NOVEMBER 2005

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

NOVEMBER 2005

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

Secretary of Labor, MSHA on behalf of Wendell McClain, et al. V. Misty Mountain Mining Inc., and others, Docket Nos. KENT 2005-96-D, etc. (Judge Hodgdon, October 21, 2005)

No cases were filed in which Review was denied during the month of November:

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

November 10, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 2000-480-R
ADMINISTRATION (MSHA)	:	WEST 2002-131
	:	
v.	:	
	:	
TWENTYMILE COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000), involves an order issued to Twentymile Coal Company ("Twentymile") by the Department of Labor's Mine Safety and Health Administration as a result of a violation of the mandatory training standard at 30 C.F.R. § 48.7(c).

Following a decision by the Commission (26 FMSHRC 666 (Aug. 2004)), both the Secretary of Labor and Twentymile petitioned for court review of the Commission's decision. In *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005), the District of Columbia Circuit Court of Appeals affirmed the Commission on the question of violation but vacated the Commission's order setting aside the Secretary's proposed penalty.

In vacating the Commission's decision on the penalty issue the court remanded the matter to the Commission for proceedings not inconsistent with the instructions contained within the

court's opinion. *Id.* at 262. Accordingly, the Commission reinstates the $1,500 penalty originally assessed by the judge.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

November 16, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos.	WEVA 2002-111-R WEVA 2002-112-R
v.		
SPARTAN MINING COMPANY		

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration issued a citation against Cannelton Industries, Inc. ("Cannelton")[1] alleging a significant and substantial ("S&S") violation of 30 C.F.R. § 75.360(a)(1), requiring preshift examinations. Administrative Law Judge T. Todd Hodgdon vacated the citation at issue on the grounds that the operator did not violate the preshift requirement set forth in section 75.360(a)(1) because of the "pumpers' exception" contained in 30 C.F.R. § 75.360(a)(2). The Commission affirmed the judge's dismissal. *Cannelton Industries, Inc.*, 26 FMSHRC 146 (Mar. 2004).

In *Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82 (D.C. Cir. 2005), the District of Columbia Circuit Court of Appeals vacated the Commission's decision. The court determined that the pumpers' exception only applies in "areas where pumpers are scheduled to work or travel" and that the preshift requirement remains applicable in areas where the pumpers do not travel, such as where there are energized trolley wires. 415 F.3d at 85 (citing 30 C.F.R. § 75.360(a)(2) & (b)(7)). On September 19, 2005, the court issued its mandate in this matter, returning the case to the Commission's jurisdiction.

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[1] During the pendency of this appeal, the assets of Cannelton were purchased by the parent company of Spartan Mining Company. Spartan was substituted as the party in interest by court order. *Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 84 (D.C. Cir. 2005).

Accordingly, consistent with the instructions of the D.C. Circuit, we hereby remand to the judge for further proceedings on the issue of violation, an evaluation of the S&S nature of the violation, if appropriate, and an assessment of any civil penalty.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 17, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	
NATIONAL CEMENT COMPANY OF CALIFORNIA, INC.	:	Docket No. WEST 2004-182-RM
and	:	
TEJON RANCHCORP.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Duffy, Chairman, and Suboleski and Young, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act") and involves a citation alleging a violation of 30 C.F.R. § 56.9300(a).[1] Administrative Law Judge Jerold Feldman granted the Secretary of Labor's motion for summary decision and held that the access road to the National Cement Company of California, Inc. ("National Cement") facility in Lebec, California, is a "coal or other mine" and is thus subject to the jurisdiction of the Mine Act and the Department of Labor's Mine Safety and Health Administration ("MSHA"). 27 FMSHRC 84 (Jan. 2005) (ALJ). Upon the subsequent motion of National Cement, the judge certified his interlocutory ruling. 27 FMSHRC

[1] Section 56.9300(a) requires that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

157 (Feb. 2005) (ALJ). The Commission thereafter ordered review of the judge's decision. For the reasons that follow, we vacate the judge's decision and remand this proceeding to the judge.

I.

Factual and Procedural Background

At issue in this case is an access road leading to a cement plant and quarries on the Tejon Ranch property ("Ranch"). The Ranch occupies approximately 270,000 contiguous acres of land that stretch over an area approximately 40 miles by 26 miles in Los Angeles and Kern Counties, California. 27 FMSHRC at 85.[2] It is owned by Tejon Ranchcorp ("Tejon"). *Id.* The Ranch is comprised of an operating cattle ranch and other commercial operations. *Id.* On the southern portion of the Ranch a variety of commercial activities take place, one of which is National Cement's cement plant facility in southern Kern County. *Id.* at 85-86.

In 1966 Tejon entered into a long-term Cement Manufacturing Plant Lease, covering approximately 5,000 acres of Ranch land, with Pacific Western Industries, Inc. ("Pacific Western"). *Id.* at 87; Jt. Ex. 3. The lease was ultimately assigned to National Cement. 27 FMSHRC at 87. Pursuant to the terms of the lease, National Cement extracts minerals such as limestone, shale, and silica from quarries on the land, and processes them at the facility with other materials trucked in from off-site sources to produce Portland cement for sale. *Id.* at 85.

Prior to the construction of the cement plant, there was a network of dirt roads on the southern portion of the Ranch. *Id.* at 87. In 1965, Pacific Western began constructing an access road to the cement plant by using in part some of the existing dirt roads. *Id.*; Jt. Exs. 5-6. The resulting access road, which is the road at issue in this case, is a 4.3-mile-long, two-lane road that runs north from State Route 138 in northern Los Angeles County to the location of the cement plant. 27 FMSHRC at 86. In 1966, the access road was paved, and the cement plant was constructed and began operating. *Id.* at 87. Easement deeds covering the road were entered into and recorded during that time and were eventually assigned to National Cement. *Id.*; Jt. Exs. 1-2. The road is not covered by any federal or state permits required to operate the mine. Contestant's Mem. in Support of Mot. for Summ. Dec. ("Contestant's Mem."), Ex. 2, ¶ 3.

Use of the road is restricted to: (1) Tejon's employees, vendors, contractors, lessees, licensees, and visitors; (2) National Cement's employees, vendors, contractors, and visitors; and (3) those persons authorized to use it by the State of California. 27 FMSHRC at 87. Signs reflecting this restricted nature of the road, Tejon's ownership, and National Cement's operations are posted at the road's intersection with State Route 138 and on the initial segment of the road on the way to the cement plant. *Id.* at 87-89.

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[2] The factual record in this case is largely based on the 77 joint stipulations that the parties submitted to the judge, all of which he set forth in his decision. *See* 27 FMSHRC at 85-98. The parties also submitted a book of Joint Exhibits. *Id.* at 85.

Adjoining the road is fenced-in Ranch land that is accessed by other dirt Ranch roads, locked gates, and three cattle guard crossings. *Id.* at 86, 89. The road ends at the cement plant site, where a gate and guardhouse, only intermittently manned, sit in front of the cement plant. *Id.* A sign next to the guardhouse informs those entering that they must check in at the front office, that MSHA regulates the site, and that those entering must comply with MSHA's regulations. *Id.* at 89-90.

The road provides the only vehicular access to the cement plant, which operates around the clock, 7 days per week. *Id.* at 86, 91. The cement plant has a maximum annual production capacity of 1-1/2 million tons, and operated at approximately 62 % capacity in 2003. *Id.* at 85. Tanker trucks, weighing approximately 25,000 pounds, bring raw material loads of approximately 55,000 pounds to the plant and leave empty. *Id.* at 91. Similarly, empty tank trucks arrive at the plant and exit with 55,000-pound loads of cement for National Cement's customers. *Id.* These trucks run 6 days a week, throughout the day and night, although the customers' truck trips are concentrated between midnight and the early morning hours. *Id.* The daily average for tanker-truck round trips on the road is 148. *Id.* In addition, on average, 84 employee round-trips and 5 non-tank truck deliveries to the cement plant occur daily. *Id.*[3]

While the great majority of traffic on the road is due to the cement plant, the road is used by Tejon and its other lessees, licensees, and authorized visitors to gain access to and exit from other commercial activities at the Ranch. *Id.* at 85-86, 91. These activities include: management of ranching operations by Tejon and its lessees (*id.* at 92, 94); entertainment production companies, commercial photographers, and others filming motion picture scenes, commercials, music videos, and taking commercial still photographs (*id.* at 92-93); and hunting and camping programs administered by Tejon management (*id.* at 93-94).[4]

In addition to providing access to Tejon's commercial interests in the Ranch, the road is used by various utility companies to access portions of the Ranch subject to easements those utilities have entered into with Tejon to accommodate transmission lines and related facilities

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[3] The written materials in National Cement's Site-Specific Hazard Training program include instructions that National Cement's contractors, vendors, and employees are to follow all traffic signs and speed limits and are not to pass other vehicles on the access road to the plant. 27 FMSHRC at 91; *see* Jt. Ex. 65.

[4] The subject road may also become a main traffic artery for an area of the Ranch for which there are extensive mixed-use development plans. 27 FMSHRC at 94. Tejon wants to use 12,000 acres of the Ranch for a 23,000 unit commercial and residential development that would include housing, retail, schools, and office facilities. *Id.* Tejon hopes to obtain the necessary governmental approvals for the development starting this year, but it recognizes that any number of impediments to the project could delay, alter, or derail the project, known as Tejon's "Centennial" development. *Id.* at 94-95. The subject road is presently being used for accessing areas of the Ranch in the project planning process. *Id.* at 95.

that serve not only the cement plant, but also other users. *Id.* at 95-96. Similarly, representatives of the Federal Aviation Administration use the road to access a communications tower located on Tejon land adjacent to the cement plant quarry. *Id.* at 95.

The road is also used by the California Department of Water Resources ("DWR") to access an aqueduct that DWR constructed in 1970. *Id.* at 90. In fact, DWR owns the bridge that carries road traffic over the aqueduct and maintains the bridge and its approaches. *Id.* The total distance of road that DWR is responsible for maintaining is approximately 600 feet, and DWR has installed speed bumps on both approaches along with warning signs. *Id.*

Maintenance of the road is otherwise the responsibility of the various parties that use it, pro rata to their use. *Id.* at 91. In practice, however, National Cement has always maintained and kept it in usable condition. *Id.* For example, in November 2003, National Cement resurfaced, sealed, and restriped the road, and installed speed bumps and speed limit signs on the road. *Id.* National Cement has not sought Tejon's pre-approval for maintenance to be done on the road. *Id.*

In 1992, the lack of berms or guardrails along parts of the road led MSHA to cite National Cement for an alleged violation of section 56.9300(a). *Id.* at 96. MSHA soon thereafter vacated the citation on the ground that National Cement was located at the end of the access road and had no means to control the users entering the road from State Highway 138 until those users reached the cement plant. *Id.*; Jt. Ex. 66 at 2.

The road was not the subject of any further citations until February 2003, when MSHA again alleged a violation of section 56.9300(a). 27 FMSHRC at 96-97; Jt. Ex. 68. On this occasion, the citation was vacated on the ground that National Cement lacked adequate notice that the road was subject to Mine Act jurisdiction. 27 FMSHRC at 97-98; Jt. Ex. 68 at 3.

In December 2003, MSHA sent a letter to National Cement in order to put it on notice that MSHA considered the road subject to the Mine Act. 27 FMSHRC at 98; Jt. Ex. 69. On February 9, 2004, MSHA issued National Cement the citation that is the subject of this proceeding, Citation No. 6361036, once again alleging a violation of section 56.9300(a). 27 FMSHRC at 86, 98; *see* Jt. Ex. 70. The citation states:

> The mine operator failed to provide berms and guardrails on the banks of the primary access road to the Lebec Cement Plant. There were drop offs along the roadway ranging from 6 ft. to approximately 25 ft. and sufficient to cause a vehicle to overturn or endanger persons in equipment. The roadway was used extensively by large over-the-road trucks, delivery vehicles, and personal vehicles of mine personnel and vend[o]rs. The l[a]ck of berms or guardrails on the two lane road presented a hazard

particularly during inclement weather when vehicles could be expected to slide and potentially become involved in accidents.

27 FMSHRC at 86-87; Jt. Ex. 70.

National Cement contested the citation, and Tejon intervened. 27 FMSHRC at 84, 87. After filing their joint stipulations and exhibits, the parties subsequently filed cross-motions for summary decision on the issue of whether the road is subject to Mine Act jurisdiction. *Id.* at 84.

In determining that the road at issue was a "coal or other mine" under section 3(h)(1) of the Mine Act, 30 U.S.C.§ 802(h)(1), the judge read subsection (B) according to what he considered to be its plain meaning. 27 FMSHRC at 98-99. He concluded that the parties' stipulations established that the road was "private," and that under the commonly understood meaning of the term, the road was "appurtenant" to the cement plant. *Id.* at 99. The judge rejected National Cement's argument that its lack of control over the road would prevent it from ensuring compliance with a section 104(b) withdrawal order, 30 U.S.C.§ 814(b), and held that National Cement's history of maintaining and improving the road belied the operator's argument that it does not have the authority under its agreement with Tejon to construct berms or guardrails, as MSHA would have it do pursuant to section 56.9300(a). *Id.* at 100. The judge also found that National Cement's use of the road was frequent and disproportionate as compared with other users, thus justifying Mine Act oversight of the road. *Id.* at 100-01. He additionally found that MSHA's inconsistent enforcement history with respect to the road was not a bar to the assertion of Mine Act jurisdiction and that MSHA was unlikely to require hazard training on the part of users of the road who had no connection to the cement plant. *Id.* at 101-02. Consequently the judge granted the Secretary's motion for summary decision on the jurisdictional question and scheduled further proceedings. *Id.* at 103. The judge's certification for Commission interlocutory review of the issue raised by the cross-motions for summary decision mooted that schedule. *Id.* at 157.

II.

Disposition

National Cement urges the Commission to apply the plain meaning of the definitional provisions of the Mine Act and reverse the judge's decision that the road is a "coal or other mine." NCCC Br. at 17-20, 35. The operator contends that because it does not have the power to control the road, and because it is not the only user of the road, the road qualifies as neither "private" nor "appurtenant" to the cement plant as those two terms are used in section 3(h)(1)(B) of the Mine Act. *Id.* at 17-28. National Cement also maintains that relevant legislative history and the structure of the Mine Act compel the same conclusion. *Id.* at 28-32. It further argues that, given the Secretary's enforcement history with respect to the road, her interpretation is not entitled to deference in this case. *Id.* at 32-35. Intervenor Tejon filed a brief in support of the operator's position.

The Secretary argues for affirmance of the judge's decision because the definition of "coal or other mine" plainly includes a road such as the one at issue. S. Br. at 15-19. The Secretary continues that the road is "private" as that term is commonly understood and provides access to the cement plant, thus making it "appurtenant." *Id.* at 19-21. The Secretary also submits that the legislative history supports such an interpretation of the statute and that control of the road is irrelevant to a determination of whether it is subject to the Mine Act. *Id.* at 21-30. The Secretary further contends that nothing in the Mine Act or the enforcement history prevents the road from being considered part of the mine within MSHA's jurisdiction. *Id.* at 30-35.

Section 4 of the Mine Act provides in part that "[e]ach coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. The term "coal or other mine" is defined in section 3 of the Act, 30 U.S.C. § 802. Specifically, section 3(h)(1) defines it as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1).

There is no dispute that the National Cement facility is a "mine" under section 3(h)(1) of the Mine Act,[5] and the parties have stipulated as much. 27 FMSHRC at 85. The issue here is

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[5] Pursuant to section 3(h)(1)(C), an agreement between MSHA and the Occupational Safety and Health Administration (OSHA) allocates responsibility between the two agencies for various types of operations involving the mining and milling of minerals. *See* 44 Fed. Reg. 22,827 (Apr. 17, 1979), *amended by* 48 Fed. Reg. 7,521 (Feb. 22, 1983). Paragraph B.6.a. of that agreement provides: "[p]ursuant to the authority in section 3(h)(1) [of the Mine Act] to determine what constitutes mineral milling considering convenience of administration, . . . MSHA jurisdiction includes . . . cement plants." 44 Fed. Reg. at 22,828.

whether Mine Act jurisdiction extends beyond the National Cement facility to include the 4.3-mile-long access road, because that road is, in the words of subsection (B), a "private way[] [or] road[] appurtenant" to the facility.[6] This is the first time the Commission will address the meaning of section 3(h)(1)(B).[7]

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).

The starting point for interpreting the statutory definition of "coal or other mine" is the language of the definition. *See, e.g., Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 796 (4th Cir. 1981); *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1296 (Nov. 2000). Because the Mine Act does not define "private" or "appurtenant," we first look to the commonly understood definitions of those terms. *See Drillex, Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994) (relying on dictionary definition of "milling" to determine meaning of section 3(h)(1)(C)).

As to whether the subject road was "private," the parties agree on the applicable definition of the operative term: "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." *Webster's Third New Int'l*

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[6] We note that neither the parties nor the judge applied the exact wording of section 3(h)(1) in this instance. Mine Act jurisdiction does not extend to private ways and roads that are appurtenant to a "mine," but rather extends to private ways and roads that are appurtenant to "an area of land from which minerals are extracted." *See* 30 U.S.C. § 802(h)(1)(A) & (B); *Bush & Burchett, Inc. v. Sec'y of Labor*, 117 F.3d 932, 936-37 (6th Cir. 1997) (discussing issue in exact language of statute). While the parties stipulated that the facility constituted a "mine" under section 3(h)(1), they also are apparently assuming that the entire National Cement facility qualifies as an "area of land from which minerals are extracted" under subsection (A) thereof. Given the parties' approach to the issue, we therefore examine the relationship of the road to the cement plant.

[7] The court in *Bush & Burchett* addressed the meaning of section 3(h)(1)(B) and agreed with the Secretary that a road and bridge connecting a coal mine to a rail loadout facility did not fall within the definition of "coal or other mine" under the facts of that case. There, OSHA had issued three citations alleging violations of the Occupational Safety and Health Act of 1970 ("OSH Act") to the contractor responsible for constructing the bridge and its approaches, which were to be used as part of the 6.5-mile route between the newly constructed surface mine and the loadout facility. 117 F.3d at 933 & n.1. The Occupational Safety and Health Review Commission ("OSHRC") rejected the contractor's arguments that the roads to be used as part of the route were "appurtenant" to an area of land from which minerals are extracted and thus within MSHA, not OSHA, jurisdiction and the court upheld OSHRC. *Id.* at 936-39.

Dictionary, 1804-05 (1993) ("*Webster's*"). *See* NCCC Br. at 21; S. Br. at 19. This definition of the term makes it clear that a road can be private even if more than one party can use it, as a user can be a member of a group or class of persons to which use is restricted. Here, the parties by their stipulations established that the road is not now open to the general public, and is intended for or restricted to the use of a particular group or class of persons — that is, those that Tejon and National Cement permit to use it. 27 FMSHRC at 86 (Stip. Nos. 10-11), 87-89 (Stip. Nos. 16-21), 99.

Regarding the meaning of the term "appurtenant," the parties again generally agree on the applicable definition, citing the dictionary definitions relied upon by the judge in his decision. NCCC Br. at 27; S. Br. at 20-21. The judge found "appurtenant" to be commonly defined as:

> "a: annexed or belonging legally to some more important thing (a right-of-way – to land or buildings); b: incident to and passing in possession with real estate – used of certain profits or easements." *Webster's Third New International Dictionary* 107 (1993). An "easement appurtenant" is defined as: "an easement created to benefit another tract of land, the use of easement being incident to the ownership [or leasehold] of that other tract." *Black's Law Dictionary* 549 (8th ed. 2004).

27 FMSHRC at 99. In concluding that the subject road is "appurtenant" in its entirety, both the judge and the Secretary rely on the undisputed fact that National Cement holds an easement interest in the entire road. *Id.*; S. Br. at 21. Moreover, the Secretary adds that the easement transfers to successor lessors of the cement plant and thus can be said to pass in possession with the real estate. S. Br. at 21 (citing Jt. Ex. 2).

Nevertheless, we conclude that the literal interpretation of the specific words used in section 3(h)(1)(B) offered by the Secretary is not dispositive in determining the meaning of that provision. To properly construe the phrase "private ways and roads appurtenant" as it is used in section 3(h)(1)(B), it is necessary to consider the language in the context of the Mine Act. In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Local Union 1261, UMWA*, 917 F.2d at 44-45 ("If the first rule of . . . construction is 'Read,' the second rule is 'Read on!'").

Moreover, in statutory interpretation, the ordinary meaning of the words used in the statute cannot be applied to produce absurd results. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (citing *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 643 (1978)). In particular, the Sixth Circuit recognized that section 3(h)(1)(B) must not be read "contrary to common sense" and that reasonable limitations must be placed on its breadth in order to avoid

"bizarre results." *Bush & Burchett, Inc. v. Sec'y of Labor*, 117 F.3d 932, 937 (6th Cir. 1997). Similarly, that court recognized that Congress' use of the phrase "appurtenant to" with respect to a road's relationship to a mine produced a "nebulous boundary" in determining the scope of MSHA jurisdiction. *Id.* at 936-37.

The resolution of whether a particular road is "appurtenant to" a mine facility must take careful account of the specific factual circumstances and not be based on an inflexible, literal application of the statute that disregards real, practical implications and leads to an absurd result. Accordingly, we analyze in some detail the facts in this case, how they relate to the jurisdictional issue presented, and how the definition of "coal or other mine" must be applied consistently with the overall structure and purpose of the Mine Act.

In this case, Tejon, pursuant to the terms of the Cement Manufacturing Plant Lease, has granted the operator of the cement plant facility an easement which permits that operator the right of access to its facility via the entire road, and the right to grant others such access.[8] This is a non-exclusive easement, however, as Tejon reserves to itself the right to also use the road, and the right to grant others use of the road, so long as such additional use of the road does not materially interfere with the cement plant operator's use.[9]

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[8] The lease provides in pertinent part:

> 11. Easements. Lessor shall grant to Lessee without further consideration such non-exclusive rights of way and easements upon the Demised Premises and Lessor's adjacent lands as may be reasonably necessary and convenient for the erection, construction, maintenance, and operation of access roads, . . . ; provided, however, the location of any such rights of way and easements shall be subject to the prior written approval of Lessor, which Lessor agrees to give so long as such location does not unreasonably [interfere] with the present or reasonably contemplated future operations of Lessor or any tenant of Lessor. . . .
>
> Lessee and the other grantees, if any, of joint-use easements and rights of way, pro rata in accordance with their respective use thereof, shall maintain all such easements and rights of way in such condition as necessary for use thereof by Lessee in the usual conduct of its business.

Jt. Ex. 3 at 17-18.

[9] Pursuant to the Cement Manufacturing Plant Lease, a Memorandum of Easement Deed ("MED") was recorded that describes the easement for the access road. Jt. Ex. 2. In addition to

Consequently, parts of the road are used for purposes unrelated to the cement plant as Tejon permits. 27 FMSHRC at 90, 92-96. This non-cement plant traffic is beyond National Cement's control. The road leads to several locations other than the cement plant, and this traffic can enter and leave the road at a number of locations, such as, for instance, when the road is being used by members of the "Explorer Program" conducted at the Ranch.[10] *Id.* at 92-96. While, as the judge found, the vast majority of traffic on the road is to and from the cement plant, vehicles carrying Tejon employees, contractors, and others that Tejon may permit on the Ranch property for various purposes also travel over all or part of the road. *Id.* at 91-95, 100.

The Secretary does not dispute that National Cement cannot control use of the road, and instead argues that the degree of control National Cement has over the road is not a relevant consideration to a determination of whether a road is private and appurtenant under section 3(h)(1)(B). S. Br. at 25-27. The Secretary further suggests that jurisdiction in this instance be decided only within the context of the citation at issue, and alleges that, because National Cement could install berms or guardrails where needed, Mine Act jurisdiction over the road is justified in this instance. *Id.* at 30-32.

Looking at the Mine Act as a whole, as we must, we do not agree with the Secretary that National Cement's lack of control over use of the road can be ignored. A finding of Mine Act jurisdiction over the subject road in this instance would not simply mean that National Cement would be obligated to install guardrails or berms along the road; such a finding would raise a host of issues regarding compliance with the Mine Act and Mine Act standards under circumstances where National Cement could not control other users of the road. As discussed below, a determination that property is a "coal or other mine" has far-ranging consequences under the Act. *Cf. Bush & Burchett*, 117 F.3d at 937 (examining ramifications of deciding that road would fall within Mine Act jurisdiction).

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providing a description of the boundaries of the easement, the MED states that "[t]he easement is for the purpose of enabling Grantee to construct, maintain, operate, inspect, repair, remove and use an access road and right of way for the purpose of ingress and egress to and from Grantor's land leased by Grantee under [the aforementioned lease]." *Id.* at 1 & Ex. A. The MED also states that the easement runs as long as the lease runs, and that the easement's terms, covenants, and conditions are contained in a concurrently executed separate Easement Deed, which is incorporated by reference into the Memorandum. *Id.* at 1-2. While the parties did not include that Easement Deed in the Joint Exhibits, the Road Easement Deed that was superceded by the Easement Deed referred to in the MED was included as Joint Exhibit 1. That earlier easement reserved to Tejon the right to use and cross over the subject road, "and the right to grant to others easements in proximity to, crossing or overlapping the right of way and easement herein granted provided such other easement shall not materially interfere with the use and enjoyment of the right of way and easement herein granted." Jt. Ex. 1 at 1.

[10] The Ranch has approximately 30 miles of paved roads, with significantly more miles of dirt roads. 27 FMSHRC at 86.

First of all, other fundamental terms used in the Mine Act, in both establishing the reach of health and safety standards and in outlining the enforcement procedures to be followed, are defined in relation to the term "coal or other mine." For instance, section 3(d) defines "operator" in the Act to mean "any owner, lessee, or other person who operates, *controls*, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d) (emphasis added). Thus, a conclusion that the entire access road is a "coal or other mine" might lead to an expansive interpretation of "operator" not intended by Congress.[11]

Similarly, section 3(g) provides that a "miner" is "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Consequently, if the entire access road is a "coal or other mine," individuals over whom National Cement has no control — such as, for example, DWR personnel or a truck driver or explosives expert working for a film company — would each presumably be considered a "miner" for purposes of MSHA enforcement. There is nothing in the Mine Act or its legislative history that leads us to believe that Congress would have intended such an absurd result when it drafted the language of section 3(h)(1)(B).

The concern with such absurd results is not an idle one. Because the Mine Act is a strict liability statute, any violation of the Act or the mandatory safety and health standards adopted thereto that occurs on the road would be attributable to the mine operator, regardless of whether the operator is at fault. *See, e.g., Allied Products Co. v. FMSHRC,* 666 F.2d 890, 893-94 (5th Cir. 1982) (under section 104(a), if conditions exist which violate regulations, citations are proper); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982) (under section 110(a), operators are liable for violations without consideration of fault).

Below, the judge expressed confidence that the Secretary would not seek to enforce Mine Act requirements with respect to those users of the road with no connection to National Cement's operations, such as cattle ranchers. 27 FMSHRC at 102. He also believed that National Cement could comply with a withdrawal order issued pursuant to section 104(b) of the Act, 30 U.S.C.

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[11] Here, the facts clearly establish that, for purposes of section 3(d), National Cement "controls" the access road only to the extent that it is used in conjunction with the activities of the quarries and the cement plant. National Cement does not and could not exercise control over non-mining activities that also utilize the access road. The Secretary intimates that in some situations it may be more appropriate for MSHA to cite Tejon instead of National Cement for a violation of a standard. S. Br. at 31-32. Citations under the Mine Act may only be issued against "operators." *See* 30 U.S.C. § 814(a) ("[i]f . . . Secretary . . . believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall . . . issue a citation to the operator"). The Secretary gives no further explanation of what could lead her to conclude that Tejon should be considered an operator under the Mine Act, so her suggestion provides no reassurance that the ramifications of asserting Mine Act jurisdiction over the access road have been thoroughly explored.

§ 814(b), by simply turning away its traffic from the road, while non-cement plant related traffic could continue to use the road. 27 FMSHRC at 100.

Regardless of whether the judge's reading of the Mine Act is correct,[12] on appeal the Secretary has reaffirmed her authority to hold National Cement strictly liable for all violations, including those committed by unrelated third parties. *See* S. Br. at 28-32 (citing *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 491 (9th Cir. 1983)). Thus, as National Cement fears, it appears that the Secretary would issue a citation for Mine Act violations committed by a user of the road who had no connection to National Cement's operations. Such users could include Tejon ranch workers and security personnel, the various employees of movie and video production companies, those leading hunting and camping expeditions, engineers and others involved in the Centennial development project, DWR staff examining the aqueduct, and FAA employees. Again, we cannot conclude that Congress intended that the jurisdictional provisions of the Mine Act should be interpreted to cover workers with no connection to National Cement, particularly when National Cement has no control over those individuals when they use the access road.[13]

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[12] We note that section 3(h)(1) defines "coal or other mine" in geographic terms. *Energy West Mining Co.*, 15 FMSHRC 587, 592 & n.9 (Apr. 1993). All activities that occur within a mine's consequential boundaries are covered by the Mine Act. There is nothing in the Mine Act which would limit jurisdiction over the access road temporally or functionally, such as only when the road is being used in furtherance of National Cement's operations. In addition, under section 103(a) of the Act, each "coal or other mine" is subject to inspection, and if a violation is found during such inspection, the inspector, pursuant to section 104(a) of the Act, "*shall* . . . issue a citation to the operator" of the mine. 30 U.S.C. §§ 813(a), 814(a) (emphasis added). The Mine Act thus does not allow for discretionary enforcement once a violation is discovered to have occurred in an area that is a "coal or other mine" under section 3(h)(1).

[13] While our dissenting colleague may not believe that the Secretary intends "to enforce the Act in such a bizarre fashion" (slip op. at 20), this is not the first time the Secretary has taken the position that an operator is strictly liable for any violation occurring on mine property. *See Extra Energy, Inc.*, 20 FMSHRC 1, 8 n.11 (Jan. 1998) (Secretary argued that operator is strictly liable for violations that take place at its mine, including "private ways and roads appurtenant thereto," "even if it was the victim of an unrelated party's actions"). In fact, she has done so in this case. *See supra* n.11. Furthermore, unlike the dissent (slip op. at 20), we do not read the Secretary's citation in her brief to *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 n.3 (D.C. Cir. 1990), to provide any comfort to National Cement. There the court suggested that there may be a case in which a contractor's connection to a mine is so infrequent or *de minimis* that the *contractor* would not be subject to the Mine Act jurisdiction as an operator. *Id.*; *see also Northern Illinois Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846-49 (7th Cir. 2002). There is no suggestion whatsoever in *Otis* that in such a circumstance the *operator* of the mine where the violation occurs would also escape liability under the Act's strict liability standard.

Considering 30 C.F.R. Part 56 alone, National Cement would be potentially liable for violations of a myriad of Mine Act standards that would apply to parties using the access road for any number of non-cement plant purposes if we were to uphold MSHA's jurisdiction over the access road. While many Part 56 standards are by their nature limited in their application to mining operations, a significant number are not and are relevant to the various non-cement plant uses of the access road. *See, e.g.*, 30 C.F.R. Part 56, Subpart C (Fire Prevention and Control), Subpart D (Air Quality and Physical Agents), Subpart E (Explosives), Subpart H (includes traffic safety provisions), Subpart Q (Safety Programs), and Subpart S (Miscellaneous). Moreover, Subpart H of Part 56 defines "mobile equipment" as "wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved." 30 C.F.R. § 56.9000. That broad application covers every conceivable vehicle that could be operated on the road by entities other than National Cement.[14]

In deciding whether Mine Act jurisdiction extends to the road, we cannot ignore the potential application of various Mine Act standards to those users of the road who have no relation to mining and cannot be controlled by National Cement. Due process requires that an operator must be in a position to prevent a violation before it can be charged with the violation under the strict liability of the Mine Act. *Cf. Miller*, 713 F.2d at 491 (operator held liable for violation that occurred when unknown party entered operator's underground mine and altered ventilation system); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) (holding that mine owner can be held liable for violation by its independent contractor because the owner is generally in continuous control of conditions at mine). Here, given the lack of control National Cement has over use of the access road by others, National Cement is in no position to prevent Mine Act violations by those other users.

Furthermore, application of the definition of "coal or other mine" must be guided by the purposes and policies of the Mine Act. *See Local Union 1261, UMWA*, 917 F.2d at 47-48. It is significant here that the hazards to which miners and other persons are exposed on the access road are essentially typical highway hazards — they are not hazards peculiar to quarries, other mining operations, or traditional mine haulage roads. Indeed, we note that, from the lengthy videotape evidence submitted, the access road appears to be virtually indistinguishable from State Route 138 in its composition, layout, and terrain. Jt. Ex. 71. Thus, we conclude that placing commonsense limitations on Mine Act jurisdiction in this case is consistent with the purposes and policies of the Act.

Finally, the Secretary points to the legislative history of the Mine Act as support for the notion that Congress nevertheless intended that the road fall under Mine Act jurisdiction. S. Br.

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[14] In addition to the requirements of Part 56, the extensive requirements of Part 50 governing notification, investigation, reporting, and recording of accidents, injuries, and illnesses attributable to any worker's use of the road, regardless of whether the worker had a connection to National Cement, would also presumably apply, as those regulations use the Mine Act definitions of "mine" and "miner." *See* 30 C.F.R. § 50.1 et seq.

at 22-25. In discussing the issue of jurisdiction, the Committee responsible for drafting the Mine Act stated that:

> it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978). The Sixth Circuit in *Bush & Burchett*, however, specifically rejected the idea that this portion of the Mine Act's legislative history can be used to extend Mine Act jurisdiction to areas that defy common sense and lead to bizarre results. 117 F.3d at 937.[15]

The Secretary also argues that National Cement should not be permitted to escape Mine Act jurisdiction over the road because of agreements it entered into with Tejon. S. Br. at 29. The Commission has generally refused to let parties' commercial agreements limit the reach of the Mine Act. *See, e.g., Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 620-21 (May 1985) ("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."); *Republic Steel Corp.*, 1 FMSHRC 5, 11 (Apr. 1979) ("[a] mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.").

Here, however, there is no credible allegation that National Cement's agreements with Tejon were designed to limit Mine Act jurisdiction over the road. The agreements establishing the cement plant and the use of the access road predate the enactment of the Mine Act (Jt. Exs. 1-3), and there is no evidence that the agreements were entered into for any reason other than legitimate business concerns on the part of Tejon and the original cement plant operator. Moreover, the record establishes that Tejon uses the southern portion of the Ranch to pursue

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[15] As both parties acknowledge (S. Br. at 23-24 n.8; NCCC Br. at 28), a definition of "mine" much along the lines of that now found in section 3(h)(1) of the Mine Act, and including the subsection (B) language at issue here, originated in a predecessor statute to the Mine Act, the Federal Metal and Nonmetallic Mine Safety Act. *See* Pub. L. No. 89-577, Sec. 2(b), 80 Stat. 772, 772-73 (1966). There is no explanation in the reports that accompanied that legislation of the meaning of "private ways and roads appurtenant to." *See* 1966 U.S.C.C.A.N. 2846 (S. Rep. No. 89-1296). Consequently, the applicable legislative history is of no assistance in determining whether Congress intended to extend MSHA's jurisdiction to a road over which the mine operator substantially lacked the ability to exclude other users, as is the case here.

other significant commercial interests, and that the road at issue here is necessary to those uses. *See* Contestant's Mem., Ex. 1, ¶¶ 5-6.

As discussed above, the definition of "coal or other mine" must be applied to the unique factual circumstances in this case in a way that avoids absurd or unintended results and is consistent with the purposes and policies of the Act. Accordingly, we reverse the judge's conclusion that the entire access road is subject to Mine Act jurisdiction. Interpreting section 3(h)(1)(B)'s extension of Mine Act jurisdiction over "appurtenant" roads in the context of the Mine Act as a whole, we hold instead that only such portion of the access road over which National Cement and its customers have exclusive use can be considered an appurtenant road in this instance. While not established with specificity below, it appears from the record that there is a point on the road, at or near the last crossroads departing the access road on the way to the cement plant, beyond which traffic authorized by Tejon but unrelated to National Cement's facility ceases.[16] On remand, the judge should ascertain that point, reopening the record if necessary, and Mine Act jurisdiction would extend under section 3(h)(1)(B) only to the segment of the road between that point and the entrance to the National Cement facility.

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[16] Our holding does not leave the remainder of the access road unregulated. As in the case of *Bush & Burchett*, (*see supra* n.7), jurisdiction for workplace health and safety would lie with OSHA, its state counterpart in California, or both. *See* 29 U.S.C. § 653(b)(1) (OSHA has jurisdiction to regulate working conditions of those employees whose occupational health and safety is not regulated by other federal agencies or by state agencies pursuant to the OSH Act); Cal. Lab. Code § 6307 (Division of Occupational Safety and Health in California Department of Industrial Relations "has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary to adequately enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment").

III.
Conclusion

For the foregoing reasons, we vacate the judge's decision granting the Secretary's motion for summary decision and remand the case for further proceedings consistent with this decision.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

The majority states that in order to avoid "absurd results," it must find that the Department of Labor's Mine Safety and Health Administration ("MSHA") has no jurisdiction over most of an access road leading to a cement plant and quarries owned by National Cement Company of California, Inc. ("National Cement"). Slip op. at 8-14. Accordingly, miners driving on the road are bereft of protection under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). In reaching their conclusion, my colleagues caution against an interpretation of the jurisdictional language in the Mine Act "that disregards real, practical implications," slip op. at 9, and yet they fail to mention, much less analyze, the "real, practical implications" of a completely unregulated road over which miners working for National Cement travel daily and where they are exposed to safety hazards. Because I disagree with the majority's rationale, I dissent and would hold that MSHA has jurisdiction over the entire road at issue.

My analysis of this jurisdictional question begins, as it must, with the language of the Mine Act. Section 4 of the Mine Act states in part that "[e]ach coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Like other terms used in the statute, the term "coal or other mine" is defined in Section 3 of the Act, 30 U.S.C. § 802. Specifically, section 3(h)(1) defines it in relevant part as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, [and] (B) private ways and roads appurtenant to such area . . . .

30 U.S.C. § 802(h)(1). Thus, the controlling question in this case is whether the road at issue is private and appurtenant to an area of land from which minerals are extracted.

Substantial evidence supports the judge's conclusion that the road is private, and the majority appears to have implicitly adopted this finding. Slip op. at 7-8.[1] The parties, by their stipulations, established that the road is not now available to the public and is intended for or restricted to the use of a particular group or class of persons — that is, those that Tejon and National Cement permit to use it. 27 FMSHRC 84, 86 (Stip. Nos. 10-11), 87-89 (Stip. Nos. 16-21), 99 (Jan. 2005) (ALJ). For example, the signs erected by National Cement at the entrance to the road warn the public that the road is private. One states "You Are Now Entering Private Property Of National Cement Co., Inc." Jt. Ex. 22. The terms of the easement that National Cement holds in the road actually require the operator to post the road as private. Jt. Ex. 1 at 2. The road's use is restricted to those permitted there by National Cement and Tejon, 27 FMSHRC at 87 (Stip. No. 21), and trespassing is explicitly forbidden. *Id.* at 88 (Stip. No. 21b, c).; Jt. Exs.

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[1] The parties agree that "private" means "intended for or restricted to the use of a particular person or group or class of persons; not freely available to the public." Slip op. at 7-8, citing *Webster's Third New Int'l Dictionary* 1804-05 (1993).

18, 19. In fact, Tejon admits that the road is private. Sec'y's Mot. for Summ. Dec., Ex. 3 at 3 (Intervenor's Adm. No. 2). Moreover, the agreed upon definition of "private" makes it clear that something can be private even if more than one party can use it, as the definition contemplates that a user can be a member of a group or class of persons to which use is restricted.

Substantial evidence also supports the judge's finding that the road is appurtenant. The parties do not dispute the definitions relied upon by the judge in his decision:

> "a: annexed or belonging legally to some more important thing (a right-of-way – to land or buildings); b: incident to and passing in possession with real estate – used of certain profits or easements." *Webster's Third New International Dictionary* 107 (1993). An "easement appurtenant" is defined as: "an easement created to benefit another tract of land, the use of easement being incident to the ownership [or leasehold] of that other tract." *Black's Law Dictionary* 549 (8th ed. 2004).

27 FMSHRC at 99.

As my colleagues acknowledge, slip op. at 8, it is undisputed that National Cement's property interest in the road is by way of easement. 27 FMSHRC at 99. Furthermore, the Secretary points out that the road is incident to, and would pass in possession with the lease from Tejon pursuant to which National Cement operates the cement plant. *Id.*; S. Br. at 21 (citing Jt. Ex. 2). In contrast, National Cement argues that the road is not annexed to the mine in this instance, as the mine does not control the road, and despite the easement National Cement has to use the road, the road exists not to exclusively benefit the mine, but rather benefit the larger Tejon tract of property of which the mine is but a part. NCCC Br. at 27-28.

National Cement argues that the plain meaning of the term "appurtenant" as it applies to private roads reaches only those private roads over which the mine has exclusive use and control, but the dictionary definition of that term explains it by way of references that run counter to such a notion. There is no denying that a "right-of-way to land or buildings," referred to in the first *Webster's* definition of the term, can be granted to or otherwise possessed by more than one party. The same can be said with respect to an "easement," referred to in the second definition. Indeed, the Memorandum of Easement submitted by the parties describes the "right-of-way easement" granted as "non-exclusive." Jt. Ex. 2 at 1.

Moreover, *Webster's* additionally defines "appurtenant" as "belonging, appropriate, accessory." *Webster's* at 107. The parties have stipulated that the subject road provides the only vehicular *access* to the cement plant for raw materials entering it and cement product exiting it. 27 FMSHRC at 86 (Stip. No. 12). It appears, therefore, that the plant cannot operate without the road. Accordingly, I do not agree that considerations of exclusive control override the plain meaning of the term "appurtenant" as it is used in section 3(h)(1)(B). *Cf. RNS Servs., Inc. v.*

Sec'y of Labor, 115 F.3d 182, 186 (3rd Cir. 1997) (refusing to read a purity requirement into "coal" as it is used in section 3 definitions).[2]

Furthermore, there is nothing in the legislative history of the Mine Act that supports the notion that Congress intended the Act to cover only those private access roads over which a mine operator had exclusive use and control. The legislative history, in comparing the definition of "mine" in the Mine Act with that found in its predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 ("Coal Act"), states that "*all* private roads" appurtenant to mineral extraction areas were to be included in the definition of "coal or other mine." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist.*"). This passage clearly cuts against the restrictive interpretation of "private" and "appurtenant" urged by National Cement and accepted by the majority.

In addition, when Congress enacted the Mine Act, the Conference Committee stated that the definition of "mine" should include "roads . . . related to the mining activity." S. Conf. Rep. No. 95-461, at 38 (1977), *reprinted in Legis. Hist.* at 1316. The road at issue is certainly "related to mining activity," as it provides the sole means of access to the cement plant and is used almost continuously by heavy trucks carrying materials and products to and from the plant. 27 FMSHRC at 91 (Stip. Nos. 39-42).

Despite the fact that both the plain meaning of the statutory terms and the legislative history of the Mine Act support MSHA's jurisdiction over the road, the majority reads a third criterion into the Mine Act jurisdictional language (private and appurtenant *and* exclusive use) under the protective guise of the "absurd results" doctrine. Slip op. at 8-14. In effect, the majority's ruling changes the language of the Mine Act, "read[ing] into the statute a drastic limitation that nowhere appears in the words Congress chose . . . ." *Hercules, Inc. v. EPA*, 938 F.2d 276, 280 (D.C. Cir. 1991). *See also Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1280 (10th Cir. 1995); *Asarco, Inc. - Northwestern Mining Dept. v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989). Relying on the necessity to avoid "absurd results," the majority holds that only the portion of the road over which the operator has "exclusive use can be considered an appurtenant road in this instance." Slip op. at 15. The occasional and sporadic use of the road by others should not deprive the National Cement trucks of Mine Act protection – *that* is the absurd result occurring here.[3]

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[2] I note that National Cement chose to acquire a cement plant on leased property with road access pursuant to a non-exclusive easement. The Commission has generally refused to permit the design of employers' commercial relationships to limit the reach of the Mine Act where it would otherwise apply. *See Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 620-21 (May 1985).

[3] Although my colleagues cite *Bush & Burchett, Inc. v. Secretary of Labor*, 117 F.3d 932 (6th Cir. 1997), when they suggest that, despite their holding, the access road would be regulated,

The Secretary's reminder that mine operators have frequently been held liable even for violations for which they were not at fault, S. Br. at 28-32, is interpreted by the majority as an indication the Secretary is prepared to cite National Cement for a violation that might be committed by a user of the road who had no connection to National Cement's operations. Slip op. at 12. The specter of National Cement receiving a citation, for example, because of a condition observed on the vehicle of an employee of a movie and video production company causes my colleagues great discomfort. As well it should. In fact, I share their concern about the fairness of such an enforcement action. But I see no evidence that the Secretary intends to enforce the Act in such a bizarre fashion. Indeed, citing to *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1290 n.3 (D.C. Cir. 1990), the Secretary acknowledges authority stating that there may be occasions when an entity's contact with a mine is "so attenuated as to remove it from MSHA jurisdiction." S. Br. at 31.[4]

Accordingly, I am reluctant to join the majority in basing my decision in this matter on the proposition that the Secretary may cite "workers with no connection to National Cement." Slip op. at 12. The Secretary simply has not indicated any intent to cite National Cement to address conditions it is not in a position to correct.

In any event, other than with respect to the road itself, MSHA's regulation of transportation under 30 C.F.R. Part 56 is largely drafted to apply only to mine vehicles and equipment, so the regulations should not reach non-mine users of the road. *See* 30 C.F.R. Part 56, Subpart H ("Loading, Hauling, and Dumping"). Thus, the majority's concerns are not only misplaced but possibly unfounded. Many of the regulations apply only to vehicles that would not

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slip op. at 15 n.16, their reliance is misplaced. That case involved a construction site located on a haul road and bridge. 117 F.2d at 935. The court ruled that the worksite was covered by the Occupational Safety and Health Act instead of the Mine Act. *Id.* at 940. The violations at issue did not involve road conditions; rather, they included alleged safety violations at the construction worksite itself (e.g., rung spacing on a ladder, fire extinguishers, fall protection, etc.). *Bush & Burchett, Inc.*, 17 OSHC 1531, 1538, 1540, 1542 (1995). My colleagues have failed to point out any regulation promulgated by the Occupational Safety and Health Administration that would require the installation of a berm or guardrail on the road at issue here, and indeed, I have been unable to locate one.

Also, although my colleagues appear to suggest that the Court upheld the ruling of the Occupational Safety and Health Review Commission that the road was "'appurtenant' to an area of land from which minerals are extracted," slip op. at 7 n.7, the court expressly refused to address that issue, because it found the road to be public, not private. 117 F.3d at 936-37 n.6.

[4] My colleagues are not reassured by the Secretary's citation to *Otis*, because, according to them, the case involved a contractor, rather than an operator. Slip op. at 12 n.13. However, under section 3(d) of the Mine Act, 30 U.S.C. § 802(d), such a contractor performing services at a mine is an operator.

be driven by non-cement plant users of the road or reference activities that would only occur within the confines of the cement plant itself. Those regulations which do apply to all vehicles require nothing out of the ordinary of their drivers and recognize different standards are appropriate for different vehicles. *See, e.g.*, 30 C.F.R. § 56.9101 ("Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used.").

My colleagues reject the "literal interpretation" of the statutory language offered by the Secretary because it is "necessary to consider the language in the context of the Mine Act." Slip op. at 8. However, the context chosen by the majority appears to be one of operator convenience, rather than of miner safety. The majority gives lip service to an interpretation "consistent with the purposes and policies of the Act" but never discusses the safety implications of its decision and the lack of protection it creates for miners traveling on the road. Inexplicably, and with no citation to the record nor with any explanation, the majority opines that "the hazards to which miners . . . are exposed on the access road are essentially typical highway hazards — they are not hazards peculiar to . . . traditional mine haulage roads." Slip op. at 13. I fail to see how the miners driving these trucks are not at risk for some of the same hazards found on mining roads.[5] In fact, the potential dangers that miners driving trucks could face on the road, described by MSHA Assistant District Manager Ronald Goldade (Sec'y's Mot. for Summ. Dec., Ex. 5 (Aff. of Goldade) at 1-2), are addressed by MSHA regulations regarding haulage roads found in Part 56 Subpart H ("Loading, Hauling, and Dumping"). *See, e.g.*, 30 C.F.R. § 56.9100 ("Traffic Control"); 30 C.F.R. § 56.9101 ("Operating Speeds and Control of Equipment"); 30 C.F.R. § 56.9300 ("Berms or Guardrails").

Permitting concerns about future National Cement liability for non-mining related activity to guide the outcome of this case is letting the tail wag the dog. The majority lists a speculative

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[5] The citation issued in this case (for a violation of 30 C.F.R. § 56.9300, requiring berms or guardrails) describes a situation typically found on mine haulage roads. It states:

> The roadway was used extensively by large over-the-road trucks, delivery vehicles, and personal vehicles of mine personnel and vendors. The lack of berms or guardrails on the two lane road presented a hazard particularly during inclement weather when vehicles could be expected to slide and potentially become involved in accidents.

27 FMSHRC at 86-87; Jt. Ex. 70. In addition, although the majority focuses on the type of road at issue, the type of truck used by National Cement has been identified by MSHA as particularly hazardous. ("[L]arge haulage vehicles with a high center of gravity and relatively narrow wheel track width are more susceptible to overturning than small utility trucks." Safety Standards for Loading, Hauling, and Dumping at Metal and Nonmetal Mines, 49 Fed. Reg. 49,202, 49,209, (proposed Dec. 18, 1984)) .

parade of horribles that could be created if jurisdiction were found here. It fails to focus on the ongoing use of the road by heavy mine trucks and fails even to mention the concrete reality of the dangerous situations that have already occurred on this road. The parties stipulated that most of the traffic on the road is for cement-plant related purposes. 27 FMSHRC at 91 (Stip. No. 38). In fact, the judge found that "[n]on-National Cement use of the road is dwarfed by National Cement traffic." *Id.* at 101. National Cement trucks run 6 days per week, with an average 148 round-trips made daily by the tanker trucks. *Id.* at 91 (Stip. No. 42). As many as 33,887 trucks travel up the mine road annually. Jt. Ex. 64. The trucks weigh approximately 25,000 pounds empty as they arrive at the plant and approximately 80,000 pounds loaded as they leave. 27 FMSHRC at 91 (Stip. No. 39). In addition, there are also an average of 84 employee round trips and 5 deliveries to the cement plant daily. *Id.* (Stip. No. 43). Accidents have occurred on the road, including the rollover of one heavy truck and the partial rollover of another. Sec'y's Mot. for Summ. Dec., Ex. 5 (Aff. of Goldade); *Id.*, Ex. 6 (National Cement Accident Report & Mem. from Randy Logsdon dated Sept. 8, 2003); *Id.*, Ex. 7 (Contestant's First Supplemental Resp. to Interrog. No. 19). Furthermore, miners have made numerous complaints to MSHA regarding the road conditions. *Id.*, Ex. 5 (Aff. of Goldade).

It appears that my colleagues, in addressing the interpretive and jurisdictional questions raised by this case, have not focused on the concerns outlined above. Thus, while basing their entire analysis on the "absurd results" exception to the plain meaning doctrine of statutory interpretation, they completely ignore an equally important canon of statutory construction stating that remedial legislation should be construed broadly so as to effectuate its purpose, and that therefore questions of interpretation should be resolved to ensure consistency with the safety-promoting purposes of the Mine Act. *See Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999); *RNS Servs. Inc.*, 115 F.3d at 186-87.

Finally, my colleagues restrict jurisdiction to that part of the road where National Cement has exclusive use, but appear unable to cite to any part of the record demonstrating that such exclusive use in fact exists ("While not established with specificity below, it appears from the record that there is a point on the road . . . beyond which traffic . . . unrelated to National Cement's facility ceases," slip op. at 15, is as clear as the majority could get on this point). Thus, they are merely presuming that there actually is a portion of the road where other individuals (with no connection to National Cement's work) could be banned or would not venture. This is pure speculation.[6] However, what *is* established is that heavy trucks are making 148 round trips

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[6] National Cement has consistently protested throughout this litigation that it does not have exclusive control over the road. *See, e.g.*, Contestant's Mem. in Support of Mot. for Summ. Dec. at 1, 2, 4, 21. *See also id.* at 6 ("National Cement does not and cannot control who travels on the 4.3 mile portion of the road lying between the highway and the entrance to the plant . . . ."). Also, according to the National Cement plant manager, "[o]n its northern end, on the eastern side of the Lebec Plant, the road continues beyond the cement plant in a northeasterly direction." *Id.*, Ex. 2 at 1, ¶ 4 (Aff. of Byron E. McMichael). Tejon also stated that "the actual ranch road continues on past where the paved portion ends near the cement plant, and serves

on the road every day, that some miners have complained of dangerous conditions and that, due to the majority's decision, there is no legal entity with the authority to impose safety measures that could prevent accidents and possibly save lives. Accordingly, I respectfully dissent.

Mary Lu Jordan, Commissioner

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other purposes and persons unrelated to the cement plant, as it has for many years . . . ." Sec'y's Mot. for Summ. Dec., Ex. 3 at 3 (Intervenor's Adm. No. 1); *see also* Jt. Ex. 10 (map of area). Accordingly, I am puzzled by the majority's assertion that "it appears from the record that there is a point on the road, at or near the last crossroads departing the access road on the way to the cement plant, beyond which traffic authorized by Tejon but unrelated to National Cement's facility ceases." Slip op. at 15. The majority's holding would appear to lead to a kind of "floating jurisdiction" for MSHA, because if National Cement has exclusive use over a different portion of the road in the future, it seems as if jurisdiction will subsequently attach there as well.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 30, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 2005-241
	:	A.C. No. 36-00958-48507
v.	:	
EIGHTY-FOUR MINING COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On August 12, 2005, the Commission received from Eighty-Four Mining Company ("Eighty-Four") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 28, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Eighty-Four for a citation issued to the company by MSHA on July 21, 2004. Mot. at Ex. 1. Eighty-Four states in its motion that it had already timely contested the citation, which is the subject of Docket No. PENN 2004-232-R. Mot. at 1. This proceeding is currently on stay before Commission Administrative Law Judge David Barbour. Eighty-Four states that it failed to timely contest the proposed penalty assessment at issue because of "inadvertence and mistake." *Id.* at 2. The Secretary states that she does not oppose Eighty-Four's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 30, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2005-245
ADMINISTRATION (MSHA)	:	A.C. No. 36-07059-42383
	:	
v.	:	Docket No. PENN 2005-246
	:	A.C. No. 36-07059-44995
CHESTNUT COAL COMPANY	:	
	:	Docket No. PENN 2005-247
	:	A.C. No. 36-07059-51978
	:	
	:	Docket No. PENN 2005-248
	:	A.C. No. 36-07059-58839
	:	
	:	Docket No. PENN 2005-249
	:	A.C. No. 36-07059-61229

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On August 17, 2005, the Commission received from Chestnut Coal Company ("Chestnut") motions made by counsel to reopen five penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers PENN 2005-245, PENN 2005-246, PENN 2005-247, PENN 2005-248, and PENN 2005-249, all captioned *Chestnut Coal Company* and all involving similar procedural issues. 29 C.F.R. § 2700.12.

penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On November 10 and December 8, 2004, and March 9, June 8, and July 6, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed assessments to Chestnut. Mot. at 1, Ex. (the five motions to reopen filed by Chestnut are similar, and citations herein are to all five motions). In its motions, Chestnut states that the employee responsible for processing proposed penalty assessments for the company was familiar with contest procedures that existed prior to 2004, i.e., returning a "green card" to MSHA. Mot. at Aff. This employee was unaware of new contest procedures that require a plain white printout to be returned to MSHA. *Id.* The employee discovered his error when he consulted with Chestnut's attorney. *Id.* Chestnut further states that it had intended to contest the proposed penalties. *Id.* The Secretary states that she does not oppose Chestnut's requests for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Chestnut's motions, in the interests of justice, we remand these matters to the Chief Administrative Law Judge for a determination of whether good cause exists for Chestnut's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 30, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. YORK 2005-138-M
	:	A.C. No. 37-00093-52286
v.	:	
HOLLISTON SAND COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On August 25, 2005, the Commission received from Holliston Sand Company, Inc.("Holliston Sand") 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).

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

On March 11, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Holliston Sand the proposed penalty assessment at issue. In its letter, Holliston Sand addresses the merits of the citation underlying the proposed assessment. The company offers no explanation, however, for its failure to timely contest the proposed assessment. The Secretary states that she does not have enough information to determine whether reopening may be warranted.

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

Walter Res., Inc., 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

I would deny the operator's request for relief from the final order. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, Holliston Sand has failed to provide any explanation to justify its failure to timely contest the proposed penalty assessment. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief). Accordingly, I find no grounds upon which relief could be granted in this case, and would deny the company's request and dismiss these proceedings without prejudice.

Mary Lu Jordan, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

Washington, D.C. 20001-2021

November 1, 2005

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

DECISION

Appearances: Edward H. Fitch IV, Esq., Mark R. Malecki, Esq., Keith E. Bell, Esq., Paul D. Knothe, Esq., James F. Bowman, U.S. Department of Labor, Arlington, Virginia, on behalf of the Petitioner;
David M. Smith, Esq., Kevin W. Patton, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama; Timothy M. Biddle, Esq., Thomas C. Means, Esq., Crowell & Moring, L.L.P., Washington, D.C., on behalf of the Respondent;
Judith E. Rivlin, Esq., United Mine Workers of America, Fairfax, Virginia; Thomas F. Wilson, United Mine Workers of America, Birmingham, Alabama, on behalf of the Intervenor

Before: Judge Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") on behalf of her Mine Safety and Health Administration ("MSHA") against Jim Walter Resources, Inc. ("JWR"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. §§ 815, 820 ("Mine Act" or "Act"). The Secretary seeks the assessment of civil penalties for eight alleged violations of mandatory safety standards for underground coal mines. 30 C.F.R. § 75.1 *et seq*. The alleged violations are set forth in one citation issued pursuant to section 104(a) of the Act and one citation and six orders issued pursuant to section 104(d) of the Act. 30 U.S.C. §§ 814(a), 814(d). The enforcement actions arise out of the Secretary's investigation of two explosions that occurred at JWR's No. 5 Mine ("the mine") on September 23, 2001. The explosions took the lives of 13 miners and injured several others. The Secretary views each of the alleged violations as directly contributing

to the cause of the explosions and/or the resulting deaths and injuries. She alleges the conditions constituting the violations were significant and substantial ("S&S") contributions to mine safety hazards and, in seven instances, were the result of JWR's unwarrantable failure to comply with the standards. She seeks civil penalties that total $435,000.[1]

Following the filing of the petition, JWR denied the violations and contested the Secretary's S&S and unwarrantable assertions. In addition, the United Mine Workers of America ("UMWA") entered the case as an intervenor.

The parties engaged in extensive pretrial discovery. As discovery neared its final stage, the company filed summary decision/judgement motions and motions in limine. The motions were denied. *Jim Walter Res., Inc.*, 26 FMSHRC 623 (July 2004) (ALJ) (order denying motion for summary decision); *Jim Walter Res., Inc.*, 26 FMSHRC 734 (Aug. 2004) (ALJ) (order denying motion for reconsideration or certification); *Jim Walter Res., Inc.*, 26 FMSHRC 754 (Sept. 2004) (Commission's order denying petition for interlocutory review); *Jim Walter Res., Inc.*, 26 FMSHRC 830 (Oct. 2004) (ALJ) (order denying motions in limine and summary judgement). The case was tried in Birmingham, Alabama. During the course of the trial 65 witnesses testified and 396 exhibits were entered into evidence. There are 9,528 pages of transcript.[2]

I. FACTUAL BACKGROUND

The mine, which began operating in 1978, is an underground bituminous coal mine located in Tuscaloosa County, Alabama. During the first two quarters of 2001, it produced slightly more than 500,000 tons of coal each quarter and, at the time of the accident, it employed 318 contract miners and 70 salaried miners. Gov't Ex. 10 at 2. Eighty percent of the coal was

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[1] The Secretary proposed civil penalties of $55,000 for all of the alleged violations except one, for which a penalty of $50,000 was proposed.

[2] Originally Docket Nos. SE 2003-161 and SE 2003-174 were consolidated with Docket No. SE 2003-160. Prior to the hearing, the parties agreed that, of 18 alleged violations at issue in Docket No. SE 2003-161, 17 could be settled. They further agreed that the sole remaining alleged violation in Docket No. SE 2003-161, Citation No. 7328084, should await a final Commission decision in Docket No. SE 2003-160. Therefore, the allegations concerning Citation No. 7328084 were removed from Docket No. SE 2003-161 and placed in Docket No. SE 2003-161-A, which was stayed. The parties' settlement of Docket No. SE 2003-161 was approved on June 1, 2005 and the case was dismissed. Docket No. SE 2003-174, contained eight alleged violations, of which the parties were able to settle seven. On July 14, 2004, I approved a partial settlement of the case and effectively stayed the remaining portion of the case, noting that, at the parties' request, a determination on the allegations concerning the remaining citation, Citation No. 7679648, would be deferred until the decision in Docket No. SE 2003-160 issued. *See* E-mail dated March 15, 2005 (Docket No. SE 2003-174).

produced by longwall mining. The longwall panels were developed by continuous mining machine ("continuous miner") sections.

In September 2001, the mine contained a longwall unit and two development units. The longwall unit was functioning on the H panel. The two development units were the No. 4 Section and the No. 6 Section. Each section had four entries. From left to right heading inby, the No. 1 Entry was a return entry, the No. 2 Entry was an intake entry as well as a track entry, the No. 3 Entry was an intake entry as well as a belt haulage entry, and the No. 4 Entry was a return entry. *Id.*; Tr. 12 at 173; *see also* Gov't Ex. 15. Brattices separated the intake belt entries from the returns, and on the No. 4 Section there were overcasts at the section's mouth. Tr. 12 at 172-74.

Only coal from the Blue Creek Seam was produced at the mine. The seam is extremely soft and when it was mined, it tends to liberate high quantities of methane. In general, the seam was thick enough to allow entry heights between 6 and 7 feet. The roof strata above the Blue Creek Seam consisted of the "Middleman," a strata of silty shale that in general was 6 to 7 feet thick; above the "Middleman" was another coal seam, the Mary Lee Seam, which usually was 10 to 16 inches thick; above the Mary Lee Seam was the main roof of sandy shale and sandstone. Gov't Ex. 10 at 25; Tr. 12 at 171-72.

Roof control was governed by the approved roof control plan. As pertinent to the events at issue, JWR was using 72-inch-long, fully grouted resin bolts as a primary means of roof support. The bolts were supplemented as needed with 10-foot-long, non-tensioned cable bolts with 4-foot grouted length. Gov't Ex. 10 at 24. Although under the plan, the maximum width of entries and crosscuts was 24 feet, entries and crosscuts typically were mined 20 to 21 feet. *Id.*

The mine is very gassy. In the months before the accident, samples and air quality measurements indicated that the mine liberated over 17,000,000 cubic feet of methane per day ("cfmd"). In the 3 weeks leading up to the accident, the No. 4 Section, the section where the explosions originated, liberated 1,400,000 cfmd. Gov't Ex. 10 at 32.

The mine was ventilated by an exhaust system. Air entered the mine through four intake shafts and exited through two return shafts. As previously noted, the No. 4 Section and the No. 6 Section were ventilated with dual return aircourses, and air used to ventilate the faces coursed up the No. 2 and No. 3 Entries and returned through the No. 1 and No. 4 Entries. Gov't Ex. 10 at 30-32.

Surface to underground communication was accomplished via a mine-wide telephone system. A central telephone was located in the surface CO room. From that telephone the CO room supervisor was able to call all of the underground telephones in the mine.[3] Each

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[3] The exact number of underground telephones is not clear. The CO room supervisor, Harry House, believed there might have been more than 20 telephones. Tr. 5 at 352.

underground telephone was equipped with an audible speaker system. If the telephone was not answered, the person on the surface could make an audible page. Tr. 5 at 352. However, the page did not guarantee miners would be contacted in that it was possible for them to be working outside hearing range of the page.

A. The Accident[4]

The explosions originated in the No. 2 Entry on the No. 4 Section, in the vicinity of Survey Station No. 13333 ("SS 13333"). At the time of the accident, SS 13333 was located three crosscuts outby the face of the No. 2 Entry. Gov't Ex. 10 at App. L. The intersection of the crosscut and the entry where SS 13333 was located initially was supported by 72-inch, fully grouted resin bolts and metal straps. The roof support in the intersection met the requirements of the roof control plan.

Nothing unusual was noticed in the intersection for some time after the No. 2 Entry was driven. *Id.* at 4. The first sign of anything out of the ordinary was seen by Burt Duvall, the No. 4 Section coordinator, during the day shift on Friday, September 21.[5] Duvall noticed small cracks in the roof and water dripping from the roof. Duvall believed that further roof support was required so he instructed Greg Brown, the day shift section foreman, to have cable bolts installed. As a result, approximately 16 10-foot-long cable bolts were placed in the roof. Gov't Ex. 10 at 4.

That same day, during the afternoon shift, the belt was moved up to the second crosscut outby the face of the No. 2 Entry. In addition, the battery charging station was moved up to the third crosscut outby the face, between the No. 1 and No. 2 Entries, adjacent to the SS 13333 intersection. There were yield pillars on either side of the battery charger. The afternoon shift section foreman, Michael Buchanan, noticed water dripping from the roof at the SS 13333 intersection. Gov't Ex. 10 at 4.

With the movement of the belt and battery charging station, coal was ready to be produced at the faces of the No. 4 Section. As a result, mining took place on the next two shifts (the midnight shift and the day shift of September 22). The roof at the SS 13333 intersection was observed by the mine foremen on the midnight and day shifts. Although water continued to drip from the roof, the foremen did not think the situation was hazardous. Gov't Ex. 10 at 4.

The September 22 afternoon shift was devoted to maintenance work. Included in the work was the rock dusting of the section belt entry. Gov't Ex. 10 at 4. Foreman Michael

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[4] Because of the nearly simultaneous nature of many of the events, a strictly chronological description of the accident is not possible.

[5] There were three shifts at the mine: (1) day shift, (2) afternoon or evening shift, and (3) midnight or owl shift.

Buchanan did not detect any worsening of roof conditions at the SS 13333 intersection during the shift. *Id.*

No work was scheduled for the next shift, the midnight or owl shift, on September 23. Albert "Jack" Dye, Jr., a precision mason, was scheduled to work on the owl shift from 11:00 p.m. on September 22 to 7:00 a.m. As part of his duties, Dye conducted the preshift examination for the oncoming day shift of September 23. Dye traveled in the track entry (the No. 2 Entry) of the No. 4 Section as far as the power center. He found and reported no hazards. Tr. 3 at 393-95. To Dye, the rock dust that existed in the No. 2 Entry looked like a "light snowfall." *Id.* at 398. It was "adequate," but he believed that more "probably" was needed. *Id.* at 399. Dye observed water dripping around the roof bolt holes, approximately 30 to 40 feet outby the SS 13333 intersection. Gov't Ex. 10 at 4; Tr. 3 at 400.

John Puckett was the section foreman on the September 23 day shift. Puckett also noticed a small amount of water dripping from the roof bolt holes near the SS 13333 intersection. However, Puckett saw nothing indicating the roof was moving or unstable. Tr. 4 at 153. Puckett assigned his crew to, among other things, repair the continuous mining machine and move supplies into a newly established supply hole in the crosscut between the No. 3 and No. 4 Entries, three crosscuts outby the face. *Id.* at 206-07.

Later that day, around 1:30 p.m., Puckett conducted an examination for the oncoming shift. As he traveled toward the faces of the No. 4 Section, Puckett noticed the left rib was sloughing between the battery charger and the power center. Gov't Ex. 10 at 5; Tr. 4 at 137. Continuing his examination, Puckett entered the No. 1 Entry. Looking through a crosscut toward the No. 2 Entry, he noticed a yield pillar with sloughing ribs in the entry inby the battery charging station. He also noticed a small hole in a stopping. Tr. 4 at 138. Puckett called Duvall. Puckett told him the ribs needed additional support and that the stopping should be repaired before mining took place on the section. Gov't Ex. 10 at 5; Tr. 4 at 139, 140.

Puckett instructed the electricians to move the continuous miner into the No. 1 Entry so the scoop could clean the sloughage in the No. 2 Entry and cribs could be built. Puckett called Dave Blevins, the afternoon shift foreman, to verify that Blevins understood that cribs would be needed. Tr. 4 at 155-56. Later in the shift, Puckett and another miner, David Terry, were in the No. 2 Entry near SS 13333 and Puckett asked Terry, who had been working in the area, about the sloughage. Terry told Puckett that it had been taking place "on and off all day." *Id.* at 220. Puckett observed the water that was dripping in the SS 13333 intersection. The amount "hadn't changed from the morning." *Id.* at 221.

The foreman of the oncoming evening shift was Tony Key. Before he went underground on the afternoon of September 23, Key spoke with Duvall who told him that he had spoken with Puckett and had learned the ribs of the yield pillar were sloughing in the area of the battery charging station. Puckett also spoke with Key when Puckett called out his preshift examination. Key recorded Puckett's report. Puckett remembered telling Key about the rib sloughage and the

fact that a stopping was damaged in the crosscut between the No. 1 and No. 2 Entries in the vicinity of SS 13333. *Id.* at 239. Although Puckett did not remember saying it, Key maintained that Puckett mentioned the roof was "working," or words to that effect, and Key wrote "top working" in the preshift examination report. Gov't Ex. 10 at 6; Tr. 6 at 47-48. Duvall instructed Key to build cribs at the four corners of SS 13333 and to build cribs on 5-foot centers on both sides of the No. 2 Entry from the battery charging station to the power center. *Id.*; Tr. 6 at 45.

The afternoon shift began around 3:00 p.m. Thirty-two persons went underground, four of whom were supervisors. As usual, foreman Dave Blevins intended to begin his shift at the bottom of the service shaft in case one of the work crews needed more supplies sent to its work areas. Gov't Ex. 10 at 7. Tony Key's job was to supervise work on the No. 4 and No. 6 Sections. Key assigned Mike McIe, a longwall machine helper, and Gaston "Junior" Adams, a longwall machine operator, to install cribs in the No. 2 Entry near the SS 13333 intersection. Tr. 6 at 56. Dennis Mobley and Charles Nail, electricians, were assigned to do maintenance work on equipment on both sections. *Id.* at 75. Skip Palmer, a motorman, was to transport roof control supplies to the No. 4 Section. Miners Robert Tarvin, Jerry Short, and John Knox were assigned to rockdust the belt entry beginning in Sub Main B. Benny Franklin, the longwall foreman, was to supervise activities at the longwall. Charles Ogletree and Jimmy Dickerson were to do maintenance work on the longwall, and George Corbin, an electrician, was to join them later in the shift. Three other miners, Sammy Riggs, Charles Smith, and Terry Stewart were to work on stopping construction in the H panel tailgate. Gov't Ex. 10 at 6.[6]

Before the assigned crews headed for the sections, Tony Key discussed the roof conditions in the vicinity of the SS 13333 intersection with Puckett. Gov't Ex. 10 at 7; Tr. 6 at 113. Puckett told Key to look at the ribs and roof to see if the roof bolts were "taking any weight." Tr. 6 at 113.

Tony Key and his crew arrived on the No. 4 Section shortly after 4:00 p.m. Key left the manbus, and he and McIe walked up the track entry toward the faces. Key heard the roof popping and cracking, and he saw trickles of coal falling off the ribs at various places. Key also saw a small slip in the roof at the SS 13333 intersection. The slip extended across the track, into the crosscut between the No. 1 and No. 2 Entries. *Id.* at 58, 117-19. Key and McIe saw water dripping from the roof. Gov't Ex. 10 at 7; Tr. 6 at 117. To Key, the roof bolts did not appear to

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[6] Other miners who were to work during the shift were: Christopher "Chris" Key, a fireboss/pumper; Clarence "Bit" Boyd and Nelson Banks, Jr, who were assigned tasks in 2 East; Tom Connor, Alvin Bailey, and Lonnie Willingham, who were assigned to work in the F panel headgate area; belt foreman Gene Robertson, who was assigned to supervise belt work on the 1 East and 2 East belts; Joseph Sorah, Vonnie Riles, Raymond Ashworth, and Bill Hallman, who were assigned to repair a section of the 2 East belt; Stewart Sexton, Rick Rose, and Wendell Johnson, who were assigned to belt maintenance on the 1 East belt; and Randy Jarvis, who was assigned to work primarily in H panel.

be taking excessive weight. Tr. 6 at 117. However, Key felt the roof was deteriorating. He ordered cribs built in the No. 2 Entry starting about 50 feet outby the SS 13333 intersection. *Id.* at 57-58.

After giving the work order, Key traveled to the battery charging station where he saw the stopping with the hole. The scoop battery was hung from roof bolts on chains and charging cables were connected to the battery. The charging cables were not energized. At about this time, McIe began to transport crib blocks inby on the track. Key went inby one crosscut to the power center where he observed sloughage along the left rib. Key left Adams and McIe, and Key walked to the faces of the No. 1 and No. 2 Entries to check for methane. *Id.* at 119-20. At both faces, the methane concentration was minimal. Gov't Ex. 10 at 7.

Returning from the face of the No. 1 Entry, Key met Nail and Mobley. They had traveled to the vicinity of the last open crosscut of the No. 1 Entry to move the continuous miner to the face of the entry so mining could begin on the next shift. Nail energized the miner and proceeded to the face. Meanwhile, McIe brought some crib blocks to Adams who was in the process of building the first crib. Gov't Ex. 10 at 7-8; Tr. 1 at 274-75.

Tony Key called Blevins from the telephone at the power center to tell him that materials were needed to repair the hole in the brattice. Tr. 6 at 52. Key then sent Nail and Mobley to the No. 6 Section to do needed repair work. Key checked again on the stopping adjacent to the battery charging station. The hole was bigger. Key also noticed that the slip in the roof extended into the No. 1 Entry. Gov't Ex. 10 at 8.

Tony Key re-entered the No. 2 Entry and proceeded to the location where Adams was building the crib. Key started to help Adams. McIe, who had finished bringing up the crib blocks, also started to help. Tr. 6 at 56-57. As the work continued, conditions rapidly degenerated. Water began to pour steadily from the roof and small rocks fell. Key, Adams, and McIe backed up a few steps. They heard sounds that indicated possible roof bolt breakage. At approximately 5:17 p.m., a large rock fell, then the roof in the entire intersection crashed down.

The fall obscured the battery and the charger. Key thought the equipment might be under the fallen rock. Key, Adams, and McIe walked outby the fall. *Id.* at 59. Key believed that electrical power to the section should be de-energized and the fall should be reported to MSHA. He told Adams and McIe that he was going to a telephone to call out a report, and he started outby. Gov't Ex. 10 at 8; Tr. 6 at 59-62.

1. The First Explosion

Minutes later Tony Key heard a loud detonation. He was picked up and hurled down the entry by the force of the air rushing outby. He lost his hard hat and cap lamp. His back was injured. Tr. 6 at 63-64. McIe was blown outby too. He also had his hat and lamp blown off. McIe was burned and his back and ribs were injured. Tr. 1 at 211-12. Palmer, who was at the

end of the track, was blown off his feet and down the track entry. He was without his hat and lamp. Gov't Ex. 10 at 89; Tr. 1 at 355. Adams was pinned under debris.

Following the explosion, Key, McIe, and Adams were separated. Their visibility was severely limited by dust in the atmosphere, and it was difficult for them to breath. Key could not see Adams or McIe, but he heard Adams say that he could not move. Tr. 6 at 69-70. McIe, who could see Adams, observed blood coming from Adams' mouth and ears. Tr. 1 at 212. McIe borrowed Adams' hat and lamp, but so much dust was swirling in the atmosphere it was difficult to see, even with the lamp. Key glimpsed a faint light and moved toward it. Key found McIe. *Id.* at 212-13. McIe's ribs were hurt and McIe thought he had been burned. Gov't Ex. 10 at 8. McIe told Key that Adams was partially covered by rocks from the fall. Key heard Adams moaning. He also heard the locomotive running at the end of the track outby. Key and McIe locked arms and following a cable in the track entry they walked toward the locomotive. *Id.* at 9; Tr. 1 at 213-14; Tr. 6 at 70-71. They wanted to find help for Adams.

Tarvin, Short, and Knox were in the Sub Main B area of the mine. They had been sent there to rockdust the belt. Before they could begin rockdusting, they noticed the air had reversed direction. Knox took a locomotive and traveled inby toward the No. 4 Section to investigate why the air changed. Tarvin and Short stayed where they were. Gov't Ex. 10 at 9; Tr. 1 at 427-30.

Franklin, Dickerson, Corbin, Ogletree, and other miners working in the longwall section also were aware something had happened. Each either heard a noise or felt his ears pop. Gov't Ex. 10 at 9; *see, e.g.*, Tr. 2 at 10-11. A few minutes after the explosion, the computer printout in the CO room indicated communication errors on the No. 4 Section and 4 East. Gov't Ex. 10 at 9.

On the longwall section the air became very dusty. Corbin thought a crew was rockdusting inby. As the atmospheric dust became thicker, Franklin tried to call inby and have the miners stop dusting. Franklin could not reach anyone. Franklin and his crew then took a mantrip and proceeded toward the main line track to find out what had happened. Tr. 2 at 11-12.

Meanwhile, as Tony Key and McIe made their way toward the locomotive and out of the No. 4 Section, the dust in the atmosphere had become so thick that the men could not see the locomotive's lights, which were on. When they reached the locomotive, the dust thinned somewhat. The men found Palmer who was getting to his feet. Key wanted to telephone the surface to request help for Adams and report the explosion. Key, McIe, and Palmer boarded the locomotive and headed outby. Gov't Ex. 10 at 9-10; Tr. 1 at 215-17; Tr. 6 at 71-73.

They were slowed by debris on the tracks. When Tony Key saw the lights from two cap lamps approaching, he stopped the locomotive, got off, and walked to meet the men. It was Nail and Mobley. Mobley told Key that he could not proceed much further in the locomotive because an overcast was damaged and debris was blocking the track. Key asked Nail to de-energize the high voltage electrical circuit to the No. 4 Section. Gov't Ex. 10 at 9-10; Tr. 6 at 74-77.

Near the mouth of the section, at the damaged overcast, the intake air was short circuiting into the return aircourse. Although Key could not tell which overcast was damaged, he concluded that the ventilation was seriously disrupted. Tr. 6 at 79-80.

As Nail traveled to de-energize the high voltage circuit, Key and Mobley proceeded outby on foot to find a working telephone. On their way out, they met Knox who had come to the mouth of the No. 4 Section on his locomotive. Key and Mobley told Knox what had happened. They boarded the locomotive with Knox, and the three men traveled outby to a telephone at the 3 East turn. *Id.* at 81-82. Knox told Key that he did not believe the telephone was working, but Key tried it while Knox went to another telephone in the area to call the CO room. Gov't Ex. 10 at 10; Tr. 6 at 83-85.

At about 5:45 p.m., Tony Key reached Harry House in the CO room.[7] Key maintained that he told House about the roof fall, the explosion, and the damaged overcast and stoppings. He also told House that Adams was injured and emergency help was needed. Tr. 6 at 83-85, 149.[8] Communication between Key and House was unclear and somewhat garbled, and Key's call ended abruptly. Tr. 5 at 398.[9] House tried to reach Key again through a mine-wide page, but Key could not hear the page. Gov't Ex. 10 at 11.[10]

Knox came back and told Key that the other telephone was not working and that he and Mobley were going to the No. 4 Section to help Adams. The two miners then headed toward the No. 4 Section on a personnel carrier. Gov't Ex. 10 at 11; Tr. 6 at 86-87. Key did not tell them to evacuate the mine because he knew they were going to help Adams. Tr. 6 at 87.

Back in the CO room, House tried to page Will Tanniehill, an afternoon shift foreman (House did not know that Tanniehill was not working). After failing to reach Tanniehill, House

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[7] House had been CO room supervisor at the mine since March 2001. Prior to 2001 he served in the same capacity at other JWR mines. Tr. 5 at 337-39.

[8] Key stated he did not recall saying anything about a fire underground. Tr. 6 at 86.

[9] A short time later Key again called House. Key maintained that someone other than House answered. Key did not know who. Key told the person that power to the mine should be disconnected. Tr. 6 at 89 ("I told whoever I talked to, to knock the power on the mines"). However, power never was totally disconnected because, on the way out of the mine, Key noticed the block light system was working. *Id.*

[10] Frankie Lee, who supervised Harry House, explained that the telephones were placed at strategic locations throughout the mine and that, by dialing a certain group of numbers, it is possible for the CO room supervisor to page all telephones. The page was heard simultaneously at all underground telephones. Such a page was referred to as a "mine-wide page." Tr. 3 at 279-80.

tried to page Gene Robertson, a belt foreman, whom House believed was working underground. At about 5:48 p.m., House called 911. The call went to the Tuscaloosa County Sheriff's Office and North Star Paramedic Services in Tuscaloosa. House stated that there was a fire, men were injured, and help was needed. Tr. 5 at 375-76. The call ended abruptly. Gov't Ex. 10 at 11.

House continued trying to reach Tanniehill through a mine-wide page. Blevins, who was still at the service shaft bottom, answered. Blevins asked House what was going on. House told Blevins that there had been an explosion and a roof fall, miners were injured, and they needed help. Tr. 5 at 359-60. House also testified that he told Blevins there had been damage to ventilation or that some brattices were destroyed. *Id.* at 360. House recalled Blevins responding "We're on our way," which House understood to mean that Blevins and other miners were going to help Adams. *Id.* at 361. Blevins then left the bottom of the service shaft in a manbus and headed for the No. 4 Section.

Stuart Sexton, who was working with Wendell Johnson and Rick Rose splicing the 1 East belt, heard House paging Robertson on a nearby telephone. Sexton told Johnson to call House. Johnson picked up the telephone and spoke with House. Tr. 2 at 109-10. Because Johnson did not identify himself, House thought that he was speaking with Robertson. House testified that he told Johnson there had been an explosion and roof fall, brattices were destroyed, and injured men needed help. Tr. 5 at 369-70. However, Johnson told Sexton and Rose that House said there was a fire or ignition on the No. 4 Section and he wanted all available miners to go to the area to help with the situation. Tr. 2 at 111, 174.[11] Johnson, Sexton, and Rose finished up what they were working on and traveled to the 2 East belt to get the other members of the belt crew. *Id.*

While this was happening, Knox and Mobley proceeded toward the No. 4 Section. When they reached it they left the locomotive on which they had been riding at the No. 4 Section switch, and traveled on foot inby where they encountered Palmer, McIe, and Nail. McIe told Knox that there had been a roof fall and explosion, Adams was inby, and he was hurt. Because McIe and Palmer were injured, Knox told them to leave the mine. Tr. 1 at 218-19. At about 5:55 p.m., Knox, Nail, and Mobley traveled into the No. 4 Section. Shortly before 6:00 p.m., McIe and Palmer walked outby to the locomotive at the No. 4 Section switch. Gov't Ex. 10 at 12. They boarded the locomotive, started outby, and a short time later saw Tony Key, whom they picked up. The three continued outby toward the E panel switch. Tr. 1 at 223-24.

In the CO room, House called deputy mine manager Trent Thrasher at home. House told Thrasher that there had been an explosion, miners were injured, one injured man was left on the section, and help was needed to evacuate and get the injured man out. Tr. 12 at 223-24. Thrasher asked if all the miners were on their way out of the mine, and House said he was getting the miners out. *Id.* at 224. Thrasher immediately left for the mine. He called House from the

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[11] "Ignitions" were referred to frequently during the course of the hearing. Although the word was never specifically defined, it was clear the witnesses were referring to methane that had ignited and had continued to burn or had caught something else on fire.

road and asked specifically about the longwall crew. House replied that they were "on their way out." *Id.* at 225.

House also called mine superintendent Jesse Cooley and told him that there had been an explosion, a roof fall, brattices were destroyed, and miners were injured. Cooley asked if everyone was out of the mine, and House replied that he was in the process of getting people out. Tr. 5 at 382-83. Shortly after his conversation with Cooley, House was called by Tarvin who told House about the large amount of dust in the atmosphere. Tarvin asked if a stopping had failed. According to Tarvin, House told him "yes," miners had been hurt, and the track should be kept clear because the injured miners were on their way out of the mine. *Id.* at 433-34.

Dale Byram, JWR's manager of safety and training, who was not at the mine, called House. House told Byram that there was an explosion or ignition, ventilation controls were damaged, and miners were injured. Byram alerted the company's rescue team. Gov't Ex. 10 at 13; Tr. 12 at 381-82.

Meanwhile, Chris Key, Boyd, and Banks finished their work at the 2 East sump. Banks left the other two and traveled inby on his manbus to find out whether electrical power was reset on all the belt drives. Chris Key and Boyd walked toward the longwall area of 2 East to get a water pump. They saw Riggs, Stewart, and Smith. Riggs told Chris Key that there had been an ignition and that he was going to help. Tr. 2 at 288. Boyd went with Riggs. Chris Key followed Riggs on the track. *Id.* at 288, 306-08; Gov't Ex. 10 at 13. They were going to the No. 4 Section to find out what had happened. Tr. 2 at 308-09.

Gene Robertson's crew (Ashworth, Sorah, Riles, and Hallman) was working on a damaged belt near the 2 East belt header. Sexton traveled to where they were working and told Robertson that there was a page for him and that Johnson had picked up the phone and had been told there was a fire on the No. 4 Section and miners were needed to help. *Id.* at 113. Robertson told everyone to get on the manbus, and the crew traveled toward the No. 4 Section. *Id.* at 115.

Tarvin and Short, who also had boarded a locomotive, were taking rock dust to a storage area when they met Blevins coming from another direction on a manbus. Tarvin stated that Blevins told him the mine was on fire and he and Short had to help fight it. Blevins ordered Tarvin and Short to get two fire extinguishers from the locomotive and to board the manbus. Tr. 1 at 437-38. As Blevins, Tarvin, and Short started inby on the manbus, the belt crew arrived and their manbus followed Blevins toward the No. 4 Section. Gov't Ex. 10 at 13.

Once Banks arrived at the E panel, he continued inby toward the No. 4 Section. Riggs, Smith, and Stewart arrived after Banks. Chris Key and Boyd arrived next. The miners saw Tony Key lying against a rib. Palmer was sitting on the locomotive and McIe was standing beside it. Gov't Ex. 10 at 13. Boyd got off Chris Key's manbus and spoke to McIe, who told Boyd that Adams was hurt and where Adams was located on the No. 4 Section. Riggs said that he was going inby to the No. 4 Section to help Adams. Boyd told Chris Key and McIe that he too was

going to help. Tr. 2 at 313. Chris Key responded that he would take Palmer, McIe, and Tony Key out of the mine. *Id.*

Boyd got on Riggs' manbus and he proceeded inby with Riggs, Smith, and Stewart. Chris Key helped the three injured miners onto his manbus and, around 6:05 p.m., he headed out of the mine. Gov't Ex. 10 at 14. McIe was certain that before Tony Key left the area with McIe and Palmer, neither Tony Key nor anyone else told any of the miners to evacuate the mine. Tr. 1 at 224. McIe was not surprised by Tony Key's failure to order an evacuation. Key was "in too much of a shock" to say much of anything. *Id.* at 229.

In Sub Main B, Blevins saw Chris Key's manbus approach and Blevins stopped and walked to the manbus to speak with Tony Key. Tony Key told Blevins that Adams was hurt, there had been a roof fall and an explosion, ventilation was damaged, and there was the possibility of another explosion. Tr. 6 at 91, 161-62. Sexton and the belt crew members arrived and Sexton got off the belt crew manbus to speak with Tony Key. Robertson got off his manbus and came to where Tony Key and Blevins were. Sexton believed Key told Robertson that there had been an explosion. Tr. 2 at 118. Chris Key told Blevins that he was taking the injured miners out of the mine. *Id.* at 293. Blevins instructed the miners who had stopped to move their manbuses to a spur in the track so the injured miners could continue out of the mine. *Id.* at 121-22.

According to Tarvin, who spoke with Blevins at the 459 switch, Blevins knew that Adams was injured and he thought there was a fire on the No. 4 Section. Tr. 1 at 436-37. Blevins told the miners at the switch that they needed to go fight the fire and that they should put on their self-rescuers so they could travel to the section. *Id.* at 443-44.[12] Blevins asked for three volunteers to go with him to the No. 4 Section. Ashworth, Sorah, and Johnson got on Blevins' manbus. *Id.* at 443-44, 446-49; Tr. 2 at 120-21. However, both Tarvin and Sexton testified they declined. Neither wanted to go inby to fight a fire. Tr. 1 at 445; Tr. 2 at 120-21.

Blevins asked Robertson to go to the nearest telephone to call House and make sure that he knew the injured miners were on their way out of the mine and they required medical assistance. According to Sexton, Blevins added, "When you get through doing that, come back." Tr. 2 at 121. Blevins then set off for the No. 4 Section. Tarvin, Short, and Hallman waited at the D panel switch for Robertson to return. Gov't Ex. 10 at 5.

At about the same time, House received a telephone call from Tarvin advising him that Tony Key had reported an overcast was out on the 4 Section track. House told Tarvin to stop Blevins and tell Blevins to call the CO room. Tarvin said that Blevins already had gone toward the No. 4 Section. Tr. 5 at 379-80.

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[12] A little before this, as Blevins and Riles stood at the 495 switch, Blevins asked Riles if he smelled smoke. Riles replied that he did and asked Blevins where it was coming from. Blevins said that he was going to find out. Tr. 5 at 143-44, 181-82.

Benny Franklin and the rest of the longwall crew stopped at the H panel tailgate switch and Franklin called House from the telephone located there to ask about the dust the crew had encountered on the longwall. House said there was a problem and told Franklin to exit the mine with his crew and anyone else he saw. Tr. 3 at 41-42. Franklin maintained that he told the crew they were going to leave the mine. However, one miner stated that there was still power on at the power center, so Franklin told the electrician to "back up, and we'll turn the vacuum breaker off, which terminates our power to our power center." *Id.* at 43; *see also* Tr. 2 at 70; Tr. 3 at 55-56.[13]

After knocking the power, Franklin and his crew traveled toward the bottom. When they reached the 459 switch they stopped to let a manbus pass. Franklin could not see who was on the bus but he was told it was an injured miner. Tr. 3 at 60-61. Franklin and his crew then waited for another bus to pass. It was Robertson and his crew. Franklin recalled Robertson saying to him that there was a fire on the No. 4 Section. *Id.* at 61. Robertson said that he was going to call House and get further instructions. Franklin saw Robertson go to a nearby telephone, but he did not know if Robertson was able to reach House. *Id.* at 61-62.

About 6:10 p.m., Banks, Riggs, Smith, Boyd, and Stewart arrived at the No. 4 Section switch. The miners started walking the track entry into the section. To do so, they had to pass through the debris from the damaged ventilation controls. Gov't Ex. 10 at 15. In addition to Adams, other miners on the No. 4 Section by this time or a few minutes later were Knox, Mobley, Nail, Johnson, Sorah, Ashworth, and Blevins.

2. The Second Explosion

At approximately 6:15 p.m., a second explosion, much larger than the first, occurred on the No. 4 Section.[14] The explosion, which started in the No. 2 Entry, within seconds propagated into all four entries, into the No. 6 Section, the 5-9 Shaft area, and 3 East. Adams and the 12 miners who had gone into or toward the No. 4 Section to assist him or to fight a fire were killed. Only Ashworth survived the immediate effects of the explosion, and he died the next day.

Almost all of the miners who were underground felt the effects of the second explosion. At the D panel switch, Tarvin, Short, and Hallman were knocked into a nearby crosscut by the

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[13] However, according to Ogletree, Franklin told Corbin and Dickerson that there was an explosion on the No. 4 Section and miners were injured. Tr. 2 at 349. Further, Ogletree maintained that, at the 459 switch, Franklin said to his crew "Let's go on [to the No. 4 Section] and get those [injured] guys" and Ogletree told Franklin he would not go. *Id.* at 350 ("I told him I wanted to invoke my individual safety rights"). Ogletree understood that men who went inby would use their self-rescue devices. If he used his self-rescue device to go into No. 4 Section, Ogletree wondered what he would use to come out. *Id.*

[14] Approximately 55 minutes elapsed between the first and second explosions.

surge of air. The atmosphere was so dusty they could hardly see. They held onto one another's belts and followed the track to the 459 switch. Tr. 1 at 449-50.

Miners from the longwall crew and the belt crew who were at the 459 switch also were knocked off their feet by the force of air. The atmosphere in the switch area was dust-filled, and all of the miners except Corbin began to travel outby to get out of the mine. Corbin joined Franklin and Robertson at the F panel headgate switch telephone. The three men decided to leave the mine and get the mine rescue team. Gov't Ex. 10 at 6; Tr. 2 at 21-22. Chris Key and those with him felt their ears pop and they continued toward the bottom to get out. Tr. 2 at 319.

Randy Jarvis, who was in the H panel tailgate, heard a rumble. The air reversed direction for a short time. Jarvis thought an overcast had failed. The air around him was thick with dust. Jarvis called the CO room and asked House what happened. House told Jarvis to leave the mine. Tr. 3 at 182-83.

Connor, Bailey, and Willingham were sitting in a supply car near the end of the track in the F panel headgate. They heard a loud noise, the air reversed direction, returned to normal, and the atmosphere filled with dust. The miners heard House paging Blevins. Connor called the CO room and House said that he did not have time to explain what had happened but that Connor and the others should immediately exit the mine, which they did. Gov't Ex. 10 at 16-17; Tr. 2 at 374-77.

Chris Key brought Tony Key, McIe, and Palmer to the surface around 6:25 p.m. The injured miners were taken by ambulance to a hospital. Tarvin, Short, and Hallman now had reached the F panel headgate switch, where Tarvin called House from a telephone. Tarvin told House that there had been an explosion. Tr. 1 at 451. Tarvin, Short, and Hallman began walking outby to leave the mine. They met Jarvis and they told him to come with them, that there had been an explosion. The four men reached the surface around 7:00 p.m. Gov't Ex. 10 at 17; Tr. 1 at 452-54.

3. Rescue and Recovery Efforts

Nineteen miners exited the mine. Thirteen were missing. MSHA and UMWA officials were notified. A rescue effort began almost immediately. Senior management officials arrived and took charge of the rescue attempt. MSHA, UMWA, and state officials also arrived. MSHA promptly issued a 103(k) order, giving the agency control over the rescue and recovery operation.[15]

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[15] Section 103(k) provides that in the event of an accident an MSHA official may "issue such orders as he deems appropriate to insure the safety of any person in the . . . mine, and the operator . . . shall obtain the approval of [MSHA] . . . of any plan to recover any person in . . . [the] mine . . . or return affected areas of . . . [the] mine to normal." 30 U.S.C. § 813(k).

At approximately 8:05 p.m., a rescue team entered the mine. In addition, an escape capsule was lowered down a shaft in the event that any miners had reached the shaft bottom and were waiting there to get out. As the rescue team proceeded inby on a manbus, members of the team smelled smoke and stopped frequently to take gas tests of the atmosphere. The CO level was high. The team also encountered debris and damaged stoppings.

As the team moved into 4 East, debris on the track prohibited the manbus from proceeding further. The team members continued on foot, and they found Ashworth sitting against a rib. Two of the team members took Ashworth out of the mine. *See* Gov't Ex. 10 at 18-19.

One crosscut inby, members of the team found Sorah and Johnson. The men were located on a manbus. Both were dead. A short time later, team members found Blevins under the same manbus. He too had died in the accident. Shortly after midnight, the team moved into the No. 6 Section hoping to find surviving miners. The team encountered smoke and donned breathing apparatuses. The team tested for gas and found a high level of CO. As the team continued to move inby, it encountered burning crib blocks, which the team tried unsuccessfully to extinguish. Gov't Ex. 10 at 19.

Meanwhile, a second rescue team entered the mine and headed toward 3 East. The two teams met and worked together to try to extinguish the fire while a third rescue team was sent in to relieve the first team. Around 6:00 a.m. on September 24, the first team left the mine. Gov't Ex. 10 at 20. While the first team was moving out of the mine, the second team discovered that the ventilation controls in the No. 1 and No. 2 Entries at the mouth of the No. 4 Section were destroyed. The team also observed smoke issuing from the No. 1 Entry of the No. 4 Section. Gas tests revealed a very high CO content, as well as 3.1% methane. They believed there was a fire on the No. 4 Section. When they reported their findings to the surface command center, those in charge of the rescue effort concluded no one remaining underground could have survived and the rescue effort became a recovery effort. Gov't Ex. 10 at 20.

Later that day, it was determined that before the bodies of the victims could be recovered, the fires had to be extinguished by sealing and flooding the mine. On the morning of September 25, water was pumped into the mine through the 5-9 Shaft. All told, 30 million gallons were put into the mine. Put another way, 10,000 gallons of water per minute fell into the mine from the surface, ½ mile above the shaft bottom. *See* Tr. 7 at 293-94. The force of the water scoured the entries at the bottom of the shaft making them wider than before the explosions and some of the coal from the ribs was drawn further into the mine as the water rushed to fill the mine's sections. *Id.* at 290-92. The water flooded 3 East, the No. 6 Section and all but a small inby and uphill portion of the No. 4 Section.

By September 29, the flooding operation was completed. On October 20, pumping operations began to remove the water. As the water was pumped out, temporary seals were built and repairs were made outby. The seals were progressively moved inby and ventilation was re-established. Gov't Ex. 10 at 21.

By November 3, the recovery effort had advanced to just inby the mouth of the No. 4 Section. The area of the No. 4 Section switch, where the bodies of Sorah, Johnson, and Blevins were located, was ventilated. The bodies were brought to the surface on the early afternoon of November 3. On November 7, the recovery team moved into the No. 4 Section. The bodies of the nine remaining victims (Adams, Nail, Mobley, Knox, Banks, Riggs, Stewart, Smith, and Boyd) were found that afternoon near SS 13333. They too were brought to the surface. Gov't Ex. 10 at 21.

Ventilation on the No. 4 Section was entirely re-established by November 17, and on November 21, final pumping operations commenced.

B. The Investigation

Prior to the recovery of the bodies and the re-establishment of ventilation on the No. 4 Section, MSHA began investigating the cause or causes of the explosions. Ray McKinney, MSHA District 5 Manager at the time of the accident, headed the MSHA investigation team. Members of the investigation team included personnel from MSHA Districts 2, 5, and 6, personnel from the Health Technology Center, and personnel from the Secretary's Office of the Solicitor. On October 1, investigation team members began collecting records and other information from the MSHA District 11 Office and from JWR. In addition, people with relevant information about the accident were identified and interviews, both non-confidential and confidential, were conducted.

A thorough examination and inspection of the mine was undertaken by accident investigation teams. MSHA's witnesses who were part of the investigation team almost without exception testified that JWR was "very cooperative . . . honest and diligent" with regard to the investigation. *See, e.g.*, Tr. 8 at 46. The teams included representatives of MSHA, JWR, the UMWA, and the State of Alabama. The affected areas of the mine were mapped thoroughly. In addition, physical evidence was gathered and in some instances tested by MSHA.

Among the physical evidence was mine dust, which was collected by seven sampling and mapping teams. The teams were composed of MSHA inspectors, company personnel, and UMWA members. The samples were collected by MSHA inspectors, the samples' locations were mapped, and the samples were transported to Mt. Hope, West Virginia where they were analyzed and tested by MSHA. Approximately 648 samples were gathered, of which 310 were collected in areas most immediately affected by the explosions.

On December 11, 2002, following completion of the investigation, MSHA issued a report (Gov't Ex. 10) detailing its findings regarding the causes of the explosions. In addition to the

report, the Secretary cited JWR for the eight violations that are at issue and that she alleges contributed to the accident.[16]

II. THE ISSUES AND BURDEN OF PROOF

Despite the voluminous record, the fundamental issues are simple. Each of the citations and orders allege that JWR violated a mandatory safety standard. It is the Secretary's burden to prove the alleged violations by a preponderance of the evidence. If she does, the Commission, or in the first instance, the judge, must assess a civil penalty. 30 U.S.C. § 820(a). In assessing a penalty the Commission must consider the statutory civil penalty criteria: JWR's history of previous violations; the appropriateness of the penalty to the size of JWR's business; JWR's negligence, if any; the effect of the penalty on JWR's ability to continue in business; the gravity of the violation; and the good faith of JWR in attempting to achieve rapid compliance after notification of the violation. 30 U.S.C. § 820(i). It is also the Secretary's burden to prove each of these criteria by a preponderance of the evidence, except for the criterion related to JWR's ability to continue in business. On that issue, JWR bears the burden. *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); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (Apr. 1997). Because there may be instances where it is difficult, even impossible, to obtain the direct evidence necessary to prove facts at issue, the Secretary may meet her burden by inferences. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). However, the inferences must be "inherently reasonable and there . . . [must be] a logical and rational connection between the evidentiary facts and the ultimate fact[s] inferred." *Id.*; *accord Garden Creek*, 11 FMSHRC at 2153.

III. THE ALLEGED VIOLATIONS

There are four categories of violations. The first category relates to the control of the roof. The second category relates to the incombustible content of mine dust. The third and fourth categories relate to the miners' evacuation of the mine and their participation in fire drills. I will analyze the evidence and resolve the issues by category.

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[16] According to William Crocco, who at the time of the explosions was MSHA's Accident Investigation Program Manager and who drafted much of MSHA's investigation report, the report and the alleged violations represent the consensus of MSHA's investigation team. Tr. 7 at 486, 494-95.

A. The Citation Relating to Roof Control

Citation No. 7328083 charges a violation of 30 C.F.R. § 75.202(a) in that the roof at SS 13333 in the No. 2 Entry of the No. 4 Section was not adequately supported.[17] Section 75.202(a) requires in part that "[t]he roof . . . of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof . . . ." 30 C.F.R. § 75.202(a). The citation also asserts that the 13 miners were fatally injured as a result of the violation and that the violation was S&S and due to JWR's moderate negligence. Gov't Ex. 3. The alleged violation elicited a considerable amount of testimony, pertinent portions of which are set forth below.

1. The Testimony

At the No. 5 Mine, the primary means of roof control for a developing section was the use of 6-foot fully grouted resin bolts installed on 5-foot centers. The 6-foot bolts were supplemented

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[17] The citation, which was issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814, states:

> On September 23, 2001, two separate explosions occurred in 4 Section resulting in fatal injuries to thirteen miners. The accident investigation revealed the roof in the No. 2 entry of 4 Section at the intersection of Survey Station 13333 was not supported or otherwise controlled to protect persons from hazards related to a fall of roof in that area. On Friday, September 21, a crack in the roof was observed, a noise was heard and water was observed dripping from some roof bolt holes at this location. The section coordinator directed the section foreman to have supplemental roof support (cable bolts) installed through the intersection. About sixteen, 10-foot long cable bolts were installed during [the] day shift on Friday. Methane, water, broken coal and broken shale were encountered above the anchorage zone of the primary roof supports (72-inch fully grouted resin bolts). Competent roof was not encountered in the anchorage zone of many of the cable bolt holes, rendering the cable bolts ineffective. An unintentional roof fall occurred in that area on September 23. As the mine roof fell, methane was liberated from the strata into the mine entries. Arcing of a scoop battery that was damaged by the roof fall ignited the methane. The explosion damaged critical ventilation controls, disrupted the airflow and injured four miners. A second explosion resulted in fatal injuries to miners.

Gov't Ex. 3.

on an "as needed" basis with cable bolts and various other means of supplemental support, including straps and cribs. *See* JWR Ex. 185 at 2, 4-9; Tr. 4 at 80-81; Tr. 8 at 435-36; Tr. 11 at 264-65. Although prior to the accident, 8-foot, 10-foot, and 12-foot cable bolts were occasionally used at the mine, the predominant and usual method of supplemental support was the use of 10-foot bolts. Tr. 12 at 212-13; *see, e.g.*, Tr. 13 at 168 (testimony of roof bolter William Prisock that it was the only length with which he worked). These roof control practices were largely successful in holding the roof in place and, prior to September 23, few roof falls occurred at the mine.

Regarding general conditions, roof bolter Terry Eulenstein testified that the roof usually was stable, but that water and methane were encountered at times. Tr. 11 at 267. Michael Goggins, a general inside laborer, added that water was not considered a hazard, but "you need[ed] to keep an eye on it." Tr. 5 at 315. In addition to water, the roof occasionally exhibited faults, joints, and fractures, but these were not "day-to-day" occurrences. Tr. 12 at 287.

Robert Howell, a company engineer with a PhD in engineering, testified that in the mid to late summer of 2001, continuous miner operators on the right side of the No. 4 Section had to limit cuts because of roof problems in unbolted areas of the faces. As a result, about a month prior to the explosions, Howell called the JenMar Company and asked if there were roof support products that could be used to allow longer cuts. Tr. 13 at 183-84.[18] JenMar representatives came to the mine and examined the section's roof. Using a stratoscope they looked for cracks or fractures. They found none. *Id.* at 185-86. Nor did they find indications of lateral separation in the roof. As a result, the representatives did not recommend any changes in the company's roof control equipment or procedures. Tr. 12 at 219.

Prisock, who worked on the No. 4 Section, testified that several weeks prior to the accident, he installed roof bolts in the intersection of a crosscut and the No. 2 Entry at SS 13333. Prisock put in two rows of 6-foot resin grouted bolts on 4-foot centers and then went back and installed two 10-foot cable bolts at 6-foot intervals between the rows. Tr. 13 at 120. Prisock installed a total of six 10-foot bolts. Tr. 6 at 418; Tr. 13 at 120-21, 123.[19] The cable bolts were used to give added strength to the roof because the No. 2 Entry eventually would be used as a bleeder entry, and the roof had to stand a long time. Tr. 13 at 215.

On September 20, Ricky Parker, the chairman of the mine's UMWA safety committee, passed through the No. 2 Entry at SS 13333. Parker, who was accompanying MSHA Inspector Jarvis Westery, detected no problems with the roof. Tr. 6 at 327. Indeed, practically all of the

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[18] JenMar, one of the largest roof bolt manufacturers in the United States, provided technical support to mine operators upon request. Tr. 13 at 248.

[19] Installing the resin grouted bolts on 4-foot centers exceeded the requirements of the roof control plan, which provided for the installation of the 6-foot bolts on 5-foot centers. JWR Ex. 185 at 6; *see* Tr. 4 at 79.

witnesses agreed that prior to September 21, the condition of the roof in the No. 2 Entry of the No. 4 Section at the intersection of SS 13333 was unremarkable. *See, e.g.*, Tr. 6 at 425.

As mining advanced, it was decided to move the battery charging station to a short crosscut between the No. 1 and No. 2 Entries at the intersection. On the morning of September 21, Prisock returned to the area to install extra 6-foot bolts. The bolts were to be used as battery hangers. Tr. 13 at 124. While there, Prisock noticed some loose rock peeling from the roof, and he decided to add some more 6-foot bolts and two 10-foot bolts to make sure the rock stayed put. *Id.* at 125-27; JWR Ex. 224. Addition of the bolts to the area was part of Prisock's ordinary duties as a roof bolter, and after he finished Prisock thought the roof in the intersection looked normal. Tr. 13 at 128. Prisock told his foreman, Bruce Mabe, that he had added the extra bolts. *Id.* at 128-29. Although Prisock described the main roof above the Mary Lee Seam as not "that hard" (*id.* at 129), he felt that it was "more solid" (*id.* at 130) than the immediate roof and that the 10-foot cable bolts had adequately anchored into the main roof. *Id.* at 131. In fact, Prisock believed that each of the 10-foot bolts had anchored almost 4 feet into the main top. *Id.* at 132.

Later that day, Greg Brown, the day shift section foreman, checked the roof in the area at the start of the shift. Brown noticed some roof water. It was something he had seen before. Tr. 6 at 432-34. Prisock too had seen roof water on other sections. He did not find it unusual. Tr. 13 at 144. Also on September 21, Hershell Robbins, a miner on the evening shift, noticed the water. Like Brown and Prisock, Robbins did not regard it as anything about which to be concerned. Tr. 6 at 31. Roof bolter Wayne Bonner agreed. Tr. 4 at 108.

During the day shift, Brown met with Burt Duvall, the day shift section coordinator, at the SS 13333 intersection. Before the meeting, Duvall too noticed roof water, or as he put it, "a little bit of dampness." Tr. 5 at 194. He heard a thump and saw a "slight hairline crack." The crack was "no bigger than what . . . could [be] draw[n] with a pen." *Id.* at 193; Tr. 6 at 384. Duvall asked Brown to have additional cable bolts placed in the intersection "as a precaution" (Tr. 6 at 384) because the power was going to be moved up later that day and because of the length of time the roof had to remain intact. Tr. 5 at 194. Brown assigned roof bolters David Terry and Wayne Bonner to install more 10-foot cable bolts in the area. Tr. 4 at 47-48, 52.

Terry installed eight additional 10-foot bolts and Bonner installed eight. Both men felt the bolts were well anchored in the main roof. Tr. 4 at 108, 112; Tr. 5 at 59-60; JWR Ex. 121. According to Brown, who conducted on-site supervision of the roof bolting, the 10-foot cable bolts anchored in 2 to 3 feet of solid top, that is, 2 to 3 feet above the Mary Lee Seam. Tr. 6 at 386.[20] As the holes for the bolts were drilled, water came out of the holes like a mist. Brown

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[20] Bonner's testimony was somewhat different in this regard. He stated that the bolts anchored 1 to 2 feet above the Mary Lee Seam (Tr. 4 at 52-53) and that the top, although "solid," was "not as solid as you would normally desire." Tr. 4 at 52. On a scale of 1 to 10, Bonner rated the hardness of the top as "4." *Id.* at 55, 89. Nonetheless, Bonner testified that all of the cable bolts that he installed on September 21 were well and solidly anchored. *Id.* at 108, 112. They

testified this was something not normally seen, but it was not unprecedented. *Id.* at 432 ("[W]e had [it] on other areas of the section."). The water "quit after a while." *Id.* Neither Terry nor Bonner said anything to Brown about the bolts and neither reported the bolts were not anchoring in solid top. Tr. 4 at 103; Tr. 6 at 387, 429-30. Eric Barnes, a member of the UMWA safety committee, for a time also observed the bolts being installed. Barnes did not complain about the number of bolts installed or that they anchored insufficiently. Tr. 6 at 430. After the bolting was concluded, Brown did not think that cribs needed to be installed, nor did anyone suggest their installation. Tr. 6 at 434.

During the evening shift on September 21, other cracks in the roof of the entry were noticed by Darrell Lynn, a ram car operator on the shift. The cracks extended across the entry. In addition, water resumed coming from the roof. Tr. 3 at 291-93, 298. According to Mike Buchanan, the evening shift section foreman, the cracks continued to be small and hairline, and the water dripped, not flowed, from the roof. The roof itself was solid and unbroken. Tr. 13 at 22. Buchanan saw no signs of excessive sloughing or other evidence that the ribs were taking weight. *Id.* at 32, 34-35. Buchanan had been told by the shift coordinator that supplemental roof support had been installed on the previous shift, and he did not feel there was any need for additional roof support. In Buchanan's opinion, with the addition of the supplemental support, the roof was in essentially the same condition it had been on September 20. Certainly, cribs were not needed. *Id.* at 34. Buchanan therefore directed that the scoop charger and battery be moved up to the short crosscut adjacent to the SS 13333 intersection. *Id.* at 20-21.

On September 22, Bruce Mabe, who conducted the preshift examination for the oncoming day shift, described the roof conditions on the No. 4 Section as "nothing out of the ordinary." Tr. 12 at 517. The roof bolt plates were not bending and the adjacent pillars were not sloughing excessively. *Id.* at 518.[21] Water was coming from the roof, but Mabe did not believe the water posed a hazard and he did not mention it on his preshift report. *Id.* at 534-35.

Day shift foreman Brown recalled no change in the roof condition from the previous day. Tr. 6 at 436. During the shift no additional roof bolts or other supplemental roof support were

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also were, in his opinion, "safely installed," and he believed that, once he was finished bolting, he left no hazards for his coworkers. *Id.* at 109, 112.

[21] On the other hand, Ronnie Hyche, a mason who also worked as a roof bolter and who worked on the September 22 day shift, stated that in the last long crosscut between the power center and the face he heard noises indicating the roof was "working" and "setting down. Tr. 6 at 189. Hyche also maintained water was "pouring" from the roof. *Id.* Hyche's heightened descriptions were at odds with almost every other witness who saw the roof on the section that day. Moreover, he agreed that his testimony was about an area approximately 100 feet inby the cited area and that he had no idea what was or was not happening at SS 13333. *Id.* at 192-93. The area about which Hyche testified was not commented on by other witnesses.

installed nor were any needed. *Id.* at 437. Like almost everyone else, Brown mentioned the roof water at SS 13333. *Id.* at 385.

Buchanan did the preshift examination for the evening shift on September 22. The ribs showed no evidence they were taking weight. Buchanan continued to believe that the roof did not present a hazard and there was no need for additional roof support. Tr. 13 at 31-34.

Joseph Cybulski, an MSHA supervisory mining engineer who participated in MSHA's accident investigation and who appeared as an expert witness for the Secretary, confirmed the consensus view of the on-site observers as to the roof's basically unchanged condition between September 21 and September 23. He testified that MSHA concluded the roof conditions did not deteriorate significantly between September 21 and the September 23 day shift. Tr. 11 at 402.

However, on the afternoon of September 23, things changed dramatically and for the worse. All of the witnesses spoke of rapidly deteriorating conditions. Tony Key, who worked on the evening shift on September 23, arrived at the mine around 2:00 p.m. Key went to the mine office and spoke with Duvall about work for the evening. Tr. 6 at 44-45. John Puckett had completed the preshift examination for Key's oncoming shift. Puckett told Key to look at the ribs, the roof bolt plates, and the roof bolts to see if the ribs, plates, and bolts were taking weight. *Id.* at 113. Key, who recorded Puckett's preshift report conditions, wrote "top working" in the hazardous conditions section of the report. *Id.* at 46-48.[22] Duvall told Key the ribs were sloughing in the No. 2 Entry. Duvall wanted to build cribs down the entry and around the intersection adjacent to SS 13333. Key understood that Duvall had sent for additional cribbing material. *Id.* at 111. Therefore, when Key started work on September 23, his priority was to further support the roof and ribs in the No. 2 Entry. Key felt he had an appropriate number of men and supplies to deal with the situation. *Id.* at 111, 114.

Key traveled into the mine with his crew, Nail, Mobley, McIe, and Adams. They went to the No. 4 Section where Key heard sporadic noises coming from the roof and ribs. Tr. 6 at 49-50. Key proceeded to the battery charging station. *Id.* at 51. He noticed a crack in the brattice in the short crosscut. The crack ran from the upper right corner of the brattice to the lower left corner. In addition, a hole had developed in the brattice. Key believed that either the floor was heaving or the roof was setting down or both things were happening. Key knew the brattice would need to be repaired and he ordered materials for the repair. *Id.*

Key then traveled to the power center at SS 13348. The roof looked good there, and he heard no noises coming from it. He took a methane reading which showed minimum methane. Key next traveled to the supply hole and a few minutes later went to the faces of the No. 1 and

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[22] Key maintained that he used those words because Puckett mentioned ribs rolling and Key associated ribs rolling with deteriorating top since the two normally happened together. *See* Tr. 6 at 48.

No. 2 Entries. At each of these places his methane detector registered minimal amounts of the gas. Tr. 6 at 54-55.

At SS 13333 Key looked at the roof. Although it did not appear that the roof bolts were taking weight, more water was coming from the roof, small diagonal cracks had appeared, and the ribs were sloughing. Because of these conditions and the situation with the brattice, Key, who agreed with Duvall that cribs should be built in the intersection, assigned Adams and McIe to build them in conformance with a map that Duvall had drawn. Tr. 6 at 56-58. As Key recalled, the map indicated that at least 10 cribs were needed. *Id.* at 56. Cribbing material had been brought into the section and was on a flat car at the end of the track. There was not enough material to build all of the cribs indicated on Duvall's map, but there was enough to build some and the crew started building outby the charging station in the No. 2 Entry, near the intersection of SS 13333. Key felt this was the safest place to start, and he intended to have the crew continue constructing cribs by working inby. *Id.* at 58.

Key thought the cribs would adequately address the situation. There was no sign that a roof fall was imminent. However, at approximately 5:15 p.m., after the third crib was constructed, the roof inby started "aggressively working." Tr. 6 at 58-59. Roof bolts popped, ribs rolled, rocks fell, and water poured. *Id.* at 59. McIe and Adams stepped out of the intersection and got behind some equipment. Suddenly, the roof came down "like the World Trade Center." *Id.* at 61.[23]

After the fall and the explosions, the SS 13333 intersection was not observed again until the accident investigation. MSHA supervisory mining engineer Cybulski went to the No. 4 Section on November 19, 2001. During the course of the investigation, Cybulski made seven trips underground, most of them to the No. 4 Section. Tr. 11 at 299-300. Cybulski, who helped map the roof of the section, observed joints running northwest to southeast across No. 4 Section. *See* Gov't Ex. 24A (App. U).[24] Jointing was sparse at the mouth of the section but increased as one moved inby toward the accident site. Tr. 11 at 301. In the vast majority of the areas where he saw jointing, the roof had stayed up. *Id.* at 363. For example, he saw a 2-inch-wide joint inby the fall, but the roof in the area was stable. *Id.* at 365-66.

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[23] Prior falls involving roofs supported with 10-foot cable bolts were almost unheard of. Roof bolter William Prisock testified that in his experience 10-foot cable bolts always had been effective in holding the roof. Tr. 13 at 113-14. Cybulski confirmed that he was aware of only one other fall in the No. 4 Section involving a bolted area, and it occurred after the explosions. Tr. 11 at 389-90.

[24] Cybulski described joints as natural fractures in the roof rock. Tr. 11 at 302. In Cybulski's opinion, joints might or might not warrant additional roof support. However, the situation needed to be evaluated because "the more rock is fractured, the less stable it is." *Id.* at 304.

When Cybulski reached the area of the fall, he helped measure the height of the fall with a laser range finder. The fall cavity extended 25 feet above the roof line. Tr. 11 at 367. Based on Cybulski's experience in mining he believed that the fall initially extended somewhat less than 25 feet into the roof but that, following the fall, the roof continued to deteriorate deepening the cavity.[25] According to Cybulski, debris from the fall consisted of slabs of rock that ranged between 3 feet and 1 foot in size. Cybulski confirmed that he believed there was a failure of the main roof higher than the intersection of the main roof and the Mary Lee Seam. *Id.* at 367-68. In addition, Cybulski saw one or two cable bolts that were still hanging and partially exposed near the edges of the fall. *Id.* at 372. The other bolts were buried in the debris. *See id.* at 372-73.[26]

Cybulski testified the purpose of the cable bolts was to suspend the intermediate roof, which was held together by the 6-foot bolts, from the main roof. Tr. 11 at 313-14. For this to happen, the cable bolts had to be securely anchored in the main roof. *Id.* at 315.[27] Cybulski did not dispute the accuracy of the measurements contained in the notes of Paul Tyrna, the MSHA geologist who accompanied Cybulski on his December 11 visit to the No. 4 Section. In the notes, Tyrna indicated that he found the Middleman Seam at the "edge of the roof fall" area (*id.* at 370) to be approximately 5-feet thick and the Mary Lee Seam to be approximately 12 to 15-inches thick (*id.* at 370-76). At this location 10-foot cable bolts would reach almost 4 feet above the Mary Lee Seam. *Id.* at 376. Cybulski also agreed that he and the agency had no idea of how many cable bolts, if any, were insufficiently anchored in competent roof. *Id.* at 378. Cybulski maintained, however, that on September 21, the bolts used in the fall area at best anchored into only 1 to 2 feet of competent top, and that this was inadequate to hold the roof.[28]

In Cybulski's opinion, additional roof control measures had been required. *Id.* at 317-18, 325, 333-34. The cracks visible in the roof and the water coming from the roof should have

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[25] Robin Dzurino, a JWR engineer at the time of the explosions, accompanied Cybulski and MSHA geologist, Paul Tyrna. Dzurino helped measure the fall area. Tr. 12 at 817. He thought that the fall was 50-feet wide from west to east and 92-feet long from north to south. As he recalled, the cavity extended approximately 23 feet above the roof line, a distance that was 13 feet above the longest roof bolt. *Id.* at 819-20.

[26] Because of the height of the cavity and the debris that covered and damaged almost all of the affected roof bolts, none of the witnesses could state that the bolts had failed to hold the roof. *See, e.g.*, Tr. 4 at 112-14.

[27] Cybulski explained that once a cable bolt was anchored "the [M]iddleman [Seam] and Mary Lee [Seam] start[ed] to sag a little and [came] in contact with the bearing plate that is on the head of the cable bolt providing the support." Tr. 11 at 315-16.

[28] Cybulski relied in part on a NIOSH Information Circular which he testified stated that, at a minimum, cable bolts should anchor 4 feet into competent top. Tr. 11 at 312, 320-21.

indicated this to JWR personnel. Test holes should have been drilled. They would have shown how much competent roof could be reached with 10-foot bolts. As a result, longer cable bolts could have been used, or if the longer bolts were not available, cribs could have been constructed. *Id.* The cribs might have changed the size and extent of the fall, or even have prevented it. *Id.* at 336. In addition, by taking the load from the roof, the cribs might have provided a visual warning that the roof was taking weight. *Id.* at 340-41. Cybulski agreed, however, that test holes and longer cable bolts were not required under the roof control plan. Nor did the plan require at least 4 feet of anchorage in the main roof if cable bolts were used. *Id.* at 320, 400.

The company's expert witness in roof control, Syd Peng, chairman and professor of the Department of Mining Engineering at West Virginia University, made three post-accident visits to the site of the fall. Tr. 13 at 265. He also reviewed the results of JenMar's August 2001 visit to the No. 4 Section, the roof control plan, and the transcripts of the testimony of witnesses to the roof conditions on the No. 4 Section, including the testimony of the section's roof bolters. Peng found no evidence that the roof bolts failed to hold the roof. Tr. 13 at 266-67. Peng concluded that the fall was due to the existence of concentrated joint swarms (several cracks concentrated in a localized area) that were unknown to JWR because they are high in the roof and became visible only after the accident. *Id.* at 273-74; JWR Ex. 226 at 2 . In Peng's opinion, the fall occurred when large blocks of the roof fell along vertical joints. Tr. 13 at 286. In Peng's view the 6-foot fully grouted resin bolts had formed a "beam" in the roof, which was anchored into the main roof by the 10-foot cable bolts. *Id.* at 278-79.[29] Peng believed that the initial fall originated at least 2 feet above the 10-foot cable bolts and that the larger cavity was created by additional falls that occurred after the explosions. *Id.* at 285-86. In Peng's opinion even 12-foot bolts would not have held the roof in place because the fall originated at a level either concurrent with the end of the 12-foot bolts or higher, which was above the anchorage zone of the bolts. *Id.* at 294-95; *see also id.* at 319-20.

Peng concluded that the roof had quickly deteriorated on September 23, and he doubted that anything could have prevented the fall. Even if cribs had been used at the SS 13333 intersection, the roof would probably have fallen between the cribs. Tr. 13 at 306-07. Peng also noted that, prior to the fall, two similar fault areas were mined through successfully, that in securing the areas JWR used procedures like those used at SS 13333, and that there were no roof control problems in either of the areas. Tr. 13 at 290-91.

2. The Violation

The Commission has held that section 75.202(a) is a broadly worded standard and, therefore, "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the

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[29] Peng noted that under the roof control plan roof bolts were required to be anchored into the main roof above the Mary Lee Seam only in the No. 4 Entry, which was a longwall gate entry. Tr. 13 at 281; JWR Ex. 185 at 9.

mining industry and the protective purposes of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987) (cited in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998)). The Commission has emphasized that, in the context of a particular alleged violation, "the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors and considerations bearing on the inquiry in issue." 9 FMSHRC at 668.

Because the essential nature of a mine's roof – its strata and its propensity to maintain stability – in most instances is relatively constant, the actions of a reasonably prudent operator always are informed by the operator's past experience with the roof. In this way the mine's roof control history plays prologue to the operator's present control efforts, and the reasonableness of the operator's actions or lack thereof is gauged in part against the operator's and the industry's past experience given the particular conditions the operator knew or should have known existed.

By citing the company for a violation of section 75.202(a), the Secretary is asserting that given all of the information the company knew or should have known prior to the fall, the company did not act as a reasonably prudent operator in attempting to support the roof. As one of the Secretary's counsels stated, "[I]n essence, it's the Government's position that all that could have been done was not done at a time that was appropriate." Tr. 4 at 120.

The Secretary argues that the company knew, beginning on September 21, that roof conditions were deteriorating. The Secretary acknowledges the company tried to meet the conditions by adding cable bolts, but she asserts the measures the company took were not "reasonably sufficient." S. Br. at 11. The cable bolts only anchored in 1 to 2 feet of solid top. In the Secretary's view they should have anchored into at least 4 feet of top.[30] In the Secretary's view, "The fact that . . . nothing else was done to support the intersection until it was too late to do so, establishes the violation of section 75.202(a)." S. Br. 11-12.

After listening to and reviewing the testimony and the exhibits and after considering all of the parties' arguments, I reject the Secretary's arguments and conclude that JWR personnel acted reasonably in attempting to control the roof in the cited area. The picture that emerges from the record was not of a company unmindful or neglectful of conditions that cried out for the installation of cribbing, longer cable bolts, a combination of both, or other procedures on September 21, 22, or 23. Rather, it is of a company that, relying on past experience and the evidence before it, responded reasonably to conditions as they developed until, on September 23, its efforts were overwhelmed by a precipitous and massive roof failure.

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[30] The Secretary points to plant engineer Robert Howell's testimony that manufacturers of cable bolts state that, to achieve full strength in holding the roof, cable bolts need to be anchored in solid top for up to 1/3 to 1/2 their length. Tr. 13 at 212; S. Br. at 11-12. However, I note Howell also stated without contradiction that he conducted tests that achieved full strength when a little less than 1/5 of a 12-foot bolt anchored in solid top. Tr. 13 at 212.

In concluding that JWR personnel acted reasonably, I reject the Secretary's view that, "[g]iven the cited roof conditions and the lack of anchorage of [the] cable bolts into solid top according to the manufacturer's specifications and industry practice, it should have occurred to . . . [Burt] Duvall and . . . [Greg] Brown that [the] bolts were not going to be effective in supporting the roof" and that "given their collective experience in mining . . . [they] should have take[n] additional steps to support the roof in . . . [the SS 13333 intersection] with standing support." S. Br. at 13. The problem with the Secretary's contention is that a preponderance of the evidence does not support it. Unable to point to a specific violation of the roof control plan and unable to point to any course of action that with certainty would have prevented the fall, the Secretary has chosen to cast a wider net and cite the company under the broader and more amorphous requirements of section 75.202(a). However, and as the Commission has noted, even though the standard for compliance with that regulation essentially is one of reasonableness, it is the objective nature of all the surrounding circumstances and considerations that determines the outcome. *Canon*, 9 FMSHRC at 668. In my view these circumstances and considerations fully support the company's reasonableness.

To understand JWR's response to the roof conditions at the SS 13333 intersection, it is important to note that prior to September 21, there were no significant observable problems with the roof in the cited area and no indication that roof control measures other than those which took place during development were necessary. In this regard, I fully credit miner Ricky Parker's testimony that when he and Inspector Westery traveled under the roof in the cited area on September 20, he observed no problems with the roof. Tr. 6 at 327-28.[31] Thus, it is not surprising that Parker described the condition of the roof as it then existed as "good." *Id.* at 330. In this regard, I also note Cybulski's observation during his deposition that he found no indication of a need for supplemental roof support prior to September 21. Tr. 11 at 408-09.

Because the reasonableness of the company's response to the subsequent changes in the roof's condition must be evaluated, in part, in terms of the company's knowledge of the roof in the cited area, it is also important to review what the record reveals about the state of the company's knowledge as the first shift entered the mine on September 21. First, JWR personnel knew that during development, because the entry would eventually be used as a bleeder, the roof had been strengthened by installing 10-foot cable bolts and straps in the subject area. Second, JWR personnel knew that for the same reasons the 6-foot fully grouted resin bolts that constituted the usual developmental support were installed on 4 rather than 5-foot centers. Tr. 13 at 109, 120-23, 215. Third, management was aware that the roof had remained virtually unchanged for several weeks after it was developed. Fourth, mine personnel knew that several weeks before the roof fall JenMar representatives had come to the mine to study the roof in the No. 4 Section, that on-site analysis revealed no cracks or separations, and that no change in roof support procedures

[31] I note as well that Westery issued no citations for violations connected with the roof, which he was obliged to do had he detected any. Tr. 6 at 329-30.

or materials was recommended. Fifth, JWR was aware the use of 10-foot cable bolts had been successfully used to hold the mine's roof in the past.[32] Tr. 12 at 214-15, 219; Tr. 13 at 185-86.

On September 21, when Duvall saw a small crack and dampness on the roof and heard a bump or thump (Tr. 5 at 193-94), he decided in an exercise of caution, to add additional 10-foot cable bolts to the roof to better control it. The water, crack, and noise signaled to Duvall that the roof might come to be less stable if supplemental support was not provided. *See id.* at 58, 124. Using 10-foot cable bolts as supplemental support was a logical choice given their favorable record. In addition, Prisock's testimony established, and mine management knew, that prior to September 21, 10-foot cable bolts already had solidly anchored in the main roof of the affected area. Tr. 13 at 131. These cable bolts anchored above the Middleman Seam and, as Chuck Stewart, then the general manager of purchasing at the mine, observed, typically control of the Middleman Seam meant control of the roof. Tr. 15 at 1018-19.[33] These facts indicate that use of the 10-foot bolts on September 21 was a reasonable choice.

The question then is whether as of September 21, it was unreasonable for the company to fail to do more (i.e., install cribs) or to do something else (i.e., use 12-foot or 14-foot cable bolts) or to do a combination of other things (i.e., use cribs, longer bolts, and more substantial straps) to support the roof, and I conclude it was not. Certainly, the presence of water dripping from the roof did not put the company on notice that it needed to do more than install additional 10-foot cable bolts. As was stated over and over by numerous witnesses, water was not uncommon at the mine. *See, e.g.*, Tr. 6 at 432-33; Tr. 12 at 517-18, 605. Miners and mine management reasonably did not consider its presence to signify a necessarily hazardous roof. *See, e.g.*, Tr. 12 at 534-35.[34]

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[32] There had been faulty roof areas previously in other areas of the mine, and JWR always had mined through them successfully by using 6-foot fully grouted resin bolts supplemented by 10-foot cable bolts. Tr. 12 at 214-15; Tr. 13 at 181-82, 290-91; *see also* JWR Br. at I-3. In fact, then assistant mine manager Trent Thrasher knew of no roof falls prior to the accident in areas supported with 10-foot cable bolts. Tr. 12 at 214.

[33] I recognize that there was some equivocal testimony about whether 10-foot cable bolts had sufficiently anchored in the roof prior to September 21. For example, roof bolter Terry Eulenstein, a UMWA witness, exhibited ambiguity when asked. At the hearing he testified that he had experienced difficulty getting 10-foot cable bolts to anchor properly in the main roof, but when he was deposed, he stated that he had not. *See* Tr. 11 at 269-70. On the other hand, Ronnie Hyche testified that in his experience "[10-foot cable] bolts always anchored good in the main top." Tr. 6 at 201. Despite such conflicts, the testimony predominantly supports the conclusion that the 10-foot cable bolts had been successfully anchored prior to September 21 and that they had held the roof when they were used.

[34] Terry, Bonner, Brown, and Hyche all testified that roof water had been encountered before and that the measures JWR took were adequate to control the roof where it occurred. Tr. 4 at 85-86, 107-10; Tr. 5 at 43-46, 57; Tr. 6 at 193-94, 431-33.

Rather, as Goggins stated, it was something "you need[ed] to keep an eye on" (Tr. 5 at 315), which is exactly what the company was doing when it ordered installation of the additional 10-foot cable bolts.

Further, although the noise heard by Duvall and the small crack he saw might (or might not) have signaled that the roof was becoming less stable, given JWR's successful past history of using 10-foot cable bolts and given the additional roof support that already had been installed in the area (the 4-foot center bolting pattern and the supplemental cable bolts), it was not unreasonable for Duvall to fail to order more than the installation of additional 10-foot cable bolts. In short, there was no indication that anything more was needed.

I further conclude that, on September 21, once the decision to install the additional supports was made and once the cable bolts were installed, it was reasonable for JWR to do nothing further regarding supplemental support. In response to Duvall's decision to add more cable bolts, roof bolters Bonner and Terry, under the direct supervision of section foreman Greg Brown, installed the additional 10-foot bolts. Bonner and Terry believed the bolts were well anchored and that the area was safe. Tr. 4 at 108-09; Tr. 5 at 57, 60; *see also* Tr. 5 at 79-80; Tr. 6 at 386.[35] Brown, who was standing with Bonner and Terry when the bolts were installed and who was watching and assisting with the drilling also believed the bolts had anchored into 2 to 3 feet of solid roof. Tr. 6 at 386, 428-29. Neither Bonner nor Terry, the two miners with the most intimate knowledge of the roof, stated to Brown that the roof strata was "soft." *Id.* at 387. Nor did either express concerns about the anchorage of the bolts. The same is true of Eric Barnes, the UMWA safety committeeman, who observed the bolting process for part of the time it was underway. *See id.* at 387, 429.

Given the fact that JenMar had scoped the roof on the section and found no slips or faults, that the company had a history of successfully relying on cable bolts to hold the roof in similar situations,[36] that there were no visible or audible sounds signifying the need for support different from that being used, and that the roof bolters most immediately involved with the situation did not indicate the need for other support, I conclude that it was not unreasonable for the company to act as it did on September 21 and to rely solely on the 10-foot cable bolts.

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[35] As previously noted, Bonner testified the top "wasn't as hard as it should have been," and that the top was "questionable" (Tr. 4 at 108, 109), but he also testified that the bolts were satisfactorily anchored into the top, and at his deposition, which was closer to the events at issue, he stated he felt that he had placed the bolts in "competent roof." *Id.* at 110.

[36] MSHA Inspector Donald Greer testified that 6-foot resin bolts and 10-foot cable bolts when used in combination had been routinely effective in supporting the roof. Tr. 12 at 605-06. Moreover, Duvall testified that to his knowledge there never had been a prior roof fall at the mine when 10-foot cable bolts, or even 8-foot cable bolts, had been used. Tr. 5 at 240-41; *see also* Tr. 4 at 248; Tr. 5 at 40-41; Tr. 13 at 310.

In reaching this conclusion, I have found the testimony of the roof bolters to be especially compelling. William Prisock testified that the bolts he placed prior to September 21 anchored "close to four feet" into the main roof. Tr. 13 at 132. His testimony was not refuted. Although Bonner testified the top into which the bolts anchored was sometimes softer than he would have liked (Tr. 4 at 52-54), both he and Terry described the bolts as "well anchored" in "competent top" and both believed the intersection was safe and not a hazard. Tr. 4 at 51-52, 108-10; Tr. 5 at 47, 60. For this reason, I conclude that Bonner's later observation as to the consistency of the roof (Tr. 4 at 108, 109) is not a critical factor making use of the 10-foot bolts unreasonable at the time. I also find the fact that at the time neither Bonner nor Terry spoke to their supervisor or to their fellow miners about any safety concerns for the roof or about a need for different and other roof control measures to further support the roof buttresses the reasonableness of JWR's reliance on the 10-foot cable bolts. Tr. 6 at 430-31.[37]

Moreover, it is reasonable to assume that if miners believed the roof support methods they were using in the cited area were inadequate, they would have reported it to Brown, yet there is no testimony, aside from Linn's uncorroborated assertion, that any of them communicated with Brown about the control methods they were using. *See* Tr. 5 at 125-26; Tr. 6 at 430. The miners' silence on the topic is especially telling in the case of Bonner and Terry, roof bolters who were not only engaged in work that was vital to the safety of others, but was equally vital to their own well being. Cybulski was of the opinion that a reasonable roof bolter would have stated to his or her supervisor that he or she was not getting enough anchorage when using the 10-foot bolts. Tr. 11 at 403-04. If so, a logical corollary is that the lack of such a statement indicates the opposite.

The Secretary argues that in fact the cable bolts were not anchored "sufficiently in competent top." S. Br. at 11. She notes the testimony of Cybulski that 4 feet of anchorage is necessary to obtain maximum strength from the bolt and the testimony of Howell that manufacturers' specifications require 1/3 to 1/2-length of the bolt to anchor into solid top to

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[37] Continuous miner helper Nobel Linn, who worked on the September 21 day shift, testified that he, Terry, Bonner, and Brown discussed the roof in the No. 2 Entry during the course of the shift that day, that Brown suggested the use of longer cable bolts but that the consensus view was to use steel rails supported with cribs, and that Brown stated sufficient material was not available and would have to be ordered. Tr. 5 at 100-01. I do not find Linn's story credible. There is no confirming testimony from Terry or Bonner, and Brown stated he did not recall a conversation with Linn and that, in any event, cribbing material was stored in the supply hole, although he was not certain how much was available. Tr. 6 at 385-87. Also, as JWR points out, Linn did not mention a concern about the adequacy of the roof support to his UMWA safety committee representative whom he saw that day on the section. JWR Br. at I-24 (citing Tr. 5 at 110). Nonetheless, even were I to credit Linn's version of the conversation, it would not mean that what was done to support the roof was *per se* unreasonable. Roof support that is "best" or "better" is not necessarily roof support that is exclusively reasonable, and the question before me is the reasonableness of JWR's action under all of the circumstances.

develop full strength. *Id.* at 12; Tr. 13 at 212. Of course, as previously noted, Howell also testified, in seeming contradiction to manufacturers' specifications, that he had achieved full bolt strength with a little less than 1/5 of a cable bolt anchored in solid top. Tr. 13 at 212. However, even if the cable bolts used in the SS 13333 intersection did not obtain maximum strength, the failure to use longer cable bolts did not necessarily make the use of 10-foot bolts unreasonable. Adequate support depends upon the circumstances. Given what the record reveals about the prior history of roof support at the mine, the signs of roof deterioration available to JWR on September 21, the roof bolters' belief that they had sufficiently anchored the bolts, and the lack of any complaints or concerns from them regarding the way the bolts anchored, I conclude there was no reason to suspect that the 10-foot bolts were not providing adequate support. It bears repeating that my inquiry is directed not at whether the most effective roof support was used by JWR, but whether, under all of the circumstances, the support which was used was reasonable.

Having concluded that JWR acted reasonably through the installation of the supplemental supports on September 21, I now must consider the company's actions between September 21 and the September 23 roof fall. After the supplemental cable bolts were installed, the condition of the roof remained essentially unchanged during the next shift on September 21 (the evening shift). Mike Buchanan, the supervisor on the shift, observed small "hairline" cracks and water coming from the roof at SS 13333, but he saw no signs that the ribs were taking weight. Tr. 13 at 21, 25, 56-57. It was Buchanan's conclusion that cribs were not needed. Buchanan's decision to have the battery charger and battery moved into the intersection of SS 13333 lends weight to the reasonableness of his belief. *Id.* at 21-22. Only a recklessly negligent person would have purposefully moved equipment under roof he believed was insufficiently supported, and there is no indication that Buchanan was such a person.

The record also supports the conclusion that September 22 came and went without any meaningful change in the roof's condition. Bruce Mabe, who made the preshift examination for the day shift, described the roof on the No. 4 Section as "nothing out of the ordinary." Tr. 12 at 517. Mabe saw no evidence that the roof bolts were "loading up" and taking weight. *Id.* at 518. The roof bolt plates were not bent. The adjacent ribs were not sloughing excessively. *Id.* Brown, who worked the day shift, recalled no change in the roof's condition (Tr. 6 at 436-37), a statement whose credibility is buttressed by the fact that Brown did not direct further roof bolts to be installed. *Id.* Buchanan, who did the preshift examination for the evening shift, continued to believe the roof did not present a hazard and that there was no need for additional roof support. Tr. 13 at 34. Even the Secretary's witness, Cybulski, stated that his investigation of the accident led him to conclude that the roof had not deteriorated between September 21 and the first shifts on September 23. Tr. 11 at 402.

However, and as previously noted, on the afternoon of September 23, conditions began to change fast. On the day shift, signs of deterioration were observed in the SS 13333 intersection. While conducting the preshift examination for the oncoming shift, Puckett saw ribs sloughing in the short crosscut adjacent to SS 13333 and a crack and a small hole in a nearby brattice. Tr. 4 at 227-28. It was evident to Duvall that more was needed to control the situation, and he advised

Tony Key that cribs, the next logical step in JWR's arsenal of roof and rib control measures, should be built. Tr. 6 at 45-47. Puckett's preshift report confirmed this need.[38] The testimony of Duvall and Key establishes that JWR was aware there was a problem requiring additional and different support and that the company, through Duvall, responded to the problem by ordering the installation of that support.

Key's testimony that his first priority when he started the evening shift on September 23 was the installation of cribs in the No. 2 Entry of the No. 4 Section is entirely credible. Key had his work orders and the orders conformed to what Duvall believed was needed. Tr. 6 at 45. Key and his crew (Nail, McIe, Mobley, and Adams) traveled underground. When they arrived on the section, Key noticed the damage to the brattice. After visiting the power center and taking methane readings there and at the faces, Key instructed McIe and Adams to start building cribs by beginning outby and moving progressively inby. *Id.* at 56-58. Key acted safely and reasonably by having the men begin work only after he had checked the section for methane and to start their work at what he believed was the safest place. *Id.* at 58.

There is no indication that Key dawdled in taking reasonable remedial steps to address the deteriorating situation. Rather, once he was on the section, he moved in a logical and timely fashion to make sure installation of the cribs proceeded safely. Unfortunately, the roof conditions degraded so rapidly there was insufficient time to build the cribs, and it is impossible to know whether the prior installation of longer cable bolts, more cribs, or other measures would have

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[38] When Puckett orally called out the report, it was recorded in writing by Tony Key who was scheduled to work on the evening shift. Among the things Key wrote in the report were the words "top working" in the "hazardous conditions" section. Tr. 6 at 47-48. There is a dispute whether Puckett actually told Key the roof was "working" or whether Puckett was talking about the adjacent rib (the yield pillar), and Key interpreted what Puckett said as relating to the roof because excessive rib sloughage and unstable roof conditions frequently occur together. *Id.* at 46-48; Tr. 5 at 203-07; *see* JWR Br. at I-18. However, resolving the dispute is not important when deciding whether or not JWR personnel acted reasonably because whatever Puckett meant, Duvall, Key's supervisor, clearly understood that the situation was fast changing and that it called for additional and different support, i.e., cribs. Tr. 5 at 204, 209-10.

resulted in a different outcome.[39] I therefore conclude that JWR's actions on September 23 also were reasonable.

Because JWR personnel acted reasonably in the face of the circumstances they knew or should have known existed on the No. 4 Section, the company did not violate section 75.202(a).

B. The Citation and Orders Relating to the Incombustible Content of Mine Dust

Citation No. 7328081 charges a violation of 30 C.F.R. § 75.403 in that, of 123 dust samples collected during the accident investigation throughout 3 East, 4 East, the No. 4 Section, the No. 6 Section, and the connecting entries of Shaft 5-9, 121 of the samples did not meet the regulatory requirements for incombustible content of the combined coal dust, rock dust, and other dust. The citation also specifically notes that none of 31 band samples taken in an area of the No. 4 Section inby the previously flooded area ("inby the toe of the water") met the requirements of the regulation.[40] The citation contains an S&S finding. It also asserts that the 13 miners were fatally

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[39] In this regard, it should be emphasized that there is no way to accurately determine the height at which the fall originated, except that it originated above the anchorage zone of the 10-foot cable bolts and, as Peng persuasively testified, almost certainly above the anchorage zone of 12-foot bolts. Tr. 13 at 285-86, 295, 319-20. It also may well have originated above the anchorage zone of 14-foot cable bolts. In any event, such issues are beside the point in that the fundamental question is not what JWR could or should have done but whether what it did was reasonable. As Stewart observed, "if you look at the accident in hindsight . . . something different might have helped" but, as he also recognized, the proper perspective regarding the alleged violation is to view events as of the time they occurred and from the vantage point of those involved. Tr. 15 at 1166. When this is done, I agree with Stewart that, based on what miners and management officials "saw and knew," their actions were "prudent," that is to say, reasonable. *Id.*

[40] Citation No. 7328081 states in part:

> On September 23, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. During the investigation, a total of 123 mine dust samples were collected throughout 3 East, 4 East, 4 Section, 6 Section and the connecting entries for Shafts 5-9. These band samples were subjected to a laboratory incombustible analysis. The results revealed that 121 (98.4%) of the sample results did not meet the regulatory requirements for incombustible content of the combined coal dust, rock dust and other dust of at least 65% in the intake air courses and at least 80% in the return air courses. None of the 31 band samples taken in the inby area of 4 Section met the regulatory requirements. This area of 4 Section was not flooded during

injured as a result of the violation, that the violation was due to JWR's unwarrantable failure to comply with section 75.403, and that the company's negligence was high. Gov't Ex. 1.

Section 75.403 states in part:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor and sides of all underground areas of the coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum.

30 C.F.R. § 75.403.

Order No. 7328088 charges a violation of 30 C.F.R. § 75.360(b)(3) in that an adequate preshift examination was not conducted in the No. 4 Section for the afternoon shift of September 22, because inadequate rock dust was not identified by the examiner.[41] The order contains an S&S

> recovery operations and was the location where both explosions originated. This was also the area where coal dust became the primary fuel for the second explosion. The condition contributed to the severity and extent of the second explosion that resulted in fatal injuries.

Gov't Ex. 1.

[41] Order No. 7328088 states:

> On September 23, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. The accident investigation revealed that an adequate preshift examination was not conducted in 4 Section where persons were scheduled to perform maintenance work during the oncoming afternoon shift on September 22, 2001. A hazardous condition consisting of inadequate rock dust existed, but was not identified by the examiner. The condition was obvious, widespread, and in the areas traveled by the examiner. During the investigation, mine dust samples were collected throughout 4 Section. These band samples were subjected to a laboratory incombustible analysis. The results revealed that approximately 97% of the sample results did not meet the regulatory requirements for incombustible content of the combined coal dust, rock dust and other dust. None of the 31 band samples taken in the inby area of 4 Section met the

finding. It also asserts that the 13 miners were fatally injured as a result of the violation, that the violation was due to JWR's unwarrantable failure to comply with section 75.403, and that the company's negligence was high. Gov't Ex. 5.

Section 75.360(b)(3) in part requires preshift examinations in:

> Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places.

30 C.F.R. § 75.360(b)(3).

Order No. 7328104 charges a violation of 30 C.F.R. § 75.362(a)(1) in that an adequate on-shift examination was not conducted for the afternoon shift of September 22, because inadequate rock dust was not identified by the examiner on the No. 4 Section where two mechanics were assigned to work.[42] The order contains an S&S finding. It also asserts that the 13 miners were

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> regulatory requirements. The average incombustible content was less than 40%, indicating a condition significantly below the regulatory requirements that should have been recognized by a prudent mine examiner. This area of 4 Section was not flooded during recovery operations and was the location where both explosions originated. This was also the area where coal dust became the primary fuel for the second explosion. The condition contributed to the severity and extent of the second explosion that resulted in fatal injuries. The Order will not be terminated until hazard recognition training is provided for certified mine examiners at the No. 5 Mine.

Gov't Ex. 5.

[42] Order No. 7328104 states:

> On September 23, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. The accident investigation revealed that an adequate on-shift examination was not conducted in 4 Section where two mechanics were assigned to work during the afternoon shift on September 22, 2001. A hazardous condition consisting of inadequate rock dust existed, but was not identified by the examiner. The condition was obvious, widespread and in the areas traveled by the examiner. During the investigation, mine dust samples were collected

fatally injured as a result of the violation, that the violation was due to JWR's unwarrantable failure to comply with section 75.403, and that the company's negligence was high. Gov't Ex. 6.

Section 75.362(a)(1) states in part:

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

30 C.F.R. § 75.362(a)(1).

Order No. 7328105 charges a violation of section 75.360(b)(3) in that an adequate preshift examination was not conducted for the day shift on September 23, because: (1) the examiner did not inspect the areas where miners were scheduled to perform maintenance and to roof bolt on the No. 4 Section but rather limited the examination to electrical installations; and, (2) the examiner did not identify obvious and widespread inadequate rock dust.[43] The order contains an S&S

> throughout 4 Section. These band samples were subjected to a laboratory incombustible analysis. The results revealed that approximately 97% of the sample results did not meet the regulatory requirements for incombustible content of the combined coal dust, rock dust and other dust. None of the 31 band samples taken in the inby area of 4 Section met the regulatory requirements. The average incombustible content was less than 40%, indicating a condition significantly below the regulatory requirements that should have been recognized by a prudent mine examiner. This area of 4 Section was not flooded during the recovery operations and was the location where both explosions originated. This was also the area where coal dust became the primary fuel for the second explosion. The condition contributed to the severity and extent of the second explosion that resulted in fatal injuries. The Order will not be terminated until hazard recognition training is provided for certified mine examiners at the No. 5 Mine.

Gov't Ex. 6.

[43] Order No. 7328105 states in part:

> On September 23, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. The

finding. It also asserts that the 13 miners were fatally injured as a result of the violation, that the violation was due to JWR's unwarrantable failure to comply with section 75.360(b)(3), and that the company's negligence was high. Gov't Ex. 7.

Order No. 7328106 charges a violation of section 75.360(b)(3) in that an adequate preshift examination was not conducted for the afternoon shift of September 23, because the examiner did

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> accident investigation revealed that an adequate preshift examination was not conducted in 4 Section where persons were scheduled to perform maintenance work and install roof bolts during the oncoming day shift on September 23, 2001. The examination was incomplete in that an examination of the working places was not conducted where miners were scheduled to roof bolt the unsupported face areas. The main mine fan had been off during the previous shift, creating the potential for methane accumulations in the long crosscuts between No. 2 and No. 3 Entries as well as in the face areas. The examiner was not made aware of these circumstances and was instructed by mine management to limit the examination to the electrical installations only. In addition, a hazardous condition consisting of inadequate rock dust existed, but was not identified by the examiner. The condition was obvious, widespread and in the areas traveled by the examiner. During the investigation, mine dust samples were collected throughout 4 Section. These band samples were subjected to an incombustible analysis. The results revealed that approximately 97% of the sample results did not meet the regulatory requirements for incombustible content of the combined coal dust, rock dust and other dust. None of the 31 band samples taken in the inby area of 4 Section met the regulatory requirements. The average incombustible content was less than 40%, indicating a condition significantly below the regulatory requirements that should have been recognized by a prudent mine examiner. This area of 4 Section was not flooded during recovery operations and was the location where both explosions originated. This was also the area where coal dust became the primary fuel for the second explosion. The condition contributed to the severity and extent of the second explosion that resulted in fatal injuries. The Order will not be terminated until hazard recognition training is provided for certified mine examiners at the No. 5 Mine.

Gov't Ex. 7.

not identify obvious and widespread inadequate rock dust.[44] The order contains an S&S finding. It also asserts that the 13 miners were fatally injured as a result of the violation, that the violation was due to JWR's unwarrantable failure to comply with section 75.360(b)(3), and that the company's negligence was high. Gov't Ex. 8.

1. Citation No. 7328081

Section 75.403 requires rock dust to be distributed on the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust is not less than 65%, and the incombustible content in the return aircourses is not less than 80%. The regulation, which restates section 305(d)(2) of the Mine Act (30 U.S.C. § 865(d)(2)), first was set forth as section 304(d)(2) of the Federal Coal Mine Health and Safety Act of 1969 (the "Coal Act"). 30 U.S.C. § 864(d)(2) (1976).

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[44] Order No. 7328106 states:

> On September 23, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. The accident investigation revealed that an adequate preshift examination was not conducted in 4 Section where persons were scheduled to install cribs during the oncoming afternoon shift on September 23, 2001. A hazardous condition consisting of inadequate rock dust existed, but was not identified by the examiner. The condition was obvious, widespread and in the areas traveled by the examiner. During the investigation, mine dust samples were collected throughout 4 Section. These band samples were subjected to a laboratory incombustibility analysis. The results revealed that approximately 97% of the sample results did not meet the regulatory requirements for incombustible content of the combined coal dust, rock dust and other dust. None of the 31 band samples taken in the inby area of 4 Section met the regulatory requirements. The average incombustible content was less than 40% indicating a condition significantly below the regulatory requirements that should have been recognized by a prudent mine examiner. This area of 4 Section was not flooded during recovery operations and was the location where both explosions originated. This was also the area where coal dust became the primary fuel for the second explosion. The condition contributed to the severity and extent of the second explosion that resulted in fatal injuries. The Order will not be terminated until hazard recognition training is provided for certified mine examiners at the No. 5 Mine.

Gov't Ex. 8.

Because the Coal Act established numerical minimal levels for the incombustible content of the combined dust, it was an axiom of coal mine safety law that a violation of section 304(d)(2) and/or its implementing regulation could be established only by numerical results from valid dust samples – results that proved the required minimum level of incombustible content had not been reached. In one of its earliest decisions, the Commission's predecessor, the Interior Board of Mine Operations Appeals, found that:

> Since Congress specifically delineated percentages . . . [a violation of section 304(d)(2)] must be supported by more than the mere visual observation of an inspector. Unless samples support an alleged violation . . . it cannot be sustained.

Hall Coal Co., Inc., 1 IBMA 175, 178 (Aug. 22, 1972); *see also Newsome Brothers, Inc.*, 1 IBMA 190, 192-93 (Sept. 29, 1972) (invalidating alleged violation based "solely upon the visual observation of the inspector").

The Commission's judges long have followed the same principle in Mine Act cases. *See, e.g., Consolidation Coal Co.*, 22 FMSHRC 455, 466 (Mar. 2000) (ALJ), *rev'd on other grounds*, 23 FMSHRC 588 (June 2001). The Secretary also has recognized the principle. Reiterating that observation alone is insufficient to support a violation, she has instructed her inspectors to "[c]ollect samples to substantiate the violation when citing inadequate rock dust." *Coal General Inspection Procedures Handbook*, 4-12 (Apr. 1, 1969).[45]

In most instances when the agency collects and analyzes dust samples, its purpose is to determine the incombustible content of the dust as of the moment the samples are collected. After analysis of the samples, if a sufficient percentage of the samples indicates the dust content does not meet required minimum levels, a citation charging a violation of section 75.403 is issued. The alleged violation relates back to the time of sampling.

The citation at issue presents a very different scenario. The agency is not alleging the sample results indicate a violation as of the time the samples were collected. Rather, it is alleging the results indicate a violation that existed almost 2 months before the samples were taken, that is to say, immediately before the roof fell on September 23.[46] In other words, the Secretary is

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[45] Kevin Stricklin, an MSHA district manager who participated in the collection of samples following the accident, referred to the agency's implementation of the principle when he agreed that MSHA's decision to charge JWR with a violation of section 75.403 "[came] from the samples." Tr. 7 at 280.

[46] Collection of the samples began far outby in unaffected areas of the mine on October 13, 2001 and progressed inby as affected areas were recovered. Sampling ended on December 13, 2001. Samples for the No. 4 Section and the outby affected areas were not taken until almost 2 months after the first explosion. *See* Tr. 7 at 307-10.

asserting that the sample results represent pre-existing conditions. There is nothing wrong with such an assertion, provided the Secretary can prove that conditions relating to the mine dust did not change between the time of the alleged violation and the samples' collection; or, alternatively, provided the Secretary can prove that although conditions changed, the sample results nonetheless are sufficiently representative of results that would have been obtained had the samples been collected at the time of the alleged violation.

In the context of this case, for the sample results to be sufficiently representative, the samples must reflect the particular characteristics they would have had if they had been taken immediately prior to the roof fall. They need not consist of identical amounts of combined moisture, coal dust, rock dust, and other dust that then existed. If that were required, the changing conditions to which all miners are subject would ensure that post-event samples rarely – perhaps never – could establish a violation. But to carry her burden of proof, the Secretary must be able to show by a preponderance of the evidence that no intervening events fundamentally changed the samples' contents and, thus, that the samples are sufficiently like those that would have been collected at the time the violation allegedly occurred.

The Secretary argues that she has established the reliability of the dust samples and that JWR has failed to show how "changed conditions in the mine would have altered the percentage of incombustible content in the relevant areas overall." S. Br. at 79. She asserts that, "In the absence of evidence demonstrating . . . changes in the mine site would render the dust samples meaningfully dissimilar to the conditions before the explosion, the samples establish a violation" of the cited standard. *Id.* at 80.

Not surprisingly, JWR counters that the Secretary has failed to furnish the proof necessary to show that the company did not maintain the mine in compliance with section 75.403. JWR Br. II-1. JWR maintains the Secretary has failed to meet her burden because the post-explosion samples have no probative value. Rather than reflect conditions existing immediately prior to the roof fall, they are "samples of a mine environment so radically and materially different from pre-explosion conditions that are legally at issue ... [they] lack any legal relevance." *Id.* at II-14. The company also sets forth a systematic and concerted evaluation of what it claims are manifold inadequacies in the testimony of the Secretary's expert witness on the dust issue, Clete Stephan. *Id.* at II-38-54.

a. Changed Conditions

The testimony is replete with descriptions of the rock dusting and coal dust reduction program that was in effect at the No. 5 Mine and of its use on the No. 4 and No. 6 Sections. *See* Tr. 4 at 322-23; Tr. 5 at 210-13, 234-35, 312-13; Tr. 6 at 399; Tr. 12 at 188-92; Tr. 13 at 15, 60; Tr. 15 at 982. While the adequacy of the rock dust applications is at issue, there is really no dispute that most parts of the areas were in fact rock dusted.

In addition to this testimony, the general visual appearance of the areas indicated the presence of varying amounts of rock dust. The descriptions of the areas ranged from "white" (Tr. 3

at 495, 512 – miner Joe Phillips describing the roof and ribs of the No. 6 Section on September 21 and 23; Tr. 13 at 27-30 – foreman Mike Buchanan describing entries in the No. 4 Section on September 22) to "dark grey" and "black" (Tr. 3 at 339-40 – miner Eddie Maxwell describing areas on the No. 4 Section on September 21).

However, following the explosions a visually dramatic change in these conditions was noted by every witness who saw the sampled areas. Whatever had been their look and condition prior to the explosions, everything in the affected areas – the ribs, the floor, the roof, and the equipment – was covered with a coating of soot and/or coal dust. Fresh coal littered the floors and was exposed on many ribs. No rock dust was visible. The result was that the affected areas, and especially the No. 4 Section, were blacker than night, and without digging into the floor or taking away surface dust from the roof and ribs, rock dust could not be seen.

The testimony describing this change was compelling. Dale Byram, JWR's manager for safety and training who went underground approximately 3 hours after the second explosion, stated that, as the rescue team he was leading proceeded inby, he began to see light grey dust on the track. The closer the team came to the No. 4 Section, the darker in color the mine surfaces became and debris from the explosion became noticeable. Tr. 12 at 395, 397. For example, at the 3 East turnout he saw a significant amount of debris, including a large pod duster that had been blown from one side of the track to the other. *Id.* at 398-99. As the crew arrived at what would have been the entrance to the No. 6 Section, the debris on the track forced the crew to abandon the manbus and proceed on foot. *Id.* at 399. Everything from 3 East inby was "solid black." *Id.*

Approximately 42 days later, after the mine had been flooded and the water had been removed, Byram was able to view all of the No. 4 Section. The changed conditions were even more dramatic than they had been immediately following the explosions. In addition to the "consistent blackness everywhere" and "total destruction" (Tr. 12 at 422), Byram could see that coal had been scoured from the pillars and that metal doors were wrapped around steel pipes "much like you see in a tornado." *Id.* at 423. A ram car was mangled. Stoppings were blown out. Everything was covered with a sooty layer of black. The only evidence of rock dust was seen when the black layer was broken through and scraped away. *Id.* at 424.

Terry Eulenstein, a company roof bolter, who participated in the collection of dust samples, also described the No. 4 Section as "black" and a place of "total destruction." Tr. 11 at 277. Eulenstein's testimony was echoed and supplemented by union safety committeeman Ricky Parker, who took part in the post-accident investigation. Parker noted that the roof, ribs, and floor were so black that light from his and others' cap lamps was simply swallowed up and absorbed by the darkness. Fresh coal was everywhere in the area, including coal from sloughed ribs. Tr. 6 at

334-35, 351.[47] Parker thought that conditions before and after the explosions were as different as night and day. *Id.* at 349.

Another union safety committeeman, Eric Barnes, who had been on the No. 4 Section on September 21 and who revisited it on November 1, also thought the section was "totally different." Tr. 2 at 520. Like many others, Barnes noted that equipment was destroyed, ribs were blown away, and particles of coal of all sizes littered the section. *Id.* at 520-22. Roof bolter David Terry, who was on the No. 4 Section and in the affected areas before and after the explosions, agreed as to the totality of the change, and he stated that hardly "a grain" of rockdust was visible anywhere. Tr. 5 at 78. In fact, conditions on the No. 4 Section were so different, John Puckett, the day shift foreman who was last on the section on September 23, stated if the mine had looked on September 23 as it did following the explosions and flooding, his crew "would have probably called . . . [MSHA] and the [union] safety committee before we got to the section, if I had even tried to make them go." Tr. 4 at 252.

Trent Thrasher, who was the deputy mine manager at the time of the explosions, and who went underground during the course of the investigation, saw that the ribs had sloughed and rolled out into the entries and that coal was scattered everywhere from the intake shaft to the faces. Tr. 12 at 187-88. Gary Toxey, then a member of the union, who was part of the team collecting dust samples, described the rib sloughage on the No. 4 Section, both in the area that had been flooded and in the area inby the toe of the water as "astronomical." Tr. 12 at 683, 705.[48] Some of the equipment on the section was buried in 18 to 24 inches of rubble. Tr. 12 at 353-54.

MSHA Inspector Donald Greer, who was underground before and after the explosions, stated that the mine looked like nothing he had seen before. He noted the absence of observable rock dust and the fact that in some places, the ribs had been blown away near their tops so that the entry cross sections were trapezoidal rather than rectangular. Tr. 12 at 599-600.

Given the overwhelming testimony of these eyewitnesses, I find that the conditions in which the samples were collected following the explosions were fundamentally different from those that existed immediately prior to the roof fall. However, this finding does not doom the

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[47] Chuck Stewart, the company's assistant mine manager, who went to the No. 4 Section in early November also saw the post-accident sloughage. Tr. 15 at 913-20; *see* JWR Ex. 260. As Stewart recalled, some of the sloughed coal extended at least two thirds of the way into the entries. Tr. 15 at 917-18.

[48] Toxey's description of the amount of sloughage was at odds with that of Kenneth Murray, an MSHA District Manager and a member of MSHA's investigation team. Murray described the No. 4 Section as having a "bit" of sloughage. Tr. 9 at 57-58. However, under either scenario, it is clear that post-explosion sloughage was present in the affected area.

alleged violation, providing the Secretary can show by a preponderance of the evidence that despite the changed conditions the sample results are sufficiently representative of what they would have been had the samples been collected immediately prior to the roof fall.

b. The Representative Nature of the Samples

After a thorough review of the record, I conclude that the Secretary has not made such a showing. In fact, she has not even come close. Rather, the record establishes beyond doubt that forces unleashed by the explosions, water that was pumped into and out of the mine, and the sloughing of the Blue Creek Seam changed the content of the dust that was sampled so that the collected mix of rock dust, coal dust, and other dust was different after the explosions than it was immediately before the roof fell. The record also confirms that the Secretary failed to show, as was her burden, that despite these changes the results were fundamentally the same as they would have been if the samples had been collected prior to the roof fall. Indeed, as will be discussed, the testimony and exhibits offered by the Secretary fail to provide a basis for answering with a requisite degree of certainty many critical questions regarding the effect of the events on the samples, and the resulting inconclusive nature of the Secretary's case defeats her efforts to prove the violation.

To understand what happened to the rock and coal dust included in the samples, it is necessary to review what is known about the effects of the events that occurred during and following the explosions. First, it is indisputable that existing rock dust on the No. 4 Section and elsewhere in the sampled areas was moved by the explosions' forces and by the flow of water when the mine was flooded. In addition, it is indisputable that draining the water from the mine also moved and removed rock dust from the formerly flooded and sampled areas.

Second, it is indisputable that forces from the explosions, the flooding of the mine after the explosions, and the sloughing of the coal ribs after the explosions moved existing coal dust and added new coal dust to the sampled areas. It is equally indisputable that draining the water moved and removed coal dust from the formerly flooded and sampled areas.

Clete Stephan was the Secretary's primary witness regarding the samples. Stephan was instrumental in the agency's decision to cite JWR for the violation of section 75.403 based on the post-accident samples. *See* Tr. 7 at 223-24. With regard to rock dust, Stephan agreed that the shaking of the ribs that accompanied the explosions would have redistributed "some" rock dust located on the surface of the ribs. Tr. 10 at 293-95. Further, he agreed that during the first explosion, rock dust on the section was lifted and moved, but he maintained that because the forces generated by the first explosion were "small," "very little" of the rock dust was moved off of the No. 4 Section. Tr. 11 at 158-59, 161-62. He also believed that although forces of the second explosion lifted more rock dust, "the dust lifted in the vicinity of the face [was] left within about two hundred feet of where it was initially picked up." *Id.* at 162.

However, Stephan's opinions are suspect. Given the totality of the testimony, it is equally plausible that forces from the explosions put much rock dust in the sampled areas into suspension and that this dust traveled out of the sampled areas, in some instances far out of them. I note that miners outby the No. 4 Section following the first explosion invariably commented about dust that soon appeared around them. Benny Franklin, the longwall production supervisor, testified that the dust in the air was so thick he had to find a second phone from which to call out of the mine. As Franklin remembered, visibility was extremely restricted, and it was hazardous to stand in the dust at the first phone. Tr. 3 at 55. In fact, the dust was so thick in the air that those working on the longwall thought miners inby were rockdusting and that the rock dust was traveling outby over them. *See*, *e.g.*, Tr. 3 at 39, 50. Other miners who were outby the No. 4 Section following the first explosion agreed that, as they got closer to the section, the dust in the air increased. *See*, *e.g.*, Tr. 2 at 290-91, 311.

Nor was transportation of the rock dust limited to underground areas. Rock dust was blown completely out of the mine. Section foreman Mike Buchanan described the surface area around the top of the 5-9 Shaft on the day after the explosions as having "rockdust all over the ground where it blew out." Tr. 13 at 42-43. Chuck Stewart confirmed this and added that some thought it looked as though it had snowed. Tr. 15 at 966-67. According to Buchanan, the rock dust was 1/8- to 1/4-inch deep around the top of the shaft, and 1/8-inch deep to a minimal amount up to 1,000 feet away from the shaft. Tr. 13 at 43-44. There is no testimony disputing Buchanan's and Stewart's descriptions of the rock dust, and Martin Hertzberg, an expert witness who appeared on behalf of the company, persuasively testified that the rock dust around the 5-9 Shaft was evidence of how the explosions' forces could transport dust great distances. Tr. 15 at 863.

I conclude that the eyewitness testimony of those both underground and above as to the presence of rock dust that appeared soon after the explosions undermined Stephan's opinion that "very little" dust was moved off the No. 4 Section by the explosions. The rock dust came from somewhere. The record confirms that rock dust in the sampled areas was picked up by the explosions' forces, yet one searches the record in vain for scientifically reliable evidence establishing how much rock dust was picked up and the distance it was moved. Indeed, Stephan admitted that MSHA did not calculate the explosions' forces (Tr. 11 at 100), a calculation that would seem to have been critical to any scientific determination of the distance that dust – rock and/or coal dust – was transported. The fact that it is impossible to determine the amount of rock dust that was put into suspension and the extent that it was moved is one of the unresolved issues that undermines the Secretary's case.

The same is true of coal dust. Trent Thrasher believed forces from the explosion blew coal dust out of the areas sampled. *See* Tr. 3 at 39, 50.[49] Stephan agreed that as a mine's atmosphere

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[49] Thrasher, like many of the witnesses, used the generic term "dust" to refer to both rock dust and coal dust. It is clear, however, from the context of the testimony, that Thrasher, like the other witnesses who used the general term, believed that coal dust, in addition to rock dust, was moved by forces unleashed by the explosions.

expands during an explosion, dust (including coal dust) is picked up off the mine floor, knocked off the surfaces of the mine's roof and ribs, and put into suspension. Tr. 11 at 95. Once coal dust is placed in suspension it is moved by the atmosphere. Martin Hertzberg logically explained, "the distance that the dust gets thrown . . . depends on how big the explosion is." Tr. 15 at 438. "[C]oal dust . . . can get transported hundreds of feet to thousands of feet, depending upon the dimensions of the explosion." *Id.* at 439; *see also* JWR Exs. 253, 254 (pictorial and video depiction of coal dust propelled by explosion).

Stephan did not disagree that dust was in fact raised by the first explosion and that the amount of dust suspended and transported outby by the first explosion depended on the magnitude of the forces created by the explosion. He also did not disagree that MSHA made no calculations regarding these forces. Tr. 11 at 81-84. He testified that to some extent dust located inby the end of the track before each explosion was propelled outby by each explosion. *Id.* at 87. He agreed during his deposition that the liberation of coal and coal dust from the ribs "would contaminate the area with respect to conditions that existed before the roof fall." Tr. 10 at 219. He added that, to some extent – perhaps to a great extent – dust samples "that included . . . dust that's liberated from the ribs by the first explosion . . . would not be representative of pre-roof fall conditions." *Id.* He further agreed that there was no way to know after the explosion how much the liberated dust affected the samples. *Id.* at 219-20.

In addition, Stephan acknowledged that the second explosion transported dust a far greater distance than the first explosion (Tr. 11 at 8, 78), and that the dust would have been transported outby in all four entries of the No. 4 Section. *Id.* at 78. He testified that some dust transported in the second explosion also had been transported in the first explosion, and because the forces from the second explosion were greater, dust not moved by the first explosion was in fact moved by the second. *Id.* at 81-82. Stephan acknowledged that MSHA made no calculations as to how much dust was transported by either of the explosions. *Id.* at 83. However, he was of the opinion that some dust inby the end of the track on the No. 4 Section was pushed or propelled outby the end of the track after the second explosion. *Id.* at 87. The fact that it is impossible to determine from the record the amount of coal dust that was put into suspension and the distance it was moved is yet another unresolved issue that undermines the Secretary's case.

In addition to being unable to determine how much rock and coal dust was put into suspension by the explosions and how far it was moved, the government was unable to establish to a reasonable degree of certainty how the dust settled after the explosions. Stephan even conceded the dust could have been in compliance before the first explosion and settled in such a way that it was explosive. Tr. 11 at 7-8.

To this must be added the fact that the explosive forces in and of themselves resulted in the liberation of coal dust that was not present before the roof fall. Witnesses for both the company and the Secretary agreed that equipment and other objects were hurled by the explosions' forces into the ribs and that the impacts fractured the ribs and freed coal dust. *See, e.g.*, Tr. 8 at 262-65

(Jim Langley); Tr. 10 at 214-17 (Stephan); Tr. 14 at 603 (Jack Tisdale);[50] *see also* Tr. 11 at 260-61. As MSHA Inspector Jim Langley aptly noted, the friable nature of the Blue Creek Seam virtually ensured coal dust would be liberated. Tr. 8 at 262, 268.

In addition, the nature of the Blue Creek Seam meant that coal dust was continually added to the sampled areas between the last explosion and the dates the samples were collected. Almost every witness who traveled underground commented upon the presence of post-explosion sloughage in the sampled areas. *See*, *e.g.*, Tr. 15 at 913-20 (testimony of Chuck Stewart regarding No. 4 Section); Tr. 12 at 683, 705 (testimony of Gary Toxey regarding No. 4 Section); Tr. 9 at 57-58 (testimony of Kenneth Murray regarding No. 4 Section); Tr. 8 at 271-72 (Langley); Tr. 12 at 524-26 (Mabe). True, there was disagreement as to the amount of sloughage. As has been previously noted, Toxey's description of the sloughage as "astronomical" (Tr. 12 at 683) was at odds with Kenneth Murray's description of the No. 4 Section as exhibiting a "bit" of sloughage. Tr. 9 at 57-58. However, under either scenario, it is clear that post-explosion sloughage was present in the affected area.

It is also clear that the post-explosion sloughage produced "sampleable" coal dust. Murray, the MSHA field office supervisor who co-authored the part of the MSHA accident report dealing with dust, thought that most of the dust produced by the sloughage was too large to pass through a 20 mesh sieve and, therefore, was too large to be included as part of the samples. Tr. 9 at 59. Stephan echoed Murray's opinion and stated that sloughage occurring after the second explosion would not have affected samples because coal usually sloughs in blocks or clumps and not particle sizes that pass through a 20 mesh screen. *Id.* at 538-39.[51]

However, I reject Murray's and Stephan's opinions and find for a fact that sloughage occurring after the second explosion liberated coal dust that was included in the samples. Miner Ricky Parker, who was chairman of the union safety committee at the time of the explosions, and who, unlike Murray and Stephan, had experience working with the Blue Creek Seam, described the coal as so soft, it could be dislodged from the ribs with one's fingers and turned to dust by squeezing. Tr. 6 at 338-39. Even more persuasive was a video offered into evidence by JWR depicting the pulling of ribs at the No. 5 Mine and the collection of resulting dust that was sifted through a 20 mesh screen. JWR Ex. 217. As the supporting testimony of JWR engineer James Jones established and as the video clearly shows, sloughage produces coal dust of a size that can be sampled. Tr. 12 at 778-91. It is logical to conclude that at least some of such dust was included in the samples that were collected following the explosions.

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[50] While Stephan's testimony pertained to dust liberated from the ribs by the forces unleashed by the first explosion, it is clear that the second explosion, which was far more powerful and extensive, would have had an even greater impact, something that Stephan acknowledged. Tr. 11 at 81-82.

[51] However, Stephan was not entirely consistent on this point. He also testified that he did not think "very much" screenable coal dust would be produced. Tr. 10 at 216-17.

It is apparent that MSHA had no idea how much coal dust was produced by the sloughage and how much was included in the samples. Stephan agreed that the amount of sloughage between the second explosion and the taking of the samples was "important, relevant and unknown" (Tr. 10 at 212-13), and he conceded in his deposition that, "[t]he liberation of coal and coal dust from the ribs would contaminate the area with respect to conditions that existed before the roof fall." *Id.* at 219. He also agreed there was no way to know how much the liberated dust affected the samples. *Id.* at 219-20.

From this review of the record, I conclude that measurable coal dust was liberated in the sampled areas during and after the explosions, that some of the dust was included in the samples, and that the Secretary does not know and cannot establish to a requisite degree of certainty how much this dust affected the sample results. It is another unresolved issue.

The effect of flooding and draining on the samples taken in the formerly flooded area also is unknown. Murray agreed the water coursing in and out of the mine would have moved and rearranged the coal dust and rock dust particles and removed them from areas where they previously existed. Tr. 9 at 180-81. Therefore, coal dust conditions in the flooded areas would have been "different" from those that existed prior to the explosions. *Id.* at 181. Murray could not say whether the difference was "large," "small," or "otherwise." *Id.* at 183-84. Kevin Stricklin, a member of MSHA's investigation team, testified that rock dust and coal dust were pumped out of the mine along with the water. Stricklin did not know if rock dust and coal dust amounts were the same after the water was gone. Tr. 7 at 271, 278-79. Nor did he know if flooding and draining the mine "changed the mine conditions by changing the dust composition of the area." Tr. 7 at 277-79.

Stephan agreed there was no evidence as to the content of the water that was pumped from the mine. Tr. 11 at 91-92. However, he maintained that the flooding actually was beneficial to JWR because moisture was added to the incombustible content (Tr. 11 at 153-56) and because the rock dust, being heavier than the coal dust, was more likely to settle out and remain when the water was drained. Tr. 9 at 560.[52] But Stephan's opinions in this regard were not based on any measurements or simulations, on-site or off. As Stephan himself testified, none of the accident investigations in which he participated involved mines that had been flooded following explosions. Tr. 10 at 28-29. To put the matter plainly, MSHA simply did not know and could not tell the extent to which pre-accident dust conditions were altered by the flooding process. True, the Secretary offered guesses, but I cannot find that the samples taken outby the toe of the water are sufficiently representative based on guesses. Thus, the effect of the flooding on the composition of the dust is something that cannot be determined with any requisite degree of certainly. It is another unresolved issue.

There are two final points regarding the samples that must be made. Stephan, and thus MSHA, relied in part on two "scientific" principles to confirm the existence of the alleged

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[52] This opinion contrasted with Stephan's earlier agreement that the water would have been "equally as likely to remove rockdust as it would be to remove coal dust." Tr. 9 at 556.

violation. First, Stephan believed that because some coal and coal dust was burned away by the heat of the second explosion, the incombustible content of the dust sampled in the area affected by the flame of the explosion actually was higher than its pre-explosion content. Therefore, the samples taken within the zone of the flame were even further out of compliance than the results indicated. *See* Tr. 11 at 165.

While this theory might have offered some inferential support for the existence of the violation if it was established as scientifically credible, it was not. The record reveals that Stephan and other MSHA officials felt that further research was needed to verify the principal and that Stephan asked for and received the assistance of the National Institute of Occupational Safety and Health ("NIOSH"). *See* Tr. 10 at 96. As JWR points out, and as Stephan himself recognized, NIOSH experiments on the issue were not conducted under conditions equivalent to those involving the explosions at the No. 5 Mine. Lacking other scientific support the principal remains, on the basis of this record, an unsubstantiated theory, one that can have no effect on my conclusion regarding the existence of the violation. *See* JWR Br. at II-49-50.[53]

Second, Stephan explained that all of the samples were subjected to alcohol coke tests. If the tests revealed the presence of large to extra large amounts of coke, Stephan believed that it was an indication the incombustible content of the samples was less than 50% and therefore indicative of non-compliance. *See* Tr. 10 at 79, 81; *see also* Tr. 9 at 275. Stephan felt the alcohol coke test results were "very critical . . . for making decisions about where the incombustible content was prior to an explosion." Tr. 10 at 79-80.

However, Stephan also testified that prior to coming to a final conclusion regarding the significance of coke in the samples, he felt that consultation with NIOSH was required. As a result, Kenneth Cashdollar of NIOSH, collaborated with Stephan and others at MSHA on the significance of post-explosion coke. Tr. 10 at 97.

As part of this collaboration the sample results were reviewed, and it was noted that some samples showing large amounts of coke had incombustible contents above 50%, even above 65%.[54] These results surprised Cashdollar, who felt that more testing was needed. Tr. 8 at 358-62, 385-86.

When Stephan was asked about these "anomalous" results, he conceded that "under some conditions," coking can occur when the sampled dust has an incombustible content of more than

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[53] Indeed, Stephan seemed to agree. He testified, "[W]e cannot draw any conclusions regarding what may occur under other conditions." Tr. 11 at 119.

[54] Several of the samples which had large to extra large amounts of coke showed incombustible contents ranging from 65.3% to 70.1%. Kenneth Murray agreed these results seemed at odds with the principle that coke only formed if the dust was 50% or less incombustible. Tr. 9 at 292-95; *see also* Tr. 8 at 360-62.

50% (Tr. 10 at 107), but he maintained that only a few tests showed these results, whereas "the knowledge that [MSHA had] . . . [came] from thousands of experimental tests." Tr. 10 at 107-08. When questioned further, Stephan admitted, he had no knowledge of the thousands of experimental tests. *Id.* at 185-87.

On the basis of the record, I find the Secretary's theory regarding the presence of coke in the samples is unsubstantiated and it will not influence my conclusion regarding the existence of the violation. *See* JWR Br. at II-49-50.[55]

Accordingly, I conclude that the Secretary has failed to prove: (1) that conditions relating to the incombustible content of the mine dust did not change between the time immediately prior to the roof fall and the samples' collection; and (2) that the sample results are sufficiently representative of results that would have been obtained at the time of the alleged violation. Therefore, I find that the Secretary has failed to establish the alleged violation.

In reaching these conclusions I am not ruling on likely causes of the explosions or on culpability for them. I am simply ruling on the issue before me – whether the Secretary has proved the alleged violation of section 75.403 by a preponderance of the evidence.

2. Order Nos. 7328088, 7328104, 7328105, and 7328106

Except for the charge in Order No. 7328105 that the preshift examination for the oncoming day shift on September 23, 2001 was incomplete because the examination was limited by mine management to electrical installations, all of the orders allege that variously required examinations on September 22 and September 23 were not adequate because "inadequate rock dust existed but was not identified by the examiner." Gov't Exs. 5, 6, 7, 8. The orders further allege that the "inadequate rock dust" is established by the same sample results as the alleged violation of section 75.403.

I have concluded that the Secretary failed to prove a violation of section 75.403 because, *inter alia*, she did not show that the sample results were sufficiently representative of conditions that existed at the time of the alleged violation. In view of this conclusion, the question arises whether the Secretary can nonetheless establish violations of sections 75.360(b)(3) and 75.362(a)(1) by showing the examiner failed to identify "a hazardous condition consisting of inadequate rock dust." Although it might be possible to do so in theory, in these particular circumstances the answer is "no." The alleged inadequate examinations are too closely tied to the sample results to survive the results' invalidation. The language of the orders specifically cites the results, and the testimony of the Secretary's witnesses Kenneth Murray and Kevin Stricklin make clear that, but for the results, the agency never would have cited JWR for the alleged failures to

[55] Even if I found the principles scientifically reliable, it would not overcome the deficiencies in the Secretary's case and change my ultimate conclusion that the Secretary did not establish the sample results were sufficiently representative.

identify inadequate rock dust during the examinations. *See* Tr. 9 at 991-92, 102, 106-07; Tr. 7 at 437-38. For these reasons the orders must be vacated as they relate to the alleged failures of the examiners to detect such conditions.

This leaves the allegation in Order No. 7328105 regarding the alleged improper limitation of the September 23 preshift examination to electrical installations. Under section 75.360(b)(3), among the locations where the preshift examiner is required to conduct an examination are "[w]orking sections and areas where mechanized equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift."

The record reveals that on September 23, Dye conducted the preshift examination for day shift on the No. 4 Section and No. 6 Section. Dye worked on the owl shift (11:00 p.m., September 22, to 7:00 a.m., September 23). Dye's supervisor was Randy Hagood. Tr. 3 at 380-81. When Dye arrived at the mine, he could not immediately begin the examination because the fan was being inspected in order to make sure it was functioning properly (a "fan check"). Hagood told Dye to wait until the fan check was completed. Tr. 3 at 380-82.

Dye did not go underground to begin the examination until around 2:00 a.m. or 3:00 a.m. Dye testified that Hagood told him to examine what Dye described as "electrical parts," which Dye understood to be "power centers and scoop chargers." Tr. 3 at 383. Dye asked Hagood if he was supposed to "make a complete check of the section" and Hagood responded, "No, just electrical installations." *Id.* at 384. When Dye went underground he believed that no one would be working on the No. 4 Section during the shift. *Id.*

Once underground, Dye recalled entering the No. 4 Section at the end of the track and proceeding inby along the No. 2 Entry. Dye examined the scoop battery charger and proceeded further inby along the No. 2 Entry to the power center. *See* Gov't Ex. 83C. Dye examined these areas. Dye did not examine anything inby the power center, including any of the face areas. Tr. 3 at 395. Dye retraced his steps, and exited the mine. At about 6:30 a.m., he reached the surface.

Dye completed a written preshift report indicating that he had inspected the scoop battery charger and the power center and that he traveled in the No. 2 Entry (the track entry). Tr. 3 at 393-94. The report was signed by Dye and later by the oncoming shift foreman, Burt Duvall. *Id.* at 394. Dye testified that he did not speak with anyone about the examination.

On September 23, John Puckett was scheduled to supervise the maintenance crew on the No. 4 Section during the day shift. According to Puckett, one of the things he did when he reached the mine was to check the preshift report and make certain a preshift examination had been conducted for his shift. Tr. 4 at 126.[56]

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[56] Puckett claimed that he intended to sign the preshift report to indicate he reviewed the report, but he later realized he neglected to do so. Tr. 4 at 132.

Puckett was aware that he would be responsible for work on the No. 4 Section. The work had been scheduled on the Thursday before Sunday, September 23. Tr. 4 at 126-28. Puckett thought the work would include roof bolting as well as maintenance work. He did not know the specific maintenance duties that would be assigned to his crew because those changed as the needs of equipment changed, but he knew that whatever the duties, they would take place on the No. 4 Section. *Id.* at 127.

Puckett also knew the areas that Dye had examined before Puckett entered the mine. Puckett stated when a preshift examiner did not know where miners would be assigned to work, they frequently limited the preshift to "the power center areas, the charger areas, any place that power is going to be restored." Tr. 4 at 131. When Puckett saw that Dye had restricted the preshift examination, Puckett decided to conduct a "supplemental preshift" examination after he reached the No. 4 Section. *Id.*

Once Puckett and his crew arrived at the section, Puckett led his crew up the No. 2 Entry. He had them wait at the power center while he examined the faces and conducted the rest of the supplemental preshift examination of the areas that had not been inspected by Dye. *Id.* at 132-36. The power center was located well inby the mouth of the No. 4 Section. *See* Gov't Ex. 83D. Puckett maintained that he called Duvall to report the conditions he found during the supplemental preshift examination. Tr. 4 at 142.[57]

Section 75.360(b)(3) requires the preshift examination to be conducted in "[w]orking sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift," and further specifies that "[t]he scope of the examination shall include the working places." A "working place" is defined as "[t]he area of a coal mine inby the last open crosscut." 30 C.F.R. § 75.2. The Secretary argues that JWR personnel knew that miners were scheduled to work on the No. 4 Section on September 23, and that although the job duties to be performed on the section may have changed, the location of the work did not. Therefore, the Secretary alleges the failure of JWR to preshift examine the working places before Puckett's crew went underground violated the standard. S. Br. at 63-64.

JWR asserts that although Dye limited his preshift examination to the electrical installations in the track entry, when the work plans for his crew changed and he understood the

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[57] However, the nature of Puckett's "supplemental" examination is open to question. Later in his testimony Puckett stated that he believed he had conducted two examinations on the No. 4 Section, a supplemental preshift examination and an on-shift. Tr. 4 at 161. He maintained that he called out the results of his supplemental preshift examination, but he agreed the results were recorded as an on-shift examination, not a preshift examination. When he was asked if he combined the two examinations, he stated that he had and "[t]here was no reason not to." *Id.* at 166.

crew was supposed to roof bolt the faces, he conducted a supplemental preshift of the faces and other unexamined areas before the miners were to go there. JWR Br. at III-16. The company also notes that due to the continuing power outage on the No. 4 Section, the miners on Puckett's crew never in fact worked at the faces. *Id.* According to JWR, since the record reveals that the preshift was conducted in places where miners actually worked, there was no violation of section 75.360(b)(3). *Id.* at 17.

Analysis must begin with the words of the regulation, which requires an examination for hazardous conditions (i.e., a preshift examination) in "[w]orking sections . . . if anyone is scheduled to work on the section . . . during the oncoming shift." 30 C.F.R. § 75.360(b)(3). "Working section" is defined as "[a]ll areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2. The standard also states that the scope of the examination shall include the "working places," which, as the Secretary notes, is defined as "[t]he area of a coal mine inby the last open crosscut." *Id.* Dye admitted that he did not examine the faces. Therefore, if anyone was "scheduled to work on the section" prior to Dye's examination, the standard was violated.

Puckett testified that prior to going underground on September 23, he understood that he and his crew were scheduled to work on the No. 4 Section. He further stated that the work was scheduled on the Thursday prior to Sunday, September 23. He believed the work would include roof bolting and maintenance work. Tr. 4 at 126-30. Puckett's testimony, which was not refuted, was entirely credible. Based on it, I find that JWR scheduled miners to work on the No. 4 Section prior to Dye's preshift examination, and I conclude that Dye's failure to examine "[a]ll areas of [the No. 4 Section] . . . from the loading point of the section to and including the working faces" (30 C.F.R. § 75.2), which includes "[t]he area of the . . . mine inby the last open crosscut" *(id.),* violated section 75.360(b)(3).

Having found a violation of the standard, I must now consider the inspector's findings relating to the S&S nature of the violation and JWR's unwarrantable failure to comply with section 75.360(b)(2). Further, since a civil penalty is required to be assessed for the violation, I must consider two of the civil penalty criteria for which there are no stipulations: the gravity of the violation and the negligence of JWR in allowing the violation to exist.

3. S&S and Gravity

An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a 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).

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained its interpretation of the term "S&S" as follows:

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

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. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (August 1985), the Commission explained that:

> the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 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 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

7 FMSHRC at 1129 (emphasis in original).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Further, any determination of the S&S nature of a violation must be made in the context of continued normal mining operations. *U.S. Steel*, 7 FMSHRC at 1130; *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986).

The Secretary argues, and I agree, that the violation was S&S. First, there was a violation of section 75.360(b)(3).

Second, there was a discrete safety hazard that was contributed to by the violation in that had normal mining operations continued, power would have been restored, and miners would have

been sent forward to the face areas to roof bolt or to other areas of the section for maintenance work. Tr. 4 at 127. This was prevented by a continued disruption of the power, but the disruption was abnormal, and JWR was working to put the power back online as the day shift commenced. It is true that Puckett's "supplemental" examination covered areas not covered by Dye, but miners already had entered and advanced well into the section before Puckett's examination began. Given the gassy nature of the mine the failure to conduct the full preshift examination before miners were on the section significantly and substantially contributed to exposing the miners to a methane-related accident. Any such accident was reasonably likely to result in serious, indeed fatal, injuries.

Third, there was a reasonable likelihood that the hazard would result in an injury causing event. Section 75.360(a)(1) prohibits persons other than the preshift examiner from entering or remaining in an underground area unless a preshift examination has been completed. 30 C.F.R. § 75.360(a)(1). A working section where miners have been assigned to work is designated by section 75.360(a)(3) to be one of those underground areas. The No. 4 Section was such an area, and Puckett's testimony makes clear that miners entered the area before it was examined. According to Puckett, he had the crew wait at the power center while he examined the areas that Dye had not visited. Tr. 4 at 132-33, 135. As previously noted, the power center was located well inby the mouth of the section. Thus, miners entered one of the nation's gassiest mines and proceeded inby to a section that had not been completely examined after the fan had been off and ventilation had been disrupted. This meant that miners were on the section before the methane and ventilation tests required by section 75.360 were made. Given the propensity of the mine to liberate methane, and the fact that electric and diesel equipment was in place and that the power would have been restored had normal operations continued, I find that it was reasonably likely the failure to conduct a complete preshift examination significantly and substantially contributed to the danger of the miners being involved in a methane-related ignition or explosion. The fact that power was off does not lessen the reasonable likelihood of injuries arising from the violation since JWR was working to restore the power and in the course of normal operations would have done so.

Fourth, burns and suffocative and percussive type injuries frequently are associated with methane-related ignitions or explosions. Therefore, it was reasonably likely the injuries would be of a reasonably serious nature.

Gravity and S&S are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). I conclude that hazards presented by the failure to completely preshift examine the entire No. 4 Section at this mine were indeed serious as indicated by the discussion above regarding the type of injuries that could have occurred. While I recognize the gravity of the violation was mitigated somewhat by Puckett's "supplemental" examination (Tr. 4 at 166), the fact remains that until that examination was completed, Puckett's crew was for some time exposed to the hazards of a less than fully examined section. Given the nature of the mine, the lack of ventilation prior to the shift, and the presence of

electric and diesel equipment, the mitigation does not remove the violation from the serious category.

4. Unwarrantable Failure and Negligence

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a miner 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. Sec'y of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th 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 Youghiogheny & 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).

JWR's failure to ensure the No. 4 Section was completely examined before miners were sent to work on the section was indicative of a serious lack of reasonable care. Puckett knew the preshift examination was incomplete for the No. 4 Section. Tr. 4 at 131. He understood miners were assigned to work on the No. 4 Section. *Id.* at 130. Nonetheless, Puckett, a representative of mine management and a person with a heightened standard of care, allowed miners to enter the section before a complete examination was conducted. Even though Puckett conducted the rest of the examination after the crew halted at the power center, placing miners on the section and thus in harm's way before the preshift examination was completed represented a failure of compliance that was unwarrantable.

It also was highly negligent. Randy Hagood, Dye's supervisor and a JWR management official, should have known on the Thursday before September 23, that the No. 4 Section had been designated as a place that miners would be assigned to work. It was his responsibility to assign Dye accordingly, yet he chose to give Dye instructions that effectively restricted Dye's preshift examination. Hagood, as supervisor, is held to a high standard of care, and here he failed to meet it.

Further, Puckett, being a management official and certified examiner, also is held to a high standard of care. In view of what Puckett knew about the restricted nature of Dye's examination and the fact that miners were assigned to work on the section, his failure to see that the entire section was examined before leading his crew onto the section was another major departure from the standard of care JWR's supervisors were required to meet.

5. Civil Penalty Assessment

The criteria that must be considered in assessing a penalty have been enumerated above. Slip Op. at 17. The Commission has repeatedly instructed its judges on the importance of considering all of the criteria and of making findings of fact regarding the criteria so as to provide the parties and the Commission with notice as to the bases upon which the penalties are assessed. *See, e.g., Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600-01 (May 2000).

The parties have stipulated that the proposed penalties for the alleged violations will not adversely affect JWR's ability to continue in business, that JWR is a large operator, and that the company should be credited for good faith, timely abatement. Stipulations 6, 7, 9 (Sept. 7, 2004). They also have stipulated that a computer printout from September 23, 1996 to September 23, 2001 "is the history of prior violations for the No. 5 Mine for the purposes of [this proceeding]." *Id.* at 8. The printout lists a total of 2,184 paid violations. This is a large history.

Order No.	Date	30 C.F.R. §	Proposed Assessment
7328105	12/11/02	75.360(b)(3)	$55,000

I have found that the violation was serious in view of the types of injuries to which it could have engendered. I also have found the violation was due to the high negligence of JWR management personnel. Given these findings, the company's large size, its large history of previous violations, its good faith, timely abatement, and the fact that the assessment will not adversely affect its ability to continue in business, I conclude that a penalty of $2,500 is appropriate for the violation.[58]

C. The Order Relating to the Lack of Evacuation of Miners

Order No. 7328082 charges a violation of 30 C.F.R. § 75.1101-23(a) in that, after the first explosion on the No. 4 Section, miners were not evacuated from the mine. The order asserts that mine management personnel knew the explosion had damaged critical ventilation controls and that the section foreman believed a second explosion was possible, yet miners were not alerted to the problem.[59] The order contains an S&S finding. It also asserts the 13 miners were fatally injured as

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[58] In assessing the penalty I note the inadequate preshift examination did not contribute to the fatalities that resulted from the explosions and that other violations of section 75.360 cited pursuant to section 104(d) of the Act have been assessed by the Secretary at similar amounts. *See* Attachment to Stipulations (printout of previous history).

[59] Order No. 7328082 states:

> On September 23, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. The accident investigation revealed a proper evacuation procedure was

a result of the violation, the violation was due to JWR's unwarrantable failure to comply with section 75.1101-23(a), and the company's negligence was high. Gov't Ex. 2.

At the time the alleged violation occurred, section 75.1101-23(a) required in part:

> Each operator of an underground coal mine shall adopt a *program for the instruction* of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and *proper evacuation procedures to be followed in the event of an emergency. . . .*
>
> (1) The approved program of instruction shall include a *specific fire fighting and evacuation plan* designed to acquaint miners on all shifts with procedures for:
>
> (i) Evacuation of all miners not required for fire fighting activities;
>
> (ii) Rapid assembly and transportation of necessary men, fire suppression equipment, and rescue apparatus to the scene of the fire; and
>
> (iii) Operation of the fire suppression equipment available in the mine.
>
> (2) The approved program of instruction shall be given to all miners annually, and to newly employed miners within six months after the date of employment.

30 C.F.R. § 75.1101-23(a) (emphasis added).

> not followed after the first explosion on 4 Section. Miners were not evacuated from the mine after an explosion damaged critical ventilation controls. These conditions were known by, and communicated to, management personnel, including the CO Room Supervisor. The section foreman believed there was a possibility of a second explosion and did not effectively communicate this information to other miners.
>
> Miners from other areas of the mine responded to the emergency on 4 Section believing either an ignition or a fire had occurred. These miners were unaware an explosion had occurred and a second explosion was possible. Miners underground were not alerted to the problem through the mine wide telephone paging system. Also, management directed 7 additional miners to join the 13 miners already in 4 Section.

Gov't Ex. 2.

1. Section 75.1101-23(a)

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Id.*; *Rock of Ages Corp.*, 20 FMSHRC 106, 111 (Feb. 1998), *aff'd*, 170 F.3d 148, 161 (2d Cir. 1999); *Central Sand and Gravel Co.*, 23 FMSHRC 250, 253-54 (Mar. 2001); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

In my pre-hearing order denying JWR's motion for summary decision on the applicability of section 75.1101-23(a) and the fire fighting and evacuation plan, I concluded that MSHA properly cited JWR for a violation of section 75.1101-23(a) because "the meaning of the standard is plain" and the term "emergency" referred to in the standard is inclusive of an explosion. 26 FMSHRC at 626-28 (citing *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1982) (recognizing the language of many standards is "simple and brief in order to be broadly adaptable to myriad circumstances")).

Based on the regulation's plain language, it followed that JWR had adequate notice of the regulation's requirements. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that adequate notice provided by unambiguous regulation). Further, applying an objective standard of notice, I concluded that a reasonably prudent mine operator would have recognized that an explosion is a type of emergency event referenced in the standard. 26 FMSHRC at 626-28 (citing *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (Jan. 1983); *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept. 1991); *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996)). I stated:

> In evaluating whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized the applicability of the standard to the cited facts at issue, the Commission has analyzed a number of factors including the ordinary definition of the terms of the text of the regulation at issue, the consistency of the Secretary's enforcement, and whether MSHA has published notices regarding its interpretation of the standard in question.

26 FMSHRC at 627 (quoting *Western Industrial, Inc.*, 24 FMSHRC 269, 270 (Mar. 2002) (ALJ) (citing *Allen Lee Good d.b.a. Good Const.*, 23 FMSHRC 995, 1005 (Sept. 2001); *Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1141-42 (Sept. 1988); *Alabama By-Prods. Corp.*, 4 FMSHRC 2128, 2131-32 (Dec. 1982))). I determined that JWR had been provided notice

of the standard's requirements by MSHA's published abstract of section 75.1101-23, which explicitly stated the standard "requires each operator of an underground coal mine to adopt a program for mine evacuation in the event of an emergency, such as fire or explosion." 26 FMSHRC at 626 (quoting 60 Fed. Reg. 23,567 (May 8, 1995)). In addition, I considered the definitions of "explosion" and "fire" in the *Dictionary of Mining, Mineral and Related Terms*, U.S. Dept. of Interior, Bureau of Mines 402, 429 (1968), which indicate that fires and explosions can be interrelated events. 26 FMSHRC at 627-28.

Having held that section 75.1101-23(a) applied to explosion-related emergencies and that JWR had been provided adequate notice of the standard's requirements, I stated that the next question was whether JWR followed its MSHA-approved fire fighting and evacuation plan on September 23. I observed that the Secretary would have to prove the alleged violation of the plan at trial. *Id.* at 628.[60]

In JWR's post-hearing brief, the company again urges reconsideration of the issue, which I again deny. At the time I ruled on the motion I felt it was correct to read the standard's reference to an "emergency" as applicable to an explosion, and I think so now. At the time I ruled on the motion I also felt the Secretary would have to prove at trial that particular portions of JWR's adopted and approved plan were applicable and were violated, and I think so now.

I conclude, however, that there is an important distinction between the applicability of the standard to explosions and other emergencies and the applicability of the approved and adopted plan to the facts of a particular case. As I read the standard, it was not restricted to fires only. Rather it provided that an operator shall either expressly or implicitly include provisions relating to explosions in its adopted plan.[61] Lacking such express or implied provisions, a plan adopted under the standard does not *ipso facto* apply to explosions. Nor would it make sense for it to do so, since a fire evacuation program might be considerably different from an explosion evacuation program and *vise versa.*

2. The Violation

After listening to all of the testimony and after carefully reviewing the documentary evidence, it is clear to me that the plan adopted by JWR and approved by the Secretary did not require that miners be evacuated after the first explosion on September 23. The crux of the Secretary's case is her argument that "section V.[a.8] requires miners to 'be evacuated if a fire cannot be extinguished or brought under positive control.'" S. Br. at 22. She goes on to argue that

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[60] Subsequently, I denied JWR's motion for reconsideration or certification of the issue to the Commission. 26 FMSHRC 734.

[61] I again note the Secretary's observation in her abstract of the standard, that the standard "requires each operator . . . to adopt a program for mine evacuation in the event of an *emergency such as* a fire *or* explosion." 60 Fed. Reg. 23,567 (emphasis added).

"miners [are] not capable of extinguishing an explosion or bringing it under positive control, and so evacuation was required." *Id.*[62]

As JWR has repeatedly pointed out, the plan which it adopted and the Secretary approved states that "Miners shall be evacuated if a *fire* cannot be extinguished or brought under positive control." Gov't Ex. 34 at section V.a.8 (emphasis supplied). Nothing in the language of section V.a.8 or the provisions surrounding it indicates these words are used in the plan in other than their most commonly accepted manner. A "fire" that "cannot be extinguished or brought under positive control" is the thing specified in the plan that triggers an evacuation. There is no reference to any other initiating circumstance. Nor is one implied from the context within which the requirement is stated in that part V refers only to situations involving fires.[63] Therefore, I find that both the plain meaning of the evacuation provision and the overall context in which it appears require evacuation only in the event of "fire." In other words, as used in section V.a.8 of the adopted plan, "fire" does not mean "explosion." [64]

This does not end the matter, for the plan might have required an evacuation of all miners in the event of an "emergency" other than a fire or even in a general emergency situation, such as that referenced in section 75.1103-23(a). But, it did not. It bears repeating that the *only* event explicitly or implicitly indicated as requiring an evacuation is a "fire" that "cannot be extinguished or brought under positive control." [65]

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[62] However, during the cross-examination of witnesses who testified about an explosion at the mine in 1993, the Secretary's counsel asked questions implying that the extent of damage to ventilation, not the fact of explosion, was an essential component of determining the provision's applicability. *See* Tr. 14 at 171-72; Tr. 15 at 1179.

[63] It is clear that, until this dispute arose, JWR never considered the plan to apply to anything other than fire situations, and if the Secretary considered the matter at all, she seemingly believed that to be the case as well. I find the testimony of mine foreman Burt Duvall involving the 1993 explosion at the mine instructive. The explosion disrupted ventilation and injured miners, and Duvall's first priority was to go into the area to help get injured miners out. Other miners rushed to the area of the explosion to assist Duvall in his rescue efforts. The firefighting and evacuation plan then in effect was substantively the same as it was in 2001 (*see* JWR Ex. 236), yet MSHA issued no citations for miners going into the area of the explosion following its occurrence. Tr. 5 at 248-57, 260-61, 279; *see also* Tr. 14 at 96-99.

[64] Interestingly, the Secretary would have me apply a "plain meaning" rule of interpretation to section 75.1101-23(a), but not to a plan drafted pursuant to it.

[65] Another part of the plan, entitled "Evacuation Procedures," requires evacuation in the event of a CO alarm signal. Gov't Ex. 34 at sections II.d & II.e. In this case, although a communication error signal indicated that the CO sensor had stopped communicating with the computer at the mine surface, the error signal was different from an alarm signal indicating an

Therefore, I conclude that while explosions and fires are both the kind of emergencies referenced in section 75.1101-23(a) and while both may be "covered" by a plan drafted in accordance with that section, the plan has to either expressly or impliedly reference them in specifying what is required. As noted above, the plan adopted and approved for the No. 5 Mine had no express directive for evacuation in the event of an explosion. Nor was such a provision implied. For this reason, I conclude that JWR did not violate section 75.1101-23(a) as alleged.[66]

I want to emphasize that, in reaching this conclusion, I am not finding that a provision requiring miners to evacuate in the event of an explosion was undesirable from a safety standpoint. One may have been highly desirable, to say the least. In fact, one may have been necessary to fully effectuate miner safety. I am only finding that such a provision was not included in the plan either expressly or impliedly and that the Secretary cannot at this late date supply through an administrative law judge's decision something she wishes she had insisted on more than 6 years ago. It is not the role of the Commission's judges to write or re-write plans that should have been the result of a "bilateral" process involving the parties' "consultation, discussion, . . . negotiation and . . . mutual agree[ment]." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987).

D. The Order Relating to the Lack of Fire and Emergency Drills

Order No. 7328085 charges a violation of 30 C.F.R. § 75.1101-23(c) in that fire and emergency drills were not conducted at intervals of no more than 90 days. The order asserts that the lack of training regarding proper evacuation procedures affected the miners' response to the situation in the mine on September 23.[67] The order contains an S&S finding. It also asserts the 13

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emergency. *See* Tr. 5 at 384-88, 393-98.

[66] The plan contains many specific provisions relating to fire fighting and rescue. Sections I.3 and V.a.1 provide for the rapid assembly and transportation of fire suppression equipment, rescue apparatus, and personnel to the scene of a fire. Section II.4 states that "[t]he supervisor will assign men to carry necessary supplies such as first aid supplies, maps, necessary tools and brattice materials." Section II.3 states that "[a] supervisor or designated person will assemble *all* men promptly and lead the way during the evacuation." (Emphasis added). I note that Key and House were trying to help Adams, who remained injured on the No. 4 Section, and Blevins was intending to fight a fire. Tr. 1 at 436-437; Tr. 5 at 143-44. In view of the fire fighting and rescue provisions, I conclude that the attempts by miners and management officials to help Adams and fight a fire were not contrary to the plan.

[67] Order No. 7328085 states:

> On September 23, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. The accident investigation revealed the operator failed to conduct fire and emergency drills at intervals of not more than 90 days.

miners were fatally injured as a result of the violation, the violation was due to JWR's unwarrantable failure to comply with section 75.1101-23(c), and the company's negligence was high. Gov't Ex. 4.

At the time the alleged violation occurred, section 75.1101-23(c) required in part:

> Each operator of an underground coal mine shall require all miners to participate in fire drills, which shall be held at periods of time so as to ensure that all miners participate in such a drill . . . at intervals of not more than 90 days . . . .
>
> (1) The operator shall certify by signature and date that the fire drills were held in accordance with the requirements of this section. Certifications shall be kept at the mine and made available on request to an authorized representative of the Secretary.
>
> (2) For purposes of this paragraph (c), a fire drill shall consist of a simulation of the actions required by the approved fire fighting and evacuation plan described in paragraph (a)(1) of this section.

30 C.F.R. § 75.1101-23(c).

> Interviews of underground miners and a review of mine records indicate that *no* such drills had been conducted since March, 2001. The lack of training and simulation relative to proper evacuation procedures to be followed in the event of an emergency, affected the miners' response to the emergency situation of September 23.

Gov't Ex. 4 (emphasis added). The Order was subsequently modified as follows:

> A further review of the fire drill and escapeway walk records indicates that some miners received some related training. However, complete fire drills, including all miners every 90 days, had not been conducted during the period from March 2001 to September 23, 2001. Therefore, the statement, "Interviews of underground miners and a review of mine records indicate that *no* such drills had been conducted since March, 2001" is modified to reflect the following: "Interviews of underground miners and a review of mine records indicate that *few* such drills had been conducted since March, 2001."

Gov't Ex. 4A (emphasis added).

1. Section 75.1101-23(c)

Although the parties dispute the meaning of the standard, I conclude that its language is clear and its terms must be enforced as written. *See Dyer*, 832 F.2d at 1066; *Utah Power & Light*, 11 FMSHRC at 1930. Under the standard's provisions, an operator is required to ensure that all of its miners participate in fire drills at least every 90 days and to certify in writing that each miner has participated. The requirements of participation and certification are separate, and, although they are topically related, non-compliance with the certification requirement does not automatically establish non-compliance with the participation requirement. While the lack of certification can be an indication of non-participation, to establish non-participation the evidence must be examined in its totality.

The standard also is clear as to what constitutes a fire drill. It states that a drill "shall consist of a simulation of actions required by the approved fire fighting and evacuation plan." 30 C.F.R. § 75.1101-23(c)(2). The ordinary connotation of the word "shall" is "must," and it is a term of legal significance in that it is mandatory or imperative, not precatory. *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990). As used in section 75.1101-23(c)(2), the term "consist" means "to become composed or made up." *Webster's Third New International Dictionary Unabridged* at 484 (1993). "Simulation" is defined as "the act or process of simulating: imitation, pretense . . ." and "simulate" means "to give the appearance or effect of: feign, imitate . . . to have the characteristics of: resemble . . . to make believe: pretend." *Id.* at 2122. Nothing in the language of the standard indicates that the words "shall," "consist," and "simulation" are used in an unorthodox manner. Therefore, I conclude that under section 75.1101-23(c) a fire drill is an on-site imitation of actions specified by the approved plan to be part of the drill. Or, as the Secretary terms it, the required drill is a "hands-on simulation." S. Br. at 40.[68]

2. Parties' Arguments

The order alleges that JWR violated section 75.1101-23(c) because few miners received complete fire drills between March 2001 and September 23, 2001. Gov't Exs. 4 & 4A. Consistent with the order, the Secretary argues that JWR violated section 75.1101-23(c) by failing to conduct fire drills within the required time periods, i.e., at intervals of not more than 90 days. S. Br. at 40. As noted, in the Secretary's view, the 90-day fire drills must be "simulations" for which other fire-related education or training cannot be substituted. *Id.* at 41.

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[68] Based on the regulation's plain language, it follows that JWR had adequate notice of its requirements. *See Bluestone*, 19 FMSHRC at 1029.

JWR's Exhibit 164 lists the names of 163 miners. JWR Ex. 164.[69] JWR stipulated that the company did not have records headed "Fire Drill" for 130 of the 163 miners listed on Exhibit 164 "for the ninety days before the accident." Tr. 8 at 160. Extrapolating from this stipulation, and focusing on the period from January 1 to September 23, 2001, the Secretary asserts that, although 7 days remained in the last 90-day cycle, "it is implausible to think that JWR would have . . . provided drills for 130 miners who were not drilled in the previous two [90]-day cycles." S. Br. at 40 & n.31 (citing JWR Ex. 164). The Secretary argues that JWR's failure to produce records of fire drills for many of its miners is a *prima facie* violation of the standard. *Id.* at 41. She submits that the absence of records allows an adverse inference against JWR that such fire drills did not take place. *Id.*

JWR responds that, during the accident investigation, MSHA removed fire drill records without providing JWR copies, receipts, or a Bates stamp tracking system and that MSHA misplaced those records. JWR Br. at V-2, V-6-7, V-11, V-15 n.8 (citing Gov't Ex. 4A as evidence of MSHA's mishandling of fire drill records). JWR states that, consequently, "no one knows what fire drill records exist or existed at the time of the accident." *Id.* at V-2. In addition, JWR argues that, according to precedent involving analogous standards, even if some of its miners had not participated in fire drills, a violation would not be established. *Id.* at V-9-11.

3. The Violation

In its most fundamental formulation, the issue before me is whether JWR violated the requirement of the standard that all miners participate in fire drills at not more than 90-day intervals. By focusing on the standard and by determining whether the evidence conforms to its requirements, it is possible to resolve the issue.

Turning first to the plain meaning of the regulation, I find that "all miners" means exactly what it says. I am not persuaded by JWR's negatively stated argument to the contrary, i.e., a violation would fail to be established if the evidence showed that some of the company's miners had not participated in fire drills. JWR Br. at V-9-11. JWR relies upon *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672, 1675 (Oct. 1983) (citing *North American Coal Corp.*, 3 IBMA 93, 107 (1974)), a case that involved interpretation of the phrase "shall be required to wear . . . safety belts and lines" as used in the surface coal protective clothing standard, 30 C.F.R. § 77.1710(g). *See* 5 FMSHRC at 1672-73. In *Southwestern*, the Commission held the regulation did not state that a mine operator must "guarantee" that belts and safety lines be actually worn, therefore, "when an operator requires its employees to wear belts when needed, and enforces that requirement, it has discharged its obligation under the regulation." *Id.* at 1675. The Commission specifically restricted its holding to the regulation at issue in that case. *Id.* Here, however, section 75.1101-23(c) states that "[e]ach operator . . . shall require all miners to participate" and "ensure

[69] The list was compiled by Stanley Blankenship, MSHA's special investigation supervisor. It is headed "JWR Hourly Employees [Who] Did Not Participate in Fire Drill From January 1 through September 23, 2001." JWR Ex. 164; Tr. 8 at 150-51, 153-54.

that all miners participate" in fire drills every 90 days. Unlike *Southwestern*, the operator's obligation is not discharged by merely requiring training because under section 75.1101-23(c)(1) the operator is also required to certify the training. The term "certify" means to "confirm," "assure," or "guarantee." *Webster's* at 367. Thus, section 75.1101-23(c) provides for the protection of miners by directing that mine operators certify that the required fire drills were conducted for all, not merely some, of its miners.

Having concluded that the standard applies to each and every miner, the next step is to determine the nature of the "fire drill" in which all miners are required to participate. Section 75.1101-23(c)(2) states that "a fire drill shall consist of a simulation of the *actions required by the approved . . . plan*." (Emphasis added). Therefore, I must look at the plan. As I have noted previously, once the plan is adopted by the operator and approved by the Secretary, its provisions are binding and enforceable as though they were mandatory safety standards. 26 FMSHRC at 628.

The plan for the No. 5 Mine is far from a model of clarity.[70] In fact, it is poorly drafted and confusing. Nevertheless, it is the plan JWR adopted and the Secretary approved so its provisions must be applied. Under the heading "Fire Drills (part V) the plan mingles the duties of fire fighting with those of a fire drill. However, a careful reading of part V reveals specific duties that designated miners and supervisors are required to perform during a drill. For example, "[m]iners are assigned by occupation to handle the different types of fire fighting equipment." Gov't Ex. 34 at section V.a. In this regard, the electrician must "[p]ull power and man fire extinguishers," the miner operator must "[m]an [a] fire hose," etc. *Id.* Under the plain language of the standard, this means that, during a fire drill, there must be an on-site simulation of a response to a mine fire. Therefore, during the drill the miners must go through the motions of actually carrying out the duties specified in the plan.

The plan also requires miners to "be acquainted with procedures for rapid assembly and transportation of necessary personnel, fire suppression equipment, and rescue apparatus to the scene of the fire during the first fire drill conducted each year," and it requires the section foreman to "acquaint the miners with these procedures." *Id.* at section V.a.1. This means that during the

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[70] For example, under the heading "Fire Drills" the plan specifies the jobs to which various personnel remaining in the fire area are assigned "in the event of an actual fire." Gov't Ex. 34 at section V.a.2. Further, the plan surprisingly fails to specify that evacuation is part of the drill. As already discussed, the plan states that "Miners shall be evacuated if a fire cannot be extinguished or brought under positive control," another provision that only comes into effect in the event of an actual fire. *Id.* at section V.a.8. However, this latter gap in the plan is, to a large extent, filled by 30 C.F.R. § 75.383(c) entitled "Escapeway maps and drills," which plainly allows that practice escapeway drills "may be used to satisfy the evacuation specifications of the fire drills required by § 75.1101-23," and the record contains numerous documents showing that practice escapeway walks were conducted at the mine. *E.g.*, JWR Exs. 6, 14, 50, 53, 69, 70, 94, 136, 158, 198, 199.

first quarter of each year, at least, the on-site simulation must include verbal instruction from the section foreman in the assembly and transportation requirements.

Further, the plan requires all miners not assigned to specific jobs during a drill to assemble at a posted evacuation map. *Id.* at sections V.a.3 & V.a.7. This means, as part of the same on-site simulation, unassigned miners must physically travel to the posted evacuation map.

The plan also specifies the instruction of new miners on their first day of employment in the use of self-rescuers and annual re-instruction of all miners thereafter, and imposes a duty on the section foreman to review the proper use of the self-rescuer with miners who need instruction during a fire drill. *Id.* at section V.a.6. This means that, during the same fire drill occurring in the appropriate quarter and thereafter, the section foreman must demonstrate – presumably orally and physically – the use of self-rescuers to miners who require it.

Did all miners participate in an on-site imitation of the actions specified in the plan? Credible testimony establishes they did not. Tarvin, who worked at the mine for 20 years, stated that fire drills at the mine "were more of a discussion" than a simulation of fighting a fire. Tr. 1 at 489-90. Corbin, who worked for JWR since 1997, testified that he could recall no "physically [sic] hands-on fire drill" taking place in 2001. Tr. 2 at 38. Jarvis too stated that he could not recall any instance prior to the explosions in which he was required to "simulate" or "act out" actions required by the plan. Tr. 3 at 213. In like measure, Dye, who worked for JWR at the mine since 1981, testified that he did not participate in an "actual hands-on simulation" of fighting a fire. *Id.* at 403. Bonner, who worked for JWR at the mine since 1979, also did not recall participating in any "hands-on" fire drills prior to the accident, although he noted that since September 23, 2001, such drills have been "extensive." Tr. 4 at 56. Randy Clements, a JWR employee since approximately 1980, testified that in the 6 months prior to the explosions he had not participated in a fire drill that simulated what he was "to do under the firefighting and evacuation plan." *Id.* at 341. Goggins, who started working at the mine in 1999, maintained that between 1999 and September 2001, he did not participate in a "hands-on" fire drill. Tr. 5 at 289. Finally, Robbins, who began work at the mine in 1996, stated that he could not recall "a fire drill where [he] simulated the duties . . . [he] would be expected to carry out if there were a fire." Tr. 6 at 14. I find that the credible testimony of these miners establishes that JWR violated the standard by failing to ensure their participation in the type of simulated fire drills required by the standard at least every 90 days.

The plan also states that "[a] record of each fire drill will be maintained on the attached form [and that] [t]hese complete forms will be located on the surface in the safety office." Gov't Ex. 34 at section V.a.4. No form was attached to the copy of the plan that was entered into evidence as the official exhibit. *See id.* It is clear, however, that JWR's practice was to make available to MSHA forms that MSHA accepted as appropriate certification. During the course of the investigation the company submitted to MSHA numerous different documents that served as its fire drill records. *See* Gov't Ex. 35 (single exhibit containing forms entitled "Fire fighting, Escape and Evacuation Plan Washer Facilities," "Fire Fighting, Escape and Evacuation Plan All Surface

Facilities Other than Washer," "Fire Drill Record Underground Longwall," "Fire Drill Outby Crews," and "Fire Drill Section Crews"); Tr. 8 at 21-22. While these forms may or may not have included the form stated to be attached to the plan, they do not reflect the type of fire drill that I conclude was required by the regulation and the plan, i.e., an imitation of fire drill activities specified by the plan or, as the Secretary terms it, a "hands-on simulation," and I do not find that the records overcome the credible testimony of Tarvin, Corbin, Jarvis, Dye, Bonner, Clements, Goggins, and Robbins – testimony that establishes they did not participate in the type of drills the standard requires. Going further, I infer from the testimony of these witnesses that there was a general lack of on-site simulations at the mine. There are too many miners with similar credible testimony for them to represent isolated instances.

I recognize, of course, that JWR argues its fire drills included escapeway walks, hands-on training and demonstration of fire fighting equipment, safety meetings, group discussions, role playing and putting out mock fires, using self-rescuers, instruction on the danger of methane, and first aid training, and that together these activities constituted drills that complied with the standard. JWR Br. at V-2-3. I also recognize that JWR represents this training took place at daily, weekly, 6-week, and 90-day intervals, and annually during annual refresher training. *Id.* at V-3, V-12-14. I conclude, however, that although many of the subjects included in the plan may have been covered, these "drills" did not meet the simulation requirement of the standard and the plan. There is too much testimony about a lack of the type of drills that I conclude was required for me to hold otherwise.

Not surprisingly, JWR points to MSHA's *PPM* as sanctioning its fire drill practices. The *PPM* lists examples of the types of training that meet section 75.1101-23's requirements for fire drills as follows:

> Various types of training will constitute a fire drill, e.g., demonstrations (surface or underground), hands-on training, group discussions, and task-oriented training. Firefighting plans will be acceptable if the fire drills as outlined in such plans satisfy the intent of this regulation, which includes making all miners familiar with firefighting procedures to be followed at the mine.
>
> * * *
>
> All fire drills required by paragraph (c) of this Section need not be held underground. The evacuation portion of the drill need not be held at the same time as the firefighting portion of the drill.

JWR Ex. 146 (excerpt of V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 105-06 (1994)). The *PPM*, however, is not binding on the Secretary and does not have the same force and effect of law as a mandatory safety standard. *D. H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981); *see also*

Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538-39 (D.C. Cir. 1986) (reversing Commission which improperly regarded the Secretary's general statement of enforcement policy as binding).[71] Nor can the provisions of the *PPM* change the compliance responsibilities of the operator when the meaning of the standard is clear. *See Mingo Logan Coal Co.*, 133 F.3d 916, No. 97-1392, 1998 WL 3613, at 3 (4th Cir. 1998) (unpublished *per curiam* opinion).

I conclude, therefore, that the record supports finding that JWR violated section 75.1101-23(c) by failing to conduct the kind of simulated fire drills required by the standard.

4. S&S and Gravity

JWR contends that if section 75.1101-23(c) was violated, the violation was only technical because no miner lost his life on September 23 due to a lack of fire drill training. JWR Br. at V-17-18.

With regard to the question of S&S, the Secretary has established that there was a violation of section 75.1101-23(c), satisfying the first *Mathies* element. 6 FMSHRC at 3-4. The remaining *Mathies* elements require, *inter alia*, that the violation be proven to have contributed to a discrete safety hazard that is reasonably likely to result in serious injury. *Id.* In this case, the facts show that JWR's mine is one of the gassiest mines in the country (Tr. 1 at 82; Tr. 9 at 16; Tr. 15 at 32) and the mine experiences occasional fires.[72] If JWR failed to train its miners in how to fight a fire,

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[71] I find unavailing JWR's argument that MSHA assured the mine's compliance with section 75.1101-23(c) during quarterly "AAA" inspections by auditing its fire drill records and that the mine had never been cited for, nor had MSHA questioned the quality of, its fire drills. JWR Br. at V-4-5, V-11, V-14 & n.8. The evidence shows that MSHA did not consistently document its examination of fire drill records during the second quarter. Moreover, the records or lack thereof, do not outweigh the statements of those who testified to a lack of required drills. Further, the fact that JWR had not been previously cited for a violation of section 75.1101-23(c) does not prevent the Secretary from alleging a violation in this case. The Commission has repeatedly held that a lack of previous enforcement of a safety standard does not constitute a defense to a violation and that estoppel does not generally apply against the Secretary. *U.S. Steel Mining Co., Inc.*, 15 FMSHRC 1541, 1546-47 (Aug. 1993) (citing *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981); *Bulk Transp. Serv., Inc.*, 13 FMSHRC 1354, 1361 n.3 (Sept. 1991)); *see also Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984) (courts invoke the doctrine of equitable estoppel against the government with great reluctance).

[72] Tr. 1 at 523-28, 543-44 (Tarvin stating that in the 1993 explosion miners put out the fire); Tr. 2 at 301, 309, 317 (Chris Key stating that there have been many ignitions and he has fought fires); Tr. 3 at 265-68 (Lee stating that a few weeks prior to the September 23 accident, there was a small ignition on the No. 4 Section and it was promptly extinguished using a water hose, fire extinguishers, and rockdust); Tr. 5 at 94-95, 109 (Linn stating that about 2 weeks prior

the likelihood of the miners exhibiting ineptitude in fire suppression techniques when confronted with a fire, the likelihood of their confusion in how to respond to a fire, and even the likelihood of panic in the event of a fire would be increased. However, while I conclude that JWR did not provide all miners with the on-site simulated fire drills required by the standard, it is clear the company regularly instructed its miners through other exercises in fire fighting practices and techniques.[73] Thus, the violation at issue does not relate to the company's failure to conduct all training in how to confront a fire or in how to respond to a fire emergency. Rather, it relates to the failure to conduct the type of on-site, hands-on drills required by the standard and the plan. Given the other types of instruction and training that JWR's miners received, I conclude that it was not reasonably likely that the lack of training specified in the standard would result in an injury, and that the violation was not S&S.

I further conclude that the violation was only moderately serious. Certainly, I agree with the company that the record confirms no miner lost his life on September 23 due to a lack of fire drill training. JWR Br. at V-17-18. Nevertheless, the focus of the gravity criteria is on the effect of the hazard if it occurs (*Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996)), and it is conceivable that the effect of not conducting on-site, hands-on fire drills for all miners could have had serious consequences in the event of a fire.

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to the September 23 accident, the face ignited so he and his partner used the water hose and fire extinguishers to fight the fire until the scoop arrived with rockdust to put it out); Tr. 5 at 218-21, 230, 255, 263-65 (Duvall recalling the 1993 explosion/fire as well as two ignitions/fires on the No. 4 Section and one ignition/fire on 6 Section in the months prior to the September 23 accident); Tr. 5 at 460 (Darrell Key acknowledging that ignitions have occurred over the years); Tr. 6 at 412-13, 459-72, 478 (Brown recalling an ignition on the No. 4 Section in early September 2001); Tr. 9 at 88-89 (Murray stating the mine had spontaneous combustion problems and a history of occasional ignitions).

[73] I credit the testimony of supervisors who signed the company's fire drill records, stating that drills which the company considered compliant with the standard were regularly conducted on a quarterly basis. Tr. 3 at 71-87 (Franklin stating that he conducted fire drills with his crew on a regular basis, including during 2001); Tr. 4 at 181-83, 189-93 (Puckett stating that he conducted fire drill training regularly, perhaps every 90 days); Tr. 6 at 366-67, 403-04, 457-58, 478-80 (Brown stating that fire drills were conducted quarterly and that he recorded all of them); Tr. 12 at 504-06 (Mabe stating that fire drills were conducted on a regular basis as required by the regulations). *See also* Tr. 5 at 229, 231 (Duvall stating that foremen and crews were keeping up with fire drill training requirements every 90 days); Tr. 12 at 235, 246, 284-85, 360 (Thrasher stating that miners received fire drill training every 90 days). I also note the testimony of virtually every miner witness that he received much of this training.

5. Unwarrantable Failure and Negligence

Regarding unwarrantable failure, I find that JWR's action in failing to conduct the type of fire drills required by the standard and the plan did not exhibit "reckless disregard" for the company's compliance responsibilities. The record supports finding that JWR honestly believed that it was complying, a belief abetted in no small part by the *PPM* and the Secretary's failure to previously cite the company for not conducting proper drills. As discussed above, JWR's supervisors credibly testified about what they believed were compliant fire drills, i.e., company personnel honestly believed that other training, such as group discussions and instruction, constituted an alternative means of compliance. In addition, according to section 75.383(c), JWR's escapeway walks satisfied the evacuation specifications of fire drills required by section 75.1101-23, and JWR's annual refresher training included the topic of firefighting and evacuation. Therefore, I conclude that JWR's violation of section 75.1101-23(c) was not an unwarrantable failure to comply with the standard.

Even so, I conclude that JWR was moderately negligent for failing to comply with the requirements of a standard that is clear on its face. It is the operator's responsibility to adopt a plan and to conform to it after its approval. Here, JWR did not conform, and in failing to abide by its plan it exhibited a lack of care required by the circumstances.

6. Civil Penalty Assessment

As discussed earlier, the parties stipulated that the proposed penalties will not adversely affect JWR's ability to continue in business, JWR is a large operator, and the company should be credited for good faith, timely abatement. Stipulations 6, 7, 9 (Sept. 7, 2004). In addition, as previously found, the company has a large history of prior violations.

Order No.	Date	30 C.F.R. §	Proposed Assessment
7328085	12/11/02	75.1101-23(c)	$55,000

I have found the violation was moderately serious and JWR was moderately negligent. Given these findings, the company's large size, its large history of previous violations, its good faith, timely abatement, and the fact that the assessment will not adversely affect its ability to continue in business, I conclude that a penalty of $500 is appropriate for the violation.[74]

IV. A FINAL WORD

In reaching this decision, I have tried to be careful to rule and to render an opinion only on the specific issues that are before me. Also, I have tried to be mindful that the events and

[74] This assessment is in the range of other assessments proposed by MSHA for moderately serious violations that resulted from the company's moderate negligence. *See* Attachment to Stipulations (printout of previous history).

conditions of September 23, 2001 will impact the lives of those involved for so long as they live. In this regard, the case represents the resolution of disputes as to whether certain of those events and conditions were engendered by violations of the Mine Act. Under the Act, such disputes are resolved through the hearing process – a process that, at times, can be rancorous and acrimonious. I am compelled to observe, however, that in this instance all of those involved, i.e., the parties' counsels, representatives, witnesses, and technical support personnel, never lost sight of the underlying tragic circumstances which brought us together. Each person conducted herself or himself so as to accord full respect to the memory of those who lost their lives and empathy and understanding for the sorrow of those left behind. In this way, each person paid tribute to what Congress has termed the mining industry's "most precious resource – the miner." 30 U.S.C. § 801(a).

ORDER

Citation No. 7328083, Citation No. 7328081 and Order Nos. 7328088, 7328104, 7328106, and 7328082 are **VACATED**. Order No. 7328105 is **VACATED IN PART** to the extent it refers to an incomplete preshift examination due to the failure to detect the presence of inadequately inerted mine dust and is **AFFIRMED IN PART** to the extent it refers to an incomplete preshift examination due to the failure to preshift examine the areas of the No. 4 Section where miners were scheduled to roof bolt and perform maintenance work. Order No. 7328085 is **AFFIRMED** but **MODIFIED** to a citation issued pursuant to section 104(a) of the Act. 30 U.S.C. § 814(a). The inspector's S&S finding is **DELETED**. His gravity and negligence findings are **MODIFIED** to conform with my findings.

JWR is **ORDERED** to pay a total civil penalty of $3,000 in satisfaction of the violations in question. Payment is to be made to MSHA within 30 days of the date of this proceeding. Upon receipt of full payment, this proceeding is **DISMISSED**.

David F. Barbour

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, D.C. 20001

November 4, 2005

TAMKO ROOFING PRODUCTS, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. YORK 2005-87-RM
	:	Citation No. 6027243;03/01/2005
v.	:	
	:	Docket No. YORK 2005-88-RM
SECRETARY OF LABOR,	:	Citation No. 6027244;03/02/2005
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. YORK 2005-89-RM
Respondent	:	Citation No. 6027245;03/02/2005
	:	
	:	Tamko Frederick
	:	Mine ID 18-00750
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2005-115-M
Petitioner	:	A.C. No. 18-00750-54441
v.	:	
	:	
TAMKO ROOFING PRODUCTS,	:	Frederick Grinding Plant
Respondent	:	

DECISION

Appearances: Brian J. Mohin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;
Tonya Osborne, Esq., and Kathleen Pontone, Esq., Miles & Stockbridge, P.C., Baltimore, Maryland, on behalf of Tamko Roofing Products.

Before: Judge Melick

These cases are before me pursuant to Section 105 (d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* "the Act", to challenge three citations issued to Tamko Roofing Products (Tamko) by the Secretary of Labor and the civil penalties proposed for each. The general issue before me is whether the violations have been committed as alleged and, if so, what is the appropriate civil penalty for such violations. Additional specific issues are addressed as noted.

At hearing, the Secretary moved to settle Citation No. 6027243 and Tamko agreed to pay the proposed penalty in full. The proposed settlement was accepted at hearing and an order directing

payment will be incorporated in the decision herein.

Citation No. 6027244 alleges a violation of the mandatory standard at 30 C.F.R. § 56.12028 and charges, in essence, as follows:

> A continuity and resistence test had not been performed on the ground electrode and its adjacent ground field area. Plant supervisor stated that it had not been done for over two years according to the record. Testing needs to be done to assure grounding system is working properly to prevent serious injury.

The cited standard, 30 C.F.R. § 56.12028, provides as follows:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

The facts supporting the alleged violation are essentially undisputed. Tamko purchased the grinding plant at issue on May 5, 1994 from the previous owner/operator, Florida Rock Industries (Florida Rock). It is undisputed that at the time of the inspection herein and the issuance of the citation at bar on March 2, 2005, more than one year had elapsed since the test had last been performed in compliance with the cited standard. Tamko nevertheless argues that the computation of time for the "annual" testing required by the cited standard should commence with the date it assumed ownership i.e. on May 5, 2004, and not on the last date of testing which was performed by Florida Rock, the previous owner/operator. Under this computation of time, Tamko would therefore have had until May 2005 to complete the testing and there would have been no violation of the cited standard.

The Secretary argues, on the other hand, that annual testing within the meaning of the cited standard means just that and that ownership of the grinding plant is irrelevant. She argues that under her interpretation of the standard the requisite tests must be performed within a year of the previous tests. I find that I am in agreement with the Secretary on this issue. I find no ambiguity in the requirement that the test be performed annually, i.e. within 365 days of the prior testing. See *Secretary v. Cactus Canyon Quarries of Texas, Inc., 23 FMSHRC 280, 289 (ALJ March 2001).* There is no exception or waiver in the standard to account for a change in mine ownership. Clearly, the objective of maintaining safe conditions requires that testing be performed annually without exception as to ownership of the mine.

Under the circumstances, I find that the Secretary has proven the violation as charged. The inspector's findings that injuries were "unlikely" as a result of the violation and that the operator was chargeable with "low" negligence are undisputed. Under the circumstances, I find that the Secretary's proposed minimal penalty of $60.00 is appropriate for the violation.

Citation No. 6027245 alleges a violation of the standard at 30 C.F.R. § 56.14107(a) and charges as follows:

> The east approach of the take-up pulley and counter-weight of the inclined belt conveyor was not guarded. Pulley and counter-weight was [sic] within 6 feet of the ground, do [sic] to the build-up of spillage. Guards were provided on all other approaches. The pulley and counter-weight were only being suspended by tension of the conveyor belt and no safety cable or chains were provided. Employees approaching the east side of the take-up pulley are exposed to the hazard of moving machine parts and the falling of the counter-weight in the event that the belt brakes [sic].

The cited standard provides that "[m] oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and take-up pulleys, fly wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The cited standard, in part (b), also provides an exception to the above requirement in that "guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces."

As noted, the citation at bar actually charges two violations. The first alleged violation concerns a lack of guarding at the take-up pulley. Tamko argues that the cited take-up pulley was at least seven feet away from any walking or working surface and maintains that under the exception noted above, there was no violation. According to Inspector Richard Burkley of the Department of Labor's Mine Safety and Health Administration (MSHA), there was spillage on the ground approximately one and one half feet horizontally from the counterweight and about one foot in height. Standing on top of the spillage with his arms raised, Burkley had an MSHA colleague estimate the distance from the top of the spillage to the bottom of the cited roller. Burkley's colleague, apparently knowing Burkley's height and approximate arm length, thereby estimated that it was about six feet between the top of the spillage and the bottom of the cited pulley. Burkley therefore concluded that the exposed moving parts on the cited take-up pulley were less than seven feet from the walking or working surface below.

Robert McNally, Tamko's general manager, has a Bachelor of Science degree in engineering from the United States Military Academy and a Masters degree in Business Administration from Baylor University. McNally credibly testified that, using a 10 foot tape measure, he measured from the bottom of the take-up pulley to the slab below and found the distance to be seven feet. Using the same tape, he measured eight and a half feet from the top of the spillage to the bottom of the cited take-up pulley. In light of such actual measurements, in contrast to MSHA's rough estimates, I must give greater weight to the testimony of Mr. McNally. Accordingly, I find that the take-up pulley was at least seven feet from any walking or working surface. The exception to the requirement for guarding set forth in the cited standard therefore applies and I conclude that the take-up pulley at issue was not in violation of that standard.

Tamko argues, with respect to the second violation alleged in the citation, that the counter-weight was not a "similar moving part" within the meaning of the cited standard. Under the rule of statutory and regulatory construction, *ejusdem generis,* when specific examples set forth in a statute or regulation are followed by general words, the general words are construed to embrace only objects

similar in nature to the specific examples. *Garden Creek Pocahontas Company,* 11 FMSHRC 2148 (November 1989); 2A *Sutherland Statutes and Statutory Construction* § 47.17 (6th ed.). Clearly, counterweights are not of the same or similar nature as the specific items listed in the standard i.e. "gears, sprockets, chains, drive, head, tail, and take-up pulleys, fly wheels, couplings, shafts, [and] fan blades" all of which have the potential for creating dangerous pinch points and/or entanglements. Counterweights are therefore not within the scope of items covered by the standard. Accordingly, there was no violation of the standard as alleged and the citation must be vacated.

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 effect the operator's ability to continue in business. The record shows that the operator is small in size with a minor history of violations. There is no dispute that the violations were abated in a timely and good faith manner and no evidence has been presented as to the effect the penalties would have on the operator's ability to continue in business. Under the circumstances, the Secretary's proposed penalty of $60.00 for the violations charged in Citations No. 6027243 and 6027244 are appropriate.

ORDER

Citation No. 6027245 is vacated. Citations No. 6027243 and 6027244 are hereby affirmed and Tamko Roofing Products is directed to pay civil penalties of $60.00 for each violation within 40 days of the date of this decision. Contest Proceeding Docket No. YORK 2005-89-RM is accordingly granted. Contest Proceedings Docket Nos, YORK 2005-87-RM and YORK 2005-88-RM are accordingly dismissed.

Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 21, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 2005-22-M A.C. No. 30-00048-44703
v.	:	
HANSON AGGREGATES NEW YORK, INC., Respondent	:	Jordanville Plant

SUMMARY DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Hanson Aggregates New York, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and proposes a penalty of $9,100.00. For the reasons set forth below, I affirm the citation and assess the penalty proposed.

Procedural Background

The parties have submitted the case on cross motions for summary decision. The Commission rule governing summary decisions, Rule 67(b), 29 U.S.C. § 2700.67(b), provides that: "A motion for summary decision shall be granted only if the entire record . . . shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." The parties have stipulated to the facts, so the first requirement of the rule is met. Based on the stipulated facts, I conclude that the Secretary is entitled to summary decision as a matter of law.

Stipulated Factual Background

On the morning of March 23, 2004, an accident occurred at Hanson's Jordanville Plant in Herkimer, New York, as several Hanson employees were in the process of setting up a 75 ton P & H mobile crane on a ramp leading to the mine's primary crusher. The feeder and hopper assembly on the primary crusher were scheduled for repair, and the crew needed the crane to lift the feeder and hopper off the crusher.

When the accident occurred, the crew had extended the crane's outriggers and roped off the working radius of the crane, and the crane operator, Robert Kimball, was setting up the crane. The crane operator raised the crane's boom approximately 71°, and he extended the boom about fifty feet. The supervisor of the crew, Dean Robertson, was the designated signal or ground man. At the time of the accident, Mr. Robertson was standing to the side of the crane.

As Mr. Kimball extended the crane's hydraulic boom, he apparently failed to lower or extend the auxiliary hoist line. A hoist ball with a hook was secured to the crane's auxiliary hoist line. The extending boom eventually pulled the hoist ball tight against the tip of the boom, snapping the auxiliary hoist line. Such an occurrence is commonly known as "two-blocking."

The hoist ball and hook fell and struck Dean Robertson, killing him instantly. The forces involved in separating the ball and the hook from the auxiliary hoist line and the reactionary movement of the boom caused the assembly to be thrown out and away from the head sheave a few feet.

After the accident, MSHA issued Citation No. 6002658 to Hanson. MSHA later modified the citation to allege that Hanson violated 30 C.F.R. § 56.14211(c) in that:

> A fatal accident occurred at this operation on March 23, 2004, when a mine foreman was struck by a metal ball and lifting hook that detached from the auxiliary hoist cable of a crane. The auxiliary hoist cable's weight ball and hook contacted the end of the boom causing the cable to break (two-block condition). The crane's anti-two block device either was not activated or malfunctioned and there was no other functional means to prevent accidental lowering. The victim, who was performing the task of a signal man at the time of the accident, was exposed to the hazard of the hoist's ball and hook suddenly falling.

Section 56.14211(c) provides that "[a] raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component."

Facts and Conclusions of Law

Hanson argues that it did not violate the regulation. It maintains that the Secretary has stipulated that it used all of the load locking devices that it could have and that an anti-two-block device is not required by the regulation. Further, the Respondent asserts that a reasonably prudent person familiar with the mining industry would not have understood the requirement of the regulation as urged by the Secretary. The Secretary counters that the meaning of the regulation is plain on its face and that Hanson clearly violated the regulation. I hold that the Secretary's position is correct.

Section 56.14211(c) can be broken down into four elements. It requires that: (1) raised components; (2) be secured to prevent accidental lowering; (3) when persons are working on or around mobile equipment; and (4) exposed to the accidental lowering of the component. The parties have stipulated that the raised component was the hook and ball originally secured to the auxiliary hoist line. (Stipulated Material Fact (SMF)16.) They further agree, as set out in the stipulated narrative, that Robertson was working around the crane and that he was exposed to the accidental lowering of the hook and ball. Thus, the issue in this case is whether the hook and ball were secured to prevent accidental lowering.

Section 56.14211(d), 30 C.F.R. § 56.14211(d), sets out the method for securing raised components against accidental lowering. It states that: "Under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent."

In this connection, the parties have agreed that the crane was equipped with an anti-two-block device, that the load braking system on the crane's auxiliary hoist was working properly when the accident occurred, and that the ball and hook were properly rigged or secured to the auxiliary hoist line. (SMF 5, 7 and 12.) In addition, they have agreed that the load brake on the auxiliary hoist line constitutes a "load locking device" or a device that "prevents free and uncontrolled descent." (SMF 14.) They have further agreed that load brakes, anti-two-block devices and proper rigging are the only load locking devices that Hanson could have used to prevent the free and uncontrolled descent of the hook and ball. (SMF 15.) Finally, they have stipulated that based on tests conducted by MSHA following the accident, MSHA could not determine whether the anti-two-block device was working properly and consistently on the day of the accident. (SMF 6.)

Because MSHA was unable to determine whether the anti-two-block device was working properly on the day of the accident, the company argues that the Secretary has failed to prove the violation. It asserts that it had two load locking devices in working condition, when it was only required to have one, and, therefore, it complied with the regulation. This contention, however, ignores the failure of the anti-two-blocking device.

Respondent's arguments might be pertinent if the crane had only been equipped with a load brake and proper rigging. Then, if the Secretary were contending that the crane should have been equipped with an anti-two-block device, it would be relevant that the regulation does not specifically require an anti-two-block device, or that MSHA's *Program Policy Manual* discussion of the rule mentions such a device only in connection with using a crane to hoist personnel. But here, the crane *was already equipped with an anti-two-block device*. Thus, these arguments are beside the point.

The crane was equipped with a Microguard 424 Rated Capacity Indicator (Microguard system), a computerized system with anti-two-block elements. Those elements included two anti-two-block switches or devices, one for the main hoist line and one for the auxiliary hoist

line. (SMF 22.) The Microguard system has two modes: the "rigging/travel mode" and the "work mode." (SMF 23.)

If the crane approached a two-block condition while in "rigging/travel mode," the anti-two-block switch for the hoist approaching the two-block condition should trip or open, and the Microguard would display a red warning light. (SMF 24.) If the crane approached a two-block condition while in "work mode," one or both of the anti-two-block switches should trip or open, and the Microguard would activate hydraulic cut valves, depending upon whether one or both hoists are approaching a two-block condition, sound an audible alarm and display a red warning light. When activated, the hydraulic cut valves would essentially shut the crane down, hydraulically preventing a two-block condition from occurring. (SMF 25.)

MSHA was unable to determine whether the Microguard system was in "rigging/travel mode" or "work mode" when the accident occurred. (SMF 3.) And if anyone from the company knows, that information has not been volunteered. Further, there is no evidence that a red warning light was displayed, that an audible alarm sounded, or that the crane was shut down. Nevertheless, it seems a logical inference that if the crane had shut down, this case would not be before me.

It is possible, however, to arrive at the following conclusions: (1) The crane was in the "rigging/travel mode," the anti-two-block switch for the hoist did not trip or open and/or the red warning light was not displayed; (2) The crane was in the "work mode," the anti-two-block switches did not trip or open and/or the hydraulic cut valves were not activated, the audible alarm was not sounded and the red warning light was not displayed; or, (3) The crane was in either the "rigging/travel mode" or the "work mode," the hydraulic cut valves were activated, the audible alarm was sounded and/or the red warning light was displayed and the crane operator ignored them.

It seems unlikely that condition No. 3 occurred without there being any evidence of it.[1] As noted above, if the hydraulic cut valves had been activated, the crane would have shut down whether the operator ignored the situation or not, and the accident would presumably have been prevented. Further, bystanders would have noticed the shut down. Similarly, if an audible alarm had sounded, bystanders would have heard it. Moreover, when MSHA tested the anti-two-block device after the accident, it worked when crane's boom was at 50° and below, but it did not work consistently when tested above 50°. (SMF 6.) When the accident occurred, the crane's boom was at approximately 71° according to the stipulated narrative. Thus, I find that a preponderance of the evidence, and the logical inferences to be drawn therefrom, supports a conclusion that the anti-two-block device did not function properly.

It is not enough that the crane was equipped with an anti-two-block device, if it did not

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[1] The parties have stipulated that operator error was a root cause of the accident. (SMF 17.) However, no information beyond that enigmatic statement is provided.

function properly. In *Mettiki Coal Corp.*, 13 FMSHRC 760 (May 1991), a case involving an improperly functioning lockout device on a circuit breaker, the Respondent argued that "since the Secretary's regulations do not require that a breaker be equipped with a lockout device and the failure to have such a device would not violate section 77.507, then having a modified lockout device cannot be deemed to violate the safety standard." *Id.* at 768. Like Hanson, Mettiki also argued that MSHA's interpretation of the regulation did not meet the "reasonably prudent person" test. *Id.* The Commission rejected these arguments and held that:

> A reasonably prudent person would have recognized that the standard required that the No. 34 breaker, a switch used by Mettiki to lock out the belt motor circuit, be equipped with a *functioning* lockout device and that the improperly installed lockout device on the switch was in violation of section 77.507.

Id. at 769 (emphasis added); *accord Western Fuels-Utah. Inc.*, 19 FMSHRC 994, 999 (June 1997).

Hanson makes the same arguments in this case. They must be rejected for the same reasons. I find that a reasonably prudent person would recognize that section 56.14211(c) requires that if the crane is equipped with an anti-two-block device as a means of preventing accidental lowering, it be equipped with a functioning anti-two-block device and that the failure of the device to function is in violation of the regulation. This is particularly apparent in this case where the device is designed, as its name indicates, to prevent "two-blocking."

Accordingly, I conclude that the Respondent violated the regulation as alleged.

Civil Penalty Assessment

The Secretary has proposed a penalty of $9,100.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*,18 FMSHRC 481, 483-84 (Apr. 1996).

In connection with penalty criteria, the parties have stipulated that the violation was abated in good faith, that the penalty proposed for the violation will not affect Hanson's ability to continue in business and that the Jordanville Plant is a small mine. (SMF 1, 20, 32.) Furthermore, the Assessed Violation History Report shows that Hanson's Jordanville Plant has a very good history of prior violations. (SMF 27, App. A.) In addition, the negligence involved in this violation was "low." Finally, the gravity of the violation was very serious in that it resulted in the death of a miner.

Taking all of these factors into consideration, I conclude that the $9,100.00 penalty proposed by the Secretary is appropriate. Accordingly, that is the penalty that will be assessed.

Order

In view of the above, the Secretary's Motion for Summary Decision is **GRANTED** and the Respondent's motion is **DENIED**. Citation No. 6002658 is **AFFIRMED**. Hanson Aggregates New York, Incorporated, is **ORDERED TO PAY** a civil penalty of **$9,100.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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November 28, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-269-M
Petitioner	:	A.C. No. 05-04209-21545
	:	
	:	Crusher Operation #2
	:	
	:	Docket No. WEST 2004-270-M
	:	A.C. No. 05-04612-21601-01
	:	
v.	:	Docket No. WEST 2004-271-M
	:	A.C. No. 05-04612-21601-02
	:	
	:	Crusher Operation #5
	:	
	:	Docket No. WEST 2005-133-M
	:	A.C. No. 05-04558-43192
	:	
	:	Docket No. WEST 2005-218-M
	:	A.C. No. 05-04558-48439
	:	
CARDER, INC.,	:	Dredge Operation #1
Respondent	:	
	:	Docket No. WEST 2004-326-M
	:	A.C. No. 05-04116-24225
	:	
	:	Docket No. WEST 2005-132-M
	:	A.C. No. 05-04116-43159
	:	
	:	Docket No. WEST 2005-160-M
	:	A.C. No. 05-04116-45725
	:	
	:	Dredge Operation #3
	:	
	:	Docket No. WEST 2004-491-M
	:	A.C. No. 05-04581-35054

:	Docket No. WEST 2005-134-M
:	A.C. No. 05-04581-43233
:	
:	Screening Operation/
:	Dredge Operation

DECISION

Appearances: Gregory Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mike Ausmus, Carder, Inc., Lamar, Colorado, for Respondent.

Before: Judge Manning

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

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Carder operates several sand and gravel pits in Prowers County, Colorado. The citations are grouped in this decision by operation rather than by docket number.

A. Crusher Operation No. 2

1. Citation No. 6298298, WEST 2004-269-M

MSHA Inspector Steven Ryan inspected Carder's Crusher Operation No. 2 on May 8, 2003. Inspector Ryan issued Citation No. 6298298 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14105. The body of the citation states, as amended:

> A front end loader operator was observed cleaning out loose material from the return end of the primary hopper discharge conveyor [that was] being turned on and off at the start-stop controls next to the hopper by another employee upon signals from the front end loader operator cleaning the conveyor of material. The power was not off and the conveyor belt was not blocked from motion while the work was being performed. The company has a lockout policy. An oral 107(a) imminent danger order was given to Uraldo Bargus, another front end loader operator at the site.

The inspector determined that it was highly likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would be permanently disabling. He determined that the violation was of a significant and substantial nature ("S&S") and that Carder's negligence was moderate. The cited safety standard provides:

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

The Secretary proposes a penalty of $750.00 for this citation.

Inspector Ryan testified that the primary feed hopper is where the raw mined rock is fed into the plant. (Tr. 12). The rock leaves the hopper through a conveyor system under the hopper which delivers the rock to a crusher. (Tr. 13). When Inspector Ryan arrived at the crusher operation, the plant was energized but it was not running. He observed two miners on one side of the feed hopper and another miner on the other side of the hopper, who was standing at the stop/start control panel. (Tr. 16). The loader operator was "reaching in and cleaning material" off the "return end of the belt going back to the self-cleaning tail pulley," which was under the guard. He was using his bare hands to remove loose rock. The other miner was giving signals to the miner at the stop/start switch to jog the start button so that the conveyor would move slightly as the other miner was cleaning. *Id.*

Inspector Ryan told the miners to stop working because there have been serious accidents at other plants when this same procedure was used. He issued the citation in conjunction with an imminent danger order. (Tr.10; Ex. G-1). Ryan testified that he has personally investigated two accidents in which miners were injured while cleaning belts using the same procedure. (Tr. 17). To comply with the standard, equipment should have been turned off and the moving parts should have been blocked against motion while the cleaning was performed. He states that start/stop buttons are not fail-safe and the belt could have started moving without notice. (Tr. 18). In addition, the miner at the start/stop switch could accidently turn the belt on while the loader operator was reaching in to clean the belt. (Tr. 19).

Inspector Ryan believes that the miner could have been seriously injured if the belt had started moving without his knowledge. He determined that the violation was S&S because he has investigated serious accidents under very similar circumstances. Indeed, he testified that he investigated a serious accident in which an employee got "caught up" in a conveyer belt at one of Carder's other operations a few months later. (Tr. 21-22, 25).

Mike Ausmus, Carder's general manager, testified that the stop/start switch consists of two separate buttons, one for on and one for off. (Tr. 33-34). He stated that the switch is

designed so that arcing will not occur between the poles which may accidently energize the circuit. He has never seen a start/stop switch of this type malfunction. (Tr. 35). Ausmus said that cleaning the belt was necessary so that it could be repaired.

I find that the Secretary established a violation. There is no dispute that power was on and the belt was not blocked against motion. Adjustments were not being made and the conveyor was not being tested. I also find that the violation was extremely serious and S&S. The miner cleaning the belt could have been seriously injured if the other miner accidently energized the conveyor with the start/stop switch. The miner operating the switch had been working for Carder for one day and he apparently did not speak English. (Tr. 30-31). As Inspector Ryan stated, "steel has no mercy." (Tr. 20).

A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary established all four elements of this test. There was a violation of the safety standard that created a discrete safety hazard. The violation presented a reasonable likelihood that the hazard contributed to by this violation would result in an injury of a reasonably serious nature, assuming continued normal mining operations.

I also find that Carder's negligence was moderate to high. The citation is affirmed and a higher penalty of $1,500.00 is appropriate.

B. Dredge Operation No. 1

1. Citation No. 6311844, WEST 2005-133-M

MSHA Inspector Brad Allen issued Citation No. 6311844 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14112(a)(1). The body of the citation states:

> A guard on the diesel motor driven water pumps located on the rear of the dredge was not being maintained. The guard on the front of the motor fell off and was laying down, fully exposing the moving machine parts. Employees working/traveling near this area were exposed to the possibility of injury from entanglement hazards and/or pinch points. Employees work and travel this area several times daily.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would be permanently disabling. He determined that the violation was S&S and that Carder's negligence was moderate. The cited safety standard provides that "[g]uards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation." The Secretary proposes a penalty of $177.00 for this citation.

Inspector Allen testified that he issued the citation because the guard covering the water pump for the motor on the dredge had apparently vibrated loose. (Tr. 41; Ex. G-3). The guard was replaced to abate the citation. The photo that the inspector took before the condition was abated shows that the guard had fallen. Inspector Allen determined that the violation was serious and S&S because a miner travels throughout the dredge and, if his clothing were to become entangled in the moving machine parts, he would likely suffer a permanently disabling injury. (Tr. 42). This employee's duties "required him to travel all the way around the dredge throughout the day." *Id.* He stated that it was three feet "into the pulleys" from the travelway. *Id.* He also stated that the "moving machine parts are frequently accessed by the dredge operator." (Tr. 43). Allen estimated that the cited condition was about 25 feet from the dredge operator's cab. (Tr. 58).

Mr. Ausmus testified that a preshift examination had been performed on the dredge at the start of the shift and the guard was in place. (Tr. 68). He further stated that, contrary to the inspector's testimony, the dredge operator does not walk around the dredge all day. Instead, he remains in the operator's cab which is about 40 feet from the cited condition. *Id.* The dredge operator must monitor gauges constantly and he only leaves the cab for short periods of time. *Id.* Ausmus testified that the dredge operator does not walk near the diesel motor because there is nothing there that he needs to do. (Tr. 69).

I find that the Secretary established a violation of section 56.14112(a)(1). Inspector Allen cited that safety standard because the guard was in the position that it would be if it fell out of place. (Ex. G-3, Photo 1). A miner who needed to remove the guard to perform repairs would not have placed the guard in the position shown in the photograph. Thus, the guard was not being maintained to withstand the vibration, shock, and wear it was subjected to. I find that the Secretary established a *prima facie* case and that Carder did not offer any evidence to contradict the inspector's assumption that the guard fell out of place.

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 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

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

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in determining the amount of the penalty. Thus, if a safety standard is violated, a penalty is assessed even if there was no injury and the chance of an injury was not very great.

I find that the violation was neither serious nor S&S. The moving machine parts which the guard protected were recessed three feet from the walkway. In addition, I credit Ausmus's testimony that the dredge operator does not walk by the diesel motor with any frequency. In addition, there has been no showing that there were any tripping or stumbling hazards in the area. Thus, I find that it was highly unlikely that the dredge operator or his clothing would get caught in moving machine parts. I also find that Carder's negligence was low. Carder established that the cited condition existed for a short period of time and there has been no showing that anyone knew that the guard had fallen out of place. A penalty of $20.00 is appropriate.

2. <u>Citation No. 6311846, WEST 2005-133-M</u>

Inspector Allen issued Citation No. 6311846 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The engine powering the work boat contained exposed moving machine parts that are not guarded. The alternator pulley, main pulley and drive belts are open and exposed on the left side. Employees are exposed to the possibility of injury if they were accidently to contact the moving machine parts. The moving machine parts are placed along a travel way that is regularly used and the work boat is used at least twice daily, making the chance of accidental contact reasonably likely.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would be permanently disabling. He determined that the violation was S&S and that Carder's negligence was moderate. The cited safety standard provides that "[m]oving machine parts shall be guarded to protect persons from

contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The Secretary proposes a penalty of $177.00 for this citation.

Inspector Allen testified that the alternator pulley, main pulley, and drive belts were open and exposed on the left side of the engine. (Tr. 46; Ex. G-5). The work boat is used for transportation to and from the barge. Anyone who operated the boat or was a passenger in the boat would be exposed to the hazard. Allen believed that the violation was S&S because it was reasonably likely that someone would be injured as a result of the condition and that the injuries would be permanently disabling. The inspector believed that miners could stumble or fall into the moving machine parts. (Tr. 62). The opening in front of the cited moving parts between the guard for the fan and the housing for the engine was about three inches. (Tr. 63; Ex. G-5, photo 1). The inspector believed that the motor had been recently installed and the guard for the left side was inadvertently left off. (Tr. 49).

Carder admits that the cited condition violated the safety standard. (Tr. 60). Mr. Ausmus testified that the exposure to the hazard was minimal. (Tr. 70). He believed that miners would walk by the exposed area to get into the boat before the engine was started and would walk by after the engine was shut off but that miners would not be in the area while the motor was running. Ausmus also believed that the frame of the engine and the guard around the fan provided sufficient protection for the area. He said that there was "maybe an inch of room." *Id.*

I find that the cited condition created a serious safety hazard. Although the opening in front of the moving machine parts was not wide, the parts were nevertheless exposed. Several people travel on the boat at least twice a day. I do not credit Ausmus's testimony that the engine is always off when miners travel near the moving parts. It is reasonably likely that someone would stumble and get his fingers caught in the moving parts. Although the injuries may not be permanently disabling, they would be serious. The Secretary established that the violation was S&S. Carder's negligence is moderate to low because the engine had only been recently installed. A penalty of $100.00 is appropriate.

3. Citation No. 6311848, WEST 2005-218-M

Inspector Allen issued Citation No. 6311848 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The self cleaning tail pulley on the Kolberg stacker conveyor was not adequately guarded. The guarding provided on the south side consisted of a loosely hung piece of conveyor belt, leaving openings of one and a half foot wide, and contact less that one foot away to the moving machine parts as well as a six inch by six inch opening on the rear of the bearing block. The moving machine parts were approximately 28 inches above ground level. This

> condition exposed employees to the possibility of an injury if they were accidently to contact the moving machine parts. The pulley is not placed along a regularly used travel way and no foot prints were observed in the area making the chance of accidental contact unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Carder's negligence was high. The Secretary proposes a penalty of $500.00 for this citation.

Inspector Allen testified that when the conveyor is operating, a lot of water falls in the area so miners would not usually be in the area. (Tr. 53; Ex. G-6). He designated the negligence as high because Mr. Ausmus admitted that he observed the condition the previous day. (Tr. 54, 65). Allen believes that Ausmus should have recognized that the condition created a hazard.

Mr. Ausmus objected to the $500.00 penalty for the citation because the inspector admitted that the condition was unlikely to cause an injury. Ausmus believes that, because the cited area was in an inaccessible location, a miner would have to intentionally put his arm in the opening in order to injure himself. He also contends that this stacker conveyor had been previously inspected by MSHA in the same condition and no citations were issued. (Tr. 71).

I find that the Secretary established a non-S&S violation. I credit Inspector Allen's testimony that it was unlikely that the guard was in the cited condition during previous MSHA inspections. I find that Carder's negligence was moderate because, although Ausmus may have previously observed the cited condition, he did not believe that a guard was crucial because the tail pulley was in a rather inaccessible location. A penalty of $60.00 is appropriate.

C. Dredge Operation No. 3

1. Citation No. 6311828, WEST 2005-160-M

Inspector Allen issued Citation No. 6311828 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14130(i). The body of the citation states:

> The seat belt on the John Deere front-end loader . . . company number 373 did not meet the requirements of SAE J386. The belt strap was worn frayed, and the right side of the belt contained a tear approximately one and one half inches long, creating a hazard to the operator of the loader by eliminating the ability of the seatbelt to function properly in the event of an accident. The loader is used on a daily basis in a fairly level area and light traffic, making the chance of an accident unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides that "[s]eat belts shall be maintained in functional condition and replaced when necessary to assure proper performance." The Secretary proposes a penalty of $300.00 for this citation.

Inspector Allen testified that the seatbelt, while not completely ineffective, was not being properly maintained. (Tr. 83; Ex. G-9). He determined that the violation was not S&S because the loader is used in a flat area where there is little traffic. He concluded that it was unlikely that the loader would be in an accident. Mr. Ausmus testified that he does not disagree with the citation but that he contests the special assessment of $300.00. (Tr. 125).

I affirm the citation as written. I find that a penalty of $60.00 is appropriate taking into consideration the gravity and negligence designated by the inspector.

2. Citation No. 6299980, WEST 2004-326-M

Inspector Allen issued Citation No. 6299980 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14132(a). The body of the citation states:

> The horn on the John Deere front-end loader, company number 404 . . . was inoperable. The front-end loader was not being operated at the time, but was on the ready line. There was no record or tag to indicate it was taken out of service. The defective horn had been identified on the pre-operation checklist.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition 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 Carder's negligence was low. The cited standard provides that "[m]anually-operated horns . . . provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." The Secretary proposes a penalty of $91.00 for this citation.

Inspector Allen determined that the condition was S&S because there was foot traffic in the area where the loader would operate. (Tr. 86). The loader was not being operated at the time of his inspection, but it was not tagged out. The pre-operation checklist indicated that the horn had been operable for three days. Allen determined that the negligence was low because the defect had been identified and documented.

Mr. Ausmus testified that the defect had been noted and the loader was not being used. (Tr. 117). Because only three people work at the mine, it is not necessary for the operator to tag out the loader. Only two of these employees would operate the loader and they both knew that

the horn was not working. (Tr. 118). The mechanics had been notified that the horn needed to be repaired, but they had not been able to fix it by the time of the inspection.

I find that the Secretary established a violation. Although the loader apparently had not been used, it was available for use. Because the loader was not tagged out, one of the two employees who use the loader may well forget that the horn was not working and operate the loader in the defective condition. Because there has been no showing that the loader was used with the defective horn, I find that the violation was not S&S. Carder's negligence was low. A penalty of $20.00 is appropriate.

3. Citation No. 6299981, WEST 2004-326-M

Inspector Allen issued Citation No. 6299981 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14100(b). The body of the citation states:

> The John Deere front-end loader . . . company number 404 . . . contained a defect that affected the safety of persons. The brake lights were defective and not maintained in a functional condition. Vehicular traffic was observed in the area while the loader was in operation. Miners were exposed to the possibility of injury due to the inability of another equipment operator to know when the loader is stopping.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition 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 Carder's negligence was low. The cited standard provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary proposes a penalty of $91.00 for this citation.

The evidence on this citation was the same as for the previous citation. For the same reasons, I find that the Secretary established a non-S&S violation with low negligence. A penalty of $20.00 is appropriate for this violation.

4. Citation No. 6299982, WEST 2004-326-M

Inspector Allen issued Citation No. 6299982 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.11002. The body of the citation states:

> There were no handrails provided on the top of the tank for the diesel fuel trailer company number 537. Employees working on top of the tank were exposed to the possibility of a fall injury of approximately eight feet eight inches to the ground below. A

> miner mounts and dismounts the tank once a week to check tank levels. Failure to provide handrails and the rough walking surface makes the chance of an accident reasonably likely.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would be fatal. He determined that the violation was S&S and that Carder's negligence was moderate. The cited standard provides that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." The Secretary proposes a penalty of $217.00 for this citation.

Inspector Allen testified that there were no handrails provided on the top of the tank for the diesel fuel trailer. (Tr. 91; Ex. 13). He further testified that employees told him that they "were required to go up there at least once a week to check the levels of the tank." *Id.* They gained access to the top of the trailer by climbing the ladder at the rear of the trailer. (Tr. 107-08). Allen stated that the area was not a smooth walking surface. He determined that the violation was S&S based on the conditions he observed and the fact that miners have fallen to their deaths in similar circumstances. (Tr. 93).

Mr. Ausmus testified that the tank trailer cited by Inspector Allen has been in the same location for four years without handrails and has never been cited by any MSHA inspector. (Tr. 119). He assumes that other inspectors observed the condition. *Id.* He also testified that there is no need for employees to walk on the top of the tank to check fuel levels. (Tr. 119-20).

I find that the Secretary established a violation. I credit the testimony of Inspector Allen that the top of the tank trailer was used as a walkway when employees needed to check fuel levels. As a consequence, I find that the top of the trailer was an elevated walkway.

In some situations a citation should be vacated if the cited condition has been previously inspected by MSHA without any enforcement action being taken. Prior inconsistent enforcement of a safety standard at a mine is a factor that the Commission considers when evaluating whether a mine operator has received fair notice of the Secretary's interpretation of an ambiguous safety standard. *Good Construction*, 23 FMSHRC 995, 1006 (Sept. 2001). In this case, however, it is not clear whether an MSHA inspector has actually inspected the trailer. Mr. Ausmus was not sure if the trailer had been previously inspected but he assumed it had. (Tr. 119). In addition, previous MSHA inspectors may not have known that miners walk on top of the trailer tanks to check fuel levels. Consequently, I find that Carder did not establish this affirmative defense.

I also find that the Secretary established that the violation was S&S. The Secretary met all four elements of the *Mathies* S&S test. Because employees must regularly walk up on the top of the tank trailer, it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. Employees may not have to go up on the tank

on a weekly basis, but they travel there enough to create a hazardous situation. The top of the tank has the potential to be slick if it is wet or if the employee's boots are muddy. (Tr. 109).

Because the condition had existed for four years and the application of the standard to the top of a tank trailer is somewhat ambiguous, I find that Carder's negligence was low. A penalty of $80.00 is appropriate.

5. Citation No. 6299983, WEST 2004-326-M

Inspector Allen issued Citation No. 63299983 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.11002. The body of the citation states:

> There were no handrails provided on the top of the tank for the diesel fuel trailer company number 538. Employees working on top of the tank were exposed to the possibility of a fall injury of approximately eight feet ten inches to the ground below. A miner mounts and dismounts the tank once a week to check tank levels. Failure to provide handrails and the rough walking surface makes the chance of an accident reasonably likely.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would be fatal. He determined that the violation was S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $217.00 for this citation.

The evidence presented for this citation was identical to the evidence for the previous citation. The two tank trailers were immediately adjacent to one another. (Ex. G-13, G-14). Consequently, I find that the Secretary established a S&S violation with low negligence. A penalty of $80.00 is appropriate.

6. Citation No. 6299985, WEST 2004-326-M

Inspector Allen issued Citation No. 63299985 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.11002. The body of the citation states:

> There were no handrails provided on top of the portable generator set, unit number 488. The opening was four feet long and the height from ground level was three feet and eight inches. The opening was located over the right rear fender. Employees working on top of the elevated work deck were exposed to the possibility of a fall injury. A miner mounts and dismounts the trailer once a week to service the motor which is mounted on it.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition 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 Carder's negligence was moderate. The Secretary proposes a penalty of $135.00 for this citation.

The generator cited by Inspector Allen is mounted on the back of a truck bed. The cited area is the fender above the rear wheels of the truck bed. (Tr. 95, Ex. G-15). The fender is flat in that location so that persons can stand on it and a tread is present. It was almost four feet above the ground. Allen believed that a miner would be in the cited location twice a day to start and stop the generator and to provide any maintenance on the generator. Inspector Allen believed that it was reasonably likely that a miner would fall from the trailer and injure himself because a miner must walk on the trailer on a regular basis. (Tr. 96-97). Serious accidents have occurred in similar circumstances at other mines.

Mr. Ausmus testified that the generator trailer had been at the mine for two years. (Tr. 121). He stated that miners can reach all of the controls for the generator from the ground. The top of the radiator is so high that employees must use a ladder to check the fluid level. He implied that miners do not have to get up on the generator trailer during their work day.

I find that the Secretary established a violation. The photographs show that there were stairs leading up to the cited area. I find that the top of the fender was an elevated walkway as that term is used in the safety standard. Because I credit the uncontroverted testimony of Inspector Allen, I find that the violation was S&S and that Carder's negligence was moderate. A penalty of $120.00 is appropriate.

7. Citation No. 6299987, WEST 2004-326-M

Inspector Allen issued Citation No. 6299987 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12032. The body of the citation states:

> The inspection cover plate was missing for the number seventeen circuit inside the electrical breaker box located on the northwest end of the scale house trailer. Miners could come in contact with the one hundred and ten volt ac current that was exposed.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was low. The cited standard provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that there was one cover plate missing on a breaker box in the scale house. (Tr. 98; Ex. G-16). The breaker box was in a section of the scale house that Carder leased to another company, but the box controlled the power for the entire building. Allen was told that Carder miners flip the switches in the breaker box when there is a power outage. Inspector Allen testified that it was unlikely that anyone would be injured as a result of this violation. (Tr. 99-100).

Mr. Ausmus testified that the citation should be vacated because the breaker box was in an area of the scale house controlled by another company. There is a locked door between the two areas of the scale house so the exposure to Carder employees "would be zero." (Tr. 120).

I find that the Secretary established a violation but the safety hazard created by the violation was de minimis. As the inspector testified, a miner would have to purposefully stick a tool into the small opening to sustain an injury. The violation was not serious and Carder's negligence was quite low. A penalty of $20.00 is appropriate for this violation.

D. Crusher Operation No. 5

1. Citation No. 6299958, WEST 2004-270-M

Inspector Allen issued Citation No. 6299958 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.4230(a)(1). The body of the citation states:

> The John Deere front end loader, company number 384 . . . did not have a fire extinguisher on the equipment. This creates a potential hazard to miners trying to escape in the event of a fire. No other fire extinguishing equipment was provided on this equipment.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides that "[w]henever a fire or its effects could impede escape from the equipment, a fire extinguisher shall be on the equipment." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen was concerned that if the loader were to catch on fire, the loader operator would have a difficult time escaping from the vehicle. (Tr. 128). A diesel fuel tank was under one door and a hydraulic tank near the other door. "Because there was a fire promulgator under both exits, [Carder] needed a fire extinguisher for the miner to be able to escape from that piece of equipment." *Id.* The inspector did not believe that the violation was serious or S&S because a fire was unlikely. (Tr. 129). Not every piece of mobile requires a fire extinguisher, just those in which a fire would impede escape. *Id.* In this case, there was a tank of combustible liquid adjacent to the each door of the loader. (Tr. 154).

Mr. Ausmus testified that, because the loader had two doors, there would always be a way for the loader operator to escape. (Tr. 173). He believes that a fire would most likely start in the engine compartment and it would be highly unlikely that both doors would be engulfed with flames. (Tr. 154-55). Ausmus noted that subsection (a)(2) of the safety standard provides that "[w]henever a fire or its effects would not impede escape from the equipment but could affect the escape of other persons in the area, a fire extinguisher shall be on the equipment or within 100 feet of the equipment."

I find that the Secretary established a violation. I agree with Mr. Ausmus that in most instances a fire would not impede the loader operator from exiting the loader. Nevertheless, if a fire were to break out quickly both tanks could catch fire and the miner would need to be able to use the extinguisher to help him escape. The inspector admitted that it was not likely that the extinguisher would ever have to be used.

I find that Carder's negligence is quite low. MSHA inspectors have inspected Carder's facilities on a regular basis. No inspector has ever advised Carder that some of its self-propelled equipment may require a fire extinguisher even if the equipment has two doors. I find that a penalty of $20.00 is appropriate.

2. Citation No. 6299959, WEST 2004-270-M

Inspector Allen issued Citation No. 6299959 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.4201(a)(2). The body of the citation states:

> The fire extinguisher located on the Caterpillar 96F front end loader, company number 532 . . . had not received a maintenance check in the last twelve months (since October 1999), creating a potential hazard to employees trying to use it to extinguish a fire.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides that "[a]t least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of the extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that the "last proof" of any inspection of the fire extinguisher was in October 1999. (Tr. 131). He did not believe that the violation was serious because the loader was in good repair. Mr. Ausmus testified that, because a fire extinguisher was not required to be on the loader, there could be no violation of section 56.421(a)(2). (Tr. 156-57, 174-75).

I find that the Secretary established the violation. If a mine operator places a fire extinguisher on a piece of equipment, it must meet MSHA's testing and maintenance requirements. A miner will assume that an extinguisher will function when fighting a fire. There was no showing that his extinguisher was not working properly. The violation was not serious or of an S&S nature. Carder's negligence was moderate. A penalty of $60.00 is appropriate.

3. Citation No. 6299961, WEST 2004-270-M

Inspector Allen issued Citation No. 6299961 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The hopper feed conveyor contains two idlers that are not guarded. The open and exposed idlers are eighteen inches and forty-eight inches above the mine floor, respectively. This condition exposed employees to the possibility of injury if they were accidently to contact the moving machine parts. The idlers are not . . . along a regularly used travelway, making the chance of accidental contact unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that the idler rollers were not guarded but that the rollers were not close to a travelway. (Tr. 132; Ex. G-20). A miner or his clothing could become entangled in the rollers. (Tr. 134). He admitted that MSHA has determined that conveyor belt rollers are not considered to be moving machine parts for purposes of the standard. (Tr. 158). The inspector testified, however, that this policy applies to "material-carrying rollers," not return or idler rollers. (Tr. 160). The plant was not operating while the inspector was at the plant.

Mr. Ausmus testified that two miners work at the plant, one in a loader and the other in the operator's station. (Tr. 159). As a consequence, miners are not walking around the plant while it is operating. Ausmus also testified that, during previous inspections, some MSHA inspectors have told him that return rollers do not have to be guarded and others have told him that guards are required. (Tr. 175). Ausmus stated that one inspector told him that "there's not a pinch point on the return roller." *Id.* Ausmus believes that when one inspector gives Carder "a clean bill of health" for a certain condition, it is unfair for another inspector to issue a citation for the same condition. (Tr. 176). If a condition is inspected and "accepted by an inspector," does it mean that the inspector did "not do his job?" (Tr. 177).

As stated above, the Secretary must provide fair notice of the requirements of a broadly written safety standard. The language of section 56.14107(a) is "simple and brief in order to be

broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application' " *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990) (citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

The Commission addressed this issue with respect to the Secretary's guarding standard in *Good Construction*. In that case, the mine operator contended that it did not have adequate notice of the requirements of 30 C.F.R. § 56.14107(a) because the language of the safety standard "does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years." *Good Construction* 23 FMSHRC at 1002. The moving machine parts were guarded, but the MSHA inspector determined that the guarding was insufficient. The Commission remanded the case to the administrative law judge for consideration of the notice issue.

In the present case, Carder believes that it has been led astray by MSHA's policy statements and prior inconsistent enforcement. MSHA's program policy manual provides that conveyor belt rollers are not to be construed as moving machine parts that must be guarded under the standard "where skirt boards exist along the belt." The Secretary takes the position that the statement in the policy manual applies only to "material-carrying rollers, not return rollers – return idlers." (Tr. 160). In addition, the cited idlers were not protected by a skirt board.

I find that the standard applied to the cited idlers and that Carder had fair notice of the requirements of the standard. Although the statement in the program policy manual is subject to differing interpretations, it is clear that the statement does not apply to the idlers cited by MSHA in this case. These return rollers were exposed moving machine parts that are similar to those specifically mentioned in the standards. The Secretary has often applied this standard to return rollers. *See e.g. Heritage Resources Inc.*, 21 FMSHRC 626, 632 (June 1999) (ALJ); and *Asphalt Paving Co.*, 27 FMSHRC 123, 124 (Feb. 2005) (ALJ). In *Heritage Resources* a miner was killed when he became entangled in a return roller and in *Asphalt Paving* a miner was injured when his arm was pulled into a return roller. Unguarded return rollers are a known hazard in the mining industry. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of section 56.14107(a) would have recognized the cited return rollers were required to be guarded. Mr. Ausmus's testimony with respect to prior MSHA inspections is too vague for me to find that Carder was a victim of prior inconsistent enforcement. The cited idler was near the tail pulley in an area where cleaning would be required.

It was not reasonably likely that anyone would be injured by the violation. The return rollers were in a rather remote area. In addition, with only two employees, the risk of injury was reduced. The condition did create some measure of danger to employees.

I find that Carder's negligence was low. It is clear the Carder believed that these rollers were not required to be guarded. A penalty of $20.00 is appropriate.

4. <u>Citation No. 6299962, WEST 2004-270-M</u>

Inspector Allen issued Citation No. 6299962 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The cone feed conveyor contains a return idler that is not adequately guarded in that the guard contained several openings and the idler was readily accessible. The idler is sixty-eight inches above the mine floor. This condition exposed employees to the possibility of injury if they were accidently to contact the moving machine parts. The idler is not . . . along a regularly used travelway, making the chance of accidental contact unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The evidence presented with respect to this citation is essentially the same as the evidence for the previous citation. (Tr. 135-37, 160-61, 175-77; Ex. G-21). Carder raised a general issue with respect to this and other citations concerning the need to protect against intentional

misconduct by an employee. Carder believes than the only way for a miner to be injured by the cited condition is for him to intentionally put himself in harm's way. Carder's position fails to consider human error. The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. 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).

For the reasons set forth above, I find that the Secretary established a non-S&S violation and that Carder's negligence was low. A penalty of $20.00 is appropriate.

5. Citation No. 6299963, WEST 2004-270-M

Inspector Allen issued Citation No. 6299963 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The screen feed conveyor contains a return idler that is not guarded. The idler is fifty-four inches above the mine floor. This condition exposed employees to the possibility of injury if they were accidently to contact the moving machine parts. The idler is not . . . along a regularly used travelway, making the chance of accidental contact unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The evidence presented with respect to this citation is essentially the same as the evidence for the previous two citations. (Tr. 137-39, 162-63, 175-77; Ex. G-22). For the reasons stated above, I find that the Secretary established a non-S&S violation and that Carder's negligence was low. A penalty of $20.00 is appropriate.

6. Citation No. 6299964, WEST 2004-270-M

Inspector Allen issued Citation No. 6299964 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.9300(a). The body of the citation states:

> No berms or guardrails were provided on the banks of the elevated scale roadway adjacent to the scale house, where a thirty-two to thirty-six inch drop off exists. This condition creates a vehicular overturn hazard. The scales are used daily to weigh over the road haul trucks.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was low. The safety standard provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that Carder's customers use the scale roadway. (Tr. 140; Ex. G-23). Several trucks entered and exited the property during his inspection. He determined that an accident was unlikely because trucks move very slowly over the scale. (Tr. 141). He determined that Carder's negligence was low because its managers were not aware that the standard would apply to the scale. (Tr. 142).

Mr. Ausmus testified that the scale has been in its present position for several years through many MSHA inspections without guardrails or berms. (Tr. 176-77). The condition had not been previously cited by MSHA nor had an MSHA inspector suggested the guardrails be installed. Anyone entering or leaving the property would see the scale, as shown on the photographs taken by Inspector Allen. (Ex. G-23).

I find that the citation should be vacated because Carder was not provided with adequate notice that guardrails were required on the scale. The scale has been present for many years and perhaps as long as 15 years. (Tr. 164). The scale would be quite obvious to anyone entering the property. A reasonably prudent person familiar with the mining industry and the protective purposes of section 56.9300(a) would not have recognized that the cited scale was covered by the standard given the lack of enforcement at the mine and the fact that truck drivers drive over the scale at a very low rate of speed. I further find that, putting aside the notice issue, the scale fits within the scope of the safety standard. The scale is a roadway where a drop-off exists of sufficient grade or depth that could cause a truck to overturn or endanger persons in the truck. By issuing the citation, MSHA put Carder on notice that guardrails are required. The citation is vacated.

7. Citation Nos. 6299965 through 6299976, WEST 2004-270-M

Inspector Allen issued Citation Nos. 6299965 through 6299976 under section 104(a) of the Mine Act alleging violations of 30 C.F. R. § 50.30(a). The body of Citation No. 6299965 states:

> The MSHA #7000-2 (Quarterly Employment Report) for the 1st Quarter 2001 (January, February and March) was not completed properly in that the employment and employee hours for the mine were not reported correctly.

The inspector determined that there was no likelihood that someone would be injured as a result of this condition. He determined that the violation was not S&S and that Carder's negligence was moderate. The regulation provides, in part, that "[e]ach operator of a mine in which an individual worked during any calendar quarter shall complete a MSHA form 7000-2 in accordance with the instructions and criteria in § 50.30-1. . . ." The Secretary proposes a penalty of $60.00 for each citation. Each of the 12 citations charging a violation of section 50.30(a) are identical, except that they cite a different calendar quarter. (Exs. G-24 through G-36).

Inspector Allen stated that he issued the citations following an audit of Carder's record-keeping compliance. (Tr. 143). The audit revealed that Carder made the same mistake on the 7000-2 form in 12 consecutive quarters. A separate citation was issued for each quarter. (Tr. 144). Inspector Allen described the mistake as follows:

> We identified during the course of the audit that the mine operator was not reporting hours for the scale-house person. [Carder has] a roving scale-house person that would bounce around for the different mines, and they were not tracking the hours to associate with each mine ID.

(Tr. 145). The same mistake was made with respect to Mike Ausmus, the general manager. Inspector Allen testified that Carder has a unique situation because it has "people that travel to [four] different mine Ids and it's a little difficult to track it." (Tr. 16).

Mr. Ausmus testified that he was surprised that he received these citations because Carder has been reporting hours worked the same way for a long time. Carder was never advised by MSHA that it was not correctly reporting hours worked. Ausmus testified that the scale-house employee works about 40 hours a week in the summer, but does not usually work at all during the winter months. (Tr. 178-89). Ausmus testified that he is at the No. 5 crusher about 10 hours a week. (Tr. 178). When Mr. Ausmus asked Inspector Allen why the alleged reporting violation was not included in one citation, he replied that it is MSHA's policy to issue a separate citation for each quarter. (Tr. 166).

The Secretary is authorized to assess proposed penalties for violations of Part 50. *Consolidation Coal Co.*, 14 FMSHRC 956, 963-65 (June 1992). Inspector Allen did not refer to a specific provision of section 50.30-1 that was violated. Nevertheless, section 50.30-1(g)(3) requires mine operators to "[s]how the total hours worked by *all* employees during the quarter covered." (Emphasis added). "Hours worked" includes work performed by employees who only work part of their time at the No. 5 crusher. It does not appear that Carder's employment records had been previously audited. In *Consolidation Coal*, the Commission recognized the Secretary's authority to issue a separate citation for each calendar quarter.

I find that the citations should be affirmed as non-serious citations. I find that Carder's negligence was very low because it believed that the hours were being correctly reported. Carder relied on an administrative assistant to calculate and report the employment and hours worked. (Tr. 146). A penalty of $10.00 for each citation is appropriate.

8. Citation No. 6299957, WEST 2004-271-M

Inspector Allen issued Citation No. 6299957 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14100(b). The body of the citation states:

> The John Deere front end loader, company number 384 . . . contained defects that affected the safety of persons. The horn and the lights were defective and not maintained in a functional condition. Miners and other vehicular traffic were observed in the area while the loader was in operation. Miners were exposed to the possibility of injury due to the inability of the loader operator to warn others in the event of an emergency. The mine operator was not aware of the defects on the loader.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would be permanently disabling. He determined that the violation was S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $154.00 for this citation.

Inspector Allen testified that the operator of the cited loader was loading a truck when he arrived for the inspection. (Tr. 149). Use of the loader with an inoperable horn and lights presented a serious safety risk to employees. When Mr. Ausmus attempted to turn on the lights during the inspection, sparks were created under the dashboard. (Tr. 150). No defects were noted in the pre-operational checklist. Inspector Allen could not determine how long the loader had been in this condition because the loader operator did not speak English. (Tr. 151).

Mr. Ausmus testified that there was sparking when he turned the key for the loader. (Tr. 179). He believes that the problem developed at that moment. Ausmus contends that the sparking indicated a short in the electrical system that caused the horn and lights to malfunction.

(Tr. 180). The citation is not fair because MSHA did not give Carder an opportunity to fix the problem.

Carder argues that the standard requires that safety defects be corrected in a timely manner. Because it was not given the opportunity to correct the problem that developed at the time of the inspection, the citation should be vacated. Inspector Allen believes that the loader operator knew that there was a problem with his equipment because he parked the loader and started using another loader as soon as the inspector arrived at the mine. (Tr. 150-51, 167-68).

I find that the Secretary did not meet its burden of proof with respect to this citation. The pre-operational checklist for the cited loader did not indicate that the horn and lights were not working. If there was sparking under the dash when Ausmus and Allen inspected the loader, it is possible that the lights and horn had been working that shift. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 714-15 (July 2001). Consequently, I vacate this citation.

9. Citation No. 6299960, WEST 2004-271-M

Inspector Allen issued Citation No. 6299960 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14100(b). The body of the citation states:

> The Caterpillar 966F front end loader, company number 532 . . . contained defects that affected the safety of persons. The brake lights were defective and not maintained in a functional condition. Vehicular traffic was observed in the area while the loader was in operation. Miners were exposed to the possibility of injury due to the inability of another equipment operator to know when the loader is stopping. The mine operator was not aware of the defects on the loader.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition 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 Carder's negligence was moderate. The Secretary proposes a penalty of $114.00 for this citation.

Inspector Allen testified that there was a possibility of a collision between vehicles at the mine as a result of this violation. (Tr. 152). The defect was not noted on the pre-operational checklist. He admitted that it was possible that the brake lights stopped working during the shift. (Tr. 172). Mr. Ausmus testified that the citation was unfair because the defect was not noted on the pre-operational checklist. (Tr. 181). He stated that the brake lights must have malfunctioned during the shift. Ausmus believes that everything was working at the start of the shift. He admitted that when he spoke to the loader operator after the citation was issued, he merely asked him whether he did a preshift exam and whether everything checked out. (Tr. 182). The loader operator spoke broken English.

I find that the Secretary established a non-S&S violation of the standard. Carder did not effectively rebut the Secretary's evidence of a violation. It is not at all clear that the loader operator checked the brake lights at the start of the shift. Although there was a possibility that the hazard contributed to by the violation would result in an injury, such an injury was not reasonably likely. Carder's negligence was moderate. A penalty of $60.00 is appropriate.

E. Screening Operation/Dredge Operation

1. Citation No. 6311741, WEST 2004-491-M

Inspector Allen issued Citation No. 6311741 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.16006. The body of the citation states:

> The oxygen and acetylene tanks being transported on the company number 170 maintenance truck were observed in the upright position with no protective covers provided over the valve stems. Employees working in this area were exposed to the possibility of injury, should the cylinders tip over or receive an impact on the valve body causing fire and/or projectile hazards.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it could be fatal. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides, in part, that "[v]alves on compressed gas cylinders shall be protected by covers when being transported or stored . . . ." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that the valves for the compressed gas cylinders were not protected as required by the standard. (Tr. 186; Ex. G-40). He observed the cylinders being transported in the cited condition while on the truck. (Tr. 189). The cylinders were secured to the truck. (Tr. 213). He stated if the valves were "impacted and knocked off, those compressed gas cylinders [had] the potential to become a rocket." (Tr. 187, 214). The violation could also propagate a fire. (Tr. 188). There were covers available at the mine.

Mr. Ausmus testified that Inspector Allen admitted that the cylinders could not tip over and there was nothing overhead that could fall onto the valves. (Tr. II. 8). Ausmus believes that there was no safety hazard connected with the cited condition.

As stated above, the Secretary is not required to prove that an alleged violation created a safety hazard. I find that the Secretary established a non-S&S violation. It was highly unlikely that the violation would result in an injury. The gravity was quite low and Carder's negligence was moderate. A penalty of $40.00 is appropriate.

2. Citation No. 6311743, WEST 2004-491-M

Inspector Allen issued Citation No. 6311743 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12004. The body of the citation states:

> The power conductors feeding power from the 12 volt DC battery to the engine on the work boat were not insulated and/or provided [with] adequate protection. The conductors had mechanical damage near both electrical connections at the battery. A diesel fuel tank is located in the near vicinity to the damaged conductors. Employees working in and around this area were exposed to the possibility of shock and/or fire.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition 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 Carder's negligence was moderate. The safety standard provides, in part, that "[e]lectrical conductors exposed to mechanical damage shall be protected." The Secretary proposes a penalty of $154.00 for this citation.

Inspector Allen testified the conductors were damaged near where they were attached with lugs to the 12 volt battery. (Tr. 190; Ex. G-42). He stated that having broken wires in the conductors can create arcing and sparking if the battery is moved. The battery was on the bottom of the boat and was not secured. (Tr. 224). He also stated that the conductors could overheat since their current-carrying capacity was reduced. One of the conductors was "almost broken clear off where it entered into the lug that mounts to the battery." (Tr. 218). The work boat is used on a daily basis. A fuel tank was near the battery. (Tr. 191). Inspector Allen determined that the violation was S&S because of the proximity of the fuel tank. (Tr. 192). On cross-examination, Inspector Allen admitted that one of the cited conductors was the ground conductor and that he did not know what would happen if that conductor failed. (Tr. 221). Allen stated that he issued the citation because the conductors were damaged. (Tr. 222-23).

Mr. Ausmus testified that the conductor that concerned Mr. Allen was the ground conductor. (Tr. II 9). The conductor on the ground can be a bare wire because the ground goes to the frame of the equipment. There is no possibility of sparking from the ground conductor. Mr. Ausmus introduced the ground cable (negative cable) as Exhibit R-1 and the positive cable as Exhibit R-2. (Tr. II 11).

I find that the Secretary established a violation. Both conductors were badly damaged at the point where they entered the lugs. Although this condition created a potential hazard, Inspector Allen's testimony as to the likelihood that someone would be injured by the violation, assuming continued normal mining operations, was not very convincing. The Secretary did not show that it was reasonably likely that sparking would occur, that sparking would cause a fire, or

that a miner would be shocked by the condition. I find that the violation was not S&S and that Carder's negligence was moderate. A penalty of $60.00 is appropriate.

3. Citation No. 6311745, WEST 2004-491-M

Inspector Allen issued Citation No. 6311745 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14100(a). The body of the citation states:

> The work boat used daily during the shift has not received an inspection by the equipment operator before being placed in operation on that shift. Several safety defects were found and cited . . . on the work boat that should have been identified if a proper pre-operational check had been made.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition 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 Carder's negligence was moderate. The safety standard provides that "[s]elf propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." The Secretary proposes a penalty of $154.00 for this citation.

Inspector Allen determined that the preshift examination had not been performed after talking with Leonard Smart, the lead man on the shift. (Tr. 193). Smart told him that no pre-operational check had been performed.

Mr. Ausmus testified that the work boat cannot be classified as self-propelled mobile equipment under section 56.14100 because section 56.14000 defines "mobile equipment" as "[w]heeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved." (Tr. 225; Tr. II 12). A boat does not fit within this definition.

I agree with Mr. Ausmus that a boat is not mobile equipment as that term has been defined by the Secretary. The safety standard applies to self-propelled mobile equipment. Consequently, the citation is vacated.

4. Citation No. 6311746, WEST 2005-134-M

Inspector Allen issued Citation No. 6311746 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14103(b). The body of the citation states:

> The broken window on the Collidge dredge impaired the operator's visibility for safe operation and/or created a hazard to the equipment operator. Numerous cracks running both vertically and

> horizontally existed, creating a spider web effect. There [are] other windows that are intact, making the chance of an accident unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides, in part, 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." The Secretary proposes a penalty of $425.00 for this citation.

Inspector Allen testified that he issued this citation because a window on the dredge was cracked. He stated that it looked like an object had struck the window. (Tr. 196; Ex. G-44). Mr. Ausmus testified that a dredge is not mobile equipment as that term is defined by the Secretary and that the citation should be vacated. (Tr. 226-28; Tr. II 12).

Section 56.14103 is entitled "Operators Stations." Subsection (a) states that "[i]f windows are provided on operators' stations of self-propelled mobile equipment, the windows shall . . . ." Subsection (c) also limits its applicability to self-propelled mobile equipment. Subsection (b) cited by Inspector Allen does not make any direct reference to self-propelled mobile equipment. Nevertheless, the entire standard clearly applies only to windows on operators' stations of self-propelled mobile equipment. This subsection requires the replacement of damaged windows on such equipment but does not require the replacement of windows at other locations at a mine. The preamble to section 56.14103 states "[t]his final standard sets forth several safety requirements relating to the operator's station on self-propelled mobile equipment." 53 Fed. Reg. 32507 (August 25, 1988). I find that the dredge did not fit within the Secretary's definition of mobile equipment. Consequently, this citation must be vacated.

5. <u>Citation No. 6311747, WEST 2004-491-M</u>

Inspector Allen issued Citation No. 6311747 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states, in part:

> The drive shaft between the engine and the main pump located on the Coolidge dredge contained exposed moving machine parts that were not adequately guarded. The existing drive shaft guarding contains a twenty one inch by fifty nine inch opening and is open and exposed on the bottom side. There are also two seven inch by nine inch lids on the top side that are not secured and were easily opened. . . . The moving machine parts are along a travel way that is not regularly used. . . .

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined

that the violation was not S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $425.00 for this citation.

Inspector Allen testified that the rotating drive shaft was exposed to accidental contact. (Tr. 198; Ex. G-45). There were also lids on the top side of the shaft which could be opened. He testified that the drive shaft was about 30 inches above the walking surface. (Tr. 200). He took the photograph of the alleged violation while he was on his knees with the camera pointing up. (Tr. 201, 230-32).

Mr. Ausmus testified that the cited area was about 40 feet from the operator's station and that there is no reason for him to be anywhere near this area while the dredge is running. (Tr. II 13). He testified that the bottom of the existing guard protecting the drive shaft was about 18 inches above the deck of the dredge. (Tr. II 14). He states that any greasing of the drive shaft is performed while the dredge is shut down. The lids on the top side were closed and are only opened for greasing operations.

I find that the Secretary established a technical violation of the safety standard. Moving machine parts, that were within seven feet of an infrequently used walkway, were exposed. To become entangled in the parts, a miner would have to be down on the deck kneeling or on his hands and knees. I find that the existing guard would protect miners walking by the shaft. The lids above the shaft were designed so that they could not flip open. I find that the gravity was very low. Because this technical violation was not obvious, Carder's negligence was extremely low. A penalty of $10.00 is appropriate.

6. Citation No. 6311748, WEST 2004-491-M

Inspector Allen issued Citation No. 6311748 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 47.41(a). The body of the citation states, in part:

> The [mine] operator failed to ensure that a five gallon container of a hazardous chemical has a label that was located in the fuel area.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The standard provides, in part, that the "operator must ensure that each container of a hazardous chemical has a label." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen stated that the cited container contained gasoline. (Tr. 202; Ex. G-46). The container was a red five gallon metal can. (Tr. 233). Mr. Ausmus testified that MSHA has a safety standard which provides that a gasoline container that is emptied every night is not required to be labeled. (Tr. II 15-16).

The Secretary established a technical violation. Mr. Ausmus raised a defense, but he did not present any credible evidence that the can was emptied every night. The violation was not serious. The container in the photograph is a typical metal gasoline can. (Ex. G-46). It is highly unlikely that a miner would mistake the container for anything other than a gasoline can. For the same reasons, Carder's negligence is very low. A penalty of $10.00 is appropriate.

7. Citation No. 6311749, WEST 2004-491-M

Inspector Allen issued Citation No. 6311749 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.4102. The body of the citation states, in part:

> Excessive amounts of engine oil had been allowed to accumulate under the engine (a pool approximately three feet long by four feet wide) and the dirt around the genset was oil soaked for a distance of approximately six feet wide by twelve feet long, on and around the plant's Caterpillar generator that supplies the plant [with] power.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition 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 Carder's negligence was moderate. The safety standard provides that "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard." The Secretary proposes a penalty of $154.00 for this citation.

Inspector Allen testified that the accumulation created a serious fire hazard. (Tr. 203-04; Ex G-47). He testified that miners were exposed to the hazard on a daily basis. He admitted that it was possible that the oil line at the generator had broken the day before. (Tr. 235). Fuel was stored in the area and, since he did not issue a citation for failure to post a No Smoking sign, it is safe to assume that the area was posted. (Tr. 236). The inspector believes that a spillage of flammable liquid must be cleaned up as soon as it is discovered. (Tr. 237).

Mr. Ausmus testified that the night before the MSHA inspection, a hose broke on the generator which caused excessive amounts of oil to spill on the ground. (Tr. II 16). He believes that the generator was not being used at the time of the inspection. Ausmus contends that a mine operator must be given a reasonable amount of time to clean up a spill of flammable liquid. In addition, there were "No Smoking" and "No Open Flames" signs posted in the area. (Tr. II 17).

I agree with Mr. Ausmus that, under the safety standard, a mine operator must be given a reasonable amount of time to clean up the spill before a violation is established. A mine operator must take steps to ensure that the danger is immediately mitigated, however. There is no dispute that the oil spill described by Inspector Allen existed. Inspector Allen stated that it was possible that the spill could have occurred the previous day, but Carder employees did not advise him of

that fact at the time of his inspection. He could not recall if the generator was operating at the time of his inspection. (Tr. 235). On the other hand, Mr. Ausmus only "believed" that miners were not using the generator at that time. (Tr. II 16). Although Carder generally outlined a defense at the hearing, it did not present sufficient evidence to rebut the Secretary's *prima facie* case. There were no warning signs or instructions given to keep away from the generator. I find that the Secretary established an S&S violation and that Carder's negligence was moderate. A penalty of $100.00 is appropriate.

8. Citation No. 6311750, WEST 2004-491-M

Inspector Allen issued Citation No. 6311750 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). At the hearing, Mr. Ausmus stated that he did not have any objections to the citation and he admitted that the guarding on the generator set was not adequate. (Tr. II 17). Consequently, the citation is affirmed as written. The Secretary's proposed penalty of $203.00 is appropriate.

9. Order No. 6311751, WEST 2005-134-M

Inspector Allen issued Order No. 6311751 under section 104(g)(1) of the Mine Act alleging a violation of 30 C.F. R. § 46.11(b)(4). The body of the citation states, in part:

> Three commercial over-the-road truck drivers at the mine have not received site-specific hazard awareness training. The mine operator was aware of the training requirements.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would be fatal. He determined that the violation was S&S and that Carder's negligence was high. The regulation provides that mine operators must provide site-specific hazard awareness training to "[c]ustomers, including commercial over-the-road truck drivers." The Secretary proposes a penalty of $1,700.00 for this citation.

Inspector Allen testified that he observed three over-the-road truck drivers lined up at the pit getting ready to have their trucks loaded with product. (Tr. 208; Ex. G-51). When he talked to the drivers, none of them had been given the required safety training. He considered the violation to be S&S because an untrained person at a mine site is a hazard to himself and others. He believed that this mine presented unusual hazards because it is a dredge site. He felt that entrapment in a sand pile was a real possibility if the pile were to fail. (Tr. 209). Inspector Allen believed that Carder's negligence was high because the lead man was not paying attention to new truckers. Carder has been in operation for about ten years and it had knowledge of this training requirement.

Allen admitted that there were no Carder employees at the scale house and that there was a sign posted at the entrance to the mine. (Tr. II 5). The scale house was on the opposite side of the dredge pond from the area where the trucks were lined up. The drivers did not adhere to the signs at the entrance of the mine.

Mr. Ausmus testified that Carder has posted a sign at the entrance of the mine which reads: "Customers & Visitors Must Report to Scale Office Before Entering Property." (Tr. II 17-18; Ex. R-3). Ausmus contends that, because no miners were manning the scale house, drivers who were new to the property just drove around to where they saw activity. (Tr. II 18). In doing so, these drivers disregarded the sign posted at the entrance to the mine. Ausmus contends that if these drivers had remained at the scale house, someone would have driven around the pond to greet them and given them the required hazard training. Carder had four employees at the mine that day. Ausmus further testified that, as soon as the lead man noticed the trucks, he would have asked them if they had the required training. If they said no, he would have escorted them back to the scale house to provide the training. (Tr. II 19).

I credit the testimony of Inspector Allen. He testified that the lead man told him that he thought the truckers had already been trained and that he was not paying any attention to new truckers. (Tr. 209). Inspector Allen's notes corroborate this testimony. (Ex. G-51). I find that the Secretary established an S&S violation of the training regulation. I also find that Carder's negligence was high because Carder's employees were not paying attention to this requirement. Carder should have expected new truckers would travel to the area of the mine where people were located rather than sit at the scale house. The lead man should have asked each unfamiliar driver whether he had received any hazard training. The Secretary proposed the penalty under her special assessment regulations. I am reducing the penalty to $1,000.00 taking into consideration the civil penalty criteria. This mine has no history of previous violations.

10. <u>Citation No. 6311753, WEST 2004-491-M</u>

Inspector Allen issued Citation No. 6311753 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.11003. The body of the citation states, in part:

> The twelve foot ladder located on the #1 oversized conveyor was not maintained in good condition. The ladder had two of the rungs bent and a crack was observed in the right side frame that penetrated approximately one third of the way through. . . . Employees seldom use this ladder, making the chance of an accident unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be fatal. He determined that the violation was not S&S and that Carder's negligence was moderate. The standard provides that "[l]adders

shall be of substantial construction and maintained in good condition" The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified at to the condition of the ladder. (Tr. 210-12; Ex. G-50). He believed that the ladder could easily fail with a miner on it. The ladder was not in use and he was not sure if there were other ladders available in the area. (Tr. II 6).

Mr. Ausmus testified that there was another ladder in perfect condition in the area that miners could use. (Tr. II 20). In addition, the ladder was used to access a platform. If the ladder were properly placed, the bent rungs would be above the level of the platform and no miners would be required to step on them.

I find that the Secretary established a violation. Although the hazard was not very great, it was possible that the violation could contribute to an injury. The violation was not serious. Carder's negligence was moderate. A penalty of $60.00 is appropriate.

F. Citation Nos. 6311742, 6311830, and 6311847

Carder agreed to withdraw its contest of the above citations at the start of the hearing. As a consequence, these citations are affirmed as written.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The individual operations have the following history of previous paid violations during the 24 months preceding these inspections: Crusher No. 2 - no reported history; Dredge Operation No. 1 - three; Dredge Operation No. 3 - six; Crusher Operation No. 5 - four; Screening Operation/Dredge Operation - no reported violations. Carder is a small operator and its mines are small. All of the violations that were affirmed in this decision were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Carder's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

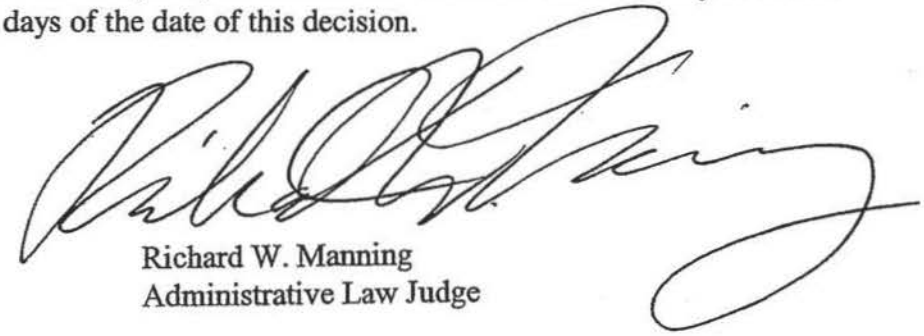
Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
WEST 2004-269-M		
6298298	56.14105	$1,500.00

Citation No.	30 C.F.R. §	Penalty
WEST 2004-270-M		
6299958	56.4230(a)(1)	$20.00
6299959	56.4201(a)(2)	60.00
6299961	56.14107(a)	20.00
6299962	56.14107(a)	20.00
6299963	56.14107(a)	20.00
6299964	56.9300(a)	Vacated
6299965	50.30(a)	10.00
6299966	50.30(a)	10.00
6299967	50.30(a)	10.00
6299968	50.30(a)	10.00
6299969	50.30(a)	10.00
6299970	50.30(a)	10.00
6299971	50.30(a)	10.00
6299972	50.30(a)	10.00
6299973	50.30(a)	10.00
6299974	50.30(a)	10.00
6299975	50.30(a)	10.00
6299976	50.30(a)	10.00
WEST 2004-271-M		
6299957	56.14100(b)	Vacated
6299960	56.14100(b)	60.00
WEST 2004-326-M		
6299980	56.14132(a)	20.00
6299981	56.14100(b)	20.00
6299982	56.11002	80.00
6299983	56.11002	80.00
6299985	56.11002	120.00
6299987	56.12032	20.00
WEST 2004-491-M		
6311741	56.16006	40.00
6311742	56.14112(b)	203.00
6311743	56.12004	60.00
6311745	56.14100(a)	Vacated

Citation No.	30 C.F.R. §	Penalty
6311747	56.14107(a)	10.00
6311748	47.41(a)	10.00
6311749	56.4102	100.00
6311750	56.14107(a)	203.00
6311753	56.11003	60.00
WEST 2005-132-M		
6311830	56.14100(b)	60.00
WEST 2005-133-M		
6311844	56.14112(a)(1)	20.00
6311846	56.14107(a)	100.00
6311847	56.14112(a)(1)	60.00
WEST 2005-134-M		
6311746	56.14103(b)	Vacated
Order No. 6311751	46.11(b)(4)	1,000.00
WEST 2005-160-M		
6311828	56.14130(i)	60.00
WEST 2005-218-M		
6311848	56.14107(a)	60.00
	TOTAL PENALTY	$4,206.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Carder, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $4,206.00 within 30 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
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November 29, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAY HEETLAND, Applicant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. CENT 2006-43-DM MSHA No. SC MD 2005-13
v.	:	Portable Plant #1/Palo Quarry
SMASAL AGGREGATES & ASPHALT, LLC, Respondent	:	Mine I.D. 23-02197

DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: Lydia Tzagoloff., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Applicant;
Robert C. Johnson, Esq., Husch & Eppensberger, Kansas City, Missouri, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Jay Heetland against Smasal Aggregates & Asphalt, LLC, ("Smasal Aggregates") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Mine Act"). The application was filed on or about November 4, 2005 and Smasal Aggregates requested a hearing within ten days of receipt of the application. The application alleges that Smasal Aggregates discriminated against Heetland when he was terminated from his employment on July 28, 2005, because he made safety complaints to company management about his working conditions on July 27 and 28, 2005. The application states that the Secretary has determined that the underlying discrimination complaint filed by Smasal was not frivolously brought. A hearing in this temporary reinstatement proceeding was held on November 22, 2005. For the reasons set forth below, I find that the applicant established that Heetland's discrimination complaint was not frivolously brought.

II. SUMMARY OF THE EVIDENCE

On or about August 15, 2005, Heetland filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"). Heetland was the only witness who testified in this temporary reinstatement hearing. He testified that he started

working for Smasal Aggregates in April 2004 as an equipment operator. On July 26, 2005, Smasal Aggregates' employees started making preparations to clean off 10 to 12 feet of overburden on top of limestone that was to be mined. (Tr. 8). The area to be cleaned was near the edge of a highwall that dropped about 30 feet to the floor of the pit. The overburden consisted of loose, unconsolidated material which had been previously blasted. Heetland constructed eight foot high berms along the edge of the haul truck route being constructed to the area. He was concerned about the "tight conditions" in the area and expressed these concerns to another equipment operator.

On July 27, 2005, Heetland was assigned to operate a track hoe to scoop up overburden and dump the material into trucks. (Tr. 11). As Heetland started loading haul trucks, he became concerned about the working conditions. When Mike Smasal, owner/operator of Smasal Aggregates, came to the area, Heetland complained about these working conditions. Specifically, he complained that he was operating too close to the edge of the highwall and there was not sufficient room for the haul trucks and track hoe to safely operate. Mr. Smasal did not respond to his complaints but merely stated that the rock had to be removed. (Tr. 13).

The track hoe is an excavator that is mounted on caterpillar tracks. Heetland testified that, in operating the track hoe, he was required to reach out with the boom on the front of the track hoe, scoop up material, pivot the body of the track hoe, and dump the load into a waiting haul truck. (Tr. 12-13, 35-36). Because the material he was digging was blasted rock, it was loose and unconsolidated. Heetland testified that as he scooped up the material, it would roll out from under the track hoe. Heetland's track hoe was positioned facing the edge of the highwall with the tracks perpendicular to that edge. He had to extend the boom as far forward as possible so that the bucket could scoop up rock at the "very edge of the highwall." (Tr. 12). Heetland stated that as he removed the loose material with the bucket, rock rolled "back from out underneath [the] tracks [of the track hoe]." *Id.* As he worked, the front ends of the tracks would stick out 18 to 24 inches "into mid air over this probably 45-degree slant with a 30-foot drop-off underneath that." (Tr. 13). Heetland was concerned that, if his track hoe started sliding as rock rolled out from under the tracks, the track hoe could easily keep sliding down the loose rock toward the edge of the highwall. As he worked, the front of the tracks were sometimes about 20 feet from that edge and he believed that there would be nothing to stop the track hoe from falling 30 feet to the pit floor if the track hoe started sliding. (Tr. 27, 38, 41-45). He could sometimes feel the track hoe drop a few inches as the material under him settled. (Tr. 46-48).

The highwall rose 30 feet above the pit floor. Because the track hoe was on top of the overburden that was to be removed, Heetland stated that he was operating another 10 to 12 feet above that. Heetland estimated that, as he worked, the overburden that was adjacent to the edge of the highwall would become sloped at an angle of about 45 degrees. (Tr. 28). He believed that if the track hoe started sliding, the loose rock would act like "ice" and the track hoe would "shoot" right over it. (Tr. 29).

Heetland continued to work in spite of his concerns. (Tr. 14). When Mike Smasal returned later that day, Heetland told him that he did not like working so close to the edge of the highwall because it is unsafe. (Tr. 14). Smasal told Heetland that "we have just got to work through it." (Tr. 15). Heetland testified that the haul trucks that he was loading also had to come close to the edge of the highwall. Near the end of the shift, Heetland talked to Mr. Smasal again about the unsafe working conditions. Heetland complained that there were too many big pieces of equipment operating in a confined area close to the edge of the highwall. At that time, Heetland was working near the outer wall of the mine where another highwall rose above the area were the miners were working. (Tr. 15). Heetland testified that Mike Smasal replied "just get over it . . . that's what we pay you to do." (Tr. 16). As Heetland was leaving the mine at the end of his shift, Mr. Smasal asked him if he had banged up the cage on the skid loader. Heetland replied that he had not operated the skid loader for several months.

When Heetland returned to work on July 28, he was assigned to operate the track hoe at the same location. Some words were exchanged between Heetland and Smasal. Apparently, Smasal told Heetland that he would be "swinging out over the edge again." (Tr. 17). Heetland replied that Smasal should operate the track hoe if he thinks "it's so safe and so easy." (Tr. 18). Heetland operated the track hoe until about 11:00 a.m. that day. At that time the haul truck drivers had to back down the road toward him. He was concerned that if a truck's brakes or transmission failed, it would run right into him and he would be "over the edge." (Tr. 19). Heetland testified that he gathered the truck drivers and told them "we have got to figure out a safe way to do this." *Id.* When Mike Smasal came down, he wanted to know why the men were not working. Heetland testified that he told Smasal that they were trying to figure out how to work safely because the overburden was not being removed in a safe manner. *Id.* When Smasal replied that "we have got to do this in a safe manner," Heetland started laughing because he had been after Smasal about this for a day and a half. Smasal then told Heetland that "if you are going to have that kind of attitude, you just go home." (Tr. 20). When Heetland asked if he could operate other equipment, Smasal told him to go home.

When Heetland arrived at his house, he left a message that he wanted to talk to Rick Miller, a superintendent with Smasal Aggregates. In the early afternoon, Miller arrived at Heetland's house. Heetland testified that Miller told him that he would be better off if he worked somewhere else and he tried to talk him into quitting. (Tr. 22). When Heetland refused to quit, Miller told him that the company did not have a position for him anymore. When Heetland asked him why, he was told that he did not get along with management and he was too abusive to equipment. *Id.*

Heetland called MSHA on July 28 about the conditions described above. He filed his complaint of discrimination with MSHA in August 15, 2005. He did not ask for temporary reinstatement at that time because he did not want to work under the same conditions. (Tr. 26). When he heard that the crew was no longer working near the edge of the highwall, he asked MSHA to seek temporary reinstatement.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(2) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] 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. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("*Legis. Hist.*").

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission established a procedure for making this determination at 29 C.F.R. § 2700.45. Subsection (d) provides that the "scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought."

"The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). Courts and the Commission have equated the "not frivolously brought" standard contained in section105(c)(2) of the Mine Act with the "reasonable cause to believe standard" at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with "not insubstantial." *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it "appears to have merit." (*Legis. Hist.* at 624-25).

The Commission has frequently acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Applicant relies on the proximity in time between safety complaints and his termination, Smasal Aggregates' knowledge of his safety complaints, and the words that were spoken between Heetland and mine management. (Tr. 59-60). The Secretary contends that she established that the discrimination complaint was not frivolously brought.

Smasal Aggregates contends that the Applicant's discrimination complaint is frivolous on the basic physical facts presented during the hearing. (Tr. 60). Heetland testified that he was often working near the outside perimeter wall as he was excavating "which means that the ability for his excavator to slide forward and into a lower level was virtually nil." *Id.* Smasal Aggregates also maintains that Heetland's complaint concerning the safety of the truck roadway

lacked merit because he does not have any direct knowledge of those conditions. His complaint also assumes that one of the haul trucks will suffer a mechanical failure and he presented no evidence that the trucks had any mechanical problems. Smasal Aggregates asks that this temporary reinstatement case be dismissed.

I find that the applicant established that the underlying discrimination complaint was not frivolously brought. Heetland's safety concerns about the position of his track hoe relative to the edge of the highwall were "not insubstantial" and they "appear to have merit." I find that the Secretary established that Heetland had an honest, good faith belief that his operation of the track hoe near the edge of the highwall on July 27 and 28 put him in serious danger. Whether there was no possibility of sliding when he was working immediately adjacent to the outside perimeter wall remains to be seen. Moreover, Heetland also had to work near the edge of the highwall when he was not adjacent to the outside perimeter wall. After Heetland continued to complain to management about his safety concerns, he was sent home and was told that the company no longer had a position for him. I base my decision in this case entirely on Heetland's evidence concerning the working conditions for the track hoe and I have not considered his testimony concerning safety hazards on the roadway used by the haul truck drivers.

III. ORDER

For the reasons set forth above, Smasal Aggregates & Asphalt, LLC, is hereby **ORDERED** to immediately reinstate Jay Heetland to the position he held prior to his termination from employment on July 28, 2005, at the same rate of pay and benefits for that position, or to a similar position with the same or equivalent duties, at the same rate of pay and benefits. The Secretary **SHALL COMPLETE** as quickly as possible her investigation of the underlying discrimination complaint.

Richard W. Manning
Administrative Law Judge

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