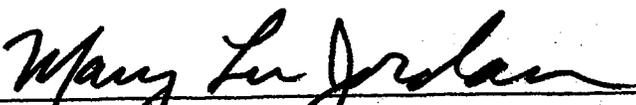
<sup>2</sup> Commission Rule 69(b) states that, except for the correction of clerical errors, "the jurisdiction of the Judge terminates when his decision has been issued." 29 C.F.R. § 2700.69(b).

*In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1004 (June 1992) (“discovery orders are usually not appealable”). Accordingly, we deny both petitions.

III.

Conclusion

Consequently, we vacate the judge’s Dismissal Order of October 27, 2010, and remand the case to him for further proceedings consistent with this decision. Once the judge has issued a final decision, a petition for discretionary review of that decision may be filed within 30 days after issuance of the decision or order, pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and the Commission’s Procedural Rule 70(a), 29 C.F.R. § 2700.70(a). If Mr. Nagel files a petition for discretionary review, he may include the issues set forth in his interlocutory petitions on the security and discovery issues.<sup>3</sup>



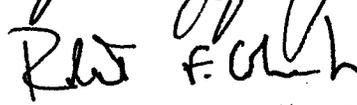
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

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<sup>3</sup> On November 19, 2010, the Commission received from Mr. Nagel another petition for discretionary review, which asked the Commission to review the judge’s denial, on October 20, 2010, of Mr. Nagel’s Motion to Order Respondent to Reduce Verbal Motion to Writing. As with the other two petitions, we find it inappropriate to review this ruling on an interlocutory basis. Therefore, we deny this petition. Mr. Nagel may raise this issue in the context of a petition for discretionary review after the judge has issued a final decision in the overall case.

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**ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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November 3, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2009-712-M
Petitioner,	:	A.C. No. 40-02937-190347
	:	
v.	:	
	:	
U.S. SILICA COMPANY,	:	
Respondent.	:	Mine: Jackson Plant

**DECISION**

Appearances: Matthew Shepherd, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Bob Dailey, Safety Director, U.S. Silica Company, Jackson Tennessee, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against U.S. Silica Company (“U.S. Silica” or “Respondent”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The case involves three citations issued by MSHA under section 104(a) of the Mine Act at the Jackson Plant located in Jackson, Tennessee. The parties presented testimony and documentary evidence at the hearing held on September 9, 2010, in Nashville, Tennessee. A decision was issued on the record at the conclusion of the hearing. Portions of the transcript, with necessary edits and amendments, are included in this decision. The parties stipulated that, at all pertinent times, U.S. Silica was a mine operator subject to the provisions of the Mine Act. Stip. 2-3.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

U.S. Silica is the owner and operator of the Jackson silica plant (the “plant” or “mine”) in Jackson, Tennessee. On June 2, 2009, Kenneth Large, a twenty-five year veteran MSHA inspector, conducted a regular inspection at the mine. Large has worked in the mining industry for 42 years. Prior to working for MSHA, Large worked for a number of mine operators and held numerous positions, including assistant mine superintendent.

The mine operates three shifts, i.e., two production shifts and one maintenance shift. The mine processes sand that is hauled to the processing plant by trucks. During the inspection Large was accompanied at various times by Anna Walters and Dan Simms, both representatives of the Respondent.

Transcript pages 96-97:

In the case of the U.S. Silica Company, Docket No. SE 2009[-]712, I make the following finding[s]: U.S. Silica Company is the owner and operator of the Jackson silica plant located in Jackson, Tennessee. The parties have entered into stipulations that have been accepted into the record, and those stipulations refer to the jurisdiction of the Mine Safety and Health Administration to conduct an inspection at the plant, as well as the jurisdiction of the Review Commission to hear the case and issue a decision. I accept the stipulations and enter those into the record at this time.

The stipulations also refer to a number of the penalty criteria, including the fact that the proposed civil penalties will not affect U.S. Silica's ability to . . . [continue in] business. I find that the Jackson plant is a medium-sized sand operation, but it is owned by a large company. U.S. Silica Company is, indeed, a large operator within the meaning of the Mine Safety and Health Act.

On June 2nd, 2009, Inspector Kenneth Large conducted a regular inspection at the U.S. Silica Jackson plant. He was accompanied, at least during part of his inspection, by a representative from the plant. Inspector Large has many years' experience -- over 40 years' experience in the mining industry and many years' experience with the Mine Safety and Health Administration.

a. *Citation No. 6517158*

As a result of the investigation Large issued Citation No. 6517158 to U.S. Silica alleging a violation of 30 C.F.R. § 56.14112(a)(2), which requires that “[g]uards shall be constructed and maintained to . . . [n]ot create a hazard by their use.” The citation described the violation as follows:

The guard on Conveyer #13 which feeds Mill #1, was loose at the head pulley and sharp edges were exposed. The area is easily accessed and is accessed by the Mill operator at least six times a day for regular equipment checks. The guard had created a hazard to the miners and a cut injury could occur.

Large determined that the violation was reasonably likely to result in an injury, that it was significant and substantial("S&S"), that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$150.00 has been proposed for this violation.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In *Thompson Bros.*, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. Guards are designed to prevent accidents. The fact that no employee has ever been injured by an unguarded or inadequately guarded area is not a defense because there is a history of such injuries at crushing plants throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions . . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

Large explained that the edges protruding from the guard were a hazard since persons are in the area and could, with little effort, brush against the sharp edges and be cut. The mine operator agrees that the guard had sharp edges protruding but denies that it was a hazard. The mine submits that access to the sharp edges was prevented by the belt pulley and shaft guards.

Transcript pages 97-99:

As a result of his investigation on June 2nd, [Large] issued Citation No. 6517158 for a violation of . . . [30 C.F.R. § 56.14112(a)(2)], which requires that guards shall be constructed and maintained to not create a hazard by their use. He issued the citation based upon observation of a guard that had come loose or out of its place and had exposed sharp edges. Inspector Large determined that it was reasonably likely that a violation would result in an injury, that the violation was S and S, one employee would be affected and negligence would be moderate.

I credit Inspector Large's testimony, that he observed that the guard was loose, had jagged edges sticking out. Exhibit 2 is a photograph of the guard with the jagged edges, and Exhibit 3 is a photograph of the guard after the violation was terminated.

The guard was located at the head of the conveyor belt. The conveyor belt was used to carry material into the mill. It was made of expanded metal. Jagged edges were sticking out a couple inches away from the guard.

Someone at -- there is at least one employee working in the area and passes through this area at least six times per day. I believe Inspector Large's testimony was that he was told that someone walked through the area, that is shown in Exhibit 5(a), at least six times a day, every hour and 20 minutes. When Inspector Large entered the area, the violation was obvious to him. Although he did not touch it, he could see that the edges were sharp. I understand that one of -- the operator believes that the edges were burred and were not sharp. But a look at the photograph, Exhibit 2, particularly, makes it clear that those edges would cut someone if they came in contact with [them]. So I credit Inspector Large's testimony in that regard.

Large stated that the hazard was obvious, that it should have been pre-shifted, and that it was most likely there for a number of shifts in order for it to get in that condition. He also testified that the area is open and that it would be easy for someone to come in contact with it.

I will note that the Commission interprets safety standards to take into consideration ordinary human carelessness. And in the case of Thompson Brothers Coal, the Commission held that a guarding standard must be interpreted to consider whether there is a reasonable possibility of contact[] [that would result in] injury, including contact stemming from an inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.

In this particular case, the area is open, and certainly there is a reasonable possibility of contact and injury, including contact from inadvertent stumbling, falling, momentary inattention, or carelessness. If someone were specifically standing in the area talking to someone and moved back out of the way, they would come in contact with the guard. Therefore, I find that the violation is established as alleged by the Secretary, based on -- primarily on the testimony of Inspector Large and the testimony of Mr. McKibbin, who was not present during the inspection, but did agree that the guard was in the condition as cited by the inspector.

i. Significant and Substantial

A S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard

contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. I find, further, that the violation contributed to the hazard of persons walking by, or working in, the area and contacting the jagged metal edges. Third, the hazard contributed to will result in an injury as a result of someone coming in contact with the sharp edge. Finally, given the sharpness, and the fact that any cut or gash would be caused by metal, the injury would certainly be serious.

Transcript pages 100-103:

Next, is the issue of whether or not this particular violation is significant and substantial. The Review Commission has indicated that a significant and substantial violation is a violation of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The violation is properly designated S and S . . . [if] based upon the particular facts . . . [s]urrounding that violation, there exists a reasonable likelihood that the hazard could contribute to or result in an injury or illness of a reasonably serious nature.

In order to establish the violation as significant and substantial, I must first find that there is an underlying violation of the mandatory safety standard, which I do in this case. I have already found that there is a violation.

Next I must find that there is a discrete safety hazard, that is a measure of danger to safety contributed to by the violation. And I find in this case that the -- that there is a discrete safety hazard and measure of danger to safety, and that hazard is those sharp edges of the guard sticking out in an area where someone may come in contact with

them. And if, in fact, someone does come in contact with those edges, an injury is likely to result, and that injury would be of a serious nature.

... Inspector Large testified that the injury would result in lost workdays or restrictive duty. I credit[] his testimony in that regard. The Commission and Courts have observed that an experienced MSHA inspector's opinion that a violation [is] significant and substantial is entitled to substantial weight. [*Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995).] Inspector Large... qualifies, without question, as an experienced MSHA inspector. He described the violation as significant and substantial, and explained that it is likely that someone would come in contact with the sharp edges of the guard, and that as a result, someone would suffer a serious scrape or cut.

In making his determination, he relied upon his experience as a mine inspector, and particularly in a recent accident investigation that he had conducted, wherein a miner had been scraped by the sharp edge inadvertently, accidentally, of expanded metal and as a result suffered a serious injury, including the amputation of his leg.

In his view, it's reasonably likely this violation was reasonably likely to lead to an event that causes a serious injury, and that serious injury could be as serious as the amputation of a leg or an arm.

... [T]he mine operator... [argues] that the violation is not significant and substantial for a number of reasons, including that the guard -- the sharp edges of the guard are not next to the walkway, that the walkway is -- somehow is back and that the guard is set back under... [T]he photograph shows that the walkway is not far away, and certainly it is an open area up to the guard. If it were somehow blocked -- it's not blocked by something else that I can see in the photograph.

... I find that this violation is significant and substantial as Inspector Large indicated. I credit his testimony in that regard. I find -- I also agree with Inspector Large that the negligence for this violation is moderate. The guard was visible. Inspector Large saw it immediately upon entering the area. In his view, it should have been detected and repaired immediately. If it continued to exist, it would again contribute to an accident or an injury. There were

two shifts. People were walking by it on both of those production shifts and most likely on the maintenance shift for the third shift. I find that the facts of this violation clearly lead to a significant and substantial finding.

With regard to the penalty, the parties have stipulated to the history, which I -- this mine has a stellar history, and I give the mine credit for having such a good history and such a good safety record . . . .

The mine -- U.S. Silica is a large mine operator. A penalty will not affect its ability to continue its business. It engaged in a good faith abatement of the violation. The gravity is, as I described above, in the significant and substantial discussion, and the negligence was moderate, as the inspector indicated. The violation was obvious. No one knows how long it existed, but it certainly didn't get in that condition overnight. The condition should have been seen and corrected, or should have been noted at least on a pre-shift. I assess a \$500 penalty for this violation.

b. *Citation Nos. 6517159 and 6517160*

As a result of the investigation Large issued Citation Nos. 6517159 and 6517160 to U.S. Silica alleging violations of 30 C.F.R. § 56.20003(a), which requires that "[a]t all mining operations . . . [w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." Citation No. 6517159 describes the violation as follows:

On top of 7BIN2 there was material build up and in some areas the build up was over the toe board. There were footprints on top of the bin which shows that someone had been in the area. An injury could occur from a slip, trip or fall.

Large determined that it was reasonably likely that the violation would result in an injury, that the violation was S&S, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$150.00 has been proposed for this violation. The Secretary moved to modify the citation to non-S&S based upon the testimony at hearing and I accept the Secretary's modification.

Citation No. 6517160 describes the violation as follows:

On top of 7BIN15 there was material build up and in some areas the build up was over the toe board. This area is only accessed by maintenance personnel and hasn't been accessed in over a month. An injury could occur from a slip, trip or fall.

Large determined that it was unlikely that the violation would result in an injury, that the violation was non-S&S, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

The cited standard does not require that the area be a "travelway," i.e., a passage, walk or way that is *regularly used* and designated for persons to go from one place to another. Rather, as pertinent to this matter, the area need only be a workplace or passageway. Section 56.2 of the Secretary's regulations defines "working place" as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. The Secretary's regulations do not define "passageway." The dictionary defines "passageway" as "a way that allows passage," while "passage" is defined as "a way of exit or entrance: a road, path, channel, or course by which something passes," or alternatively as "a corridor or lobby giving access to different rooms or parts of a building or apartment." *Webster's New Collegiate Dictionary* (1979) at 830.

A number of the Commission's judges have addressed in similar cases the issue of what constitutes a workplace or passageway. In *USS, a Division of USX Corp.*, 13 FMSHRC 145, 153 (Jan 1991) (ALJ), the judge determined that section 56.20003 applied to "all workplaces and passageways, even though no work was being performed at the time of the cited violations, and even though the passageways were not designated or regularly used as such." Similarly in *Brubaker-Mann Inc.*, 8 FMSHRC 1482, 1483 (Sept. 1986) (ALJ), violations were affirmed where the inspector observed a build up of powdery fines, which created a slipping and tripping hazard, on top of a storage tank.

With regard to both citations, Inspector Large testified that sand and fine material were located on top of the bins. Gov. Exs. 8, 9, 14. The bins are used to store sand. There is an access ladder to the top of the bins, a catwalk around the top of each bin, and a catwalk leading to other bins. There is a footprint in the accumulated material on top of the one bin cited in Citation No. 6517159. Gov. Ex. 11. Workers travel around the bins to conduct inspections, and maintenance persons access the area to do routine maintenance and repairs. The accumulated material was as deep as 12 inches in places and was over the toe board at points. *Id.* The material constituted a tripping hazard.

There is no dispute that the accumulations existed as cited by the inspector. The Respondent, however, argues that the area is not a "workplace" or "passageway" as required by the standard. There are twelve bins, connected by walkways and ladders. According to the

Respondent, employees perform limited work on top of the bins. Occasionally, persons climb the ladder to the top of a bin to inspect piping and ensure that it is not clogged or, if clogged, to unclog the pipes. At times an electrician may walk on top of the bins to do repair work. In addition, workers regularly climb up to the area to clean it when the dryer operation is complete.

Transcript pages 103-106:

The next two violations I'll talk about together. Citation No[s]. 6517159 and [6517]160 are both violations of the same standard, . . . [30 C.F.R. § 56.20003(a)], which requires that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." There is no question, and I don't think the mine disputes, that there was an accumulation of sands on the top of those bins, and certainly they were not kept clean and orderly.

The issue in both of these citations is whether or not the bins were a workplace, passageway, store room, or service room. I will focus on the issue of workplace or passageway. And I would note for the record -- I believe it's already in there -- that originally one of the citations was S and S, but the Secretary has moved to modify, so both of these violations are non S and S. And I will just address the issue of the violation and the penalty.

The photographs in evidence clearly show the accumulation of material on top of the bin. The issue then is whether or not they were a workplace or passageway. I looked at the cases regarding this particular standard. There are no Commission decisions that address what -- the workplace or passageway, as it's used in this standard. There are ALJ decisions, and there are decisions of the Commission that address this language under other standards.

In this particular area, there is an access ladder to the top of the bin. There's a catwalk leading to other bins. There were footprints indicating, at some point, whether before or after the spill, someone was up there. The testimony is clear that people do work on there. It may only be -- I think, the inspector mentioned -- he was told once a month, but people do go up there, workers go up to inspect, maintenance people go up on top of the bin, and certainly people access it, pass through it, and perform work there.

It doesn't have to -- the work doesn't have to be ongoing -- doesn't have to be going on when the inspector visits or sees the

violation, nor does someone have to be walking through there at the time of the violation. Based on the inspector's testimony and the testimony of Mr. McKibbin, I find that the area is a passageway and a workplace, that both things occur in that area, that the Commission has interpreted that language in a broad sense. And the case law[] by the administrative law judges that I read found it was not a workplace or passageway in areas that were under a belt -- under a belt where no one would go for any reason that -- or in a grease pit, in certain areas that people just really would not travel in any sense for work.

... I find that it is a passageway or a work way. I find that there is a violation as alleged in both citations, 6517159 and 657160 as alleged by the Secretary. Both of the violations are non S and S. I've already discussed the mines -- the penalty criteria with regard to these. I find I agree with the inspector's indication that the negligence was moderate. Even though some of the spill could, in the inspector's view, be seen from below the bin, I would still indicate negligence to be moderate, and the -- that neither of them are S and S. The gravity of the violation then would be low -- would not be very high. ... I would assess \$100 penalty for each of those violations.

## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

30 U.S.C. § 820(I).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history is normal for this size operator. I accept the Secretary's finding of low negligence. Finally, I find that the Secretary has established the gravity as described in the citations.

Transcript page 106:

[B]ased on the criteria in Section 110[(i)] of the Act, the proposed penalty is \$500 for the first violation, [and \$100 dollars each] for the other [two] violations, for a total [penalty] of \$700.

### III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$700.00 for the violations. U.S. Silica is hereby **ORDERED** to pay the Secretary of Labor the sum of \$700.00 within 30 days of the date of this decision.<sup>1</sup>

  
Margaret A. Miller  
Administrative Law Judge

Distribution:

Matthew S. Shepherd, U.S. Dept. of Labor, Office of the Solicitor, 618 Church St., Suite 230,  
Nashville, TN 37219-2456

Bob Dailey, Safety Director, U.S. Silica Company, P.O. Box 187, Berkely Springs, WV 25411

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<sup>1</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**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 8, 2010

WILLIAM METZ, : DISCRIMINATION PROCEEDING  
Complainant :  
 :  
v. : Docket No. PENN 2009-541-DM  
 : NE MD 2009-02  
 :  
CARMEUSE LIME, INC., : Carmeuse Lime  
Respondent : Mine 36-00017

**DECISION**

Appearances: Kim Lengert, Esq., Lengert Law LLC, Robesonia, Pennsylvania, for the Complainant;  
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on June 4, 2009, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act"). The complaint, filed by William Metz, concerns his March 18, 2009, termination by Carmeuse Lime, Inc. ("Carmeuse") from a lime processing plant located in Annville, Pennsylvania.<sup>1</sup> Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), provides, in pertinent part:

No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because such miner . . . instituted any proceeding under or related to this Act . . . .

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<sup>1</sup> Metz's complaint which serves as the jurisdictional basis for this matter was filed with the Secretary of Labor (the "Secretary") on March 28, 2009, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Metz's complaint was investigated by the Mine Safety and Health Administration ("MSHA"). On May 11, 2009, MSHA advised Metz that its investigation did not disclose any section 105(c) violations. On June 4, 2009, Metz filed his discrimination complaint with this Commission which is the subject of this proceeding. The hearing in this matter was delayed because Metz had difficulty obtaining counsel.

The hearing was conducted in Lancaster, Pennsylvania from April 13 to April 15, 2010. The parties have filed post-hearing briefs and replies that have been considered in disposition of this matter.

## **I. Statement of the Case**

Metz's discrimination allegation primarily is based on his complaint, expressed shortly before his termination, concerning his belief that contract employees were dismantling a kiln in an unsafe manner. As discussed below, direct evidence of discriminatory motive is rare. More commonly, acts of discrimination are inferred from circumstantial indicia such as, coincidence in time between a safety related complaint and the adverse action, hostility or animus towards the complaint, and disparate treatment of the complainant. *Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Metz presented a *prima facie* case of discrimination as his safety related complaint occurred shortly before his March 18, 2009, termination of employment.

In response, Carmeuse seeks to rebut the *prima facie* case by demonstrating that the termination of Metz was not motivated by his protected activity. Rather, Carmeuse asserts that Metz was terminated as a direct result of an incident that occurred on March 12, 2009, in which Metz used profanity and expressed hostility towards a Carmeuse human resources official. This incident was unrelated to any protected activity under the Mine Act. The hostility occurred during a meeting in which Metz was protesting a company policy that denied retroactive back pay for on-call employees who now are receiving compensation for their on-call status. In the alternative, Carmeuse seeks to affirmatively defend by demonstrating that it would have terminated Metz regardless of any protected activity.

With the exception of coincidence in time, the evidence does not reflect any other circumstantial evidence of discriminatory motive to support Metz's complaint. Rather, the evidence reflects that his unprotected belligerent conduct provided an adequate independent basis for his termination. In this regard, Metz's hostile reaction to the company's refusal to provide him with a written denial of his back pay request was an unreasonable response that was not elicited by any wrongful provocation. Moreover, Metz's hostility was related to a personnel matter rather than any activity protected by the Mine Act. Accordingly, Metz's discrimination complaint must be denied.

## **II. Findings of Fact**

### **a. Background**

Carmeuse is an affiliate of Carmeuse Lime and Stone, Inc. (Resp. Br. 1). The company operates approximately 35 sites across the United States and Canada and employs approximately 2,400 people. (Tr. 368-69, 683). Its North American headquarters is in Pittsburgh, Pennsylvania. (Tr. 368). There are approximately 50 employees at the Annville, Pennsylvania plant. (Tr. 612).

The plant produces lime from stone extracted from an adjacent quarry that is owned and operated by an unaffiliated company. (Tr. 639). Raw stone extracted from the adjacent quarry is heated in kilns. (Tr. 639). The by-product is a powdery lime substance that can be crushed into different sizes for commercial sale. (Tr. 639).

William Metz was employed by Carmeuse and its predecessor companies at the Annville plant for approximately 22 years. (Tr. 32). At the time of his March 2009 termination, Metz was employed in the maintenance department as a millwright. (Tr. 33). His responsibilities included working on general maintenance, inspecting equipment, and welding and fabricating. (Tr. 33, 226). Metz also served on the safety committee and periodically accompanied mine inspectors as a miners' representative. (Tr. 35-37, 195).

Metz filed two previous discrimination complaints under section 105 of the Mine Act against Carmeuse and a predecessor company. Metz's initial complaint, filed against predecessor company Wimpy Minerals ("Wimpy") and Wimpy's successor Tarmac America, Inc, concerned his March 21, 1995, termination of employment. At that time, Metz was allegedly terminated for confronting a supervisor with "loud," "insubordinate" and "threatening behavior." Metz's employment was ordered to be reinstated after a Commission hearing on the merits. The decision was based on a finding that the conduct, relied on by Wimpy as an independent basis for Metz's termination, was provoked by the company's response to Metz's safety related protected complaints. *Metz v. Wimpy Minerals*, 18 FMSHRC 1087, 1089-90, 1100-01 (June 1996) (ALJ).

An investigation by MSHA following Metz's second complaint, filed in March 2007, found no evidence of discrimination. Metz did not pursue this complaint after MSHA informed him of the results of its investigation. Metz does not contend that his previous discrimination complaints were a motivating factor in his March 18, 2009, discharge.

b. Metz's Behavioral History

Metz is an assertive and opinionated individual who was not hesitant to express safety concerns to management, or, to act as an employee spokesman who communicated personnel grievances. (Tr. 228, 514, 547). Metz's brief characterizes Metz's reported safety related complaints as, "caus[ing] friction with management." (Metz Br. at 2). However, with the exception of Metz's termination 14 years earlier by a predecessor company, the evidence, including testimony by a Metz witness, does not reveal any history of animus or retribution by Carmeuse in response to safety related complaints.

Metz had a history of engaging in confrontational and abusive behavior. At trial, Metz was questioned about an incident that occurred on or about March 5, 2007, in which Metz was seeking the approval of area manager Ken Kauffman for four hours of compensation that had been docked from Metz for a previous incident. Metz was asked:

Metz Counsel: In 2007 – and I only bring this up because it was part of the consideration that was used for your termination. In 2007, did you ever threaten Ken Kauffman?

Metz: Oh, yeah. Yeah.

Metz Counsel: How did you threaten him?

Metz: Well, I, actually, don't call it a threat. I didn't then until I looked it up, but it had to do with when I was helping Jim Smith. They sent me home. I filed a peer review. Ken Kauffman denied it.

(Tr. 112).

Contrary to Metz's characterization of his behavior as non-threatening, Kauffman testified that Metz told him, and an MSHA inspector who was present at the time, that he would "kick both of [their] asses." (Tr. 572). As a result of this incident, a written warning was placed in Metz's personnel file cautioning him of termination if his threatening behavior should reoccur. (Resp. Ex. 6).

Metz also had a history of abusive and harassing behavior towards a fellow employee. Metz teased the employee about the fact that the employee's mother, who had separated from his father, was in a relationship with another Carmeuse employee. Metz told the employee that his mother was "pretty hot," and he suggested that he wanted to have sexual relations with her in crude and obscene language. (Tr. 418).

Carmeuse's harassment assertion was presented through hearsay rather than direct evidence. (Tr. 418). However, Metz's inappropriate conduct was corroborated by Metz's witness, Robert Bohler, who testified that the victim of Metz's harassment quit his employment because Metz harassed him about his mother. (Tr. 312).

At trial, Metz again was equivocal when given the opportunity to deny that he had, in fact, teased this employee:

Metz Counsel: Did you ever tease [this employee]?

Metz: I don't remember teasing him.

Metz Counsel: Not the same thing. Did you ever tease him? . . .

Metz: I can't remember a specific incident, but we all teased around with him some, a little bit.

(Tr. 120).

### c. Kiln Complaints

During Metz's employment at the Annville plant, there were four kilns that were used to process lime from limestone rock. These kilns were suspended on solid steel girders that were connected to a wheel called a trunion that allows the kilns to spin. Kilns and their supporting structures weigh several tons. During approximately the first week in March 2009, independent contractors started to dismantle and remove two of the four kilns that had been inactive for several years. (Resp. Br. 12). Instead of being paid by Carmeuse, the contractor was allowed to sell the scrap metal salvaged during the dismantling and removal of the kilns. (Tr. 25, 50-55, 577, 669).

Metz was concerned that someone could be struck by falling material because the area being dismantled was not properly dangered-off. Metz was also concerned about possible electrocution because the kiln area was not de-energized. (Tr. 53-55). During the week preceding Metz's termination, Metz and several other hourly employees expressed their safety related concerns to mine management officials, Ron Popp, Greg Doll, Keith Lambert, Mark Miller, and area manager Ken Kauffman. (Tr. 56).

Although Kauffman could not specifically recall Metz's kiln related complaints, Kauffman testified, "it wouldn't be uncommon for [Metz] to come in and talk about issues at the plant." (Tr. 581). Kauffman testified that he had met with Metz and other employees numerous times about various safety issues. (Tr. 581-82). In this regard, Bruce Kercher, a friend of Metz, who was also an hourly employee at the plant, also complained to mine management about the kiln contractor. (Tr. 252, 284). Kercher testified that he did not experience any company retaliation as a consequence of his safety complaints. (Tr. 252). In fact, Kercher testified that he would feel comfortable making safety complaints to management. (Tr. 283-84).

The activities of the independent contractor were the subject of an MSHA inspection on March 5 and March 6, 2009. (Tr. 583-85, 669-70). The mine inspector spoke to the contractor but no violations were cited. (Tr. 583-84, 669-70). The contractor ultimately discontinued the work because the price of scrap metal was low and the job was unprofitable. (Tr. 276, 577). At trial, Carmeuse stipulated that "[t]here were complaints by any number of people," including Metz. (Tr. 59). Carmeuse also stipulated that these complaints were communicated within no more than two to three weeks prior to Metz's termination. (Tr. 60). Although Carmeuse maintains that the contractor was operating in a safe manner, Carmeuse stipulated that Metz's complaints were made in good faith. (Tr. 60-61).

### d. The On-Call Policy

Carmeuse has an "on-call policy" that requires certain maintenance and electrical employees to be available to work on their days off if their services are needed at the plant. (Tr. 72-76, 219). On-call employees have always been paid for at least four hours if they were summoned to work. However, prior to January 2009, it was Carmeuse's policy not to pay on-call employees for their on-call status, even though their required availability disrupted their personal lives. (Tr. 169-71). In January 2009, in response to employee requests, a new on-call policy was implemented at the plant. (Tr. 74-76, 219, 718). On-call employees continued to receive at least

four hours pay if their services were required. However, the new policy paid employees \$25.00 for each day that they were on-call, but not required to work. (Tr. 74-76, 219, 501, 718).

Some employees, including Metz, believed that they deserved back pay for at least the prior two-year period when the new on-call program had not been in place. (Tr. 169; Resp. Ex. 15). Determined to obtain the back pay he believed was owed to employees, Metz acted as a representative of the millwrights. (Tr. 76, 222). Metz approached several members of the human resources department, including Annville plant human resources representatives Becky Vinton and Ed Jones about this issue. (Tr. 427-28). Metz testified that Vinton promised that on-call compensation would be paid retroactively. (Tr. 93, 191). Consequently, the company's refusal to pay retroactively was a contentious issue. (Tr. 72).

e. Metz's Peer Review Request

Peer review is a method of addressing employee grievance and discipline issues. It is a process where aggrieved employees can request review by the employee's supervisor, the human resources area manager, and the plant manager. Alternatively, an employee can request peer review before a panel of hourly and salaried employees who have completed peer review training. (Metz Ex. 10). Certain subjects are excluded from the peer review process, including the setting or changing of company policy and issues concerning sexual harassment. (Metz Ex. 10).

On December 29, 2008, Metz filed a written peer review request concerning the back pay issue. Metz's request for peer review stated:

Per HR Pittsburg [sic] agrees compensation for being on call is reviewable by peer review – maintenance has been on-call for over yr and hlf [sic] with no compensation for our lives being interrupted. Back pay for an agreed amount that's fair for the troubles on-call cause and has caused.

(Metz Ex. 15). Metz's request for peer review was denied by supervisor Ron Popp and area manager Ken Kauffman. (Resp. Ex. 15).

f. Croll's Account of the March 12, 2009, Meeting

Melissa Croll is a corporate human resources manager based out of Carmeuse's corporate headquarters in Pittsburgh, Pennsylvania. (Tr. 364-68). Croll's supervisor is Kathy Wiley. Wiley is a Vice President of Human Resources who also is based in Pittsburgh, Pennsylvania. (Tr. 367-68). Croll, who recently had been assigned to oversee the Annville plant, made her initial visit to the plant in February 2009. (Tr. 370).

On March 12, 2009, Croll returned to the plant to finalize her performance goals with human resources assistant Ed Saterstad. (Tr. 371-72). After the meeting, Saterstad informed Croll that an employee wanted to meet with her. (Tr. 372). Croll initially testified that Saterstad did not identify or tell her anything about the employee she was about to meet. (Tr. 373). However, when confronted with her deposition, Croll later admitted that Saterstad told her the employee

was Bill Metz and that Metz was a “complainer.” (Tr. 453-54). Moreover, Croll admitted in a March 12, 2009, e-mail, sent to Wiley shortly after her meeting with Metz, that she had known that Metz was a “disgruntled employee” prior to the March 12, 2009, meeting. (Resp. Ex. 18).

Metz denies that he requested the March 12, 2009, meeting with Croll, claiming that it was Saterstad and Croll who initiated the meeting. (Tr. 71). However, Metz testified that he previously had called Croll in Pittsburgh in January 2009. (Tr. 81). At that time, Metz left Croll a message requesting that Carmeuse explain in writing why the men were not getting back pay for being on-call. (Tr. 81). However, Croll reportedly did not recall receiving a message from Metz, and she did not return his call. (Tr. 371). Regardless of who initiated the meeting, given Metz’s December 2008 written request for peer review on the back pay issue, and his January 2009 telephone message to Croll, the company had reason to believe that Metz wanted to speak to Croll.

Saterstad called Metz to come to the plant conference room to meet with Croll. (Tr. 374). Upon entering the conference room, Metz was greeted by Croll who was sitting at the conference table. (Tr. 376). Saterstad, a human resources assistant who worked at the Annville plant and knew Metz, departed the conference room leaving Metz and Croll alone. Metz sat down next to Croll, a distance of approximately three to four feet, and they faced each other as the conversation began. (Tr. 377; Metz Ex. 24).

Metz began the conversation by stating that he wanted to invoke the company’s peer review process to resolve whether maintenance workers were entitled to receive back pay for being on-call for the past two years. (Tr. 378-79). Croll informed Metz that the company’s new on-call policy did not include back pay for employees who had been on-call. Croll reminded Metz that issues concerning company policy were not subject to the peer review process. (Tr. 379; Metz Ex. 10). Croll testified that Metz became agitated and irate and yelled at her, “that’s fucking bullshit.” (Tr. 379).

Croll testified that she tried to placate Metz, but he again yelled, “that’s fucking bullshit.” (Tr. 380). He reportedly repeated similar statements several more times. (Tr. 381). Croll stated she again attempted to diffuse the situation by offering to bring the back pay issue to the attention of her supervisor Kathy Wiley. (Tr. 381). Consistent with the prior telephone message he had left Croll requesting a written decision, Metz demanded, “I want a fucking formal response on this issue.” (Tr. 382). Croll related that Metz continued to be loud and aggressive, and before exiting the room, he sprang from his chair in a manner that made it appear that he was lunging at Croll. (Tr. 382-83).

g. Metz’s Account of the March 12, 2009, Meeting

Metz’s account of the March 12, 2009, meeting cannot be reconciled with Croll’s account of the meeting. Metz testified that he was summoned to Saterstad’s office without explanation, where he was met by Saterstad and Croll. (Tr. 77, 85). Shortly thereafter, Croll exited her meeting with Saterstad and joined Metz who was waiting in the conference room. (Tr. 85). Saterstad left the area and did not participate in the meeting. (Tr. 93).

Although Croll testified that she initially became aware of a previous incident that occurred when Metz confronted Mei Lorick, a former human resources representative at the plant, after the March 12 meeting, Metz testified that Croll began the meeting by stating to him, "you are the one who hates Mei Lorick." (Tr. 85-8, 391-93). Metz testified that he denied hating Lorick, but he told Croll that "[Lorick] doesn't do her job." (Tr. 87).

Metz testified that Croll explained Carmeuse's position on peer review. Metz responded that he already understood the peer review policy. (Tr. 88). Metz testified that he requested a written document formalizing Carmeuse's refusal to provide back pay for retroactive on-call service. (Tr. 89). Metz stated that he sought this document as a means to extricate himself from his role as intermediary between Carmeuse and its employees on the back pay controversy. (Tr. 89). In this context, Metz instructed Croll to "have Ms. Wiley . . . make this document up." (Tr. 89). Croll reportedly responded, "[d]on't talk to me like that," to which Metz reportedly responded, "what do you mean?" (Tr. 89). Metz testified that he concluded that, "something screwy is going on here. I am going to get out of here and try to save myself," and then he left the conference room. (Tr. 89).

Conspicuously absent from Metz's account is any admission that he used profane language, or, that he acted in a hostile or otherwise inappropriate manner. Metz's testimony regarding his behavior on March 12, 2009, was evasive and lacking in credibility. In this regard, Metz testified:

Metz Counsel: Did you swear at Melissa Croll?

Metz: I don't remember swearing at her.

Court: Mr. Metz, the question was: did you swear at Ms. Croll? You said you don't remember swearing at Ms. Croll or you didn't swear at Ms. Croll? What was your response?

Metz: If I did, I wouldn't have had to ask her what I did or said. I don't remember swearing at her.

Court: That's what I'm asking. Is your testimony that you didn't swear at her or is your testimony that you don't remember swearing at her?

Metz: I would say it would be out of character for me to swear in front of a lady, first of all. Not that I don't; but, accidentally, you could maybe say something.

Court: So I'll ask you again. Is it your testimony that you don't remember swearing at her or that you didn't swear at her?

Metz: I would say I didn't because since she couldn't tell me what it was when I asked her a couple times.

Court: I am not asking you to tell me what she told you. I am asking you to try to remember what you said. Do you remember what you said or was your testimony that you remember what you said and you didn't swear at her?

Metz: I don't remember swearing at her. . . .

Court: So you don't remember what you said?

Metz: No.

Court: Was that a yes?

Metz: No.

Court: You do remember what you said?

Metz: Okay, no. You are confusing me.

Court: Well you are confusing me. My question is: do you remember what you said to her?

Metz: I don't recall swearing at her. I thought that's what you asked. I didn't swear at her.

Court: Your testimony is you didn't swear at all at her?

Metz: Not that I remember. I am confusing you again.

Court: No, you are not confusing me. Your testimony is that you don't remember swearing at her. That's the best we are going to get, right?

Metz: I am saying that there's -- there could be sometimes when someone swears, and they don't remember swearing or -- .

Court: I am not asking you to recall what happened on March 12 . . . I am asking you: since this was a topic of discussion all during that time, March 12, 13, 14 -- when were you finally terminated? March 18?

Metz: Yes.

Court: So it was a topic of conversation. I don't find it credible that you don't remember what you said. Because this would have been discussed over the course of that week. Did you or didn't you swear at all at her.

Metz: I say I didn't swear at her.

Court: Your testimony is you didn't swear at her?

Metz: No, I didn't. I hate to say not that I know of. I am going to say no.

Court: All right.

Metz: I didn't swear at her.

Court: It's an equivocal no.

(Tr. 107-10).

#### h. The Events Following the March 12, 2009, Meeting

Metz's behavior reportedly startled Croll. (Tr. 384). She left the conference room and went to Kauffman's office where Kauffman testified he noticed she appeared "very shaken." (Tr. 385, 587). Croll reported to Kauffman what had happened. She was concerned about Metz returning to work in his agitated state. (Tr. 385). Croll asked Kauffman to call Metz to the office so that she could express her concerns and explain to Metz that his behavior in the conference room was inappropriate. (Tr. 385).

Kauffman called Maintenance Manager Keith Lambert, and Lambert escorted Metz to Kauffman's office. (Tr. 387, 587-88). When Croll explained to Metz that his behavior was unacceptable, Metz replied, "this is all bullshit." (Tr. 388, 588-89). Concerned by Metz's agitation, Croll suggested to Metz that he should look for another job if working at the plant was making him that unhappy. (Tr. 389). Metz promptly left the room at which time Croll, Kauffman and Saterstad left to go to lunch. (Tr. 391-92).

During lunch, Saterstad remembered an incident involving Metz and Mei Lorick. (Tr. 391). Saterstad explained that Metz had been upset about an incident where he was accused of intentionally burning an employee by giving the employee a recently welded hot piece of metal. The company ultimately found that Metz was not at fault. However, Saterstad recalled that Metz became hostile in his meeting with Lorick in that he yelled and pointed his finger in Lorick's face. (Tr. 392-93). Saterstad further related to Croll that Metz was known to exhibit anger and hostility in the workplace. (Tr. 393).

Upon returning from lunch, Croll, Kauffman and Saterstad were met by maintenance supervisor Ron Popp who had just spoken to Metz. (Tr. 394). Popp gave Croll written notes he had taken after his encounter with Metz. (Tr. 395; Resp. Ex. 20). Popp explained that he had asked Metz what was wrong after seeing Metz, who was apparently upset, standing by one of the kilns. (Tr. 396, 644). Metz responded, "who the fuck does she think she is," and "she is a waste of my fucking time." (Tr. 396, 644; Resp. Ex. 20). Metz then said, at least twice, that he needed to go home before "I hurt myself or someone else." (Tr. 396, 644, Resp. Ex. 20).

Concerned for the well being of Metz and the safety of the plant employees, Popp agreed that Metz should go home. (Tr. 644). Popp drove Metz to the locker room and waited until he observed Metz leave plant property. (Tr. 645). Popp opined to Croll that he believed Metz was "a time bomb ready to explode." (Tr. 395; Resp. Ex. 20).

After listening to Popp, Croll felt threatened and believed Metz was capable of workplace violence. (Tr. 397-98). Mark Miller, an area loss prevention manager, also testified that an hourly employee came to see him after the Metz incident because he too was afraid Metz could return and harm people at the plant. (Tr. 673-74, 679-80).

Kauffman and Croll called Roger Downham, Vice President of Operations, who is based in Toronto, Canada, as Croll's supervisor Wiley was unavailable because she was on jury duty. (Tr. 19, 398-99). They explained the series of events that had occurred. Downham decided that Metz should be suspended without pay pending further investigation. (Tr. 399). Pursuant to Downham's decision, Croll and Kauffman decided they would have Lambert meet Metz at the gate entrance to plant property the next morning at 5:30 a.m. before the start of the 6:00 a.m. shift to inform Metz of his suspension. (Tr. 399-400).

In the meantime, Croll decided to review Metz's personnel file and to interview employees about their interactions with Metz before speaking to Wiley. (Tr. 410). In addition to the incident involving Metz's hostile reaction to Lorick, Croll noted the March 6, 2007, discipline notice concerning Metz's threatening behavior towards Kauffman, and the warning that Metz would be terminated if his threatening behavior toward management should reoccur. (Tr. 404, 571-72; Resp. Ex. 6).

Croll e-mailed Wiley a detailed description of the March 12 events, including attachments of copies from Metz's personnel file. (Tr. 406, 685; Resp. Ex. 18). Wiley telephoned Croll to discuss the incident and they agreed on a plan to determine if this was an isolated event or a pattern of behavior. (Tr. 406, 685, 687). Wiley suggested contacting the local police to provide security at the plant if Metz became angry about being prevented from entering plant property. (Tr. 407). Carmeuse informed the North Landonerry Township Police of their concerns regarding Metz. (Tr. 406-08, 597; Resp. Ex. 27B).

Metz did not attempt to come to work on March 13, 2009. (Tr. 106, 407-08). Concerned that Metz would be upset by the investigation and suspension, Miller arranged for Metz's suspension notice to be delivered by the state constable as suggested by the Township Police. (Tr. 409; Resp. Ex. 21).

Croll continued her investigation by interviewing employees about their interactions with Metz. (Tr. 410; Resp. Ex. 26). Croll learned about the previously noted incident in which Metz harassed a fellow employee and made lewd comments about that employee's mother. (Tr. 418-20). After completing her interviews, Popp escorted Croll to the highway for her return to Pittsburgh. (Tr. 420).

Upon returning to Pittsburgh, Croll called Lorick and Jones as they were former human resources representatives at the Annville Plant who were familiar with Metz. (Tr. 424-28; Resp. Exs. 22, 23). Croll testified that each described Metz as a “hot head” with a bad temper. (Tr. 424-28). Lorick also described Metz as a “time bomb ready to explode.” (Tr. 426). Jones told Croll that Metz also had previously contacted him about obtaining peer review for the on-call back pay issue. (Tr. 428).

Croll reported to Wiley a chronological account of the relevant events concerning Metz. (Tr. 695-96; Resp. Ex 18(a)). Wiley testified she reviewed the information and discussed the March 12 incident with Downham and Carmeuse’s in-house counsel Kevin Whyte. (Tr. 699-700; Resp. Exs. 22, 23). Their conclusion was that Metz should be terminated. (Tr. 597, 685, 699).

In a telephone conversation on March 18, 2009, Wiley explained to Metz Carmeuse’s decision to terminate his employment because of his “repeated use of profanity, vile, threatening and/or abusive conduct in the workplace with [his] peers and members of management.” (Tr. 701-02; Resp. Ex. 1). Wiley informed Metz that his personnel file had been reviewed and it too demonstrated a “clear pattern of harassing, abusive and offensive behavior” that would not be tolerated in the workplace. (Tr. 702).

A letter from Wiley summarizing her conversation with Metz and outlining the reasons for his termination was sent to Metz on March 18, 2009. (Resp. Ex. 1). The letter stated, in pertinent part:

Effective Wednesday, March 18<sup>th</sup>, 2009, you are being terminated from employment with Carmeuse Lime and Stone for violation of the Corporate Harassment Policy in addition to General Rules and Regulations as outlined in the Annville Handbook (plant specific). Your repeated use of profane, vile, threatening and/or abusive language in the workplace used with your peers and members of management, in addition to a thorough review of your personnel file, has demonstrated a clear pattern of harassing, abusive and offensive behavior in the workplace as well as a lack of respect for others. This behavior will not be tolerated in the workplace.

(Resp. Ex. 1).

Metz requested peer review of his termination. (Tr. 704). The request was denied due to the confidential nature of information obtained during the investigation concerning harassment of a Carmeuse employee. (Tr. 704-05; Resp. Ex. 27A). A formal letter dated March 23, 2009, was sent to Metz detailing the reasons for the denial of his request for peer review. (Resp. Ex. 27A).

### **III. Further Findings and Conclusions**

#### **a. Analytical Framework**

Section 105(c) of the Mine Act prohibits discriminating against a miner because of his participation in safety related activities. Congress provided this statutory protection to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977), *reprinted* in Senate Subcomm. on Labor, Committee on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). It is the intent of Congress that, "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

Metz, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Metz must establish that he engaged in protected activity, and that the termination of his employment was motivated, in some part, by that protected activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Carmeuse may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the termination of Metz was not motivated in any part by his protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Carmeuse may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity, and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

#### **b. Metz's Prima Facie Case**

As the complainant, Metz has the burden of proving that his termination violated the anti-discrimination provisions of section 105(c) of the Act. While Metz testified that he occasionally served as a miners' representative, the primary protected activity relied upon is Metz's safety related complaints concerning the contractor's method of dismantling the kilns. To establish a *prima facie* case, Metz need only demonstrate a proximity in time between his protected activity and the adverse action complained of, in this case his termination, and company knowledge of the protected activity. Although Carmeuse maintains that the contractor was dismantling the kiln in a safe manner, Metz's kiln related complaints are protected as long as he had a good faith belief that a hazard existed, regardless of whether the activities of the kiln contractor were in fact hazardous. *Robinette*, 3 FMSHRC 810-812.

Carmeuse has stipulated that several employees, including Metz, communicated kiln related safety complaints no more than two to three weeks prior to Metz's termination. (Tr. 60-61). Carmeuse also stipulated that Metz's complaints were made in good faith. (Tr. 61). Consequently Metz has satisfied his burden of demonstrating a *prima facie* case of discrimination.

As a threshold matter, Carmeuse contends that the protected activity relied upon by Metz is not material because Croll, Wiley, and Downham, who made the ultimate decision to terminate Metz, had no knowledge of Metz's safety related complaints. However, plant management personnel who knew Metz well, such as, Kauffman, Saterstad, and Popp, counseled Croll in her deliberations concerning Metz. Moreover, the Annville plant is a relatively small facility with approximately 50 employees. Notwithstanding whether actual knowledge of protected activity has been demonstrated, the Commission has held that the small size of a mine supports an inference that an operator was aware of a miner's protected activity. *Morgan v. Arch of Ill.*, 21 FMSHRC 1381, 1391 (December 1999) (citations omitted). Consequently Carmeuse is deemed to have had actual knowledge of Metz's protected activity when they decided to terminate him.

c. Carmeuse's Rebuttal

However the analysis does not stop there. In an effort to rebut Metz's *prima facie* case, Carmeuse contends that Metz's termination was motivated solely by his inappropriate and hostile conduct on March 12, 2009, as well as his history of abusive and threatening behavior. In this regard, Carmeuse contends that Metz's reported safety related protected activity was not considered in any way in the company's decision.

Having concluded that Carmeuse was aware of Metz's protected activity, the analysis shifts to whether Carmeuse's reported rationale for terminating Metz, *i.e.*, his profane, insubordinate and belligerent behavior, is a pretext for an ulterior motive of retaliation. Determining whether Carmeuse's reported rationale is a pretense requires analysis of the credibility of the differing accounts of Metz and Croll with respect to their March 12, 2009, meeting. In resolving credibility issues, the judge "[who] has an opportunity to hear the testimony and view the witnesses . . . is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Croll's initial testimony that she was totally unprepared for Metz's outburst, because she did not know prior to their meeting the identity of Metz nor his history, lacks credibility. (Tr. 353). Croll later admitted that Saterstad had told her, prior to the meeting, that Metz was a complainer. Moreover, Croll's e-mail to Wiley after the meeting reflects that Croll had reason to know before the meeting that Metz was a "disgruntled employee." (Tr. 353, 453-54; Resp. Ex. 18). Thus, the degree to which Croll contends that she was startled by Metz's conduct is suspect.

Despite her unsubstantiated claim that she was not forewarned about Metz, Croll's account of Metz's profane and belligerent conduct is entitled to great weight because it is corroborated by evidence of similar conduct both before and after the March 12 meeting. Kauffman testified about an incident that occurred in March 2007 when Metz threatened him. (Tr. 573). Metz's threat was taken seriously enough to warrant a written disciplinary notice cautioning Metz that he would be terminated if such threatening conduct directed at management reoccurred. (Resp. Ex 6). Metz had also reacted aggressively during a previous meeting with Lorick, a company human resources employee. (Tr. 391-93).

Popp encountered Metz shortly after the meeting with Croll, at which time Metz used profanity and threatened to hurt himself or someone else. (Tr. 394-96; Resp. Ex. 20). Popp escorted Metz off mine property because he was so concerned about Metz's hostile behavior. Miller also testified that employees were afraid that Metz was capable of harming people at the plant. (Tr. 673-74, 679-80). Saterstad also believed Metz had a reputation for exhibiting anger and hostility in the workplace. (Tr. 393). Even Metz's own witness, Jeffrey Englehart, related that Metz was known to be the one to confront management on employee issues because "[h]e has more balls than we do." (Tr. 222).

Finally, the company's claim that Metz's behavior could no longer be tolerated is supported by the information contained in Metz's March 18, 2009, termination letter. The termination letter described Metz's language as "profane, vile, threatening and/or abusive." (Resp. Ex. 1). In short, unless Croll, Kauffman, Lambert, Saterstad and Popp have all conspired to falsely report that they witnessed Metz's hostile and abusive conduct on March 12, 2009, the evidence amply supports Croll's testimony that Metz acted in a profane and hostile manner during their meeting.

Although Metz has attempted to discredit Croll, his testimony concerning whether he had acted inappropriately and used profane language was evasive. Moreover, Metz's testimony that he could not recall whether he used profanities during his meeting with Croll is not worthy of belief. Metz's March 12 conduct was the focus of discussion and consideration from March 12 until March 18, 2009. (Resp. Exs. 1, 21). On March 18, 2009, Wiley telephoned Metz to inform him that his employment was terminated because of his "repeated use of profanity, vile, threatening and/or abusive conduct in the workplace with [his] peers and members of management." (Tr. 701-02; Resp. Ex. 1). Wiley also informed Metz that his personnel file had been reviewed and it too demonstrated a "clear pattern of harassing, abusive and offensive behavior" that would not be tolerated in the workplace. (Tr. 702). Their telephone conversation was committed to writing in Metz's March 18, 2009, termination letter. (Resp. Ex. 1).

It is in this context that Metz's claim that he is not certain that Croll's accusations are true, because he cannot recall how he behaved during their meeting, is incredulous. It is also noteworthy that Metz also could not recall his behavior with regard to the Kauffman incident and the events concerning his harassment of a fellow employee. (Tr. 572, 312). Thus, in the final analysis, the great weight of the evidence supports Carmeuse's contention that Metz's conduct on March 12, 2009, was insubordinate and intolerable.

d. Metz's Reliance on Circumstantial Evidence

The focus now shifts to whether Carmeuse was also motivated, in any part, by Metz's protected activity. In determining whether Metz's conduct, alone, was the basis for Carmeuse's decision to terminate his employment, it is significant that the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

The Commission has addressed the proper criteria for considering the merits of an operator's asserted business justification:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

*Chacon*, 3 FMSHRC at 2516-17.

The Commission subsequently further explained that, while a proffered business justification must be facially reasonable, it is not the role of the judge to substitute his or her judgement for that of the mine operator. The Commission stated:

[T]he reference in *Chacon* to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgement or a sense of "industrial justice" for that of

the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed."

*Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

In determining whether Carmeuse's decision to terminate Metz is tainted, in any part, by a discriminatory motive, it must be remembered that direct evidence of discrimination is rare. Rather, the Commission looks to circumstantial evidence of discrimination. Thus, the Commission has stated:

[D]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'

*Chacon*, 3 FMSHRC at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 8<sup>th</sup> Cir. 1965). Some of the more common circumstantial indicia of discriminatory intent are knowledge of the protected activity, hostility or animus towards it, coincidence in time between the adverse action and the protected activity, and disparate treatment of the complainant. *Id.*

However, to demonstrate by indirect evidence that Carmeuse was motivated, at least in part, by Metz's protected activity requires a rational connection between the evidentiary facts and Metz's termination. See *Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (Nov. 1989) citing *Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138. Carmeuse's knowledge of Metz's kiln related complaints, that were communicated shortly before his termination, alone, does not provide an inherently reasonable basis for inferring that he was discriminated against.

Rather, the evidence must reflect that Metz was the victim of disparate treatment because of a company animus toward his protected activity. With respect to animus, the evidence does not reflect an atmosphere of general intolerance of safety related complaints. On the contrary, Metz's own witness testified that he felt comfortable making safety complaints to anyone in management. (Tr. 283-84). The company conceded that, in addition to Metz, numerous other employees complained about the kiln contractor. It has neither been contended nor shown that any of these employees experienced retaliation. Moreover, there is no evidence of a retaliatory motive for Metz's activities as a miners' representative, or, for his previous discrimination complaints that are remote in time. Significantly, despite his history of protected activity, Metz received only a written warning for his March 2007 insubordination.

The Commission has previously addressed the issue of disparate treatment in a matter where a mine operator relies on the use of profanity as a justification for termination. "In analyzing whether a complainant was disparately treated in the context of termination for using offensive language, the Commission has looked to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and how the operator treated other[s] . . . who had cursed." *Sec'y o/b/o Bernardyn v. Reading Anthracite* 23 FMSHRC 924, 929-30 (Sept. 2001) *citing Cooley v. Ottawa Silica*, 6 FMSHRC at 521, and *Hicks v. Cobra Mining*, 13 FMSHRC 532-33.

Here, Carmeuse had previously warned Metz for threatening Kauffman. In seeking to minimize the significance of his profane and hostile behavior, Metz claims the company has a permissive policy regarding the use of profanity. In this regard, Metz presented evidence that hourly employees in the maintenance department "routinely swear" during their conversations with each other. (Tr. 204). While I am certain that men at the plant did not always use the Queen's English to express themselves, such banter cannot be equated with the inappropriate language and hostile behavior witnessed by Croll, Kauffman, Lambert, Saterstad and Popp. (Tr. 379-80, 388, 392-93, 395-96, 572). Thus, the company's assertion that its termination of Metz was motivated by his profanities and threatening behavior is neither pretextual in nature, nor evidence of disparate treatment.

Metz also contends that the denial of peer review for his termination is an indicia of disparate treatment. Carmeuse's assertion that peer review did not apply because Metz's termination involved comments that constituted sexual harassment is supported by the peer review guidelines. (Metz Ex. 10; Resp. Ex. 27A).

Moreover, the company's concern about a potential violent situation, as evidenced by the company's request for a police presence after Metz's suspension and termination, provides an additional business justification for denial of peer review. In this regard, although Metz presented evidence that two employees were granted peer review prior to their discharge, the discharges apparently did not involve threatening behavior as a police presence at the plant was not requested immediately after their terminations. (Tr. 316, 325). *See Dreissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n. 14 (Apr. 1998) *citing Schulte v. Lizza Indus., Inc.* 6 FMSHRC 8, 16 (Jan. 1984); *Chacon*, 3 FMSHRC at 2512 (disparate treatment requires evidence that another employee guilty of the same or more serious offenses escaped the disciplinary fate suffered by the complainant). Thus, there is no rational basis for concluding that the denial of peer review is an indicia of discriminatory motive.

Finally, a Commission judge is "obligated to determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity." *Floyd Dowlin, III, v. Western Energy Co.*, 28 FMSHRC 23, 31 (Jan. 2006) (ALJ) *citing Sec'y of Labor o/b/o McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 992 (Sept. 2001). Consequently, at the culmination of the hearing, the parties were requested to address the issue of provocation in their briefs.

The Court of Appeals has noted that “[t]he more extreme an employer’s wrongful provocation the greater would be the employee’s justified sense of indignation and the more likely its excessive expression.” *Bernardyn*, 23 FMSHRC at 936 quoting *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4<sup>th</sup> Cir. 1965). In its brief, Carmeuse concedes that it “may not have handled Mr. Metz in the best manner possible, from a human resources standpoint . . .” (Resp. Br. at 36). Croll had never met Metz prior to their March 12 meeting. Given Metz’s volatile history, his outburst may have been foreseeable. However, the failure of Carmeuse to anticipate Metz’s aggressive behavior does not constitute the requisite intentional wrongful provocation that would mitigate, or otherwise justify, Metz’s behavior on March 12, 2009. In the final analysis, Metz is responsible for his conduct.

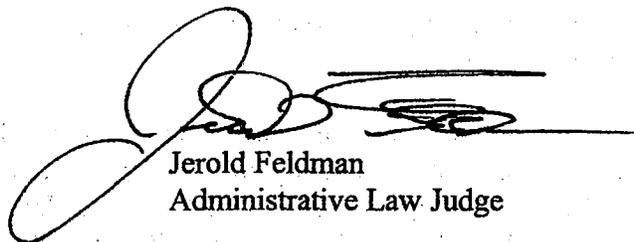
Moreover, even if Metz was provoked by Carmeuse, such provocation would not give rise to a discrimination claim under the Mine Act because it was not in response to safety related protected activity. Consequently, Carmeuse’s reliance on Metz’s misconduct as the sole reason for his termination cannot be defeated by a claim of provocation.

Absent evidence of animus, disparate treatment or wrongful provocation, the evidence reflects that Metz’s termination was not motivated in any part by his protected activity. Thus, Metz’s *prima facie* case of discrimination has been successfully rebutted by Carmeuse.

As Carmeuse has rebutted Metz’s claim that he was the victim of discrimination, further inquiry into whether Carmeuse has demonstrated an affirmative defense is unnecessary. *Gravelly v. Ranger Fuel Corp.*, 6 FMSHRC 799, 803 (Apr. 1984). However, I note that even if Carmeuse was motivated, in any part, by Metz’s protected activity, his hostile and threatening conduct during and immediately following the March 12, 2009, meeting provided Carmeuse with a rational and independent basis for his termination regardless of his protected activity. Accordingly, Metz’s discrimination complaint must be denied.

**ORDER**

In view of the above, **IT IS ORDERED** that the discrimination complaint filed by William Metz **IS DENIED**. Accordingly, **IT IS FURTHER ORDERED** that Docket No. Penn 2009-541-DM **IS DISMISSED**.

  
Jerold Feldman  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

November 8, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2009-173
Petitioner,	:	A.C. No. 46-08993-165542
	:	
v.	:	
	:	Mine: Coalburg Number One Mine
NEWTOWN ENERGY, INC.,	:	
Respondent.	:	

**DECISION**

Appearances: Jessica R. Hughes, Esq., Office of the Regional Solicitor, Arlington, Virginia, on behalf of the Petitioner  
Christopher D. Pence, Esq., Allen Guthrie and Thomas, PLLC, Charleston, West Virginia, on behalf of the Respondent

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 Newtown Energy, Inc. ("Newtown"). The matter arises under sections 105(a) and 110(a) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). 30 U.S.C. §§ 815(a), 820(a). In the petition, the Secretary alleges Newtown violated a mandatory safety standard requiring the roof, rib, and face of areas where persons work or travel be supported so as to protect those persons from the hazards relating to the falls of the roof, ribs, or face. The standard is set forth in Part 75, Section 202(a), Title 30, Code of Federal Regulations. 30 C.F.R. Part 75.202(a). The Secretary alleges that the company violated the standard on October 30<sup>th</sup>, 2007 when the roof of a travel way used to examine an unsealed and worked out area was not supported so as to protect persons from roof falls. She further alleges that the violation was a significant and substantial contribution to a mine safety hazard ("S&S"), that the violation was due to the company's high negligence, and because of the violation, one miner was reasonably likely to be fatally injured. She proposes an assessment of \$12,900 for the alleged violation.

Following the issuance of the citation, the company contested the validity of the citation and the proposed assessment. After the Secretary's penalty petition was filed, Newtown answered, denying the Secretary's allegations, and in particular challenging the S&S finding and the negligence assertion of the inspector.

The matter was assigned to me, and I issued an Order directing Counsels to confer to determine whether they could settle the case. When the parties, following diligent efforts, advised me that they were unable to agree to a settlement, I scheduled the case to be heard in Charleston, West Virginia. At the hearing, the parties presented testimonial and documentary evidence regarding the alleged violation. Also at the hearing, the parties presented stipulations and offered them as a joint exhibit. Tr. 14-15.

### **STIPULATIONS**

The stipulations are as follows:

1. This case involves one underground bituminous coal mine known as Coalburg No. 1 Mine, which is owned and operated by Newtown.
2. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1997 ("the Act").
3. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.
4. Newtown is an "operator" as defined in § 3(d) of the Act, 30 U.S.C. § 803(d), at the coal mine at which the citation at issue in this proceeding was issued.
5. The parties stipulate to the authenticity of the examination reports and inspector's notes, but not to the relevance or truth of the matters asserted therein.
6. Newtown's operations affect interstate commerce.
7. True copies of each citation at issue in this proceeding were served on Newtown or its agent as required by the Mine Act.
8. The citation contained in Exhibit A attached to the Secretary's petition [is an] authentic [copy] of the citation that is at issue in this proceeding with all appropriate modifications or abatements, if any.
9. The individual whose signature appears in Block 22 of the [citation] . . . was acting in [his] official capacity and as an authorized representative of the Secretary of Labor when the [citation was] issued.
10. The proposed penalty will not affect Newtown's ability to remain in business.
11. Newtown demonstrated good faith in abating the cited conditions.

12. The Violator Data Sheet contained in Exhibit A attached to the Secretary's petition accurately sets forth:

[A.] The size of Newtown, in production tons or hours worked per year,

[B.] The size in production tons or hours worked per year, of the coal or other mine at which the citation . . . at issue in this proceeding [was] issued,

[C.] The total number of assessed violations for the twenty-four (24) months preceding the month of the referenced citation . . . , and

[D.] The total number of inspection days for the twenty-four (24) months preceding the month of the referenced citation[.]

Jnt. Exh. 1.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
7276088	10/30/07	75.202(a)	\$12,900

The citation states in part:

The travelway being used to examine the first left panel unsealed worked-out areas was not supported or otherwise controlled to protect persons from hazards related to falls of the roof, or ribs [,] and coal or rock bursts. Numerous locations have rock fallen away from permanent roof supports that have made the bolts not effective at spads 2726 (34 bolts), 2767 (40 bolts), 2585 (4 bolts), and 2948 (5 bolts).

The operator endangered the areas off to travel.

Gov't. Exh. 3:

In pertinent part, section 75.202(a) requires "[t]he roof . . . of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards relating to falls of the roof."

Following the conclusion of the testimony, the submission of the evidence, and counsel's closing arguments, I delivered an oral bench decision. Pertinent parts of the decision follow. Editorial changes have been made for clarity's sake.

I stated:

The fundamental issue in this case is whether the company violated section 75.202(a), and I find that it did. The Commission has made clear that to prove a

violation of a standard, the Secretary must establish the operator acted other than in a way a reasonably prudent person would under the circumstances . . . I am persuaded that here a reasonably prudent operator would not have acted as Newtown did. I accept [the mine inspector's] description of the roof conditions[.] The inspector was forthright and he was credible. I have no doubt the conditions existed as he indicated on [the] citation and in his testimony. And this includes . . . [places] where the roof had fallen two to three feet above the roof bolt plates.

That the conditions found by the inspector were hazardous . . . is patently obvious . . . . The entire entry . . . itself was made hazardous by the defective bolts, especially where two feet to three feet of the roof was missing . . . . Further, the standard requires that miners work or travel in the affected area, and clearly this was the case. All of the witnesses agree that although [active] . . . mining had ceased on the first level panel, the second area was subject to a weekly examination. Thus, as Inspector Nelson found, one person, the weekly examiner, was subjected to the hazards inherent in the inadequately supported roof.

[T]he company recognized how hazardous it was for the examiner by using two senior management persons, Mr. Asebes and Mr. Harper, to conduct the examinations . . . . The fact that they could avoid traveling under the damaged bolts by staying to the right of the entry does not defeat the violation, because the evidence establishes that . . . roof sloughage . . . compromised the safety of the roof in the . . . crosscuts and across the entire entry. The evidence [also] establishe[s] that both Mr. Asebes and Mr. Harper, [the two senior management persons], walked the route traveled by [the mine inspector]. I [therefore find] that [the two senior management persons] . . . traveled under inadequately supported roof in violation of the standard.

I . . . [further] find the violation was significant and substantial. First, there was a violation of [the] standard. Second, the violation created a discrete safety hazard, the . . . danger that the cited areas of the roof would fall on the weekly examiner. Third, the hazard was reasonably likely to come to fruition. I must view the violation not only in terms of when it was cited, but also in terms of ongoing mining . . . . It is clear Newtown was awaiting the agency's approval to seal the first left panel. It had no apparent plans to move the evaluation point. [The] plans did not materialize until after the violation was cited. Thus, in terms of continuing mining, I find that . . . the weekly examinations would have brought the examiner under a seriously compromised roof. Making the situation even more dangerous is the fact that all of the witnesses agree and I find that roof conditions were deteriorating as time went on, a situation that subjected the examiner to an increasingly greater hazard. [T]he inspector rightly noted that the hazard could reasonably be expected to result in a fatal injury. Roof falls continue to be leading causes of death in the nation's underground coal mines.

The violation also was very serious. I evaluate its gravity not in terms of [if the hazard] was reasonably likely, but in terms of what [could have] happened if . . . [a roof fall] . . . occurred. And a roof fall under these circumstances [easily] could have seriously injured or killed an examiner. [S]o[,] with regard to the violation, its [S&S] nature and its gravity, I affirm the inspector in all respects.

However, I take issue with [the inspector's] negligence finding. It is clear to me that the company was caught in an unfortunate situation that was not entirely of its . . . making. Newtown was trying to get permission to seal the first left panel in the wake of two major disasters [at other mines] involving . . . seals. MSHA's resulting consideration of regulatory changes to . . . the standard involving seals and the agency[']s . . . [desire] to "get it right," led to delays in approvals to seal areas. The company had the misfortune of getting caught in [such a] delay. I credit Mr. Hartsog's testimony that he was genuinely surprised . . . how long it was taking to get the seals approved. [T]his [together] with the fact that . . . it would have been extremely impractical for the company to . . . [rehabilitate the roof, and] . . . testimony regarding the laborious nature of such work emphasized why the company did not seriously consider [that] option.

Rather, than try to change the evaluation point, the company waited for MSHA's approval to seal the area, and it coupled this with sending only highly experienced miners to conduct the weekly examination. It changed its examination procedure because it recognized the hazard. It used its judgment to address the danger.

As it turned out, the company's choice of a remedy did not meet the standard of care required, but given the situation in which [the company] found itself, . . . [its approach] was not . . . illogical[.] I conclude that the company's lack of care was more moderate than high, and I will modify the citation to reflect this conclusion. In [reaching] this conclusion, I . . . accept as entirely factual [the company's counsel's] observation that absolutely nothing in the record supports finding that the company's approach to the situation was financially motivated. Tr. 232-238.

#### **CIVIL PENALTY ASSESSMENT**

Having found the alleged violation exists, I must assess a civil penalty taking into account the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). I must consider the very serious nature of the violation, the company's moderate negligence, its good faith abatement, its size, as stipulated by the parties, and the fact that the penalty [will not] affect its ability to continue in business. I also will be especially mindful of the small applicable history of prior violations, which may well reflect [the MSHA inspector's] observation that management at the mine was good and cared about compliance. [Tr. 71.]

I stated at the hearing:

Given all of the civil penalty criteria, I assess the civil penalty at \$6,000[.]  
Tr. 239.

**ORDER**

Within 40 days of the date of this decision, the Secretary **IS ORDERED** to modify Citation No. 7276088 by reducing the negligence level from high to moderate. In addition, Newtown **IS ORDERED** to pay civil penalties totaling \$6,000 in satisfaction of the violation in question. Upon modification of the citation and payment of the penalty, this proceeding **IS DISMISSED**.

  
David R. Barbour  
Administrative Law Judge

Distribution: (Certified Mail)

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/sa

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19th STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-5267/FAX 303-844-5268

November 12, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-536
Petitioner,	:	A.C. No. 48-01034-175585
	:	
v.	:	
	:	Caballo Mine
CABALLO COAL COMPANY, LLC,	:	
Respondent.	:	

**DECISION**

Appearances: Ronald F. Paletta, Conference and Litigation Representative, Mine Safety and Health Administration, Price, Utah, for Petitioner;  
Duane Myers, Safety Manager, Caballo Mine, Gillette, Wyoming, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA") against Caballo Coal Company, LLC, 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").

Caballo Coal Company ("Caballo" or "Respondent") operates the Caballo Mine (the "mine"), a surface coal mine in Campbell County, Wyoming. This case involves one 104(a) citation issued at the mine. An evidentiary hearing was held in Gillette, Wyoming, and the parties introduced testimony and documentary evidence. For the reasons set forth below, I find that the Secretary established a technical violation of the safety standard, but that the violation was not significant and substantial.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On December 24, 2008, MSHA Inspector David Hamilton issued Citation No. 6686966 to Caballo for an alleged violation of section 77.205(d) of the Secretary's safety standards. The citation states that:

The regularly used travel way at the Main office for the Caballo Mine was not sanded, salted or cleared of snow and ice as soon as

practicable. For 150 feet on the East side and 150 feet on the South side of the Office Building the travel ways were covered with accumulations of at least one quarter inch of packed snow from foot traffic. Posing slipping and falling hazards.

(Ex. P-1). Inspector Hamilton determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial (“S&S”) and that 50 persons would be affected. Hamilton subsequently modified the citation to reflect that only one person would be affected. In addition, he found that the violation was the result of moderate negligence on the part of the operator.

Section 77.205(d) of the Secretary’s regulations requires that “[r]egularly used travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable.” 30 C.F.R. § 77.205(d). The Secretary proposes a penalty of \$634.00 for this citation.

#### **A. Background and Summary of Testimony**

David Hamilton has worked for MSHA for over three years and is currently a surface coal mine inspector. (Tr. 8). As a surface mine inspector, Hamilton spends approximately 230 to 240 days a year inspecting equipment, buildings, impoundments, and explosive storage, and checking for, among other things, imminent dangers and other hazards. (Tr. 9-10). Prior to joining MSHA, Hamilton worked in the mining industry for over 26 years and, in 1996, received his surface mine foreman certificate from the State of Wyoming. (Tr. 8-9).

On December 23, 2008, Inspector Hamilton traveled to the Caballo mine to begin conducting a required biannual inspection. (Tr. 10-11). During the inspection Hamilton was accompanied by Randy Milliron, a safety supervisor at the mine. (Tr. 11, 47). Hamilton testified that, at some point on the 23<sup>rd</sup>, he had a conversation with Milliron and Duane Myers, the mine’s safety manager. Milliron advised the inspector that there had been an accident at the North Antelope Rochelle Mine in which a miner had slipped and fallen on ice.<sup>1</sup> (Tr. 11). Hamilton testified that, during the conversation, Myers stated that he was planning to send an internal email to the supervisors at the Caballo mine asking them to clean all of the walkways, travelways, and sidewalks so that a similar accident would not occur at the Caballo mine. (Tr. 11-12). Hamilton stated that, as he left the mine on the 23<sup>rd</sup>, the outside temperature was at or near zero degrees Fahrenheit and there was ½ inch of snow on the ground. (Tr. 12-13). While he was concerned about the snow accumulations on the sidewalks, Hamilton believed that Myers and Milliron had the situation under control. (Tr. 12).

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<sup>1</sup> The Caballo mine and the North Antelope Rochelle Mine are both owned by Peabody Energy.

At 8:30 a.m. on December 24, 2008, Inspector Hamilton returned to the Caballo mine to resume the inspection. (Tr. 13). During the course of the inspection, Hamilton took a series of 14 photographs which, according to him, represented the condition of the exterior walkway as it appeared at the time. (Tr. 19-25; Ex. P-2). Upon arrival, he noted that an additional eighth of an inch of snow had fallen over night and the parking lot area had been sanded. (Tr. 13, 17). Hamilton testified that further examination revealed that none of the sidewalks had been shoveled or otherwise cleaned; that the snow on the walkways was becoming packed down by people walking on it, and that, with one exception, all of the salt canisters located at the entrances and exits to the buildings had snow on top of them, which indicated to him that the canisters had not been opened since the snow began to fall. (Tr. 13; Ex. P-2). Salt had been thrown on the ground near the one exterior door. (Tr. 21; Ex. P-2, Photo 4). Hamilton testified that, while attempting to find Myers in one of the buildings, he encountered Walt Mayo, a Caballo employee, who told Hamilton that he was "stepping up" while Myers was in a meeting with mine management. (Tr. 14). Mayo accompanied Hamilton while he examined the remaining travelways and entrances/exits around the perimeter of the buildings. (Tr. 14). In addition to the snow on the travelways, Hamilton specifically noted "at least an inch" of ice that had formed on the step and the grating at the main entrance to the building. (Tr. 14-15, 23-24; Ex. P2, Photo 11). Hamilton testified that Mayo told him the ice was created by snow melt dripping off of a light above the entrance and re-freezing on the step. (Tr. 15). According to Hamilton, Mayo told him this had been a problem for quite a while. (Tr. 15). Hamilton observed additional areas where scuff marks in the snow on the travelways indicated to him that individuals had slipped while walking on the travelways. (Tr. 21-22; Ex. P-2, Photos 5& 7). Finally, Hamilton noted a mixture of ice and dirt that had formed inside and on top of the metal grating in front of an exterior door. (Tr. 22; Ex. P-2, Photo 5). Hamilton explained his concerns to Mayo and, based on the conditions observed, issued Citation No. 6686966 under section 104(a) for a violation of section 77.205(d). (Tr. 15-16).

Hamilton told Mayo that the travelways needed to be cleared before anyone else walked on them. (Tr. 14). Mayo instructed a number of mechanics, plant technicians, and truck drivers to clean the walkways. (Tr. 26). Hamilton terminated the citation after the employees abated the violation by shoveling and salting the travelways, at which point he took a set of post abatement photos. (Tr. 25-27; Ex. P-3).

Hamilton determined that an injury was reasonably likely to occur based on his observation that (1) the snow that had built up on the travelways had been packed down, (2) there were marks in the snow that indicated sliding or slipping, and (3) his knowledge that an accident involving a slip-and-fall had recently occurred at the North Antelope Rochelle Mine. (Tr. 17). However, Hamilton testified on cross-examination that he was not positive what type of injury was sustained, or what the conditions were, at the other mine. (Tr. 28). Hamilton testified that an injury could reasonably be expected to result in lost workdays or restricted duty since such accidents generally result in sprains, bruises, concussions, and broken bones, which "in [his] opinion would at least end up in restricted duty, and most likely lost work days, but . . . would [not] be permanently disabling." (Tr. 17). He initially determined that 50 persons would be

affected by the conditions,<sup>2</sup> but later modified the citation to one person affected since he could reasonably only expect one person to slip at a time. (Tr. 16-17). Hamilton testified that he did not issue the citation as an imminent danger because he did not see anyone standing in the cited areas at the time he issued the citation. (Tr. 30).

Hamilton determined that the violation was the result of the company's moderate negligence based on the fact that at least some effort had been made to address the conditions, i.e., the parking lot had been sanded and salt had been thrown in front of one door. (Tr. 18). He felt that the violation was the result of more than low negligence because there were still 300 feet of travelways around the buildings that had not been touched. (Tr. 18).

Walt Mayo, an hourly employee who worked as a plant maintenance technician at the mine, testified that, based on his hazard recognition training, he did not believe that the cited conditions were a hazard since "there was not enough snow . . . [and] [i]t wasn't slick." (Tr. 36-37, 39). He had not slipped on the snow, nor had he heard of anyone else slipping on it. (Tr. 39). Mayo testified that, while Hamilton told him the condition was citable, Hamilton did not issue the citation prior to it being abated. (Tr. 38). Mayo stated that the scuff marks noted by Inspector Hamilton were not from slipping but were caused by coveralls dragging behind the boots that created the footprints in the snow. (Tr. 40-41; Ex. R-1, Photo 8). Mayo testified that the employees had recently been issued new coveralls that were too long and would drag behind the miner's boots. (Tr. 40-41). Mayo noted that the texture of the ground under the snow was very rough and the ice which had built up near the main entrance was not on the tread, i.e., upward facing part of the step, but rather, was on the rise, i.e., outward facing part of the step. (Tr. 42; Ex. R-1, Photos 2 and 4). Mayo does not remember telling the inspector that ice on the front step had been a problem for "some time." (Tr. 42.). Mayo testified that it was below freezing on both the 23<sup>rd</sup> and 24<sup>th</sup>, and the snow that was on the ground was very dry and powdery. (Tr. 43, 45).

Duane Myers, the safety and training manager at the mine, testified that he was at the mine on both the 23<sup>rd</sup> and 24<sup>th</sup>. (Tr. 47). According to Myers the high temperature on the 23<sup>rd</sup> was four degrees Fahrenheit, while on the 24<sup>th</sup> the high temperature was twenty six degrees Fahrenheit. (Tr. 48). On the morning of the 24<sup>th</sup> it was sunny and cold before warming up in the afternoon. (Tr. 48). Myers testified that he was in a safety meeting on the 24<sup>th</sup> and did not get out of the meeting until after abatement of the citation had begun. (Tr. 52-53). It was his belief that the conditions did not constitute a violation because the snow was very light and it was mostly sitting on top of rough asphalt, which increased the traction on the surface. (Tr. 48, 53). He opined that it was unlikely for a slip-and-fall to occur and, as a result, the violation should not be S&S. (Tr. 54-55). According to Myers, the snow was so light that it was difficult to shovel and, even with ice melt on top of it, very little moisture was coming out of the snow. (Tr. 49-50, 53). Myers testified that the ice alleged to be on the step at the front entrance was to the side of

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<sup>2</sup>Hamilton based this finding on a conversation he had Myers and Mayo during which he learned that at least 50 people walked the travelways twice per shift. (Tr. 16-17)

the front door, and not in front of it. (Tr. 51). As a result, the likelihood of someone stepping on the ice was very remote. (Tr. 51; Ex. R-1, Photo 2). Myers stated that the one area that had been salted was the main entrance for the hourly employees. (Tr. 51-52; Ex. R-1, Photo 6). Myers testified that the ice and dirt mixture in the grate near the exterior door that had been noted by Hamilton was not dangerous because the dirt provided traction and the frozen mix was below the surface of the grate. (Tr. 58; Ex. R-1, Photo 7). Further, the scuff marks in the snow were the result of the miners' coveralls dragging behind their boots. (Tr. 52; Ex. R1, Photo 8). He argued that if miners had been slipping, there would not have been clear boot sole imprints in the snow, which there were. *Id.* Additional photos taken by Caballo after the Christmas holiday show the rough asphalt that was under the snow at the time of the citation. (Tr. 49, 51; Ex. R-2, Photos 2-8). Myers testified that all mine employees are trained in how to identify and correct hazards. (Tr. 56).

### **B. The Violation**

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

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

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

There is little dispute regarding the relevant facts as to whether a violation of the cited standard occurred. The cited safety standard requires that “[r]egularly used travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable.” 30 C.F.R. § 77.205(d). It is not disputed that miners regularly travel the subject walkways, or that the walkways are travelways as contemplated by the cited standard. Indeed, the pre-abatement pictures provided by both parties show multiple footprints in the snow which indicate that heavy foot traffic is quite common on these walkways. (Ex. P-2; Ex. R1, pp. 2-9). Further, there can be no debate that snow existed on these walkways. I credit Inspector Hamilton’s testimony that approximately 5/8ths of an inch of snow had fallen, i.e., there was ½ inch of snow on the ground on the 23<sup>rd</sup> and an additional 1/8th inch of snow fell overnight before Hamilton arrived on the 24<sup>th</sup>. Respondent takes issue with whether there was “enough” snow on the ground to create a hazard. The cited

section of the Secretary's regulations does not require a certain amount of snow to be present before it needs to be sanded, salted or cleared. Rather, the language requires only that snow and ice be sanded, salted, or cleared "as soon as practicable."

The issue of what constitutes "as soon as practicable" is not entirely clear. "As soon as practicable" is not defined in the Secretary's regulations. The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. 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). The dictionary defines "practicable" as "possible to practice or perform: FEASIBLE." *Webster's New Collegiate Dictionary* 895 (1979). Relying on such, a reasonable interpretation of the cited standard would require that snow and ice be sanded, salted, or cleared as soon as possible.

While neither the Commission nor its judges have addressed what "as soon as practicable" means in the context of the standard at issue, they have addressed this language in an identical standard for surface metal/non-metal mines.<sup>3</sup> In *Hanna Mining Co.*, the Commission upheld an administrative law judge's finding that, while the judge did not know exactly how long an accumulation of ice existed, he could infer that it had existed for some time and had not been removed "as soon as practicable" based on the particular cause of the condition, i.e., water dripping/spraying from a pipe, and the fact that more than three hours had elapsed since the beginning of the work shift. 3 FMSHRC 2045, 2049 (Sept. 1981). Commission administrative law judges have also addressed this similar standard. In *N.L. Industries, Inc.*, a judge found that an accumulation of six inches of snow and ice was not cleared as "as soon as practicable" when it had been present on a walkway for three days. 2 FMSHRC 3040, 3044 (Oct. 1980) (ALJ). In *Spencer Quarries Inc.*, I found that an operator had salted its walkway "as soon as practicable" when, on the morning after a day in which the mine was closed, salt was applied to the snow-covered walkway at the start of the shift. 32 FMSHRC 644, 646-647 (June 2010) (ALJ).

It is clear that snow, albeit very little, was present on the cited travelways on both December 23<sup>rd</sup> and 24<sup>th</sup>. Salt canisters were readily available along the exterior of the buildings. No evidence has been offered to show that any effort was made to sand, salt or clear the snow prior to Inspector Hamilton instructing Mayo to do so. I credit Inspector Hamilton and find that the snow which had accumulated on top of the salt canisters was evidence that the canisters had not been opened and that, with one exception, salt from those canisters had not been used on the cited travelways. The multiple footprints seen in the photos provided by both parties indicate that a number of people had traversed the walkways in the time since the snow had stopped falling. I find it highly unlikely that it was "impossible" or "not feasible" for any of the individuals who created such footprints to reach into the provided salt containers, grab some salt, and spread it along the travelways. In finding that cited areas had not been sanded, salted or cleared "as soon as practicable," I rely in part on the fact that at least one individual found time to spread salt on the travelway near one of the exterior doors. Clearly it was practicable to do so,

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<sup>3</sup>The current surface metal/non-metal standard is located at 30 C.F.R. § 56.11016.

yet it had not been done. Light, dry snow can be easily removed from walking surfaces with a broom. For the above reasons, I find that a technical violation of section 77.205(d) did occur.

### **C. Significant and Substantial, Gravity and Negligence**

At the outset of this analysis I note that snow is an extremely common occurrence in the region where this mine is located. The cited standard does not differentiate between trace amounts of snow, as were present in this instance, and amounts which could reasonably pose a hazard. I credit the testimony of Mr. Mayo that the snow was dry and powdery so that it contained very little moisture. For reasons that follow, I find that the violation discussed above was not S&S and that the gravity was very low.

An S&S violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in

accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

As discussed above, I find that a violation of the cited mandatory safety standard did occur. Further, I find that a discrete safety hazard contributed to by the violation did exist, i.e., the danger of injuries caused by a slip-and-fall accident on the accumulated snow and ice. However, I find that the Secretary has not met her burden with regard to the third element of the *Mathies* formula. The evidence indicates that the accumulated snow and ice were not extensive. The snow was dry and powdery, which means that it was not particularly slippery at low temperatures. Further, the surface of the travelways was level and the rough nature of the ground underneath the snow provided substantial traction such that a slip-and-fall, while possible, was not reasonably likely to occur. I do not credit the testimony of Inspector Hamilton that the scuff marks he observed in the tracks on the travelways indicated that someone had slipped in the snow. The inspector did not demonstrate any expertise in the interpretation of footprints in snow. It is more likely that the scuff marks behind the footprints were caused by coveralls that were dragging in the snow. The miner or miners who left those tracks could also have simply been dragging their feet.

With regard to the ice near the main entrance, I credit the testimony of Mayo and find that the ice on the step was at the very edge of the step and mostly on the rise, i.e., non-walking surface, of the step. The light above the main entrance was attached to a vertical surface that was directly above and along the same plane as the rise of the step. Given the location of the ice on the non-walking surface of the step, I find it unlikely that an individual would slip on the ice and, in turn, very unlikely that any slip would result in an injury. Finally, I credit the testimony of Myers and find that the ice and dirt mixture that had accumulated in the grating near the back entrance did not present a hazard that could reasonably be expected to result in an injury. Ex. R-1, Photo 7. Myers explained that the mixture had accumulated in the grating as miners used the grating to scrape the mud off of the bottom of their boots. The dirt in the mixture provided traction such that a slip-and-fall was unlikely to occur. For the above reasons, I find that the violation was not S&S. In addition, I find that the gravity should be modified to reflect that an injury or illness was unlikely.

I further find that Caballo's negligence was moderate. The violation did not create a hazard to employees. Dry, light snow is quite common in Wyoming. Caballo's management and

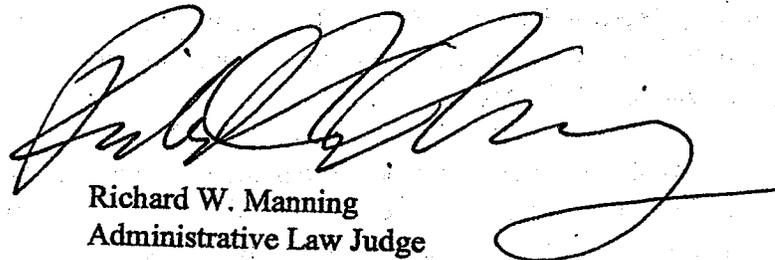
its miners genuinely believed that the cited condition did not create a hazard and did not violate the safety standard. Nevertheless, Myers advised the inspector on December 23, following their discussion of the accident at the North Antelope Rochelle Mine, that the snow would be removed. Caballo's failure to remove or apply salt to the snow and ice demonstrated a lack of reasonable care.

## II . APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Caballo had 36 paid violations at this facility during the two years preceding December 24, 2008. (Ex. P-4). Three of these violations were S&S. Caballo produced 31,172,396 tons of coal in 2008. Caballo Coal Company, Inc. is a large operator. The penalty assessed in this decision will not affect the operator's ability to continue in business. The violation was abated in good faith. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that a penalty of \$100.00 is appropriate.

## III. ORDER

For the reasons set forth above, Citation No. 6686966 is **MODIFIED** to delete the S&S determination and to reduce the gravity to "unlikely." Caballo Coal Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$100.00 within 30 days of the date of this decision.<sup>4</sup>



Richard W. Manning  
Administrative Law Judge

### Distribution:

Ronald F. Paletta, Conference and Litigation Representative, Mine Safety and Health Administration, 45 East 1375 South, Price, UT 84501 (Certified Mail)

Duane Myers, Caballo Coal Company, 2298 Bishop Road, Caller Box 3401, Gillette, WY 82717-3041 (Certified Mail)

RWM

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<sup>4</sup>Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19th STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-5267/FAX 303-844-5268

November 17, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-523
Petitioner	:	A.C. No. 11-03143-187455
	:	Mine: Prairie Eagle
	:	
	:	Docket No. LAKE 2009-501
v.	:	A.C. No. 11-03162-184600
	:	Mine: Royal Falcon Mine
	:	
	:	Docket No. LAKE 2009-438
KNIGHT HAWK COAL, LLC	:	A.C. No. 11-03143-181532
Respondent	:	Mine: Prairie Eagle

**DECISION**

Appearances: Matthew Linton, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for the Petitioner  
Mark Heath, Spilman Thomas & Battle, PLLC, Charleston, West Virginia for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Knight Hawk Coal, LLC., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve the three dockets listed above, containing a total of nine violations, all of which settled at the time of the hearing. The total penalty assessed for the dockets is \$31,402.00. The citations were issued by MSHA under section 104(a) of the Mine Act at the Prairie Eagle mine and at the Royal Eagle Mine. The parties presented the settlement proposal at the hearing held on October 26, 2010 in Evansville, Indiana.

Knight Hawk Coal, LLC, (“Knight Hawk”) is the owner and operator of the Prairie Eagle Mine and the Royal Falcon Mine. The mine agrees that it is subject to the jurisdiction of the Mine Safety and Health Administration and the Administrative Law Judge has jurisdiction to issue this decision. (Tr. 5). In March and April of 2009 MSHA inspectors conducted a regular

inspection of the Prairie Eagle Mine and the Royal Falcon Mine. As a result of the inspection, the citations contested herein were issued.

Docket No. Lake 2009-438: Prairie Eagle Mine

The parties reached an agreement and entered the following stipulation on the record. The originally proposed assessment amount for the docket is \$724.00.

Citation No. 6679874: the parties agree that no modification is made to the citation but the Secretary has agreed to modify the penalty from \$362.00 to \$308.00.

Citation No. 6679875: the parties agree that no modification is made to the citation but the Secretary has agreed to modify the penalty from \$362.00 to \$308.00.

Docket Lake 2009-501: Royal Eagle Mine

The originally proposed assessment amount for the docket is \$1,333.00.

Citation No. 6680512: the parties agree that no modification is made to the citation but the Secretary has agreed to modify the penalty from \$1,026.00 to \$872.00.

Citation No. 6680515: the parties agree that no modification is made to the citation but the Secretary has agreed to modify the penalty from \$207.00 to \$176.00.

Citation No. 6680516: the parties agree that no modification is made to the citation and the Respondent agrees to pay an amended penalty of 2,276.00.<sup>1</sup>

Docket No. Lake 2009-523: Prairie Eagle Mine

The originally proposed assessment amount for the docket is \$26,767.00

Citation No. 8417042: the parties agree that no modification is made to the citation but the Secretary has agreed to modify the penalty from \$9,882.00 to \$2,470.00.

Citation No. 8417043: the Secretary agrees to reduce the violation to non S&S to modify it to "unlikely" and reduce the original penalty of \$8,893 to \$800.00.

Citation No. 8417044: the parties agree that no modification is made to the citation but the Secretary has agreed to modify the penalty from \$3,996.00 to \$3,000.

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<sup>1</sup>This file originally contained citation No. 6680514 and not 6680516. Citation No. 6680514 has been paid and, instead, the docket has been amended to include Citation No. 6680516.

Citation No. 8417045: the Secretary agrees to reduce the violation to non S&S and reduce the proposed penalty from \$3,996.00 to \$500.00.

### PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

30 U.S.C. § 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history of each mine is typical for a mine of its size. The size of the operator is small. I accept the Secretary's proposed modification of the penalties based upon the information presented regarding the reduced negligence for the citations as discussed above. Further, I find that the Secretary has established the gravity as described in the citation or as modified and assess the following penalties as agreed by the parties:

Docket No. Lake 2009-418:

Citation No. 6679874	\$308.00
Citation No. 6679875	\$308.00.

Docket Lake 2009-501:

Citation No. 6680512	\$872.00
Citation No. 6680515	\$176.00.
Citation No. 6680516	\$2,276.00

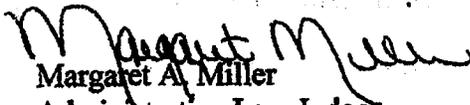
Docket No. LAKE 2009-523:

Citation No. 8417042	\$2,470.00
Citation No. 8417043	\$800.00
Citation No. 8417044	\$3,000.00
Citation No 8417045	\$500.00

Total for all of the dockets: \$10,710.00.

### ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of \$10,710.00 and Knight Hawk Coal, LLC, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$10,710.00 within 30 days of the date of this decision.

  
Margaret A. Miller  
Administrative Law Judge

**Distribution:**

Matthew Linton, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway  
Suite 800, Denver, CO 80202-5708

Mark Heath, Spilman Thomas & Battle, PLLC, P.O. Box 273, Charleston,  
WV 25321-0273

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 New Jersey Avenue, NW, Suite 9500  
Washington, DC 20001-2021

November 18, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2008-438-M
Petitioner	:	A.C. No. 13-02285-145467
	:	
	:	Docket No. CENT 2008-565-M
v.	:	A.C. No. 13-02285-149527-01
	:	
	:	Docket No. CENT 2008-785-M
	:	A.C. No. 13-02285-162467
JEPPESEN GRAVEL,	:	
Respondent	:	Mine: Jeppesen Pits

**DECISION**

Appearances: Jamison Poindexter Milford, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, on behalf of the Petitioner;  
Jay A. Jeppesen, Sibley, Iowa, *pro se*.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (“Act”), charging Jeppesen Gravel (Jeppesen) with violations of mandatory standards and proposing civil penalties for those violations.<sup>1</sup> The general issue before me is whether Jeppesen violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110 of the Act. Additional specific issues are addressed as noted.

Jeppesen Gravel is the sole proprietorship of Jay Jeppesen. His business primarily involves excavation, tree removal, demolition and the haulage of fill dirt and gravel. The record shows that during 2007, the calendar year at issue, he devoted only six hours to mining. At the initial hearings on August 25, 2009, Mr. Jeppesen stipulated to the violations charged in the citations and orders at issue herein. He further stipulated to the gravity, “significant and substantial”, negligence and “unwarrantable failure” findings made therein. At hearings, Mr. Jeppesen also stated that he was, as a preliminary matter, first challenging the Secretary’s jurisdiction under the Act to cite the

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<sup>1</sup> A motion for partial settlement of a number of citations was submitted before hearings in which an 80% across-the-board reduction in penalties was approved based solely on the financial condition of the operator.

Caterpillar front end loader at issue. Alternatively, assuming that the Secretary has jurisdiction under the Act, he was challenging the amount of civil penalties proposed by the Secretary for these violations. In particular, he maintained that the proposed penalties for the five violations remaining at issue will effectively bankrupt him.<sup>2</sup>

Following the initial hearings and reviewing the evidence of record, it was apparent that additional evidence was necessary to determine whether all of the proffered stipulations were supported by evidence. In particular, it appeared that the unrepresented Respondent did not fully comprehend the complex legal concepts of "significant and substantial" and "unwarrantable failure." Accordingly, subsequent hearings were held to permit additional evidence limited to the issues of whether the violations were "significant and substantial" and whether the violation charged in Order No. 7840434 was the result of Respondent's "unwarrantable failure."

### *Jurisdiction*

As noted, Respondent maintains that the Caterpillar model 966C front end loader cited in each of the charging documents at issue was not subject to the Secretary's jurisdiction as not within the scope of the Act. However, under Section 3(h)(1) of the Act, "coal or other mine" means (A) an area of land from which minerals are extracted in non-liquid form and ....(B) private ways and roads appurtenant to such area, and (C)...equipment, [or] machines...used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in non-liquid form...."

Based on the undisputed allegations in the charging documents at bar as well as the corroborated testimony of Inspectors Jeffrey Hornback, James Hines, and William Owen of the Department of Labor's Mine Safety and Health Administration ("MSHA"), it is clear that the cited 966C front end loader was being used at the time of the issuance of these charging documents in a private way and/or road appurtenant to the area where a mineral (gravel) was extracted. It was loading processed gravel from the gravel stockpile into dump trucks for removal from the mine (Exhibit R-7). The front end loader was also "equipment" or a "machine" performing a function (loading) that resulted from the work of extracting a mineral. Respondent does not dispute that the cited loader was used in this manner and was located in the position depicted on Exhibit R-7 as "loader." Within this framework of evidence and law it is clear that the cited loader was being used in an area and in a manner bringing it within the scope of the Act. Accordingly, Respondent's claim that the Secretary lacked jurisdiction is denied.

In reaching this conclusion I have not disregarded Mr. Jeppesen's argument that he can, in essence, carve out or segregate his loading activities from his other operations. However the Commission specifically rejected such an approach in *Mineral Coal Sales, Inc.*, 7 FMSHRC 615 at

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<sup>2</sup> These penalties were proposed by the Secretary in accordance with the mandatory minimum penalties prescribed by the 2006 Miner Act for "Section 104(d)" citations and orders. See Section 110(a)(3) of the Act.

620-21 (May 1985) in which it held that:

In examining the “nature of the operation” performing work activities listed in section 3(i), [of the Act], the operations taking place at a single site must be viewed as a collective whole. Otherwise, facilities could avoid Mine Act coverage simply by adopting separate business identities along functional lines, with each performing only some part of what, in reality, is one operation. This approach is particularly appropriate in the present case in view of the pervasive intermingling of personnel and functions among entities that sporadically operated at the facility, with little or no apparent regard for business or contractual formalities.

Within this framework of law I conclude that Jeppesen cannot carve out from the Secretary’s jurisdiction under the Act his act of loading, with his own front end loader, his stockpiled gravel next to his processing plant into trucks for transport and sale. It is an integral part of his overall mining operation.

#### *Alleged Violations*

Citation Number 6198325, issued September 24, 2007, pursuant to Section 104(d)(1) of the Act alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.14130 (h) and charges that the violation was the result of “reckless disregard” negligence.<sup>3</sup> The citation charges

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<sup>3</sup> Section 104(d) of the Act provides as follows:

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

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued

as follows:

The seat belt was not properly installed on the Cat 966 C front end loader S/N 76J3644. The seat belt order cited; date 08/24/2006 # 6181901 was abated for the front end loader being removed from the mine property. When the citation was terminated the mine operator was informed in writing by registered mail that the violation still existed but was being terminated because of the equipments removal from that mine site. Further, the operator was informed that they were required to repair the seat belt prior to working the machine at the mine site. The co-owner stated that this is the only loader they own and that there is [sic] no moneys available to repair or replace the machine. By returning this loader to the mine site and loading trucks from the stockpiles, the mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R. § 56.14130(h), provides as follows:

*Seat belts construction.* Seat belts required under this section shall meet the requirement of SAE J386, "Operator Restraint System for Off-Road Work Machines" (1985, 1993, or 1997), or SAE J1194, "Roll-Over Protective Structures (ROPS) for Wheeled Agricultural Tractors" (1983, 1989, 1994, or 1999), as applicable, which are incorporated by reference.

SAE J386 "Operator Restraint System for off-Road Work Machines" June 1985 provides at section 5.2.5 that "there must be no rupture release or other failure of any element in the operator's restraint system...."

MSHA Inspector Jeffrey Hornback testified that he issued the subject citation on September 24, 2007 when he observed that the safety belt on the cited CAT 966C front-end loader was improperly installed. According to Hornback, the retractor spring was broken outside of its housing and would not permit the seatbelt to pull freely from the retractor. As a result, the seatbelt would not pull up to latch.

The Secretary alleges that the violation was "significant and substantial". A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that

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pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provision of paragraph (1) shall again be applicable to that mine.

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 hazard contributed to will result in injury and (4) 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'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), 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); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In this regard, Inspector Hornback opined that, without an operable seatbelt, there was a reasonable likelihood that the operator would fall out of the cab and be injured. He noted that MSHA's statistics demonstrate that not wearing a seatbelt has resulted in many fatalities throughout the mining industry. More particularly, the inspector testified that if you are operating the loader on uneven ground traveling roadways that are not paved and not wearing a seatbelt, you could reasonably expect the operator could be injured during a roll over situation. He noted in this regard that the mine surface was not level and there were dips and valleys and a large ditch on the property. Hornback noted that when the loader operator is ejected, he is not thrown beyond the cab structure and thereby gets crushed by the loader. Within this framework of evidence, I conclude that, indeed, without an operable seatbelt, the loader operator was reasonably likely to be ejected from the cab of the loader and suffer serious if not fatal injuries. The violation was therefore "significant and substantial" and of high gravity.

In reaching this conclusion, I have not disregarded Mr. Jeppesen's testimony that on the date the citation was issued, September 24, 2007, the cited loader was being used only to load trucks from the stockpile. Jeppesen claims that at that time, the loader was not being driven up the feed ramp. While the loader was nevertheless available to drive up the feed ramp and since other hazards such as the uneven ground existed, it is clear that the violation charged herein was, under all the circumstances, "significant and substantial" and of high gravity.

The violation was also found to have been the result of Jeppesen's "unwarrantable failure"

and high negligence. Unwarrantable failure is “aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991). See also *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7<sup>th</sup> Cir. 1995) (approving Commission’s unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. See *Youghioghery & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Considering the prior citations and warnings issued to mine owner himself, the violation herein was clearly the result of his unwarrantable failure and high negligence.

Order Number 6198326, also issued on September 24, 2007, pursuant to Section 104(d)(1) of the Act, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.14130(a) and charges that the violation was the result of “reckless disregard” negligence. The order charges as follows:

Roll Over Protection was not provided Cat 966 C front end loader s/n 76J3644. The ROPS order cited; date 08/24/2006 # 6181902 was abated for the front end loader being removed from the mine property. When the citation was terminated the mine operator was informed in writing by registered mail that the violation still existed but was being terminated because of the equipments[sic] removal from that mine site. Futher[sic], the operator was informed that they were required provide Rops structure meeting all the requirements of this standard prior to working the machine at the mine site. The co-owner stated that this is the only loader they own and that there is [sic] no moneys available to repair or replace the machine. By returning this loader to the mine site and loading trucks from stockpiles, the mine operator has egaged [sic] in aggravated conduct constituting more than ordinary negligence.

This violation is an unwarrentable[sic] failure to comply with a mandatory standard.

The cited standard, 30 C.F.R. § 14130(a) provides, in relevant part, as follows: “(a) *Equipment included.* Roll-over protective structures (ROPS) and seat belts shall be installed on....(3) wheel loaders and wheel tractors....

According to Inspector Hornback, there was no “manufactured roll over protective structure” provided on the cited loader. The inspector acknowledged that there was a steel cab structure on top

of the cited loader, but that it did not have a "certification" from the manufacturer. Hornback further acknowledged that he could not testify regarding the level of protection provided by the existing cab and that a structural engineer would be required to make that determination. Thus, while it is clear that the cab on the cited loader did not have the proper manufacturer's certification, I find that there was insufficient credible evidence presented by the Secretary to show what level of protection the cab did in fact provide. Without such information, it cannot be determined whether the violation was indeed "significant and substantial." Accordingly, the violation is affirmed without "significant and substantial" findings. For the same reasons I find that the Secretary has not sustained her burden of proving a high level of gravity with regard to this violation. Order Number 6198326 must accordingly be modified to a citation under section 104(a) of the Act. However, because of the existence of prior charges and notice to the operator regarding the same violation on the same loader, I find the operator chargeable with high negligence.

Order Number 6198899 issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(h) and charges that the violation was the result of "reckless disregard" negligence. The order charges as follows:

The seat-belt remains inoperable on the Caterpillar 966c front end loader serial #76J3644. On 08/24/2006 Citation #6181901 which addressed the inoperable seat-belt was terminated when the loader was removed from the mine site. On 09/24/2007 Citation #6198325 was issued when again the loader was brought to the mine site and again the seat-belt was inoperable and again terminated upon removal of the loader from the mine site. In both of these cases, upon termination, the mine operator was informed in writing that return of this loader to the mine site without repair of the cited condition could constitute a higher than ordinary negligence. On 11/15/2007 the loader was again found on mine property with evidence showing it to have recently ran [sic] and it again being the only loader on site to be used for truck and material loading. By again returning this loader to the mine site without repairing the cited condition, the mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with the mandatory standard.

The loader may not be operated on the mine site until the cited condtion [sic] has been repaired and the order lifted by an authorized representitve [sic] of MSHA.

MSHA Inspector James Hines issued this order on November 15, 2007 when he found that the seatbelt remained inoperable on the cited CAT 966-C loader. Hines testified that he tried to pull the seatbelt out but could not. The spring remained in a ball on the side of the seat and you could not move the seatbelt. (Gov. Ex.17). This is the same condition that had previously been reported. Hines followed the loader's tracks which showed the movement of the loader from the bank where the raw materials (sand and gravel) were removed. (Gov. Ex.18). The tire tracks from the loader were also observed between the processed material to the truck loading site. The tracks also indicated that the loader operated on a roadway passing an unbermed drainage ditch. The violation is clearly proven

as charged.

The Secretary also alleges that this violation was “significant and substantial.” Inspector Hines observed that the loader had been working on uneven ground and near drop-offs and that should the loader overtravel, it could roll the large machine over. Hines also noted that there were no berms on the feed ramps and as the loader proceeds up the ramp to feed materials into the plant, the loader has to raise its bucket. As the bucket is lifted, the loader becomes more unstable and without a berm on the side of the feed ramps, it would be more likely to roll over. Hines opined that based on his experience, there was a reasonable likelihood that the operator would fall or be thrown out of the loader and sustain fatal injuries. Within this framework of evidence, it is clear that the Secretary has met her burden of proving that the violation was “significant and substantial” and of high gravity.

The Secretary also argues that the violation was the result of the Respondent’s “unwarrantable failure” and high negligence. There were two violations for inoperable seatbelts on the subject loader, on August 24, 2006 and September 24, 2007. Jeppesen nevertheless continued to resume operation of the loader without an operable seatbelt. The violation herein was therefore clearly the result of unwarrantable failure and intentional misconduct.

Order Number 6198900, issued on November 15, 2007, pursuant to Section 104(d)(2) of the Act, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.14130(a) and charges that the violation was the result of “reckless disregard” negligence. The order charges as follows:

Roll over protection has not yet been provided for the Caterpillar 966C front end loader Serial # 76J3644. This lack of ROPs was cited on 08/24/2006 and was terminated when the loader was removed from the mine site. On 09/24/2007 Citation #6198326 was issued when again the loader was brought to the mine site and again the ROPs system was not provided and again terminated upon removal of the loader from the mine site. In both of these cases, upon termination, the mine operator was informed in writing that return of this loader to the mine site without repair of the cited condition could constitute a higher than ordinary negligence. On 11/15/2007 the loader was again found on mine property with evidence showing it to have recently ran [sic] and it again being the only loader on site to be used for truck and material loading. By again returning this loader to the mine site without repairing the cited condition, the mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The loader may not be operated on the mine site until the cited condtion[sic] has been repaired and the order lifted by an authorized representitve[sic] of MSHA.

During his inspection on November 15, 2007, Inspector Hines also observed that the cited

966 loader did not have what he asserted was a roll over protection system. He concluded that it did not have "roll-over protection" because a roll-over protection system is a "fairly massive steel structure." The steel cab on the cited loader was, in Hines' opinion, simply to protect the operator from the dust, noise, rain and snow. Hines did not however test the existing structure in any way to see what level of protection it might have provided in a roll-over situation. It is also noted that Inspector Hornback had previously testified that it would be necessary for a structural engineer to test the cab to make such a determination. Since it is not disputed that Respondent violated the cited standard, I find that there was a violation. However, without testing of the existing structure, it is not ascertainable what level of protection it did provide in the event of a rollover. Without such evidence, I cannot find that the Secretary has met her burden of proving that the violation was "significant and substantial" or of high gravity. Order No. 6198900 must accordingly be modified to a citation under section 104(a) of the Act.

I do find however that the violation was a result of gross intentional misconduct. The Secretary has shown that the same equipment on two prior occasions had been operated and cited for not having certified rollover protection.

Order Number 7840434, also issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(g) and charges that the violation was the result of "reckless disregard" negligence. The order charges as follows:

The loader operator observed operating the Caterpillar 966C front end loader was not wearing a seat belt. The loader was under a 104d2 order at this time for lack of a working seat belt and at the time of this issuance the seat belt remains inoperable. The loader is used to load trucks as well as travel unbermed areas including a feed ramp approx. 5 foot in height. In addition, when cited, the left cab door was open increasing the level of danger to this operator and the likelihood of injury. These conditions expose this miner to the hazard of possibly over turning the loader or being thrown from the cab and being over traveled by this large machine.

The mine operator had knowledge of the inoperable seat belt and both citations and orders have been written to him requiring the correction of this dangerous condition. Currently the loader is under a 104d2 order and the operator aware the machine should not be ran [sic] (Order #6198899) until the seat belt is repaired. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence knowing the seat belt remains inoperable and the loader continues to be used on site.

The cited standard, 30 C.F.R. § 56.14130(g), provides, "(g) Wearing seat belts. Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt."

Inspector Hines issued this order on May 5, 2008 when he observed an individual operating the cited loader and not wearing a seatbelt. The loader operator was actually in the process of loading from the stockpile onto a truck. The door to the loader was latched opened and Hines had a clear

view of the operator in the cab without a seatbelt. Upon close examination, Hines observed that the retractor spring was still in a ball as it had existed at the time of the prior violation and the seatbelt remained inoperable. (Gov. Ex.22). As the operator exited the cab, he told Inspector Hines "obviously I wasn't wearing it." The violation is clearly proven as charged. Based on the prior testimony regarding the hazards in failing to use a seatbelt at this mine site, I find that the violation was also "significant and substantial" and of high gravity. It is also clear that the violation was the result of Respondent's "unwarrantable failure" and gross negligence. As noted by Inspector Hines, the same condition had been cited at least four or five times but the Respondent would merely remove the loader from the mine site to terminate the citations. Respondent would then later return the loader with the same inoperable seatbelt.

### *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 operators ability to continue in business. As noted, Jeppesen Gravel is the sole proprietorship of Mr. Jeppesen. The Commission has construed "the ability to continue in business" criterion as applied to sole proprietors as whether the proposed penalty would affect the proprietor's ability to meet his financial obligations. *Secretary v. Unique Electric*, 20 FMSHRC 1119, 1122 (October 1998). It is also noted that Section 110(a)(3) of the Act qualifies and may supercede the provisions of section 110(i) by imposing mandatory minimum penalties for violations of section 104(d).

The parties have stipulated as follows with respect to the civil penalty criteria:

Jay Jeppesen is the sole proprietor of Jeppesen Gravel, and his only employee is his son, Alan. Mr. Jeppesen mines gravel, as needed, from a small gravel pit on property that he leases. Sometimes he runs the mined gravel through his plant to produce gravel for sale. He also produces gravel that is not processed in any way for use as ballast under concrete.

#### **Respondent's History of Previous Violations:**

Jeppesen has no history of previous violations, as defined by 30 C.F.R. § 100.3(c), with regard to any of the citations at issue in these consolidated dockets. Jeppesen was assessed no history penalty points with regard to calculating the penalty assessments in these cases.

#### **Appropriateness of the Penalties to the Size of the Business of the Operator:**

Jeppesen is a nonmetal mine. 30 C.F.R. § 100.3(b) provides that the size of a nonmetal mine is measured by hours worked. According to the evidence present by the Secretary, Jeppesen worked 16 hours in 2006, 6 hours in 2007,

and 23 hours in 2008. Jeppesen was assessed no “size of operator” penalty points with regard to calculating the penalty assessments in these cases.

**Demonstrated Good Faith of the Operator in Abating the Violations:**

Jeppesen was given a 10% penalty credit/reduction for good faith abatement, as defined in 30 C.F.R. section 100.3(f), for the § 104(a) citations in Docket Nos. CENT 2008-438-M, CENT 2008-565-M, CENT 2008-566-M, CENT 2008-668-M, and CENT 2008-713-M. Jeppesen was given no credit for good faith abatement for the citations in Docket No. CENT 2008-785-M.

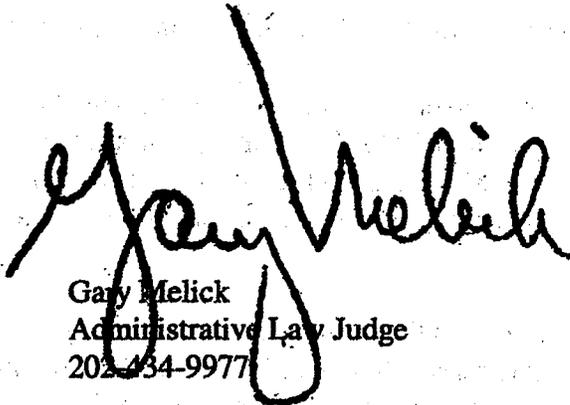
The record shows that mining activities during the year in question (2007) were limited to six hours and it may reasonably be inferred that the cited front end loader was not being operated during the entire time. The size of Mr. Jeppesen’s mine (calculated by hours worked) is also extremely small i.e. only six hours in 2007 and 23 hours in 2008. I further find that the proposed penalties would seriously affect Mr. Jeppesen’s ability to meet his financial obligations. He has met his burden of proof in this regard through credible evidence (Ex. R-1). Indeed, in recognition of his financial condition, the Secretary agreed in the motion for partial settlement to reduce her proposed penalties for the settled citations by 80%. However, the mandatory minimum penalties set forth in section 110(a)(3) of the Act may supercede consideration of this factor.

**ORDER**

Citation No. 6198325 is affirmed as written and, pursuant to section 110 (a)(3) of the Act, Jeppesen Gravel is directed to pay the mandatory minimum penalty of \$2,000.00 within 40 days of the date of this decision. Order No. 6198326 is modified to a citation under section 104(a) of the Act without “significant and substantial” findings and, in recognition of the reduced gravity and the serious financial conditions of the operator (in effect, stipulated to by the Secretary in basing her 80% reduction in penalties in the settlement motion). Jeppesen Gravel is directed to pay a civil penalty of \$100.00 within 40 days of the date of this decision.

Order Number 6198899 is affirmed and, pursuant to section 110 (a)(3) of the Act, Jeppesen Gravel is directed to pay the mandatory minimum penalty of \$4,000.00 within 40 days of the date of this decision. Order No. 6198900 is modified to a citation under section 104(a) of the Act without “significant and substantial” findings and, in recognition of the reduced gravity and the serious financial condition of the operator, Jeppesen Gravel is directed to pay a civil penalty of \$100.00 within 40 days of the date of this decision. Order Number 7840434 is affirmed and, pursuant to

section 110 (a)(3) of the Act, Jeppesen Gravel is directed to pay the mandatory minimum penalty of \$4,000.00 within 40 days of the date of this decision



Gary Melick  
Administrative Law Judge  
202-434-9977

Distribution: (Certified Mail)

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Jay A. Jeppesen, Owner, Jeppesen Gravel, 719 8<sup>th</sup> Street, Sibley IA 51249

/to

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>th</sup> Street, Suite 443  
Denver, CO 80202-2500  
303-844-3577/FAX 303-844-5268

November 18, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2009-293-M
Petitioner	:	A.C. No. 22-00035-167206
	:	
	:	Docket No. SE 2009-639-M
v.	:	A.C. No. 22-00035-186663
	:	
OIL-DRI PRODUCTION COMPANY,	:	Ripley Mine & Mill

**DECISION**

Appearances: Lydia A. Jones, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;  
Larry R. Evans, Safety & Health Manager, Oil-Dri Corporation of America, Ochlocknee, Georgia, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Oil-Dri Production Company ("Oil-Dri") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Memphis, Tennessee, and presented closing arguments.

Oil-Dri operates a clay mine and mill in Tippah County, Mississippi. This facility employed an average of 60 people in 2008. The citations at issue in these cases were all issued at the mill, which is often referred to as the "plant" in this decision. These cases involve 17 citations issued under section 104(a) of the Mine Act. The parties settled nine of the citations prior to the hearing, as discussed in more detail below. At the hearing, the representative for Oil-Dri agreed that it was not contesting the gravity or negligence of any of the citations but only the fact of violation and whether the violation was of a significant and substantial nature ("S&S"). (Tr. 6-7, 176).

## I. DISCUSSION WITH FINDINGS OF FACT CONCLUSIONS OF LAW

### A. Citation No. 7751806

On July 30, 2008, MSHA Inspector Tim Schmidt issued Citation No. 7751806 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11012 as follows:

No railing was provided for the elevated travel way near the platform for the tail pulley of the takeaway belt. Miners travel to the platform approximately once a year to perform maintenance. This condition exposes miners to a fall of 4 feet to a concrete surface should they slip and fall from the unprotected opening.

(Ex. G-2). The inspector determined that an injury was unlikely but that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was moderate. Section 56.11012 provides 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 \$100.00 for this citation.

Inspector Schmidt testified that he issued the citation because there was no railing for an elevated travelway near the bottom of the ladder-way leading to a work platform. The ladder-way, which was constructed of fixed rails and was part of the structure supporting the work platform, was adjacent to a retaining wall with a four foot drop-off. This ladder-way provided access to the platform. (Tr. 16; Ex. G-3). He did not believe that an accident was likely because he was advised that miners would generally approach the ladder-way from a direction that was not near the unprotected edge. (Tr. 17). He issued the citation because a miner approaching the ladder-way to go up on the platform could walk next to the unprotected drop-off. (Tr. 19). At the time Schmidt conducted his inspection, the cited area consisted of uneven ground, which he believed presented a tripping hazard. On cross-examination, Inspector Schmidt admitted that he was advised that employees do not walk near the unprotected area. (Tr. 54-55).

Lance White, an inspector-trainee, accompanied Inspector Schmidt. He testified that there was uneven ground, loose, unconsolidated rock, and vegetation along the travelway adjacent to the retaining wall. (Tr. 75). It is his understanding that miners only needed to get to the platform to perform maintenance on the tail pulley about once a year, but that they might need to access the platform more frequently if mechanical problems occur. (Tr. 76).

Steve Gibens, packing and processing manager at the mill, testified for Oil-Dri. He stated that employees who work in the processing plant never travel in the cited area. (Tr. 122). Grease hoses are provided so that components can be greased without climbing up the ladder-way to the platform. The only employees who work on the platform are from the maintenance department. They must work on the platform to replace the belt. (Tr. 122). Steven Barnes is a journeyman

mechanic, miners' representative, and treasurer of the local union. (Tr. 159). He said that mechanics perform maintenance on the belt and tail pulley from the work platform. He testified that mechanics access the platform from the road rather than from the area where the citation was issued. (Tr. 160).

The Secretary argues that Inspector Schmidt took into consideration the fact that the cited travelway was not frequently used when he determined that an accident or injury was unlikely and that the violation was not S&S. (Tr. 176). She states that the area cited by the inspector was a travelway even though it was infrequently used. She relies, in part, on *Nolichuckey Sand Company, Inc.*, 22 FMSHRC 1057, 1059-61 (Sept. 2000). In that case, the Commission held that a judge's decision upholding MSHA's treatment of a maintenance platform as a "travelway" under section 56.14109 was consistent with the plain meaning of that term. Oil-Dri argues that the area cited by Inspector Schmidt was not a travelway as that term is defined by MSHA. The platform was "not approached" from the direction that would put employees near the hazardous area. (Tr. 185).

In section 56.2, the Secretary defines the term "travelway" as a "passage, walk, or way regularly used and designated for persons to go from one place to another." The issue in this case is whether the area cited by the inspector was "regularly used *and* designated" for persons to go from one place to another.<sup>1</sup> Here Oil-Dri is contending that the alleged travelway was neither regularly used nor designated for persons to go from one place to another.

I find that the area cited by Inspector Schmidt was not a passage, walk, or way regularly used by persons to go from one place to another. I credit the testimony of Gibens and Barnes on this issue. They stated that when mechanics need to access the work platform for maintenance, they approach the work platform from the road. Mechanics do not travel by the cited area when approaching the work platform in this manner. No other employees go up on the work platform. In addition, the area cited was not designated for persons to get from one area to another. Consequently, this citation is vacated.

#### **B. Citation No. 6068216**

On July 30, 2008, MSHA Inspector Schmidt issued Citation No. 6068216 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a) as follows:

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<sup>1</sup> In *Nolichuckey Sand Co.*, the Commission applied a different definition of "travelway" because the Secretary has defined that term differently as applied to "Subpart M – Machinery and Equipment." In Subpart M, at section 56.14000, the Secretary defined "travelway" as a "passage, walk, or way regularly used *or* designated for persons to go from one place to another." *See also* 22 FMSHRC at 1060. I must assume that the Secretary intended that these two definitions to have different meanings; otherwise the definition at section 56.14000 serves no purpose since the definition at section 56.2 applies to all safety standards in Part 56.

Guards were not provided for the trunnion and truss roller on the new Ag kiln. An area guard was in place but individual moving parts were not guarded. This condition is a hazard to miners should they travel inside the area guard and become entangled in the moving machine parts. Miners travel in the area once a month to do maintenance.

(Ex. G-5). The inspector determined that an injury was unlikely but that if an injury did occur it would be of a permanently disabling nature. He determined that the violation was not S&S and that the company's negligence was moderate. Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive head, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The Secretary proposes a penalty of \$117.00 for this citation.

Inspector Schmidt testified that the cited area was guarded by what he referred to as an "area guard." (Tr. 21). This guard acts as a barrier to prevent employees from getting close to the kiln, but maintenance personnel had to pass through a gate in the guard to perform their work from time to time. He testified that, for an area guard to be acceptable, the gate for the guard must be locked to prevent entry and the gate must be equipped with an automatic switching device that will de-energize the equipment inside the gate. (Tr. 21, 57). He stated that equipment inside the area guard was not individually guarded to prevent miners from becoming entangled in the moving parts. Inspector Schmidt also testified that he was told that miners must enter the area behind the guard about once a month to perform maintenance. (Tr. 24, 68). The inspector stated that the photographs he took during the inspection show the moving machine parts that are required to be individually guarded under the safety standard. (Tr. 25-26; Exs. G-7, G-8, and G-9).

Mr. Gibens testified that the guards that were present around the kiln would prevent anyone from getting close to any machinery. (Tr. 124). No employee would be required to be in the area while the plant was operating. If any maintenance were required, mechanics would lock out and tag out the equipment before going inside the guards to the kiln. (Tr. 124, 142, 157, 161). He further testified that other inspectors have inspected this same area of the plant and have not issued citations under MSHA's guarding standard. (Tr. 124-25, 142-43). Mr. Gibens does not believe that the cited condition created a hazard to miners and MSHA has never designated it as a hazard in the past. (Tr. 125).

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded gear without first shutting it down. In such an

instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by moving machine parts at the Ripley Mine and Mill is not a defense because there is a history of such injuries at mines, quarries, and mills throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

I find that the Secretary established a violation. The existing guarding was more like a fence than a guard for moving parts. Area or perimeter guarding does not comply with the safety standard. *See, e.g. Walker Stone Company, Inc.*, 16 FMSHRC 337, 357 (Feb. 1994) (ALJ). Miners must enter the area about once a month to perform routine maintenance. These miners would be exposed to gears, rollers, and other moving parts. Individually guarding the trunnion and truss roller protects a miner who, through a lapse of judgment, enters the area without shutting down the operations. A penalty of \$117.00 is appropriate.

### **C. Citation No. 6068218**

On July 31, 2008, MSHA Inspector Schmidt issued Citation No. 6068218 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11001 as follows:

Safe access was not provided to the ladders to the cooler tank belt and new Ag scrubber platform in the RVM cooler area. Standing water and several inches [of] mud, with footprints and forklift tracks, were in a wide area, exposing the miners to slips, trips, and falls.

(Ex. G-10). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would result in lost workdays or restricted duty. He determined that the violation was S&S and that the company's negligence was high. Section 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of \$1,304.00 for this citation.

Inspector Schmidt testified that there was standing water and mud in one of the main milling areas of the plant. (Tr. 27; Ex. G-12, G-13). Miners had to walk through this area to access machinery and equipment. There were footprints showing that miners had walked through the slick, wet area. The footprints primarily went to and from ladder-ways and equipment in the area. The inspector testified that the violation created a slip-and-fall hazard to miners traveling in the area. (Tr. 28). If a miner were to fall, he would likely suffer strains, sprains, contusions, or broken bones. (Tr. 28, 32). Inspector Trainee White's testimony supports Inspector Schmidt's testimony. (Tr. 79-82).

Inspector Schmidt determined that the violation was S&S because the violation existed over a large area and there were numerous footprints through the mud. (Tr. 30, 53). The area was about 10 by 15 yards in size. The mud was two to three inches deep in some areas. (Tr. 30; Ex. G-12). He determined that the negligence was high because it was obvious that the mud had been there for some time and the operator had been cited numerous times for violations of the safety standard. (Tr. 30, 33, 60, 68).

Mr. Gibens testified that the cited area is the low spot in the plant. When it rains, water gathers in that area. (Tr. 127). There is a sump in the area to drain the water. If mud collects in the area, it is washed out with a hose. (Tr. 128, 144-46). It had been raining heavily in the days preceding this inspection. (Tr. 157). Mr. Barnes testified that the area is cleaned up once or twice a week. (Tr. 162). The surface below the mud and water was concrete. (Tr. 163). The area is accessed daily. (Tr. 171).

I find that the Secretary established a violation of the safety standard. Miners traveled through the area on a daily basis. The mud and water made the area hazardous with the result that safe access was not provided to working places. Oi-Dri argues that the condition should have been cited under the housekeeping standard at section 56.20003. While it is true that Inspector Schmidt could have cited that standard, he chose to cite section 56.11001 and I find that the conditions he observed violated section 56.11001.

I also find that the Secretary established that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861

F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

As discussed above, I find that a violation of the cited mandatory safety standard did occur. Further, I find that a discrete safety hazard contributed to by the violation existed. I also find that the Secretary met her burden with regard to the third element of the *Mathies* test. There existed a reasonable likelihood that the hazard contributed to by the violation would result in an injury, assuming continued mining operations. I credit the testimony of Inspector Schmidt as to the conditions that existed at the time of his inspection. There was standing water and a considerable amount of accumulated mud in an area that is frequently traveled. The concrete walking surface was very slippery. A miner could easily slip and fall. The injuries sustained would range from strains and sprains to broken bones. These types of injuries are of a reasonably serious nature and meet the fourth element of the *Mathies* test. A penalty of \$1,304.00 is appropriate.

**D. Citation No. 6068226**

On July 31, 2008, MSHA Inspector Schmidt issued Citation No. 6068226 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14132(b)(2) as follows:

The backup alarm on the Nissan 50 Optimum forklift was not audible above the surrounding noise. The forklift is used throughout the entire plant for maintenance work. This condition

exposes miners operating in or around the forklift to the hazard of not knowing of the forklift's intended rearward movement.

(Ex. G-14). The inspector determined that an injury was unlikely but that if an injury did occur it would be of a permanently disabling nature. He determined that the violation was not S&S and that the company's negligence was moderate. The safety standard provides that "[a]larms shall be audible above the surrounding noise level." The Secretary proposes a penalty of \$100.00 for this citation.

Inspector Schmidt testified that the backup alarm on the cited forklift could not be heard above the ambient noise level. (Tr. 35). He testified that the forklift is required to be operated around some of the noisiest equipment in the plant such as blowers and dryers. He said that when the backup alarm was tested in his presence, he could not hear it. (Tr. 36, 61). Someone working near the forklift could suffer serious injuries if he could not hear the alarm and the forklift struck him. The inspector was advised that, when the forklift was examined by the equipment operator at the start of the shift, he could hear the backup alarm. The inspector believes that it was tested in an area where the ambient noise level was not as great. Inspector Schmidt determined that such an accident was unlikely, because the forklift was equipped with a strobe light that flashes whenever it is operating. *Id.*

Inspector Trainee White testified that some of the machinery used in the plant is loud and earplugs are required in some of those areas. (Tr. 83). The backup alarm could be heard in quiet areas, but not in the noisier areas. White testified that he could not hear the backup alarm when it was tested until he walked quite close to it. (Tr. 83, 89-90).

Mr. Gibens testified that he was with Inspector Schmidt when the backup alarm was tested and he was able to hear it. (Tr. 129-30). He said that the inspector was standing a little further away from the forklift at the time. (Tr. 146). Mr. Barnes also testified that he could hear the alarm when it was tested. (Tr. 163). He said he was standing behind the forklift. Oil-Dri abated the condition by installing a new backup alarm.

I find that the Secretary established a violation. I credit the testimony of Schmidt and White that the backup alarm could not be heard above the ambient noise level when it was tested, unless you were standing right next to the forklift. The fact that the forklift was equipped with a strobe light does not eliminate the hazard because it flashes whenever the forklift is operating and not just when it is put into reverse. The citation and penalty are affirmed.

**E. Citation No. 6068238**

On August 2, 2008, MSHA Inspector Schmidt issued Citation No. 6068238 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11012 as follows:

Three chained areas of the top rail of the railing around the stack testing platform were not in place. One chain was broken and another taped to the post. Contractors travel to the area once every two years to perform testing. This condition exposes miners to the hazard of a fall of approximately 50 feet.

(Ex. G-16). The inspector determined that an injury was unlikely but that if an injury did occur it would be fatal. He determined that the violation was not S&S and that the company's negligence was low. The Secretary proposes a penalty of \$100.00 for this citation.

Inspector Schmidt testified that there was an elevated platform around the smoke stacks for the plant. (Tr. 38; Ex. G-). The platform had a railing around it, but some sections of the top railing were missing. In the areas with the missing railing, chains had been installed. One chain was not attached at one end because the clasp was broken and another chain was secured to the upright with duct tape. There were three areas that did not have a top railing around the platform. (Tr. 38-39; Exs. G-18, G-19, G-20). The platform was about 50 feet above the ground level. Oil-Dri representatives told the inspector that the platform is only used by a contractor who comes in every two years to test for emissions from the smoke stacks. (Tr. 39). This platform provided the only access to the stacks. There were no barriers to prevent Oil-Dri employees from going up on the platform. (Tr. 42). The middle rail was present in all areas. The inspector determined that an accident was unlikely. He also determined that Oil-Dri's negligence was low because the platform is infrequently used. (Tr. 42, 62). Preshift examinations of the platform were not required because it is not a working place. (Tr. 62). The citation was abated by securing the chains over the opening.

Mr. Gibens testified that the contractor had to remove the top rail in the three cited locations in order to perform the stack testing. (Tr. 130). The testing equipment hangs off the side in those locations. (Tr. 147). The chains were not replaced when the testing work was completed. (Tr. 147). The contractor's employees wear fall protection when they are up on the platform. *Id.* Gibens testified that he has worked at the plant for 27 years and he has never been up on this platform because Oil-Dri employees have no need to go up there. There is no equipment or machinery there. Mr. Barnes also testified that Oil-Dri's maintenance employees do not go up on this platform. (Tr. 164).

Oil-Dri maintains that the cited platform is not a travelway, as that term is used in the safety standards. (Tr. 187). I find that a work platform can be considered to be a travelway. *Nolichuckey Sand*, 22 FMSHRC at 1059-61. As stated above, a walkway is defined as a "passage, walk, or way regularly used and designated for persons to go from one place to another." I find that the cited platform is "designated" for persons to go from one place to another. The contractor employees must walk along the platform to do their testing at the three locations on the platform. Whether the platform is "regularly used" is a more difficult question. The evidence demonstrates that Oil-Dri employees do not use the platform. Nevertheless, I find that the employees of a contractor regularly walk along the platform to test for emissions.

Although these people do not walk on the platform on a frequent basis, they do so on a regular basis.<sup>2</sup> Every two years the contractor performs emissions testing so that the facility can maintain its state license. I find that the Secretary established a violation. In the future, Oil-Dri need only make sure that the contractor replaces the chains before its employees leave the platform. A penalty of \$100.00 is appropriate.

**F. Citation No. 6068239**

On July 31, 2008, MSHA Inspector Schmidt issued Citation No. 6068239 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12047 as follows:

Seven guy wires on three different power poles were not insulated according to the National Electrical Code. Guy wires were attached to the poles above the level of energized high voltage conductors. The guy wires did not have insulators and were not grounded to the pole.

(Ex. G-21). The inspector determined that an injury was unlikely but that if an injury were to occur it would be fatal. He determined that the violation was not S&S and that the company's negligence was moderate. The safety standard provides that "[g]uy wires of poles supporting high-voltage transmission lines shall meet the requirements for grounding or insulator protection of the National Electrical Code . . . ." The Secretary proposes a penalty of \$224.00 for this citation.

Inspector Schmidt testified that the cited power poles had guy wires that helped support the poles. (Tr. 44). The reason that guy wires must be insulated or grounded is so that, in the event of an accident, the guy wires do not become energized. The inspector testified that he did not observe a grounding wire or insulators for the guy wires on the power poles in question. (Tr. 44-45; Exs. G-23, G-24, & G-25). He said that either of these safety components can "typically" be seen from the ground. (Tr. 44). Given the conditions he observed, he believed that if one of guy wires were to break, it could become energized and electrocute someone. A guy wire could break if a vehicle struck it. The poles were near the plant parking area and they were within 15 feet of traveled roadways. (Tr. 46). Miners have been killed at other mines when guy wires have broken. The testimony of Inspector Trainee White is consistent with Inspector Schmidt's testimony. (Tr. 85-87, 90).

Schmidt testified that he discussed this citation with company representatives at the time he issued it. Someone called the power company and was advised by Danny Caples that the guy wires on power poles in the area of the mine were not insulated or grounded. (Tr. 47; Ex. G-22). The citation was terminated by Inspector Morrison after the guy wires were insulated to abate the

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<sup>2</sup> The term "regular" can be defined as "recurring or functioning at fixed or uniform intervals." *Webster's New Collegiate Dictionary* 966 (1979).

condition. Photographs taken by Inspector Morrison show insulators that were added to the guy wires. (Tr. 50; Ex. G-26 & G-27).

On cross-examination, Inspector Schmidt admitted that a grounding wire, colloquially referred to as a "butt ground," ran down the power poles. (Tr. 64; Exs. G-23, G-24 & G-25). Schmidt said that he did not see any wires connecting the guy wires to the butt ground wires on the power poles. (Tr. 66, 69-70).

Mr. Gibens admitted that the guy wires were not insulated. (Tr. 131). Gibens testified that when a service technician from the power company came to the mine to abate the condition, he told mine personnel that the guy wires were already grounded. (Tr. 132, 148). The technician came a few days after the inspection. Gibens testified that Oil-Dri went ahead and had the insulators installed because the power company already had a work order to complete this work. For some of the poles, the power company electrician simply made the wires connecting the guy wires to the butt ground more visible to someone standing on the ground. (Tr. 133, 150). Barnes testified that the wires connecting the guy wires to the butt ground were very difficult to see from ground level. (Tr. 172-73).

The parties do not dispute the fact that the National Electrical Code requires that guy wires be insulated or grounded on poles supporting high-voltage transmission lines. Oil-Dri does not dispute that the power lines in question were high-voltage transmission lines. Oil-Dri also admits that the guy wires were not insulated. The Secretary argues that the guy wires were not grounded at the time of Inspector Schmidt's inspection. Oil-Dri put on evidence to show that, although the company did not know it at the time of the inspection, the guy wires were grounded. It offered hearsay evidence that when the local power company sent an electrician to abate the violation, the electrician told company representatives that the guy wires were already grounded. Oil-Dri maintains that it had insulators installed because the power company's electrician was already at the site to install insulators. It argues that, in at least one instance, the electrician simply moved the existing ground wire to make it more visible from the ground level.

There are significant conflicts in the testimony on this citation. On one hand, I can understand that it would be difficult to see whether a guy wire is properly grounded by simply looking up at the pole while standing on the ground. On the other hand, at the time of the inspection, a representative of the power company advised Oil-Dri that the guy wires were not grounded or insulated at the plant. The evidence that the power company's electrician said that the guy wires were already grounded when he came to abate the cited condition is hearsay. Although this is a close case, I credit the testimony of the two inspectors that the guy wires were not grounded to the butt wire. The citation is affirmed and a penalty of \$224.00 is appropriate.

#### **G. Citation No. 6513295**

On April 29, 2009, MSHA Inspector Harold J. Wilkes issued Citation No. 6513295 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 46.12(a)(2) as follows:

The mine operator failed to provide information to [an] independent contractor of [its] obligations to comply with [MSHA] regulations. Each production operator must provide information to each independent contractor who employs a person at the mine in site-specific mine hazards and the obligation to comply with [MSHA] regulations.

(Ex. G-29). The inspector determined that there was no likelihood of an injury or illness. He determined that the violation was not S&S and that the company's negligence was moderate. Section 46.12(a)(2) provides that "[e]ach production-operator must provide information to each independent contractor who employs a person at the mine on site-specific mine hazards and the obligation of the contractor to comply with our regulations, including the requirements of this part." The Secretary proposes a penalty of \$100.00 for this citation.

Inspector Wilkes testified that during his inspection of the plant he encountered contractors performing construction work at a building known as the perimeter building. (Tr. 96). The contractor, Steel-Con, was installing siding on the recently constructed building. This building was behind the main plant and was between the shipping and maintenance buildings. There were seven Steel-Con employees at the mine that day. The inspector talked to Brent Ross, the project supervisor for Steel-Con, and was advised that he was not aware that Steel-Con's employees needed to have Part 46 new miner training. (Tr. 97, 106). Mr. Ross stated that his crew did receive site-specific hazard awareness training from Oil-Dri. Inspector Wilkes testified that when he talked to Oil-Dri managers, he was told that, because the contractor's employees would not be exposed to any mine hazards, the company determined that site-specific hazard training was all that was necessary. (Tr. 98).

Inspector Wilkes determined that Steel-Con's employees would be exposed to a number of mine hazards. The contractor employees had to cross an active railroad track to get from the parking lot to their work site.<sup>3</sup> To get to their parts and tools trailer, the contractor employees had to walk across an open area in between some of the buildings at the plant where mobile equipment is operated and customer trucks travel. (Tr. 99; Exs. G-31 & G-32). These employees also worked near operating conveyor belts carrying Oil-Dri's product. (Tr. 101). He testified that, if the employees of Steel-Con had received new miner training, they would have been made aware of the hazards present in the plant environment. (Tr. 102- 05; Ex. G-33). Steel-Con had been working at the site for about two months. The employees of the contractor who had built the perimeter building had been provided with new miner training and some of those employees were still working at the site. (Tr. 107).

Mr. Gibens testified that site-specific safety awareness training is given to all contractor employees by Oil-Dri. (Tr. 134). These employees are also given a tour of the facility. Oil-Dri

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<sup>3</sup> The contractor employees were instructed to use a parking lot that was away from the other work areas at the plant.

notifies contractors of its obligation to comply with MSHA regulations and safety standards on the requisitions it issues. *Id.* The requisition that was used to contract with Steel-Con states:

Supplier shall be in compliance with all MSHA regulations & Oil-Dri policies at all times while on the job site. The Project Manager will advise of requirements and administer site-specific hazard training.

(Tr. 134-35 ; Ex. R-M).

The Secretary argues that mine operators are obligated to inform all independent contractors of their training obligations under the Mine Act and MSHA regulations. (Tr. 181). The Secretary contends that, given the nature of the work being performed by Steel-Con, Oil-Dri was obligated to advise Steel-Con that their employees would be required to have new miner training before they could start their work.<sup>4</sup> She maintains that, as a general matter, because construction workers will potentially be exposed to mining hazards, they are required to have new miner training. She contends that it is clear from the evidence that Steel-Con's employees were exposed to mining hazards. She relies, in part, on my decision in *Spencer Quarries, Inc.*, 32 FMSHRC 644, 648-50 (June 2010) (ALJ). In that decision, the operator admitted that it did not advise a construction contractor that new miner training was required for its employees. *Id.*

Oil-Dri argues that it provided the required site-specific hazard training to the employees of Steel-Con. (Tr. 188). The company also advised Steel-Con on the requisition form that it had to comply with all MSHA regulations. (Ex. R-M). Prior to the start of work, Oil-Dri determined that new miner training was not required for Steel-Con's employees.

I find that the Secretary established that the employees of Steel-Con were exposed to the hazards of the mining operations. The plant is, of course, part of the mine as that term is defined in section 3(h)(1) of the Mine Act. 30 U.S.C. § 803(h)(1). The preponderance of the evidence shows that the employees were exposed to numerous hazards that were present at the plant. I credit the testimony of Inspector Wilkes in this regard. Although many of the hazards that Steel-Con's employees faced were similar to hazards they would face on other construction projects, the mining environment presents challenges that may not be present at other jobs.

I also find that Steel-Con's employees were required to be provided with new miner training. Subsection (b) of section 46.12 makes clear that the independent contractor is primarily responsible for making sure that its employees have all the necessary MSHA-required training. Section 46.5 provides that each "new miner" must receive training in a number of subjects as specified in the regulation. The term "miner" is defined to include employees of independent

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<sup>4</sup> Inspector Wilkes issued a section 104(g) order of withdrawal to Steel-Con for its failure to provide new miner training to its employees. (Tr. 109).

contractors “who are engaged in mining operations” and construction workers who are “exposed to hazards of mining operations.” 30 C.F.R. § 46.2(g)(1).<sup>5</sup>

The issue with respect to this citation is what sort of notice must the production operator provide to the independent contractor under section 46.12(a)(2). The regulation simply states, as relevant here, that each production operator must “provide information to each independent contractor” on the “obligation of the contractor to comply with” MSHA’s regulations including the requirements of part 46. Thus, the regulation merely requires the production operator to “provide information” to the independent contractor.

Oil-Dri contends that it provided all necessary information on the requisition form that was used to engage the services of Steel-Con. That form contained what appears to be boiler-plate language that states that the contractor shall be “in compliance with all MSHA regulations.” (Ex. R-M). The language goes on to state that the “project manager will advise of requirements and administer site-specific hazard training.”

This appears to be a case of first impression. My decision in *Spencer Quarries* did not address this issue. I find that the language in the requisition form did not provide sufficient information to Steel-Con regarding its obligation to comply with MSHA’s training regulations. Simply putting stock language on a form advising all contractors that they must comply with all MSHA regulations is insufficient. Most construction contractors are familiar with the safety regulations of the Occupational Safety and Health Administration, which are similar to MSHA’s safety standards for surface metal and nonmetal operations. It is unlikely, however, that these contractors will know much about the detailed training requirements that MSHA has promulgated. Indeed, in *Spencer Quarries*, the construction contractor had no knowledge of MSHA’s training requirements when it was constructing a building at the quarry. 32 FMSHRC at 650. I hold that the responsibility of a production operator to notify an independent contractor performing work at the mine of its obligation to comply with MSHA’s training regulations cannot be carried out by simply putting language in a standard form stating that MSHA regulations must be followed. It must affirmatively advise the contractor of its duty to have its employees trained in accordance with the requirements set forth in MSHA’s regulations.<sup>6</sup> Indeed, the language in Oil-Dri’s form states that its project manager will advise the contractor of these requirements.

In this instance, Oil-Dri unilaterally determined that new miner training was not required for Steel-Con’s employees. The company’s safety manager and the plant manager discussed the matter before making this determination and apparently Mr. Ross of Steel-Con was told that

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<sup>5</sup> The definition excludes, in subsection (2), such people as vendors, delivery workers, and over-the-road truck drivers.

<sup>6</sup> The contractor does not necessarily have to provide the training. It can reach an agreement with the production operator to provide new miner training for its employees.

training beyond hazard awareness training was not required. (Tr. 106, 152, 188). Based on the above, the violation alleged in this citation is affirmed and I find that a penalty of \$100.00 is appropriate.

#### **H. Citation No. 6513296**

On April 29, 2009, MSHA Inspector Wilkes issued Citation No. 6513296 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14112(b) as follows:

The tail roller guard on the north side of the truck load-out belt conveyor was damaged exposing the moving machine parts. The guard had been pulled up [in the area] where the grease line came up from the fitting on the bearing. This condition exposed persons working on three shifts . . . . The area has low overhead clearance and is in a narrow place between two belt conveyors.

(Ex. G-34). The Inspector determined that an injury was reasonably likely and that if an injury were to occur it would be of a permanently disabling nature. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.14112(b) provides that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." The Secretary proposes a penalty of \$8,209.00 for this citation.

Inspector Wilkes testified that during his inspection he walked by the tail roller of the truck load-out belt. (Tr. 110). This belt carries the product from the plant to bins that are used to store the product for loading into trucks for shipment to customers. The guard for the tail roller was damaged in that the guard had been pulled up, thereby exposing moving parts. Another section of the guard had come loose and swung down, thereby exposing more of the moving parts. *Id.* The inspector testified that this condition exposed miners to the hazard of becoming entangled in the moving machine parts, which could result in the amputation of a hand or arm.

He testified that a person has to bend over to walk through the area. Because the tail roller is adjacent to another piece of machinery, the area was also narrow. (Tr. 111). In addition, there were accumulations of product on the ground in the area. (Tr. 111; Ex. G-36, G-37). Given these environmental conditions, he determined that the violation was serious and S&S. The inspector believed that it was reasonably likely that someone would slip, trip, or lose his balance in the area and get his hand caught in the moving machine parts. (Tr. 112). Employees would be required to go into the area to grease the tail rollers, to clean up the accumulated material, and to perform preventive maintenance. He observed footprints in the accumulated material. Maintenance Supervisor Billy Jordan, who was with Inspector Wilkes, told the inspector that he did not know that the guard was damaged. *Id.* Inspector Wilkes said that the exposed moving parts were less than waist high. (Tr. 113). The condition was abated when the operator constructed and installed a new guard. (Tr. 114; Ex. G-37).

Mr. Gibens testified that the photograph taken by Inspector Wilkes shows the area between the truck load-out belt and the hopper car belt. (Tr. 137). Gibens was not at the plant on the day of the inspection, but he examined the area after the citation was issued. He estimated that the hole in the guard that the inspector cited was about seven inches long and an inch and one half wide. (Tr. 138). He testified that the accumulations were cleaned up using a fire hose because the area is too tight to do any shoveling. The person using the hose stands outside the cited area when he cleans up accumulations next to this belt. (Tr. 139). Mr. Barnes confirmed the testimony of Gibens. (Tr. 166).

I find that the Secretary established a violation of the safety standard. It is not disputed that the guard for the tail pulley on the truck load-out belt was not securely in place. The primary issue is whether the violation was S&S. Oil-Dri maintains that miners were not exposed to the hazard because, when the bearings were greased, a grease line was used. It also argues that machinery was locked out whenever maintenance was performed. Finally, it contends that the area was cleaned from a different location using a high-pressure hose. I find that a preponderance of the evidence establishes that the violation was S&S. The grease line was immediately adjacent to the damaged area of the guard. (Ex. G-36). The conditions in that confined area were such that it was reasonably likely that a miner would stumble or lose his balance while using the grease line. His hand, arm, or clothing could easily become entangled in the moving machine parts. I find that the Secretary established all four elements of the Commission's *Mathies* S&S test.

The Secretary proposed a penalty of \$8,209.00 for this citation. The proposed penalty is substantially higher than the proposed penalty for S&S Citation No. 6068218 issued on July 31, 2008, primarily because of the Secretary's manner of calculating penalty points for citations issued per inspection day and repeat citations issued per inspection day. Information at MSHA's website shows that nine citations were issued to Oil-Dri in December 2008, but that these citations have all been contested by Oil-Dri. I find that a penalty of \$5,000.00 is appropriate for this violation.

## II. SETTLED CITATIONS

Prior to the hearing, the parties agreed to settle the remaining citations in these cases. In SE 2009-293-M, by order dated August 13, 2010, I approved the parties' joint motion to approve partial settlement. The parties agreed that one citation should be vacated and I ordered Oil-Dri to pay the Secretary a total penalty of \$341.00 for the remaining two citations included in the motion. Docket No. SE 2009-639-M was originally assigned to Judge William Moran. On July 27, 2010, the parties filed a joint motion to approve partial settlement with Judge Moran. This motion has not yet been ruled on. The Secretary agrees to vacate Citation No. 6513287. The parties agree that Citation Nos. 6513289, 6513290, 6513291, 6513293, and 6513297 should be affirmed and that Oil-Dri should pay a total penalty of \$1,608.00 for the violations. I have considered the representations and documentation presented and I conclude that the proposed

settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The joint motion to approve partial settlement in SE 2009-639-M is **GRANTED**.

### III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Oil-Dri had about 14 paid violations at the Ripley Mine and Mill during the 15 months preceding August 4, 2008, and about 14 paid violations during the 15 months preceding April 29, 2009.<sup>7</sup> Oil-Dri is a medium-sized operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Oil-Dri's ability to continue in business. I have not entered gravity and negligence findings because the representative for Oil-Dri agreed not to contest the MSHA inspectors' determinations. Consequently, I affirm the gravity and negligence determinations set forth in the citations.

### IV. ORDER

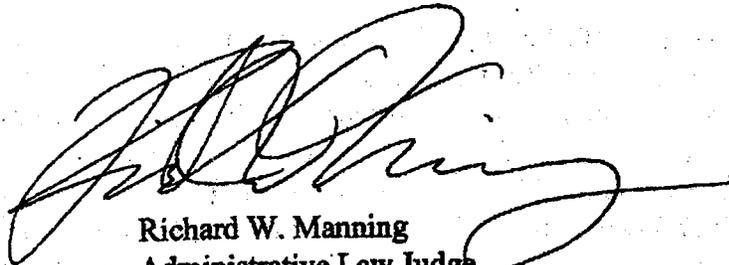
Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
SE 2009-293-M		
7751806	56.11012	Vacated
6068216	56.14107(a)	\$117.00
6068218	56.11001	1,304.00
6068226	56.14132(b)(2)	100.00
6068238	56.11012	100.00
6068239	56.12047	224.00
SE 2009-639-M		
6513295	46.12(a)(2)	100.00
6513296	56.14112(b)	5,000.00
Settled Citations	Various	1,608.00
<b>TOTAL PENALTY</b>		<b>\$8,553.00</b>

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<sup>7</sup> These numbers are based on information at MSHA's website. Citations that were contested by Oil-Dri are not included in these figures including the citations that were contested in these two cases.

For the reasons set forth above, Citation No. 7751806 is **VACATED** and the other citations listed above are **AFFIRMED**. Oil-Dri Production Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$8,553.00 within 40 days of the date of this decision.<sup>8</sup> Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

**Distribution:**

Lydia A. Jones, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, S.W., Suite 7T10, Atlanta, Georgia 30303

Larry R. Evans, Safety & Health Manager, Oil-Dri Corporation, P.O. Box 380, Ochlocknee, GA 31773

RWM

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<sup>8</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**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: 202-434-9964 / FAX: 202-434-9949

November 19, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-397-M
Petitioner	:	A.C. No. 15-16138-132556 -01
v.	:	
	:	Docket No. KENT 2008-463-M
DIX RIVER STONE, INC.,	:	A.C. No.: 15-16138-134706-01
Respondent	:	
	:	Dix River Surface

**DECISION**

Appearances: Jennifer D. Booth, Esq., (at October 14, 2009, hearing) and Willow Fort, Esq., (at March 10, 2010, hearing), Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner, Tommy Owens, President, Dix River Stone Inc., Stanford, Kentucky, for the Respondent.

Before: Judge Weisberger

**Statement of the Case**

These cases are before me based upon Petitions for Assessment of a Civil Penalty filed by the Secretary of Labor, ("Secretary") seeking the imposition of civil penalties for the alleged violation by Dix River Stone, Inc., ("Dix River") of various mandatory standards and set forth in Title 30, Code of Federal Regulation. Subsequent to notice, these matters were scheduled to be heard in Lexington, KY on October 14, 2009. At the hearing, the following citations were litigated: Nos. 7765946, 7765949, and 7765950.<sup>1</sup> Due to scheduling conflicts, Citation Nos. 7765947 and 7765593 were rescheduled based on the parties' agreement, and heard on March 10, 2010, in Richmond, Kentucky.

I. Docket No. Kent 2008-463

A. Citation No. 7765946

At the conclusion of the hearing on October 14, 2009, a bench decision was rendered which, aside from the correction of non-substantive matters, is set forth below.

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<sup>1</sup>Subsequent to the hearing, the Secretary vacated Citation No. 7765950.

On September 11, 2007, MSHA Inspector Richard Jones inspected Dix River's surface quarry ("the quarry"). He observed an employee on an elevated belt guard that was approximately ten feet off the ground. Jones testified that the employee was not tied off, and was not wearing a safety belt. He issued a citation alleging a violation of 30 CFR § 56.15005.<sup>2</sup>

1. Violation of Section 15005, *supra*

a. Respondent's Position

The Respondents' defense is based upon a number of contentions. It is argued, that there was a greater danger to the use of a belt and tie line in circumstances where the work being performed was only ten feet above the ground. Owens explained that if a person is tethered at this height and falls, he would lose control of the motion of his body, and could be bumped against some dangerous materials causing severe injuries.

In essence, Respondent argues that if the Section 56.15005, *supra* is applied to the situation presented herein, the result would be a diminution of safety. Commission case law has established the principle that it can not entertain this argument. Rather, it must first be presented in a modification, and that it can not be raised before the Commission as a defense. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (1989); *Otis Elevator Co.*, 11 FMSHRC 1918, 1923 (1989)

Next, Respondent argues, in essence, that the cited condition was not dangerous, as it did not expose the observed employee to any danger. Owens opined that if the employee would have lost his balance, he could have landed on a platform that was four feet below the platform he was working on, and protruded approximately four feet beyond it. He said that a tank was located below the work platform, and partially protruded beyond it. Also, Owens maintained that the cited conditions, and manner of operation have existed for ten years, and they have not led to any accidents or injuries.

b. Discussion

I note that the following particulars of the inspector's testimony have not been contradicted or impeached: that the employee was not tied off, and was not wearing a safety belt, that he was working on a platform that was approximately ten feet off the ground, and that while the employee was sitting on a belt guard at the edge of the platform, he was leaning over, picking up fist-sized stones, and throwing them down to the ground. Jones opined that the employee could lose his balance and fall to the ground below which was composed of various sized stones.

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<sup>2</sup> Section 56.15005, *supra*, provides as follows, "Safety belts and lines shall be worn when persons work where there is a danger of falling."

Based on Jones' testimony, I find that one of Dix River's employees was working on an area ten feet above the ground, but he was not wearing a safety belt or line. Also, that he was sitting on a belt guard close to the edge of the platform, leaning over, picking up and throwing stones to the ground. Hence, there was a danger of falling. I'm not quantifying the danger, but certainly there was a danger of falling, especially considering that there weren't any rails. I thus find the Respondent violated Section 56.15005 which requires the wearing both a safety belt and lines where there is a danger of falling.

## 2. Significant and Substantial

In essence, Commission case law provides that a violation is "significant and substantial" if "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish that a violation of a mandatory safety standard under the Federal Mine Safety and Health Act of 1977 ("Mine Act") is significant and substantial, the Secretary must prove: 1) the underlying violation of the mandatory safety standard; 2) a discreet safety hazard 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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

As set forth above, the evidence clearly establishes the first two criteria. I find that the record establishes the existence of the following facts: (1) the employee observed by Jones was on a platform that was 10 feet above the ground; (2) the employee was observed throwing stones off the platform; (3) the employee was picking up and throwing stones; (4) there were not any rails on the platform; and (5) the employee was not wearing a safety belt or a line. Based on a combination of these facts, I conclude that the third and fourth of the above criteria have been established. I thus find that the violation was significant and substantial. (*See, Mathies, supra*)

## 3. Penalty

Pursuant to Section 110(i) of the Mine Act, in determining the penalty to be assessed upon a mine operator, the following six factors must be considered: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business of the operator; 3) whether the operator was negligent; 4) the effect on the ability of the operator to continue in business; 5) the gravity of the violation; and 6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation.

I find that the gravity of the violation was relatively high for the reasons set forth above, (I)(A)(2) *infra*. I do not find anything in the operator's history of previous violations or the size of the operator's business that justifies an increase or decrease of a penalty. Dix River is a small operator. The history of violations neither warrants increasing or decreasing the penalty. The evidence appears to indicate that abatement was done in a reasonably timely fashion.

The following testimony of Jones is instructive regarding the level of the operator's negligence:

And I figured that if the operator had provided him with proper fall protection, the training how to wear it, a good place to store it, then I felt the operator . . . had some sort of an attempt to provide this person with the fall protection that they needed . . . and the training to know when to use the equipment . . . even though the operator is not there standing there telling him to put it on, that he would know to put it on himself. (Tr. 30).

Based on all the above, I find that Dix River's negligence is mitigated to some extent.<sup>3</sup>

The mine operator has the burden of showing that the penalty will have a detrimental effect on its ability to continue in business. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983); *Buffalo Mining Co.*, 2 IBMA 226 (1973). Respondent's representative has submitted evidence showing that Dix River Stone, Inc. was merged with Owens Chevrolet, Inc., a used Chevrolet dealership owned by the subject quarry's owner. He also submitted various bank statements, loan balances, and a judgment by a Kentucky Circuit Court ordering payment by Owens Chevrolet of taxes, penalties, interest and fees. These documents indicate that Owens Chevrolet, Inc. incurred losses in the previous years. However, Respondent did not offer any evidence of the quarry's assets and liabilities and provided only an estimation of the assets owned by Owens Chevrolet.<sup>4</sup> The documents provided by Respondent fall short of the kind of

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<sup>3</sup>The bench decision did not make any determination the remaining penalty criterion set forth in Section 110(i) of the Act, i.e., the effect of the imposition of a penalty on the ability of the operator to remain in operation. The record was kept open to allow Dix River to proffer documentary evidence on this issue. Subsequent to the hearing, Dix River filed Exhibits C1-9, G-A, G-1-11, H, I, J, K, L, M, N-1, N-2, O, P-1, Q, R, S, and T-1. In conference calls on September 11, 2010, and April 30, 2010 the Secretary did not object to their admission, and they were admitted.

<sup>4</sup>Section 110 (a)(1) of the Act provides, as pertinent, as follows:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provisions of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$50,000 [currently \$70,000] for each such violation. (emphasis added)

evidence which allows a reduction in a penalty due to the operator's inability to continue in business. *See, Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994)(the operator introduced its tax returns, balance sheets, and tax liens. It was held that the operator "failed to introduce specific evidence to show that the penalties would affect their ability to resume operations and continue in business"); *Ron Coleman Mining, Inc.*, 21 FMSHRC 935 (Aug. 1999)(ALJ). (mine's tax returns indicating a loss, was held to tend to indicate a negative impact on its ability to continue in business). *See also, Bob Bak Construction*, 19 FMSHRC 1791 (Nov. 1997)(ALJ).

Within the above context, I find that Respondent has not provided specific evidence to show that the penalties would affect its ability to continue operations and continue in business.

Considering all the above factors set forth in Section 110 (i) of the Act, especially the low level of negligence, I find that a penalty of \$1,000 is appropriate.

B. Citation No. 7765947<sup>5</sup>

1. Introduction

On September 11 and 12, 2007, Jones conducted an inspection of the quarry. Jones observed a Thomas ProTough 900 brand skid steer loader ("loader" or "skid steer loader") parked on the quarry premises. The loader was not marked as defective and was not parked in an area specially designed for defective equipment. During his inspection, Jones spoke to an employee whom he identified as the "plant operator" (Tr. 187.) Jones said the latter indicated that he was the "normal" operator of the loader. (*Id*) Jones "had him" raise the safety bar ("seat bar") "all the way" to the "up" position (Tr. 188). Jones indicated he observed that the operator lifted the seat bar to its "full upright position" which should have "locked" all the controls (Tr. 188-89). The employee operating the loader was able to use the controls to raise the bucket while the seat bar was in the raised position. (Tr. 189-90.)

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<sup>4</sup> cont'd Section 110(i) of the Act provides that if the penalty amount assessed by the Secretary is challenged, the Commission is required to assess a penalty. The Commission is mandated to consider, inter alia, the operator's ability to continue in business (*Sellersburg Stone, supra*). Section 3(d) of the Act, defines an "operator" as the owner, or other person who operates controls, and supervises ". . . a coal or other mine." (emphasis added.) Thus, reading together all these sections, it is clear that for the purpose of assessing a penalty, the consideration of its effect is limited to the operation of a mine, rather than the financial condition of the non-related businesses of the owners of the mine. Therefore, not much weight was placed on the evidence adduced by Dix River related to the operation of Owens Chevrolet.

<sup>5</sup>This matter was heard on March 10, 2010. The date for the parties to file post briefs was extended to August 20, 2010, based on the granting of numerous requests made by the parties. The date to file responses was extended to August 30, 2010. The Secretary filed a brief on August 2, 2010. To date, Dix River has not filed a brief, or argument.

Jones subsequently issued citation No. 7765947 alleging a violation of 30 C.F.R. §56.14100(c), which states as follows:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective item shall be used to prohibit further use until the defects are corrected.

2. Violation of 30 C.F.R. §56.14100(c)

To show a violation of Section 56.14100(c) *supra*, the Secretary must establish 1) the existence of a defect, that 2) makes continued operations hazardous to persons, and 3) the machine was not taken out of service. Since both parties agree that the loader was not taken out of service, only the first two elements are presently at issue.

a. The Existence of a Defect

i. The Parties' Evidence

Jones testified that a typical skid steer loader is equipped with a seat bar safety device which, when raised to the upright position, locks the machine's controls so that the machine cannot move. Jones testified that an employee he identified as the plant manager told him that he was the normal operator of the skid steer loader. Jones asked the employee to enter the cab of the loader, and start it. Jones observed the employee lift the seat bar safety device to its full upright position. While the seat bar was raised, Jones observed the employee attempting to move the loader with the tram controls in the cab, but it did not move. Jones observed that the employee was able to raise the bucket on the loader, even though the safety bar was in the full upright position.

Owens did not impeach Jones' testimony. However, he asserted that the loader did not have any defect. Owens testified that the loader was equipped with a button which, when pushed in, would deactivate the loader's controls. According to Owens, the button was designed to be pushed in by the seat bar when the seat bar was raised. He indicated, in essence, that his testimony in these regards is based upon the safety instruction booklet that he read. Owens testified that the day the loader was cited, an 80-year old employee, whom he referred to as Clarence, was the only employee at the quarry who was not "up front" with him. (Tr. 272.) Owens opined that Clarence was directed to operate the loader. According to Owens, Clarence was not trained to operate it, and due to his age and medical condition, was not allowed to get on it. Owens opined that Clarence must not have fully raised the safety bar. As such, the button had not been pushed in to de-activate the controls.

Owens testified that a technician inspected the machine shortly after Jones issued the citation and found nothing wrong with the loader's safety device.

ii. Discussion

The Commission has defined a "defect" as "a fault, a deficiency, or a condition impairing the usefulness of an object or a part." *Allied Chemical Corp.*, 6 FMSHRC 1854, 1857 (Aug. 1984) (citing *Webster's Third New International Dictionary* 59 (1971); U.S. Dept. Of Interior, Bureau of Mines, *Dictionary of Mining, Mineral and Related Terms* 307 (1968)). According to Jones, he observed the bucket move while the seat bar safety device was in the full upright position. As such, it can be reasonably inferred from the inspector's observation that the safety device was deficient, as it did not prevent movement of the bucket while the seat bar was in the upright position. In other words, the usefulness of the loader's safety mechanism was impaired to some degree.

Owens did not observe the operator of the loader raising the safety bar. Thus, Owens does not have any personal knowledge as to how far the operator raised the safety bar. It is significant to note that Respondent did not call this employee to testify.

I note Owens' testimony that the day after the citation was issued a "technician" checked it out and "there was nothing wrong with the machine." (Tr. 273-274.) There is not any evidence that Owens had personal knowledge as to specifically what the technician did. It is significant to note the Respondent did not have the technician testify.

For all the above reasons, I find that Owens' conjectures as to what individuals might have done are insufficient to rebut the direct evidence adduced by the Secretary, consisting of Jones' testimony based on his observations. I therefore conclude that the Secretary has established the existence of a defect.

b. Continued Operations Hazardous to People

i. Testimony

According to Jones, he was told by quarry employees that the loader was used almost every day, and had been used that day prior to Jones' arrival at the quarry. Jones testified that ". . . [he's] seen it commonly done where [operators] would leave the cab and leave the machine operating . . . [and] the safety bar would be in the upright position . . . ." (Tr. 199.) Jones indicated that the loader "could very well be used" when there were employees nearby (Tr. 198.) He testified that he has seen it "commonly done where [operators] would leave the cab and leave the machine running." (Tr. 199.) Jones concluded that the safety defect on the skid steer loader constituted a hazard to the loader operator and other quarry employees.

According to Owens, the quarry had not been running on the day the citation was issued. However, Andrew Works, a foreman, testified that the loader is used even when the quarry is not running.

ii. Discussion

The descriptive term "hazardous" denotes a measure of danger to safety or health. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC at 827. I note Jones' testimony that, in essence, given the defective operation of the safety bar as observed by him, an individual could have been struck by the bucket if its controlling levers were unintentionally moved while the bar was in an upright position. Based on this testimony that was not impeached or contradicted, I find that the defect constitutes a measure of danger to the safety of quarry workers. Therefore, I find the Secretary has established that the defect makes continued operations of the loader hazardous to people.

For all the above reasons, I find that Respondent violated Section 56.14100(c), *supra*.

3. Significant and Substantial

As set forth above, the condition of the loader violated a mandatory standard i.e., Section 56.14000(c), *supra*. Also, the violation contributed, in some degree, to a safety hazard. Hence, I find that the first two elements of *Mathies supra*, have been met.

The third element set forth in *Mathies, supra*, requires that the Secretary establish a reasonable likelihood that the hazard will contribute to an injury-producing event. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). In the case at bar, in order for the safety defect on the loader to contribute to an injury-producing event, a number of events must occur. First, the operator of the skid steer loader would have to raise the seat bar safety device. Next, the operator would have to exit the machine while the machine was still running. Finally, the operator must inadvertently hit the controls of the skid steer loader, causing the machine to move and strike a quarry worker. Jones testified that it is common for an employee operating a skid steer loader to raise the seat bar safety device and exit without turning the machine off. However, the Secretary did not adduce any evidence to establish that the inadvertent contact with the controls by the operator was reasonably likely to have occurred.<sup>6</sup>

Thus, I find that the Secretary has not established that there was a reasonable likelihood of an injury-producing event, i.e., a person being hit by the bucket.

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<sup>6</sup>There is not any evidence of the inner dimensions or the cab of the spatial relationship of operator's seat, and the controls. Indeed, Inspector Jones stated he did not know where the controls on the skid steer loader were located. He also did not remember if he could see the operator moving the controls.

Accordingly, it is concluded that the Secretary has not established that the violation was significant and substantial. (*See, Mathies, supra*).

#### 4. Penalty

As discussed above, inadvertent movement of the bucket as a consequence of the violation, was not reasonably likely to have occurred. However, if, as a consequence, the bucket had hit a person, serious injuries could have resulted.

I find that the penalty is appropriate when considered in the context of the size of the operator's business. The analysis of the effect of a penalty on the operator's ability to remain in operation is the same as set forth above, I (A)(3), *infra*. I find nothing in the operator's history of previous violations to justify either an increase or decrease in penalty.

I find that Respondent, in good faith, attempted to achieve prompt abatement of the violation. Since the defect would become apparent only if the controls for the bucket were activated while the safety bar was in an upright position, I find that the violative condition was not obvious.

The safety bar was intended to prevent movement both of the loader and the bucket. When Jones tested its functioning, only the bucket could still be moved. I find that the violative condition was not extensive. There is not any evidence as to how long the violative condition had existed prior to its being cited by Jones on September 11, 2007. There is not any evidence that Respondent had either knowledge or notice of the violative condition. I thus find that the level of Respondent's negligence was low.

Taking into consideration all of the above, especially the low level of negligence, and the fact that the violative condition was neither extensive nor obvious, I find that a penalty of \$700 is appropriate.

#### C. Citation No. 7765953

##### 1. Introduction

On September 12, Jones inspected the quarry's pug mill. Jones observed three distribution boxes which controlled the electrical circuits to the pug mill. The distribution box on the right controlled the right paddle of the pug mill, and the box in the middle controlled the left paddle. The box on the left was the main disconnect for the pug mill.<sup>7</sup>

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<sup>7</sup>According to Jones, "... [if the main disconnect] is shut off, there's not power to either of the other two boxes." (Tr. 334.)

The distribution boxes controlling the paddles had black markings on the exterior of the boxes. The distribution box for the main disconnect did not have any markings, but had a manufacturer's label on the front of the box.

Inspector Jones issued citation number 7765953, alleging a violation of 30 C.F.R. §56.12006, which states as follows:

Distribution boxes shall be provided with a disconnecting device for each branch circuit. Such disconnecting devices shall be equipped or designed in such a manner that it can be determined by visual observation when such a device is open and that the circuit is de-energized, the distribution box shall be labeled to show which circuit each device controls.

2. Violation of Section 56.12006, supra

a. The Parties' Evidence

According to Jones, the distribution box in the middle (center) controlling the left paddle, "has some sort of writing on it that you could make out part of it but not entirely" (Tr. 333.) Jones testified that the box on the right, controlling the right paddle was not labeled at all, and the left box controlling the main disconnect did not have any markings on it regarding the circuit it controls. Jones concluded that the boxes were inadequately labeled. In support of his conclusion, Jones stated that:

there is some portion, part, piece of labeling, but for the person who is under a stressful situation or something similar to that; or if a person wants to make absolutely sure that they lock out the proper circuit, you've got to be able to absolutely make positively sure that it is the circuit that you want locked out." (Tr. 367.)

Owens testified that the distribution boxes controlling the pug mill's left and right paddles were labeled, and the labeling was faded but readable. Owens also testified that the distribution box for the main disconnect had a factory label on the front of the box. According to Owens, the factory label included the words "main disconnect." (Tr. 375.) Respondent also provided a photograph of the distribution boxes taken within a week after the citation was issued, and after the boxes had been re-labeled.

b. Discussion

Section 56.12006, *supra*, requires that each distribution box be labeled in order to show which circuit it controls. Thus, in order to establish a violation of Section 56.12006, *supra*, the Secretary need only show that one distribution box was not adequately labeled.

Government Exhibit 14A, and Respondent Exhibit F, appear to indicate that the distribution box located in the middle of the three boxes, was somewhat labeled to show it controlled the left paddle. I note Owens' testimony that the distribution box controlling the main disconnect had a factory label that said "main disconnect" in fine print. (Tr. 375.) On the other hand, Jones testified that this box did not have any markings on it regarding the circuit it controls. I examined Exhibits 14A and F and I find that they do not corroborate Owens' testimony in that the words "main disconnect" can not be ascertained. Further, according to Jones' testimony, the box on the right did not have any markings regarding the circuit it controls. A photograph of the boxes taken on the day he issued his citation, appears to corroborate his testimony regarding the lack of labeling.

I note that Respondent proffered photographs depicting the boxes in issue, and the following is written in black on the right distribution box "right side paddle." (Ex. F1 and F2.) However, the record fails to establish that these pictures were taken on the date the conditions were observed and cited by Jones. Owens testified that he took them "within probably a week [after they were cited on September 11]" (Tr. 374), and after the boxes at issue had been labeled. In follow-up testimony he said that he "[did not] know if that was before or after, . . . but it was shortly after \*\*\* we did this like the very same day he did the inspection." (Tr. 375.) I find this testimony unclear and confusing. I therefore accord more weight to Jones' pictures as depicting the condition of the labeling of the boxes when they were cited. In this connection, I note that in Exhibit 14A, taken on September 11 by Jones, the left and right boxes are not depicted with any writing or other labeling to indicate the circuit each controlled.

Based on all the above, I find that the left and right boxes were not adequately labeled to indicate the circuit controlled by each box. Thus, I conclude that the Secretary has established that at least one distribution box was inadequately labeled. Accordingly, I find that it has been established that Respondent violated Section 56.12006, *supra*.

### 3. Penalty

As set forth above, I (A)(3), I conclude that nothing in the operator's history of previous violations or size leads me to increase or decrease the penalty. I also found that Dix River has not provided specific evidence to establish that the penalties would affect its ability to continue in business. I find that Respondent, in good faith, attempted to achieve prompt abatement of the violation. Jones testified that the violative conditions could have resulted in electrocution, or a fatal injury. This testimony was not refuted by Respondent. Accordingly, I find the gravity of the violation to be relatively high.

I find that the violative conditions, affecting only two distribution boxes, were not extensive. Based on Jones' photograph of the outside cover of the box on the right side, I find that the lack of labeling was obvious.

The operator promptly abated the situation by re-labeling the distribution boxes.

Respondents negligence regarding the lack of labeling on the left is mitigated somewhat by Owens' testimony that a factory label on the box indicated "main disconnect in 'fine print'" (Tr 375.) The Secretary did not establish how long these conditions had existed. Therefore, I conclude the operator's negligence to have been only moderate.

Considering all the above criteria set forth in Section 110(i) of the Act, I find that a penalty of \$200 is appropriate.

II. Docket No. Kent 2008-463

A. Citation No. 7765949

At the conclusion of the October 14, 2009 hearing a bench decision was issued which, except for the correction of non-substantive matters, is set forth below as follows:

On September 12th, 2007, MSHA Inspector Richard Jones inspected Dix River's above ground crushing operation. He specifically inspected a rock-breaker platform that was elevated approximately 20 feet from the ground. There were two parallel rails on three sides of the platform. The highest rail was approximately four feet off the ground and the rail below was at an equal distance between the top rail and the platform.

According to the inspector, men needed to access the platform to perform maintenance and repair work on various hydraulic lines, motors, and equipment. He indicated that it would be extremely hazardous for a person to access the platform from a platform located adjacent that was approximately a foot and a half higher because of the presence of rails on three sides and the presence of a series of rebar bars closing off the fourth side. Jones testified that a person could lose his balance and trip while climbing over the rails and fall 20 feet. He was told that Dix River had some type of man-bucket to transport a miner to the platform at issue in order to perform maintenance and repairs. However, he was concerned about the hazard of climbing from the man-bucket over the rails to get onto the platform. Also, he noted that the previous day he issued a citation because he had observed an employee working on a piece of equipment that was approximately ten feet off the ground, and that employee did not have either a safety belt or was not tied off. He was concerned that a person attempting to access the platform at issue from a man-bucket would also not be tied down.

30 CFR § 56.11001 provides as follows, "Safe means of access shall be provided and maintained to all working places." (Emphasis added.) 30 CFR § 56.2 provides that a "working place" means any place in or about the mine where work is being performed.

The plain wording of Section 56.11001 *supra*, requires the provision of a safe means of access; it does not require the safest means of access. Also, the plain language of Section

56.11001 *supra*, does not state that only safe ambulatory access satisfies its requirements.

Owens testified that the company had a "bucket-truck"(Tr. 125-26), that allowed a person to enter a bucket, and then be transported right up to that platform. He also indicated that he is familiar with this operation, that he has been in the bucket, and that it can be placed flush against the rail. He also indicated that the height of the rail is less than the height of the bucket. Thus, to access the platform safely one would have to climb out of the bucket and then just step down onto the platform; it is not necessary to climb over any rail. I find Jones' testimony credible based on my observations of his demeanor, and the fact his testimony in these regards was not impeached or contradicted. Therefore, I find that safe access to the platform was provided.

For all the above reasons I find that it has not been established that the operator did not comply with Section 56.11001, *supra*.

B. Citation No. 7765950

After this matter was heard on October 14, 2009, the Secretary vacated this citation, therefore, it is dismissed.

**ORDER**

It is **Ordered** that Citation Nos. 7765949 and 7765950 be **DISMISSED**.

It is further **Ordered** that, within 30 days of this decision, Respondent shall pay a total civil penalty of \$1,900 for the violations found herein.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

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/cmj

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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November 19, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-979-M
Petitioner,	:	A.C. No. 04-00119-147478
	:	
v.	:	Mine: AR Wilson Quarry
	:	
GRANITE ROCK COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: John Perez, U.S. Department of Labor, Mine Safety and Health Administration, Vacaville, California, for the Petitioner,  
Kevin Jeffrey, Esq., Watsonville, California, for the Respondent

Before: Judge Weisberger

**Statement of the Case**

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), alleging violations by Granite Rock Company ("Granite Rock") of 30 CFR § 56.11027<sup>1</sup> (Citation No. 6196739), and 30 CFR § 56.14132 (Citation No. 6196742). Subsequent to notice, the case was scheduled and heard in San Jose, California on October 19, 2010.<sup>2</sup> After both parties rested, they waived the right to file a written brief, and relied on closing arguments. A bench decision was made which, with the exception of correction of non-substantive matters is set forth below.

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<sup>1</sup>The citation was issued alleging a violation of 30 CFR § 56.11012, but was subsequently amended to allege a violation of Section 56.11027, *supra*.

<sup>2</sup>At the hearing, the parties filed a set of stipulations.

I. Citation No. 6196739

Granite Rock Company ("Granite Rock") owns and operates a quarry known as the AR Wilson Quarry, an above-ground mining operation. This operation contains an elevated work platform where a primary rock crusher ("crusher") is located. The work platform is approximately 32 inches above the platform located below it. The size of the work platform is approximately twenty-eight by eighteen inches. There was a rail around the perimeter of the platform except for an eighteen inch gap on the on the west side of the platform.<sup>3</sup>

The crusher, used to break rocks, is operated approximately twice during the evening shift. The operator stands in front of two joysticks that are located on the north side of the platform, and moves the joysticks to operate the crusher.

On February 4, 2008, MSHA inspector Jan Niceswanger inspected the work platform. Niceswanger indicated that he observed that there was a gap in the railing. According to Niceswanger, the platform needed to be protected by a rail, as there was an eighteen inch gap. He indicated that due to the lack of handrails, a person could fall off the elevated platform. He issued a citation alleging a violation of 30 CFR § 56.11012 which was amended to cite a violation of 30 CFR § 56.11027. The condition was abated by the placing of a removable chain which eliminated the eighteen inch gap.

A. The Company's witnesses

Angel Mejia was the company's lead man operator for a little more than three years. He operated the primary crusher approximately twice a night. He indicated that in operating the crusher, he faces the joysticks which are on the north side of the platform, and there is not any need for him to look to his left. However, he does glance to the right to check the cone to ensure that the crusher is working properly. Mejia indicated that he had not been distracted by any rock. Also, that the area is well lit during his night shift. He said that he is not aware of any persons slipping on the platform; nor has he slipped on it. He opined that the eighteen inch gap did not create any type of a hazard.

David Clay, a heavy duty mechanic for the last four years, has been involved in some operations at the crusher. He indicated that, in his experience, he did not become disoriented by dust, did not experience any lighting problems, and has not seen frost on the platform. He indicated specifically that when he has operated the joysticks, there wasn't any need to move to the left. According to Clay, in operating the joysticks, he kept his feet shoulder length apart, and right in front of the controls. He also has never experienced any slipping or tripping, and has not been aware of anyone slipping or tripping on the platform. He opined that the absence of an eighteen inch gap did not constitute a hazard.

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<sup>3</sup>The north and south sides of the platform extended for eighteen inches; the east and west sides extended for twenty-eight inches.

Henry Ramirez, the plant manager for the last six years, indicated that in his position he becomes aware of all the safety incidents. According to Ramirez, there have not been any tripping, slipping or falling accidents on the platform at issue. He stated that he also is not aware of any such accidents in his 20 years experience at the quarry. He opined that the gap did not constitute a hazard.

B. Discussion

The secretary has the burden of proof of establishing a violation. Section 56.11027, *supra*, provides, a pertinent, that working platforms shall be “provided with handrails.”

The secretary’s position is that, in essence, there should have been a handrail all around the perimeter of the platform. Thus, it is argued that an eighteen inch gap in the railing constituted a violation of Section 56.11027, *supra*. The company argues just the opposite, i.e., that there is not anything in the wording of Section 56.11027, *supra*, that requires that the handrails completely go all around the working station.

I note that the word “handrail” is defined in Webster’s Third New International Dictionary, (2002 ed.), as pertinent, as follows: “a light structure of wood or metal serving as a guard at the outer extremity of a deck.” Random House Unabridged Dictionary (1998 ed.) similarly describes a handrail as “a rail serving as a support or guard at the side of a stairway, platform, a number of other related places.” Thus, the common meaning of a handrail relates to its use as a guard at the edge of a platform, which is consistent with the clear purpose of Section 56.11027, i.e., to prevent a fall.

Thus, specific issue is whether the handrail that had an eighteen inch gap, was adequate to serve as a guard to prevent falls. I take cognizance of Respondent’s argument that, in essence, the Secretary has not met its burden of showing that a reasonable likelihood of a hazard existed.<sup>4</sup> However, there is not anything in the clear language of Section 56.11027, *supra*, which requires the Secretary to prove a likelihood of injury as part of its burden of establishing a violation.

Based on the inspector’s testimony that I find credible, I conclude that there was a possibility of a fall because of the eighteen inch gap in the railing. Taking into account the purpose of Section 56.11027, *supra*, and the common meaning of the word “handrail”, I conclude that the cited handrail was not adequate. Hence, I find the Respondent violated Section 56.11027 *supra*. (See, Palmer Coking Coal Co., 26 FMSHRC 504 (June 2004) (ALJ)).

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<sup>4</sup>I note the inspector’s testimony, in essence, that it was “unlikely” that this condition would have resulted in any injuries.

C. Penalty

I find that the violative condition was abated in good faith. The inspector indicated the area was clean, well maintained, and well lit. He indicated that should there be a fall, it would result in loss of work days. All this adds up to very low level of gravity.

With regard to negligence, there is not any evidence as to the length of time that the violative condition existed. There is not any evidence that MSHA had ever communicated to the Respondent any need for additional compliance with the standard. There is not any evidence of any history of accidents. I find that there is not sufficient evidence to establish that the negligence was any more than low.

There was no any evidence adduced relating to the operator's history of violations and its size. Hence neither of those factors play any part in either raising or lowering a penalty.

The parties stipulated that the imposition of the penalty will not have any effect on the operators' ability to continue in business.

Weighing all these factors, especially the good faith abatement, and low levels of gravity and negligence, I conclude that a penalty of \$25 is appropriate.

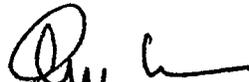
II. Citation No. 6196742

At the hearing, the parties, in essence, made a motion to approve a settlement of Citation No. 619674 on the ground that the operator has agreed to pay the full amount of the penalty assessed by the Secretary (\$100). The settlement was approved as follows:

I have reviewed all the documentary evidence in the trial, and the operator's agreement to pay the full amount is a reasonable resolution of this matter under the terms of the Act, especially Section 110(i) of the Act. I approve it.

Order

It is **ordered** that within 30 days of this decision, Respondent shall pay a total civil penalty of \$125.

  
Avram Weisberger  
Administrative Law Judge

**Distribution:**

**John Pereza, U.S. Department of Labor, (MSHA), 2060 Peabody Road, Suite 610, Vacaville, CA 95687**

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**/cmj**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, NW, SUITE 9500  
WASHINGTON, DC 20001

November 22, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2008-1825
Petitioner,	:	A. C. No. 46-08436-150504
	:	
v.	:	
	:	Upper Big Branch-South
PERFORMANCE COAL COMPANY	:	
Respondent	:	

**DECISION**

Appearances: Patrick M. Dalin, Esq.; Linda M. Henry, Esq., U.S. Department of Labor, Philadelphia, PA on behalf of the Secretary

Carol Ann Maunich, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of Performance Coal Company

Before: Judge David F. Barbour

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) against Performance Coal Company (Performance or the company) pursuant to section 105(d) (30 U.S.C. §815(d)) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. §801, *et seq.* The Secretary alleges that in four instances Performance violated mandatory safety standards for underground coal mines at its Upper Big Branch mine, a bituminous coal mine located in Raleigh County, West Virginia. In addition to making allegations regarding the gravity and negligence of each of the violations, the Secretary alleges that each was a significant and substantial contribution to a mine safety hazard (S&S). The Secretary proposes assessing Performance a total of \$10,260 for the violations. Performance denies all of the Secretary's allegations.

Pursuant to an order directing the parties to confer, counsels agreed to settle all issues relating to three of the four alleged violations. The Secretary then moved for approval of the partial settlement, and on November 23, 2009, I granted the motion. *Performance Coal Company*, Decision Approving Partial Settlement (November 23, 2009). Counsels advised me they remained irreconcilably at odds over the Secretary's allegations regarding Citation No. 7279729, in which the Secretary alleges the company violated mandatory safety standard 30

C.F.R. §74.400, and that a trial would be necessary.<sup>1</sup> As a result, the case was heard in Beckley, West Virginia.

### **STIPULATIONS**

At the commencement of the hearing the parties stipulated as follows:

1. [C]oal mine inspector, Keith Sigmon . . . was acting as a representative of the Secretary . . . when he issued Citation [No.] 7279729.
2. Citation [No.] 7279729 was properly served . . . upon the agents of [Performance] at the date, time, and place stated . . . on the citation.
3. [A] true copy of Citation [No.] 7279729 was served upon . . . [Performance] or its agents as required by the Mine Act.
4. [T]he imposition of the proposed civil penalty of \$4,329 will have no effect upon . . . [Performance's] ability to remain in business.
5. [T]he appropriateness of the penalty, if any, to the size of . . . [Performance's] business should be based on the fact that in 2007 [Performance] . . . mined 576,672 tons of coal from the Upper Big Branch-South [m]ine and that in 2007 Massey Energy Company, the controller of . . . [the mine], mined in excess of ten million tons of coal.
6. [Performance] was assessed the total of one hundred forty nine citations based on two hundred twenty two inspection days in the fifteen month period preceding

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<sup>1</sup> Section 75.400 states:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electrical equipment therein.

the issuance of Citation [No.] 7279729.

7. [A]n authentic copy of . . . [Citation No. 7279729] may be admitted into evidence for the purpose of establishing its issuance.
8. [On the date Citation No. 7279729 was issued] the power center at issue in this case . . . was in an area where miners were normally required to work or travel.
9. [T]he . . . power center is electrical equipment as described in . . . [section]75.400.

### THE TESTIMONY

#### THE SECRETARY'S WITNESSES

MSHA Inspector Keith Sigmon issued Citation No. 7279729. In addition to being an inspector, Sigmon also is an agency ventilation specialist. At the time of the hearing Sigmon had been with MSHA for three and one half years. Before that, he worked for Consolidation Coal Company, during which he held a wide range of positions, “[e]verything from utility work to supervision.” Tr. 14. Once with MSHA, Sigmon conducted inspections at many different mines. Sigmon was trained to recognize combustible materials such as coal dust, float coal dust and float coal dust mixtures. Tr. 15-16.

Prior to February 11, 2008, Sigmon had inspected the Upper Big Branch-South mine “on numerous occasions”. Tr. 16. On February 11, he arrived at the mine at 6:00 a.m. Tr. 19. Sigmon, accompanied by mine foreman William “Bill” Harless, went underground and he and Harless traveled to the one north main conveyor belt. Tr. 18-19. A production shift was in progress. Tr. 18. Sigmon inspected the belt. He also inspected the cross cut in which the belt’s high voltage power center was located.<sup>2</sup> The power center supplied power to the one north main conveyor belt’s drive and hydraulic take up unit. Tr. 27. The power center was located at the point where the one north main conveyor belt discharged onto the one south main conveyor belt. Tr. 20, 27. (The discharge point is also known as the transfer point. *Id.*). At the transfer point, the coal dropped four or five feet from the north to the south belt. Tr. 28. The power center was approximately twenty feet from the transfer point. *Id.*

Sigmon testified that “float coal dust . . . had accumulated in the cross cut where the power center was located and [that the] float coal dust [was] on top of the power center as well as

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<sup>2</sup> 12,470 volts of electricity ran to the power center. Tr. 18.

inside the power center on the electrical components, the leads, insulators and exposed leads.”<sup>3</sup> Tr. 19. There also was coal dust and float coal dust outside the power center on the floor, ribs and roof of the cross cut. Tr. 21. The float coal dust ranged from “paper thin” to an eighth of an inch deep. *Id.*, Tr. 84. Around the power center’s cat heads the float coal dust was a little deeper than one eighth of an inch. Tr. 21.

Sigmon acknowledged that the float coal dust on the floor and ribs was deposited on top of rock dust. Despite this, the float coal dust was black in color. The float coal dust in and on the power center also was black. Tr. 22-23. The color signified to Sigmon that the coal dust had not mixed with the rock dust. *Id.*, Tr. 194.

In Sigmon’s opinion, the float coal dust was dangerous. He testified that, “the blacker the coal dust . . . the more combustible it would be.” Tr. 22. Sigmon also explained that the power center had a “sight glass,” that is, a plexiglass window that allowed a person to look into the power center and see the busbars of the high voltage circuits.<sup>4</sup> Looking through the window he could see that the coal dust “covered the electrical components, the insulators, [and] the bare wires.” Tr. 24. He was certain that much of what he saw was float coal dust. He testified that the dust, “[W]as a fine powder.” Tr. 24. He stated, “I took my fingers across the power center and [the coal dust] went up in suspension. It was dry. It wasn’t . . . stick[ing] together. It was a very dry powder.” *Id.* No fire suppression system was installed over the power center or in the crosscut. Tr. 32.

Sigmon believed the float coal dust accumulated because a valve that controlled the water sprays at the discharge point of the subject conveyor belt was broken and coal dust was not being suppressed.<sup>5</sup> Tr. 26. Sigmon stated that even with the sprays working, during the transfer of the coal from one belt to another, the vibration of the belts and the impact of the falling coal “pulverized” the coal, which became “fine and . . . powdery and [began] to be

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<sup>3</sup> It was the company’s safety director, Michael Vaught, who explained how the coal dust could enter the power center. Air to ventilate the center came into the box enclosing the center through louvered vents on the box’s lower sides. A “chimney effect” pulled the air through the lower vents and out through similar vents near the top of the box. Coal dust traveled on the air into and through the box, and some of the coal dust was deposited on the interior surfaces of the power center. According to Vaught, some rock dust also was deposited inside the box in this way. Tr. 150-151, 166.

<sup>4</sup> A busbar is defined as a “heavy conductor, often made of copper in the shape of a bar, used to collect, carry and distribute powerful electrical currents.” [Hiip://dictionary.reference.com/browse/busbar](http://dictionary.reference.com/browse/busbar).

<sup>5</sup> Sigmon and Harless found the broken valve after Sigmon inspected to the power center and cross cut. *Id.*

suspended in the air and the air current then [took] it to different areas of the mine and [laid] it down.” Tr. 27. With the sprays not working, the amount of coal dust generated at the transfer point increased significantly. According to Sigmon, the float coal dust entered the power center through the center’s ventilation vents. Once inside the power center, it settled on the center’s interior components. Tr. 27-28, 51-52.

Sigmon testified that in the case of the subject power center, there was a stopping which should have prevented much dust-laden air from reaching the center. However, there were holes in the stopping and even though there were pieces of curtain placed over the stopping, the air still traveled through the stopping and the coal dust accumulated at, on and in the power center. Tr. 37. None the less, he recognized the curtain somewhat limited the amount of dust that reached the center. Tr. 75.

Sigmon reviewed the pre-shift report for the belt conveyors. Tr. 38; Gov’t Exh. 2. The shift before his inspection was the February 11 owl shift. Tr. 39. He noticed that the pre-shift examiner indicated that both the number one south mains belt and the number one north mains belt needed dusting “from head to tail.” *Id.*, Gov’t Exh. 2 at 3. This indicated to Sigmon that the area had “become settled with float coal dust and need[ed to be] rock dusted.” Tr. 39-40. This was consistent with what he later found. Tr. 41.

Sigmon thought that the conditions at the power center reflected conditions on both belts. The air flowing from the one north main belt carried the float coal dust around and into the power center. Tr. 43. The pre-shift examiner reported by telephone at 6:30 a.m. Gov’t Exh. 2 at 3. Sigmon was at the power center at 11:20 a.m., approximately 5 hours later. Tr. 43. Based on his experience, Sigmon believed that the accumulations at the power center existed between “two or three shifts . . . at least.” Tr. 44. Five hours was not enough time to accumulate that amount of float coal dust that he saw. Tr. 46. He also stated that at 11:20 a.m. there was not a great amount of float coal dust suspended in the air. He implied from all of this that it took up to three days for the float coal dust to accumulate in the amounts he observed. *Id.*

As a result of what he saw in and around the power center, Sigmon issued Citation No. 7279729 to the company.<sup>6</sup> Tr. 47; Gov’t Exh. 3. The citation charges that the accumulations of float coal dust violated section 75.400. Tr. 47. In addition, Sigmon found that the violation of section 75.400 was reasonably likely to result in a fire or ignition. Gov’t Exh. 3. He explained:

because of the float coal dust being inside the power center where there [were] exposed electrical connections. You [had] a transformer that produce[d] heat inside the power center. You [had] relays and contacts that [were] being made.

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<sup>6</sup> Sigmon served the citation on Rick Hodge, the mine superintendent. According to Sigmon, neither Hodge nor any one else disputed the citation. Tr. 54.

Also, . . . there [would be] arcing that occurs when those [electrical] relays [were] . . . made . . . [a]nd . . . heat[.] Tr. 48.

He testified that the circuit breakers arced each time they were set (turned off and turned on), that they were set on the maintenance shift in order to allow work to be performed on the belts and that they were set each time there was an electrical overload. Tr. 48. He estimated the breakers were turned off and on at least three times a shift. Tr. 49. When they were set, no defects were required in the power center for arcing to occur. He believed that the arcing "would propagate a fire or ignition of the float coal dust and . . . [if] the float coal dust was in suspension . . . that could cause an explosion." Tr. 51. If an explosion occurred, Sigmon believed it reasonably likely that the explosion would spread via suspended dust to the north and south main conveyor belts where other coal dust had accumulated. Tr. 52.

In addition, there were exposed and energized electrical wires in the power center and Sigmon could plainly see through the sight glass that coal dust had accumulated on the wires. Tr. 49-50. Further, Sigmon believed it was possible that the circuit breakers themselves could fail, which would result in "[a] lot of charring, burning, [and] melting of . . . metal." *Id.* In sum, Sigmon believed a fire or explosion was reasonably likely to occur because of "the electrical components being exposed, the heat of the . . . transformer, the breaker arcing, and the float coal dust being present in the power center and outside." Tr. 51.

Sigmon testified that if an ignition and explosion occurred, numerous miners could be affected: the fire boss could be in the area conducting an inspection, maintenance shift personnel could be in the area servicing the belts, in addition, six miners were observed by Sigmon cleaning the south main belt on the day he issued the citation. Tr. 52-53.

He also found that the company was moderately negligent. He testified the company should have known float coal dust had accumulated at the power center and in the crosscut and should have cleaned the areas. According to Sigmon, Earl Halls, the midnight shift foreman described the power center as a "problem area" because float coal dust tended to accumulate there. Tr. 56. He also told Sigmon that he had to frequently clean the area. Tr. 82.

On cross examination Sigmon agreed that the violation concerned only float coal dust, not coal fines and not loose coal. Although he was concerned about the possibility of a fire, Sigmon did not know the flash point of float coal dust. Tr. 60. He agreed that for float coal dust to catch on fire, a specific concentration of dust had to be present, but he did not know what that concentration was.<sup>7</sup> Tr. 63-64. Further, he did not know if the power center's transformer could "rise to the level of the heat flash point necessary to catch any of [the] float coal dust" on fire. Tr. 66-67. There was no visual indication of any improper arcing or sparking when he was at the

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<sup>7</sup> None the less he stated, "The more confined float coal dust is, the less you have to have and the greater [is the] likelihood of [an] explosion." Tr. 72.

power center, and he observed no defective components at the power station. Tr. 71. Further, fire extinguishers and rock dust were in the area. Tr. 65.

Larry Cook is an electrical engineer and an MSHA employee. He supervises a group of electrical specialists who conduct electrical inspections and investigate mine accidents. Tr. 110. Cook has been an MSHA supervisor for the past ten years. Cook, stated that he is familiar with underground power centers supplying power to belt drives. Tr. 112. Inside such power centers are sources capable of igniting accumulated coal dust and float coal dust. Circuit breakers arc when they open and close. In fact, each time a circuit breaker trips, an arc occurs. Tr. 113. In addition, bare, high voltage connections are common throughout a power center. Tr. 114.

Cook also stated that if a fire for some reason began inside a power center, the flame could travel outside the center through the center's side vents. Tr. 114. He had seen this, and he knew of instances where circuit breakers inside a power center had arced and caused a fire. Tr. 115-116, *see also* Tr. 130. However, Cook agreed that he had no knowledge as to the particular conditions of the power center in question, since he never saw the subject power center.

#### THE COMPANY'S WITNESS

In February, 2008, Michael Vaught was the Safety Director of Performance. Prior to becoming the safety director, he had been involved in mining for approximately nine years, seven of them in the coal industry. Vaught was not an electrician, but as the safety director, he was familiar with the safety hazards associated with power centers and coal dust. Tr. 136-138, 190.

In Vaught's opinion, the concentration of coal dust inside and outside the cited power center was not high enough to pose an explosion hazard. Tr. 139. Vaught explained that sometimes when there is dust in the air, it is not all coal dust. Rock dust often mixes with the coal dust, and rock dust is not combustible. *Id.*, Tr. 141. The company tried to ensure that all areas of the mine were rock dusted at least every five days. Tr. 142. Vaught stated that management instructed "electricians and fire bosses and people to keep an eye out for float coal dust . . . in order to control . . . accumulations." Tr. 142-143.

Vaught was not present when Inspector Sigmon found the cited conditions, but after the citation was issued, he looked at the area, including the power center. He forthrightly stated, "I did observe float coal dust on the power center, and I did observe float coal dust in the area. It was . . . paper thin[.]" Tr. 144-145. However, Vaught did not believe there was enough coal dust present to create a fire or explosion hazard.<sup>8</sup> Tr. 149.

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<sup>8</sup> Vaught stated,

In my experience as a coal miner when I look at dust that's as thin as a sheet of paper laying on rock dusted

In addition, he did not believe the power center constituted an ignition hazard. He maintained:

If everything . . . is working properly . . . the settings are set properly, everything is insulated and hooked up the way it should, you shouldn't have any major arcs or sparks or problems[.]

Tr. 161.

Even if there was a fire or an explosion, Vaught believed that miners who worked out by the power center would "get outside pretty quickly." Tr. 177. Moreover, they had self contained self rescue devices. Tr. 177-178.

Finally, if there was a violation of section 75.400, it was not due to the company's moderate negligence, because the fire boss:

indicated that we did have some float coal dust in and around the belt head area, which . . . includes the power center area. They did report it in the preshift book. They did report it to mine management and we were making arrangements to have the area cleaned and dusted.

Tr. 178-179.

### **THE ISSUES**

The issues are whether section 74.400 was violated and, if so, whether the violation was S&S. If a violation is found, also at issue are the gravity of the violation, the negligence of the company and the amount of the civil penalty that must be assessed taking into account the statutory civil penalty criteria.

### **THE VIOLATION**

For almost as long as the Commission has existed, it has been accepted that section 75.400 "is violated when an accumulation of combustible materials exists" (*Old Ben Coal Company*, 1 FMSHRC 1954, 1958 (December 1979)) and that a violative "accumulation" exists

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areas or in and around a power center that doesn't have any problems, that's operating normally, there's no extremely high temperatures, then I'm not . . . alarmed to take immediate action to correct or terminate this condition. I am going to make [a] note . . . that the area needs clean[ing], [and] needs rock dust[ing.]

Tr. 185-186.

“where the quantity of combustible materials is such that, in the judgement of the [inspector,] it likely could cause a fire or explosion if an ignition source were present.” *Old Ben Coal Company*, 2 FMSHRC 2806, 2808 (October 1980). Since some combustible material is inevitable in mining operations, the inspector’s judgement as to what constitutes a mass of combustible materials which could cause or propagate a fire or explosion is subject to challenge before a Commission administrative law judge (*Old Ben*, 2 FMSHRC at 2808, n.7), and the judge is required to review the inspector’s judgement by applying the objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent. *UP&L*, 12 FMSHRC 965, 968 (May 1990); *aff’d* 591 F.2d 292 (10<sup>th</sup> Circ. 1991).

In this case, I find that the citation reflects the reasonable exercise of Inspector Sigmon’s judgement. He testified as to the existence of the float coal dust both on and inside the power center, on the catheads at the power center, and in the crosscut. Tr. 19-21, 51, 84. He testified that the float coal dust’s depth ranged from “paper thin” to one eighth inch or more. Tr. 21. He described the dust as black, which signified to him that it had not mixed with rock dust. Tr. 22-23. At the power center he touched the float coal dust and easily put it into suspension. As a result he believably described the float coal dust as dry. Tr. 24.

Safety Director Vaught, who was not with Sigmon when the inspector observed the accumulation, saw the float coal dust later and did not disagree that it was present when Sigmon found it. Rather, he thought that the coal dust did not exist in a concentration sufficient to create a fire or explosion hazard. Tr. 149. Vaught also thought that a lot of the float coal dust was mixed with rock dust. He described the dust as charcoal colored, a lighter color than Sigmon described. Tr. 171. However, Vaught’s testimony was tentative. It lacked the specificity and certitude that characterized Sigmon’s testimony, and I therefore fully credit the inspector’s description of the existence, quantity, and quality of the float coal dust that he observed.

Moreover, I fully credit Sigmon’s belief that the float coal dust was dangerous and posed a fire and/or explosion hazard. Black, dry, float coal dust not only can burn, it also can trigger a self propagating explosion when an ignition puts it into suspension. Sigmon was trained to recognize float coal dust and to prevent such a hazard from occurring, and I fully credit his belief that if an arc or spark occurred inside the box, the accumulated dust could catch on fire and/or explode.

The Commission has repeatedly held that violations of section 75.400 can be established by an inspector’s observations, and here, where I credit inspector Sigmon’s description of the existence, amount, quantity and quality of the float coal dust and the danger it posed, I find that the company violated the standard. *See e.g. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1290 (December 1998).

#### **S&S AND GRAVITY**

Inspector Sigmon found that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Act, 30 U.S.C. §814(d)(1), as a violation of "such nature as could significantly and substantially contribute to the cause and effect of a coal . . . mine safety or health hazard." A violation is properly designed as S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.* 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission enumerated four criteria that must be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F. 2d 99, 103-104 (5<sup>th</sup> Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2012 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.* 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

I have found a violation of the cited safety standard. I further find that the accumulated float coal dust contributed to a distinct safety hazard, i.e., that the accumulation served as the source of a fire and/or the source and propagator of an explosion. I have credited the testimony of Inspector Sigmon regarding the presence, quantity and quality of the float coal dust. In so doing I have rejected Safety Director Vaught's suggestions that the coal dust may have been sufficiently inerted by rock dust to make the accumulation nonhazardous. It should go without saying that float coal dust can burn and, worse, can explode and propagate an explosion. Further, the inspector, a person who had been trained to recognize combustible materials (Tr. 15-16), credibly believed the float coal dust he saw could burn and/or explode.

The question then is whether there was a "confluence of factors" that made an injury producing fire and/or explosion reasonably likely, and I conclude that there was. *Utah Power & Light Col*, 12 FMSHRC 965, 970-971 (May 1990); *Texasgulf*, 10 FMSHRC at 500-503; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (January 1997). I have accepted Sigmon's testimony that the quantity and quality of the float coal dust was such that it could catch fire or explode and/or propagate an explosion. Further, Sigmon credibly described ignition sources that were present and that could have caused just such a fire and/or explosion. In fact, in this instance it is enough that ignitable float coal dust was present inside the confines of the power center where, as Sigmon explained, there were "exposed electrical connections" and where "arcing occur[ed] when . . . [electrical] relays [were] . . . made" and when breakers were reset approximately three

times each shift. Tr. 48, 49; *see also* Tr. 113-114 (testimony of MSHA supervisory engineer, Larry Cook). With 12,470 volts of electricity being delivered to the power center (Tr. 102-103), Vaught's opinion that even if everything in the power center was working properly, there would be no "major" arcs or sparks was inapposite to the issue. Tr. 161. I accept Cook's knowledgeable statement that each time a circuit breaker tripped, an arc resulted. (Tr. 113), and I conclude that as normal mining continued the presence of a triggering arc or spark, whether "major" or not, inside the power center and immediately adjacent to the combustible accumulations of float coal dust made it reasonably likely that a fire and/or explosion would occur.

Moreover, it is clear from the record that miners worked outby the power center and that occasionally miners traveled into the crosscut where the power center was located. Stip. 8. Miners at the power center and those outby were subject to burn injuries, smoke inhalation and/or concussive type injuries, any of which were reasonably likely to be serious, even fatal.

The S&S nature of a violation and the gravity of a 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 FMSRHC 1541, 1550 (September 1996). Here, the "effect of the hazard" if it occurred would have been gave indeed, up to and including a fatality or fatalities. This was a serious violation.

### NEGLIGENCE

Negligence is the failure to meet the standard of care required by the circumstances, and I agree with Inspector Sigmon that the company was moderately negligent. Within the context of this case, the most reasonable interpretation of Sigmon's testimony that the company placed curtains across the holes in the stopping near the power center is that the company knew there was a problem with coal dust traveling to the power center and that it was trying to alleviate the problem. Tr. 75. The company's knowledge that float coal dust was a problem at the power center and crosscut was confirmed by Earl Halls who he told Sigmon about the problem and about the frequent need to clean the area. Tr. 56, 82. Moreover, as Sigmon also testified, the preshift reports indicated that for the three shifts prior to his inspection the one north main belt needed to be extensively rock dusted. This indicated to Sigmon that coal dust had accumulated on and around the belt. Tr. 44-46. As Sigmon also noted, the mine's ventilation system carried float coal dust from the belt into the crosscut where the power center was located. Thus, Sigmon's belief that the float coal dust he saw in the crosscut and in and on the power center took up to three days to accumulate was perfectly consistent with the preshift reports for the one main north belt and with his visual observations during the inspection. Tr. 54.

I do not doubt Vaught's testimony that the company was trying to have all areas of the mine rock dusted at least every five days. Tr. 147. Nor do I doubt that some rock dust had been applied to the crosscut where the power center was located. However, I do not find the fact that

the preshift examiner for the shift on which the condition was observed found that the crosscut was "okay" to be indicative of a lack of negligence on the company's part. See Tr. 171. Rather, given the amount of float coal dust found by Sigmon, I conclude the preshift examiner misreported the condition of the crosscut and the power center. Knowing that the cited area was a "problem," the company should have taken more aggressive steps to make sure that it was kept clean. It did not do so. As a result, float coal dust accumulated in violation of the standard. Because the company did not exhibit the care required by the circumstances, I affirm Inspector Sigmon's negligence finding.

### CIVIL PENALTY ASSESSMENT

I have found that the violation was serious and was the result of the company's moderate negligence. The parties have stipulated that the proposed penalty of \$4,329 will not effect the company's ability to continue in business. Stip. 4. Further, they have stipulated that mine and its controlling entity are large in size, as is the mine's history of prior violations. Stips. 5 and 6. I find further that the company exhibited good faith in abating the violation. Given these criteria, I conclude the Secretary's proposal is appropriate, and I assess a civil penalty of \$4,329.

### ORDER

Within 40 days of the date of this decision, Performance Coal Co. **IS ORDERED** to pay a civil penalty fo \$4,329 for the violation of section 75.400 set forth in Citation No. 7279729. Upon payment of the penalty, this proceeding **IS DISMISSED**.

  
David F. Barbour  
Administrative Law Judge

Distribution: (Certified Mail)

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/sa

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001  
202-434-9981/tele 202-434-9949/fax

December 2, 2010

FREEDOM ENERGY MINING CO., Petitioner	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 2007-433-R
	:	Order No. 6643527;07/31/2007
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	:	#1 Mine
	:	Mine ID 15-07082
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 2008-776
	:	A.C. No. 15-07082-142973 -01
FREEDOM ENERGY MINING CO., Respondent	:	#1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 2008-1503
	:	A.C. No. 15-07082-157603A (10633A)
MYRON DESKINS, employed by FREEDOM ENERGY MINING CO., Respondent	:	#1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 2008-1506
	:	A.C. No. 15-07082-157602A (10634A)
JERRY VARNEY, employed by FREEDOM ENERGY MINING CO., Respondent	:	#1 Mine

## DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor,  
Nashville, Tennessee, on behalf of the Secretary of Labor;  
Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia,  
for Respondents

Before: Judge Zielinski

These cases are before me on a Notice of Contest and Petitions for Assessment of Civil Penalties filed pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815, 820. The petition in Docket No. KENT 2008-776 alleges that Freedom Energy Mining Company is liable for 20 violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines<sup>1</sup> and proposes the imposition of civil penalties in the amount of \$52,116.00. The Secretary also filed petitions, pursuant to section 110(c) of the Act, alleging that two employees of Freedom Energy are liable in their individual capacities for one violation, and seeks imposition of a civil penalty in the amount of \$1,000.00 against each of the individual respondents. A motion seeking approval of partial settlement of 12 violations as to Freedom Energy was filed prior to the hearing. At the hearing, which was held in Pikeville, Kentucky, an oral motion was made seeking approval of settlement of an additional four violations. The proposed settlements will be approved. Remaining at issue as to Freedom Energy are four alleged violations, for which the Secretary has proposed civil penalties in the total amount of \$29,809.00. The violations alleged as to the individual Respondents also remain at issue. The parties filed briefs following receipt of the hearing transcript.<sup>2</sup> For the reasons set forth below, I find that Freedom Energy committed three of the violations, and impose civil penalties in the amount of \$3,850.00. I also find that the Secretary failed to prove the allegations against the individual Respondents, Deskins and Varney, by a preponderance of the evidence. That citation is vacated as to all parties and the petitions against the individual Respondents are dismissed.

### Findings of Fact - Conclusions of Law

Freedom Energy operates the subject underground coal mine, the #1 Mine, located in Pike County, Kentucky. Inspectors from the Secretary's Mine Safety and Health Administration ("MSHA"), inspected the mine several times from July 2007 through January 2008. The citations and orders at issue in these cases were issued in the course of those inspections. Freedom Energy and the individual Respondents timely contested the alleged violations and assessed civil penalties.

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<sup>1</sup> 30 C.F.R. Part 75.

<sup>2</sup> The transcript of the first day of the hearing is referred to as "Tr." The transcript of the second day of the hearing is referred to as "TrII."

Citation No. 6643527

Citation No. 6643527 was issued by MSHA inspector Darrell Hurley on July 31, 2007, and alleges a violation of 30 C.F.R. § 75.202(b), which provides that "No person shall work or travel under unsupported roof . . ." The violation was described in the "Condition and Practice" section of the Citation as follows:

Observed the rail-mounted Fletcher Roof Bolter S/N 75170 being used to install primary support in a fall area. Six rows of four-foot resin rods had been installed and the Fletcher Roof Bolter was not equipped with an ATRS nor were any safety jacks being used or present at the work site. The distance the roof bolts had been installed measured 17'6". Two foremen were engaged in aggravated conduct constituting more than ordinary negligence because one was observed operating the roof bolter and one was standing beside the machine observing this action. A clean-up plan was posted at the three sides of the fall area and item 2 and item 10 directly stated that under no circumstances will any one be allowed to travel out past roof support and the bolter will be equipped with an ATRS or safety roof jacks. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-2.

Hurley determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was high. The citation was issued pursuant to section 104(d)(1) of the Act. A specially assessed civil penalty in the amount of \$18,700.00 was proposed for this violation.

The Violation

Freedom was considering a change to its roof control plan in its No. 1 working section, and had requested that MSHA evaluate the proposal.<sup>3</sup> Hurley, an MSHA roof control specialist, traveled to the mine in response to Freedom's request. He was accompanied by Arnold Fletcher, an MSHA trainee. Worley Taylor, a roof control specialist for the Kentucky Office of Mine Safety and Licensing, was also present to evaluate the roof control plan proposal, and traveled with Hurley and Fletcher. On the previous day, July 30, there had been a small roof fall on the track entry. The fall resulted from a shift in rock strata that had sheered off roof bolts ranging from several inches to two or three feet above the mine roof. It was below the anchorage zone of

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<sup>3</sup> Operators are required to develop and follow a roof control plan approved by the MSHA district manager. 30 C.F.R. § 75.220(a).

the six-foot-long roof bolts and was not required to be reported as an accident.<sup>4</sup>

The inspectors arrived at the mine and went to the office where they met with Eric Coleman, the mine superintendent at the time, who told them about the fall. They advised Coleman that they wanted to see the area of the fall, and Coleman replied that they would be traveling right by it because it was on the track entry that was the route to the section. Coleman called underground to Rodney Chapman, a mine foreman, and instructed him to bring a transport vehicle to the elevator. The inspection party, including Coleman, went underground about 9:00 a.m., and traveled to the working section on tracked vehicles. When they reached the area of the fall, they had to stop and proceed on foot. Escapeways and lifelines had been re-routed around the fall, the area had been dangered off, and copies of Freedom's clean-up plan had been posted at all approaches to the area. That plan specified that, when re-bolting a fall, a bolter with an ATRS be used, or that roof jacks be employed if the ATRS was not available or would not reach the roof.<sup>5</sup> Ex. G-3.

At the fall, the inspectors observed a track-mounted Fletcher roof bolter attached to a locomotive. The drill head was located at the end of a boom mounted on the inby end of the bolter. The controls were located on the right side of the boom, as viewed from the track-mounted base. There was a four-foot-square canopy above the controls, made of approximately one-half inch thick steel plate. As the inspectors walked forward, past the locomotive, they observed Myron Deskins, a mine foreman, at the bolter's controls in the process of installing a roof bolt. Jerry Varney, another foreman, was standing to the right of the bolter, observing Deskins. The bolter did not have an ATRS and there were no jacks in the area.

Deskins was approximately half-way through the process of installing the bolt. The inspection party watched him finish for about two minutes, by which time Hurley "figured out what was happening." Tr. 41. Six rows of bolts had been installed in the fall area, and about two more rows of bolts needed to be installed to support the roof up to the inby edge of the fall.<sup>6</sup> Hurley and the other inspectors believed that Deskins and Varney had installed all of the bolts in the fall area without using jacks. Tr. 51-54, 120-21; Ex. G-2, R-14, R-15. As Hurley explained, "if you see a guy bolting and you walk up and they've been there all morning, you just make that assumption." Tr. 51. They believed that Deskins was continuing to bolt in the fall and, as such,

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<sup>4</sup> An unplanned roof fall that is not "at or above the anchorage zone" is not an "accident" required to be reported under the Secretary's regulations. 30 C.F.R. §§ 50.2(h)(8), 50.10.

<sup>5</sup> An ATRS is an automated temporary roof support system, essentially, hydraulic jacks that apply pressure against the mine roof while bolts, permanent roof support, are being installed.

<sup>6</sup> There is conflicting evidence on the number of bolts that had been installed in the fall. Hurley testified that it was 27-29, and his notes reflect that it was 27. Tr. 32; Ex R-14. Fletcher testified that it was 20-24, and his notes reflect 24. Tr. 112; Ex. R-15. Taylor testified that it was 23. Tr. 85.

that he was under unsupported roof.<sup>7</sup> Tr. 24, 88. When Deskins was finished with the bolt, Hurley called Deskins and Varney over and asked where the jacks were. No one responded, except Varney, who said he did not believe that jacks were needed. Hurley stated that Deskins and Varney should “know better” than to do what they were doing. Tr. 263. Coleman told the men to stay quiet until he could figure out what was going on. Tr. 56, 167. He believed that Hurley was accusing them of bolting the fall without jacks, and was concerned, based upon prior experience, that any statements made might be taken out of context and used against the company. Tr. 167-69. Varney and Deskins followed Coleman’s lead, and did not discuss the situation with the inspectors. Tr. 55, 115. Deskins explained that he was “bombarded” with accusatory questions, didn’t see that he had done anything wrong, and felt that the situation “already went sour in my eyes.” Tr. 263. He did not speak, in part, because he was upset with the whole situation.” Tr. 264.

Once outside Coleman was informed that a citation was being issued pursuant to section 104(d)(1) of the Act for bolting the fall without jacks, which would have been a violation of Freedom’s roof control plan. Tr. 170. The citation, as issued, specified a violation of a different standard, traveling under unsupported roof. Fletcher’s notes indicate that Freedom was informed that a section 104(d)(1) citation would be issued for not following the roof control plan and allowing miners to work under unsupported roof. Ex. R-15.

The parties’ respective versions of the facts are in irreconcilable conflict. Respondents contend that Varney and Deskins had not installed any of the bolts in the fall, that Deskins was not bolting in the fall when the inspectors arrived, and that he was not under unsupported roof. Deskins noticed a small area where material had separated from the plate on a bolt near the right rib that was adjacent to, but not in, the fall. He decided to spot a bolt in it while he and Varney waited for the inspectors, and was in the process of installing that bolt when the inspectors arrived on the scene.

Coleman testified that, on July 30, the day of the fall, he secured jacks and the Fletcher roof bolter from another facility, and assigned John Ball, a second shift foreman, to begin the process of cleaning up and securing the roof in the area. Tr. 158-59. Ball testified that he and another miner installed cable bolts in the track entry leading up to the fall, and installed resin-grouted roof bolts in the area of the fall. Tr. 135-36. When working under the now-unsupported roof, they set jacks to provide temporary roof support, and used the track-mounted roof bolter to install a row of bolts. Tr. 136. They backed the locomotive and bolter out of the area to a spur off the main track, brought in a scoop to clean the newly re-bolted area, brought the bolter back in, re-set the jacks, and repeated the process. Tr. 135-36. They worked 16 hours and installed about 27 bolts in the fall area, over the next two shifts. A small area on the left inby corner of the fall remained to be bolted. Tr. 137-38. That area of the track entry was very confined and was

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<sup>7</sup> Taylor’s testimony was couched in terms of his assumption that the foremen had installed the other bolts and, because Deskins was bolting in the fall, “he would have to be inby the last row of permanent roof support.” Tr. 92.

crowded with water lines. In order to facilitate cleaning, they removed everything they didn't need from the area, including the jacks. Tr. 139-40. The jacks were placed on a mantrip, which was backed out to allow the locomotive and bolter to be removed. Coleman thought that the third shift miners took the mantrip, with the jacks on it, to the elevator on their way out of the mine, because the jacks were found near the elevator. Tr. 182.

When Varney reported for work on the morning of July 31, Coleman told him of the fall, that Ball was working on it, and asked him to see if anything needed to be done. Tr. 199. Varney and Chapman went underground about 7:00 a.m., and proceeded to the area of the fall. Ball was preparing to clean a newly bolted area so that the remainder of the fall could be bolted. Tr. 109. Varney brought the scoop in, cleaned the area, which took about an hour, and then backed the scoop out and brought the locomotive and roof bolter forward. Tr. 199, 208-10. Deskins knew of the fall and went to the area to see if Varney needed any help. Tr. 249. He arrived about the same time that Coleman called Chapman to get a ride for the inspection party. Tr. 210.

Deskins testified that he noticed a small defect next to an existing bolt near the right rib that was not in the area that fell. He decided to put a bolt in it to make it safer while he and Varney waited for the inspectors. Tr. 211, 255-56. Varney did not object. Deskins went to the controls under the canopy on the right side of the roof bolter's boom and began to install the bolt. There was permanently supported roof to his rear, on both sides and in front of him. Tr. 211-13, 258. He drilled the hole, but had trouble getting the drill steels out. Tr. 258. About that time the inspectors arrived. Tr. 258. Deskins put the resin grout into the hole, and installed the bolt. Tr. 259. Hurley called Deskins and Varney over after Deskins finished, and the other previously-described events occurred.

It is unfortunate, although perhaps understandable, that Coleman instructed Varney and Deskins to keep quiet when Hurley began to question them. Had there been an open discussion at that point, major conflicts in the evidence might have been eliminated. The precise location of the bolt that Deskins installed could have been fixed and the exact boundaries of the fall could have been diagramed. If there was disagreement, more probative evidence, e.g., pictures and drawings, could have been developed on those critical issues.<sup>8</sup> As it is, when Hurley made a sketch of the area, he approximated the area of the fall, and he made no attempt to indicate the locations of the bolts that had been installed in the fall or the bolt that Deskins installed. Tr. 60;

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<sup>8</sup> Freedom apparently conducted some sort of investigation after the citation was issued. Tr. 187-89. However, no pictures diagrams or other materials were presented at the hearing. Varney testified that, in 2007, he didn't think they would need much evidence to refute the violation, and that if it happened today, he would gather information to support a defense. Tr. 243-44. He also stated that if he had to do it over again he would have explained what had happened to the inspectors - but that "hindsight was 20/20." Tr. 228.

Ex. G-4, R-14.<sup>9</sup> His later-prepared diagram shows Deskins, who was at the controls of the bolter, on the wrong (left) side of the boom, which would have placed him closer to the unsupported inby area of the fall.<sup>10</sup> Ex. G-4.

It is understandable that Hurley was not particularly concerned about the location of the bolt that Deskins installed. He, and the other inspectors, thought that Varney and Deskins had installed all of the bolts that had thus far been installed in the fall, and were simply installing one more. Since they were "obviously" bolting the fall without an ATRS or jacks, they were in clear violation of Freedom's roof control plan, and Deskins would have had to have been under unsupported roof to install the next row of bolts, both to get to and while under the canopy. Tr. 70. The assumption that Varney and Deskins were in the process of bolting the fall, undoubtedly resulted in a lack of focus on the location of the bolt, and the possibility that it was adjacent to, not in, the fall.

Despite the conflicts noted above, there are a few issues upon which the parties' evidence is not diametrically opposed. The diagram made by Hurley and the drawing submitted by Respondents show the bolter in virtually the same position in the entry, with the boom extended toward the right rib. Ex. G-4, R-16. Respondents' exhibit also depicts the location of the bolt that Deskins was installing when the inspectors arrived. It is consistent with the location and orientation of the bolter, as shown in both depictions, and I find that it accurately shows the location of the bolt along the right rib of the entry.

Witnesses agreed that a substantial portion of the fall had been bolted, and that only a small area on the inby end remained to be supported.<sup>11</sup> There is also general agreement that the fall was somewhat irregularly shaped, and the area remaining to be bolted extended further inby on the left side of the entry than on the right.<sup>12</sup> Again, there are similarities in Hurley's sketch

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<sup>9</sup> It appears that Hurley initially made a rough sketch of the scene in his notes. Ex. R-14. Later that day, he prepared a more detailed diagram. Tr. 30; Ex. G-4.

<sup>10</sup> Hurley's diagram shows Deskins on the left side of the boom. Ex. G-4. Witnesses established that the controls are on the right. Tr. 91, 122, 163, 214-15, 254.

<sup>11</sup> Approximately 11 feet of the 30-foot fall remained to be bolted. (Hurley) Tr. 32, 38. Seven to 11 feet of fall was unbolted. (Fletcher) Tr. 113. Unbolted area was 11 feet on left side, 6-7 feet on right. (Taylor) Tr. 85, 101-04. Unbolted area was 6-8 feet, and two rows of bolts were needed. (Coleman) Tr. 179. Small portion on left needed to be bolted, three to four bolts. (Varney) Tr. 179, 201-04, 230-32; Ex. R-16. Fall was 98% bolted. (Deskins) Tr. 253. Inby corner on the left side of the entry was the only thing left to bolt, three to four bolts to finish. (Ball) Tr. 137-38, 142-43.

<sup>12</sup> Fall was oblong, like a football, and the area remaining to be bolted was about 11 feet on the left and 6-7 feet on the right. (Taylor) Tr. 101-04. Fall was shaped like a "u" from the left side, area to be bolted was on left side of the bolter. (Coleman) Tr. 155, 163. Area to be

and Respondents' depiction of the area on those issues.<sup>13</sup> On Respondents' drawing, the area of the fall was outlined in blue pen by Varney. Tr. 200-04; Ex. R-16. It generally corresponds with the shape of the fall described in the testimony. The area that had been bolted, highlighted in pink, also generally corresponds with the testimony, and shows a small, unbolted area on the left inby portion of the fall. Neither Hurley's original sketch, nor his diagram, purport to show the bolted and unbolted areas of the fall. However, at the hearing he drew a line on his diagram to indicate the area of unsupported roof inby, and marked "x"s and dots to indicate where bolts had been installed.<sup>14</sup> Tr. 66-68; Ex. G-4. The line that he drew to identify the unsupported area in the entry shows the supported area extending inby past the depicted location of the bolter drill head. He later testified that the line should have been further outby closer to the bolter, where he depicted the bolts. Tr. 72-73. However, the line, as drawn, corresponds with the testimony that the fall had largely been bolted. If it were moved back outby to where he depicted the bolts, there would have been substantially more of the fall, at least half, that had yet to be bolted.

I find that the roof in the entry had been supported to a point inby where the bolter drill head was located, and that there was supported roof inby and outby where Deskins was located on the right side of the bolter's boom, as Deskins and Varney testified.<sup>15</sup> The irregular shape of

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supported was small and pie-shaped, fall was wider outby and tapered in inby. (Varney) Tr. 230-32. Fall remaining to be bolted was to the left of the bolter. (Deskins) Tr. 261.

<sup>13</sup> Hurley's original sketch, reflected in his notes, shows the fall as angled from right to left and extending further inby on the left side. Ex. R-14. His diagram shows the fall essentially across the width of the entry on the inby side. Ex. G-4. This relatively small inconsistency is quite significant, since Respondents claim that the area on the right rib toward the inby area of the fall, where Deskins installed the bolt, was not in the fall and was supported roof.

<sup>14</sup> The events in question occurred some three years prior to the hearing and recollections of events were not fresh in witnesses minds. When Hurley drew the line of unsupported roof on the exhibit, it is highly unlikely that he was doing so from recollection. Rather, he was most likely indicating an area consistent with his testimony that all but about 11 feet of the fall had been bolted. Likewise, when he placed "x"s and dots indicating the bolts, he was most likely showing where bolts would have been if Deskins was in the process of continuing to install another row of bolts in the fall area, which is what he assumed to be the case. But the last row of bolts in the fall could not have been that far outby, and been consistent with the testimony on the amount of the fall remaining to be bolted.

<sup>15</sup> Hurley also believed that there was unsupported roof behind Deskins, possibly in the crosscut intersecting the track entry on the right. There was considerable dispute about whether the fall extended into the crosscut, and whether the roof in the crosscut was permanently supported. I see no need to resolve those conflicts, because, even if there was some unsupported roof in the crosscut, neither Deskins nor Varney would have been under it. They were in much the same relative position with respect to the crosscut, and there is no contention that Varney was under unsupported roof. Tr. 69.

the fall, and the fact that it extended further on the left side of the entry than the right, also supports Respondents' contention that the right rib, where Deskins installed the bolt, was not in the area of the fall. Ex. R-16. I so find.

Respondents also argue that they would not have committed an overt violation, or exposed Deskins to a hazardous condition, in the presence of federal and State mine inspectors.<sup>16</sup> Varney and Deskins were very experienced foreman at Freedom, had cleaned up previous falls, and were well aware of the requirements of the clean-up plan. Tr. 198, 248. They knew that Freedom had requested an evaluation of proposed changes to the roof control plan for the No. 1 section, and expected that inspectors would be coming into the mine that day. Tr. 207, 251, 257. More significantly, Chapman was with them when Coleman summoned him to bring a transport for the inspectors. Tr. 210. Consequently, they knew that inspectors were actually in the mine and would soon be coming up the track entry to the area of the fall, where they would have to disembark from the transport vehicle and proceed on foot. Tr. 211, 245, 257. Varney testified that he could hear the approach of the diesel-powered mantrip that the inspectors were on, and could see them walking up to the bolter. Tr. 245. Taylor was confident that Varney and Deskins knew he was in the mine. Tr. 96-97.

Resolving the parties' competing versions of the facts has been difficult. The inspectors all had considerable mining experience, and were not likely to mistakenly conclude that Deskins was bolting in the fall. However, the similarities in the parties' evidence regarding the location of the bolter and the bolt, the shape of the fall and area of unsupported roof, are more consistent with Respondents' contentions, and lead me to conclude that it is more likely that Deskins was under supported roof. I am also persuaded that Deskins and Varney would not have committed an obvious serious violation knowing they were in, or would soon be in, the presence of mine inspectors.

Considering all of the above, I find that the Secretary has failed to carry her burden of proof that the violation was committed, as alleged. Accordingly, the citation will be vacated.

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<sup>16</sup> Deskins testified that he knew the inspectors were on the way because Chapman had gone to get them. He had no reason to hurry, because he didn't feel he was doing anything wrong. Tr. 257-58. Coleman testified that Varney and Deskins had 40 years of experience between them and deal with inspectors every day. They knew he was bringing two roof control inspectors to the section and would have to drive straight to them. If they would do something like they were accused of, they would have been fired years ago. Tr. 171-72. As previously noted, Varney testified that he heard and saw the inspectors approach and they were "absolutely not" putting a bolt in the fall. He would not have participated in an open violation of the roof control plan and would not have let his friend and co-worker engage in hazardous conduct. Tr. 224.

## Individual Liability

The Act provides that a director, officer, or agent of a corporate operator may be subject to civil penalties in his individual capacity for knowingly authorizing, ordering or carrying out a violation of the Act. 30 U.S.C. § 820(c). The legal standards governing individual liability have often been stated by the Commission. *See, e.g., Maple Creek Mining, Inc.* 27 FMSHRC 555, 566-67 (Aug. 2005). Having found that the Secretary failed to carry her burden of proof of establishing the violation of the cited provision, the cases against Varney and Deskins must also fail.

### Order No. 6645336

Order No. 6645336 was issued by MSHA inspector Roger Workman on October 11, 2007, and alleges a violation of 30 C.F.R. § 75.360(b), which requires that certified persons conduct preshift examinations of various areas, including working sections, and specifies that “the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.” The violation was described in the “Condition and Practice” section of the Order as follows:

An adequate preshift was not conducted for the 001-0 MMU section, dated 10-11-07, from 5:35 a.m. to 6:20 a.m. The preshift examiner failed to recognize the #4 right crosscut was not permanently supported and no warning devices were in place to warn miners of the unsupported mine roof. There was a line curtain hung on the last row of permanent supports going by the unsupported crosscut. The operator is required to have a safety talk with foremen before this order is terminated. Two other violations were issued in conjunction with this order. Citation # 6645334. Citation 6645335.

### Ex. G-6.

Workman determined that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was S&S, that one person was affected, and that the operator’s negligence was high. The order was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator’s unwarrantable failure to comply with the mandatory standard. A specially assessed civil penalty in the amount of \$9,800.00 was proposed for this violation.

## The Violation

Workman was at the mine to conduct a regular quarterly inspection.<sup>17</sup> He was accompanied by Lester Preece, an inspector trainee, and Varney, who represented Freedom. They traveled the No. 4 entry of the 001 MMU, and observed notations made by Jonathan Hunt, the foreman on the midnight shift, who had conducted the preshift examination for the oncoming day shift between 5:30 a.m. and 6:28 a.m. that morning. Preshift examiners mark the date and time of their examination and initial the entries at various locations during their examinations, including on the roof and ribs, and at the faces. The entry was clean, had been rock dusted, and a line curtain had been hung on the last row of roof bolts on the right side of the entry to within eight feet of the face. From all appearances, there were no hazards in the area, and none had been reported by Hunt in the preshift record book. Tr. 293.

Workman lifted the curtain to check the condition of the right rib and found the #4 right crosscut had been cut to a depth of about 20 feet, but had been left unbolted. There were no warning devices alerting persons to the condition, which posed a serious hazard. The opening of the crosscut began about 16 feet from the face, eight feet from the end of the curtain, and extended outby for approximately 20 feet. The condition is depicted in a diagram prepared by Preece. Tr. 329; Ex. G-7. Under Freedom's roof control plan, no one is permitted to proceed inby a newly mined crosscut until at least three rows of roof bolts have been installed. Unsupported mine roof may fall, and if it falls, it would typically take out the first row of bolts it encounters. Tr. 297, 332. Consequently a fall of the roof in the crosscut would most likely have extended out into the entry, a few feet past the row of bolts that the line curtain had been hung on. Clearly, this posed a threat of serious injury to any person working or traveling in that part of the entry. And just as clearly, Hunt had failed to sufficiently examine the right rib of the entry, as required by the standard.

Respondent concedes that it was improper to hang the curtain without first having bolted the crosscut, but contends that improperly hanging the line curtain does not definitively establish a violation of section 75.360(b). Respondent argues that the preshift examiner "could have been following MSHA's regulations and conducting a thorough preshift examination and still have missed this condition." Resp. Br. at 17. Respondent's argument is based, in part, on a consideration that has nothing to do with the violation. It points to the fact that an examiner should not stand behind the line curtain to measure the volume of air flow, because his body would interfere with the flow. Tr. 345. However, a proper examination of the rib would have been entirely independent of an air flow measurement. Freedom also argues, relying on Varney's testimony, that an examiner could have examined the rib by looking behind the end of the curtain, and failed to see the crosscut. Tr. 347. However, since Varney never looked behind the curtain, the accuracy of that statement is highly questionable. Tr. 358-59. Varney also conceded that a preshift examiner should check behind the curtain for hazards, and would have to look

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<sup>17</sup> The Act requires that underground coal mines be inspected four times annually. 30 U.S.C. § 813(a).

behind the curtain to check for loose ribs. Tr. 346, 357. Any examination of the right rib that failed to disclose the presence of the crosscut would have been *per se* inadequate. I find that Freedom violated the standard by failing to conduct a proper preshift examination.

### Significant and Substantial

An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the failure to conduct an adequate preshift examination, a hazardous condition was not discovered and corrected or dangered off. There is little question that any injury resulting from a roof fall would have been reasonably serious and could easily have been fatal. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event.

The injury causing event in this instance would be a roof fall in the unbolted crosscut that would extend past the first row of bolts and strike a person in the entry. That would require a confluence of two events, a roof fall in the crosscut and a person being present in the area of the entry affected by the fall. The roof in the mine was composed of sandstone and shale, which tends to separate at the seams of the layers, creating loose draw rock. Tr. 296. Workman explained that one cannot tell if a roof is about to fall by looking at it. Tr. 311. Draw rock was not uncommon on the section, but the roof in and around the crosscut appeared to be in good condition, and there was no apparent draw rock. Tr. 296, 311, 334. Judging from the appearance of the roof, a fall was not imminent.

While the entry was not a main travelway, persons had been in the entry, and were expected to be in the entry prior to the abatement of the hazardous condition. The hazardous condition most likely was created during the evening shift the day before. While it had existed for some 10 hours, it had existed only for about four hours after the preshift examination at issue, and may have existed for the rest of the shift. Tr. 299. The entry had been cleaned and dusted, and the line curtain had been hung. Tr. 307. Hunt had conducted the preshift examination, and a miner operator may have traveled to the face to conduct safety checks. However, the cleaning and dusting, as well as the hanging of the curtain, would have occurred prior to the conduct of the preshift examination. Consequently, any exposure to those persons should not be considered in evaluating the likelihood of an injury occurring because of the inadequate preshift examination. Travel in the entry after the inadequate preshift examination would have been very limited. A miner operator conducting safety checks was the only possibility noted, except for the unlikely prospect of a person simply deciding to walk up the entry. A day shift foreman may also have conducted an on-shift examination, but would likely have discovered the condition and avoided it.

A roof fall in the crosscut could extend to the second row of bolts, about eight feet into the entry, and four feet past the line curtain. Tr. 297. It was generally recognized that miners would most likely travel near the center of the entry, i.e., approximately 10 feet from either rib. Tr. 337, 342. To be struck by a fall in the crosscut, a person would have had to be within four feet of the line curtain, i.e., on the extreme right side of the 16 foot-wide opening between the left rib and the curtain.

While I agree with Workman, that people that make a habit of traveling under unsupported roof will eventually suffer a fatal injury, I am not convinced that the violation, an inadequate preshift examination, was reasonably likely to result in an injury causing event.

Tr. 306. The presence of persons in the entry was and would have been quite limited, and it is likely that any persons who did travel the entry would have remained far enough away from the right rib and line curtain, such that they would not have been injured even in the unlikely event that they happened to be adjacent to the crosscut when its roof fell.

Given all of these factors, I find that, while it is possible that a serious injury could have occurred as a result of the violation, the Secretary failed to carry her burden of establishing that it was reasonably likely that a serious injury would occur in the normal course of continued normal mining operations. I find that the violation was unlikely to result in a permanently disabling injury and that it was not S&S.

#### Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

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

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important

factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Order was issued pursuant to section 104(d)(1) of the Act.<sup>18</sup> The predicate section 104(d)(1) citation was Citation No. 6633527. That citation was invalidated above, which dictates that, in order to be properly issued pursuant to section 104(d), the Order would have to be considered a citation, and the violation would have to be both S&S and the result of an unwarrantable failure. 30 U.S.C. § 814(d)(1). Having found that the violation was not S&S, it is technically unnecessary to decide whether it resulted from an unwarrantable failure. However, it is necessary to address the issue of negligence, which is alleged to have been high. Because the S&S findings herein may, or may not, become final, the issue of unwarrantable failure will be addressed for the sake of judicial economy.

The Secretary contends that the violation was an unwarrantable failure because the preshift examiner, an agent of the operator, failed to examine the right rib of the entry, a clear violation of the standard. She notes that the condition was extremely dangerous, and that the unbolted crosscut would have been an obvious hazard to anyone who looked at it.

The unbolted crosscut presented the potential for a roof fall that would extend into the entry, possibly four feet past the line curtain. The hazardous nature of that condition was exacerbated by the hanging of line curtain that hid the condition, so that persons traveling in the entry could not see it. The hanging of the line curtain and the failure to danger off the area were egregious actions, and Workman issued two S&S citations related to the creation of the hazard. Ex. G-8, G-9. Those citations were issued pursuant to section 104(a) of the Act, because Workman had no evidence linking the obviously high negligence of the responsible hourly employees to mine management. Tr. 323.

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<sup>18</sup> Section 104(b) of the Act provides:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

The instant violation stands on a slightly different footing. The violation at issue did not involve the creation of the hazard, but, rather the failure to discover it, about eight hours after it had been created. Workman noted that the condition had existed for at least 10 hours when he issued the order. However, the violation at issue had occurred approximately four hours earlier. The condition could not be observed by anyone in the entry, but it would have been obvious to anyone who looked behind the line curtain in the area of the crosscut. Was the violation, the inadequate preshift examination, obvious or extensive? These concepts are not easily applied to this "failure to look" violation.

Freedom contends that there are several mitigating factors that preclude a finding of high negligence or reckless disregard. The curtain had been hung to the face, giving every appearance that the crosscut had not been cut. There is no dispute that this was a highly unusual situation that had not been encountered at the mine. Workman agreed that the preshift examiner was "put in a bad position" by those who created the hazard. Tr. 315-16. Varney postulated that, under the circumstances, with the entry cleaned and dusted and the roof and left rib appearing in good condition, that he might not have looked behind the curtain to check the right rib, because it too would be fine "90% of the time." Tr. 359-60, 362.

Whether Hunt's actions rose to the level of unwarrantable failure is a close question. On the one hand, he was an agent of the operator, and he clearly did not effectively examine the right rib of the entry, as required by the standard. As a result, a condition hazardous to persons traveling in the entry was not discovered and would have continued to exist for approximately one more shift. On the other hand, the hazard affected a relatively small area of the entry. Very few miners would have had reason to travel in the entry, and probably would not have traveled in the affected area. He apparently assumed, given that the roof and left rib were in good condition, that the right rib also posed no hazard.

As the Secretary points out in her brief, the Act's preshift examination requirements are "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). An effective examination by a certified person provides assurance that no hazardous conditions will be encountered by miners assigned to work or travel in the area. Freedom's agent's failure to effectively examine the right rib was clearly a violation of the standard that allowed a hazardous condition that could have resulted in a fatal accident to continue. I find that the violation was the result of Freedom's high negligence, and its unwarrantable failure to comply with the standard.

#### Citation No. 6655438

Citation No. 6655438 was issued by MSHA inspector Craig Plumley on January 7, 2008, and alleges a violation of 30 C.F.R. § 75.512, which requires that "electric equipment shall be . . . properly maintained by a qualified person to assure safe operating conditions." The violation was described in the "Condition and Practice" section of the Citation as follows:

In the underground shop area at the bottom of the elevator shaft, the operator has failed to maintain electrical equipment in safe operating condition. Two electrical heating elements were operating and were red-hot with no protective guarding to prevent persons from being exposed and coming into contact with this open heat source. The two heating elements are located 24 inches above the ground, 12 inches from a 2-man bench seat, 24 inches from personnel lockers and within 48 inches of the walkway where personnel enter and exit the mantrip. Persons coming into contact with this exposed heat source would receive severe burn injuries.

Ex. G-12.

Plumley determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$1,304.00 was proposed for this violation.

#### The Violation

Plumley was a ventilation specialist who had returned to the mine to terminate a citation that had been issued related to seals. He was accompanied by Keith Preece, who was in training to become a certified MSHA inspector. As they entered the shop area where the mine elevator terminated, Plumley noticed a "burning" smell and traced it to two electrical heating elements that were located behind a small bench. The heating elements were inside stainless steel cylinders that were 10 inches in diameter and 12 inches tall. They were about 12 inches apart, and had several electrical heating elements, similar to burners on an electric stove top, arranged two to three inches below each other starting about three inches from the tops of the open cylinders. The cylinders had been used to clean filters of diesel locomotives, but were no longer used for that purpose because the engines of the locomotives had been changed, and the filters were no longer required. The heating elements were controlled by timers, which cycled on and off over a period of about 45 minutes. They were energized during cold periods to provide heat for persons in that part of the shop area.

There are no significant factual disputes as to the cited condition. The heating elements were extremely hot, and the steel cylinders were also very hot. There was no guard or other barrier to prevent access to the heating elements, or the cylinders themselves, which were located in an area traveled by miners entering and exiting the mine. The violation was abated by the installation of expanded metal guards preventing contact with the cylinders.

Respondent argues that the devices were not defective and that they presented no hazard because in order to suffer a burn injury a person would have to intentionally stick his hand down through the curing filter to the heating element. The arguments are unavailing. The key consideration in the standard is that electric equipment be maintained in a safe condition. The fact that the cylinders were not defective, in an operational sense, does not alter the fact that they

were extremely hot when in operation, and could cause injury to anyone coming into contact with them. It would not have been necessary to contact the heating elements to suffer a burn injury. The hot steel cylinders themselves could also have caused an injury. There is some suggestion that the devices were still in use to clean filters at the time of the alleged violation. I find that they were no longer used for that purpose. In any event, it is clear that they were not being used to clean filters at the time of the violation. Smith explained that the filters were also 10 inches in diameter and fit on top of the cylinders. There clearly were no filters on the devices at the time. They were being used to provide heat in the shop area, not to clean filters. With no filter on top, the heating elements were readily accessible to inadvertent contact.

I find that the cylinders and heating elements presented a hazard. Persons coming into contact with either object could suffer burns. Because the electrical equipment was not maintained in safe operating condition, the standard was violated.

S&S

Plumley believed that the hazard was reasonably likely to result in a permanent injury, either from personal contact with the hot surfaces, or a fire resulting from clothing or objects coming into contact with the heating elements. Crews worked on two sections in the mine, three shifts per day, six days per week. Consequently, two groups of 18-20 men, one exiting and one entering the mine, traveled through the shop area three times per day. If a mantrip was not immediately available, the group entering might spend 5 to 10 minutes in the area. In cold weather, men waiting in the area would gather near the cylinders for warmth. The area was clean, generally dry, and there were no slipping or tripping hazards noted. Plumley thought that there were personnel lockers in the area, but, they were actually metal tool boxes that resembled lockers and were not routinely accessed by the miners in transit. TrII. 14, 45.

Respondent counters that miners also have access to mantrips through an adjacent entry, and do not necessarily travel through the shop area when entering and exiting the mine. There are also numerous fire extinguishers in the shop area. The cylinders have been in operation for many years and have caused no injuries. Miners and other personnel, including mine inspectors, have warmed themselves by the heaters, which have never been cited as being in violation of a standard. Respondent also argues that the chance of inadvertent contact was minimized by the presence of the timing devices on a shelf located above the devices. TrII. 112.

Considering the number and frequency of miners that came into relatively close proximity to the unprotected cylinders, I find that it was reasonably likely that a miner would have suffered a burn injury as a result of the violation. However, I find it unlikely that any such injury would have been reasonably serious. Rather, a miner, typically wearing protective clothing, would suffer no more than a minor burn injury, resulting in no lost work days.<sup>19</sup> Consequently, the

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<sup>19</sup> Plumley also determined that injuries might result from a fire originating from the heating elements contacting clothing or personal items worn by miners sitting on the bench, or by

violation was not S&S. I agree with Plumley's assessment of the degree of operator negligence as moderate, for the reasons stated in his testimony. TrII. at 16-17.

Citation No. 6656994

Citation No. 6656994 was issued by MSHA inspector Kip Bell, on January 10, 2008, and alleges a violation of 30 C.F.R. § 75.202(a), which requires that the "roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." The violation was described in the "Condition and Practice" section of the Citation as follows:

The roof where persons work or travel, is not being supported to prevent falls of the mine roof, located at the elevator bottom at the man trip storage area (track spur). There are two cribs on the left rib that have not been constructed firmly against the mine roof. The area between the top of the cribs and the mine roof measures approximately 1 inch to 10 inches. Loose and broken draw rock is present in the affected area.

Ex. G-16.

Bell determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$1,304.00 was proposed for this violation.

The Violation

Bell was conducting a regular quarterly inspection of the Freedom mine. He was accompanied by Phillip Carter, an MSHA inspector in training. The area in question was located at the bottom of the mine elevator, where crews entering the mine boarded man trips to travel to the working sections, and crews exiting the mine exited man trips to get on the elevator. Man trips, used to transport miners to and from the working sections, traveled on tracks that ran in an entry adjacent to the elevator access. Another entry intersected the main track entry in the area of the elevator. A short section of track, or spur, ran up that entry and was used to store man trips that were inactive or in need of repair. TrII. 73, 78. A switch controlled tracked vehicles' access to the spur. Generally, entering miners boarded the vehicles parked on the main track that had been used by the exiting miners to travel to the elevator. TrII. 78, 84. Occasionally, a man trip was not immediately available on the main track, and one that was stored on the spur was used.

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items being tossed into the cylinders on the mistaken belief that they were trash cans. His description of how such a fire might result in an injury was vague. He opined only that smoke could be generated and that there was flammable material used in the shop. TrII. at 30. I find it highly unlikely that the violation would have resulted in a fire-caused injury.

There had been a rib roll on the left side of the entry in which the spur was located, and 12 sets of cribs had been erected along the rib to provide roof support and protection from rib rolls.<sup>20</sup> Nine jacks had also been installed on the right side of the entry, to provide supplemental roof support. The spur entry was approximately 20 feet wide, rib-to-rib. The cribs and jacks effectively shortened the width to 15-16 feet. TrII. 73. The mine roof in the area of the cribs was broken, and loose draw rock was present. TrII. 56, 79. The two cribs that were nearest to the main track had been dislodged, possibly by a piece of mobile equipment, such that they were no longer in contact with the mine roof. Varney traveled with Bell and confirmed the conditions observed by Bell and Carter. TrII. 75, 79. When the inspection party traveled to the working sections, the shop personnel "tightened up" the cribs, and the citation was terminated by Bell when he returned to exit the mine.

Rib rolls change the location of the rib/roof intersection, lengthening the distance from existing roof bolts to the rib, and necessitating the installation of supplemental roof support. TrII. 83. Properly installed cribs supplied that support, and provided protection from further deterioration of the rib and the adjacent mine roof. The two cribs that were not installed firmly against the roof did not provide the required support and created the possibility of further deterioration of the roof and rib. TrII. 55-56. They also presented an additional hazard, because they could be toppled by a rib roll and strike a nearby miner. TrII. 56-57.

Respondent argues that the standard was not violated because there was adequate roof support in the area, and the "loosened cribs were still present and provided adequate protection." Resp. Br. at 26. I reject the argument. The critical area was located in the immediate vicinity of the left rib of the spur entry, where the rib roll had occurred, and the cribs had been erected. The presence of permanent roof support in the entry, and the jacks on the opposite side, did not provide support in that area. TrII. 88. Nor did the loosened cribs provide support for the roof in that area, which had loose and broken draw rock.

I find that the standard was violated, as alleged in the citation.

S&S

An injury caused by falling draw rock, or crib timbers toppling into or onto a miner, would have been reasonably serious. TrII. 58. The critical question in the S&S analysis is whether an injury causing event was reasonably likely to have resulted from the violation. There was loose draw rock in the area that could have fallen at any time. However, the evidence establishes that it was confined to the immediate area of the cribs, where the rib roll had occurred. The cribs themselves, including the two that were not firmly against the roof, provided a reasonably effective barrier to travel under the loose draw rock. Bell did not require that any draw rock be taken down before departing the area, and did not require that the area be dangerous

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<sup>20</sup> Cribs are constructed of 6-by-6-by-30-inch pieces of hardwood, stacked in alternating pairs. Wooden wedges are driven between the mine roof and the last layer of structural timber.

off before departing to inspect the working sections. TrII. 64, 79. It is unlikely that a miner would have been injured by falling draw rock. A rib roll might have toppled the loose cribs, and they might have fallen on or into a miner in the immediate area. However, the probability of such a rib roll occurring is unknown. That section of the mine had been developed many years before, and the rib roll had occurred years before. TrII. 71. Miners were only occasionally in the area. Man trips on the spur were not routinely accessed. TrII. 78. If an additional vehicle was needed, an operator would conduct a pre-operational inspection of the vehicle, and then move it onto the main track. TrII. 53. If it was to be used to transport a crew to a working section, the miners would generally enter the spur entry to board the covered man trip. However, there is no evidence that that was a frequent occurrence.

In light of the uncertainty of a potentially injury-causing event and limited presence of miners in the subject area, I find that the Secretary has failed to prove by a preponderance of the evidence that the violation was S&S.

Negligence.

Bell determined that Respondent's negligence was moderate because examiners checked the area three times per day, and there were numerous foremen passing by the condition daily. While the condition should have been observed by foremen passing through the area, there is no evidence as to how long the condition had existed. The cribs could have been dislodged by a piece of mobile equipment shortly before the inspectors arrived. Varney had noted a similar condition and corrected it about a month earlier. TrII. 61, 86. I find that Respondent's negligence was low.

### The Appropriate Civil Penalties

The Freedom Energy Mining Company's #1 mine is a very large mine which produced over 1,000,000 tons of coal in 2007. Its controlling entity is also extremely large. The assessment data reflects that it averaged slightly over 0.5 violations per inspection day during the relevant period, a moderate incidence of violations. Freedom does not contend that payment of the proposed penalties will affect its ability to continue in business. The violations were promptly abated.

Order No. 6645336 is modified to a citation issued pursuant to section 104(a) of the Act, and the violation is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. Respondent's negligence was found to be high. A specially assessed civil penalty of \$9,800.00 was proposed by the Secretary. The reduction in gravity justifies a significant reduction in the proposed penalty. I impose a penalty in the amount of \$3,000.00 upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6655438 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. A civil penalty in the amount of

\$1,304.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. I impose a penalty in the amount of \$500.00 upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6656994 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. In addition, the operator's negligence was found to be low. A civil penalty in the amount of \$1,304.00 was proposed by the Secretary. The lowering of the levels of negligence and gravity justify a significant reduction in the proposed penalty. I impose a penalty in the amount of \$350.00 upon consideration of the above and the factors enumerated in section 110(i) of the Act.

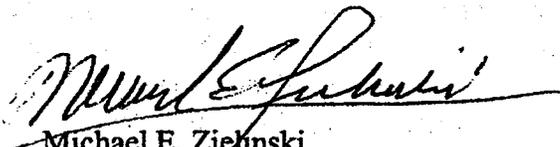
#### The Settlement

On May 19, 2010, the Secretary filed a Joint Motion to Approve Partial Settlement, which presented a proposed disposition of 12 of the citations at issue. At the commencement of the hearing, the parties jointly moved for approval of a proposed settlement of four additional citations. As to the settlement of the 16 citations which are the subjects of the motions, the Secretary has agreed to modify six citations and it is proposed that the total penalty for the settled violations be reduced from \$21,058.00 to \$14,102.00. I have considered the representations and evidence submitted and conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

#### ORDER

**WHEREFORE**, the motions for approval of settlement are **GRANTED**, and it is **ORDERED** that the citations are hereby amended as proposed in the motions and that Respondent pay a penalty of \$14,102.00 for the settled violations.

Citation No. 6643527 is **VACATED**, and the petitions in Docket Nos. KENT 2008-1503 and KENT 2008-1506 are **DISMISSED**. Order No. 6645336 is **MODIFIED** to a citation issued pursuant to section 104(a) of the Act and, as so modified, is **AFFIRMED**. Citation Nos. 6655438 and 6656994 are **AFFIRMED**, as modified, and Respondent is **ORDERED** to pay civil penalties in the amount of \$3,850.00, for the litigated violations.

  
Michael E. Zielinski  
Senior Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 8, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2009-344-M
Petitioner	:	A.C. No. 14-00073-178858
	:	
v.	:	
	:	
LAFARGE MIDWEST, INC.,	:	Lafarge Midwest Inc.
Respondent	:	

**DECISION**

Appearances: Matthew Finnigan, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Christopher Peterson, Jackson Kelly, PLLC, Denver, Colorado, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Lafarge Midwest, Inc., ("Lafarge") 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" or "Act"). The case involves one citation issued by MSHA under section 104(d) of the Mine Act at the Lafarge Midwest cement plant operated by Lafarge Midwest, Inc. The parties presented testimony and documentary evidence at the hearing held in Wichita, Kansas on June 15, 2010. At the conclusion of the hearing, the parties presented oral arguments, and a decision was rendered from the bench. This decision incorporates the decision issued from the bench, and adds to that decision. There is some minor editing of transcript pages 206 through 225, which is incorporated into this decision and set out below. For the reasons stated on the record, and as further explained below, Citation No. 6448009, is affirmed as issued and Lafarge Midwest Inc. is ordered to pay a penalty of \$10,000.00.

The parties entered into the following stipulations that were accepted by the Court:

1. The Administrative Law Judge has subject matter and personal jurisdiction over the dispute in this case.
2. Lafarge Midwest, Inc. ("Lafarge") is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

3. Lafarge is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-965.
4. Lafarge operates the Lafarge Midwest, Inc. cement plant in Wilson County, Kansas, Mine ID No. 14-00073 (the "Mine").
5. Melvin Lapin ("Lapin") is an authorized representative of the United States Secretary of Labor, assigned to the Topeka, Kansas field office of the Mine Safety and Health Administration's Metal/Non-Metal division.
6. Lapin inspected the Mine on February 4, 2009, and issued Citation No. 6448009 to Lafarge, alleging a violation of 30 C.F.R. § 56.14103(b) under Section 104(d)(1) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1).
7. The Secretary of Labor proposed a penalty of \$8,209.00 for Citation No. 6448009.
8. Lafarge purchased the John Deere "Gator" at issue in this case on July 21, 2008.
9. The Gator was provided for use by the Mine's Quality Control Laboratory.
10. The Mine's Quality Control Laboratory used the Gator every two hours of all three shifts, seven days each week.
11. Lafarge cleaned the Gator's windshield on the following dates and with the following substances:
  - i. August 4, 2008: glass cleaner;
  - ii. August 7, 2008: different glass cleaner;
  - iii. August 12, 2008: vinegar and water; and
  - iv. September, 2008: Ro-Mix Back-Set solution, which is a molecular cement dissolver.
12. Greg Hicks was the Mine's Quality Control Laboratory Supervisor between September 1, 2008 and February 4, 2009.
13. Lafarge demonstrated good faith in abating the violation.
14. The exhibits to be offered by the parties are stipulated to be authentic but no stipulation is made as to their relevance or as to the truth of the matters asserted therein.

(Tr. 6-7).

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Lafarge Midwest, Inc., operates the cement plant at issue (the "mine"), which is located in Wilson County, Kansas. (Tr. 23). The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Lafarge is an operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.

### a. Citation No. 6448009

On February 4, 2009, Inspector Melvin Lapin issued Citation No. 6448009 to Lafarge for a violation of Section 56.14103(b) of the Secretary's regulations. The citation alleges that:

[t]he Plexiglas windshield for the Quality Control Lab's John Deere Gator, located in the parking area on the east end of the Quality

control Lab, was damaged from scratches in the glass from cleaning the abrasive dust off that was generated from the cement milling process. A person would clean the glass with a dry cloth, or sometimes, glass cleaner was used. When the gator was driven toward the sunlight during the day, or toward bright lights at night, the glare created from the reflection of the light in the scratches made it very difficult for the driver to see. When a person was driving this vehicle under these conditions, they could easily run over another person walking in the area, impact an obstruction, or travel into the path of another vehicle. This vehicle was used every two hours of all three shifts, 7 days a week to obtain samples for quality control purposes.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of high negligence on the part of the operator.

1. The Violation

At hearing, I read the following findings into the record:

With regard to citation number 6448000 issued on February 4th, 2009 by Inspector Melvin Lapin, I make the following findings: Inspector Lapin issued a citation for a violation of Section 56.14103(b) of the Secretary's regulations and essentially charged that the Plexiglas windshield in the quality control lab's John Deere gator was damaged from scratches to the glass to the point that it created a hazard to anyone driving the equipment.

Lapin testified that he has been a mine inspector for more than four years and he has worked in the mining industry for nearly 30 years prior to working with MSHA. He is an inspector in the Topeka, Kansas office.

Inspector Lapin on February 4th was continuing an inspection that he had begun at the mine on January 20th, 2008. He went to the -- on that day, he inspected equipment first in the maintenance shop.

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Exhibit 13 is a map or a layout of the facility that was used to indicate the various areas in the mine.

Inspector Lapin, inspected the equipment in the maintenance shop, the trucks and other equipment, and including in that inspection two gators that the maintenance shop used. A gator is a four-wheel

vehicle, a small -- similar to a small pickup, bigger than a golf cart. It has a bench seat, and in this case the gators that Mr. Lapin observed on that date had Plexiglas windshields.

One of the employees, while Mr. Lapin was -- while Inspector Lapin was in the lunchroom, one of the employees asked him to look at the windshield because that employee felt that it was not safe. Lapin saw both -- saw that both of the gators in the maintenance shop had Plexiglas windshields that were scratched.

He rode in the first gator. They attempted to wipe off the windshield prior to getting in, he used a dry cloth. He took a drive with the shop mechanic, drove

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northeast and then turned into the sun, and the glare from the sun shown on all the scratches and encompassed the entire windshield making it difficult to see. The glare covered all but the corners, and the glare blinded him as well as the driver.

He instructed the driver to turn around as soon as he saw the glare. He returned to the maintenance shop and then looked at the second gator and again took a ride in that gator. This time the operator of the gator used a windshield cleaner to try to clean the glass prior to the ride. The same thing occurred when the gator, with Lapin in it, was turned toward the sun. The glare was so bad that Lapin testified he couldn't see, instructed the driver to turn around and return to the shop.

At that point, Lapin determined that the mine had violated the standard, that there was a hazard, they could not see out of the windshield in the sun or in the light and that would result in an accident. He issued citations for both gators at the maintenance shop.

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Later he spoke with someone -- or at some point during that day, he spoke with some -- another employee about the gator that was being used by the quality control lab, so he went to that lab to examine that gator. While -- during that, the course of his inspection, he spoke with both Don Ballard and with Greg Hicks concerning the gator at the quality control shop.

When Mr. Lapin observed the gator, he saw that the gator's windshield had the same -- the scratches and the same - what word

- the same problems that he had seen in the earlier -- in the two gators that he had observed earlier in the maintenance shop, they had the same type of scratches and the same kind of damage. There was a light in the garage but no natural light but he could easily see the scratches and he could easily tell that the gator was in the same condition as the other two he had driven.

The photos on Exhibit 5 show the scratches on the Plexiglas, and they resemble what he saw in the gator parked in

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the garage. The photos also showed the glare that he experienced except the photos don't show it accurately. He testified that the glare was a lot more than the photos depict.

He did not get into the driver's side of the gator but he could see the pattern and scratches on the windshield and he, after just driven in two other gators, he did not think it was safe -- first he didn't believe that he needed to look at it again, but he also thought it was unsafe for others to get in and drive the gator, it might expose someone to a hazard and he didn't want to do that understandably. So he already knew that the scratches were the same and that the sunlight and the light at night would create a hazard given the condition of the windshield as he observed it.

I understand that there are some cases that talk about an inspector getting into the cab and actually looking at the windshield, but there are also cases that say if a miner has been operating the

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equipment and has looked through the windshield, their testimony, if credible certainly, is just as valid as that of an inspector.

I think Mr. Lapin was correct in what he did, not having someone drive it in an unsafe condition, and given his experience and what he observed on that day, I see no problem with him coming to the conclusion that windshield was as -- as unsafe, if not more, than the other gators he had looked at during that day.

This particular gator at the quality control lab is used every two hours, every shift for seven days. It's driven primarily by the persons -- the persons who work in the quality control lab who collect samples every two hours. Particularly the testimony of Mr.

Ballard, who was one of the persons who collected samples every two hours at the mine, supports the testimony of Inspector Lapin.

Ballard testified that he had retired from Lafarge in February 2009 after working there for many years. He worked primarily

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on the day shift. The mine operated three shifts each day. He drove the gator every two hours for any time period, but he testified approximately 15 minutes as he rode around the plant area collecting samples.

He complained constantly to his supervisor regarding the condition of the windshield on the gator until he gave up in frustration. His supervisor was Mr. Hicks, who also testified. Mr. Ballard operated the gator, he used it for samples and at other times depending on what he's required to pick up.

Ballard described how he traveled most of the areas of the mine, normally in a complete circle every two hours, it took him about 15 minutes. It depended on how much he had to pick up. There were coal piles in the area that could be 20 feet high and as long as 100 feet. Other vehicles operated around the stockpiles, loaders, maintenance vehicles, supervisors, other four-wheelers, and he had to be careful as he said he had to watch it going

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around the corner.

There's also foot traffic, many people worked. The area R where he primarily traveled was a busy place for vehicles, there were loaders, maintenance vehicles, pickups, open-bed pickups, loaders, forklifts, and trailers parked in the area to unload. Area R is a very busy location given that it is adjacent to the -- given that it's adjacent to the storage area, and there's also a repair area at that -- in that location.

Ballard drove the gator as much as anyone, and shortly after he -- the mine acquired the new gator the glass started to scratch up, it fogged over. He washed the windows as much as he could. The abrasive cement, dust and dirt caused scratches on the windshield. The Plexiglas didn't hold up according to Ballard. The damage got worse over time and it became - became more scratched.

He used different window cleaners; usually just dusting it off made it a little bit better. The scratches obscured

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his view, mostly with direct light. Driving into the sunlight made it difficult for him to see, hard to look out the window. The same experience is true at night when the large lights were on.

Mr. Ballard indicated that there was a lot of traffic, as I mentioned before, foot traffic and equipment that he had to watch out for. He often encountered other workers on foot. He could see that he did -- he said he could see them but it wasn't clear, he could just make them out. Driving at night, the glare of the lights in the dark made it -- made it difficult, and in Ballard's words it certainly didn't help any. Lights from other vehicles and lights were on at the plant.

The parties agree that the mine had cleaned the windshield on a number of days and times with different things. According to Ballard, none of those things alleviated the problem with the scratches and the difficulty with seeing out the windshield.

I credit Lapin's testimony first that the windshield was damaged and next that

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the windshield obscured the visibility necessary for safe operation, and also that the condition of the windshield created a hazard to the equipment operator. Lapin indicated that it was his opinion that visibility was obscured by the scratches to the extent that the operator of the vehicle could not operate it safely. He said that the glare of the sun on the scratches would impede the safe operation of the gator. Due to impeded vision, a crushing injury would result if the operator did not see a person in the area and ran over him or if he ran into or was run into by another vehicle.

Lapin's observation of the windshield are supported by Ballard in every regard. I find that a violation did occur as alleged by the Secretary, supported by Mr. Lapin and Mr. Ballard. I understand that Mr. Hicks testified that he didn't see the scratches, but I credit the testimony of the other witnesses in that regard.

(Tr. 207-216).<sup>1</sup>

Section 56.14103(b) requires that “[i]f damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed.” 30 C.F.R. § 56.14103(b). I find that, based upon the testimony of Lapin and Ballard, there is a violation.

A number of Commission judges have decided the issues raised by this standard. In *Walker Stone Company, Inc.* 17 FMSHRC 1389 (Aug. 1995) (ALJ), an ALJ vacated a similar citation because the inspector did not look through the windshield to determine whether visibility was impaired, and the operator of the vehicle testified credibly that he drove the truck and his view was not obstructed by the cracks. In the case at hand, the inspector, did not sit in the driver’s seat of this particular gator but he did look through the windshield and Ballard, who drove the gator daily, testified that the condition of the windshield obscured his vision. In *D & H Gravel*, 31 FMSHRC 272 (Feb. 2009) (ALJ), the Secretary alleged that a cracked windshield presented a hazard in the form of a risk that an individual would cut their hand while cleaning the windshield. There, the ALJ found that the risk was so insignificant that the citation for violation of section 56.14103(b) was vacated. *Id.* at 277. Here, the risk is much more substantial, i.e., that an equipment operator would not be able to see when the sun or the glare from the lights hit the windshield. The hazard described by Ballard was more than enough to substantiate a violation of the standard.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d*, *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Secretary has met her burden of proving that, on the day of inspection, the gator had a damaged windshield that obscured visibility to the point that it could not be operated safely and, consequently, created a hazard to the driver and others working in the area in which he drove. I find that the Secretary has established a violation.

## 2. Significant and Substantial Violation

A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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<sup>1</sup>The numbers located at breaks in the transcript quotations refer to the page numbers of the transcript.

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violation, i.e., the danger associated with the driver of the gator not being able to see when operating the vehicle in sun or in the glare of the lights at night. Third, I find that the hazard created by driving with an obstructed view will result in an injury to the driver or to a person who crosses the path of the gator. Fourth, I find that it is reasonably likely that any injury resulting from the aforementioned hazards would be serious or even fatal.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in consideration 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 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Lapin designated this violation as a

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significant and substantial violation. I've already addressed a number of the issues that -- with regard to significant and substantial when we talk about -- when I talked about the violation in this case.

Lapin testified that he regarded this violation as S and S because the condition of the windshield was of such a nature that it created a hazard to the driver. When the sun was shining or in the light, the glare in the windshield would cause the driver to be unable to see. There were pedestrians in the area and I think all witnesses testified regarding the number of pedestrians in the area and the number of other vehicles in the area and there were quite a few. They could not be seen and would be hit by the gator if the gator were driving into the sun or into the light.

Ballard explained a number of -- the number and types of vehicles in the area along with the pedestrians and the large coal piles that he had to maneuver around. It's clear that Ballard drove the gator more near pedestrians and many other types

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of vehicles including loaders and maintenance vehicles.

I credit Ballard's testimony that the windshield was in such a condition that it created a hazard for the driver, that he couldn't see a pedestrian or another vehicle at certain times when he was driving and that that condition created the hazard, the discrete safety hazard, a measure of danger to not only the pedestrians but to the driver of the vehicle himself.

The mine operator asserts that Ballard continued to drive the gator, that there were no accidents, that the brakes worked, that other safety measures were in place, and that Ballard testified that he could see a pedestrian and other equipment, that the gator moved slowly, and that the area was not really congested.

Again, I credit the testimony of Ballard and I credit the testimony of Lapin and I find that the violation was significant and substantial as Inspector Lapin so designated.

(Tr. 216-218).

In a similar situation, an ALJ found that a sand and gravel operator committed an S&S violation of §56.14103(b) based on a cracked window on a front-end loader. The ALJ credited the inspector's detailed testimony about the window's condition and found the violation to be S&S because the cracked window obscured the operator's vision, thereby creating a risk of him running into other equipment, running off the road, or running over another employee. *South West Sand & Gravel Inc.*, 23 FMSHRC 540 (May 2001) (ALJ).

I find that the preponderance of the evidence establishes that it was reasonably likely that the hazard presented would contribute to an injury. Even if the brakes on the gator worked and the gator did not travel at a high speed, it is likely that the driver would hit a person crossing his path or run the gator into the coal pile or other obstruction because his view was obstructed. The defenses raised by Lafarge do not take away from the seriousness of the violation and the reasonable likelihood that an injury will occur. There is no question that the gator was operated in a high traffic area with both equipment and pedestrians. Ballard agreed that sometimes he could see, but, if the sun or a light was shining on the windshield, it was extremely difficult to see what was ahead. In the course of continued mining operations, an accident was sure to occur. Further, as mentioned previously, it is reasonably likely that these hazards would result in injuries of a reasonably serious nature.

### 3. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353.

Lapin described the condition as obvious and as having existed for an extended period of time. He designated the negligence level as "high" and found the violation to be an unwarrantable failure to comply with the mandatory standard. Lapin learned from employees at Lafarge that there was a problem with the gator and, after speaking with Ballard, realized that it had existed for some time. Ballard had constantly made complaints that went unheeded. Lapin credibly testified to each and every factor used to determine unwarrantability. The violation

existed for at least the six months, during which it was brought to the attention of Ballard's immediate supervisor as well as that individual's supervisor.

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As to the unwarrantable failure, there's a lot of testimony in this case about what the operator knew regarding this violation. I'll start with Mr. Ballard because Mr. Ballard certainly made the most complaints about this gator.

Exhibit 10, the area checklist, he filled out those checklists and put them in the notebook and then Mr. Hicks would look at it and maybe write -- and write down what he had done to take care of the situation.

On August 4th, Ballard wrote on the lab vehicle the gator needs a new front window, it's scratched up. Hicks wrote that he tried to clean it with glass cleaner. And Mr. Ballard reported the condition every day until August 18th. He designated the condition as U for unacceptable most of the time, on more than one occasion.

Then again on September 1st until September 5th, he reported every day that the lab vehicle was unacceptable and listed the windshield. As far as I can see at this point, the mine cleaned the windshield

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and I'm not clear why cleaning the windshield would alleviate the scratches except that Mr. Hicks testified that he didn't see the scratches so he was working on the assumption that the windshield needed to be cleaned. The windshield was not removed until February 4th after the inspector issued a citation.

On September 8th, both shifts again mentioned the windshield needed to be replaced. It wasn't Mr. Ballard who was -- it was not only Mr. Ballard who was complaining about the windshield, but I noticed on the checklist, on both checklists, Exhibit 6 and 10, that there were other lab technicians who also reported a problem with the windshield. On September 10th, for example, both lab techs reported it, not just Ballard. Ballard testified that he got frustrated and finally stopped reporting it because nothing was being done.

On August -- I find it important that on August 12th, 2010, Ballard wrote on Exhibit 6, the mobile equipment checklist, if

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someone has an accident because of the windshield, it won't be our fault. Another person on August 19th said that the windshield is uncleanable. The checklist went to Hicks and then maybe to Hicks' -- sometimes to Hicks' supervisor Parker who were supposed to do something about it.

The condition of the windshield was noted for many days. August 12th, again it says that it needs attention as soon as possible, that there could be an accident. On August (sic) 14th, Mr. Ballard filled out another form, an RIR form, for a safety auditor who came to this Lafarge plant from the headquarters office, he wrote up the windshield again, and he was told that someone would take care of it. It sounds like the person from the Lafarge headquarters office agreed that something should be done about it. It was Mr. Thompson, he looked at it, said he would take care of it, he said that it definitely needed attention, but, again, nothing was done. Ballard said he saw -- he saw no issue -- I'm sorry, strike that.

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Ballard testified that he continued to complain until he thought he couldn't do it anymore.

Mr. Hicks testified that he saw no issue with the gator, that he would not have let Mr. Ballard operate it if he felt it was unsafe and that at one point he told Mr. Ballard that he could walk or take the windshield out. And when -- in fact, when the citation was abated, Ballard and Hicks together removed the windshield.

Hicks testified that he kept cleaning the windshield to make Ballard happy, doing what he could do in other words. Hicks said that no one else complained, but a review of the checklists show that that's not exactly the case, there were several other people who did complain. One -- again, I will refer to Exhibit 6 and Exhibit 10.

Hicks testified he tried different products to clean the windshield in an effort to make Ballard happy. He noted several times that he did not see the scratches or see any problem with the

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window but tried anyway to clean the windshield. I find that Hicks did not do enough, he didn't take the problem seriously, and I credit

Ballard when he said he was told sarcastically that he could walk or take the windshield out; that it was management's responsibility to remove the windshield if indeed that was determined what the solution should be, but that the management knew for months, many, many months that there was a complaint about the windshield and not enough was done.

The complaints kept coming and cleaning it obviously was not doing any good. There was never direction from management to remove the windshield until the citation was issued. Lapin described the condition as extensive because it was the entire windshield, that it was obvious, he saw it as soon as he approached the gator, and it had -- as I discussed above, I think the most telling thing is it had existed for a period of time.

Lapin designated the negligence level as

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high and found the violation to be unwarrantable. I agree with Lapin that the citation is, indeed, unwarrantable with high negligence on the part of management. I uphold Mr. Lapin's citation in every regard.

(Tr. 219-224).

A number of the Commission's ALJs have found a violation of this type to be not only S&S, but an unwarrantable failure. For example, a cracked windshield on a front-end loader constituted an S&S and "unwarrantable" violation of §56.14103(b) because the violation was obvious and nothing had been done to correct it. *Bob Bak Constr.*, 19 FMSHRC 582 (Mar. 1997) (ALJ).

I find that the Secretary has demonstrated, by a preponderance of the evidence, that the violation was unwarrantable.

## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

30 U.S.C. § 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size (large operator) and ability to continue in business. The violation was abated in good faith, and no evidence has been presented to the contrary. The history does not demonstrate an unusual violation history. I find that the Secretary has established that the negligence was high and that Lafarge did not take seriously the safety complaints of its employees. Further, I find that the gravity determined in the order is accurate.

Next is the penalty. There are six penalty criteria addressed by the commission. The -- I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size, which is large, and their ability to continue in business, the violation was abated in good faith, and the history of violations show no other violations for this particular standard. The violation history is normal for an operator of this size, but I do note that Mr. Lapin issued two citations earlier in the day for the same violation. I find that the Secretary has established that the negligence amounted to high negligence for the violation and that the gravity was as designated by the inspector.

And I, given the six-penalty criteria,

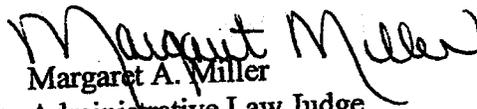
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based on the testimony I heard today, crediting the testimony of Lapin and Ballard, I assess the \$10,000 penalty for the violation. Once the order is reduced to writing, the company will be ordered to pay -- the company is ordered to pay \$10,000 within 30 days of the date of that written order.

(Tr. 224-225)

### III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$10,000.00 for this violation. Lafarge Midwest Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$10,000.00 within 30 days of the date of this decision.

  
Margaret A. Miller  
Administrative Law Judge

**Distribution:**

Matthew Finnigan, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway,  
Suite 1600, Denver, CO 80202

Christopher Peterson, Jackson Kelly PLLC, 1099 18<sup>th</sup> Street, Suite 2150, Denver, CO 80202

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19th STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-5267/FAX 303-844-5268

December 10, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-675-M
Petitioner	:	A.C. No. 33-01994-192845
	:	
v.	:	
	:	
CARGILL DEICING TECHNOLOGY,	:	
Respondent	:	Mine: Cleveland

**DECISION**

Appearances: Patrick DePace, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;  
Mark Savit, Donna Vetrano Pryor, Patton Boggs LLP, Denver, Colorado for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Cargill Deicing Technology (“Cargill”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The case involves six violations issued by MSHA under section 104(a) of the Mine Act at the Cargill deicing salt mine (the “Cleveland Mine” or the “Mine”) located in Cleveland, Ohio. The parties presented testimony and documentary evidence at the hearing held on October 14, 2010 in Cleveland, Ohio.

At the hearing, the parties agreed that four of the citations have been settled. The settlement terms were read into the record and the settlement is approved as set forth below. Two citations are left for decision, one involving ground control and one involving an electrical violation.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Cargill is the owner and operator of the Cleveland salt mine in Cleveland, Ohio. At the outset of the hearing, the parties agreed that the Mine is a mine as defined by the Act, that the

Mine is subject to the jurisdiction of the Mine Safety and Health Administration, and that the Commission has jurisdiction to hear this matter. Jt. Ex.1; (Tr. 7).

Both contested citations were issued by Inspector Jan Niceswanger of the Hebron, Ohio MSHA office. Niceswanger has been a mine inspector for six years. Prior to becoming an inspector, he worked nearly 30 years in the mining industry, most of which was spent working in coal mines. He has experience in underground and surface mines. Niceswanger has extensive training in many areas, is a certified electrician, and was hired by MSHA as an electrical inspector. (Tr. 19).

a. *Citation No. 6403641*

On June 2, 2009, Niceswanger issued Citation No. 6403641 to the Cleveland Mine, alleging a violation of 30 C.F.R. § 56.3200, which requires, as pertinent to this analysis, that “[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area.” The citation (as amended) described the violation as follows:

Hazardous ground conditions were present on the south rib next to the A/B Transfer power center, including a prominent overhanging bulge. A crack exceeding one inch wide ran vertically from the mine floor to as high as 12 feet. The bulge was about three feet wide and 10 to 14 inches thick. A miner would suffer major traumatic injuries from the falling ground. In addition, the energized 4160 volt cable was coiled beneath the loose slab and the power center was located only four to five feet away. Maintenance personnel, laborers, and the belt crew work and travel the area three shifts per day.

Niceswanger determined that it was reasonably likely that the violation would result in an injury or fatality, that the violation was significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$1,944.00 has been proposed for this violation.

i. The Violation

Inspector Niceswanger testified that, while conducting his inspection of the Mine, he noticed a bulge in the rib adjacent to the power center. Niceswanger testified that the power center, which had an energized high voltage cable attached, provided power to the conveyor belt and other parts of the mine. He described the bulge in the rib as being “separated from the original structure of the wall or rib,” “uncontrolled,” “overhanging,” and as having “large cracks.” (Tr. 22). Niceswanger took a photograph of the condition as he observed it. Gov. Ex. 3; (Tr. 22-24). The same photograph depicts the proximity of the rib bulge to the power center. *Id.* Based upon his observations, Niceswanger determined that the condition was hazardous.

Niceswanger explained that the bulge in the rib was considered a hazard due, in part, to its proximity to the power center and high voltage, energized cable laying next to it. If the rib were to fall on the cable or the power center, it is likely that it would ignite a fire. In addition, all three shifts working in the mine passed by or worked in the area of the power center and the overhanging rib. Niceswanger believed that the condition of the rib indicated that it was likely to fall. He refused to allow anyone to tap or scale the broken rib because he believed it was too dangerous, particularly given its proximity to the power center. He agreed that it would be safer to test the rib and begin scaling if the power center were moved. It was his observation that the rib was broken, loose and separated from the wall and that footprints he observed in the area indicated that miners had worked nearby. Niceswanger did not explain what it might take for the bulge to come down, and did not explain how large a piece of the wall would need to fall in order to damage the power cable or power center, thereby increasing the risk of a fire. I can only conclude from his testimony that he believed the condition to be a hazard because he expected the entire rib to fall onto the cable and power center.

John Grueber, currently the mine superintendent at the Mine accompanied Niceswanger during the inspection. Grueber disagreed with the inspector's assessment that the rib was not safe and offered to get a scaling bar to demonstrate that the rib was not loose. In Grueber's experience, simply viewing the area does not provide the information needed to determine if there is a hazard. Grueber observed the footprints in the area and also observed the 1 inch wide crack on one side of the rib. He believed that because the crack was only on one side, and not on any of the other three sides, it was safe, i.e., that it was tied in on the top and back. (Tr. 100-102).

After receiving the citation, Grueber, due to the fact that the height of the area would not accommodate the mechanical scaler, instructed the night crew to move the power center and use a front end loader and a scaling bar to take down the rib. Grueber observed the area after the work was completed. He saw that, while portions of the rib had been taken down, the entirety of the rib had not been taken down. (Tr. 102-104). Grueber later learned that, in attempting to take down the rib, the miners rammed the rib with a loader. Grueber agreed that while ramming the rib with a loader could damage the machine, it is the proper equipment to use when the mechanical scaler is not available.

Mark Khairallah, an hourly employee at the Mine, was asked by his foreman to take down the rib bulge area cited by Niceswanger. He was instructed to move the transformer and then begin the scaling. After the transformer was moved, he initially tried to use a ten foot bar to bring down the rib, but after a short time he determined that it was not effective. As a result, a loader was retrieved and another individual operating the loader began chipping away at the rib bulge with the bucket. Khairallah stood approximately 20-30 feet away from the rib while the loader operator broke off small chunks of the rib. According to Khairallah, the rib was not coming down as expected. When the initial approach of using the loader did not work, he and the other employee began using the loader to ram the wall at different angles until the material came down in chunks. In all, the assignment took 2 to 3 hours including the ten minutes to move

the transformer, the short time with the scaling bar, half an hour with the loader, and another half hour for clean up. (Tr. 119-125).

Mike Espenschied, a second hourly employee, testified about his experience working with Mr. Khairallah to remove the slab. He agreed that, first, the power center was moved, then they used a scaling bar for about fifteen minutes and, finally, moved onto the loader. He drove the loader while Khairallah directed him. He adjusted the bucket height and bumped into the rib with the bucket. He described the area as being "too tight" to get the loader at a good angle to the rib. He described the slab as coming down in chunks. (Tr. 129-131). In his view, using the scaling machine is easier because it has a pick and is designed for scaling.

Neither Mr. Khairallah nor Mr. Espenschied testified about how long it would take if the mechanical scaler was used or what the normal amount of time it had previously taken them to take down loose slabs at this mine. However, they did indicate their belief that it took an extra amount of time and effort to remove this particular slab.

Leo Van Sambeek, an expert in rock mechanics, testified on behalf of Cargill. Van Sambeek disagrees with Niceswanger that visual observation of a crack is sufficient evidence upon which to make a hazard determination. (Tr. 146-147). Dr. Van Sambeek reviewed the citation and the photographs, visited the mine after the condition was corrected, and listened to the inspectors testimony. Van Sambeek indicates that in order to make a hazard determination he would first "sound" the rib. If sounding the rib could not tell him the condition, then he would use a hammer and bolt to determine its condition. If that did not yield a result, he would next utilize a scaling bar to test the rib to determine if there is any movement. After reviewing the rib area where the bulge had been removed, Van Sambeek disagrees that a hazard existed and, instead, believes that it was safe to sound the area.

While Van Sambeek believed that the condition of the rib was such that it was safe to perform a sounding, he did not discuss the issue of the proximity of the loose rib to the power center in his analysis. He did testify that he had a concern when he first viewed the photograph of the rib prior to it being removed, i.e., Gov. Ex. 3, in that he saw a bulge that he could not explain. He explained that the photo could lead to the conclusion that there were loose slabs of rock on the rib. (Tr. 158). However, when he went underground, he determined that what looked like a bulge, was actually a mismatch of the two faces where they intersect. (Tr. 150). He testified that, because the loader hit the rib a number of times and was unsuccessful in bringing it down, he was convinced that the slab was not loose.

I cannot credit the testimony of Van Sambeek with regard to the before and after photographs and his use of such to form an opinion that what was taken down was not the area sited. The inspector observed the condition at the time of issuance, while Van Sambeek saw the area only after it had been abated. (Tr. 156). However, a portion of Van Sambeek's testimony is useful and supports the Respondent's position that the rib was not hazardous. Van Sambeek testified that he could not agree with the inspector and that he "would not characterize [the cited area] as a ground control hazard." (Tr. 160).

The primary issue is whether the ground condition, as observed by Niceswanger, was a hazard. A hazard, has been defined as a danger or risk. I have no doubt that Niceswanger had a reasonable belief, after viewing the condition of the rib, that it was a danger or risk to miners who may travel in the area, and particularly a danger or risk of rock falling on the transformer or cables. However, given that the area had to be rammed with a loader, which resulted in only small chunks of the rib being removed, it does not appear that the area created a hazard to persons. Additionally, Van Sambeek testified that the nature of the ribs in a salt mine are different than those in a coal mine. Further, when such ribs only have a crack along the side, it is not considered a hazard.

The Respondent has relied on a Commission Judge's decision in *Springfield Underground*, 17 FMSHRC 611 (Apr. 1995) (ALJ), to support its position that visually observing the cited area is not enough to support a violation. While I disagree with Cargill's reliance on that case, I do find that, in this particular case, the testimony reveals that a more thorough investigation of the condition was necessary to determine if the rib was a hazard. The witnesses indicated that it was difficult to bring down the rib. Further, there is a lack of evidence of what types of activities might cause it to come down. The Commission has discussed, in relation to another standard involving loose material, that a visual observation along with a sound test was sufficient to indicate that a roof was loose. *Amax Chemical Company*, 8 FMSRHC 1146, 1149 (Aug. 1986). However, the Commission in *Amax* refused to agree that there is *per se* rule regarding the means necessary to demonstrate that ground is loose. *Id.* There is not enough evidence here to substantiate that ongoing activity in the mine would cause the rib to fall or that such a fall would involve a slab large enough to damage the cable or the power center. The Secretary has not met her burden of demonstrating that the rib created a hazard to persons. For the foregoing reasons, the citation is vacated.

b. *Citation No. 6403648*

On June 9, 2009, Niceswanger issued Citation No. 6403648 to the Cleveland mine, alleging a violation of 30 C.F.R. § 57.12040, which requires that "[o]perating controls shall be installed so that they can be operated without danger of contact with energized conductors." The citation described the violation as follows:

The main battery switches were installed inside the electrical panels on #86 and #12 locomotives with bare energized conductors. The equipment operators would reach inside the panel to operate the switches. 72 volts DC was present on the blades of the switch about two inches below the knob of the knife-blade type switch. Two other controls for the remote system were also located next to bare conductors on the #12 unit. Miners would operate these controls routinely on start up and shut down each weekend and periodically during the week, three shifts per day. The condition created a shock/burn hazard. The close proximity of

the live parts to the controls and the repetitive nature of the practice made an accident reasonably likely to occur.

Niceswanger determined that it was reasonably likely that the violation would result in an injury that would lead to lost workdays or restricted duty, that the violation was significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$334.00 has been proposed for this violation.

i. The Violation

Inspector Niceswanger testified that he conducted an inspection of the electric panels on two of the Mine's locomotives after he learned that the controls used to operate the locomotive were located in an area that would expose the operators to energized conductors. Niceswanger stated that the location of a double-throw knife switch for the main battery, which is used to put the locomotive into start-up mode, would require an operator to place their fingers "right next to energized conductors." (Tr. 37). During the inspection, Niceswanger asked one of the Mine's electricians to take a voltage reading at the knife switch depicted in Gov. Ex. 8. (Tr. 215-216). The electrician determined that voltage at the switch was 72. *Id.* According to Niceswanger, the photograph entered as Gov. Ex. 7 accurately depicts the location of the handle of the switch and its proximity to the energized conductors. (Tr. 36).

The locomotives used at the Mine are like any train locomotive. They are used to move railroad cars around the rail yard. Two locomotives, the #12 and #86, had the exposed energized conductors near or next to the main battery switch that is used by the locomotive operators. In addition, locomotive #12 had exposed parts near the remote control switch. As Niceswanger explained, "when the switch is operated, a miner's hand was immediately adjacent to the energized parts." (Tr. 39). Gov. Ex. 9 depicts the door that is opened to operate the control, while Gov. Ex. 10 depicts the remote control operating controls that were installed by the Mine on at least one of the locomotives. The remote controls were in close proximity to fuses and wire terminations, which were energized bare conductors, that created shock and burn hazards for the miners exposed to them. (Tr. 41-43). The energized conductors seen on the right hand side of Gov. Ex. 10 were situated such that a worker's hands would be ten to twelve inches from exposed energized parts when turning on the switch.

Michael Wendell, a contractor for Cargill, testified that he has serviced the locomotives at the Cleveland Mine for 31 years. Wendell understands that miners only need to access the controller for the battery after the machine is shut down. Shutting down the battery prevents it from wearing down. The area is well lit, and he has never contacted an energized part while working. Wendell described the electrical locker on the #12 locomotive and confirmed that the photograph entered as Cargill Ex. D accurately depicted the locker. The locker contains the switches and exposed conductors that were by Niceswanger. The area marked with a number "3" in the photo is the battery disconnect switch and, according to Wendell, is not operated when the locomotive engine is running. The purpose of the switch is to isolate the batteries so they can be turned off. If the locomotive is not operating, the conductors should have 62-64 volts. The area

marked with a number "2" in the photo is the disconnect for the remote control. An operator will only touch this area if the remote control must be disconnected and, in his view, it is only disconnected for the purpose of performing maintenance. The area marked with a number "1" in the photo is the transfer valve to switch from manual to remote control. Wendell has operated the switches many times and has contacted the energized components when doing maintenance work, yet he has not been burned or shocked and, rather, has only felt a tingle. (Tr. 184).

Taimour Ahmed, the maintenance supervisor, testified on behalf of the Mine that the switches described in the citation are not operating controls. Ahmed testified that an operating control is a function of a button, or some other object that has power to it, which allow an operator to tell a machine what to do, e.g., turn signals, brakes, gears. (Tr. 204). Ahmed testified that he measured the amperage in the control box as 30 milliamp, which was far below the level of amperage that would be necessary to cause a burn to a miner. (Tr. 205). It is his view that it is not reasonably likely that a miner would inadvertently touch any component in the electrical box. He explained that it would be difficult to contact a "bare conductor" due to the distance between components in the box and the fact that not all of the components would be energized at the time a miner reaches into the box to flip the battery switch. (Tr. 207-208).

In essence, it is Cargill's position that the battery switches inside the electrical panels are not an "operating control" and, hence, it was improperly cited. Cargill relies on the fact that the panel of switches and the battery switch itself are not used to operate the locomotive, and, rather, are only used to turn off the battery. Thus, Cargill argues that the battery switch is not the operating control for the locomotive. Cargill does not cite any relevant legal authority that supports its conclusion that a breaker used to de-energize a piece of equipment is not an "operating control." It appears to be Cargill's position that the battery switches located in the electrical panel should not be considered an operating control since they are accessed only to de-energize the battery to prevent it from being drained by lights or other components that may be left on.

During normal operation of the locomotives, the battery switches at issue are thrown at least once a shift on the weekends to cut off power to the battery so as to assure that the battery does not run down. It follows that, upon start up of the locomotive, the battery switch would, out of necessity, be thrown in order to allow electricity to resume flowing to the various components so that the locomotive could be operated. Indeed, the locomotive could not operate if the battery switch were not reset. Because throwing the switch into the off position stops the operation of the battery and everything it controls, it certainly controls its operation and, accordingly, is within the purview of the term "operating controls." *TXI Port Costa Plant*, 22 FMSHRC 1305, 1312 (Nov. 2000) (ALJ) (citing *Random House Webster's Unabridged Dictionary* 1357(2nd Ed.,1999)).

The only way the battery could be de-energized and reset required a miner to open the door to the electrical panel, reach in, and throw the switch. A similar result was reached in *Nelson Quarries Inc.*, 30 FMSHRC 254 (Apr. 2008) (ALJ). In *Nelson Quarries*, circuit breakers in a cabinet were found to be operating controls that were in close proximity to exposed wires and terminals. The ALJ found that the proximity created a risk of shock for anyone who opened the

cabinet. Here, according to Niceswanger, the locomotive operator would be placing his hand into the control box often and each time he did, he would be exposed to an area of energized conductors which he could inadvertently contact. Therefore, I find that the Secretary has shown that the operating controls were not installed to prevent the danger of contact and has established that Cargill violated Section 57.12040 as alleged.

ii. Significant and Substantial

A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. I find, further, that the violation contributed to the hazard of an electrical shock. Third, the hazard contributed to will result in an injury. Finally, given the exposure to electricity, even at low levels, the injury would certainly be serious.

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). I find that the facts of this violation clearly lead to a finding that it was a significant and substantial violation.

Niceswanger explained in detail his reasoning for designating this violation as S&S. First, he described the hazard as one of a shock or burn. He measured 74 volts in the electrical panel. Niceswanger testified that, if a miner came in contact with the bare wires or conductors that possessed 74 volts, there would be a shock hazard. In addition, the locomotive operators would need to reach in the area each time they shut down and started up the motor. Moreover, Niceswanger testified that he learned that the locomotive operators did not use gloves when reaching into the electrical panel. (Tr. 44-45). As a result, the proximity of the various exposed electrical parts to the switches, and the frequency at which the locomotive operators would need to access the area made it reasonably likely that a miner would come in contact with the bare wires or conductors.

According to Niceswanger, the amount of voltage does not change if the locomotives are running or idle. The voltage is enough to cause a burn or shock to the operator who inadvertently comes in contact with the exposed energized parts. Niceswanger did not measure the amperage, but opines that even less than 1 amp has an effect on a person who contacts the exposed parts. In addition, should a short or fault occur, there is a greater potential for a burn when operating the switch.

Ahmed and Wendall both testified that the shock from contacting a bare wire or conductor inside this box would be minimal. They also allege that the components in the box are too close together to allow contact with the bare conductors. However, I credit the testimony of Niceswanger, a certified electrician, who finds this to be a serious hazard. The Secretary has established that the violation was S&S.

*c. Settled Citations*

At the hearing, the parties entered into stipulations resolving the remaining four violations as follows:

Citation No. 6403643:	No changes, penalty is \$100.00
Citation No. 6403644:	Vacate
Citation No. 6403645:	Vacate
Citation No. 6403646:	Reduce penalty from \$150.00 to \$100.00
Total penalty of settled citations:	\$200.00

I accept the stipulations and the modifications made by the Secretary. Pursuant to the agreement reached by the parties, I assess a \$200.00 penalty for the violations that have been settled.

## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

30 U.S.C. § 820(i).

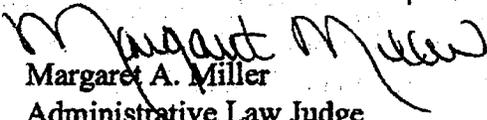
In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

As to Citation No. 6403648, I accept the stipulations of the parties that the penalty proposed will not affect the Respondent's ability to continue in business and that the violations were abated in good faith. The history shows a number of electrical violations in the twenty-four months preceding this violation. I agree that the violation demonstrates moderate negligence. Further, I find that the Secretary has established the gravity as described in the citation and discussed above. I assess a penalty of \$500.00 for this citation.

## III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I **VACATE** Citation No. 6403641, and **AFFIRM** Citation No. 6403648 and assess a penalty of \$500.00. Prior to hearing, the parties reached a settlement as to the four remaining violations in this docket resulting in a \$200.00 penalty. The motion to approve settlement is **GRANTED**. Cargill

Deicing Technology is hereby **ORDERED TO PAY** the Secretary of Labor the sum of \$700.00 within 30 days of the date of this decision.

  
Margaret A. Miller  
Administrative Law Judge

**Distribution: (U.S. Certified Mail)**

**Patrick DePace, Esq., Office of the Solicitor, U.S. Dept. of Labor, 881 Federal Office Building,  
1240 East Ninth Street, Cleveland, OH 44199**

**Mark Savit, Esq., Donna Pryor, Esq., Patton Boggs LLP, Suite 4900, 1801 California Street,  
Denver, CO 80202**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
601 NEW JERSEY AVENUE N. W., SUITE 9500  
WASHINGTON, D.C. 20001

December 16, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-1083
Petitioner	:	A.C. No. 15-02709-150056 -01
	:	
v.	:	Docket No. KENT 2008-1084
	:	A.C. No. 15-02709-150056-02
	:	
HIGHLAND MINING CO., LLC,	:	
Respondent	:	Highland No. 9 Mine
	:	

**DECISION**

Appearances: Jennifer Booth, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;  
Michael Cimino, Esq., and Brad Oakley, Esq., Jackson Kelly, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties 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 Highland Mining Co., LLC ("Highland") with 39 violations of mandatory standards and seeking civil penalties for those violations. The general issue before me is whether Highland violated the cited standards as charged and, if so, what is the appropriate civil penalty to be assessed for those violations. Additional specific issues are addressed as noted.

At hearings, the parties proffered that a partial settlement had been reached regarding 36 of the charging documents at issue herein. A formal motion for settlement of those charging documents was submitted post hearing proposing civil penalties of \$78,340.00 for the violations charged therein. I have reviewed the documentation and representations submitted and find that the proposed settlement is acceptable under the criteria set forth in section 110(i) of the Act. Accordingly, an order directing payment of those penalties will be incorporated in this decision.

As a preliminary matter at hearings, and by subsequent post hearing motion, the Secretary modified Order Number 6695564, issued on November 27, 2007, from an order issued pursuant to

section 104(d)(2) of the Act to a citation issued pursuant to section 104(a) of the Act.<sup>1</sup> The Secretary also modified Order Number 6695579 from an order issued under section 104(d)(2) of the Act to one issued under section 104(d)(1) of the Act.

*Citation Number 6695769*

This citation alleges a “significant and substantial” violation of the standard at 30 C.F.R. §75.1725(a) and charges as follows:

The beltline on 064 MMU was not being maintained in safe operating condition. A belt roller top chair had broken loose from the belt frame and was lodged between the top and bottom belts. Smoke from the top chair rubbing the belts was in the air and the top chair was hot to touch. The company stopped the belt and removed the top chair from between the top and bottom belts.

The cited standard provides that “mobile and stationary machinery and equipment shall

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<sup>1</sup> Section 104(d) provides as follows:

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

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

be maintained in safe operating condition. Machinery or equipment in unsafe condition shall be removed from service immediately.”

Jeffrey Winders, an inspector for the Department of Labor’s Mine Safety and Health Administration (“MSHA”), was inspecting the Highland No. 9 mine on April 12, 2008 when he smelled smoke from what he recognized as burning rubber. He tracked the smoke to the belt where a belt roller top chair had broken loose from the belt frame and was lodged between the top and bottom belt. He observed smoke emanating from the top chair which was rubbing against the belt. He also noted that the top chair was hot to the touch. To remedy the problem, the company representative stopped the belt and removed the top chair from between the top and bottom belts. Within this framework of undisputed evidence, it is clear that the violation is proven as charged.

The Secretary also maintains that the violation was “significant and substantial.” 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 hazard contributed to will result in injury and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See also Austin Power Co. v Sec’y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (Dec. 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); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In this regard, Inspector Winders opined that, under continued normal mining operations, the cited condition would worsen and result in a fire. According to Winders’ credible testimony, there was coal inside the belt framing. It may reasonably be inferred that, under continued mining operations, it is reasonably likely that hot pieces of belt would ignite such coal. Should a fire occur, it is reasonably likely that burns or smoke inhalation would result causing injuries to persons working on the return side, i.e. two roof bolters, a miner operator and a miner operator helper. Within this framework of credible evidence, I conclude that indeed the violation was

“significant and substantial.” In reaching this conclusion, I have not disregarded the inspector’s acknowledgment that he found no methane in the area nor coal accumulations in contact with the rollers. He further acknowledged that he did not see any belt shavings on the ground and did not detect any carbon monoxide. However, not only did he observe smoke emanating from the belt in contact with the top chair, but I find his conclusion credible that, under normal continued mining operations, that condition would likely result in additional smoke and fire.

Based on Inspector Winders’ acknowledgment, however, that the condition could have existed only moments before his discovery and that he did not believe that the condition was recognized by anyone, I conclude that the Secretary has failed to sustain her burden of proving the existence of negligence. This factor is taken into consideration in reducing the Secretary’s proposed penalty for this violation.

*Citation Number 6695564*

This citation, originally issued as a “section 104(d)(2)” order, was modified, as previously noted, to a citation issued pursuant to section 104(d)(1) of the Act and alleges a “significant and substantial” violation of the standard at 30 C.F.R. §75.203(b). The citation charges as follows:

The No. 1 and No. 2 entries on the No. 4 (064-0) MMU were driven together in the last open crosscut at spad 11+07. The entries were driven together due to not having a proper sight line installed, to project the direction of mining in the crosscut between the No. 2 and No.1 entries one crosscut outby the last open crosscut, and one properly installed to turn the right crosscut to pick up the No. 1 entry. The No. 1 entry cut into the No. 2 entry on the second cut leaving an 8 inch pillar on the inby side.

The cited standard provides that “[a] sight line or other method of directional control shall be used to maintain the projected direction of mining in entries, rooms, crosscuts and pillar splits.”

MSHA Inspector Archie Coburn, Jr. testified that he was at the subject mine on November 27, 2007 when he observed that the No. 1 and No. 2 entries on the No. 4 unit were driven together in the last open crosscut at spad 11+07. Coburn was not present when the entries were cut, but nevertheless concluded that the entries were driven together due to not having a proper sight line installed to project the direction of mining.

Coburn also claimed that the continuous miner operator at the scene told him that there had been no sight line but rather the rib line was used in cutting the crosscut. Coburn also alleged that Jeffery Wilkens, the section foreman, admitted that he made a mistake and had not installed sight lines. Coburn also testified that it was “obvious” to him that the angle of the crosscut was wrong.

Section Foreman Wilkens testified affirmatively that he did not tell mine Inspector

Coburn that he did not use sight lines. Wilkens testified that he used fluorescent orange paint to make a sight line but admitted that his calculations in locating the sight line were incorrect thereby leading to the misdirection of the crosscut.

Allen Rigney, the miner operator who cut the cited crosscut, is a member of the United Mine Workers of America. He testified that he in fact used a sight line to make the subject cut and that the sight line was made with reddish-orange fluorescent paint on the roof. Rigney testified that Wilkens was his foreman and that Wilkens had never asked him to cut without sight lines. Rigney also observed that sight lines can become obliterated by the swing duster. Indeed, Inspector Coburn himself also acknowledged that sight lines can be obliterated by water sprays, rock dusting or by cutting with a continuous miner. Rigney also testified that he did not notice that the angle of the cut was misdirected and that if he had he would have stopped mining and notified his boss. Rigney testified that the sight line drawn by Wilkens was eight to ten feet long and three inches to four inches wide.

Randy Johnson, Highland's safety supervisor, accompanied Inspector Coburn on his April 27, 2007 inspection. Johnson testified that he indeed saw the sight line in fluorescent orange paint in the subject area. Since Coburn, while underground, never told Johnson that he was going to write an order for the absence of a sight line, Johnson did not consider it necessary to show Coburn the sight line that was present.

In resolving the conflicting testimony, I note that the inspector had not previously disclosed the purported admissions in his deposition, nor did he report these purported admissions of Wilkens and Rigney in his notes. Considering the cross corroboration of the credible testimony of Wilkens, Rigney and Johnson, I can only conclude that the inspector's recollection of events that had occurred nearly three years before trial must have been mistaken. Under the circumstances, I find that, indeed, sight lines had properly been painted on the mine roof as required by the cited standard. Citation Number 6695564 must accordingly be vacated.

*Order Number 6695579*

This order, as modified to a "section 104(d)(1)" order, alleges a "significant and substantial" violation of the standard at 30 C.F.R. §75.370(a)(1) and charges as follows:

The approved ventilation, methane and dust control plan in affect [sic] at this time was not being complied with on the 4-C belt and supply road. The following conditions were present 1. The required 3,000 CFM was not present in the supply road at crosscut 15 where the company No. 38 Diesel 2 man personnel carrier was operating. The Supply Getman requiring 6, 000 CFM was also operating in the supply road at crosscut 8 out by this area. When measured, with a chemical smoke tube zero air movement was measured. 2. The air was not moving in the proper direction on the belt line from crosscut 15 to 234. The air was moving out by along the belt line. This belt line uses a heat point fire detection system. The preshift report show that the air was moving out by from

the backup curtains outby through the unit air locks. This condition was reported to the mines ventilation supervisor. The preshift was signed by the Section Foreman and Mine Foreman prior to the start of the shift. When check the air was still moving outby from the backup curtains through the air locks. The No. 4 section was in full production when the conditions were present.

The cited standard provides in relevant part that "the operator shall develop and follow a ventilation plan approved by the district manager."

It is noted that the order at issue actually charges two violations i.e. (1) insufficient air in the supply road and (2) air moving in the wrong direction on the beltline. Highland admits to the violations but maintains that they were neither "significant and substantial" nor the result of its unwarrantable failure.

Inspector Coburn testified that around 7:00 a.m. on December 5, 2007, he read the pre-shift examination book and saw the statement, "unit pre-shifted from outby low framing to faces air traveling outby from backup through airlocks outby, reported to Troy Cowan." (Ex. G-12). Coburn did not travel to the unit to inspect the reported condition but rather gave the operator an opportunity to correct it. When Coburn later arrived at the unit around 9:00 a.m., he found that the ribbons in the neutral were not moving. Coburn observed that the air was moving from the face outby through the unit airlocks and moving backwards down the belt line and supply road. Coburn testified that the air moving down the belt line and supply road was not being dumped into the return regulator at the unit airlock (Ex. G-9). Coburn further testified that the air should have been moving inby towards the low framing and that the incorrect air movement was a violation of the operator's ventilation plan. (Ex. G-10).

Coburn initially attempted to use an anemometer to determine the air movement, but since there was insufficient air movement he had to use a smoke tube. Coburn thereby determined that the air was moving away from the unit outby. Inspector Coburn also observed that a two-man personnel carrier was situated just outby the unit airlocks and had a minimal amount of air movement around it. He further testified that the two-man carrier required 3000 cubic feet per minute (c.f.m.) of air designated on the equipment's air measurement tag. Coburn also observed a Getman supply diesel in the supply road and noted that there was insufficient air for the Getman to operate in the supply road. The Getman diesel requires 7000 c.f.m. (Ex. G-9). Inspector Coburn opined that insufficient air movement over the two-man personnel carrier and the Getman supply diesel exposed the miners on the unit to carbon monoxide fumes produced by this equipment.

After observing the condition, Inspector Coburn spoke with Ventilation Supervisor, Troy Cowan, about the air moving outby, in violation of the ventilation plan. Cowan stated that he had hung a curtain, shut the belt off and restarted it, and assumed that if they were working on the problem then they could continue to run. Additionally, Coburn spoke with Section Foreman Eddie Barber and asked him why the unit was still running with the air going backwards. Barber responded that because the belt was running when he arrived he assumed the condition had been

corrected. Barber admitted, however, that he did not check to ensure that the condition had been corrected.

The Secretary maintains that the admitted violation was "significant and substantial." In this regard, Inspector Coburn indicated that the cited condition was reasonably likely to contribute to a discrete safety hazard, i.e. a belt fire and diesel fumes. He opined that if a fire were to occur on the belt line the personnel on the unit would not know or have any warning that there was a fire outby because the air was moving away rather than toward them. He further opined that this condition would affect all ten persons on the unit. I find that Coburn's expert testimony is credible and provides ample proof that the cited violation was indeed "significant and substantial" and of high gravity. In reaching this conclusion, I have not disregarded Respondent's argument that there was no evidence in this case of any accumulations, heat source or ignition source for a belt fire. However, this argument fails to recognize continued mining operations as required in any "significant and substantial" analysis. It also fails to recognize the hazard of carbon monoxide from diesel emissions.

The Secretary maintains that the violation was also the result of Highland's "unwarrantable failure." This Commission has defined unwarrantable failure as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act" and has indicated that an unwarrantable failure implies indifference, wilful intent, a knowing violator, or a serious lack of reasonable care. *Emery Mining Corporation* 9 FMSHRC 1997, 2004 (Dec. 1987). The Commission has considered a number of factors to be relevant when determining whether a violation is the result of unwarrantable failure, stating as follows:

We examine various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. (Citations omitted). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard.

*Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997).

Further, this Commission has found that because a supervisor is held to a high standard of care, evidence of a supervisor's involvement in the violation is an important factor supporting an unwarrantable finding. See *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1145-1148 (Oct. 1998).

In this regard, Coburn testified that the violative condition was a result of the operator's high negligence and unwarrantable failure because Mine Foreman Danny Thorpe, Ventilation

Supervisor Troy Cowan and Section Foreman Eddie Barber had all signed off on the fire boss report that listed the violative condition. According to Coburn, those agents of the operator, therefore knew of that condition and failed to correct it before running coal. Coburn further noted that he gave the operator at least two hours to correct the violative condition and the operator nevertheless still failed to correct it. I find that three agents of the operator (the three supervisors) demonstrated a serious lack of reasonable care and indifference to the safety of the miners on the unit when they allowed production to continue without correcting the violative condition. Indeed, the ventilation supervisor and section foreman were on the unit and aware of the violative condition yet failed to verify that it had been corrected before producing coal. Under all the circumstances, I find that the Secretary has clearly met her burden of proving that the violation herein was the result of Highland's unwarrantable failure and high negligence.

In reaching this conclusion, I have not disregarded the Respondent's argument that the language in the preshift report did not place its agents on notice of the precise violative conditions cited herein. I find however, that whether or not the same precise violative conditions were set forth in the preshift report, the report provided sufficient notice of the cited ventilation problems to Respondent's agents so that they were thereby placed on notice. Moreover, aside from the notice provided by the preshift report, it is clear that Respondent's ventilation supervisor and section foreman had actual knowledge of the violative condition but failed to verify that it had been corrected before running coal. Their failure to correct those problems was therefore the result of high negligence and unwarrantable failure.

#### *Civil Penalties*

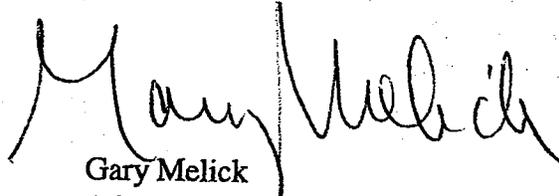
Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. It is also noted that Section 110(a)(3) of the Act qualifies and may supercede the provisions of section 110(i) by imposing mandatory minimum penalties for "section 104(d)" violations.

The operator is large in size and has a significant history of violations (from within twenty-four months of the violations at issue). There is no evidence that the penalties imposed herein would affect the operator's ability to stay in business. There is no dispute that the violations were abated in good faith. The gravity and negligence of the violations have previously been evaluated.

#### **ORDER**

Citation No. 6695564 is hereby vacated. Citation No. 6695769 is affirmed with a civil penalty of \$1,500.00. Citation No. 6695579 is affirmed with a civil penalty of \$38,500.00.

Highland Mining Co., LLC, is directed to pay the above civil penalties within 40 days of the date of this decision. Further, pursuant to the motion for partial settlement filed herein, Highland Mining Co., LLC, is directed to pay additional civil penalties of \$78,340.00 within 40 days of the date of this decision.



Gary Melick  
Administrative Law Judge  
202-434-9977

Distribution: (Certified Mail)

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/to

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 16, 2010

SECRETARY OF LABOR, MSHA, on : DISCRIMINATION PROCEEDING  
behalf of OKEY SARTIN, :  
Complainant :  
 : Docket No. WEVA 2010-1004-D  
v. : HOPE CD 2010-04  
 :  
KIAH CREEK TRANSPORT, LLC, : Mine ID 46-07809  
Respondent : Kiah Creek Preparation Plant

**DECISION**

Appearances: Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant.  
Mark E. Heath, Esq., Spilman, Thomas, Battle, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by the Secretary of Labor, on behalf of Okey Sartin, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2).<sup>1</sup> The Secretary alleges that Kiah Creek Transport, LLC, unlawfully discriminated against Sartin by terminating him in retaliation for his complaints about safety. A hearing was held in Charleston, West Virginia, and the parties filed briefs following receipt of the transcript. For the reasons set forth below, I find that the Secretary has failed to prove that Sartin was discriminated against in violation of the Act.

**Findings of Fact**

Argus Energy WV, LLC, operates a large surface and sub-surface coal mine in Wayne County, West Virginia. Kiah Creek Transport is a trucking company that contracted with Argus Energy to transport coal from stockpiles to a tippie at the mine, known as the Kiah Creek

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<sup>1</sup> Pursuant to section 105(c)(2) of the Act, a miner may submit a complaint of discrimination to the Secretary of Labor, who must conduct an investigation and file a complaint with the Commission if she determines that the Act has been violated. If the Secretary finds that the complaint "was not frivolously brought," she may also seek an order temporarily reinstating the miner. 30 U.S.C. § 815(c)(2). The Secretary filed a Temporary Reinstatement Proceeding on behalf of Sartin. *Sec'y of Labor on behalf of Sartin v. Kiah Creek Transport, LLC.*, Docket No. WEVA 2010-771-D. Pursuant to agreement of the parties, an order was entered on April 5, 2010, economically reinstating Sartin effective March 31, 2010.

Preparation Plant. Large tractor-trailer trucks, typically carrying 60 tons, are used to transport the coal. Kiah Creek operated approximately 20 trucks, loaders and other equipment, and its operations were based in a shop building on the mine site, where maintenance and repairs were done. Truck drivers worked on two shifts, six days a week. Generally, eight truck drivers would work on the second shift, from 5:00 p.m. to 5:00 a.m., Monday through Friday, and every other Saturday. Ricky Vance was the second shift supervisor. Kevin Fields was the superintendent of Kiah Creek's trucking operations, which included the off-road mine site work and an operation transporting coal to river docks in Kenova, Wisconsin. Shane Farley was the truck boss at Kiah Creek, and worked under Vance.

In March of 2009, Sartin was unemployed because of chronic medical problems. Tr. 19. He had previously worked in underground coal mines. While he had not operated large trucks in some time, he was familiar with them because his father worked with heavy equipment and trucks. Ex. P-4. One of Sartin's friends happened to work with Vance's wife, and mentioned Sartin's situation to her. Vance's wife talked to him, recommending that Kiah Creek consider Sartin. Vance suggested to Fields that they hire Sartin and give him a chance to "get back on his feet." Tr. 158. Sartin submitted an application to Kiah Creek, was interviewed by Fields, and was hired as a second shift haul truck driver on March 13, 2009. Tr. 20, 210; Ex. R-1.

The employment agreement signed by Sartin provided that, after a probationary period, his employment could be terminated as part of a progressive disciplinary process, or without prior disciplinary action if his actions, in the Company's judgment, warranted immediate termination. Examples of actions that could result in termination without prior disciplinary action included: absence without approved leave, disorderly conduct, and excessive absenteeism or tardiness. Ex. R-1.

Vance and Farley were very supportive of Sartin, who was living out of his vehicle. Vance occasionally gave him rides to and from work, brought him food, and gave him money to buy gasoline. Tr. 22, 70, 159; Ex. P-5. Later, when Sartin experienced health problems, Vance transported him home from the hospital. Tr. 159; Ex. P-5. Farley also occasionally provided transportation for Sartin to and from work, and gave him gasoline and food. Tr. 197. Sartin agreed that the company bent over backwards to help him out in the spring of 2009. Tr. 71. After Sartin started receiving paychecks, he acquired a small trailer. Although he may have had a disagreement with one co-worker, Sartin's relationships with co-workers and supervisors were unremarkable. Tr. 72. Sartin and Vance agreed that they got along well. Tr. 71, 80, 159. Farley also got along well with Sartin, and went fishing with him a couple of times. Tr. 83, 197.

For the first several months of his employment, Sartin performed very well. Tr. 160, 198. Around June or July, he was victimized in an internet scam. He was tricked into sending money to a woman who would supposedly come to the United States and live with or marry him. He lost about \$2,600.00 before he realized that he was being taken. Sartin testified that the incident did not affect his work performance. Tr. 24. However, his supervisors noticed that his attitude began to change. Tr. 160-61, 211-12. Vance reported that Sartin started missing work and didn't

seem to care about anything. Ex. P-5.

Beginning in July 2009, Sartin experienced serious health problems, mainly related to high blood pressure. He was taken from mine property in an ambulance a few times, and suffered a minor stroke while on mine property. Argus Energy's human resources and payroll administrator, Rebecca Hall, compiled a list of Sartin's absences from July 1, 2009, through February 6, 2010, along with a statement of reasons, or excuses, claimed for such absences.<sup>2</sup> Ex. P-1. The list is inaccurate in several respects.<sup>3</sup> The period beginning on Monday, December 14, 2009, through Tuesday, January 12, 2010, is the more critical time. Sartin was absent 14 of the 22 work days. He was hospitalized on four of those days, although it is unclear whether Respondent was aware of that.<sup>4</sup> He submitted an excuse for five days, admitted that he had no excuse for absences on January 5 and 8, and claimed that Fields had told him to take Friday the 9th off and that he was suspended beginning on Monday the 11th. Tr. 34-35.

Fields testified that he was running out of patience with Sartin's poor attendance. He and Vance had talked to Sartin about the problem. Tr. 228. Following Sartin's absence on January 8, Fields told Sartin that he needed to have a doctor's excuse before he could come back to work. Tr. 226, 230. When Sartin advised that he could not produce an excuse, Fields told him that he was going to be suspended for four days. Tr. 230.

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<sup>2</sup> The concept of an "excused" absence is somewhat misleading. Aside from vacation days, for which they were paid in a lump sum in July, miners, like Sartin, were not paid for days they did not work, regardless of the reason. Miners who worked all assigned days in a month received a \$150 attendance bonus. Any day missed, except for a vacation day, voided the bonus. Tr. 147. Excuses, apparently were relevant only as an indication of an employee's reliability, and to provide an opportunity to manage work schedules and seek possible replacements. If a driver simply failed to show up, Fields explained that his truck sat, production was disrupted, and the driver's performance was adversely affected. Tr. 216.

<sup>3</sup> Sartin's time sheet for December 4 through 20, shows that he did not work on six of the 10 work days, whereas, the list shows that he was absent on only four days. Ex. P-1, P-13 at 11. The time sheet for December 21 through January 3, bears a notation "Had [Dr?] excuse for all days off," whereas Argus's list does not note an excuse for five absences in that time period. Ex. P-1, P-13 at 12. Argus's list shows that Sartin was absent on January 6 and 7. Sartin testified that he worked on January 6 and 7, and his time sheet appears to confirm his claim. Tr. 34, 52; Ex. P-13 at 13.

<sup>4</sup> The Secretary introduced medical records establishing that Sartin was hospitalized from December 15 through 18. Ex. P-12. The hospitalization apparently was not reflected in Argus's payroll records, and is not reflected on Argus's list of absences.

On January 13, Sartin was called in, was counseled by Vance and Fields about excessive absenteeism, and was suspended for four days.<sup>5</sup> A form signed by all parties memorializes that Sartin was counseled about "missing too much work no excuses," and notes that "any other infraction(s) of company rules or policies could lead to [his] suspension and or . . . termination." Ex. R-3. Sartin was told to come back on January 18, a Monday, at which time he would have to sign a "last chance agreement."<sup>6</sup> Ex. R-3. On January 18, Sartin reported for work, and signed an agreement, reflecting that he had received one written and three verbal warnings regarding his "work performance or attendance," and was requesting a "Last Chance" to improve. Ex. R-4. Following his suspension, and when working under the last chance agreement, Sartin was essentially on probation, and could be terminated for any violation of work rules or regulations. Tr. 168; Ex. R-3, R-4. Sartin understood that, having signed the agreement, he could be terminated for any breach of company rules, or further absences. Tr. 37, 68, 72.

From January 18 through February 4 there were no significant problems with Sartin's attendance or work performance.<sup>7</sup> On February 5, he reported for work and was told by the day shift driver and others that his assigned truck, truck #6, had been leaning when dumping. He checked potential causes when he did his pre-operational checks, but did not find anything wrong. Vance had overheard the first shift driver's report about the truck leaning. Tr. 170. There was also mention that the leaning might be attributable to uneven loading as a result of frozen coal. Tr. 170. Vance also checked the truck's tires, springs, frame and dump chutes: things that might cause leaning. He found no problems. Tr. 171. Vance told Sartin to "light-load" the truck. He also told Farley, who was operating the loader at the stockpile, to light-load the truck until they figured out what was wrong with it. Tr. 173. The truck was loaded with 40-45 tons of coal, as opposed to a normal load of 60 tons or more. It leaned some when dumping, but was within acceptable limits for the first five loads. Tr. 200. Sartin did not feel that the truck was unsafe to operate.<sup>8</sup> Tr. 76. Farley, felt that the fifth load leaned a little more, so he loaded

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<sup>5</sup> The suspension ran from January 13 through January 16. January 16 was a Saturday. It is not clear whether Sartin was scheduled to work that Saturday, because he had been scheduled to work the previous Saturday, January 9. The list of absences prepared by Argus does not show him absent or on suspension on January 16. Ex. R-2.

<sup>6</sup> Fields explained that a last chance agreement is used when they have worked with an employee to try and save his job, but are ready to terminate him. The agreement affords the employee one last opportunity keep his job. Tr. 217.

<sup>7</sup> Vance testified that Sartin's attendance was good. He was tardy a couple of times, but he called in and was on the property. Tr. 169.

<sup>8</sup> Sartin testified that he told Vance, over the radio, that the truck was leaning after the fifth load, and that Vance told him to haul coal. Tr. 76. Vance testified that he did not hear from Sartin before he brought the truck back to the shop. Tr. 174. As noted above, Sartin did not feel that the truck was unsafe to operate at that time.

the sixth load more toward the back of the trailer to make it easier to dump. Tr. 201. However, the trailer leaned badly when dumping the sixth load, and Tony, the loader operator at the tippie, told Sartin to take the truck back to the shop because it was too dangerous to keep operating. Tr. 43.

Sartin drove the truck to the shop about 1:30 a.m. or 2:00 a.m., on February 6, 2010, and stopped outside because all three shop bays were full. He approached Vance, who was on an elevated platform greasing jack pins on a loader. Farley, who had been operating the loader at the stockpile, had brought it in for greasing when the belt shut down. He was standing on the ground, handing things to Vance. Sartin walked up next to Farley, and a critical conversation ensued.

Sartin testified that he told Vance that the truck just about rolled over and that Tony (the loader operator at the tippie) said to bring it to the shop and not to bring it back until they found out what was wrong with it. Tr. 43. Vance replied that there was nothing wrong with the truck and instructed Sartin to haul coal. Tr. 44. Sartin responded that the truck just about turned over, and Vance asked whether Sartin told Tony that Vance had looked at it. Sartin replied that he had, and that Tony said not to bring it back down there. After three to four minutes, Vance told Sartin to park the truck and that he could "go on unemployment." Tr. 44. Sartin felt that Vance was "threatening" his job and replied "do it," meaning fire me. Tr. 44. Vance replied, "you get smart with me and I'll fire you now." Tr. 44. Sartin said "you f-king fire me then," and Vance fired him. Tr. 44.

Vance testified that Sartin told him that the loader man at the tippie told him that the truck was leaning too bad and to bring it to the shop. Vance told him to park it, and looked at Farley and Sartin, "winked," and said "the way things [are] going we all [are] going to be on unemployment." Tr. 178. Sartin started cussing and said "I don't f-king care, you can go ahead and f-king fire me." Tr. 178. Farley said that Vance was just joking, and Sartin said "f-king fire me." Tr. 178. Vance then fired Sartin.

The only material differences in the parties' respective versions of these events is whether Vance's comment about unemployment compensation was made in a joking manner, or whether it was a genuine threat to fire Sartin, and whether Farley made a comment to the effect "he's joking."<sup>10</sup> There is general agreement on other aspects of the interchange, including that Sartin was loud and cursed at Vance. Sartin admitted that he was loud, and that he cursed at Vance in an angry voice. Tr. 44, 82. Vance and Farley also testified that Sartin spoke in a loud, angry voice and cursed. Tr. 178-79, 189, 203-04.

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<sup>9</sup> There were typically eight trucks operating on the second shift. That evening, there were seven, and loss of Sartin's truck would have taken that number down to six.

<sup>10</sup> Vance and Farley testified that Farley interjected with the "he's just joking" comment. Tr. 178, 203. Sartin denied that Farley made such a statement. Tr. 44.

Vance made a note of what happened, and he and Farley signed it. Exh. R-6. Vance filled out an "Employee Termination Form," reporting that Sartin had been terminated "for having no respect for his job and going off on me." Exh. R-5. Vance called Fields about 5:00 a.m., and told him he had to let Sartin go. He explained what happened, and told Fields that the termination form was on his desk. Fields signed the form when he came in. Sartin called Fields that day, told him that he had gotten into it with Vance, and inquired whether he had lost his job. Fields replied that he had been fired. Sartin said that he had been fired over a safety issue, and Fields told him "no . . . you were fired for cussing your boss out." Tr. 222. Sartin offered to drop everything, if he could have his job back. Fields replied that he was going to honor Vance's decision, to which Sartin responded: "you've got a fight on your hands." Tr. 222. Sartin's testimony describing this conversation was essentially the same. Tr. 47.

On February 8, 2010, Sartin appeared at the MSHA field office in Mt. Hope, West Virginia, and filed a discrimination complaint. The complaint was assigned to MSHA special investigator James Humphrey, who visited Sartin at his residence, and obtained a statement from him. Exh. P-4. Humphrey also visited Kiah Creek's shop, interviewed Vance and Fields, and obtained statements from them. Ex. P-5, P-6. Humphrey did not interview Farley, because until his deposition was taken, he was not aware that Farley was standing right next to Sartin and Vance, and witnessed the critical conversation. Tr. 130. Humphrey testified that he specifically inquired of Sartin whether there were witnesses to the conversation, and that Sartin did not tell him that Farley was present. Tr. 132.

Humphrey did not examine the trailer on his first visit to the site. Kiah Creek was going to send the trailer to the manufacturer to correct whatever deficiencies were causing it to lean. It voluntarily kept the trailer on site until Humphrey could examine it. About two weeks later, Humphrey examined the trailer, including the upper end of the lift/dump mechanism, which was accessed by removing a cover plate high on the trailer's front side. He found that a pin attached to the end of the hydraulic lift piston was badly worn and bent, as was the eye bracket, and that several bolts were missing from brackets mounted on the trailer into which the ends of the pin fit. Tr. 114-16. Those conditions, which are depicted in pictures taken by Humphrey, were the apparent cause of the leaning problem. Ex. P-8, P-9. Humphrey knew that a number of things can cause leaning, and was disappointed that Kiah Creek had not gone further in its efforts to find the cause. Tr. 118. However, Fields noted that all of those defective parts were replaced, and that after \$16,700.00 was spent on repairs, the trailer still had a tendency to lean. Tr. 224-25.

After Humphrey's initial investigation, the Secretary concluded that Sartin's complaint was not frivolous, and filed the aforementioned temporary reinstatement proceeding. At the conclusion of the investigation, the Secretary filed the instant Complaint of Discrimination, seeking permanent relief on behalf of Sartin and the imposition of a civil penalty in the amount of \$10,000.00 against Kiah Creek for its alleged violation of the Act.

### The Discrimination Claim

A complainant alleging discrimination under the Act typically establishes a *prima facie* case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. See *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. See *Robinette*, 3 FMSHRC at 818, n. 20. If the operator cannot rebut the *prima facie* case in this manner it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

### Prima Facie Case

Section 105(c)(1) of the Act prohibits discrimination against any miner who complains to an operator or its agent about "an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1). Sartin's report of the problem with the #6 truck related to safety and was an activity protected under the Act. He suffered adverse action when he was terminated.

The principle issue as to Sartin's *prima facie* case is whether the adverse action was motivated in any part by his protected activity. Even though there is no direct evidence of unlawful motivation, the Commission has recognized that such evidence seldom exists and that discrimination often must be proven through circumstantial evidence. *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (April 2002), *citing Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C.Cir. 1983). Circumstantial evidence of unlawful motivation may include an operator's knowledge of the protected activity, hostility toward the protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *Id.*

Here the adverse action immediately followed the protected activity, a coincidence in time sufficient to raise an inference that it was the result of Sartin's protected activity, at least in part. Vance had examined the truck and found nothing wrong with it. He was concerned that another truck being taken out of service would further reduce his fleet of available trucks on that

shift, which would adversely affect production. It would be permissible to infer that his decision to terminate Sartin was motivated, in part, by the report of a safety problem.

While drawing such an inference would be permissible, it is not compelled, and I decline to do so. As explained in the discussion of Respondent's affirmative defense, I find that Vance's decision to terminate Sartin was motivated solely by Sartin's angry reaction to an innocuous comment about unemployment compensation. While Sartin's actions with respect to the truck related to a safety issue, he was not the initiator of the complaint. The initial reports that the trailer was leaning when dumping a load came, not from Sartin, but from the first shift driver, and were overheard by Vance. Vance examined the truck and instructed Sartin and Farley to light-load it. Sartin agreed that that was the proper approach to the problem. Tr. 74.

When the trailer leaned badly while dumping the sixth load, the loader man at the tippie told Sartin to bring the truck to the shop because it was too dangerous to operate. Sartin took the truck to the shop and reported the loader operator's instruction/suggestion to Vance. Again, Sartin was not the initiator of the safety related message. He had taken the truck to the shop at the instance of the tippie operator, and he did not refuse to drive the truck. While he was the bearer of news that would have an adverse effect on production, there was little reason for Vance to have focused a negative reaction on Sartin, especially to the extent of terminating his employment. The truck was carrying limited loads, and there were only about three hours left in the shift. Several persons had reported the leaning problem, and Vance knew that it had to be dealt with.

I find that Vance's statement about unemployment was a joking commentary on the problems that he was experiencing with haul trucks that evening.<sup>11</sup> That is how Farley understood it, and he tried to calm Sartin when he reacted angrily and started cursing. Sartin may have miss-perceived the comment as a "threat" to his job - but not, apparently, that he was being fired. As the Secretary notes, in her brief, Sartin was discharged "almost immediately after" Vance's reference to unemployment. Sec'y. Br. at 6. The discharge occurred seconds later because when Vance told Sartin that further abusive conduct would result in termination, Sartin, in a loud, angry cursing voice, specifically invited Vance to fire him, and Vance then fired him.

The Secretary attempts to limit Sartin's culpability by reference to Sartin's testimony that the use of "salty" language was normal conversation for miners at Kiah Creek. Tr. 23. Vance agreed that profanity was often used in the general discourse on the job. Tr. 188. However, that is an entirely different matter than personally directed comments made in anger. Farley stated

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<sup>11</sup> Telling an employee to sign up for unemployment would be an unusual way to fire him. Persons terminated for cause typically are not eligible for unemployment benefits, at least initially. Kiah Creek "fought" the unemployment claim that Sartin made following his termination. Tr. 49. While it might be presumed that a fired employee would seek unemployment benefits, it strikes me as highly unlikely that Vance would have couched any decision to terminate Sartin in terms of his seeking unemployment benefits.

that cursing, if made in a non-joking way, should be punished, and could result in termination if one was on a last chance agreement. Tr. 205. In his mind, there was no question that Sartin was angry.

I find that Vance's decision to terminate Sartin's employment was motivated entirely by Sartin's angry, cursing behavior, and not, in any part, by Sartin's protected activity. Consequently, the Secretary failed to establish a *prima facie* case of discrimination against Sartin.

In reaching this conclusion I have found facts that are adverse to the interests of the Secretary and Sartin. Those determinations have been based upon my favorable evaluation of the credibility of Vance, Fields and Farley, and a less favorable evaluation of Sartin's credibility. Two of the considerations that weighed on Sartin's credibility were his testimony about a drug test incident, and his failure to advise Humphrey that Farley was present and participated in the exchange that led to his termination. The drug test issue was unremarkable, except for Sartin's inconsistent testimony about it. Sartin testified that he talked to Fields shortly after taking a random drug test in July, and reported that he was going to fail it because he had taken a pain pill given to him by another employee that "was not prescribed to [him]." Tr. 48. Sartin later testified that he had a prescription for the drug when he took it. Tr. 58-59. The drug test came up negative, and Sartin was never required to show a prescription to Fields. Sartin never explained why he was concerned about the test, if he had a prescription for the drug.<sup>12</sup>

#### Respondent's Affirmative Defense

While I have rejected the Secretary's argument on causation, that decision is not yet final. Assuming, for purposes of argument, that Sartin's termination was in some part the result of his protected activity, Respondent's affirmative defense will be considered. Kiah Creek contends that Sartin's termination was based upon his unprotected conduct, and that it would have taken the same action whether or not Sartin had engaged in protected activity.

In *Sec'y. of Labor on behalf of Bernardyn v. Reading Anthracite Co.* 22 FMSHRC 298, 302 (Mar. 2000) (*Bernardyn I*), the Commission reiterated the general principles for evaluating an operator's affirmative defense:

[T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this

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<sup>12</sup> Sartin also testified that drivers were required to report all prescription medications to the company. Tr. 58. But, when questioned about why the prescription he claimed to have had had not been reported, he stated that only prescriptions that bore a red label warning against operation of heavy equipment needed to be reported. Tr. 85. Respondent's actual policy on reporting of prescription drugs is unknown. If Sartin's initial statement were correct, it might explain why he was concerned about the test, even if he had a prescription.

by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

quoting from *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). As specifically as applied in cases involving the use of profanity, the Commission cited *Sec'y. of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984), and noted factors to be considered include whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and the operator's treatment of other miners who had cursed or used threats.

There is no question that Sartin's relationship with Kiah Creek had become quite strained in the months leading up to his termination. While Argus's listing of absences fails to note excuses for some days that should have been so recorded, it is apparent that Sartin missed a lot of work days from mid-December up to the date of his suspension. His absences on January 5, 8, 9, 11 and 12 were not excused. I find, as Fields testified, that he was not aware of any excuses for those days, and that he did not suspend Sartin prior to January 13. Tr. 218. Kiah Creek documented steps in its disciplinary process. The form memorializing the suspension and the fact that Sartin would have to sign a last chance agreement upon his return to work on January 18, documented the disciplinary action that was taken. It is possible that Sartin misunderstood Fields's statements about the suspension. Nevertheless, as of January 13, Sartin had been absent for several days and had tendered no excuse for his absences.

There is no evidence that Sartin had used profanity in the past, except possibly in general casual conversation. Tr. 187. But, Sartin had clearly established an unsatisfactory work record due to absences and tardiness. The tension that Sartin's absences caused with Vance and Fields was not attributable to protected activity, nor was the fact that Sartin was subject to termination for any breach of Kiah Creek's rules.

While Respondent did not have a written policy defining insubordination, its work agreement specifically prohibited disorderly conduct, and cited it as an example of conduct that could lead to immediate termination. Tr. 188; Ex. R-1. From the limited evidence of record, it appears that Sartin's termination was consistent with its written policy and previous disciplinary actions. Vance testified, in response to a leading question, that an employee could not talk to a supervisor like Sartin had and retain his job. Tr. 223. Farley testified that an employee engaging in conduct like Sartin's should be punished and could be terminated if he was on a last chance agreement. Tr. 205.

Evidence of disparate treatment can be highly probative of unlawful motive, just as evidence of consistent treatment can indicate the lack thereof. *Sec'y of Labor on behalf of*

*Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 929 (Sept. 2001) (*Bernardyn II*). Here, the Secretary introduced no evidence that there were other similarly situated miners that were treated more favorably in the disciplinary process. Respondent presented limited evidence on that issue. Fields testified that an employee at the Kenova job had also been terminated for cursing his supervisor. Tr. 225.

Sartin understood his precarious employment situation. That understanding did not influence him to control his behavior. He was openly hostile and insubordinate to his supervisor in the presence of at least one other employee. His conduct was grounds for termination under his original employment agreement, and almost certainly would have occurred even if he had not been working under a last chance agreement. In his status as of February 6, 2010, his termination was virtually inevitable.

Upon consideration of all of these factors, I find that Kiah Creek's termination of Sartin was the result of his unprotected activity and that it would have taken that disciplinary action as a result of Sartin's unprotected activity alone.

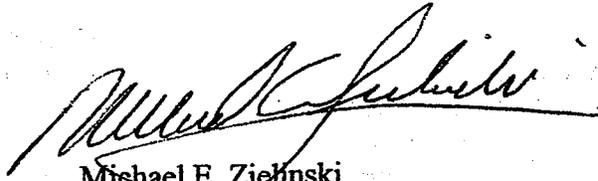
The Secretary argues that Sartin's outburst was provoked by Vance's reaction to his report of the safety problem such that his conduct cannot be used as a justification for adverse action. In *Bernardyn I*, the Commission held that even where all elements of an affirmative defense have been established, the defense may nevertheless fail because the offensive conduct was provoked by an operator's response to protected activity. 22 FMSHRC at 305-06. As noted above, Vance did not provoke Sartin. He made an offhand comment about everyone going on unemployment. While Vance's statement was occasioned by Sartin's message about a safety problem with the truck, it was not provocative and Sartin's reaction was completely beyond any leeway for impulsive behavior to which an employee might be entitled. Sartin was openly abusive and insubordinate in his language and demeanor, and persisted in his conduct despite Farley's attempt to calm him. Respondent is not precluded from relying on Sartin's conduct as a justification for his termination.<sup>13</sup>

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<sup>13</sup> The Secretary does not argue that Sartin's reaction was prompted by a misunderstanding of Vance's comment. Had she done so, I would find that as a matter of fact it was not, especially in light of Farley's intervention. However, I need not reach that issue, because the argument is unavailing. In a related context, an employee's refusal to perform work he mistakenly perceives to be unsafe can be protected if he held a good faith, reasonable belief that it was hazardous. *Dykhoff v. U.S. Borax, Inc.*, 22 FMSHRC 1194, 1198-99 (Oct. 2000). Any argument that Sartin's reaction to Vance was protected because he perceived Vance's comment to be a provocative reaction to his safety message would fail because any such perception would have been unreasonable.

**ORDER**

For the reasons stated above, I find that Kiah Creek's decision to terminate Sartin was not motivated in any part by Sartin's protected activity. Rather, it was based solely upon his abusive and insubordinate conduct toward his supervisor. It was a justifiable continuation of the disciplinary process, and would have been justifiable as an initial disciplinary action. In the alternative, I find that Kiah Creek would have taken the disciplinary action as a result of Sartin's unprotected activities alone. Accordingly, the Discrimination Complaint is hereby **DISMISSED**.



Michael E. Ziehlinski  
Senior Administrative Law Judge

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December 23, 2010

CLINTWOOD ELKHORN MINING COMPANY, INC., Contestant,	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. KENT 2011-53-R
	:	Order No. 8247767;10/15/2010
v.	:	
	:	Docket No. KENT 2011-54-R
	:	Citation No. 8247767;10/15/2010
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent.	:	Docket No. KENT 2011-40-R
	:	Order No. 8247761;10/15/2010
	:	
	:	Docket No. KENT 2011-41-R
	:	Citation No. 6660595;10/15/2010
	:	
	:	Mine: Clintwood Elkhorn Mining Co.
	:	Mine ID 15-16734

**DECISION**

Appearances: Matt S. Shepherd, Esq., and Jennifer Booth, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Secretary of Labor; Melanie J. Kilpatrick and Marco M. Rajkovich of Rajkovich, Williams, Kilpatrick & True, PLLC of Lexington, KY, on behalf of Clintwood Elkhorn Mining Co., Inc.

Before: Judge Gill

**Procedural History**

This case was tried on October 19, 2010, in Pikeville, KY. The trial was expedited in response to the Respondent's request under 29 C.F.R. § 2700.52. The following cases were consolidated for expedited resolution: KENT 2011-0053-R, KENT 2011-0054-R, KENT 2011-0040-R, and KENT 2011-0041-R. The Respondents, MSHA and the Secretary of Labor, were represented by Matt S. Shepherd and Jennifer Booth of the U.S. Department of Labor, Office of the Solicitor, Nashville, TN. The Contestant, Clintwood Elkhorn Mining Co., Inc was represented by Melanie J. Kilpatrick and Marco M. Rajkovich of Rajkovich, Williams, Kilpatrick & True, PLLC of Lexington, KY. Testimonial and exhibit evidence was taken from James Holbrook, Robert H. Bellamy, and Shane Bishop.

During a pre-trial telephone conference on October 18, 2010, the parties agreed that, although the motion to expedite the case came from the Contestant, it would be best for clarity of the record and ease of presentation of the evidence if the Respondent presented its evidence first.

(Tr. 6:1-7)<sup>1</sup> At the conclusion of the Respondent's direct case, the Contestant moved for dismissal of the citations. Contestant's motion to dismiss was granted, obviating the need for it to present any evidence.

### Rule 52(c) Motion

At the close of the Secretary's case, the Contestant moved for dismissal of the citations and orders in this case, arguing that as a matter of law and fact the Secretary had failed to produce evidence to support the issuance of the citations and orders. I granted the Contestant's motion and spoke my ruling onto the record as a bench decision.

The Commission's Rules of Procedure, the Administrative Procedure Act, and the Mine Act are silent regarding the standards that apply to motions to dismiss at the close of an opposing party's case-in-chief. It is appropriate under these circumstances to consult the Federal Rules of Civil Procedure for guidance. *Sec'y of Labor v. Basic Refractories*, 13 FMSHRC 2554, 2558 (1981). The Federal Rules of Civil Procedure allow, at the judge's discretion, the dismissal of a matter when a party fails to prove by the preponderance of the evidence a key element of their case. Fed. R. Civ. P. 52(c) ("Rule 52(c)") provides:

If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgement against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

### Fed. R. Civ. P. 52(c)

During a nonjury trial, Rule 52(c) authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence. In *Clifford Meek v. Essroc Corporation*, the Commission found that a ruling on a motion for involuntary dismissal under Rule 52(c) was at the judge's discretion and found "no error by the judge and affirm[ed] his procedural determinations." *Clifford Meek v. Essroc Corporation*, 15 FMSHRC 606, 614 (April 1993). In *Sec'y of Labor v. Martin County Coal Corporation and GEO / Environmental*, the Commission found that a judgment on a partial finding was appropriate because the judge had heard the Secretary's entire case. *Sec'y of Labor v. Martin County Coal Corporation and GEO / Environmental*, 28 FMSHRC 247 (May 2006). In addition, the Commission found in *Martin County Coal* that the judge does not need to address every point of evidence. *Id.* The

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<sup>1</sup> Transcript references consist of a starting page and line number, a dash, and a closing page and line number. If the closing page is the same as the opening page, the closing page number is omitted, as in this example: (Tr. 6:1-7). If the closing page number is different, the reference looks like this example: (Tr. 6:1-8:14), which designates the passage starting at page 6, line 1 through page 8, line 14.

judge must only include findings and conclusions on “material issues of fact [and] law.” *Id.* citing Fed. R. Civ. P. 52(c) .

As discussed below, the Secretary failed to put on evidence to prove the key factual elements for her case, i.e., that the truck involved in this roll-over incident was overloaded or that overloading played a significant role. MSHA’s investigators chose to make overloading the focus of their enforcement action in such a way and with such unbending resolve as to make their actions arbitrary and capricious. For these reasons, the motion to dismiss granted at the close of the Secretary’s case must stand.<sup>2</sup>

### Summary of Facts and Issues

This case results from a coal truck run-away incident that happened on October 6, 2010, at the Clintwood Elkhorn prep plant dump site in Pike County, KY. The players are Clintwood Elkhorn, the contestant and operator of the prep plant, Tattoo Trucking, the employer of the driver of the truck, Hubble Mining Co., the company contracted to mine the coal hauled by the truck, and MSHA employees James Holbrook, the first-line inspector, and Robert H. “Hank” Bellamy, the investigation supervisor.

Tattoo Trucking employee, Shane Bishop, was driving a Mack 800, three axle, ten wheel coal haul truck between the Hubble No. 2 deep mine and the Clintwood Elkhorn prep plant on October 6, 2010, when the brakes failed. Bishop tried, but was unable to stop the run-away truck. It rolled approximately 100 - 150 feet down the steep haul road section it was on, jumped up the berm at the bottom of the haul road, shearing off a utility pole near the berm in the process, and rolled onto its passenger side, where it came to rest with its front axle and wheels hanging over a high wall drop-off. Bishop was not injured.

Clintwood Elkhorn notified James Holbrook of MSHA’s local office of the incident. Holbrook issued a verbal 103(j) order over the phone to secure the site for investigation and evidence purposes and to ensure the safety of anyone working at the site. Holbrook then went to the site and started his investigation into what happened. He modified the verbal 103 (j) order to a 103(k) order when he arrived on the scene.

Starting that day, Clintwood Elkhorn and MSHA officials began the process of negotiating an “action plan” to address what MSHA concluded had caused the incident and to prevent a recurrence. Over the span of the next several days, Clintwood Elkhorn presented at least two proposed action plans that entailed the posting of signs cautioning drivers of the steep

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<sup>2</sup>It is obvious that the driver here lost control of his truck. 30 C.F.R. § 77.1607(b) establishes a standard that makes it a violation if the operator of moveable equipment loses control of the equipment. Mine operators are strictly liable for violations such as this. The way in which MSHA prepared this case for immediate adjudication under the Commission’s expedited hearing rule resulted in the vacation of all citations and orders relating to this incident, as is explained below. The facts and law may support further action under Sec. 105 if properly framed.

grade, providing gravel to build a run-away ramp on that section of the haul road, and the implementation of a “no shift” policy, meaning that drivers would be prohibited from shifting gears once they had started coming down the section of the haul road where the incident happened.

Clintwood Elkhorn and MSHA officials agreed on these items. They were unable to agree on an additional item that MSHA wanted in the action plan. MSHA wanted Clintwood Elkhorn to obtain the gross vehicle weight rating (GVWR) for every truck that hauled coal to the prep plant and to either put the GVWR on the weigh ticket for each load or otherwise make it available to the drivers at the prep plant scale house.<sup>3</sup> Clintwood Elkhorn balked at this requirement. MSHA insisted on having the GVWR data. An impasse ensued, which led MSHA to issue additional orders under the Mine Act, including a 104(b) citation which shut down the prep plant. Clintwood Elkhorn immediately asked for an expedited hearing to resolve the impasse.

#### Summary of Decision

The central points of contention between the parties were: (1) whether MSHA had authority to require Clintwood Elkhorn to gather and use GVWR data to address overloading of coal haul trucks; and (2) whether the Secretary proved by a preponderance of the evidence that overloading had occurred. For the reasons stated below, I find and conclude that MSHA did not have authority to regulate truck load limits in this manner and that attempting to do so in the manner reflected here was arbitrary and capricious. I further find that the Secretary failed to present evidence to prove that the alleged overloading underlying all citations and orders occurred. As a result, all orders and citations issued in this case are vacated as written.

#### Findings of Fact

1. On October 6, 2010, Shane Bishop, an employee of Tattoo Trucking, was driving a Mack 800 coal haul truck from the Hubble No. 2 deep mine to the Clintwood Elkhorn prep plant in Pike County, KY, when the brakes failed causing the truck to run away and roll over.
2. Bishop had hauled several loads of coal from the Hubble mine to the prep plant earlier that day using the same truck.
3. Just before Bishop lost control of the truck, he was coming down the haul road leading to the prep plant and had to stop to allow other equipment using the same road to clear the area. He applied his brakes and left the engine running as he waited at the side of the haul road.

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<sup>3</sup>This case is the first instance known to Holbrook or Bellamy where MSHA attempted to regulate load limits by requiring reference to and use of GVWR data. (Tr. 166:14-167:12)

4. When the other equipment cleared, Bishop continued down the haul road toward the prep plant dumping area. He tried to apply his brakes again, but they failed.
5. The truck engine was running, and the truck was in gear. As the truck accelerated, the engine revved until it stopped completely.
6. As long as the engine was running, the engine compression held the truck back somewhat, but as soon as the engine stopped, there was nothing Bishop could do or use to hold the truck speed under control. He tried to restart the engine at least once. He could not get the engine to restart.
7. Bishop testified that the transmission came out of gear at about the time the engine stopped. He tried to re-engage the transmission to no avail.
8. Bishop tried, but was unable to stop the run-away truck. It rolled approximately 100 - 150 feet down the steep haul road section it was on, jumped up the berm at the bottom of the haul road, shearing off a utility pole near the berm in the process, and rolled onto its passenger side, where it came to rest with its front axle and wheels hanging over a high wall drop-off.
9. Bishop was not injured. He was taken to a hospital emergency room as a precautionary measure where he was checked for injuries by a doctor and released without any treatment.
10. Bishop was able, wanted, and asked to return to work the same day.
11. The roll-over incident was caused by brake failure.
12. Clintwood Elkhorn is the operator of the prep plant where the roll-over occurred.
13. The prep plant comprises, among other features not relevant to this decision, a truck scale station, several coal truck dump locations, and appurtenant haul truck and end loader maneuvering areas.
14. Tattoo Trucking, Inc. is Bishop's employer. It is contracted with Hubble Mining Company, LLC., to haul coal from the Hubble No. 2 deep mine to the Clintwood Elkhorn prep plant.
15. Hubble Mining Company is contracted with Clintwood Elkhorn to mine the coal from the Hubble No. 2 deep mine.
16. James Holbrook is an employee of MSHA. He was the first-line inspector in this case.

17. Robert H. "Hank" Bellamy is an employee of MSHA. He was the investigation supervisor in this case.
18. Homer Sullivan, Mine Superintendent at Clintwood Elkhorn, informed James Holbrook about the truck runaway incident shortly after it happened on October 6, 2010. Sullivan told Holbrook that a truck had run away, run through a berm, and tipped onto its side at the Clintwood Elkhorn prep plant. Holbrook issued a verbal 103(j) order over the phone, which was later reduced to writing. (Exhibit 1)
19. Holbrook went immediately to the prep plant site where he spoke with Sullivan. At that time, Holbrook explained to Sullivan that he was converting the 103(j) citation to a 103(k) citation and why he was doing so.
20. Holbrook characterized this incident as a "non-injury" incident in the 103(k) citation. (Exhibit 1)
21. Holbrook investigated the scene and took photos of what he found. (Exhibits 2, 3, 4, 5, and 6)
22. Keith McCoy, is the director of the Clintwood Elkhorn safety department.
23. Between October 6, 2010, and October 15, 2010, Holbrook and Bellamy of the Mine Safety and Health Administration (MSHA), who work out of MSHA's District 6 office in Pikesville, KY, conferred with each other and with Sullivan and McCoy of Clintwood Elkhorn to create an "action plan" to address what MSHA concluded had caused the incident and to prevent a recurrence.
24. Between October 6 and October 15, 2010, Clintwood Elkhorn presented at least two proposed action plans (Exhibits 13 and 14) which proposed, in pertinent part, the posting of signs cautioning drivers of the steep grade, providing gravel to build a run-away ramp on the relevant section of the haul road, and the implementation of a "no shift" policy, meaning that drivers would be prohibited from shifting gears once they had started coming down the section of the haul road where the incident happened. Clintwood Elkhorn and MSHA officials - Holbrook and/or Bellamy - agreed on these items.<sup>4</sup>
25. MSHA and Clintwood Elkhorn were unable to agree on an additional item that MSHA wanted in the action plan. MSHA concluded that the truck in question had been overloaded and focused on overloading as they dealt with Clintwood Elkhorn on the action plan to resolve the citations and orders issued in response to the roll-over incident.

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<sup>4</sup> When the acronym MSHA is used, it refers to either Holbrook or Bellamy, or both.

26. MSHA wanted Clintwood Elkhorn to obtain the gross vehicle weight rating (GVWR) for every truck that hauled coal to the prep plant and to either put the GVWR on the weigh ticket for each load or otherwise make it available to the drivers at the prep plant scale house.
27. Clintwood Elkhorn balked at the GVWR requirement. MSHA insisted on having the GVWR data. An impasse ensued, which led MSHA to issue additional orders under the Mine Act, including a 104(d), a 104(a), and a 104(b) citation, which shut the prep plant down.
28. On October 14, 2010, at 11:00 AM, Bellamy issued a 104(d)(1) citation, No. 6660595, which was served on McCoy for Clintwood Elkhorn. (Exhibit 12) It alleges a safety violation and references 30 CFR § 77.1607(b). It sets a termination date and time of October 15, 2010 at 8:AM.
29. On October 15, 2010, at 9:18 AM, Holbrook issued a 104(a) citation, No. 8247768, which was served on McCoy for Clintwood Elkhorn. (Exhibit 9) It alleged that Clintwood Elkhorn had failed to provide weigh ticket records, requested by MSHA and pertinent to this investigation. It stated that failure to provide the weigh tickets would result in a daily fine of \$7,500.00.
30. On October 15, 2010, at 9:15 AM, Holbrook issued a 104(b) order, No. 8247767, which was served on McCoy for Clintwood Elkhorn. (Exhibit 8) It alleged that Clintwood Elkhorn had ample time to prevent overloaded coal trucks from coming into the prep plant and that overloaded trucks were continuing to come into the facility. It ordered that all coal haulage to the prep plant cease immediately.
31. As MSHA and Clintwood Elkhorn disputed the inclusion of the GVWR data in the action plan, Clintwood challenged whether MSHA could site to any regulatory authority creating a right on the part of MSHA to regulate the load weight of trucks used to haul coal. MSHA did not cite any such authority.
32. At trial, the court asked MSHA to provide a citation to any such regulatory authority. MSHA was unable to do so.
33. Clintwood Elkhorn proposed that the issue of alleged overloading be dealt with in the action plan (Exhibit 13) by making reference to Kentucky state statutes that regulate truck loads on public roads, although the haul road where this incident occurred is not a Kentucky state public road. MSHA would not agree to this proposal.
34. Anticipating that MSHA would not relent on its requirement that the action plan include reference to GVWR data as a means to regulate the load weights, Clintwood Elkhorn verbally communicated to Bellamy, in reference to its action plan of October 13, 2010,

(Exhibit 14), that MSHA issue a “technical violation” that it could use as a basis to request an expedited hearing. (Exhibit 10)

35. Holbrook concluded that overloading was a contributing factor in this incident.
36. Holbrook interviewed Bishop and learned that the brakes had failed.
37. Bellamy’s notes (Exhibit 10) are silent about brake failure being a factor in this incident.
38. Bellamy did not mention brake failure during his testimony at trial.
39. Both Bellamy and Holbrook concluded that MSHA did not have specific authority to regulate coal haul truck load limits.
40. Clintwood Elkhorn did not have the GVWR data MSHA required and would have to go to a third party to obtain it.
41. GVWR is too generic and nebulous to serve as a point of reference because the GVWR is based on model specifications rather than the individual configuration of individual and unique trucks.
42. GVWR data cannot be relied upon or even calculated when after-market alterations, as insignificant as changing tires, are made to trucks.

#### Discussion and Conclusions of Law

The issue of whether overloading of trucks occurred and contributed to this roll-over incident is central to this case. Holbrook and Bellamy insisted that Clintwood Elkhorn obtain and use GVWR data as a means to regulate perceived truck overloading.<sup>5</sup> Clintwood Elkhorn resisted being required to obtain and use GVWR data and asked the MSHA representatives to

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<sup>5</sup> The impasse over whether MSHA could require Clintwood Elkhorn to gather and use GVWR data in order to regulate load limits arose from consultations aimed at reaching consensus about what would be necessary to lift the 104(b) closure order. This consultation process is referred to by the parties and in this decision as an “action plan.” Elsewhere in the Mine Act, in a section dealing more specifically with large scale mine safety plans such as ventilation plans, there are regulations defining the actual formal action plan process. *See* 30 C.F.R. 75.372. It appears that MSHA borrowed from and adapted the formal action plan process in addressing this roll-over incident. Much of the regulatory and decisional language relating to action plans is inapposite here, however the key principle governing MSHA’s ability to force an operator to accept elements of an action plan as to which there is no consensus informs this decision. Both in the formal action plan setting and in this informal instance, MSHA’s actions must not be found to be arbitrary or capricious, in bad faith, or an abuse of its regulatory discretion. *See Sec’y of Labor v. Twenty Mile Coal Comp.*, 30 FMSHRC 736, (Aug. 2008) and *Sec’y of Labor v. C.W. Mining Comp.*, 18 FMSHRC 1740 (Oct. 1996).

provide authority showing that MSHA is given regulatory authority to regulate truck loading in any way. Although several citations and orders were used to get this case in a posture to be resolved with an expedited hearing, the focus of this case remains on the overarching issue of whether MSHA had authority to require Clintwood Elkhorn to obtain and use GVWR data as a condition precedent to allowing operations at the prep plant to resume and whether it was proper to shut down the prep plant to force Clintwood Elkhorn to agree to obtain and use the GVWR data. I conclude that MSHA acted arbitrarily and exceeded its authority and that it was improper for it to condition reopening the prep plant on the GVWR issue.

The Secretary failed to prove that Truck 292 was overloaded.

All citations and orders used by MSHA in this case require proof of overloading in order to be sustained. In order for the Secretary to prevail, she must satisfy her burden to prove by a preponderance of the evidence that Truck 292 was in fact overloaded and that overloading was either the cause of or a contributing factor in the roll-over incident.

The Secretary failed to prove that the truck in this case was overloaded. The evidence admitted at trial shows that Truck 292 hauled eight loads earlier in the day ranging from approximately 39 tons to approximately 47.5 tons. (Exhibit 7) However, since Truck 292 spilled its load when it rolled over, there was apparently no way to assess the weight of the load in question. (Tr. 80:3-12) The Secretary did not prove that Truck 292 was overloaded when it rolled over. The court is unwilling and unable to infer from these meager facts that overloading occurred.

The Secretary failed to prove that overloading was either the cause of or a contributing factor in the roll-over.

MSHA's actions regarding the impasse over the GVWR data were predicated on its conclusion that Truck 292 was overloaded and that overloading was at least a contributing factor in the roll-over. MSHA failed to prove that Truck 292 was, in fact, overloaded. Furthermore, in light of the strong evidence that brake failure caused the roll-over, it is surprising that Bellamy was silent about brake failure, both during his testimony and in his transaction notes. (Exhibit 10) Bellamy's silence is doubly puzzling considering that his office mate and investigating colleague, Holbrook, was aware of the brake issue from his interview with Bishop. Bishop told Holbrook what happened with the brakes and engine and that Bishop himself concluded that brake failure caused the incident. (Tr. 65:11-66:3)<sup>6</sup> I credit Bishop's testimony because of his involvement in the incident and the lack of any reason to question his motive. In the face of these facts, it appears that the two MSHA investigators did not communicate very well as to what caused the roll-over. Furthermore, a look at the action plans (Exhibits 13 and 14) shows that the brake

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<sup>6</sup>Holbrook speculated at trial that overloading could be a factor in brake failure, but his speculation is far too tenuous to support a conclusion that overloading existed and played a causal role in this incident. (Tr. 65:20-66:3)

failure issue was never mentioned. Overloading was clearly the focus of the action plans to the exclusion of much more compelling evidence of the alternate cause. The citations and orders used by MSHA to carry out its purpose are all predicated on a conclusion that overloading was the cause of the incident, despite strong and convincing evidence that brake failure caused it.

Applying these findings to the sequence of citations and orders in this case results in the conclusion that the 104(a), 104(b) and 104(d) citations must fail as written. They are all premised on the conclusion that Truck 292 was overloaded.

#### The 104(d)(1) Citation

MSHA issued a 104(d)(1) citation. (Exhibit 12) A 104(d)(1) citation is used to charge an operator with “unwarrantable failure” to remedy an alleged violation of any mandatory health or safety standard. The 104(d)(1) citation requires the following: (1) a finding of a violation of any health or safety standard; (2) which does not cause an imminent danger; and (3) a finding that the violation is of such a nature as to significantly and substantially (S&S) contribute to the cause and effect of a mine safety or health hazard; and (4) that the 104(d)(1) violation is caused by an unwarrantable failure to comply with the underlying health and safety standard. 29 U.S.C. § 814.

In this case, the 104(d)(1) citation was used as if it were in the context of an “inspection” rather than an “investigation.” The distinction is important. The legislative history of Sec. 103(a) and Sec. 103(h) is instructive. It explains that an “investigation” is an inquiry into causes, whereas an “inspection” is defined as “a close or strict examination or survey to determine compliance.” Sen.Rep. No. 95-461, 95th Cong., 1st Sess. 48 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong.2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 615. (Leg. Hist., 1977 Act). There is no question that this case involves an “investigation” rather than an “inspection.” The legislative history uses Sec. 104(d)(2) as an example to illustrate the intended use of a Sec. 104 citation, but the same rationale applies to a Sec. 104(d)(1) citation as well. *Id.* “Section 104(d)(1), however, is confined to violations found ‘upon any inspection.’” *Mining Company v. Sec’y of Labor*, 9 FMSHRC 1541, 1564 (Sept. 1987), *quoting* Leg. Hist., 1977 Act. This provision read together with Sec. 104(d)(2) provides for immediate withdrawal authority without regard to abatement efforts for violations deemed to result from the operator’s unwarrantable failure to comply. *Id.* This is a significant extension of regulatory authority and by using the term ‘inspection’ alone, Congress reserved and confined this authority to current existing violations which, because of their gravity or the operator’s underlying failure to correct them require prophylactic mine closure. *Id.* Congress did not intend this authority to be used as a post hoc sanction for violations no longer extant or previously abated but later “found” during after-the-fact “investigations” as to their causes.” *Id.*

The same distinction must be recognized in the context of this 104(d)(1) citation. First, the language of 104(d)(1) clearly restricts its application only to an “inspection.”<sup>7</sup> 29 U.S.C. § 814. Second, since this is an investigation or an “inquiry into causes” rather than “a close or strict examination or survey to determine compliance,” the extended regulatory authority reserved to inspections does not pertain, and the use of the 104(d)(1) citation in this setting is inappropriate. *Id.* This is not a situation involving current existing violations which, because of their gravity or the operator’s underlying failure to correct them, require a prophylactic closure. This is an investigation into the cause of a roll-over incident. The use of the 104(d)(1) citation here is a good example of an inappropriate “post hoc sanction for violations no longer extant or previously abated but later ‘found’ during after-the-fact ‘investigations’ as to their causes,” so prominently cited in the legislative history above. *Id.* Bellamy issued the 104(d)(1) order because he could not come to terms with McCoy of Clintwood Elkhorn on including GVWR data in the action plan, not because Clintwood Elkhorn had failed to abate a “current existing violation.” *Id.*

Irrespective of whether the 104(d)(1) citation was the proper procedure to bring the disagreement in this case to a head, the underlying alleged violation is overloading of trucks.<sup>8</sup> It is clear that in the broader context of the 104(d)(1) citation it is the overloading issue that is alleged to cause and effect a mine safety hazard. The roll-over itself was a resulting incident which, absent reference to the overloading issue, has no prospect of being a future or continuing condition warranting a 104(d)(1) citation. The only way to make sense of a 104(d)(1) citation under these facts is to conclude that the alleged overloading is the condition which contributes to the cause and effect of a mine safety or health hazard, i.e., the hazard effected by the alleged overloading is the potential for a roll-over incident such as this one. It is equally clear that the reason MSHA issued the 104(d)(1) citation - as well as the 104(a) and 104(b) citations - is because Clintwood Elkhorn challenged MSHA’s authority to regulate load limits by requiring reference to the GVWR data.

The 104(d)(1) citation must be vacated for three reasons: (1) the Secretary failed to prove that overloading existed, as a matter of fact; (2) the 104(d)(1) citation is predicated on the unproved allegation that overloading existed; and (3) the 104(d)(1) citation is an inappropriate post hoc sanction for violations no longer extant.

### The 103(j) and (k) Orders

There was no “accident” for purposes of the 103(j) and 103(k) orders. In the Mine Act, it is clear that in order for either Section 103(j) or 103(k) to apply, an “accident” must have

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<sup>7</sup> “(d)(1) If, upon any *inspection* of a coal or other mine [ . . . ]. [Emphasis added.]”

<sup>8</sup>MSHA refers to the loss of control described in 30 C.F.R. § 77.1607(b) in the 104(d)(1) citation (Exhibit 12), however it is clear that the gravamen of the investigation and subsequent actions is the alleged overloading of trucks.

occurred.<sup>9</sup> 29 U.S.C. § 813. The term “accident” has a specific technical definition under the Mine Act and its related regulations. Under 30 C.F.R. § 50.2 (h)(2) “accident” means an *injury* to an individual at a mine which has a reasonable potential to cause death. 30 C.F.R. § 50.2 (h)(2). The term “injury” has a specific technical definition under the Act as well. Under 30 C.F.R. § 50.2 (e) the definition of “injury” is satisfied only if medical treatment is administered, death or loss of consciousness occurs, or the miner is unable to perform all job duties after the event. 30 C.F.R. § 50.2 (e). Mr. Bishop was not injured. He received no medical treatment, and he remained able to perform all of his job duties on the day of the incident and beyond. (Tr. 192:10-23; 193:23-194:11; 94:12-25; 195:1-10; and 195:21-196:6) The plain meaning of these regulatory sections, applied to these facts, leads to the conclusion that there was no injury, thus no accident, thus no basis for either the 103(j) or 103(k) citations. The 103(j) and 103(k) citations must be vacated.

### The 104(a) Citation

The 104(a) citation (Exhibit 9) was issued on October 15, 2010, after MSHA and Clintwood Elkhorn had discussed the action plans relating to the October 6, 2010, roll-over incident and reached an impasse on whether Clintwood Elkhorn would have to use GVWR data to limit load weight. Clintwood had, according to the testimony and evidence in Bellamy’s notes (Exhibit 10), requested that MSHA proceed to issue whatever citations and orders it needed to bring the impasse to hearing under the Commission’s expedited hearing authority, 29 C.F.R. § 2700.52. On its face, the 104(a) citation refers to Clintwood Elkhorn’s failure to provide weigh ticket data requested by MSHA. Significantly, it is not based on any specific alleged health or safety violation, but cites only to Sec.103(a) as its authority. Sec. 103(a) establishes MSHA’s general investigation and inspection authority, but does not in itself form a basis for citations or orders in this context.<sup>10</sup> As in the case of the related 104(d)(1) citation, the gravamen of the investigation and subsequent actions is the alleged overloading of trucks. Also, as with the 104(b)(1) citation, the Secretary has failed to prove the underlying overloading existed.

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<sup>9</sup>The language of both Sec. 103(j) and 103(k) is identical regarding this point: “In the event of any *accident* occurring in any coal or other mine, [ . . . ]” [Emphasis added.]

<sup>10</sup>Assuming arguendo that MSHA should have cited to Sec. 103(h) instead of Sec. 103(a) in order to trigger an obligation to turn over documents, the arbitrary nature of MSHA’s enforcement actions nullifies the obligation. Sec. 103(a) gives the Secretary a general right of entry for investigation purposes. Sec. 103(h), however, can require that an operator turn over documents requested during an investigation: “In addition to such records as are specifically required by the Mine Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary [ . . . ] may *reasonably* require from time to time to enable [her] to perform [her] functions under this act.” 30 U.S.C. § 813 (*emphasis added*) As explained elsewhere in this decision, MSHA’s enforcement actions were arbitrary and capricious, including conditioning the reopening of the prep plant on Clintwood Elkhorn’s turning over the requested GVWR data. The document request stemming from this arbitrary enforcement action is inherently unreasonable. It deals with the same GVWR data which are the *sine qua non* for the enforcement action, and it derives from the same errors.

Accordingly, the 104(a) citation, as written, fails to cite to an alleged violation that is supported by the evidence.

### The 104(b) Order

The 104(b) order (Exhibit 8) was issued on October 15, 2010, as well. It too, was prepared and served with the understanding that MSHA would issue whatever citations and orders it needed to bring the impasse to hearing as quickly as possible. The language of Sec. 104(b) makes it clear that its authority arises only in reference to a situation that has generated a prior 104(a) citation.<sup>11</sup> It follows then that if the underlying 104(a) citation is faulty for failure of proof, the derivative 104(b) order must fail as well. On its face, the 104(b) order speaks of Clintwood Elkhorn's failure to abate the alleged overloading issue, and nothing else. The 104(b) order must be vacated because the Secretary failed to prove that overloading occurred. The 104(b) order was issued on the basis that the overloading on which the 104(a) citation was based had not been abated. Since there was no proof of overloading to support the 104(a) citation, the 104(b) order fails because there is no valid underlying citation issue that had not been abated.

### MSHA had no specific authority to regulate truck load weight limits.

The central issue in this case is whether MSHA appropriately ordered operations at the Clintwood Elkhorn prep plant to stop because Clintwood Elkhorn refused to obtain and use GVWR data to address the issue of truck overloading. I have already found that the Secretary did not prove that overloading existed or that it played a roll in this incident. It is also clear that MSHA chose to focus on the overloading issue even though brake failure was the obvious cause of the incident. Whether Clintwood Elkhorn's refusal to comply was reasonable and justified depends in large part on whether MSHA has the authority to regulate load limits in the first place. During the period between October 6, and October 15, 2010, as the parties conferred and negotiated the terms of the action plan, Clintwood Elkhorn pressed MSHA to show where the authority to regulate load limits originated. (Tr. 166:6-13) MSHA was not able to cite to any clear authority. (Tr. 85:21-86:12; 48:22-49:12; 166:6-13) At the trial on October 19, 2010, Holbrook and Bellamy testified that they were aware of no MSHA authority to regulate load limits. (Tr. 86:13-18; 158:5-23; 176:23-168:15) The evidence is clear that MSHA not only did not cite to any authority to regulate load limits, but that it acted with knowledge that it did not have authority to do so.

### MSHA abused its discretion and acted arbitrarily when it conditioned the reopening of the prep plant on the use of GVWR data to regulate truck load weight limits.

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<sup>11</sup> Sec. 104. "(b) If, upon any follow-up inspection of a coal or other mine, and authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, [ . . . ]." 30 U.S.C. § 814 (*emphasis added*).

The cascade of events that led to the expedited hearing in this case started with the roll-over incident and the issuance of a 103(j) and (k) order. I have elsewhere ruled that due to the peculiar and fortuitous fact that the driver of the Mack 800 truck was not injured at all, the 103 orders should not have been used as a means to attempt to regulate truck load limits. Here I address the manner in which the 103 orders were used in light of the law governing regulatory abuse of discretion and arbitrary and capricious actions.<sup>12</sup>

Section 103(k) of the act is to be given broad discretion. "Section 103(k) provides that it is MSHA, not the operator, who is in charge of the investigation." *Rockhouse Energy Mining Co.*, 26 FMSHRC 599, 602 (July 2004) (ALJ). The Act gives MSHA plenary power to make post-accident orders for the purpose of protection and safety of all persons. *Miller Mining Company, Inc. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983). MSHA has broad authority to issue 103(k) orders to effectuate this purpose. *Buck Mountain Coal Co.*, 15 FMSHRC 539 (Mar. 1993) (ALJ); *West Ridge Resources, Inc.*, 31 FMSHRC 287 (Feb. 2009) (ALJ). This broad grant of authority is recognized in the legislative history:

[t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and . . . to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 617 (1978).

Given the broad discretion afforded the Secretary, her issuance of a 103(k) order, or subsequent modification, is reviewable for an abuse of discretion. The Secretary must show that "the MSHA investigation team leader did not act in an arbitrary and capricious manner in deciding to issue the 103(k) order and subject modification." *Sec'y of Labor v. Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd* 1. 111 F.3d 963 (D.C. Cir. 1997). The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of a district manager were arbitrary and capricious:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for

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<sup>12</sup>The analysis of abuse of discretion and arbitrary and capricious action is not restricted only to citations and orders under Sec. 103. This analysis is broad enough to pertain to the other citations and orders issued by MSHA in this case.

its action including a “rational connection between the facts found and the choice made.” In reviewing the explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Twentymile Coal*, 30 FMSHRC at 754-755, quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Bellamy and Holbrook’s conclusion that overloading was either the cause of or a contributing factor in the roll-over incident in this case is factually unsupportable. That in itself is not a sufficient basis to conclude that their enforcement actions were arbitrary and capricious. However, the way in which MSHA dealt with the evidence of brake failure in order to promote the theory of overloading and its acknowledgment that it lacked authority to regulate load limits do support a conclusion that their actions were arbitrary and capricious.

First, the only evidence available to the MSHA investigators about potential overloading is the weight data for Truck 292 and others at the prep plant on the day of the incident, October 6, 2010, (Exhibit 7) and Holbrook’s visual observation of another truck being weighed on October 15, 2010. (Tr. 86:19-89:1)<sup>13</sup> These data are meaningless without some relevant point of reference from which one can determine whether overloading is happening. It is clear that MSHA wanted to use the GVWR data to establish this point of reference, but no evidence was presented showing that GVWR data do or even can serve this purpose. The evidence at trial indicated that the GVWR is too generic and nebulous to serve as a point of reference because the GVWR is based on model specifications rather than the actual configuration of individual and unique trucks. (Tr. 71:2-72:20) Also, MSHA could not show how GVWR data can be relied on or even calculated when after-market alterations as insignificant as changing tires are made to trucks. (Tr. 79:3-15) Without more evidence it is impossible to determine what relevance GVWR data have to the issue of unsafe overloading. Without a point of relevant reference, it is impossible to determine if Truck 292 - or any other truck - was overloaded, and it is impossible to make a meaningful judgment about whether overloading caused or played any role at all in this incident. It is difficult to reconcile MSHA’s devotion to the importance of using GVWR data as a means of assessing overloading in light of this. Without evidence that would make the use of

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<sup>13</sup>On cross examination, Holbrook testified that he only observed one truck being weighed on October 15, 2010, the day he enforced the 104(b) abatement order. He determined that the basis for the 104(a) citation, i.e., overloading, was still happening and that a 104(b) order for failure to abate was appropriate. (Tr. 89:2-91:20)

GVWR data meaningful as a point of reference, MSHA's choice to rely solely on the GVWR as it did is not rationally connected to the facts available to them.

Second, MSHA either ignored the clear and reliable evidence of brake failure or deemed it so unlikely as to not warrant mention in either the action plans (Exhibits 13 and 14), any of the citations and orders, or in Bellamy's transaction notes. (Exhibit 10)<sup>14</sup> This is clearly relevant information which requires the articulation of a satisfactory reason why it was omitted. MSHA failed entirely to consider this evidence in any way that is apparent on the record. There is no explanation why MSHA did not consider this evidence or factor it into its enforcement actions. Omission of the brake failure evidence impacts the assessment of the requirement that there be a rational connection between the facts found and the choices made. MSHA's decisions were not based on a consideration of the obvious relevant factor of brake system failure. This constitutes an unexplained and arbitrary failure to consider an important aspect of the problem.

Finally, MSHA conditioned the abatement of its orders on a single issue - the gathering and use of GVWR data to regulate load limits - knowing that there was no specific regulatory authority to regulate load limits at all. (Tr. 166:6-13)<sup>15</sup> In conjunction with the other factors discussed above, this fact tends to show that MSHA had a preconceived plan to use GVWR data as a means to regulate load limits and wanted to use this case to test its theory.<sup>16</sup> It is arbitrary to ignore facts that do not support an enforcement theory. It is arbitrary to push forward with an enforcement theory without establishing facts to support it. It is arbitrary to insist on compliance with an enforcement plan that is not supported by regulatory authority or facts.

The evidence leads to the conclusion that MSHA did not establish a "rational connection between the facts found and the choice made." MSHA's decisions and actions were not "based on a consideration of the relevant factors" in light of the evidence mentioned above. MSHA's actions and decisions were the result of a clear error of judgment. I conclude that MSHA's actions were arbitrary and capricious and an abuse of discretion. All citations and orders conditioned on use of GVWR data are invalid and must be vacated.

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<sup>14</sup>MSHA's failure to factor brake failure into their enforcement actions causes concern in light of the fact that Holbrook knew the details of the brake failure evidence from his interview with Bishop and then conducted a brake test on Truck 292 after it was put back on its wheels. He also testified that, irrespective of the load a truck is hauling, if the brakes fail in the manner described by Bishop, the truck will lose control. (Tr. 65:11-68:25)

<sup>15</sup>Clintwood Elkhorn attempted to comply with the GVWR request in a manner that could bring some clarity to the issue, i.e., by proposing to abide by the GVWR regulations created by Kentucky state statutes. (Exhibit 13) MSHA would not agree to this.

<sup>16</sup>There were two accidents on the same day where the drivers lost control of their trucks. MSHA required the other company, Frasure Creek Mining, to put the GVWR data on the weigh tickets, and Frasure Creek agreed. This lifted the 103(k) order for that case. These cases were the first time that Bellamy required the GVWR data as part of an action plan. (Tr. 166:14-167:12)

Order

All citations and orders covered by the discussion herein are vacated and set aside.

A handwritten signature in black ink, appearing to read "L. Zane Gill". The signature is stylized and cursive.

L. Zane Gill  
Administrative Law Judge

**Distribution:**

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/cd

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
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TELEPHONE: 202-434-9958 / FAX: 202-434-9949

December 27, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-1592-M
Petitioner	:	A.C. No. 15-04469-159947
	:	
v.	:	
	:	MINE: Kosmos Cement Co.
CEMEX, INC.,	:	
Respondent	:	

## DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Secretary of Labor;  
Gayle R. Harrison, Safety Manager, Cemex, Inc., 15301 Dixie Highway, Louisville, KY 40272, on behalf of Cemex, Inc.

Before: Judge Rae

This case comes before me on a Petition for Assessment of Civil Penalties filed in accordance with Section 105 (c) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §§ 801, et seq. In contest is one §104(d)(1) citation issued in violation of 30 C.F.R. §56.18002(a) of the Act by an Mine Safety and Health Administration ("MSHA) inspector. The case was heard, as proposed by the parties, via telephone on November 4, 2010.

At hearing, the parties proffered that a partial settlement had been reached regarding four additional citations numbered 7750727, 7750728, 7754413 and 7754428. A formal motion for settlement of those charging documents was submitted post hearing proposing civil penalties of \$17,400 for the violations charged therein. I have reviewed the documentation and representations submitted and find that the proposed settlement is acceptable under the criteria set forth in section 110(i) of the Act. Accordingly, an order directing payment of those penalties has been signed and will also be incorporated in this decision.

### Findings of Facts- Conclusions of Law

Cemex is a metal/nonmetal cement plant operating full time with four crews, or 155 miners in total. It is characterized as a relatively large mine with annual hours worked between 300,000 and 500,000. TR 17 and Gov. Ex 1. On March 17, 2008, Citation 7750542 was issued to Cemex, Inc. ("Cemex") for failure by the operator to conduct adequate on-shift examinations

evidenced by a number of violations issued during an inspection conducted the week of March 3, 2008. This citation was issued several days after the inspection by MSHA certified inspector Handshoe who was present during the inspection. He did not testify to having written any of the citations issued during the inspection itself.

### The Citation

Citation No. 7750542 reads as follows:

Persons designated by the operator to examine each working place for conditions affecting safety or health were not observing and reporting obvious hazards. Hazards found during the inspection which were also cited during the past 2 years included: 56.1101, cited 22 times; 56.12018, cited 10 times; 56.20003, cited 15 times. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence by not ensuring an adequate examination was conducted for obvious and apparent hazards. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 1.

The gravity of the violation was assessed as reasonably likely to result in a fatal injury and as significant and substantial.<sup>1</sup> It was also written as a Section 104(d) (1) violation, an unwarrantable failure to comply with a mandatory standard.<sup>2</sup> The operator's negligence level was assessed as high and the proposed fine is \$10,437. Gov. Ex. 2.

The citation was later amended on March 28, 2008 by removing the words "Persons designated by the operator to examine each working place for conditions affecting safety or health were not observing and reporting obvious hazards." The sentence was replaced with the words, "Persons conducting the workplace examinations were not reporting obvious hazards and the operator failed to initiate prompt corrective action."

### The Standard

30 C.F.R. §56.2008(a) provides:

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<sup>1</sup> A violation is properly designated significant and substantial, "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). The question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

<sup>2</sup> An unwarrantable failure is aggravated conduct beyond ordinary negligence characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." See *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987) at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); and *Buck Creek Coal Inc. v. MSHA*, 52 F. 3d 133, 136 (7<sup>th</sup> Cir. 1995)(approving Commission's unwarrantable failure test).

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

(c) In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

### The Evidence

Inspector Handshoe, a certified MSHA metal/nonmetal inspector, testified that during the week of March 3, 2008, he was one of several inspectors who conducted a week-long inspection of Cemex's Kosmos Cement Plant. Because he was recovering from knee surgery, he remained on the ground near the office and did not make the physical inspection of the areas requiring climbing or traveling. TR 17. The inspectors held a pre-inspection conference with mine representatives during which they reviewed the on-shift examination reports. These on-shift examination reports are for the purpose of identifying and reporting hazards so that they can be timely corrected. The reports are kept for a period of one year. Handshoe testified that the reports were being made by competent people, as far as he could recall. TR 18-22.

Following the completion of the inspection, the inspectors involved met to discuss their findings and determined that issuing the instant citation was appropriate based upon the nature of the violations issued during the inspection.<sup>3</sup> It was also determined that the citation was appropriate based upon the purported past history of 22 citations for safe access, 10 citations for electrical violations and 15 citations for housekeeping issues over some period of time.<sup>4</sup> TR 28

Handshoe testified that "some violations" were issued for hazards not reported on the on-shift examination reports. He explained the nature of the violations as some being for "spillage", "safe access," "electrical" and "housekeeping issues" that were obvious, in his opinion. TR 22. He described the location of the spillage violations in more detail as follows:

"At work platforms, on walkways, elevated walkways, tunnels, just different locations. And without my – the citations, I couldn't give you exact locations. But spills can occur

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<sup>3</sup> The Secretary did not introduce any of the citations issued during the March 3-7, 2008 inspection into evidence or the inspectors' notes.

<sup>4</sup> The Secretary did not introduce a mine history report for the time period prior to March 2008.

at any place, any time, and that needs to be addressed and found during workplace examination. (Sic.). That way, it can be reported and corrected.”

TR 23.

When questioned concerning his belief that the spillage at “some locations” was obvious and not corrected during the shift in which they occurred, he said it was based upon “the amount of spillage at some of the locations...it was obvious that some of the spillage had taken place over a period of time...maybe a couple of days, two or three days.” In support of his belief that the condition existed for more than one shift, he stated that there were footprints in some of the areas where spillage was found. He was unsure of whether the areas in question were traveled regularly but concluded that generally at “any given time, any place in the plant could be accessed at any time” for some purpose. This was sufficient in his mind to determine what exposure to miners this condition posed. TR 23-24. Other violations Handshoe described as the “main issue” were related to safe access and housekeeping located in “tunnels” or on “elevated walkways” of which there are many in a mine of this size. TR 29. In “some places” there was a danger of rocks falling off the raised platforms. TR 32. The exposure to such hazards was quantified as being that “anybody could walk anywhere at any given time... so anybody could walk anywhere during any time that day or shift, the weekend shift.” TR 31.

The type of injury Handshoe anticipated from the spillage, safe access and housekeeping violations found during the inspection would be a sprained ankle or broken wrist. He felt it was reasonably likely to occur because “it was more reasonably likely than not for them to cause an injury than not to cause an injury.” TR 34. He said he marked the gravity on the “bulk” of the citations issued, as well on this instant citation, as “fatal” based upon the fact that “usually, when I mark ‘fatal’ on something like this, the majority of the citations that were issued that could have been found with a workplace examination are more likely than not to cause a fatal injury than not.” When asked, “would that be related to some of the electrical violations that you found?” he answered, “correct.” TR 34. He assessed the negligence level of the operator for the instant citation as “high” because the hazards cited during the inspection were obvious and should have been recorded and reported in a timely manner. TR 35. The basis for his belief that management had notice of the inadequate inspections was “just the numerous obvious hazards that were detected or observed during this inspection.” TR 37. Handshoe stated the inspectors “didn’t turn over no rocks “ (sic) to find the violations for which they issued citations. TR 26-27.

On cross-examination, Handshoe could not recall whether there were three or four inspectors present and he had not reviewed his notes and did not have other inspectors’ notes to refresh his recollection. When asked to indicate where in the standard the adequacy of an inspection is mentioned, he responded that the citation was modified to state that persons conducting the examinations were not reporting obvious hazards and not initiating prompt corrective action. TR 46. Finally, he acknowledged that the standard does not determine the adequacy of the examination. TR 47. When asked if Cemex was reporting hazards in their on-shift examination reports, the following exchange took place:

Q. But they had been reporting hazards, though, right?

A. You know.. and I'm sure I made copies, and I don't have those copies in front of me, Gayle, so I can't really....

Q. But if you did not find any hazards listed... hazards listed, or if you did not find any record that even the inspection had been... had been completed, you would have reacted, though, to that, would you not?

A. I probably would have.

Q. And what would have been your reaction?

A. But I don't have anything in front of me, so I can't...

Q. Well, what would have been your reaction had you found out?

A. Had I found out what now?

Q. Had you found that they had not been completed, nothing listed; in other words, it was a blank sheet of paper.

A. Well, then, if it was a blank sheet of paper, then I would have written a citation for not completing workplace examination. (Sic)

Q. And understandably so. But you didn't find that, because we had done that, right?

A. Okay. Evidently, yes.

TR 48-49.

Jesse McCoy, a processor for Cemex who is responsible for making safety rounds in the mine, testified that he records all safety hazards that he finds when doing his on-shift examinations. TR 63.

### Discussion

The Secretary's evidence in this case fails to meet the requisite burden of proof to support this citation. There is a fatal paucity of evidence present upon which to find that any hazards existed at the time the on-shift examinations were conducted. The mere fact that conditions existed at the time of the inspection is insufficient evidence from which to infer the conditions existed at the time of the on-shift examination or that the operator knew or should have known of their existence.

Inspector Handshoe was neither the issuing inspector nor did he have the issuing inspector's notes or citations when testifying. His hearsay testimony lacked specificity as to what standards were violated, where the violations occurred. His only description was in various "tunnels," or "elevated walkways" of which there were many at this mine. He indicated there were "some" violations of a "housekeeping" nature and "some" electrical and safe access issues.

He referred very vaguely to spillage that existed at the time of the inspection that he believed existed for at least one shift because of its depth and the fact that there were footprints in it. However, there were no specific facts provided with regard to who cited it, where it was located, whether measurements were taken of the spillage, what type of material it was, what sort of work had been done in that area and when in order to determine when the material might have spilled, when management knew or should have known about it, what discrete safety hazard it posed or how many miners were exposed to it or when corrective action was initiated. There was no evidence of whether it was in an active part of the mine or how many, or how often, any miners had been in that area. The same lack of evidence exists for the remainder of the alleged conditions underlying the issuance of this citation. While it might be inferred that the spillage on an elevated walkway was the basis for housekeeping as well as safe access violations, there was no evidence presented on what electrical violations were found which Handshoe testified were the basis for a fatal injury. Furthermore, the on-shift examination reports were not submitted pertaining to the areas in question to prove that these conditions were unreported as alleged.

Because none of the underlying violations issued during the March 3, 2008 inspection were adjudicated at the hearing, and are still unsettled, there is no basis to conclude that there were standards violated or whether the operator knew or should have known of any violations prior to the inspection.<sup>5</sup>

The alleged past history of violations provides no greater support for the Secretary's theory that the discovery of obvious violations in March in any way served to put the operator on notice that they were conducting inadequate on-shift inspections in support of this section 56.18002(a) citation. The Secretary did not introduce the mine history of violations prior to March 2008. Inspector Handshoe testified that the mine had received a number of citations for housekeeping, safe access and electrical violations in the past. These categories are so broad and can relate to so many different situations that the numbers alone have no useful evidentiary value. For instance, there is no evidence that any past violations were for the same sort of spillages, or for repeatedly failing to maintain toe boards on elevated walkways. There is no evidence that any prior violations were for failure to recognize or report obvious hazards or for failure to initiate corrective action on any prior violation. Because the testimony was sparse as to the exact nature and location of the violations found during the March inspection, and no information regarding the specifics of the past violations was provided, it cannot be determined that they were of a similar nature or occurred under similar circumstances. Furthermore, the prior violations presumably were abated in a timely manner and therefore the operator would have just cause to believe their remedial steps eliminated those prior conditions. There was no evidence that any failure to report a hazard was discussed with the operator in the past to put them on notice their on-shift examinations needed greater attention. The qualifications of the examining employee were not questioned and Handshoe admitted that Cemex was conducting the inspections. Therefore, no greater notice for failure to report obvious hazards can be imposed upon Cemex based upon a past history of individual violations in this case.

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<sup>5</sup> The violations settled by the parties addressed herein were issued at an inspection conducted four months later.

It is unclear from the record whether the Secretary sought to support the assessment of an unwarrantable failure with the past history of violations. However, for the same reasons as discussed above, that assessment is unsupported by the record. In order to find an unwarranted failure there must be sufficient evidence of aggravated conduct beyond mere negligence such as reckless disregard or intentional misconduct. *Emery Mining Corp.*, *supra*. The relevant factors in determining whether a violation is unwarrantable are the extent of the violative condition, the length of time that it existed, the operator's efforts at abating the condition, whether the operator has been placed on notice that greater efforts are needed for compliance, the operator's knowledge of the existence of the violation, whether the violation is obvious and whether the violation poses a high degree of danger. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001); *San Juan Coal Co.*, 29 FMSHRC 125 (March 2007). Assuming that Cemex was failing to report obvious hazards on their examinations, and assuming the "adequacy" of the examination is contemplated by the standard, there is no evidence as to the length of time this failure existed, what actions the operator took to correct the condition, whether the operator has ever been cited for a failure to report hazards before, or whether the issue has ever been discussed with the operator in the past to put them on notice of a need to take greater care in performing the examinations. Thus, I find that even if the inadequacy of the examinations violated § 56.18002(a) in this case, the assessment of an unwarrantable failure is not substantiated.

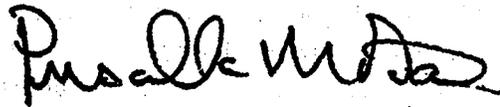
I find, however, case law and the Secretary's Program Policy Manual further undermine the Secretary's position that the inadequacy of the examination alone justifies the § 56.18002(a) citation. As Judge Manning stated in a case essentially identical to this one, "that fact that five citations were issued citing visible safety problems is too slender a reed on which to hang a violation of section 56.18002(a)." *Dumbarton Quarry Association v. SOL*, *SOL v. Dumbarton*, 21 FMSHRC 1132 (Oct. 1999). Judge Manning further referred to the Secretary's Program Policy Manual concerning §56. 18002 which states "although the presence of hazards covered by other standards may indicate a failure to comply with this standard, MSHA does not intend to cite § 56.18002 automatically when the Agency finds as imminent danger or a violation of another standard." *Program Policy Manual*, Volume IV, Subpart Q, <<http://www.msha.gov/reg/complain/ppm/pmvol4e.htm#77>>.

In another similar case involving the issuance of alleged obvious safety violations as the basis for a § 56.18002 citation, Judge Hodgdon found that the standard is violated only if examinations are not being conducted or corrective action is not being taken as neither the regulation nor the Program Manual mentions "adequacy" in the language. *SOL v. Lopke Quarries, Inc.*, 22 FMSHRC 899 (July 2000). Acknowledging "while there may be cases where the violations are so obvious and so egregious that a finding that §56.18002(a) was violated is appropriate" citations for unsafe access, electrical issues and fire extinguisher problems did not present such egregious violations. Judge Weisberger interpreted the language of the standard in the same way as Judge Hodgdon in *SOL v. TXI Port Costa Plant*, 22 FMSHRC 1301 (Nov. 2000) in a case involving a 6" deep accumulation of material with no evidence presented regarding who traveled in the area or how frequently so as to make the safe access violation an appropriate basis for issuing at § 56.18002(a) citation.

I agree with my colleagues. There may be situations in which a hazard or danger is so patently obvious and so egregious that the failure to report it is tantamount to a failure to conduct an on-shift examination. Finding such a situation could justifiably trigger a § 56.18002(a) violation for inadequate examinations as contemplated by the Program Policy Manual. In this case, however, there is no evidence from which to infer the violations, which are so vaguely described by the inspector, are of such an egregious nature.

**Order**

Based upon the foregoing, Citation No 7750542 is hereby vacated. Pursuant to the motion for partial settlement filed herein, Cemex, Inc. is directed to pay additional civil penalties of \$17,400 within 40 days of the date of this decision on Citation Nos. 7750727, 7750728, 7754413 and 7754428.<sup>6</sup>



Priscilla M. Rae  
Administrative Law Judge

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Gayle R. Harrison, Safety Manager, Cemex, Inc., 15301 Dixie Highway, Louisville, KY 40272.

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<sup>6</sup> Payment should be sent to Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
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December 29, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2009-36
Petitioner	:	A.C. No. 12-02010-162898
	:	
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	Mine: Air Quality #1 Mine
Respondent	:	

**DECISION**

Appearances: Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner  
Arthur Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Weisberger

**Statement of the Case**

This case is before me<sup>1</sup> based upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) alleging violations by Black Beauty Coal Company (“Black Beauty”), of various mandatory standards set forth in Title 30 of the Code of Federal Regulations. The parties reached a settlement regarding five citations at issue, and a hearing was held in St. Louis, Missouri, on two orders issued under Section 104(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”).<sup>2</sup>

Subsequent to the hearing, Respondent filed proposed filings of fact and a brief. The Secretary filed a brief. Respondent filed a reply brief. To date, the Secretary has not filed either objections or a reply brief.

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<sup>1</sup> This case was originally assigned to Judge Paez and was reassigned to me.

<sup>2</sup> The parties stipulated that the citations underlying these orders are “paid and final violation[s].” (Joint Stipulations, Pars. 9-12).

I. Citation numbers 6672417, 6672495, 6678086, 6678088, and 6681014

The Secretary filed a motion, and an amended motion, to approve settlement of these citations. The original assessment for these citations was \$79,886.00 and the parties reached a settlement in the amount of \$14,153.00. I have considered the representations and documentation submitted. Most significant are the Secretary's representations that "upon review" the levels of negligence, and gravity were reduced respectively in two citations, and one citation was changed to "non S&S". Also significant is the Secretary's representation that "upon information learned in preparation of this case for hearing, and a further review by the Agency, the Agency hereby vacates [two] citations (sic)."

I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Therefore, the motion for approval of settlement is **GRANTED**.

II. Order No. 6671205 (violation of 30 CFR §77.1103(d)<sup>3</sup>)

A. The Secretary's testimony

On October 15, 2007, Johnny L. Moore, an MSHA inspector, inspected Black Beauty's containment area. The containment area was made out of concrete slabs, approximately nine inches high, and covered an area of approximately fifteen by twenty-five feet. Moore indicated that the purpose of the area was to catch spills from three cylindrical storage tanks. Two tanks, five feet long and three and one-half feet in diameter, had a capacity of 400 gallons and contained waste oil. A third tank, five feet in diameter and ten feet long, contained diesel fuel. It had a capacity of one thousand gallons. All the tanks were in a horizontal position.

Moore indicated that he observed cellophane, plastic items, gloves, and other trash hanging over the edge of the containment area. He indicated that the containment area was a "slurry of mixed oil and fuel" (Tr. 23), and that he could see dried oil caked on the tanks. He also observed trash through some grating that was on top of the containment area. In addition, after the liquid in the containment had been pumped out to abate the violation, Moore observed jugs, cardboard, paper, cracked leather, cans of soda, plastic soda bottles, lids to five gallon plastic buckets, and pieces of six by six wooden crib ties that were eight to eleven inches long. According to Moore, these items "had become saturated and fully sunk." (Tr. 29). Moore indicated that a hazard was created because combustible material was near flammable storage tanks. He found the violative condition not to be significant and substantial because the gravity was "unlikely" in that there were not any ignition sources present. He indicated that if an accident should occur there would be resultant burns, smoke or inhalation injuries to one person

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<sup>3</sup> Section 77.1103(d) provides as follows: "areas surrounding flammable liquid storage tanks and electrical substations and transformers shall be kept free from grass (dry), weeds, underbrush, and other combustible materials such as trash, rubbish, leaves and paper for at least 25 feet in all directions."

who would probably be able to get away from the area. Moore issued an order under Section 104 (d) of the Act alleging a violation of 30 CFR §77.1103(d).

According to Moore, the violation was the result of the operator's unwarrantable failure because the trash was very obvious, and extensive. He indicated that the cited area was in a "high traffic area" as persons traveled by it to go to and from a training center, an underground portal, and a storage warehouse. Also, he indicated that Jim Streepy, Respondent's plant manager, observed the condition with him along with another MSHA employee, Quintin Hastings, and they both said that it was a "shame and uncalled for . . . [it] to be in this condition." (Tr. 32).

The inspector opined that, based on the way the condition looked, it had been in existence for "at least a couple of weeks to three weeks." (Tr. 35-36). Moore testified that he was told that it took thirty-four man-hours to abate the violative condition. Moore indicated that the items he cited were extensive.

Moore testified that, after he cited the operator, he met with Guy Campbell, the underground mine manager, and asked him who was responsible for the cited area. According to Moore, Campbell told him that the containment was Alan Pancake's responsibility, but he was on vacation. Moore said that Streepy said he (Streepy) was not responsible for the containment area; Streepy was not sure who was. According to Moore, after talking to Streepy and Campbell for approximately two hours, the latter told him that "[he would], take responsibility for it . . . we are going to turn it over to the surface, but Alan hasn't made it back off vacation to do that yet (sic)." (Tr. 34-35).

B. Respondent's testimony

John A. Burke, a yardman who loaded and unloaded trucks at the site in issue in October 2007, testified that he works around the containment area, and therefore he saw it daily. He indicated that it was common for the containment area to contain liquid from rain and/or spillage. According to Burke, the company gets rid of the liquid by pumping it out. In addition, it hired Kentucky Petroleum to remove the liquid from the containment area "as needed", (Tr. 71). Burke indicated that after liquid is pumped out of the area "we would have to shovel the extraneous material into barrels." (Tr. 73). He indicated that he would do it immediately after the pumping "if I was told to do it." (Tr. 74). According to Burke, Kentucky Petroleum had removed oil and water from the area on October 11, 2007.

Jim Streepy, was the plant manager at Respondent's Wheatland site<sup>4</sup> in October 2007. He was with the inspector on October 15. He indicated that there was liquid in the containment area which was mostly water but there was "some oil on top of it." (Tr. 90).

Alan Pancake was the plant supervisor of the preparation plant at issue. He testified that he was on vacation on October 15, but came to the mine after he was called by Hastings who

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<sup>4</sup> This site is approximately seven miles from the cited area.

informed him that an inspector was at the site. Pancake indicated that his area of responsibilities did not include the containment area.

C. Discussion

1. Violation of section 77.1103(d), supra

Section 77.1103(d), *supra*, requires, in pertinent part, as follows: "areas surrounding flammable liquid storage tanks and electric substations and transformers shall be kept free from grass (dry), weeds, underbrush, and other combustible materials such as trash, rubbish, leaves and paper for at least 25ft in all directions." 30 CFR §77.1103(d).

It is Respondent's position that it did not violate section 77.1103(d), *supra*, arguing that: (1) the containment was part of the storage tank itself and not covered under section 77.1103(d) *supra*, and (2) that the cited material was not combustible.

a. The containment as subject to section 77.1103(d), supra

Respondent maintains that the cited containment area is part of the storage area itself and thus is not subject to section 77.1103(d), *supra*. Respondent argues as follows:

The containment itself acts as a type of storage facility for waste oil and kerosene. It is designed to catch waste oil spillage and retain the liquid until it can be pumped and properly disposed of. It is not the area surrounding the flammable liquid storage tanks, but is part of the storage tank facility itself. The containment is therefore a flammable storage unit and not subject to the above standard.

(Respondent's Post Hearing Br. 3) (citations omitted).

I have considered this argument, but find that it is not persuasive, as it is contrary to the plain meaning of section 77.1103(d), *supra*. The mandatory requirements of this section apply to "areas surrounding flammable liquid storage tanks".<sup>5</sup> Thus, storage tanks themselves are not within the scope of section 77.1103(d), *supra*, but the surrounding areas are. Since the cited containment is adjacent to three storage tanks, (Exs. R-1 (a)(c)(e)(f), and (g)), it clearly falls within the purview of section 77.1103(d), *supra*.

b. The cited materials as being combustible

The Respondent further argues that it has not been established by the Secretary that the material cited was combustible, and hence there was not any violation. In support of its argument, Respondent cites *Marty Corp.*, 7 FMSHRC 50 (January 1985) (ALJ). In *Marty*, *supra*, the judge found that because the cited bales of straw were thoroughly soaked, they may

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<sup>5</sup> A "storage tank" is a "circular steel tank." *Dictionary of Mining Minerals and Related Terms* ("DMMRT").

not have been combustible and therefore there was not any violation of section 77.1103(d), *supra*. I note, initially, that *Marty, supra* was decided by a fellow commission judge and hence I am not bound by it. Also, the case at bar is factually distinguished from *Marty, supra*; in *Marty*, the bales of hay were soaked in water, not oil, and therefore the bales may not have been combustible. In contrast, in the case at bar, I note that Respondent did not either impeach or contradict the testimony of Moore, that the plastic and leather items that he cited were in a “slurry of mixed oil and fuel” (Tr. 23)<sup>6</sup> (emphasis added).

Further, it is significant to note that Moore testified that the lids that he cited were combustible as “[t]he plastic will burn.” (Tr. 39). Respondent did not impeach or contradict this testimony.

Moreover, “trash” is one of the specifically enumerated “combustible materials” set forth in section 77.1103(d), *supra*. In this context, I note the existence of plastic lids, cans, and leather items observed in the containment area, as well as the following items observed after it had been pumped out: pieces of a wooden crib ties, cardboard, rubber, and Saran wrap. These items were clearly “trash,” as that term is commonly understood, i.e., junk, rubbish. See *Webster’s Third New International Dictionary* (1993 Edition).

For all the above reasons, I conclude that it has been established that Respondent violated section 77.1103(d,) *supra*.

## 2. Unwarrantable Failure.

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

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. See *I.O. Coal* 31 FMSHRC 1346 (Dec. 2009) *Consolidation Coal Co.*, 22 FMSHRC 340, 252 (Mar. 2000) (“*Consol*”); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on*

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<sup>6</sup>Indeed even Respondent’s witness, Streepy, who indicated that the area “was mostly water,” testified further as follows: “There was some oil on top of it.” (Tr. 90).

*other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988).

a. Aggravating factors

The Secretary argues, in essence, that no one was assigned the responsibility of ensuring the containment area was kept clean. The Secretary concludes that this fact should be considered an aggravating factor for the purpose of determining unwarrantable failure. I note that the Secretary's argument finds support in the testimony of Moore that neither Streepy, Pancake, nor Campbell was responsible for the containment area. This testimony was not impeached or contradicted, nor did Respondent adduce any evidence to establish who was responsible for the cited area. As such, the lack of responsibility for the containment was an aggravating factor.

b. Extent

According to Moore, the containment area was approximately fifteen feet by twenty feet. He said that when he looked through the cracks in the grating that was on it, he saw trash "wherever you looked hard enough." (Tr. 25). After the area was pumped, he observed more trash. These observations were not impeached or contradicted.

He further testified that it took thirty-four man-hours to abate the violative condition. This testimony was not impeached or rebutted.

Based on all the above, I conclude the violation was extensive.

c. The length of time that the violative condition existed

I note the Secretary's argument that the cited conditions had existed for a significant period of time "as evidenced by the trash discovered at the bottom of the containment area, saturated with oil." (Secretary's Post Trial Br. at 12). In this connection Moore testified that after the cited area had been pumped, he observed various items that "had become saturated and fully sunk (sic)." (Tr. 29). The inspector opined that "based on the way it looked" (Tr. 36), the conditions had existed for two to three weeks. The inspector did not set forth in detail the basis for his opinion. There was not any evidence adduced as to the length of time for the cited materials to have become "saturated." Also, there was not any evidence adduced, aside from his opinion, regarding the length of time for these items to have "fully sunk" in a "slurry" of oil and water. (Tr.23).

I therefore find that it has not been established that the violation had existed for a significant period of time.<sup>7</sup>

d. Whether the operator was on notice that greater efforts were necessary for compliance

There is not any evidence that MSHA had any discussions with the operator, prior to the issuance of the citation at issue concerning a problem with combustible materials in the containment area, or in other areas covered by section 77.1103(d), *supra*, i.e., those surrounding flammable liquid storage tanks, electric substations, and transformers. Nor is there any evidence that the operator had actual knowledge of the violative conditions. Therefore, I conclude that it has not been established that the operator was on notice that greater efforts were necessary for compliance.

e. Whether the violation posed a high degree of danger

The inspector indicated that a hazard was created because of the presence of combustible material near flammable storage tanks. The inspector therefore indicated that the violation of §77.1103(d) created some degree of danger. However, as set forth in *IO Coal Co., supra*, “the Commission has relied on the high degree of danger posed by a violation to support an unwarrantable finding.” See *BethEnergy Mines, Inc.*, 14 FMSHRC at 1243-1244 (emphasis added). In this context, I note that it is significant that the inspector found the violative conditions not to be significant and substantial due to the absence of an ignition source. I thus find that there was not a high degree of danger.

f. The operator’s efforts in abating the violative condition

The Commission, discussing this factor in *IO Coal, supra*, indicated that “[t]he focus on the operator’s abatement efforts is on those efforts made prior to the citation or order. *Id.* (emphasis added). In this connection, the inspector indicated that when he arrived on the site he did not observe any workers cleaning up the combustible materials before he orally advised Black Beauty that he was going to issue a citation. On the other hand, Burke indicated that usually, if he observes bad conditions in the containment area, he will tell management to call Kentucky Petroleum, who is regularly called by the company to remove oil and water. Indeed, Kentucky Petroleum removed “oily water” from the area four days prior to its being cited. (Ex. R-2). It would appear that the company made some efforts to abate the violative conditions prior to the issuance of the order.

g. Obviousness of the cited conditions

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<sup>7</sup> Indeed, based on Moore’s observation of trash being blown from a nearby dumpster towards the cited area, it might be inferred that some of the trash in the containment area might have been of recent origin.

According to the inspector, when he approached the area, he observed cellophane hanging over the edge, lids sticking out of the sludge, as well as gloves and other trash. He saw trash through the cracks in the grating on the containment area. This testimony was not impeached or contradicted. Therefore, I find that these materials were obvious. However, according to Moore, some of the materials he cited consisted also of trash revealed after the area was pumped. I find that this trash was not obvious.

#### h. Conclusion

Weighing all the above, and placing significant weight on the lack of notice of the necessity for greater compliance, the lack of proof of the length of time the conditions had existed, the lack of a high degree of danger posed by the violative condition, and the lack of obviousness of some of the materials, I find that the existence of the cited conditions were not as a result of the operators' aggravated conduct, and thus did not constitute an unwarrantable failure. *See, Emery, supra.*

#### 3. Penalty

In determining the amount of the penalty to be assessed, I must consider the following factors: the operator's history of previous violations, the size of the operator's business, any negligence on the part of the operator, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in abating the violative condition. Section 110(i) of the Act.

I find that the operator acted in good faith in abating the violative condition. Neither party adduced any evidence that justifies either an increase or decrease in penalty based on the operator's size or history of violations. The parties stipulated that the proposed penalty will not affect Black Beauty's ability to continue in business. For the reasons set forth above (II)(C)(2), *infra*, I find that the operator's negligence was moderate, but that it did not reach the level of aggravated conduct. I find the evidence establishes the presence of combustible material, i.e., plastic and leather items near flammable storage tanks. Should these items have ignited, it is possible a fire could have resulted which could have led to injuries. I find that the level of gravity to have been moderate.

Based on all the above, I find that a penalty of \$500 is appropriate for the violation of section 77.1103(d), *supra*.

#### III. Order No. 6672696 (violation of 30 CFR §75.400.<sup>8</sup>)

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<sup>8</sup> Section 75.400 provides as follows: "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

A. The Secretary's testimony

On May 1, 2008, Sylvester Di Lorenzo, an MSHA inspector, inspected the No. 2 underground unit, along with Tom Burnett, mine manager for Black Beauty. According to Di Lorenzo, he observed combustible material on four different parts of the No. 18 roof bolter. He indicated that oil and oil soaked coal to an estimated depth of one-half to three inches, covered the entire area of the following locations: the surface of the right boom, (approximately two feet by fourteen inches); the hydraulic pump motor compartment, (approximately three feet by three feet); the floor of the operator's compartment, (approximately three feet by three feet); and the center section area, (two feet by three feet). Di Lorenzo indicated that the material could ignite if an ignition source was present. He found that the gravity was unlikely; if an accident would occur it would result, at a minimum, in lost workdays due to smoke inhalation, carbon monoxide inhalation or burns, and would affect a minimum of one person. Based on all the above, Di Lorenzo issued an order under Section 104(d)(2) of the Act alleging a violation of 30 CFR § 75.400.

Di Lorenzo opined that the violative conditions resulted from the operator's unwarrantable failure. (Tr. 127-128). He indicated that the "extensive" accumulations were "... obvious to the most casual observer ... you could just walk by it and see them." Di Lorenzo opined that the accumulations had existed for at least four to six shifts. He concluded that the section foreman should have been aware of the violative conditions. Di Lorenzo noted that when he first arrived on the section, he did not observe any work being performed to remove the accumulations.

Further, Di Lorenzo indicated that he had put the operator on notice of the need for further efforts regarding accumulations. He testified that on March 31, 2008, he had met with the general mine manager, Burt Hall, and told him that the mine "was put on notice for 75.400 accumulations of combustible materials on equipment, belt lines, and inby the loading points." (Tr. 131). According to Di Lorenzo, he also told Hall that it had received 319 of such citations in the last two years, and 46 citations in the quarter ending March 31, 2008. Di Lorenzo stated that he told Hall that improvement would have to be seen, or the level of negligence would be increased on the citations.

According to Di Lorenzo, on April 1, 2008, he met with Ron Madlem, the safety director and told him that what he had told Hall the previous day. On April 8, 2008, Di Lorenzo told Rick Carey, the mine manager, the same thing that he had told the other managers previously. On April 15, 2008, he spoke with Madlem again and Dave Winger and told them of the severity of the section 75.400 conditions, and that negligence will be "ratcheted up" if there is not any improvement. (Tr. 137).

On April 16, 2008, Di Lorenzo met with Bill Schaefer, a mine manager, and told him that they had to start improving and that "we weren't seeing any signs of improvement... on the accumulation issues inby the loading points and on equipment." (Tr. 138).

According to Di Lorenzo, on April 22, 2008, he spoke with Terry Courtney, Mine

Manager, and told him that MSHA has not seen improvement and that the operator has to start to take action regarding cleanup “on all three areas.” (Tr. 139). On April 25, 2008, Di Lorenzo spoke with Gary Campbell, a superintendent, regarding the problems with section 75.400, and told him that MSHA was not seeing improvement regarding equipment, belt lines, “and inby the loading point.” (Tr. 140).

B. The Respondent’s testimony

Randall Lee Hammond was the section foreman of the section at issue when it was cited, but he was not at work that day. Instead, an hourly employee had filled in for him as foreman.

Hammond indicated that he (Hammond) was responsible for each of the three shifts. He indicated that each shift (A, B, and C) was responsible for cleaning different equipment once a week. The C shift (midnight shift) was responsible for cleaning the bolters. He indicated that the floor of the bolter cab was “supposed” to be monitored on a daily basis and was washed “as needed.” (Tr. 171).

The Section Foreman’s Report for the C shift, dated April 24, 2008, indicates as follows: “washed. 18rb.” According to Hammond, the notation “18 rb” refers to the bolter at issue.

According to Hammond, Black Beauty reviewed its data base of citations and orders it had received for the period of January 1, 2008 through April 30, 2008. He indicated that in January equipment was cited eight times, and in February nine times. However, in March and April, Black Beauty received only two and three citations/orders, respectively, for section 75.400 violations on equipment.

C. Discussion

1. Violation of section 75.400, supra

Section 75.400, *supra*, provides in pertinent part, as follows: “coal dust, including float coal dust ... and other combustible materials, shall be cleaned up and not permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.”

It is Respondent’s position, in essence, that operators are provided a reasonable time to clean up spillage which is a result of normal mining, and not considered an accumulation.<sup>9</sup>

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<sup>9</sup> The clear language of Section 75.400, *supra*, does not allow for any reasonable time to clean up “spillage.” In *Utah Power and Light*, 951 F.2d 292 (10th Cir. 1991) the court rejected such an argument as follows: “While everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed.” (*Id* at 295, Fn 11); *see also Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979) (recognizing that some spillage may be inevitable, but holding that whether it is an accumulation is a question at least in part of size and amount. It was held that the vast spillage cited by the inspector, which was not disputed by the

Respondent asserts the bolter at issue had been washed on the midnight shift on April 24, a week before it was cited. According to Hammond, the C shift “was responsible” for washing it once a week. (Tr. 170). Hence, it is argued that “in the normal course of business, it would have been washed close to the time when the order was issued.” (Respondent’s Post-Hearing Br. at 14)

I do not find much merit in Respondent’s position. Respondent did not adduce the testimony of any person with personal knowledge of the washing on April 24. Thus, in the absence of such evidence there is not any basis in the record to conclude that the washing was done effectively, i.e., that it removed all combustible materials that had accumulated. Further, it is mere conjecture to conclude that the bolter “would” have been washed on April 1 based only upon testimony that the “C” shift was responsible for washing at that time. There is clearly a lack of reasonable probability that it actually would have been done on time and effectively. I thus find Respondent’s evidence to be insufficient weight to rebut the detailed testimony of Di Lorenzo, which was not impeached or contradicted, regarding his observations of accumulations of oil and oil soaked coal on four areas of the roof bolter.

Further, since Respondent did not adduce any evidence, based on personal knowledge, that all the cited materials had been cleaned prior to the inspection, I find that Di Lorenzo’s opinion that the cited materials had existed for four to six shifts has not been effectively rebutted.

Based on all the above, especially Lorenzo’s uncontradicted testimony regarding the extent of the cited materials, I find that a preponderance of the evidence establishes the existence of accumulations of combustible oil and oil soaked coal. Accordingly, I find that it has been established that Respondent violated section 75.400, *supra*.

## 2. Unwarrantable Failure.

As discussed above, (II)(C)(2), *infra*, for the purposes of determining unwarrantable failure, aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See, e.g., I.O. Coal*, 31 FMSHRC 1346.

### a. Extent of the violative condition and the length of time it had existed

#### i. Extensive

Di Lorenzo opined that the accumulations were extensive. In this connection, he testified that they were between one-half to three inches deep, and covered the entire area of the following locations on the bolter: the right front boom, (two feet by fourteen inches); the

operator’s witness, constituted an accumulation.)

hydraulic motor compartment, (three feet by three feet); the floor of the operator's compartment, (three feet by three feet); and the center section (two feet by three feet). This testimony was not impeached.<sup>10</sup> Nor did Black Beauty adduce any evidence to contradict Di Lorenzo's testimony regarding the dimensions of the areas covered by the accumulations, and the range of their depth. I therefore find that the accumulations were extensive.

ii. Length of the time

According to the testimony of Di Lorenzo, based on his experience, the accumulations had lasted four to six shifts. This testimony was not impeached on cross-examination.

I take cognition of Respondent's argument that the cited condition was not extensive or of long duration. Respondent relies on Hammond's testimony that the "C" shift "is responsible" for washing the entire bolter, (Tr. 170), and that the floor of the cab is monitored on a daily basis and washed "as needed." (Tr. 171). Further, Respondent did not adduce any testimony by any persons having personal knowledge that the subject bolter was actually cleaned or washed the previous four to six shifts prior to Di Lorenzo's inspection, and that such cleaning had removed all accumulations.

Within this framework and for the reasons set forth above in (III)(c)(1), *infra*, I find, based on Di Lorenzo's testimony that the cited accumulations had existed for approximately four to six shifts.

b. Whether the operator was placed on notice that greater efforts were necessary for compliance

It appears to be the argument of Respondent that a finding of unwarrantable failure should not be based on a history of violations of Section 75.400 without breaking it down to violations similar to those at issue, i.e., equipment in by the loading point.<sup>11</sup> The Commission has considered and rejected such an argument. See *Enlow Fork Mining Co.*, 19 FMSHRC 1, 5 (Jan. 1997); *Peabody Coal Co.*, 14 FMSHRC 1258 (Aug. 1992) (Commission did not confirm the operator's contention that commission precedent reveals that only past citations of the same standard in the same area may be considered in determining whether a violation is unwarrantable); *IO Coal*, 31 FMSHRC at 1354 (*citing*, *San Juan Coal Co.*, 29 FMSHRC 125,

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<sup>10</sup> On cross-examination, Di Lorenzo admitted that he did not know how much of the material was three inches deep.

<sup>11</sup> Respondent relies on data from its own mine data bank which indicates only eight citations for accumulations on equipment in January 2008, nine in February 2008, only two in March 2008, and three in April 2008. Respondent argues that it has shown "significant improvement in rectifying issues with accumulations on equipment" (Respondent's Post-Hearing Br. at 19) I note that Respondent did not introduce any evidence of specific improvements it made to reduce accumulations on equipment. Hence not much weight was accorded this argument.

131-132); *Consolidation Coal*, 23 FMSHRC 588 (June 2001).

Further, it is most significant to note that on seven occasions in the approximate 30-day period prior to the issuance of the order at issue on May 1, 2008, the inspector met with various mine officials and expressed concern about (1) “[section] 75.400 accumulations on the belt lines, equipment, and inby the loading points” (Tr. 134) (emphasis added), and (2) the fact that MSHA had not seen improvement. The Commission has recognized that such discussions serve to put an operator on heightened scrutiny that it must increase its efforts to comply with section 75.400, *supra*. (*San Juan*, 29 FMSHRC at 131; *Consolidation Coal*, 23 FMSHRC at 6).

For all of these reasons, I find that Respondent had been put on notice that greater efforts were necessary for compliance.

c. Whether the violation posed a high degree of danger

Di Lorenzo testified, in essence, that in the presence of ignition sources the accumulations could burn, producing the hazard of smoke inhalation, or burns affecting only one person, and causing, at a minimum, loss of work days. He conceded that there were not any ignition sources present. For all these reasons I find that although a hazard was created, there was not “high” degree of danger posed by the violation.

d. The operator’s effort in abating the violative condition

According to Di Lorenzo, in spite of numerous conversations with management, there was not increased compliance with section 75.400. Black Beauty adduced evidence that its records indicate that in the four months immediately preceding Di Lorenzo’s inspection, it received only eight citations in January 2008, and nine in February in 2008 for 75.400 violations on equipment, but only two in March and three in April. Thus it is argued that Black Beauty made significant efforts in abating the violative condition prior to its being cited by Di Lorenzo. However, Respondent did not adduce evidence of any specific efforts it had taken prior to the May 1 inspection to reduce or eliminate accumulations, i.e., to abate the violative conditions. *See I.O. Coal*, 31 FMSHRC 1346; *Enlow Fork*, 14 FMSHRC 1; *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996).

For all these reasons, I find that there is not sufficient evidence adduced by Black Beauty to establish any additional specific actions it took to improve its compliance with section 75.400, *supra*. Thus, I find the Respondent has not established that it made any significant efforts to abate the violative condition.

e. The operator’s knowledge of the existence of the violation and whether the violation was obvious

According to Di Lorenzo, the cited accumulations were obvious and would have been readily apparent to anyone walking by. In this connection I note that the bolter is used on an

active working section. Respondent did not impeach this testimony. Nor did it adduce testimony or other evidence to contradict Di Lorenzo's testimony that the accumulations were obvious. Further, Respondent did not present the testimony of any persons regarding lack of knowledge of their existence nor did it establish that it reasonably could not have known of the existence of the accumulations.

Based on all the above, along with the extent of the cited accumulations, I find that Black Beauty should have reasonably known of their existence.

f. Conclusion

Taking into account all of the above, and placing significant weight on the operator's prior notice of the need for greater efforts for compliance, I find that it has been established that the violation was as a result of its aggravated conduct and hence, constituted an unwarrantable failure.

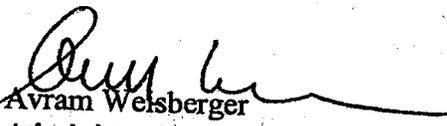
3. Penalty

For the reasons set forth above, I find that the operator's negligence reached the level of aggravated conduct. I find that the gravity was moderate. After the conditions were cited, they were abated by the operator in good faith. The remaining factors set forth in Section 110(i) of the Act were discussed above, (II)(C)(3), *infra*.

Within the above context, and based on Section 110(a)(3)(B) of the Act, I find that a penalty of \$4,000 is required, as the violation was the result of the operator's "unwarrantable failure."

**ORDER**

It is ordered that, within 30 days of this decision, Respondent shall pay a total civil penalty of \$18,653.00.

  
Avram Weisberger  
Administrative Law Judge

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**ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**Washington, D.C. 20001-2021**

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November 24, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1421
Petitioner	:	A.C. No. 000184518
v.	:	
	:	
MARFORK COAL CO., INC.,	:	Mine: Brushy Eagle
Respondent	:	

**ORDER DENYING MOTION FOR SETTLEMENT**

The Secretary, through its Conference and Litigation Representative, ("CLR"), has filed a motion for approval of settlement in this matter. The motion relates that the single citation in issue, Citation Number 9968576, involves a violation of 30 C.F.R. § 70.101, pertaining to respirable dust. It notes that the average concentration of respirable dust, based on five valid samples collected by the operator, exceeded the maximum limit for such dust by nearly three times that level.<sup>1</sup> It also reports that the citation was determined to be significant and substantial, highly likely to result in lost workdays or restricted duty, of moderate negligence and affecting ten persons. Motion at 2.

The motion then continues with a recitation of the Respondent's contentions, in which it argues that: only four persons would actually have been exposed; that its negligence should be viewed as "low" and that it took reasonable steps to "prevent or limit exposure to excess dust or gases." The motion relates absolutely no basis for the support of the claim that the number exposed would be four, nor does it identify the "reasonable steps" Respondent took to prevent or limit exposure.

The motion then advises that the Respondent would argue that it *was* in compliance with the approved ventilation and dust control plan. This is an interesting contention, given that the Respondent is admitting that it was exceeding the respirable dust limit by nearly three times the upper limit of allowable exposure. The motion then contends that it is Respondent's position that "dust conditions are transitory in nature and not entirely preventable." That argument is intriguing as well, as it implies that the upper limit is not "entirely preventable," though one would think that the upper limit establishes a contrary presumption.

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<sup>1</sup>The motion states that the applicable limit is 0.6 mg/m<sup>3</sup> and that the results recorded the level as 1.723 mg/m<sup>3</sup>.

Continuing with its scattershot defense to the admitted violation, the Respondent, the Motion relates, would also contend that the "condition could have arisen due to geological conditions or because the continuous miner operator moved out of proper operating position unbeknownst to mine management, among other unpredictable reasons." *Id.* As with the other claims, there is nothing to support these assertions either.

The Motion then relates that the Respondent would also argue that case law supports a finding of low negligence here. To establish that, the Motion cites *Costain Coal, Inc.*, 19 FMSHRC 1653, 1997 WL 640692, (October 1997) ("*Costain*"), a decision issued by an administrative law judge after conducting a hearing. The Secretary relates that the "*Costain* Court explained: "[r]espirable dust concentrations vary from shift to shift and are affected by the level of coal production as well as varying factors such as temperature and humidity. Unlike most mine hazards caused by violated conditions, excessive respirable dust concentrations ordinarily cannot be observed." Motion at 2-3.

As pertinent here, the Motion then asserts that "[d]ue to the vagaries of litigation and in the interest of settlement, the parties have agreed that the Secretary will modify the number of persons affected from ten to four." Motion at 3.

The Court cannot approve this motion. The motion is merely a recitation of the defenses the Respondent may claim at a hearing. As noted, there are problems with these claims and the Secretary seemingly accepts them at face value. The motion sheds no light as to the Secretary's stance to these various claims, it merely recites them and then announces that the "the vagaries of litigation and [] the interest of settlement," justify the "half-off sale" presented. A motion must do more than present a one-sided expression of contentions that may be raised at a hearing; it must advise and react to those assertions.<sup>2</sup>

Additional comment is warranted. First, it must be stated what is otherwise well-known: another administrative law judge's opinion has no precedential effect and accordingly other administrative law judges are not obligated to afford such an opinion any deference except insofar as the rationale contained within it may be persuasive.

In *Costain*, the case cited with apparent acceptance by the Secretary, three respirable dust samples exceeded the there applicable 2.0 mg/m<sup>3</sup> upper limit by 2.2, 3.4 and 4.4 and it was undisputed that those exceedances were properly characterized as significant and substantial. Instead, the mine operator disputed the number of persons affected and the degree of negligence involved. The administrative law judge in *Costain* noted that in *Consolidation Coal*, 8

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<sup>2</sup>For example, it would seem that the Secretary would have an obligation to consult with the inspector who issued the citation and obtain input as to the claim that four persons, not ten were affected. Any change in the number of persons affected should advise how such a new number impacts the penalty computation under the penalty policy.

FMSHRC 890, 895 (June 1986), the Commission observed that some departure from normal enforcement considerations was justified because exposure to respirable dust has fundamental differences with a "typical" safety hazard. However, this reference was not intended to ease enforcement at all. Rather, the Commission was speaking to the insidious nature of respirable dust exposure and that it was Congress' intent that the full "panoply of the Act's enforcement mechanisms" were to be used to effectuate the goal of preventing that disease, a conclusion with which the D.C. Circuit agreed. *See*, 824 F. 2d 1071 (D.C. Cir. 1987), affirming the Commission's interpretation.

Further, the administrative law judge in *Costain* noted that "[i]n the final analysis, who, if not the [mine] operator, is responsible for ensuring that miners are not exposed to excessive respirable dust?" That judge then added: "Mine operators must ensure that the maximum levels of permissible respirable dust concentrations are not exceeded [and consequently] [a]n operator's failure to do so, *regardless of fault*, warrants the imposition of *meaningful* civil penalties." *Costain* at 5 (emphasis added).<sup>3</sup> Thus, this Court has a different take on the import of *Costain* in respirable dust cases. Further distinguishing that case from the present matter, the cited standard here is 30 C.F.R. § 70.101, which is the respirable dust standard where quartz is present. As MSHA has pointed out, "[q]uartz particles are 20 times more toxic to the lungs than coal dust alone." MSHA Health Hazard Information Sheet 47. The same Information Sheet advises that a "miner exposed to high levels of quartz can develop silicosis in as little as three years."

The Court is not stating that a reduction in a proposed penalty can never be approved. Rather, the point is that the motion must be more than a mere echo of the mine operator's contentions. Apart from the serious environment in which miners work on a daily basis, the risk of Black Lung disease has long been recognized by Congress as a matter of prime importance. Settlements must reflect the seriousness of this subject as well and penalty reductions must be fully supportable.

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<sup>3</sup>Other particular facts in *Costain* should be noted as well. One citation involved a relatively new mechanized mining unit with no history of previous violations; another had no history of previous violations for the unit in issue and a third had a history of similar violations but then five compliant bimonthly samples intervened before the latest violation. That judge took that information to justify his conclusion that the operator's history was not a factor warranting a "significant impact" on the civil penalty liability. Again, it must be noted such a conclusion is of no precedential impact for other administrative law judge's consideration.

Accordingly, the Secretary's Motion is DENIED. The motion should be re-submitted with appropriate supportive information, if it exists, or in the agency's discretion transferred to an attorney in the Solicitor's Office for further review.

*William B. Moran*

William B. Moran  
Administrative Law Judge

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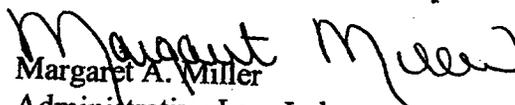
December 8, 2010

CHARLES SCOTT HOWARD, Complainant	:	DISCRIMINATION PROCEEDING
	:	
v.	:	Docket No. KENT 2008-736-D
	:	BARB CD 2007-11
	:	
	:	
CUMBERLAND RIVER COAL COMPANY, Respondent	:	Mine ID: 15-18705
	:	Mine: Band Mill No. 2

**ORDER APPROVING SETTLEMENT**

This matter is before me on Complainant's request for attorneys fees following a favorable decision issued on August 13, 2010 in accordance with the provisions of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (Mine Act) and 29 C.F.R. 2700.50 *et seq.* The parties have filed a joint motion to approve settlement.

I accept the representations and the agreements of the parties as set forth in the motion to approve settlement. I have considered the representations and documentation submitted, find that the proposed settlement is appropriate under the Act. The motion to approve settlement is **GRANTED**, and Cumberland River Coal Company is hereby **ORDERED** to pay, within 40 days of the date of this decision, on behalf of Respondent, Charles Scott Howard, one check in the amount of \$124,174.00 made payable to Tony Oppedard and one check in the amount of \$31,221.00 made payable to Appalachian Citizens Law Center at the addresses listed in the motion. All other terms of the settlement agreement are hereby incorporated into this order.

  
Margaret A. Miller  
Administrative Law Judge

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