DECEMBER 1998

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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There were no cases filed in which Review was Granted or Denied for December.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 10, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 96-254
	:	KENT 96-320
	:	KENT 96-321
HARLAN CUMBERLAND COAL COMPANY	:	KENT 96-322
	:	KENT 96-333

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

DECISION

BY THE COMMISSION:

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). At issue are: whether Harlan Cumberland Coal Company ("Harlan") committed a significant and substantial ("S&S") violation of 30 C.F.R. § 75.202(a) by failing to remove drawrock from roof support straps along the main intake roadway; whether Harlan committed an S&S violation of 30 C.F.R. § 75.220 by impermissibly deviating from the pillaring provisions of its roof control plan; whether Harlan committed an S&S violation of 30 C.F.R. § 75.1106-3(a)(2) by improperly storing compressed gas cylinders; whether Harlan committed S&S violations of 30 C.F.R. § 75.604(b) by failing to insulate and seal two permanently spliced trailing cables to exclude moisture; whether Harlan committed an S&S violation of 30 C.F.R. § 75.517 by failing to adequately insulate and fully protect a power cable; and whether Harlan violated 30 C.F.R. § 75.400 by allowing float coal dust to accumulate on energized power conductors. Administrative Law Judge David Barbour concluded that Harlan committed S&S violations of sections 75.202(a), 75.220, 75.1106-3(a)(2), 75.517, 75.400, and two S&S violations of section 75.604(b). 19 FMSHRC 911 (May 1997) (ALJ).[1] The Commission granted Harlan's petition for discretionary review ("PDR")

[1] Judge Barbour approved settlements of numerous other alleged violations in the consolidated dockets. 19 FMSHRC at 950-55.

challenging these determinations. For the reasons that follow, we affirm in part, reverse in part, and remand for reassessment of civil penalties.

I.

Citation No. 4243656

A. Facts and Procedural Background

Harlan operates the C-2 Mine, an underground coal mine in Harlan County, Kentucky. *Id.* at 912. The roof above the main intake roadway is supported by bolts. *Id.* at 913. At various locations, steel straps are bolted to the roof perpendicular to the roadway to supplement the roof bolts. *Id.*; Tr. 34-35. The straps are approximately 13 to 14 feet long and 8 inches wide. 19 FMSHRC at 913. The straps are centered approximately four feet apart. *Id.*; Tr. 35. During an inspection on March 11, 1996, Inspector Larry Bush from the Department of Labor's Mine Safety and Health Administration ("MSHA") observed that the roof along the main intake roadway contained several areas of loose hanging drawrock.[2] 19 FMSHRC at 913; Tr. 29. Some of this rock was loose and wedged between other rocks, and some lay suspended on or between the straps. Tr. 29. The drawrock measured between one inch and one foot thick. 19 FMSHRC at 913. Bush issued a citation alleging an S&S violation of 30 C.F.R. § 75.202(a).[3] Gov't Ex. P-5.

After a hearing, the judge concluded that the Secretary had proven a violation of section 75.202(a) by demonstrating that drawrock at various points along the intake roadway was hanging and ready to fall. 19 FMSHRC at 914. The judge designated the violation S&S due to the likelihood of an eventual rock fall and the serious danger posed by the loose hanging rocks. *Id.* at 914-15. In reaching these determinations, the judge relied on Inspector Bush's testimony, which was based on Bush's first-hand observation of the roof conditions. *Id.* at 914.

B. Disposition

1. Violation

Harlan contends that the drawrock was supported within the meaning of the standard. PDR at 3. The Secretary responds that substantial evidence supports the judge's finding of a

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[2] Bush described drawrock as "rock that's just above the coal seam between the coal seam . . . and . . . the immediate roof . . . [and that] tends to separate from the main roof." Tr. 21.

[3] 30 C.F.R. § 75.202(a) provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

violation. S. Br. at 14-16. The Secretary argues that the judge properly credited and relied upon Inspector Bush's testimony in reaching his finding. *Id.*

The Secretary's roof control standard is broadly worded. *See* 30 C.F.R. § 75.202(a). Accordingly, we have held that "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 mining industry and protective purpose 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 *Helen Mining Co.*, 10 FMSHRC 1672, 1675 (Dec. 1988)).

The parties do not dispute that drawrock was present on and above the straps. Tr. 21, 37. They disagree, however, on the dangers posed by loose hanging drawrock. Harlan's safety director, Eddie Sargent, testified that Harlan employees are instructed to remove drawrock that appears dangerous. Tr. 33, 36. Based on information given to him by Harlan's superintendent, Sargent believed the position of the drawrock leading to the citation did not warrant immediate correction. Tr. 37-38. Sargent testified that prematurely removing drawrock increases, rather than decreases, the danger of rock falls. Tr. 38. Conversely, Inspector Bush, who had five years of experience inspecting the C-2 mine (Tr. 20), testified that simply because drawrock is lying on a strap does not mean that it will remain there. Tr. 30. He stated that the drawrock he observed was "loose" and could fall "within a short period of time." Tr. 23.

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

The judge credited Inspector Bush's testimony that the drawrock was hanging and ready to fall. 19 FMSHRC at 914. We see no basis for overturning the judge's crediting of the first-hand observations of Bush over the testimony of Harlan's safety director, who did not personally view the roof conditions. We also conclude that the judge correctly determined that a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have removed the drawrock upon observing that large, loose slabs, which appeared ready to fall, were hanging from the roof and lying on straps above the intake roadway. Accordingly,

we find that substantial evidence[4] supports the judge's determination that Harlan violated section 75.202(a), and affirm his finding of violation.

2. Significant and Substantial

Harlan challenges the judge's S&S finding, asserting that the evidence fails to establish "a reasonable likelihood that the hazard contributed to will result in an injury." PDR at 4 (quoting *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)). The Secretary responds that substantial evidence supports the judge's designation of the violation as S&S. S. Br. at 16.

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

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

Mathies, 6 FMSHRC at 3-4 (footnote omitted); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

At issue is the third *Mathies* element. We have noted that an inspector's judgment is an important element in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *National Gypsum*, 3 FMSHRC at 825-26); *see also Buck Creek Coal*, 52 F.3d at 135-36 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). Here, the judge credited

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

Inspector Bush's testimony that the hanging drawrock, which he found to be loose and ready to fall, posed a reasonable likelihood of serious injury to miners traveling the roadway below and, therefore, the violation was S&S. 19 FMSHRC at 914-15. Bush testified that once the rock is broken loose, that does not mean that it will remain directly above the strap. Tr. 30. Harlan also acknowledged that drawrock had previously fallen and injured a miner's foot, an injury that kept the miner out of work for a week. Tr. 39. Most importantly, Bush testified that a roof fall could happen at any time — in fact, he believed a fall was virtually imminent. Tr. 23.

In sum, we find that substantial evidence supports the judge's determination that Harlan's violation of the standard was S&S. Accordingly, we affirm his S&S determination.[5]

II.

Citation No. 4243921

A. Facts and Procedural Background

On March 11, 1996, Harlan was in the process of retreat mining on the 005 section of the C-2 Mine.[6] 19 FMSHRC at 920. The approved mining sequence for pillar extraction is set forth in the mine's roof control plan. Gov't Ex. P-10. Under the prescribed sequence, a cut is made in the middle of the pillar (the "key cut") and the roof is then supported by roof bolts. 19 FMSHRC at 920. The second cut is made from the opposite side of the pillar, splitting the pillar in two. *Id.* The two portions of the pillar are called "wings." *Id.* Each wing is then extracted in the sequence described in the roof control plan. *Id.*; Gov't Ex. P-10. The plan also specifies other permissible mining sequences, including a two-pillar sequence and an alternative mining sequence. Gov't Ex. P-10 at 134, 136. In addition, the plan permits deviation from the required

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[5] Commissioner Marks agrees that this violation and those contained in citations 4250669, 4250624, and 4250670 are S&S. However, for the reasons set forth in his concurring opinions in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he continues to urge that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent. On February 5, 1998, MSHA issued a lengthy Interpretative Bulletin, setting forth a new agency interpretation of S&S and announcing that MSHA would challenge the Commission's narrow interpretation of S&S. 63 Fed. Reg. 6012 (1998). However, on April 23, 1998, MSHA suspended that Interpretive Bulletin with little explanation. *Id.* at 20,217. Commissioner Marks is curious as to MSHA's change in position on the S&S question and requests that the Secretary promptly advise him on this important issue.

[6] Retreat mining is the extraction of the pillars remaining after advance mining. 19 FMSHRC at 920.

mining sequence when adverse conditions are encountered, provided that equivalent pillar support is maintained under the alternate method. *Id.* at 116.

During his March 11 inspection, Inspector Bush came upon a row of six pillars, — numbered from left to right as 1, 3, 6, 7, 2, and 4 — four of which had already been mined. He observed that pillars 1 and 3 had been mined from right to left and that pillars 2 and 4 had been mined from left to right. 19 FMSHRC at 921. He further observed that pillars 6 and 7 were being cut straight ahead at the time of inspection. *Id.* Bush interpreted the roof control plan as mandating that the entire row of pillars be key cut in the same direction, and he concluded that Harlan's failure to do so constituted an S&S violation of the plan and 30 C.F.R. § 75.220. Gov't Ex. P-12.

The judge concluded that Harlan violated the plan by mining the key cuts in different directions. 19 FMSHRC at 923. The judge vacated the S&S designation, finding that the Secretary failed to establish that there was a reasonable likelihood that the hazard contributed to would result in an injury. *Id.* at 923-24.

B. Disposition

Harlan contends that the judge erred in finding that the Secretary proved a violation, arguing that adverse conditions made mining the entire row of pillars in the same direction impractical, thereby permitting deviation from the mining sequence described in the roof control plan. PDR at 5-10. Harlan further alleges that "nothing in the plan requires a return to the original direction of [key] cuts after adverse circumstance [sic] prompt a deviation." *Id.* at 9. The Secretary responds that substantial evidence supports the judge's finding that Harlan violated section 75.220 by deviating from the pillar cutting sequence described in the mine's roof control plan. S. Br. at 18-21. The Secretary argues that "although the existence of a swag and low roof may have made it impractical to cut pillars 2 and 4 from right to left, Harlan identified no reason why it would have been impractical to cut pillar 7 from right to left." *Id.* at 18.

To prove a violation of a mine plan, the Secretary must first establish that the provision allegedly violated is part of the approved and adopted plan. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). She must then prove that the cited condition or practice violated the provision. *Id.* When a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties[7] by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement. *Id.*

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[7] *Cf.* 9 FMSHRC at 907 ("The ultimate goal of the [mine plan] approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord.").

Here, the issue is whether, as the Secretary alleges, Harlan's plan required the operator to return to the original mining direction to remove pillars six and seven after adverse conditions required a deviation in direction to remove pillars two and four. We conclude it did not. The plan contains no such explicit requirement.[8] Additionally, the Secretary's evidence fails to demonstrate a "meaning intended by the parties." *See id.* The Secretary did not present any evidence of prior consistent enforcement of the mining direction requirements of the plan that would have demonstrated that Harlan was on notice regarding the Secretary's interpretation of the plan. *Cf. id.* at 908. Moreover, considering the location of pillars six and seven, we conclude that the Secretary's argument in this case is actually at odds with the broad purpose of the plan to protect miners from dangerous roof conditions.

Harlan asserts that "it was *SAFER* to attack [pillars 6 and 7] head on. . . . [I]t would have been crazy to . . . drag men and equipment around into an area that was (1) already pillared, with the attendant roof weakening that results, and (2) already suffering from bad mining . . . ." PDR at 9 (emphasis in original). We agree. A review of the mining sequence clearly establishes that attempting to mine pillar seven from right to left, as the Secretary suggests, would have required miners to enter an area where the mine roof had already been substantially compromised due to the extraction of pillars two and four. This mining approach would have subjected miners to an extremely dangerous and unpredictable area of mine roof. In retreat mining, standing pillars serve as roof support, and the extraction of the pillars weakens the roof above the area where the pillar stood. Moreover, once a pillar is removed, the mine roof is also weakened in the areas immediately surrounding a removed pillar — such as entries and intersections — rendering these areas impassable because of the danger of an imminent roof collapse without warning.[9]

In the instant case, MSHA's trial exhibit P-11 clearly illustrates that at the time Inspector Bush entered the area in question, the mine roof was compromised in the areas where pillars two

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[8] The relevant plan provision states:

> The standard cut sequence as indicated may be deviated from where adverse conditions make it impractical to attack a pillar in the locations indicated. Such deviation is permitted only where equivalent pillar support is maintained in the alternate method.
>
> . . . .
>
> More than one pillar may be worked in cycle, provided that the same sequence of recovery and support is followed.

Gov't Ex. P-10 at 116, 135.

[9] Here, the roof control plan provides: "While using remote controls, the continuous mining machine operator and other persons will position themselves[] [u]nder permanently supported roof." Gov't Ex. P-10 at 118.

and four formerly stood, but more importantly was also compromised in the surrounding entries and intersections up to the right corner of pillar seven, thereby eliminating the possibility that pillar seven could be mined from right to left. *See* Gov't Ex. P-11. The procedure suggested by the inspector who filed the citation, considering that he was a roof control specialist, astonishes us. In fact, attempting to mine pillar seven from right to left, which was the logical outgrowth of Inspector Bush's interpretation of the plan, would have required miners to enter an unpredictable and highly unstable area to commence mining, and would have been extremely dangerous. The judge was, therefore, incorrect in finding that "there [was] no reason apparent why pillar No. 7 could not have been cut from right to left." 19 FMSHRC at 923. Mining pillar seven straight ahead was the *only* option available to extract the pillar in a safe manner, and in a manner that was also consistent with the company's roof control plan.[10]

Accordingly, we reverse the judge's determination that Harlan's mining of pillar seven straight ahead violated the roof control plan. We also vacate the civil penalty assessed by the judge.

III.

Citation No. 4243726

A. Facts and Procedural Background

During an inspection of the 004 section of the C-2 Mine on February 27, 1996, MSHA inspector Robert Clay observed an oxygen tank and an acetylene tank leaning against the rib of a coal pillar in an active roadway. 19 FMSHRC at 924. Clay determined that the roadway was used by "very large [mobile] equipment" and that this equipment passed within one foot of the tanks. *Id.* at 925. Clay did not examine the tanks to determine whether they contained any oxygen or acetylene. *Id.* at 924. Based on his determination that the tanks were not secured in an upright position, Clay issued a citation alleging an S&S violation of 30 C.F.R. § 75.1106-3(a)(2).[11] Gov't Ex. P-3.

Judge Barbour concluded that Harlan violated section 75.1106-3(a)(2) by failing to secure the gas tanks against accidentally tipping over. 19 FMSHRC at 925. He noted that the possible absence of gas from the tanks was immaterial, since the standard draws no distinction between full and empty tanks. *Id.* The judge also affirmed Inspector Clay's S&S designation, relying on

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[10] *See* Gov't Ex. P-10 at 132.

[11] 30 C.F.R. § 75.1106-3(a) provides in pertinent part: "Liquefied and nonliquefied compressed gas cylinders stored in an underground coal mine shall be . . . [p]laced securely . . . in an upright position . . . or otherwise secured against being accidentally tipped over."

Clay's testimony regarding the extreme hazard posed by acetylene and oxygen gas and the proximity of the gas tanks to the path of mobile equipment. *Id.* at 925-26. However, the judge specifically found that the inspector "did not know if any oxygen or acetylene remained in the tanks." *Id.* at 924 (citing Tr. 104).

B. Disposition

Harlan argues that the judge erred in finding the violation of section 75.1106-3(a)(2) to be S&S, contending that since the Secretary produced no proof that the tanks contained anything, "there is no evidence in the record to support a finding of a 'reasonable likelihood' that the condition cited would result in injury." PDR at 13.[12] The Secretary responds that the judge properly credited Inspector Clay's testimony regarding the dangers of oxygen and acetylene ignitions, and that substantial evidence supports the judge's designation of the violation as S&S. S. Br. at 22-23. The Secretary asserts that it is "reasonably likely" that gas was in the cylinders because the tanks "were in a working area where gas might well be used." *Id.* at 23. The Secretary also notes that Harlan never gave any indication that the tanks did not contain gas and that section 75.1106-3(a) draws no distinction between cylinders containing gas and empty cylinders. *Id.*

When evaluating the reasonable likelihood of a fire, ignition, or explosion, we have examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). We also have indicated that proof of a fuel source is necessary to establish the reasonable likelihood that the hazard contributed to will result in injury. *Id.* at 503.

At issue here is the third *Mathies* element. The judge made no explicit finding concerning whether the tanks contained fuel. His view that the presence of fuel was "immaterial" to the violation question further indicates that he felt no finding was required. *See* 19 FMSHRC at 925. Under *Texasgulf*, however, such a finding is a prerequisite to an S&S determination. *Texasgulf*, 10 FMSHRC at 501. By arguing that the location of the tanks in a work area makes it "reasonably likely" that the tanks contained fuel, the Secretary is in essence asking the Commission to make an inference at the appellate level. We decline this invitation. It is for the judge in the first instance, not the Commission on review, to make inferences and findings based on record evidence. *See Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1139 (May 1984) ("It is . . . the judge's duty to draw conclusions from the record . . . ."); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989). We conclude that the judge's failure to apply *Texasgulf*, and his consequent failure to make the necessary factual finding as to the presence of fuel in the tanks required by that precedent, constitute error.

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[12] Harlan does not challenge the judge's finding of violation.

We further conclude that remand is unnecessary because this record cannot support a finding that the Secretary met her burden of proving that the tanks contained fuel.[13] The Secretary does not quarrel with the judge's finding that Inspector Clay "did not know whether the cylinders contained oxygene [sic] and acetylene." 19 FMSHRC at 925. Furthermore, the Secretary presented no direct evidence that the tanks contained fuel. In addition, we find unpersuasive the Secretary's contention, advanced for the first time on review, that the tanks' location in a work area makes the presence of fuel "reasonably likely." The fact to be inferred must be "inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek*, 11 FMSHRC at 2153. The alleged presence of fuel in the tanks is not rationally connected to the presence of the tanks in a work area. Without any evidence about when the tanks arrived in the work area, when if ever they were last used, their weight, or company practice in dealing with such tanks, their presence in the work area says nothing about whether they contained fuel. Further, "recognition of an inference is largely influenced by the difficulty of obtaining the direct evidence necessary to establish the fact to be inferred." *Id.* (citing *Mid-Continent*, 6 FMSHRC at 1138). Here, the Secretary has made no showing that proof of the presence of fuel was "unavailable to the Secretary or was unreasonably difficult to obtain." *See id.* Indeed, the presence of fuel in the tanks would appear to be readily provable.

In sum, because the record supports only the conclusion that the Secretary failed to carry her burden of proof as to the critical element of a fuel source, substantial evidence does not support the judge's S&S designation. Accordingly, we reverse the judge's determination that this violation was S&S, and remand for reassessment of the penalty.

IV.

Citation Nos. 4250669 and 4250624

A. Facts and Procedural Background

On May 8, 1996, during an inspection of the 004 section, Inspector Clay noticed a defective permanent splice on the trailing cable to the section's roof bolting machine. 19 FMSHRC at 930. Clay testified that he could see into the splice of the cable, which carried 480 volts of electricity. *Id.* at 930-31; Tr. 107.

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[13] We have held that the Secretary bears the burden of proving the significant and substantial nature of a violation. *Union Oil Co. of Cal.*, 11 FMSHRC 289, 298 (Mar. 1989); *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Secretary's contention that Harlan gave no indication that the tanks did not contain gas erroneously places the burden of establishing that a violation is S&S on the operator.

On May 14, 1996, during an inspection of the 005 section, Clay noticed an improperly insulated permanent splice on the trailing cable from the section's continuous miner. 19 FMSHRC at 934; Tr. 113. Clay testified that he could see into the cable, which carried 995 volts of electricity. 19 FMSHRC at 934-35; Tr. 114.

Clay determined that neither splice was insulated as to exclude moisture, as required by 30 C.F.R. § 75.604(b).[14] 19 FMSHRC at 930, 934. He issued two citations alleging violations of section 75.604(b). Gov't Ex. P-26; Gov't Ex. P-36. He designated both violations S&S, noting that the cables are handled frequently by miners. Gov't Ex. P-26; Gov't Ex. P-36; Tr. 115.

The judge affirmed both citations, stating that "[a]n open splice is not effectively insulated and sealed to exclude moisture." 19 FMSHRC at 935. The judge relied on Clay's unrefuted testimony that the 004 MMU trailing cable splice was open and damp, and his testimony that the 005 MMU trailing cable splice was open. *Id.* at 931, 935. The judge also affirmed both S&S designations, emphasizing the potentially fatal hazard created by inadequately insulated high-voltage cables, parts of which lay in water, and which miners handled frequently. *Id.*

B. Disposition

Harlan contends that the judge erred in designating the violations S&S.[15] PDR at 13-16. The operator argues, with respect to both violations, that there were no exposed copper leads and that the Secretary failed to prove "that anyone was or would be exposed to electrical current by handling the cable." *Id.* at 15, 16. Harlan also alleges that Clay's testimony that there is "[no] way of knowing" whether an accident would occur manifests a lack of evidence "that an injury of *any* consequence was 'reasonably likely.'" *Id.* at 15 (emphasis in original). Regarding the 005 MMU citation, Harlan also asserts that the judge's finding that a miner "could receive a serious electrical burn" does not satisfy the "reasonable likelihood" standard in *Mathies*. *Id.* at 14-15.

The Secretary responds, with respect to both violations, that substantial evidence supports the judge's S&S designations. S. Br. at 23. She argues that the judge properly credited Clay's testimony on the factors contributing to a reasonable likelihood of injury. *Id.* at 24. The Secretary also contends that Harlan's assertion that there were no copper leads exposed does not preclude an S&S finding, because unseen holes may be present in the insulation around the conductors. *Id.* at 25.

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[14] 30 C.F.R. § 75.604 provides in pertinent part: "When permanent splices in trailing cables are made, they shall be . . . [e]ffectively insulated and sealed so as to exclude moisture . . . ."

[15] Harlan does not challenge the judge's findings of violations.

We are unpersuaded by Harlan's chief argument that a reasonable likelihood of injury under the third *Mathies* element cannot be established if the Secretary has not shown that there were exposed copper leads by which a miner could be electrocuted. PDR at 15-16. In *U.S. Steel Mining Co.*, 6 FMSHRC 1573 (July 1984), we held that four inches of exposed wire constituted an S&S violation, despite lack of direct evidence that the exposed wires were not insulated. With regard to the 004 MMU citation, Inspector Clay testified that he could see into the splice, but could not see copper wire. Tr. 108. Similarly, with regard to the 005 MMU citation, he testified that he could see into the open splice, but could not see bare conductors. Tr. 118. However, Clay emphasized the danger of these situations, stating that "there's no way of knowing [whether there are holes in the insulation surrounding the wire within the cable]." Tr. 108; *cf. U.S. Steel*, 6 FMSHRC at 1574-75 (recognizing that a tear in the outer jacket of a cable significantly compromises the cable's protective function). Inspector Clay also testified that, even if no copper wires are exposed, there is a danger of electrocution, because "[m]uch like an extension cord with a naked place, you may not be able to see the naked place, but you grab a hold of it and you'll know it." Tr. 109.

Other record evidence supports the judge's determination that those violations were reasonably likely to result in serious injury. Parts of both cables were lying in water, and one of the splices was open and damp. 19 FMSHRC at 931, 935; Tr. 108-09, 115. The Commission in *U.S. Steel* regarded the potential effect of water on the electrical hazard posed by a violation "as an example of how conditions could develop in the mining environment which could cause an improperly protected cable to become more dangerous." *U.S. Steel*, 6 FMSHRC at 1574. As Clay testified, water is an efficient conductor of electricity. Tr. 107, 115. Moreover, during the course of their work, miners frequently moved both cables with their hands rather than with ropes or "hot sticks." 19 FMSHRC at 931, 935; Tr. 108-110, 112, 115-117.

In sum, the record as a whole supports the judge's conclusion that, under continued normal mining operations, both violations of section 75.604(b) were reasonably likely to contribute to a serious electrical injury or fatality. Accordingly, we affirm the judge's determinations that Harlan's section 75.604(b) violations were S&S.

V.

Citation No. 4250670

A. Facts and Procedural Background

On May 8, 1996, during an inspection of the 004 section, Inspector Clay noticed a readily visible rupture in the outer jacket of the trailing cable of the sections's roof bolting machine. 19 FMSHRC at 932; Tr. 141. Clay concluded that, since the insulated power conductors inside the jacket were exposed, the trailing cable was not insulated and protected as required by 30 C.F.R.

§ 75.517.[16] 19 FMSHRC at 932; Tr. 141. Clay issued a citation alleging a violation of section 75.517, and designated the violation S&S, noting that the cable is handled frequently by miners. Gov't Ex. P-27.

The judge affirmed the citation, stating that "[a] cable with an opening in its outer jacket through which its interior insulated conductors are exposed is not a fully protected cable." 19 FMSHRC at 933. He further found that "when the jacket is ruptured, the cable is not insulated as designed." *Id.* The judge affirmed the S&S designation, crediting Clay's inference that any force sufficient to rupture the outer cable necessarily damaged the internal conductors. *Id.* at 933-34.

B. Disposition

Harlan argues that the judge erred in designating the violation S&S.[17] PDR at 17. Harlan asserts that the judge erred in overruling its objection to Clay's speculative testimony that, based on his visual observation of the cable's ruptured outer jacket, the interior conductors were damaged as well. *Id.* 19-20. According to Harlan, the judge compounded the error by relying on this testimony to reach his S&S determination. *Id.* at 20. The Secretary responds that substantial evidence supports the judge's determination that Harlan's violation of section 75.517 was S&S. S. Br. at 26. She argues that the judge correctly credited Clay's testimony that any force sufficient to rupture the cable's outer jacket would necessarily have damaged the conductors inside. *Id.* at 26-27.

The issue on review is again the third *Mathies* element: whether there exists "a reasonable likelihood that the hazard contributed to will result in an injury." *See Mathies*, 6 FMSHRC at 3-4. Harlan's argument that reasonable likelihood of injury cannot be established if the record lacks direct evidence of damaged interior conductors or proof of the existence of exposed, uninsulated wire is inconsistent with Commission precedent. In *U.S. Steel*, the parties agreed that the outer jacket of a cable had ruptured, but the Secretary presented no direct evidence that the inner insulation was compromised. *U.S. Steel*, 6 FMSHRC at 1573-74. There, we held that the gash in the outer jacket of the trailing cable constituted an S&S violation of section 75.517, in part because in the "harsh environment of a coal mine," a tear in the outer jacket weakens the protection afforded by the inner insulation, "contribut[ing] significantly and substantially[] to the cause and effect of a safety hazard." *Id.* at 1574-75. Similarly, in this case the outer jacket of a trailing cable was torn, but there is no direct evidence that the inner insulation was damaged. *Cf. id.*; *see also U.S. Steel Mining, Inc.*, 7 FMSHRC 327, 329 (Mar. 1985) (affirming S&S designation and noting that "[t]he fact that the insulation was not cut at the

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[16] 30 C.F.R. § 75.517 provides in pertinent part: "Power wires and cables . . . shall be insulated adequately and fully protected."

[17] The operator does not contest the judge's finding of violation.

time the violation was cited does not negate the possibility that the violation could result in [electrocution]"). The circumstances in the instant case are similar to those in *U.S. Steel*, 6 FMSHRC 1573, which we find persuasive in this matter. Moreover, we have already held that the Secretary need not show the presence of exposed copper leads to establish the reasonable likelihood of injury from a violation of section 75.604, which contains an insulation requirement for permanent splices similar to the insulation requirement in section 75.517. Slip op. at 12.

There is no dispute that the rupture in the outer jacket of the trailing cable compromised a layer of insulation between miners and a potentially fatal 480 volt current. *See* Tr. 141. In addition, the judge credited Inspector Clay's testimony that invisible damage can exist in the internal insulation surrounding the conductors, and that even a pinhole-sized breach can conduct enough current to electrocute a miner. 19 FMSHRC at 933; Tr. 142, 145. We see no reason to disturb the judge's decision to credit this testimony.[18] *See Dust Cases*, 17 FMSHRC at 1878 (upholding judge's credibility determination), *citing Ona Corp.*, 729 F.2d at 719. Clay's testimony supports the judge's conclusion that the rupture in the outer cable increased the likelihood of serious electrical injury. The judge's conclusion is bolstered by the presence of water and the high frequency with which the cable is manually handled during normal mining operations.[19] *See* 19 FMSHRC at 933; Tr. 143. Therefore, we find that substantial evidence supports the judge's S&S designation, and we affirm it.

VI.

Citation No. 4250672

A. Facts and Procedural Background

On May 8, 1996, during an inspection of the 004 section of the mine, Inspector Clay observed what he believed to be an accumulation of combustible material on a piece of electrical equipment. Gov't Ex. P-30. Clay made this observation by visual inspection through a plexiglass window, and determined that the material was "float coal dust." *Id.*; Tr. 155. Clay

[18] We do not rely upon the judge's inference that any force sufficient to rupture the outer jacket of the cable would necessarily have damaged the internal conductors.

[19] Inspector Clay testified that during continued normal mining operations, miners likely would manually move the subject trailing cable so that mobile equipment could pass. 19 FMSHRC at 933 (citing Tr. 148). He also testified that "[p]eople handle this cable . . . constantly during the course of a shift." Tr. 144. Finally, Clay testified that the cable is "constantly drug [sic] through these areas where water accumulates." Tr. 143.

issued a citation alleging a violation of 30 C.F.R. § 75.400[20] due to the accumulation of "combustible material in the form of float coal dust . . . in and on the energized power conductors of the . . . power center . . . ." Gov't Ex. P-30. Clay designated this alleged violation S&S due to the ignitability of float coal dust, the presence of ignition sources in the power center, and the serious injuries which could result from an explosion. 19 FMSHRC at 936; Tr. 156-57.

The judge affirmed the citation, citing Clay's testimony that float coal dust was present on the power center in violation of section 75.400. 19 FMSHRC at 937. He also affirmed Clay's S&S designation, crediting Clay's testimony as to the combustibility of float coal dust, the frequency of electrical arcing in the power center, and the serious injuries which could result from an ensuing explosion. *Id.*

B. Disposition

Harlan contends that the judge erred in finding a violation of section 75.400 because the inspector's visual diagnosis through a plexiglass window is not proof of the existence of float coal dust, and because the inspector failed to determine whether the cited accumulated material would pass through a No. 200 sieve before issuing a citation alleging "float coal dust" accumulation. PDR at 22-23. The Secretary responds that substantial evidence supports the judge's finding that the accumulated material in the power center observed by Inspector Clay constituted a violation of section 75.400. S. Br. at 27. The Secretary explains that nothing in the regulations suggests that performing tests is a prerequisite to issuing a citation, and that the personal observations of an experienced inspector are sufficient to support a finding of violation for accumulation of float coal dust. *Id.* at 28. The Secretary contends that when a test is required prior to issuing a citation, the regulations so state. *Id.* at n.13.

Rather than alleging the violation of section 75.400 to include accumulations of coal dust, float coal dust or other combustible materials, the citation here specifically alleges the presence solely of "combustible material in the form of float coal dust." Gov't Ex. P-30. At trial, the testimony similarly focused on the presence of float coal dust. Tr. 153-61. Section 75.400-1(b) defines "float coal dust" as "the coal dust consisting of particles of coal that can pass a No. 200 sieve." 30 C.F.R. § 75.400-1(b).

We find that substantial evidence supports the judge's determination that Harlan violated the standard. The judge implicitly credited Inspector Clay's testimony that he observed float coal dust in the power center. Clay also testified that the dust had previously gone into suspension in order to get into the vents on the power center. Tr. 158. Reduced to its essence,

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[20] 30 C.F.R. § 75.400 provides: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electrical equipment therein."

Harlan's argument is that, as a matter of law, the judge could not rely on the inspector's testimony to support his finding of violation. However, we have never held that violations of section 75.400 require a test to determine the particular combustible material present, and section 75.400 does not by its terms require testing. Our precedent indicates that violations of the accumulation standard have been established by inspector observations. *See, e.g., Amax Coal Co.*, 19 FMSHRC 846, 847, 849 (May 1997); *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 483 (Mar. 1997); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 20 & n.2, 21 (Jan. 1997). Further, nothing advanced by Harlan here persuades us to take the extraordinary step of overruling our precedent by engrafting a testing requirement onto section 75.400.

The operator did not present any evidence to rebut the inspector's testimony that float coal dust was present, nor did Harlan establish that float coal dust could not be identified by observation. Insofar as Harlan's argument is construed as an attack on the judge's decision to credit the inspector's testimony, we see no extraordinary circumstances that would justify overturning this credibility finding. Thus, the inspector's unrebutted testimony based on his observation of the cited condition constitutes substantial evidence supporting the judge's conclusion that Harlan violated section 75.400. Accordingly, we affirm the judge's finding of violation.[21]

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[21] Harlan contends that Inspector Clay based his identification of the float coal dust solely on its black color. PDR at 22-23. However, we find that this testimony (Tr. 158) refers to the accumulation's coal composition rather than to its size.

VII.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Harlan violated the 30 C.F.R. § 75.202(a) alleged in Citation No. 4243656, and we affirm his designation of this violation as S&S. We also affirm the judge's determinations that the 30 C.F.R. § 75.604 violations alleged in Citation Nos. 4250669 and 4250624, as well as Harlan's violation of 30 C.F.R. § 75.517 alleged in Citation No. 4250670, were S&S. We affirm the judge's determination that Harlan committed the 30 C.F.R. § 75.400 violation alleged in Citation No. 4250672. We reverse the judge's conclusion that Harlan violated the pillaring plan provision of the parties' roof control plan alleged in Citation No. 4243921, and we vacate the related civil penalty. Finally, we reverse the judge's conclusion that Harlan's violation of 30 C.F.R. § 75.1106-3(a)(2) alleged in Citation No. 4243726 was S&S, and we remand to the judge for reassessment of the civil penalty for this violation.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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December 15, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KENNETH HANNAH, PHILIP PAYNE, and FLOYD MEZO	:	
v.	:	Docket No. LAKE 94-704-D
CONSOLIDATION COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), is before the Commission for a second time. In our previous decision, we reversed the determination of Administrative Law Judge Gary Melick that a work refusal engaged in by miners Kenneth Hannah, Phillip Payne, and Floyd Mezo was unreasonable and unprotected, and concluded that the miners' suspension by Consolidation Coal Company ("Consol") for their work refusal therefore violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). *Secretary of Labor on behalf of Hannah v. Consolidation Coal Co.*, 18 FMSHRC 2085 (Dec. 1996) ("*Hannah I*"). The Commission remanded the case for computation of a backpay award and assessment of an appropriate civil penalty. *Id.* at 2085, 2095. On remand, the judge directed the payment of agreed-upon backpay and interest amounts, and assessed three separate $10 penalties against Consol for its unlawful suspension of the three miners. 19 FMSHRC 525 (Mar. 1997) (ALJ). The Commission granted cross-petitions for discretionary review filed by Consol and the Secretary of Labor. For the reasons that follow, we vacate the judge's penalty assessment and remand for reassessment of a civil penalty and the entry of an order providing for other appropriate remedial measures, including the posting of a notice at the Rend Lake Mine and the expungement from the complainants' employment records of all references to the unlawful disciplinary action taken against them.

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

I.

Factual and Procedural Background

The background facts are fully set forth in *Hannah I*, 18 FMSHRC at 2086-89, and are summarized here. Consol suspended Hannah, Mezo, and Payne, with the intent to discharge them, as the result of an incident that occurred on April 10, 1994. The three miners refused orders to work underground because of their concerns that a preshift examination had not been properly conducted following a power outage the previous night, which had caused the ventilating fans to shut down. The three miners filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), and the Secretary filed a complaint on their behalf with the Commission, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).[2]

Following an evidentiary hearing, the judge dismissed the discrimination complaint brought by the Secretary on behalf of the three miners. 17 FMSHRC 666 (Apr. 1995) (ALJ). The judge concluded that the disciplinary action taken by Consol against the three miners did not violate the Mine Act because, in his view, at the time of their work refusal the miners no longer had a good faith, reasonable belief in a hazardous condition. *Id.* at 671-72. On review, the Commission concluded that substantial evidence did not support the judge's finding that Consol fulfilled its obligation to address the perceived danger communicated by the miners in a manner sufficient to quell their fears, and thereby render their subsequent work refusal unreasonable and unprotected. 18 FMSHRC at 2093-94. The Commission therefore reversed the judge's conclusion that the disciplinary measures taken by Consol did not violate the Mine Act, found that the miners were disciplined for engaging in a protected work refusal in violation of section 105(c), and remanded the case for computation of a backpay award and assessment of an appropriate civil penalty. *Id.* at 2094-95.

On remand, the judge initially scheduled a hearing for February 20, 1997, on the issues of civil penalty assessment and damages, including back pay, lost benefits, and interest. Notice of Hearing and Prehearing Order (Dec. 12, 1996). However, at the request of the parties, the judge subsequently canceled this hearing. Notice Confirming Hearing Cancellation (Jan. 24, 1997). On January 31, 1997, the Secretary filed a motion to amend the complaint to include a proposed civil penalty assessment of $3,000, and allegations concerning the size of Consol's Rend Lake Mine in Sasser, Illinois — the facility involved in this proceeding — and Consol's history of prior violations. S. Mot. to Amend Compl. On the same date, the Secretary also filed a proposed First Amended Complaint that included the proposed penalty assessment and allegations concerning these penalty criteria. In addition, the Secretary filed a separate memorandum in support of her proposal to expunge all references to the unlawful disciplinary action from the

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[2] An arbitrator subsequently reduced the discipline to suspension without pay. 18 FMSHRC at 2088.

complainants' employment records. Consol opposed the Secretary's motion to amend the complaint, and her request for an expungement order. The judge did not immediately rule on the Secretary's motion to amend.

On February 5, the judge issued a partial decision directing Consol to pay the three miners backpay and interest amounts that had been agreed to by the parties. 19 FMSHRC 435 (Feb. 1997) (ALJ). On February 11, the judge issued a notice scheduling an oral argument by teleconference to address the "only issue remaining for disposition" in the case, the assessment of a civil penalty. Notice of Oral Arg. On February 19, the Secretary filed a motion to reopen the record for an evidentiary hearing in connection with the penalty assessment. S. Mot. to Reopen the Record. Consol filed an opposition to the Secretary's motion to reopen on February 26. C. Statement in Opp'n to Mot. to Reopen the Record.

At the oral argument by teleconference conducted on February 27, the Secretary's counsel agreed that there was no evidence in the record concerning three of the penalty criteria set forth in section 110(i) of the Mine Act: the operator's history of previous violations, the appropriateness of the penalty to the size of its business, and the effect on Consol's ability to continue in business. Tr. II 5-6.[3] The Secretary's counsel also agreed that there was no evidence in the record to show that Consol did not act in good faith in attempting to achieve rapid compliance after receiving notification of the violation through issuance of the Secretary's complaint in September 1994. Tr. II 80-81. The Secretary's counsel did, however, offer to provide a certified record concerning Consol's violation history and the size of its mining operation. Tr. II 119. On March 4, the judge issued an order denying the Secretary's motion to reopen the record on the ground that it was untimely and, with the exception of data concerning Consol's size and history of violations, did not specify the precise nature and character of the additional evidence sought to be adduced. Order Denying Mot. to Reopen the Record.

On March 6, the judge issued his decision on remand in which he assessed three $10 penalties for Consol's unlawful suspension of the three miners. 19 FMSHRC at 529. In assessing three separate penalties, the judge reasoned that, because the Commission found that each of the three complainants was suspended in violation of the Mine Act, section 110(a), 30 U.S.C. § 820(a), required the assessment of a separate civil penalty for each of the three violations. 19 FMSHRC at 526 n.2. He concluded that the Secretary's position at oral argument, that only one violation occurred and only one civil penalty should be assessed, was "inconsistent with this statutory mandate." *Id.*

While noting that section 110(i) of the Mine Act lists six criteria to be considered in the assessment of penalties, the judge indicated that, at the February 27 teleconference, the Secretary acknowledged that there was no record evidence regarding four of the six criteria — history of

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[3] "Tr. II" references are to the transcript of the oral argument by teleconference conducted on February 27.

previous violations, appropriateness of the penalty to the size of the operator's business, effect on the operator's ability to continue in business, and the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of a violation. *Id.* at 526-27. Given this lack of evidence concerning four of the statutory penalty criteria, the judge concluded that the penalty to be assessed "must necessarily be based upon the only two criteria for which there is record evidence, i.e., whether the operator was negligent and the gravity of the violations." *Id.* at 527. In his decision, the judge also denied the Secretary's motion to amend the complaint on the grounds that it was "unnecessary" and "moot." *Id.* at 526.

The judge concluded that Consol was chargeable with little negligence for its unlawful suspension of the three miners, finding that it "acted in good faith in disciplining the [miners] for what it perceived in a good faith and reasonable belief to have been an unprotected work refusal." *Id.* at 527-28. The judge noted that "no clear legal precedent governed the precise facts and Consol's position in this regard was upheld by the decisions of the arbitrator and administrative law judge." *Id.* at 527. He also pointed out that Consol decided to discipline the three miners only after a state inspector confirmed that the condition upon which they based their work refusal was neither a violation of state law nor hazardous, and the complainants were so advised, and that several weeks earlier the same state inspector had informed Consol officials and some mine examiners that this same practice did not violate state law and was not hazardous. *Id.* at 527-28. The judge speculated that "Consol's shortcoming was its decision not to insist that the State inspector come to the mine site in person (even though he was available to communicate with the [miners] by telephone)." *Id.* at 528. Based upon the foregoing analysis, the judge concluded that Consol's decision to discipline the three miners was a "close judgment call" and there was no basis for inferring that it should have known that it would violate section 105(c) of the Mine Act by disciplining the miners. *Id.*

The judge also concluded that the Secretary "failed to sustain her burden of proving her allegations of high gravity." *Id.* at 529. He rejected the Secretary's assertion that the discriminatory conduct by Consol would likely have a chilling effect on the miners' future exercise of their rights to refuse work and report unsafe or unhealthful conditions, relying on the Commission's holding in *Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1320-21 (Aug. 1996), that determinations of a chilling effect on employees cannot be presumed but must be made on a case-by-case basis based upon both objective and subjective evidence. 19 FMSHRC at 529. The judge found that in this case, the Secretary had offered no objective or subjective evidence of such a chilling effect. *Id.*

Finally, the judge concluded that he lacked jurisdiction to grant the additional remedial measures requested by the Secretary — an order directing the posting of a notice at Consol's mine and the expungement of references in the complainants' employment records to the disciplinary action taken by Consol against them — because these measures were "beyond the scope of the Commission's specific remand order." *Id.* He also found, however, that these measures were otherwise "appropriate remedies customarily granted in cases such as this," and indicated that, upon subsequent remand, he would grant the Secretary's requests. *Id.* The judge

expressly found that the complainants' employment records "should be expunged of references to discipline issued as a result of actions found protected under the Act," including the decision of the arbitrator finding that Consol had just cause for disciplining the three miners because of their work refusal. *Id.*

Consol and the Secretary filed cross-petitions for discretionary review of the judge's decision, which were granted by the Commission.

II.

Disposition[4]

A. Penalty Assessment Issues

1. Number of Violations and Penalties

Both Consol and the Secretary agree that the judge erred in finding that three separate violations occurred, and assessing three separate penalties. C. Br. at 5-12; S. Resp. Br. at 2. The issue before us on appeal is thus whether the judge's penalty assessment on remand constitutes an abuse of discretion. *See U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984) (holding that while "a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal"). We find that the judge erred and that his penalty assessment was "infected by plain error."

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[4] All Commissioners join in all sections of this decision except sections II.A.2.b and II.A.2.c. All Commissioners agree to vacate the judge's penalty assessment and remand for assessment of a single penalty, and the issuance of an expungement order and an order directing the posting of an appropriate notice by Consol. All Commissioners also agree that the judge erred in not expressly considering all of the section 110(i) penalty criteria in his penalty assessment, and are in agreement as to how four of the six criteria should be considered on remand. As to the remaining two criteria, Chairman Jordan and Commissioners Riley and Verheggen affirm the judge's finding of low negligence, while Commissioner Marks would reverse and find high negligence. As stated in their separate opinions which follow, Commissioners Riley and Verheggen would affirm the judge's finding of low gravity, Chairman Jordan would vacate the judge's gravity finding and remand, and Commissioner Marks would reverse and find high gravity. Accordingly, the judge's finding of low gravity stands as if affirmed. *See Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

In his remand decision, the judge stated:

> The Commission found that each of the three Complainants was suspended in violation of the Act. In accordance with Section 110(a) of the Act[,] a civil penalty must therefore be assessed for each of the three violations. The Secretary's position at oral argument, that only one violation occurred and only one civil penalty should be assessed, is inconsistent with this statutory mandate.

19 FMSHRC at 526 n.2.

Our remand order did not require the judge to find that the operator committed three separate violations of the Mine Act or to assess three separate penalties. The judge's finding of multiple violations and his assessment of three separate penalties was apparently based on a misunderstanding of the Commission's order.

However, even if the Commission's order could have been interpreted to mean that three penalties were to be assessed, neither the Commission nor the judge have the authority to expand this case beyond the bounds under which the Secretary brought it. In other words, neither the Commission nor the judge are "authorized representatives of the Secretary and do not have the legal authority to charge an operator with violations of . . . the Mine Act." *Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991). Yet that is what the judge effectively did here when he went beyond the charge of a single violation brought by the Secretary. In so doing, he clearly erred as a matter of law, and we vacate his three penalty assessments.[5]

2. The Judge's Consideration of the Penalty Criteria

a. Size, Effect, History of Violations, and Good Faith Abatement

The Secretary contends that the judge's civil penalty assessment is not in accordance with applicable law and constitutes an abuse of discretion. S. Br. at 19-21. She argues that the judge erred by failing to consider all of the six statutory penalty criteria set forth in section 110(i).[6] *Id.*

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[5] By this decision, the Commission does not intimate any view as to whether a discriminatory act by one operator against multiple persons should be treated as one or multiple violations.

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

> [1] the operator's history of previous violations, [2] the

at 21-23. Regarding the judge's penalty assessment as a whole, the Secretary also argues that the total penalty of $30 is not likely to have any deterrent effect on Consol, which she alleges is a large operator. *Id.* at 20-21. Consol argues that the judge's failure to consider four of the section 110(i) criteria — Consol's history of previous violations, the appropriateness of the penalty to the company's size, the effect of the penalty on the company's ability to continue in business, and the company's good faith in attempting to achieve rapid compliance after notification of a violation — was directly attributable to the Secretary's failure to introduce any evidence regarding these criteria. C. Br. at 12-13. The operator argues that the Commission should either affirm the judge's $30 penalty assessment, or vacate the penalty and dismiss the proceeding on the grounds that the Secretary's lack of proof on the penalty issues prevents assessment of any penalty. *Id.* Consol contends that the record should not be reopened and that the Secretary should not be allowed to adduce additional evidence because she failed to introduce pertinent evidence at the original hearing, and has failed to establish good cause for reopening the record under Rule 60(b) of the Federal Rules of Civil Procedure. *Id.* at 14-27. Regarding the penalty's deterrent effect, Consol argues that a minimal penalty is warranted in view of the judge's findings of low negligence and gravity. *Id.* at 43-45.

There is no dispute that the judge did not consider all six of the civil penalty criteria set forth in section 110(i). The judge himself stated that, as late in the proceedings as February 1997, "there is no record evidence as to four of the six criteria," namely, "the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, the effect on the operator's ability to continue in business and the demonstrated good faith in attempting to achieve rapid compliance after notification of a violation." 19 FMSHRC at 527 & n.4. The judge went on to conclude that his penalty assessment "must necessarily be based upon the only two criteria for which there is record evidence, i.e.[,] whether the operator was negligent and the gravity of the violations [sic]." *Id.* at 527.

Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the Act]." 30 U.S.C. § 820(i). The Act delegates to the Secretary, however, the duty of proposing penalties. 30 U.S.C. §§ 815(a) & 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the

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

30 U.S.C. § 820(i).

Commission to assess the penalty. 29 C.F.R. §§ 2700.28 & 2700.44.[7] The Act requires that, "[i]n assessing civil monetary penalties, the Commission *shall* consider" the six statutory penalty criteria. 30 U.S.C. § 820(i) (emphasis added). This case raises the issue of how information on the criteria must be made part of a record so that the Commission can fulfill its statutory duty to consider the criteria.

The Mine Act provides that, "[i]n proposing civil penalties . . . the Secretary may rely upon a summary review of the information available to [her]." *Id.* The Act further provides that the Secretary "shall not be required to make findings of fact concerning" the criteria. *Id.* It is clear, however, from the legislative history that Congress intended that the Secretary base penalty proposals upon the statutory criteria. The Conference Report on the Mine Act states:

> The Senate bill provided that the independent . . . Commission would have the authority to assess all civil penalties, based on proposals made by the Secretary.
>
> . . .
>
> The conference substitute conforms to the Senate bill, with an amendment incorporating the six criteria . . . *which criteria shall be those upon which the Secretary shall propose a civil penalty* and the Commission shall assess such penalty.

S. Conf. Rep. No. 95-461, at 58 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1336 (1978) (emphasis added).

Under this statutory scheme, the Secretary proposes penalties based on the section 110(i) penalty criteria, and the Commission ultimately assesses penalties either by operation of law, or by order utilizing the same criteria. At the hearing, the Secretary is responsible for providing the judge the information he or she needs to consider the section 110(i) penalty criteria. This responsibility naturally and logically follows from the Secretary's enforcement and investigative duties — i.e., she has the means of obtaining the information via, for instance, mine identity and production reports (*see, e.g.,* 30 C.F.R. § 50.30), records of an operator's past violations, and investigations of the facts and circumstances surrounding particular violations. Although fulfillment of this responsibility necessarily precedes the Commission's exercise of its responsibility to actually assess penalties, it lies within the province of the judge to ensure that

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[7] When an operator, after receiving notice of a proposed penalty, elects not to challenge the proposal, the Commission plays no active role in the penalty determination. Instead, such a proposed penalty becomes a "final order of the Commission" by operation of law. 30 U.S.C. § 815(a).

the record contains sufficient information on all the statutory criteria. But ultimately, a penalty proposal made by the Secretary should assist the Commission in efficiently exercising that authority.

In 1983, the Commission held that the Secretary must propose penalties in discrimination cases, and must support such proposals with allegations on each of the criteria. *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2044-48 (Dec. 1983). In *Arkansas-Carbona*, a unanimous Commission held:

> [I]t is incumbent upon the Secretary in a combined proceeding to set forth in the discrimination complaint the precise amount of the proposed penalty with appropriate allegations concerning the statutory criteria supporting the proposed amount.
>
> . . .
>
> Henceforth, we shall require in these cases that the Secretary propose in his complaint a penalty in a specific dollar amount supported by information on the section 110(i) criteria for assessing a penalty.

Id. at 2048.[8]

Commission Procedural Rule 44(a) was promulgated to codify this holding. *Id.* at 2048 n.11; 49 Fed. Reg. 5750, 5751 (1984). It requires the Secretary, in connection with any proposed civil penalty for a violation of section 105(c) she alleges in a discrimination complaint, to provide "a short and plain statement of supporting reasons based on the [section 110(i)] criteria."

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[8] Among the Commission's concerns in *Arkansas-Carbona* was providing adequate notice to operators:

> Formal penalty allegations in the complaint better afford operators adequate notice of penalty issues in discrimination cases.
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> . . .
>
> Thus, the operator will be informed not only of the dollar amount proposed, but also the basis therefor. The parties will then be better prepared to litigate at the hearing any dispute concerning the penalty sought.

5 FMSHRC at 2048.

29 C.F.R. § 2700.44(a). It is thus the Secretary who must initially produce preliminary information that will assist the judge in making findings concerning the statutory penalty criteria.[9] As the Commission recognized in *Arkansas-Carbona*, this is not an onerous obligation. 5 FMSHRC at 2048 ("penalty allegations in the discrimination complaint may be stated in summary fashion"). It is certainly not comparable to the Secretary's burden to prove an underlying violation by a preponderance of the evidence. It is merely a requirement that the Secretary allege in simple terms how the criteria apply to any given case.

Whether or not the Secretary meets this requirement, Commission judges must nevertheless ensure that a complete record has been made. This goes hand in hand with the Secretary's responsibility to allege simple facts, in the first instance, that are both sufficient to give a respondent adequate notice of the bases of her penalty proposal, and to assist our judges entering findings on the criteria. Commission judges are well placed to recognize deficiencies in initial pleadings, deficiencies they can attempt to correct by, for instance, directing the Secretary to propose a specific penalty amount, or ordering the parties before a hearing to either stipulate or allege facts concerning each criterion.

Here, we conclude that the judge erred by expressly refusing to consider all six of the section 110(i) penalty criteria in making his penalty assessment. As we emphasized in *Sellersburg Stone Co.*, "[w]hen an operator contests the Secretary's proposed assessment of penalty . . . findings of fact on the statutory penalty criteria must be made." 5 FMSHRC at 292. Furthermore, the Secretary clearly failed to assist the judge in assessing a penalty. The Secretary's original complaint not only ignored the requirements of Rule 44(a) to provide "supporting reasons" for a proposed penalty (the complaint lists the criteria, but provides no information on them), but even failed to "propose a civil penalty of a specific amount" in the first instance. S. Compl. of Discrimination at 4. Instead, the complaint merely requests that the Commission "assess[] a civil penalty against the Respondent . . . in the amount . . . which is based on the assessment criteria of Section 110(i) of the Mine Act." *Id. Cf. Arkansas-Carbona*, 5 FMSHRC at 2048 ("the Secretary's naked request in his complaint for a penalty of 'up to $10,000' is scarcely a penalty *proposal* at all") (emphasis in original). Nor did the Secretary

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[9] The "ability to stay in business" criterion is unique insofar as operators are presumably in the best position to know whether penalties the Secretary proposes may affect their ability to continue in business. To provide proper notice of the bases of her case, the Secretary must nevertheless allege that, based on the information available to her, the proposed penalty would not adversely affect the operator's ability to continue in business. *Cf.* 30 C.F.R. § 100.3(h) (in determining the amount of a penalty proposal, "[i]t is initially presumed [by the Secretary] that the operator's ability to continue in business will not be affected by the assessment," with allowance made for penalty adjustments if the operator submits information showing that a penalty will have such an effect). *See also Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983) (Commission judges will "presume[] that no . . . adverse [effect] would occur" in the absence of any evidence to the contrary), *aff'd*, 736 F.2d 1147, 1153 (7th Cir. 1984).

propose a specific penalty amount at the hearing, or even in her posthearing brief. *See* S. Posthearing Br. at 34-35 (Mar. 31, 1995) (reiterating the prayer for relief as to a civil penalty appearing in the original Complaint). She proposed a penalty of $3,000 only after the case had gone to the Commission and was remanded back to the judge. *See* S. First Amended Compl. at 3 (Jan. 31, 1997).

We do not condone the Secretary's failure to conform her original complaint to the requirements of Rule 44(a). Indeed, the Secretary's filing of a deficient complaint has contributed to prolonging the penalty phase of this case, in effect thwarting Congress' "desire to speed the [civil penalty] process" when it amended the 1969 Coal Act. *See Arkansas-Carbona*, 5 FMSHRC at 2046. We also note that the sooner in the process that the Secretary provides allegations on the criteria, the sooner respondents will have an opportunity to evaluate the merits of penalties the Secretary proposes be assessed against them, and to prepare and submit rebuttals, making for more complete records for the Commission's consideration.

We note that the judge and the parties also missed an opportunity to correct the deficiencies in the record on remand. The Commission directed the judge to assess "an appropriate civil penalty." 18 FMSHRC at 2095. No civil penalty is ever appropriate unless assessed according to section 110(i). The Secretary's oversights in the original proceeding notwithstanding, the judge was under an obligation to direct the parties to supplement the record to allow him to discharge his duty under section 110(i). He thus erred when he failed to allow the Secretary to amend her complaint by denying her motion to reopen the record.[10] *See* Order Denying Mot. to Reopen the Record (Mar. 4, 1997).

b. Negligence[11]

The Secretary argues that the judge's analysis of the negligence criterion is not supported by the record and is inconsistent with the Commission's finding that Consol did not adequately respond to the miners' safety concerns even though it could easily have done so. S. Br. at 9-12. Consol argues that the judge correctly determined that its section 105(c) violation involved low negligence because the decision of the Commission in effect established a new obligation on operators to call in third parties to address miner safety concerns. C. Br. at 32-34.

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[10] The judge never ruled on the Secretary's separate motion to amend her complaint. *See* Tr. II at 116-17. We note that, consistent with Rule 15 of the Federal Rules of Civil Procedure, leave to amend should be freely granted. Fed. R. Civ. P. 15; *see also Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 n.10 (Aug. 1997); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990).

[11] For reasons stated in his separate opinion, Commissioner Marks would reverse the judge's finding of low negligence.

We conclude that the judge did not abuse his discretion in finding that this violation was the result of low negligence, even though he made certain statements that appear to reflect a misunderstanding of our decision in *Hannah I.* In our view, the record supports the judge's finding that Consol's response to the miners work refusal was a "close judgment call" as to which there was no directly applicable legal precedent. 19 FMSHRC at 528. The record indicates that Consol did not act precipitously in response to the miners' complaint about the adequacy of the preshift inspection, but instead made a good faith effort to determine whether the inspection was adequate under Illinois law. The fact that Consol officials and some mine examiners had been advised several weeks earlier that this practice did not violate state law, and that Consol's position was upheld initially by the judge and, to a limited extent, by an arbitrator, indicate that Consol's decision to discipline the three miners several hours after they first raised their complaint, and after it was investigated by company officials, was not totally unreasonable.[12]

It is true the judge erroneously stated that "Consol's shortcoming was its decision not to insist that the State inspector come to the mine site in person (even though he was available to communicate with the [three miners] by telephone)." 19 FMSHRC at 528. As we indicated in *Hannah I*, it was Consol's refusal to call the state inspector directly, or allow the miners to speak to him by telephone to confirm the statements attributed to him concerning the propriety of the preshift inspection, that provided the basis for our conclusion that Consol did not fulfill its obligation to address the perceived danger communicated by the miners in a manner sufficient to quell their fears. 18 FMSHRC at 2093-94. Moreover, we expressly found that Consol supervisor John Moore denied the miners' request to call the state inspector to confirm the statements attributed to him by Consol management. *Id.* at 2087, 2093. Thus, contrary to the judge's statement, the state inspector was not "available to communicate with the [miners] by telephone." 19 FMSHRC at 528. In our view, however, these errors are harmless since the judge otherwise provided a reasonable analysis of the negligence criterion, which is sufficient to support his finding that this violation was the product of low negligence.

c. Gravity

The Secretary contends that the judge erred in his consideration of the gravity criterion by failing to presume that Consol's unlawful disciplining of the three miners would have a chilling effect on other miners exercising their rights under the Mine Act. S. Br. at 13-18. Consol contends that the Secretary's argument for a presumption of a chilling effect resulting from unlawful disciplining of miners is contrary to the Mine Act, and is not supported by the cases she cites involving the effect of violations of the National Labor Relations Act. C. Br. at 28-32.

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[12] The Commission has held that a judge is entitled to consider these type of mitigating factors in evaluating the level of negligence assigned to a violation. *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 840 (May 1997); *Poddey*, 18 FMSHRC at 1319-20.

Commissioners Riley and Verheggen would affirm the judge's finding of low gravity. Chairman Jordan would vacate and remand the judge's holding. Commissioner Marks would reverse it. The effect of this split decision is to allow the judge's finding to stand as if affirmed. *Pennsylvania Electric Co.*, 12 FMSHRC at 1563-65. The separate opinions of Commissioners are set forth in Part III of this decision.

3. Conclusion

In light of the judge's legal errors, we vacate his penalty assessment and remand for assessment of a single penalty for Consol's violation of section 105(c). As to the statutory penalty criteria, we have already affirmed the judge's findings on negligence, and his gravity finding stands as if affirmed. As to the "size" criterion, we note that, at the outset of this case, the Secretary alleged that "Consol's Rend Lake Mine . . . is a large underground coal mine." S. Compl. of Discrimination at 1 (Sept. 9, 1994). Consol admitted this allegation in its Answer, dated October 3, 1994. Accordingly, we direct the judge to enter a finding on the "size" criterion that is consistent with this admitted allegation. We also note that both parties stipulated that assessment of a civil penalty would not affect Consol's ability to continue in business. S. Resp. to Prehearing Order at 1 (Dec. 9, 1994); Consol Prehearing Resp. at [2] (Dec. 9, 1994). Accordingly, we direct the judge to enter a finding on this criterion consistent with the parties' stipulation.[13]

Currently, there is no evidence in the record on two of the statutory criteria. As to the "history of violations"[14] criterion and whether Consol "demonstrated good faith . . . in attempting to achieve rapid compliance after notification of the violation,"[15] we direct the judge to allow the Secretary to amend her complaint for the narrow purpose of adducing information on these two criteria, to allow Consol to rebut this information as appropriate, and to then enter appropriate findings.

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[13] The Commission has authority to enter these findings even in the absence of an amended complaint. *Sellersburg*, 736 F.2d at 1153.

[14] In her amended complaint which was never admitted, the Secretary alleged that Consol was charged with 549 violations during the 24 months before the violation here. S. First Amended Compl. at 4 (Jan. 31, 1997). We note that, in the absence of a qualitative allegation (i.e., that such a history is high, low, or average), such bare information is of limited use to our judges.

[15] We note that, although the Secretary's counsel stated during oral argument that there was no evidence in the record that "Consol did not act in good faith in attempting to achieve rapid compliance" (Tr. II at 81), the judge must evaluate the allegations of the parties on this question in light of the record evidence, and must enter an appropriate finding.

In light of our conclusion that in this case only a single penalty may be assessed for the violation charged by the Secretary, we direct the judge to assess an appropriate penalty that is consistent with this decision and the overall deterrent purposes underlying the Mine Act's penalty assessment scheme. On remand, we remind the judge that the purpose of civil penalties under the Mine Act is to "'convinc[e] operators to comply with the Act's requirements.'" *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 n.17 (Sept. 1996) (quoting S. Rep. No. 95-181, at 45 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978)).

B. Expungement and Notice Posting Remedies

Consol contends that the Secretary's request for the posting of a notice was properly denied by the judge because it exceeds the scope of the Commission's prior remand order, the requested notice would not provide any new information to the miners concerning their statutory rights, and any notice-posting is premature before an appeals court reviews the Commission's decision in this case. C. Br. at 34-35. Consol agrees with the judge's determination that the expungement order requested by the Secretary exceeds the scope of the Commission's order, but takes issue with the judge's statement that expungement would be an appropriate remedy in this case and could be ordered on remand. *Id.* at 35-36. Consol argues that expungement of all references to its discipline of the three miners would be inappropriate in this case because the discipline upheld by the arbitrator (suspension) was not the same as that originally taken against the complainants (discharge), and that it would blur the distinction between contractual and statutory rights. *Id.* at 35-43.

The Secretary contends that the judge erred in denying her request for an order directing the posting of a notice and the expungement of any references to the unlawful discipline in the miners' employment records because those remedies are appropriate under the circumstances presented here and were not beyond the scope of the Commission's remand order. S. Br. at 23-25. The Secretary takes issue with Consol's argument based on the distinction between contractual and statutory rights on the ground that it is contrary to the "supremacy doctrine," which provides that the decisions of federal agencies construing statutory rights take precedence over conflicting arbitration decisions. S. Resp. Br. at 9-12 & n.2.

The Commission possesses broad remedial power in fashioning relief for victims of discrimination. Section 105(c)(2) of the Mine Act provides:

> The Commission shall have authority . . . to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

30 U.S.C. § 815(c)(2). As we have recognized, "this is a 'broad remedial charge' and . . . 'so long as our remedial orders effectuate the purposes of the Mine Act, our judges and we possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances.'" *Secretary of Labor on behalf of Rieke v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257-58 (July 1997) (quoting *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (Feb. 1982)).

The legislative history of the Mine Act similarly indicates that Congress intended to provide for expansive relief to victims of discrimination:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to[,] reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S. Rep. No. 95-181, at 37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978).

In accordance with these principles, the Commission endeavors to make miners whole and to return them to the status they enjoyed before the illegal discrimination occurred. *Rieke*, 19 FMSHRC at 1258; *Arkansas-Carbona*, 5 FMSHRC at 2056. "'Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee.'" *Arkansas-Carbona*, 5 FMSHRC at 2049 (citation omitted).

We believe that the judge correctly concluded that the expungement and notice posting orders requested by the Secretary "are . . . appropriate remedies customarily granted in [discrimination] cases such as this," which would have been appropriately entered in this case but for the narrow scope of the Commission's remand order in *Hannah I.* 19 FMSHRC at 529. While we initially remanded the case specifically "for computation of a backpay award and assessment of an appropriate civil penalty" (18 FMSHRC at 2095), our remand order should have also expressly authorized the judge to grant other forms of relief that he deemed appropriate under the circumstances. Since the judge has indicated his inclination to grant these additional forms of relief on a subsequent remand, we remand the case with specific instructions to the judge to issue an expungement order, an order directing the posting of an appropriate notice by Consol, or any other form of relief deemed appropriate under the circumstances.

We also affirm the judge's determination that any expungement order issued on remand should order the deletion of any references to the arbitrator's decision which found that Consol had just cause for disciplining the three miners. The underlying arbitration decision, which

upheld Consol's discipline of the three miners for engaging in a work refusal that we found to be protected in *Hannah I*, does not require us to provide less than complete relief under the Mine Act. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2795-96 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981); *see also Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738, 749-50 (11th Cir. 1990) (Commission not required to "defer to arbitrator's decision on matters involving the vindication of . . . miners' statutory rights under section 105(c)" where statutory and contractual issues were not congruent).

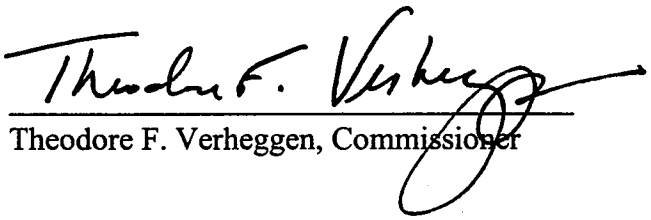
III.

Separate Opinions of the Commissioners

Commissioners Riley and Verheggen, in favor of affirming the finding of the administrative law judge that Consol's violation of section 105(c) of the Mine Act involved a low level of gravity:

We conclude that the judge properly rejected the Secretary's argument that a chilling effect on other miners exercising their rights under the Mine Act should be presumed solely on the basis of Consol's discriminatory conduct, in the absence of any other supporting evidence. As the judge noted, the Commission has held that such a chilling effect cannot be presumed to have resulted from a section 105(c) violation, but must be established on a case-by-case basis from objective or subjective evidence. *Poddey*, 18 FMSHRC at 1320-21; *Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 558-59 (Apr. 1996). The judge found that, in this case, the Secretary had produced no evidence that would support an inference that Consol's disciplining of the three miners had a chilling effect on other miners. We conclude that this finding is supported by substantial evidence.[1]

James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner

[1] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). So long as substantial evidence supports the judge's findings, the Commission does not substitute "a competing view of the facts for the view the [judge] reasonably reached," even where some record evidence supports that competing view. *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

Chairman Jordan, in favor of vacating and remanding the finding of the administrative law judge that Consol's violation of section 105(c) of the Mine Act involved a low level of gravity:

With respect to the gravity criterion in his penalty determination, the judge found "no objective or subjective evidence of a chilling effect," 19 FMSHRC at 529, and concluded that the Secretary failed to meet her burden of proving high gravity. Notwithstanding the terse opinion of Commissioners Riley and Verheggen affirming the judge, I believe there is relevant evidence in the record on this point which he failed to consider. Accordingly, I would vacate and remand for further consideration of this issue.

In two fairly recent cases, the Commission has described the type of evidence relevant to a gravity determination in a discrimination case. In *Carroll Johnson*, the Commission held that, in determining gravity in a discrimination case, both subjective and objective evidence should be considered in evaluating whether a chilling effect resulted from adverse action. 18 FMSHRC at 559. The Commission explained that, in considering objective evidence, the judge must consider whether the adverse action "reasonably tend[ed] to discourage other miners from engaging in protected activities." *Id.* The Commission emphasized that a judge must evaluate the gravity of a violation within its factual context, and in that case framed the inquiry as whether the operator's "removal of a miners' representative who was accompanying MSHA during an inspection would reasonably tend to discourage other miners from engaging in protected activities." *Id.* We remanded the case to the judge because he failed to evaluate any objective factors in determining whether a chilling effect occurred. *Id.*

Similarly, in *Poddey*, a majority of the Commission reviewed the context of the discharge in question, and concluded that it would not "reasonably tend[] to discourage miners from engaging in protected activities," because it was caused in part as a result of a heated confrontation with a foreman. 18 FMSHRC at 1321.

In the instant case, the judge utterly failed to conduct the required analysis. The record reflected that three miners who had never been subject to any previous disciplinary action were suspended. Tr. 280, 341-42, 521, 559, 673. The judge did not take into account that more than one miner was suspended. Thus, it appears irrelevant to his gravity determination, whether one, three, or thirty miners were disciplined. He should have inquired as to whether the suspension of more than one miner might have reasonably tended to discourage other miners from engaging in protected activities. As the Fifth Circuit has noted, it is appropriate to take into account the number of affected employees when analyzing the gravity of a violation. *See Reich v. Arcadian Corp.*, 110 F.3d 1192, 1199 (5th Cir. 1997) (discussing OSHA citation). The judge should also have examined the evidence regarding the employees' pristine work records, and made a finding as to whether this fact might have increased the "chilling effect" of the suspension.

It seems likely that an operator's suspension of several miners (all of whom had good disciplinary records) might produce a greater chilling effect on the workforce than the discipline of a single miner who had a less than stellar record. The judge never took these factors into account in making his gravity determination. However, the substantial evidence standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his or her decision. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951); *Amax Coal Co.*, 18 FMSHRC 1355, 1358 n.7 (Aug. 1996). In light of the judge's failure to address any relevant evidence regarding the potential chilling effect of the violative conduct, I cannot effectively review his gravity finding. Thus, I would vacate the finding and remand the matter for further consideration of this issue.

Mary Lu Jordan, Chairman

Commissioner Marks, concurring in part, dissenting in part and in favor of reversing the finding of the administrative law judge that Consol's violation of section 105(c) of the Mine Act involved a low level of gravity:

I concur in Part II.A.1 and agree with my colleagues that, in this case, the judge went beyond his authority in charging three violations. However, as set forth in my opinions in *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 883 (June 1996), and *Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 822 (Aug. 1998), a judge may modify citations pursuant to Mine Act section 105(d), 30 U.S.C. § 815(d), "so long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order." *Consolidation Coal Co.*, 4 FMSHRC 1791, 1793-94 (Oct. 1982). Because the original complaint in this case sought a penalty for one violation, the allegations necessary to sustain the judge's finding of three violations are simply not contained in the original papers served on the operator.

I dissent with respect to Part II.A.2.b. Specifically, I believe that the judge erred in his finding of low negligence with respect to this discrimination violation.

Although Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act, the Commission has cautioned that the exercise of such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986) (citing *Sellersburg*, 5 FMSHRC at 290-94, *aff'd*, 736 F.2d at 1151-53). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings are supported by substantial evidence. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel*, 6 FMSHRC at 1432.

The judge's analysis of the negligence criterion is incompatible with the Commission's earlier decision in this case, in which we reversed the judge's finding of no violation. *Hannah I*, 18 FMSHRC 2085. In particular, the judge based his finding of a low level of negligence on an improper ground. The judge found that "the operator acted in good faith in disciplining the Complainants for what it perceived in a good faith and reasonable belief to have been an unprotected work refusal." 19 FMSHRC at 527. However, in *Hannah I*, the Commission held that Consol's response to the miners' safety concern was not reasonable nor sufficient to quell the fears of the miners. 18 FMSHRC at 2092-94. The Commission also stressed the seriousness of the miners' concerns that prompted their refusal to work. These miners were concerned that there was methane gas present in the escapeways and, if they started work and power were restored to the mine, a spark or electrical problem could cause an explosion that could kill or injure them or their co-workers. *Id.* at 2092. The judge's negligence analysis fails to consider the Commission's determination that Consol could have easily responded to these serious safety concerns by acceding to the miners' request to call state inspector William Sanders or to allow the miners to call the state inspector themselves. *Id* at 2093. The judge was dead wrong when he said that "Consol's shortcoming was its decision not to insist that the State inspector come to the mine site in person (even though he was available to communicate with the Complainants by

telephone)" (19 FMSHRC at 528) because in *Hannah I*, the Commission expressly found that Consol supervisor John Moore denied the miners' request to call the state inspector. 18 FMSHRC at 2093.

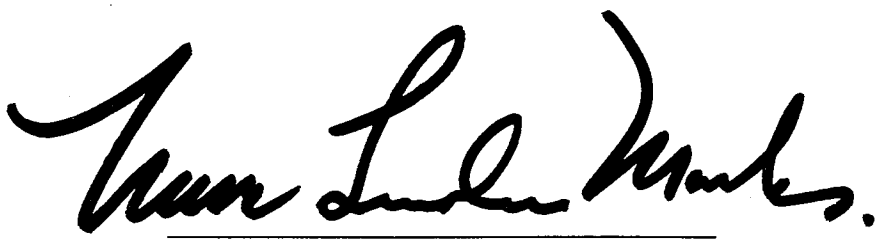
Given the Commission's holding in *Hannah I* as to the seriousness of these safety concerns and Consol's refusal to respond to them, the judge erred in finding that Consol's decision to discipline the three miners for refusing to work in a mine that they reasonably thought might be explosive amounted to a "close judgment call." 19 FMSHRC at 528. His holding flies in the face of the binding Commission law of the case. Therefore, I believe that the judge's finding on the negligence criterion was "infected by plain error." *U.S. Steel*, 6 FMSHRC at 1432.

I would reverse the judge's low negligence finding. The record in this case can support no other conclusion than that Consol failed to exercise reasonable care when it unjustly punished miners who were exercising their rights, under the Mine Act, to refuse to work under conditions they reasonably believed hazardous to themselves and others. *See American Mine Services, Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (when record can support no other conclusion, a remand to the judge for reconsideration would serve no purpose).

With respect to the gravity criterion, my colleagues have again rejected the Secretary's call for Commission recognition that violations of section 105(c) serve to chill miners' future invocation of protected activities because of a fear of similar adverse action. As I stated in my opinion in *Carroll Johnson*, 18 FMSHRC at 563, when an operator, such as Consol here, violates section 105(c), either by firing or by taking some other adverse action against miners who have merely acted as the Mine Act encourages (such as refusing to work when there is a danger of explosion, as was done in this case), such action has the effect of intimidating or "chilling" future protected activities of the miners and their co-workers. Although the majority remains unwilling to presume that such a natural reaction will occur, in the real world in which our miners must work and live, there is certainly a chilling effect on other miners when any of their brothers or sisters are illegally threatened with loss of their jobs or incur other disciplinary actions. Therefore, I would reverse the low gravity finding for the same reasons expressed in my opinion in *Carroll Johnson*, and reiterate my conclusion that a presumption of a chilling effect should be made in every instance of a section 105(c) violation.

Finally, the judge's imposition of a $30 penalty for this violation ($10 for each violation) against a large operator like Consol is tantamount to no penalty at all. *See Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997) (nominal penalty "is likely to have little financial impact, and therefore minimal deterrent effect" against a company with significant size and resources). The D.C. Circuit has explained that Congress in enacting the Mine Act "was intent on assuring that the civil penalties provide an effective deterrent against all offenders." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989). The judge's penalty flouts that Congressional intent. The Secretary proposed a $3,000 penalty in her Amended Complaint, which the judge incorrectly found unnecessary to consider. 19 FMSHRC at 525-26. In

Sellersburg, 5 FMSHRC at 293, the Commission held that, when there is a wide divergence between the penalties proposed by the Secretary and those assessed by the judge, it "behooves" the judge to provide a sufficient explanation of the bases underlying the penalties. In the instant case, the judge utterly failed to provide the required analysis on all six elements.



Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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December 18, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 99-5-M
	:	A.C. No. 23-02064-05505
GABEL STONE COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 1, 1998, Gabel Stone Company, Inc. ("Gabel") filed with the Commission a request to reopen 19 penalty assessments which had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Gabel explains that, on June 13, it received a collection letter from the Civil Penalty Compliance Office at the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 1. The operator states that it was "shocked to learn" that MSHA's enforcement activity had escalated to the point that MSHA sent a collection notice. *Id.* Gabel attached to its request a three-page table listing the date of issuance for each citation at issue, each citation number, and a brief discussion of the reasons Gabel feels each citation deserves review.

On November 6, 1998, the Secretary of Labor opposed Gabel's request. The Secretary asserts that, while Gabel's pro se submission has not specified the section or sections of Rule

60(b)[1] of the Federal Rules of Civil Procedure on which it bases its request for relief, the Commission should apply Rule 60(b) to determine if relief is warranted in this case. S. Opp'n at 7. She argues that the operator has failed to satisfy any of the requirements for obtaining relief under that standard. *Id.* at 9 & n.18. The Secretary contends that Gabel's request is untimely under Rule 60(b)(1) because it falls outside the one-year time limit applicable to motions filed pursuant to that rule, and, in any event, Gabel's request fails to set forth reasons upon which the Commission could grant relief. *Id.* at 10-11. She also asserts that Gabel's request fails under Rule 60(b)(6) because the operator has not requested relief with a "reasonable time," has not shown that it was faultless in the delay, and has failed to present a meritorious defense. *Id.* at 12-16. Finally, the Secretary contends that Gabel's receipt of the proposed penalties and the operator's existence for over 30 years weigh against a finding that Gabel was "surprised" that its failure to contest the proposed penalty resulted in MSHA's collection action. *Id.* at 11, 14 n.22.

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

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim*

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[1] Rule 1(b) of the Commission's Procedural Rules provides that the Federal Rules of Civil Procedure shall apply "so far as practicable" in the absence of applicable Commission rules. 29 C.F.R. § 2700.1(b).

Rule 60(b) states, in pertinent part:

> [T]he court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

Walter Resources, Inc., 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). Relief from a final order is available in circumstances such as a party's "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). A Rule 60(b) motion "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). This one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3). *See* 12 James Wm. Moore, Moore's Federal Practice 60.48[2], at 60-167 to 60-168 (Donald R. Coquillette et al. eds., 3d ed. 1998); *see United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977) ("[W]hen the reason asserted for relief comes properly within one of [the first three] clauses, clause (6) may not be employed to avoid the one-year limitation."). When the true grounds for relief are based on subsections (1) through (3), the one-year time limit applicable to those sections may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit.

Gabel does not base its request for relief on Rule 60(b) or any of its subsections. *See* Mot. at 1-2. The operator merely asserts that, subsequent to its receipt of a collection notice from MSHA, it learned that the proposed penalties here at issue had become final Commission orders. *Id.* at 1. Gabel also makes a vague allegation that MSHA inspectors became "defensive" when disputes arose between Gabel and the inspector regarding MSHA's enforcement of mandatory standards against Gabel. *Id.* Nonetheless, the explanations offered by Gabel for its failure to file a notice of contest for any of these proposed assessments could be characterized as requests for relief under Rule 60(b)(1) as mistake, inadvertence, surprise, or excusable neglect, or, to the extent that Gabel's request for relief alleges misconduct on the part of MSHA, within Rule 60(b)(3) as "fraud . . ., misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3); *see Lakeview Rock Prods., Inc.*, 19 FMSHRC 26, 28 (Jan. 1997).

However, Gabel's request is untimely under Rule 60(b)(1) and 60(b)(3). *See Lakeview*, 19 FMSHRC at 29; *Thomas Hale*, 17 FMSHRC 1815, 1816-17 (Nov. 1995); *Ravenna Gravel*, 14 FMSHRC 738, 739 (May 1992); *Pena v. Eisenman Chemical Co.*, 11 FMSHRC 2166, 2167 (Nov. 1989). The certified mail receipts related to the proposed penalty assessments at issue reflect that Gabel received the proposed assessments between June 28, 1993 and February 5, 1996. Pursuant to section 105 of the Mine Act, the last group of these proposed assessments became final Commission orders on March 6, 1996. *See* 30 U.S.C. § 815(a). Gabel's motion was filed on October 1, 1998, over two and one-half years after the last of the proposed penalty assessments had become final orders of the Commission. As we previously have recognized, the one-year time limit contained in the first three sections of Rule 60(b) "may not be extended." *Lakeview*, 19 FMSHRC at 29. Furthermore, we note that because Gabel's request falls within the coverage of either Rule 60(b)(1) or 60(b)(3), analysis under Rule 60(b)(6) is inappropriate here. *See id.* at 28; *Cirami*, 563 F.2d at 32. In any event, Gabel has failed to present sufficient explanation why it is entitled to relief from the final Commission orders. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995). Accordingly, we deny Gabel's request for relief under Rule 60(b).

For the foregoing reasons, Gabel's request for relief is denied.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 18, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 97-197
ARCH OF KENTUCKY	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). At issue is the decision by Administrative Law Judge Avram Weisberger that Arch of Kentucky ("Arch") violated 30 C.F.R. § 75.1403-6(b)(3)[1] by failing to adequately maintain the sanding devices on a mantrip. 20 FMSHRC 73, 75-78 (Jan. 1998) (ALJ). The Commission granted Arch's petition for discretionary review challenging the judge's determinations that it violated section 75.1403-6(b)(3) and that the alleged violation was significant and substantial ("S&S"). For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Arch operates the No. 37 mine, an underground coal mine in Lynch, Kentucky. *Id.* at 74. Just after midnight on February 4, 1997, eight miners, at the end of their shift, boarded the No. 14 mantrip at the L-15 section of the mine. *Id.*; Tr. 156; Pet. Ex. 1 at 1. The mantrip traveled on steel tracks. Tr. 25. Miners Kenneth Russell, Kenneth Bolling, Vass Mellon, and William Carter

[1] Section 75.1403-6(b)(3) provides, in pertinent part, that "each track-mounted self-propelled personnel carrier should . . . [b]e equipped with properly installed and well-maintained sanding devices."

sat in the outby passenger compartment facing the direction of travel. 20 FMSHRC at 74; Jt. Ex. 2. Miners Otis Holcomb, Charlie Walker, Bill Toliver, and Billy Boggs sat in the inby passenger compartment facing the rear of the mantrip. 20 FMSHRC at 74; Jt. Ex. 2. Tony Cox, the mantrip operator, sat in a compartment in the middle of the mantrip between and above the two passenger compartments. Jt. Exs. 2 & 3. Plexiglas windows in the outby compartment allowed passengers to look forward in the direction of travel and allowed some of them, if they turned in their seats, to see the seated operator from his shoulder level and above. Tr. 27, 37, 61, 183-84.

The No. 14 mantrip had a hand-controlled service brake to slow or stop the vehicle and a hand-controlled parking brake. Tr. 178-79. It also had sanders to provide traction to slow the mantrip, to prevent it from sliding on wet tracks, and to help it climb steep grades. 20 FMSHRC at 74. When activated, a sander released sand through a 2-inch opening onto the surface of the tracks in front of the wheels. Tr. 112. The mantrip had four sanders, one located above each wheel, that were controlled by the operator using hand levers. 20 FMSHRC at 74; Jt. Ex. 3. One lever operated the two outby sanders and the other lever operated the two inby sanders. Tr. 139-40, 193.

As the No. 14 mantrip traveled out of the mine on February 4, it entered a dip under an overcast.[2] 20 FMSHRC at 74. It was not able to climb out of the dip even though Cox attempted to activate the sanders. *Id.* He reversed the mantrip and successfully passed through the dip on his second attempt. *Id.* The mantrip continued its outby journey and, as it rounded a bend in the tracks, Cox and the passengers in the outby compartment saw the light of an approaching battery locomotive. *Id.*; Tr. 40, 58, 73, 96. Cox applied the brakes but the mantrip began to slide on the wet tracks and collided with the locomotive. 20 FMSHRC at 74; Tr. 91-92.

As a result of the collision, Russell suffered a fractured lower leg, Carter received spinal injuries, and Bolling suffered a fractured ankle and two injured vertebrae. Tr. 41, 62-63, 93; Pet. Ex. 1 at 6. Immediately after the accident, Cox ran inby for help and encountered another mantrip about to make its second attempt to pass through the dip going outby. Pet. Ex. 1 at 1; Tr. 105. The passengers on the mantrip included Shelby Brewer, an MSHA inspector, who was at the mine taking dust samples. 20 FMSHRC at 74; Tr. 102, 104-05. Inspector Brewer ran forward to the accident scene and then rode the No. 14 mantrip outby as it took the injured miners approximately 1000 feet to the mine portal. 20 FMSHRC at 74; Tr. 106.

Approximately 20 minutes after the accident, Inspector Brewer and Bob Anderson, a miner's representative, examined the No. 14 mantrip on the surface. 20 FMSHRC at 74. Anderson operated a sander lever but no sand was released. *Id.* Inspector Brewer inspected the

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[2] An overcast is defined as "[a]n enclosed airway that permits an air current to pass over another one without interruption." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 384 (2d ed. 1997).

sander boxes and found they were half full and the sand inside was compacted. *Id.* According to Inspector Brewer, the sand in a sander box has to be dry and loose in order to release through the 2-inch opening and fall on the track. *Id.* at 74-75; Tr. 112. Anderson tagged out the mantrip and moved it to the mine's repair shop. Tr. 107. Inspector Brewer told James Vicini, Arch's safety manager, that he might issue a citation to Arch because the sanders on the mantrip were not working. Tr. 161.

On the night of the accident, Vicini started an accident investigation which lasted three or four weeks. Tr. 159-60, 171. He recorded the results of the investigation in an accident report (the "Arch report"). Pet. Ex. 1. On the morning of February 4, William Johnson, an MSHA inspector and accident investigator, arrived at the mine and spoke to Vicini and some miners, including Cox, about the accident. Tr. 117-18, 122. At approximately 10:00 a.m., Johnson examined one outby sander and one inby sander on the No. 14 mantrip and found that the sander boxes were half full and the sand inside was compacted. 20 FMSHRC at 75. On February 21, Johnson issued Citation No. 4581310 to Arch, alleging an S&S violation of section 75.1403-6(b)(3). Jt. Ex. 5. Citation No. 4581310 charges that "the sanding device provided on the No. 14 Brookville diesel track-mounted self-propelled personnel carrier was not working when the No. 14 mantrip collided with the No. 25 battery powered track-mounted motor." *Id.* Arch contested the citation and the matter proceeded to hearing before Judge Weisberger.

The judge held that Arch was responsible for an S&S violation of section 75.1403-6(b)(3). 20 FMSHRC at 75-78. Based on the eyewitness testimony of the miners in the outby passenger compartment of the mantrip and on the supporting testimony of the MSHA inspectors, he concluded that the sanders did not function properly prior to the accident. *Id.* at 75-76. The judge did not assign significant weight to the hearsay testimony of Vicini that Cox told him that the sanders were working when he came out of the dip, in part because Arch did not call Cox to testify and did not indicate that he was not available to testify. *Id.* The judge dismissed as too speculative Arch's claim that the sanders became compacted after the accident due to exposure to water. *Id.* at 75. He also dismissed, for lack of any supporting evidence, Arch's claim that the mantrip had been inspected before the accident and found to be in working order. *Id.*

The judge assessed Arch a penalty of $1019, finding the gravity of the violation relatively high and the operator's negligence moderate. *Id.* at 78. Arch subsequently filed a petition for discretionary review, challenging the judge's decision.

II.

Disposition

Arch contends that the judge's findings that it violated section 75.1403-6(b)(3) and that the violation was S&S are not supported by substantial evidence. A. Br. at 1. It claims that the judge erred in relying on the testimony of the miners and MSHA inspectors about the condition of the sanders. *Id.* at 8-11. According to Arch, the judge committed prejudicial error by (1)

failing to accord sufficient weight to Vicini's hearsay testimony about Cox's out-of-court statements, (2) disregarding the Arch report which it claims fell within an exception to the hearsay rule, and (3) preventing Arch from questioning Inspector Johnson during cross-examination about what Cox told him concerning his use of the sanders before the accident. *Id.* at 7, 11-15; A. Reply Br. at 6-8. Arch contends that the judge did not adequately weigh evidence that the sanders functioned properly immediately before the shift on which the accident occurred. A. Br. at 9-10; A. Reply Br. at 5. It also argues that the judge erred when he concluded the alleged violation was S&S because the Secretary failed to prove that (1) the violation occurred, (2) its contribution to the danger of a collision was "significant and substantial," and (3) it caused the collision. A. Br. at 17-19; A. Reply Br. at 8-9.

The Secretary responds that the judge's decision is supported by substantial evidence. S. Br. at 9, 24. She contends that the eyewitness testimony of four miners and the testimony of two MSHA inspectors indicate that the sanders were not working properly prior to the accident. *Id.* at 9-14. She argues that the judge correctly found that Vicini's testimony about what Cox told him was hearsay testimony and correctly gave it less weight than the eyewitness testimony of the miners. *Id.* at 16-18. The Secretary asserts that there is no evidence to support Arch's claims that the sand became compacted after the accident. *Id.* at 14-15. She contends that the judge was right to disallow Arch's question on cross-examination to Inspector Johnson, concerning what Cox had told him about the sanders, because it had already been testified to by other witnesses and because it went beyond the scope of the Secretary's direct examination. *Id.* at 20-21. Furthermore, she argues that even if the judge did err in disallowing the question, it only amounted to harmless error. *Id.* at 19-22. The Secretary also argues that the judge did not err when he found Arch's violation to be S&S, and asserts that proof that the violation caused the collision was not required to show that the violation was S&S. *Id.* at 22-23.

A. Violation

At issue in this case is whether the judge's conclusion that the sanding device on Arch's mantrip was not functioning when the mantrip collided with a locomotive (20 FMSHRC at 75-76) is supported by substantial evidence.[3] We conclude that it is.

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[3] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). So long as substantial evidence supports the judge's findings, the Commission does not substitute "a competing view of the facts

Both post-accident inspections of the sanders indicated they were not working properly. Although Arch claims that no one inspected the mantrip until 10 hours after the accident (A. Br. at 5, 7), Inspector Brewer testified that he inspected the vehicle approximately 20 minutes after the accident. 20 FMSHRC at 74. He found that the sander boxes were half full, the sand inside was compacted, and the sand "looked like it hadn't been running" through the opening. Tr. 108. When Inspector Johnson inspected the mantrip later that morning, he found similar conditions. Tr. 124.[4]

In crediting the testimony of Brewer and Johnson, the judge rejected as too speculative Arch's claims that the sand in the sanders may have become compacted after the accident from exposure to rain or when the mantrip drove through a water hole at the mine portal. 20 FMSHRC at 75. Inspector Brewer testified that the small water hole at the mine portal had been "pumped down" when the mantrip drove through it and that it should not have affected the sanders. Tr. 110. The record also contains no evidence that the mantrip was exposed to rain during the 20 minutes it was on the surface before it was inspected by Inspector Brewer or, if it had rained during that time, that the rain had entered the sander boxes. Tr. 109. Inspector Brewer testified that the tops of the sanders were covered with lids. *Id.*[5] The judge also rejected Arch's argument that the sanders on the No. 14 mantrip had been inspected just before the shift on which the accident occurred and had been found to be functioning properly. 20 FMSHRC at 75; Tr. 195-97. The judge reasoned that Arch provided no evidence based on personal knowledge concerning the pre-shift condition of the mantrip. 20 FMSHRC at 75.

The judge also based his conclusion that the sanders were not maintained in working order on his findings that Cox attempted to use the sanders in the dip but they did not work. *Id.* at 75-76. Russell testified that, as the mantrip was attempting to pass through the dip, he called to Cox to use the sanders and he saw Cox operating the sander lever. Tr. 21-22, 26-27, 29. Russell said that he heard "a clunking sound, just metal against metal" coming from directly

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for the view the ALJ reasonably reached," even where some record evidence supports that competing view. *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

[4] We note that both inspectors had extensive experience both in the mining industry and with MSHA. Tr. 99-100, 119. We also note that Inspector Johnson had a working knowledge of mantrip sanders and had special training in accident investigation. Tr. 117-18, 120-21.

[5] Arch also argues that, because the sander boxes were found to be half full of sand after the collision, the other half of the sand must have been used on the tracks before the accident. A. Br. at 9-10. However, there is nothing in the record from which such as inference could be drawn, such as evidence that the sander boxes were more than half full with sand when the mantrip began its outby trip just after midnight on February 4, or evidence that sand was found on the tracks after the accident.

behind him where the sanders were located in the mantrip, and he inferred from this sound that Cox had activated the sanders. Tr. 27-28. He testified that the sanders were not effective because their activation did not create traction and the mantrip slid backwards into the dip. Tr. 20, 22, 28-29.

Bolling testified that some of the miners on the mantrip called to Cox to use the sanders when they were trying to get through the dip and that Cox replied, "I am, I am, I am." Tr. 59. Bolling said he saw Cox using the sander lever but, in his opinion, the sanders were not operational because they did not provide any traction. Tr. 59-60. Carter claimed that, as a passenger on a mantrip, he knew if the sanders were being operated because they were located immediately behind the passengers' compartment and he could hear them being activated. Tr. 89. He also claimed to know when the sanders were being activated because he could tell if the sand from the sanders was producing traction between the wheels and the tracks. Tr. 86. Carter said that, when the mantrip tried to pass through the dip, it "just slid back down" even though he could hear Cox activating the sanders. Tr. 88-89. However, he also testified that it usually took a mantrip two or three attempts to get through the dip. Tr. 88.

We also note that Russell claimed the mantrip began to slide on the wet tracks on the bend just before the accident. Tr. 36-37. Although he saw Cox using the sanders, he inferred that they were not working because he did not feel any traction and the mantrip did not slow down. Tr. 37, 39-40. He claimed that Cox locked the brakes but the mantrip continued to slide until it collided with the locomotive. Tr. 37.

Bolling testified that the mantrip started to slide just before the accident and did not slow down before the collision. Tr. 61. He said that he heard someone tell Cox to activate the sanders and he heard Cox reply that he was activating them. Tr. 62. He also saw Cox operating the controls but could not tell if he was specifically operating the sanders. Tr. 61-62. Mellon claimed that the mantrip began to slide just before the accident. Tr. 73. Instead of slowing down, he said the mantrip continued to speed up, as if the sanders were not working, until it hit the locomotive. Tr. 73-74.

Carter claimed that, just before the accident, Cox applied the brakes and the mantrip began to slide. Tr. 91. He believed that Cox then activated the sanders because they were immediately behind him and he could hear the "metal to metal" sound they made when they were activated. Tr. 91-93. He stated that he did not know if the activated sanders released any sand onto the tracks. Tr. 91. However, he claimed that the mantrip did not slow down as it should have done if sand was falling on the tracks and providing traction. Tr. 91-92.

Arch offered contrary evidence that the sanders did lay down sand in the dip, and that Cox did not have time to apply them thereafter. Vicini testified that Cox told him that he activated the sanders and "laid sand down" while traveling through the dip. Tr. 168-69. According to Vicini, Cox claimed that the sanders worked at the dip because he heard the "kind of squeal" that he believed occurs when sand from the sanders causes traction between the

wheels and the tracks. Tr. 169; Pet. Ex. 1 at 8. Vicini testified that Cox told him that, at the bend immediately before the accident, he applied the brakes but did not have time to use the sanders.[6] Tr. 186, 202. Vicini also said that when he asked Cox, Walker, Holcomb, and Tolliver about the sanders shortly after the accident, none of them told him that the sanders had failed to work. 20 FMSHRC at 75-76; A. Br. at 8.

In crediting the Secretary's evidence over Vicini's testimony on behalf of Arch, the judge noted:

> Vicini indicated that he had interviewed [several] miners who were passengers in the mantrip at issue, and that none of them told him that the sanders did not operate. . . . They told him that the track was slick. However, Arch did not proffer the testimony of any of these miners, nor did it indicate that any of them were not available. I thus do not accord much weight to this hearsay testimony of Vicini. On the other hand, I observed the demeanor of Carter, Bolling, and Russell and found their testimony credible . . . .

20 FMSHRC at 76. The judge also noted that Arch did not call Cox or the other miners interviewed by Vicini, or indicate that they were unavailable to testify. *Id.*

We do not find Arch's evidence of sufficient weight to overturn the judge's conclusion that the testimony of the Secretary's witnesses was more credible than Cox's. In reaching this conclusion, we are guided by the principle that a judge's credibility determinations are entitled to great weight. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). We conclude that Arch has not offered "compelling reasons to take the 'extraordinary step' of reversing the judge's credibility determination." *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (quoting *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (Nov. 1986)).

Arch also argues that the judge erred by failing to address in his decision Cox's statements recounted by Vicini in the Arch report, which the operator contends falls within the business records exception to the hearsay rule. A. Br. at 11-12. We note, however, that hearsay rule exceptions are largely irrelevant in a Commission proceeding, in which hearsay evidence is admissible.[7] 29 C.F.R. § 2700.63(a); *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135-36

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[6] The Arch report contains no information as to whether or not Cox used the sanders at the bend just before the collision. Pet. Ex. 1.

[7] Therefore, we need not reach the operator's contention that the Arch report falls within the business records hearsay exception.

(May 1984). In fact, the judge admitted the report into evidence (Pet. Ex. 1), it having been offered by the Secretary for the purposes of cross-examining Vicini, the author of the report — whose testimony regarding Cox's statements to him about the sanders the judge expressly discredited. 20 FMSHRC at 75-76. We find that the judge also implicitly discredited the report (*see Fort Scott*, 19 FMSHRC at 1516 (recognizing implicit credibility finding of judge)), and justifiably omitted it from his analysis.

We agree with Arch (A. Br. at 12-16), however, that the judge erred during the hearing by sustaining an objection by the Secretary to the following question posed by Arch's counsel to Inspector Johnson on cross-examination: "When you talked to Mr. Cox, isn't it true that he told you that he had used the sanding device shortly before the accident?" Tr. 143. The Secretary objected to the question on the grounds that it was hearsay and that it was covered by the informer's privilege. *Id.* The judge's reasons for sustaining the objection were (1) the actions of Cox had already been testified to by other witnesses, (2) the question did not relate to anything that Inspector Johnson said on direct examination, and (3) Cox's answer to the question "appears to be covered by informer's privilege." Tr. 144.

Contrary to the judge's ruling, the question put to Inspector Johnson was worded broadly enough to encompass actions by Cox that were not testified to by the previous witnesses. Nor do we agree with the judge that the question did not relate to matters testified to on direct examination. Inspector Johnson was asked on direct if he talked to anyone at the mine during his inspection. He answered: "I talked with the — both the men [sic] that was operating the mantrip and the gentleman that was operating the [locomotive]." Tr. 122. This opened the door to Arch's later question on cross-examination concerning part of that conversation. *See United States v. Hitchmon*, 609 F.2d 1098, 1100-01 (5th Cir. 1979) (holding that trial judge improperly restricted cross-examination of subject matter raised on direct examination).

Finally, we conclude that the question on cross-examination was not covered by the informer's privilege. This privilege is codified in Commission Procedural Rule 61, which states that "[a] judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner." 29 C.F.R. § 2700.61. The privilege also protects the content of a communication if its disclosure would tend to reveal the identity of the informer. *Asarco, Inc.*, 12 FMSHRC 2548, 2554 (Dec. 1990). The informer's privilege, however, does not apply to the question on cross-examination because the operator already knew Cox's identity and that he had communicated with the inspector about the accident. Tr. 122, 142, 185; *see Roviaro v. United States*, 353 U.S. 53, 60 (1957) (holding that privilege does not apply if informer's identity is known); *Secretary of Labor on behalf of Gregory v. Thunder Basin Coal Co.*, 15 FMSHRC 2228, 2236 (Nov. 1993) (finding that informer privilege may be waived if person's identity as informer is known).

Although the judge erred when he sustained the objection, we conclude that his error was harmless. First, Vicini subsequently testified to what Cox said he did with the sanders at the bend immediately before the accident. Tr. 186, 201-02. Moreover, we do not believe that Cox's

out-of-court statements to Johnson could have overcome the credited testimony of Carter, Bolling, and Russell concerning Cox's use of the sanders, together with evidence about the condition of the sanders observed after the accident.

In sum, we conclude that, based on the testimony of the two MSHA inspectors that the sanders were not functioning properly before the accident, and the evidence provided by the four miners concerning what took place prior to the accident, the record as a whole contains substantial evidence to support of the judge's decision that Arch violated section 75.1403-6(b)(3) in the manner alleged.

B. Significant & Substantial

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

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).[8]

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[8] Commissioner Marks agrees that this violation is S&S. However, for the reasons set forth in his concurring opinions in *United States Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he continues to urge that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent. On February 5, 1998, MSHA issued a lengthy Interpretative Bulletin, setting forth a new agency interpretation of S&S and announcing that MSHA would challenge the Commission's narrow interpretation of S&S. 63 Fed. Reg. 6012 (1998). However, on April 23, 1998, MSHA suspended that Interpretive Bulletin with little explanation. *Id.* at 20,217. Commissioner Marks is curious as to MSHA's change in position on the S&S question and requests, as he has done so on numerous occasions,

We have already held that substantial evidence supports the judge's decision that Arch violated section 75.1403-6(b)(3). We reject Arch's argument that, because the judge only examined whether the violation contributed to the hazard of a collision but failed to examine whether its contribution was "significant and substantial," the judge erred in analyzing the second element. A. Br. at 18. In fact, the judge's careful delineation of the four *Mathies* elements, including his finding that the failure to properly maintain the sanders may have led to reduced traction and thereby contributed to the hazard of a collision, resulted in his ultimate conclusion that the violation significantly and substantially contributed to a hazard.

We also reject Arch's contention that, because the judge did not find that the violation caused the collision, he erred in determining that the second *Mathies* element was satisfied. *Id.* at 18-19. Under Commission precedent, the Secretary does not have to show that a violation caused an accident in order to prove that the violation is S&S. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987) ("In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event."). Finally, insofar as Arch's causation argument can be understood to challenge the judge's determination that the third *Mathies* element was established, we conclude that, based on Arch's failure to maintain the sanders and the mantrip's frequent trips on tracks with downgrades and curves, substantial evidence supports the judge's finding that a reasonable likelihood existed that the failure to maintain the sanders would result in an injury. 20 FMSHRC at 78.

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that the Secretary promptly advise him on this important issue.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision that Arch violated section 75.1403-6(b)(3) and that the violation was S&S.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 2, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 96-21-M
EASTERN RIDGE LIME, L.P	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Following an evidentiary hearing, Administrative Law Judge Avram Weisberger determined that Eastern Ridge Lime, L.P. ("Eastern Ridge"), violated 30 C.F.R. §§ 57.3360 and 57.3201 and that both violations were significant and substantial ("S&S") and resulted from Eastern Ridge's unwarrantable failure.[1] *See* 19 FMSHRC 398 (Feb. 1997). The judge assessed a total penalty of $85,000. *Id.* at 407, 409, 410. The Commission thereafter denied a petition for discretionary review filed by Eastern Ridge.

Subsequently, Eastern Ridge filed a petition for review in the United States Court of Appeals for the Fourth Circuit. In an unpublished decision, the court affirmed in part and vacated and remanded in part the Commission's decision. *Eastern Ridge Lime, L.P. v. FMSHRC*, No. 97-1579 (4th Cir. Apr. 13, 1998). The court upheld the findings of violation (slip op. at 5-6), but on a 2-1 vote concluded that the judge's S&S determinations were inadequately supported because, while the judge did not make a finding that the violations caused the fatal

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[1] The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is also taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation.

accident, he relied on the contribution of the violations to the accident in reaching his S&S determination. *Id.* at 6-7. Stating that the error "becomes most consequential in the ALJ's imposition of penalties," in that he relied on the high level of gravity of the violations in assessing the penalties, the court remanded this case "for further factfinding and analysis of the penalties to be assessed." *Id.* at 7.

On June 5, 1998, the court issued its mandate in this matter, returning the case to the Commission's jurisdiction. Pursuant to the Court's order, we remand this matter to the judge for further consideration consistent with the court's decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., SUITE 600
WASHINGTON, D.C. 20006

December 1, 1998

IN RE: CONTEST OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	: : :	MASTER DOCKET No. 91-1

ORDER OF DISMISSAL

The Commission has been advised that on November 5, 1998, the Mine Safety and Health Administration issued notices that citations have been vacated to all operators with cases pending under the Master Docket, a list of which is attached to this order.

Accordingly, it is **ORDERED** that all cases in the Master Docket are hereby **DISMISSED**.

Paul Merlin
Chief Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

December 2, 1998

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 93-77-R
	:	Citation No. 3109521; 11/09/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 93-78-R
	:	Order No. 3109522; 11/09/92
and	:	Docket No. WEVA 93-79-R
	:	Order No. 3109523; 11/09/92
UNITED MINE WORKERS OF AMERICA, (UMWA), Intervenor	:	Docket No. WEVA 93-80-R
	:	Order No. 3109524; 11/09/92
	:	
	:	Blacksville No. 1 Mine
	:	Mine ID No. 46-01867
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 93-146-B
	:	A.C. No. 46-01867-03938
and	:	
	:	Docket No. WEVA 93-146-C
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	A.C. No. 46-01867-03938
	:	Blacksville No. 1 Mine
v.	:	
	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, on behalf of the Secretary;
Judith Rivlin, Esq., United Mine Workers of America, Washington, D. C., on behalf of the Intervenor;
David J. Hardy, Esq., and William Miller, Esq., Jackson & Kelly, Charleston, West Virginia, on behalf of Consolidation Coal Company.

Before: Judge Melick

A methane explosion at the production shaft of the Consolidation Coal Company (Consol) Blacksville No. 1 Mine on March 19, 1992, caused the death of four miners and injuries to two others. Following an investigation, the Secretary of Labor issued citations and orders for alleged violations under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act." These proceedings, formerly consolidated under Master Docket WEVA 93-146-B, concern one of those citations and three of the orders issued by the Secretary to Consol and the civil penalties of $200,000 proposed by the Secretary for the violations charged therein. The general issue before me is whether Consol violated the cited regulatory standards and, if so, whether those violations were "significant and substantial" and/or the result of Consol's "unwarrantable failure" to comply with those standards. If violations are found it will also be necessary to determine the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

At the time of the explosion, the Blacksville No. 1 Mine was under the administrative control of Consol's Northern West Virginia Regional Office (Regional Office). Van Pitman was manager in charge of operations for the Regional Engineering Office within the Regional Office. Rodney Baird and Russell DeBlossio worked in the Environmental Quality Control Department within the Regional Engineering Office and were supervised by Edward Moore. Charles Bane was regional manager for safety in the Regional Office and John Yerkovich was his assistant. Donzel Ammons was vice-president for Blacksville operations under the Regional Office and had supervisory authority over operations at both the Blacksville Nos. 1 and 2 Mines. Daniel Quesenberry was Ammon's assistant. Robert Levo was superintendent of the Blacksville No. 1 Mine and Jack Lowe was its mine foreman.

In March 1992, the Blacksville No. 1 Mine was known to be liberating "excessive quantities of methane" as defined in Section 103(i) of the Act as it was liberating over one million cubic feet of methane in a 24-hour period. The mine ceased coal production in June 1991, and, in early 1992, was closing down. Activities at the mine during January through March 1992, therefore consisted primarily of maintenance, equipment withdrawal, supply recovery and coal loading from surface stockpiles and silos. The Department of Labor's Mine Safety and Health Administration (MSHA) was informed of Consol's intent to abandon the mine by Charles Bane's letter dated February 3, 1992 (Resp. Exh. No. 3). In that letter, MSHA was advised that the mine was in the process of withdrawing production equipment and that all the shafts would be sealed simultaneously after the underground areas of the mine had been vacated.

In February 1992, Consol officials decided to install an 800-foot-long dewatering pipe into the production shaft to prevent water from accumulating underground and from seeping into adjacent mines. The production shaft had been used to transport coal out of the mine by a skip hoist. According to the approved ventilation plan, the shaft had also been intaking 187,880 cubic feet of air per minute (cfm). The Regional Engineering Office was responsible for installing the pipe. Van Pitman, regional manager of engineering, directed Ed Moore, supervisor of environmental quality control, to arrange for its installation. Moore then contracted with independent contractor M.A. Heston to install the pipe and ordered the materials needed to complete the project.

Mine management was responsible for constructing a working platform over the shaft. Ammons decided to cap the production shaft before withdrawing from the mine in order to facilitate the installation of the dewatering pipe. He assigned the project to Quesenberry, his assistant, who arranged for independent contractor Forest Construction to perform the job. Leon Slough, a foreman for Forest Construction, was responsible for the actual construction of the cap.

Contact with MSHA on matters relating to ventilation plans normally went through Consol's regional safety office. Terry Palmer, coal mine inspector/ventilation, was the MSHA contact on ventilation matters for the Blacksville No. 1 Mine. John Yerkovich, Consol's regional safety inspector, verbally informed Palmer of the proposal to cap the production shaft. Palmer testified that he told Yerkovich that the change in ventilation which would result from capping the shaft would have to be approved by MSHA's district manager as a revision to the ventilation plan. Yerkovich testified on the other hand, that he was told by Raymond Strahin, also an MSHA ventilation inspector, that mere written notification of this change would be sufficient. Strahin denied making any such statement.

In any event, following his conversation with Palmer, Yerkovich submitted a letter to MSHA dated March 3, 1992, regarding the capping of the production shaft (Gov't Exh. No. 27). This letter did not indicate when the production shaft would be capped nor did it indicate that a welded dewatering pipe would be installed through the cap and into the shaft. Consol proceeded to build the cap over the production shaft without receiving any response from MSHA to the March 3, 1992, letter. Palmer later drafted a letter in response to the March 3rd letter for the signature of MSHA District Manager Ronald L. Keaton (Gov't Exh. No. 29). Although the letter was drafted the week before the explosion and was dated March 16, 1992, it was not actually mailed to Consol until March 19, 1992, after MSHA had been notified of the explosion.

Palmer recommended to Keaton that they seek additional information about capping the production shaft because it was unclear why Consol was deviating from its original plan to cap all the shafts at the mine. According to Bane's February 3, 1992, letter, Consol originally planned to cap all the shafts after the underground areas of the mine had been vacated (Resp. Exh. No. 3). Palmer believed that capping the shaft required approval by the district manager because it changed the information submitted in the ventilation plan as required by the regulations, then at 30 C.F.R. § 75.316. Specifically, on page five of the approved ventilation plan the production shaft was reported to intake 187,800 cfm of air (Gov't Exh. No. 26). Palmer believed that section 75.316 required MSHA approval of revisions to ventilation plans. The previous ventilation plan approval letter also included the notation that "all changes or revisions to the ventilation plan must be submitted and approved before they are implemented" (Gov't Exh. No. 26).

As noted, Consol arranged for Forest Construction to design and construct the cap for the production shaft and contracted with M.A. Heston to install the dewatering pipe into the shaft (Gov't Exh. No. 8). Consol had frequently used the services of these as well as other independent contractors. Indeed, all jobs done by Consol's Regional Engineering Department involved independent contractors. On this job, Forest Construction had hourly crews working exclusively for Consol, and Consol directed their work. Leon Shough, foreman for Forest

Construction also reported to Consol foreman John Carter on a daily basis. M.A. Heston also worked for Consol almost on a daily basis. They had previously worked many jobs for Consol. However, at the time Moore contracted with M.A. Heston for this job neither he nor DeBlossio was aware that M.A. Heston's employees had never taken methane examinations. In addition Michael Heston and James Heston, respectively, testified that M.A. Heston's employees did not have experience with mine ventilation and were not qualified to make methane examinations. Moore explained to Heston how the job would be done, including the configuration of the support structure, the preparation of the pipe segment, and how to seal the area around the 16-inch dewatering pipe to prevent welding sparks from entering the shaft.

Officials from Consol, Forest Construction and M.A. Heston conferred on methods to construct the cap to allow work to be performed over the production shaft and to support the weight of the dewatering pipe. Initially, Consol's Regional Engineering Department had suggested using a partial covering over the production shaft, permitting additional ventilation to enter the shaft. A fireproof partition was also suggested to prevent sparks from entering the shaft. This was a procedure used successfully at three other jobs. Donzel Ammons decided however to completely cap the shaft. Officials from regional engineering were not consulted on this decision and did not learn of it until the cap had already been installed. Vice president for Blacksville operations, Dan Quesenberry, who was involved in these early discussions, did not recall that any consideration was given to using a partial cap. The decision was made by Ammons.

The cap was built over the production shaft based on a standard design previously used by Consol (Gov't. Exh. No. 24). It was constructed of 1/4-inch steel plating welded onto six-inch I-beams with concrete over the top and down the sides. A 22-inch square opening was left in the center through which the dewatering pipe would be installed and a structure of 21-inch steel I-beams was built to support the installation of the 16-inch dewatering pipe. In addition, two six-inch diameter steel pipes were welded to the steel plate in the cap to provide ventilation of the production shaft. Each pipe projected three feet above the cap and was topped with a valve and a six-inch diameter plastic PVC pipe. The PVC pipes added 10 feet to one pipe and 8 feet to the other (See Gov't Exh. No. 34A). Additional ventilation of the production shaft would be provided by air entering around the dewatering pipe in the 22-inch opening.

Ammons (vice president of Blacksville operations) made the decision to utilize the two six-inch pipes for ventilation. This was standard procedure for capping a shaft the size of the production shaft when sealing an area of the mine and Ammons determined that these pipes would provide adequate ventilation. He relied upon his own experience. He did not consult with any of Consol's engineers or rely upon any simulations or studies. He did not know the methane liberation rate in the shaft nor how much air was intaking through the six inch pipes nor the velocity of that airflow. Ammons assumed that the air intaking through one six-inch pipe alone would have been sufficient to ventilate the production shaft. He had never been involved in a project such as this where welded pipe segments were installed through a cap. Other Consol officials including Quesenberry, Morrison, Pittman, Lowe, and Bane also acknowledged that they had never been involved in a similar project.

Ammons told Quesenberry that he wanted threaded pipe to be used for the dewatering pipe so there would be no welding over the shaft. He was concerned with igniting grease in the shaft. Although he maintained that he was not concerned with a methane ignition, he acknowledged that he was aware of the potential for methane in the shaft. Quesenberry later told the regional engineering office that he wanted threaded pipe used to avoid cutting and welding over the shaft. After meeting with regional engineering officials, Quesenberry understood that threaded pipe would be used. Quesenberry later learned that they intended to use welded pipe only after the pipe arrived at the mine. When Ammons learned that the pipe received was not threaded pipe, he told Quesenberry to have it returned. Ammons had also been uninformed that the regional engineering office had decided to use welded pipe rather than threaded pipe. When the pipe arrived, Ammons called Van Pitman, who explained to Ammons that threaded pipe would not hold the weight of the casing.

When Ammons assigned the capping job to Quesenberry he maintains that he instructed him to be sure to put two pipes in it and make sure everybody knew that those pipes were to be left open for ventilation. Ammons maintains that he therefore assumed that Quesenberry would have informed M.A. Heston's employees as well as Consol's personnel from regional engineering, the mine and the regional safety department of the necessity to keep the two pipes open. Ammons claims that he also told mine superintendent Levo that the two ventilating pipes were to remain open. He did not, however, personally ensure that those pipes were kept open and survivors who had been working at the production shaft testified that they were not informed of the importance of the pipes (Tr. 126, 205, 437, 508).

Quesenberry acknowledged, moreover, that he never informed M.A. Heston's workers about the purpose for the ventilation pipes. In addition he could not remember discussing this issue with Moore, Baird or DeBlossio. Quesenberry also could not recall whether Ammons told him to make sure that the people working on the job knew that those pipes were to remain open. Quesenberry maintains that he did not learn until after the explosion that one of the ventilation pipes had been cut off and plugged. He testified that if he had been present at the worksite and saw that one of the pipes had been closed, he would have stopped the work. He was shocked when he learned that one of the pipes had been cut.

During the week of March 9, M. A. Heston personnel began construction of the cap support structure and preparation for the first segment of 16-inch pipe. Consol regional engineering officials, primarily Moore, instructed M. A. Heston personnel on how to perform the work. According to Moore, Consol designed the 21-inch I-beam support structure based upon previous jobs. On Thursday, March 12, Forest Construction personnel began installing the steel framework for the production shaft cap. The 21-inch I-beam support structure was placed on top of the cap using Consol's crane. Concrete was then poured over the top of the metal portion of the cap and over the sides. The 21-inch I-beam support structure protruded above the concrete.

On March 13, Consol prevented the oncoming shift of underground personnel from entering the mine while the steel framework and decking for the production shift cap were installed over the shaft. Between 7:20 a.m. and 7:50 a.m., the effects of the ventilation change underground were evaluated by Consol personnel. The mine was deemed safe to enter and

miners then proceeded underground around 8:15 a.m. to 9:00 a.m., to continue removing mine equipment. The evaluation of capping the production shaft consisted of the same procedures as followed during a preshift examination and took approximately 30 minutes to complete. The fan charts on the surface were also checked. Those charts would not, however, have shown the effects of capping on the airflow within the shaft itself.

Placement of the cap over the production shaft reduced the airflow within the shaft from about 187,000 cfm to about 7,350 cfm (Gov't Exh's 53, pp 6-7 and 13, pp 19-20). Mine foreman Jack Lowe traveled underground to the bottom of the production shaft at around 11:00 a.m. He released a smoke cloud from a smoke tube into the bottom of the shaft and observed the smoke travel toward himself, indicating a drift of airflow down the shaft. He did not measure the velocity of this airflow. After the cap was installed over the production shaft, three openings remained in the cap--the two 6-inch diameter pipes and the one 22-inch diameter opening. All three openings were initially intaking air into the production shaft.

There is no evidence that any evaluation was done to determine what effect the capping of the production shaft had on the air flow within the shaft itself. While Consol officials Moore and DeBlossio testified that they believed that two 6-inch pipes would provide adequate ventilation for the production shaft they admittedly did not know the amount of air intaking through the pipes and did not know the amount of methane being liberated into the shaft. DeBlossio and Mine Superintendent Levo also both acknowledged that such information would be necessary to determine the adequacy of the ventilation in the shaft. Indeed, Levo testified that a reasonably prudent mining engineer would want to know the amount of air intaking through the pipes to make a determination of whether the ventilation was adequate.

Environmental Engineer Rodney Baird and Environmental Technician Russell DeBlossio, from Consol's Regional Engineering Department, were assigned to oversee the installation of the dewatering pipe. Baird was at the worksite on Thursday, March 19, and was killed in the explosion. DeBlossio was at the worksite on Monday and Wednesday but was not present at the time of the explosion. Baird was certified to make methane examinations and had a working methane detector in his truck at the worksite. However, neither Baird nor DeBlossio had any experience in underground ventilation. DeBlossio was even unaware that the Blacksville No. 1 Mine was considered to be a gassy mine.

DeBlossio testified that he and Baird spent the better part of the day, on both Monday and Wednesday, at the production shaft. Although they were present to basically monitor job progress, both DeBlossio and Baird participated in the physical labor. They helped line up the pipe when a new segment was lifted over the shaft and helped place the Thermoglass cloth around the pipe. DeBlossio testified that he believed that he had the authority to stop work if he thought that M.A. Heston's employees were performing unsafely.

On Monday, March 16, M. A. Heston's employees arrived at the mine to organize materials and set-up the worksite for the installation of the 16-inch casing into the production shaft. M.A. Heston employees began installing the 16-inch casing on Tuesday, March 17, following the procedures depicted in Government Exhibit No. 15. This installation process was

conceived by Consol based upon previous jobs. These procedures were followed on March 18, and continued until the explosion at approximately 10:18 a.m., on March 19.

The first joint of 16-inch casing had been plugged to prevent welding sparks from entering the shaft through the pipe. As each new length of pipe was added, the area around the pipe was sealed with two steel plates cut to fit around it and then with layers of Thermoglass cloth, to prevent welding sparks from entering the shaft around the pipe (Gov't Exh. No. 15 Drawings 2-7). The steel plates and Thermoglass cloth would be positioned around the casing just before the weight of the casing was placed on the support structure. While these procedures were designed to prevent sparks and hot materials from the welding process from igniting grease and dust in the shaft, Consol officials were also aware of the potential for methane in the shaft. The 6-inch ventilation pipes were incorporated into the cap in order to provide ventilation which was intended, at least in part, to dilute methane in the shaft. With the plugged 16-inch casing in place and the steel plates and Thermoglass cloth covering the area around the 16-inch casing, the airflow within the production shaft was reduced to approximately 790 cfm (Gov't Exh. No. 13, pp 21-22).

On Tuesday, March 17, Rodney Baird and M. A. Heston employees cut off one of the 6-inch vent pipes in the cap because it was interfering with the placement of the 16-inch dewatering pipe segments over the cap, thereby leaving 6 to 12 inches of the vent pipe extending above the cap. A ball of either Thermoglass cloth or burlap was then placed inside the pipe and a second piece of the material was then wrapped over top of the pipe and wired in place thereby sealing it. With only one of the 6-inch vent pipes intaking air into the production shaft, the airflow within the shaft was then reduced to only about 400 cfm (Gov't Exh. No. 13, pp 22-23; Gov't Exh. No. 53, p 11).

Levo visited the production shaft site on several occasions while the work was progressing. On one of those occasions, he observed that one of the two vent pipes was closed. According to Levo, Baird explained that they were having trouble swinging the segments of 16-inch pipe into position because the vent pipe was in the way. They discussed cutting the pipe and installing a coupler on the pipe. Levo could not recall whether he told Baird of the importance of keeping the pipe open.

Later that day, Levo received a call, possibly from Baird, requesting that a guillotine saw be brought to the production shaft to cut the vent pipe. Levo instructed Leon Shough to deliver the saw to the production shaft. Levo knew that the saw was to be used to cut off one of the vent pipes, but thought that a valve would be installed to allow the pipe to remain open. He never inquired, however, to determine whether such a valve had been installed and he never instructed Baird to reopen the pipe. Levo assumed that Baird would know enough to reopen the pipe but did not know whether Baird had training or experience with ventilation matters. Baird's supervisor, Edward Moore also knew that one of the 6-inch vent pipes was cut and either covered or plugged.

Installation of the dewatering pipe proceeded all day on Wednesday, March 18, from around 7:00 a.m. to 7:00 p.m., and resumed at approximately 7:30 a.m., on Thursday. Baird and

DeBlossio were present at the production shaft for most of the day on Wednesday. Approximately 12 segments of pipe were installed by Wednesday afternoon. One welder was working at the production shaft on Wednesday. The same procedures were followed on Thursday but two welders were working. The addition of the second welder reduced the time needed to complete a joint from about 40 minutes or an hour to about 25 minutes.

Around 10:18 a.m., on March 19, there was a methane explosion in the production shaft, completely destroying the cap and damaging large portions of the shaft coping and the lower support structure of the head frame. Overcasts, cribs, stoppings, and the rotary dump in the underground areas within 100 feet of the shaft were also damaged. Rodney Baird, Frederick Heston, Donald Glaspell, and Robert Moran, who were working on or around the production shaft cap, were killed and James Heston and Gordon Lawson were injured.

Both the Secretary's expert, John Urosek, and Consol's expert, Donald Mitchell, concluded that, at the time of the explosion, the airflow in the production shaft beneath the cap had been reduced to no more than 400 cfm (Gov't Exh. No. 53, p 7 and 56, p 10). While it is not disputed that one of the two 6-inch ventilation pipes had been sealed, it is unclear whether the second ventilation pipe was open and intaking air at the time of the explosion. Both experts agree however that the amount of air flowing through one six-inch pipe, about 400 cfm, would not have been sufficient to dilute and render harmless the methane being liberated from around the shaft (Gov't Exh. No. 53 p.11 Tr. 2276)

Citation No. 3109521

This citation, issued pursuant to section 104(d)(1) of the Act, charges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.301 (1991) and alleges, in essential part, as follows:[1]

> The volume and velocity of air was not maintained in sufficient amounts to render harmless and to carry away explosive gases. An explosive methane/air mixture was allowed to accumulate in the production shaft which is a portion of the active workings of the Blacksville No. 1 Mine. The mine has a known history of

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[1]/ Section 104(d)(1) of the Act provides as follows:
If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if, he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

methane liberation and, in addition, methane was being liberated from within the shaft itself.

* * * *

On March 19, 1992, the methane accumulation was ignited as M. A. Heston, Inc., employees performed welding operations during the installation of the 16-inch casing. This violation was determined from information gathered during the investigation of the explosion at the production shaft of the Blacksville No. 1 Mine that occurred on March 19, 1992, which resulted in four fatalities.

The cited standard, 30 C.F.R. § 75.301 (1991), provided in relevant part as follows:

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases: and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes.

Respondent argues that there was no violation of the cited standard because the production shaft at issue was not within the "active workings" of the mine. It is undisputed that the ventilation requirements set forth in 30 C.F.R. § 75.301 (1991), indeed, apply only to "active workings" of an underground coal mine. The term "active workings" was defined at 30 C.F.R. § 75.2(g)(4) (1991) as "any place in a coal mine where miners are normally required to work or travel."

There is no evidence in this case that any person worked or traveled or normally worked or traveled in the production shaft after the shaft was capped on Friday, March 13, 1992. The Secretary nevertheless argues that it is sufficient that miners were working and traveling above and below the shaft and that the dewatering pipe, on which the miners above were working, extended into the shaft. In other words, the Secretary interprets the words "above" and "below" to mean "in." It is well established however, that 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 an absurd result. *Dyer v. United States,* 832 F.2d 1062, 1066 (9th Cir. 1987); see also *Utah Power & Light Co.,* 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). The Secretary nevertheless maintains that her interpretation is "reasonable" and therefore is entitled to deference. However, since there is no ambiguity in regard to use of the term "in," the doctrine of deference is inapplicable. In any event, one would be hard pressed indeed to find the Secretary's proffered interpretation to be reasonable.

Under the circumstances the Secretary has failed to sustain her burden of proving the elements of a violation of the cited standard and the citation at bar must accordingly be vacated.

This order, also issued pursuant to section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1112(b) (1991) and charges in essential part as follows:

> Consolidation Coal Company (Consol) did not perform or require methane examinations at the capped Production shaft where M. A. Heston, Inc., an independent contractor (I.D. B48), was performing welding operations. M. A. Heston, Inc. employees were positioned on top of the shaft cap performing welding operations during the installation of a 16-inch casing on March 17, 18, and 19, 1992. The welding operations was observed by various Consol management personnel. Also, a Consol Environmental Engineer was present at the worksite nearly continuously observed by various Consol management personnel. Also, a Consol Environmental Engineer was present at the worksite nearly continuously on the 17th and 18th and had arrived at the Production shaft site on the 19th. The Consol Environmental Engineer directly participated in the working being performed by M. A. Heston, Inc. employees. A methane detector that had been issued to and was in the possession of the Consol Environmental Engineer was available at the worksite. No one conducted or required examinations for methane at any time.
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> * * * *
>
> The Production shaft had been capped on March 13, 1992. The 16-inch casing and other ventilation restrictions were introduced into the cap openings on March 17, 1992. Calculations indicate that the ventilation of the shaft was significantly reduced from approximately 200,000 cubic feet of air per minute (cfm) to approximately 400 cfm. The mine has a known history of methane liberations and, in addition, methane was being liberated form within the shaft itself. This violation was determined from information gathered during the investigation of the explosion at the Production shaft of the Blacksville No. 1 Mine that occurred on March 19, 1992, which resulted in four fatalities.

The cited standard 30 C.F.R. § 77.1112(b), (1991) provides as follows:

> Before welding, cutting, or soldering is performed in areas likely to contain methane, an examination for methane shall be made by a qualified person with a device approved by the Secretary for detecting methane. Examinations for methane shall be made immediately before and periodically during welding, cutting, or soldering and such work shall not be permitted to commence or continue in air which contains 1.0 volume per centum or more of methane.

Consol maintains that there was no violation of the cited standard because: (1) methane was not likely to accumulate at the location where welding was actually performed, i.e., above the cap, and (2) welding was not performed below the cap, i.e., the area that was likely to contain

methane on Thursday, March 19, 1992. Consol's reading of the standard is however unreasonably narrow and would clearly defeat the underlying purpose of the standard. As the Secretary correctly observes, the clear purpose of the standard is to prevent welding operations from igniting methane. Accordingly the methane examinations required by that standard must appropriately be made in areas within the range or zone of likely ignition from such welding and, in this case, including the area beneath the cap.

The Secretary has in this case established, and it appears to be undisputed, that the area beneath the cap was an area likely to contain methane under conditions that existed on March 19, 1992. The methane explosion itself is *prima facie* proof of this. From air readings taken at the production shaft after the accident, laboratory experiments and computer simulations, the Secretary's ventilation expert, mining engineer John Urosek, determined that with only one of the six-inch pipes intaking air into the shaft, the volume of air was approximately 400 cfm (Gov't Exh No. 13, 53). This is corroborated by Consol's expert in mine fires and explosions, Donald Mitchell, who agrees that MSHA's analysis of the quantities of air passing into the production shaft was fairly accurate (Respondent's Exh's No. 56 p. 9). Urosek testified that an air flow of approximately 400 cfm correlates to an average velocity of approximately one-foot per minute (Gov't Exh. No. 13 p 23 and Gov't Exh. 53 p. 11). Urosek opined that such an air flow was inadequate to dilute, render harmless and carry away methane being liberated from the shaft. As a result, it may reasonably be inferred that once one of the six-inch vent pipes was closed, methane, which is lighter than air, had begun accumulating under the cap.

Mitchell corroborates Urosek in acknowledging that, with only one of the six inch pipes intaking air, there was a potential for explosive concentrations of methane to accumulate beneath the cap (Tr. 2169, 2276). Mitchell determined that, with one-six inch vent pipe open, the average concentration of methane immediately beneath the cap was 4.1 percent. Mitchell acknowledged that this was not an acceptable concentration of methane (Respondent's Exh. 9 at page 6, Tr. 237). In addition, Mitchell agreed that the atmosphere beneath the cap was not a homogenous methane/air mixture. Thus, it may reasonably be inferred that there were likely to be areas beneath the cap with concentrations of methane within the explosive range of five to fifteen percent (Tr. 2275). Significantly, the cited standard applies not merely to areas likely to contain explosive levels of methane but to areas containing any methane.

I further find that the area beneath the cap (an area likely to contain methane) was within the area or zone affected by welding above the cap. In this case such welding could have provided an ignition source for methane below the cap by an electrical arc from a welding machine improperly grounded above the cap to a steel "I" beam. The "I" beam extended below the cap into the methane atmosphere. Indeed Consol's expert, Donald Mitchell, agreed with the Secretary that the ignition source for the methane explosion in this case was most likely the improper grounding of the second welding machine onto one of the "I" beams extending under the cap. Accordingly, under the cited standard, methane examinations were required to be performed in the area immediately below the cap.

Consol appears to further argue that, while it admittedly failed to make methane examinations in the area beneath cap, such examinations were not feasible and, even if feasible,

would not produce accurate results. Consol however has the burden of proving the infeasibility or impossibility of compliance with the standard and has failed in this burden. The feasibility of performing methane examinations beneath the cap was in any event credibly established at hearing, e.g. by the use of an extendable probe (Tr. 846, 2018) or flexible tubing which could have been lowered into the shaft (Tr. 515, 2022; Gov't Exh No. 55), or by using sampling pipes incorporated into the cap. (Tr. 2021). Moreover, speculation concerning the potential accuracy of such tests is no defense to the failure to take such tests. The violation is accordingly proven as charged.

The Secretary maintains that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984) the Commission explained:

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

There can be no dispute that the violation of failing to conduct methane examinations beneath the cap before and during welding operations in this case was a "significant and substantial" violation and of the highest gravity.

The Secretary also maintains that the violation was the result of Consol's "unwarrantable failure" to comply with the cited standard. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corporation,* 9 FMSHRC 1997 (December 1987). It is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." Id. at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). Relevant issues therefore, include such factors as the extent of a violative condition, the length of time that it existed, whether an operator has been placed on notice that greater efforts are necessary for

compliance, and the operator's efforts in abating the violative condition. *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994).

This mine was a known "gassy" mine and Consol officials admitted that they knew methane could be liberated into the production shaft. While Consol was accordingly negligent in failing to perform methane examinations beneath the cap I do not find that such negligence rises to the level of unwarrantability. First, it could reasonably have been perceived that methane was not likely to accumulate above the cap so that not testing at that location would not be violative. Second, it could also have been perceived, although incorrectly, that the welding was to be performed in a separate and discrete area above, and separated by, the concrete cap. Third, methane examinations were in fact performed at the bottom of the shaft where several Consol witnesses reasonably and in good faith believed (because of the direction of airflow into the shaft) would be the location where methane from within the shaft, if it existed at all, would have been detectable. Finally, the most likely ignition source in this case, an electrical arc from an improperly grounded welding machine, was not an obvious source of ignition.

Order No. 3109523

This order, also issued pursuant to section 104(d)(1) the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.316, (1991) and charges as follows:

> The approved ventilation system and methane and dust control plan for this mine was not followed in that a major change in ventilation was made without the approval of the MSHA District Manger. This change occurred on March 13, 1992, when the Production shaft was capped. The capping operation included the forming of a 22-inch opening in the cap to facilitate the placement of a 16-inch diameter casing into the shaft and also included the installation of two 6-inch diameter pipes.
>
> The placement of the cap reduced the ventilation of the shaft to the amount entering through the two 6-inch diameter pipes and through a 22-inch diameter hole in the cap. Calculations indicate that the airflow in the shaft was reduced from approximately 200,000 cubic feet of air per minute (cfm) to approximately 7,500 cfm. Mine officials treated the capping operation on March 13, 1992 as a major ventilation change by removing all personnel from the mine during the capping operations except those persons necessary to evaluate the change. The placement of the cap on the Production shaft was followed on March 17, 1992 by the preplanned installation of the 16-inch diameter casing onto the 22-inch opening in the cap and the subsequent cutting-off and plugging of one of the 6-inch pipes. These two actions further reduced the airflow through the Production shaft and allowed an explosive methane/air mixture to accumulate in the shaft where work was being performed on top of the shaft cap and in underground areas of the mine. This violation was determined from information gathered during the investigation of the explosion at the Production shaft of the Blacksville No. 1 Mine that occurred on March 19, 1992, which resulted in four fatalities.

The cited standard, 30 C.F.R. § 75.316, (1991) which tracks section 303(o) of the Act, provides in relevant part that: "[a] ventilation system and methane and dust control plan and revisions thereof suitable to the conditions of the mining system of the coal mine and approved by the Secretary shall be adopted by the operator." The regulation further requires that "[t]he plan shall show ... such other information as the Secretary may require." It is also noted that when the extant ventilation plan was approved, the accompanying letter sent to Consol stated that "[y]ou are reminded that all changes or versions to the ventilation plan must be submitted and approved before they are implemented."

While acknowledging that it did not obtain approval from the Secretary before capping the production shaft, Consol maintains that there was no violation of the cited standard because it was not in fact required to obtain the Secretary's approval for ventilation changes resulting from capping the production shaft. Consol argues that MSHA enforcement practices in March 1992, and its own prior dealings with the MSHA District 3 ventilation enforcement official, resulted in its reasonable and good faith belief that approval by the MSHA district manager was not required before capping the production shaft. There is indeed credible evidence that, as a general rule, approval by the MSHA district manager had not previously been required prior to the capping of mine shafts when the mine was being sealed. This case is clearly distinguishable however since the shaft here at issue was not sealed but remained partially open to allow the insertion of a dewatering pipe and to continue intaking air for ventilation. MSHA's prior practice regarding the sealing of mine shafts is therefore inapplicable hereto.

Most significantly, however, the Secretary has proven by a preponderance of credible evidence that a responsible agent of Consol, John Yerkovich, who was assistant to the regional manager for safety of Consol's Northern West Virginia Regional Office, was specifically informed that MSHA approval would be required before capping the production shaft. The evidence shows that contact with MSHA on matters relating to ventilation plans ordinarily went through Consol's Regional Safety office and that MSHA inspector Terry Palmer was the contact at MSHA on ventilation matters for the Blacksville No. 1 Mine. As previously noted, John Yerkovich told Palmer of the proposal to cap the production shaft. Palmer testified that he told Yerkovich that the change in ventilation which would result from the capping of the shaft would have to be approved by the MSHA district manager as a revision of the ventilation plan. While Yerkovich testified that he was told by Raymond Strahin, also an MSHA ventilation inspector, that written notification would be sufficient, I do not find this testimony credible. Both Palmer and Strahin denied at hearing that Yerkovich was told that written notification was sufficient and Yerkovich in his own deposition contradicts his testimony at hearing. The following colloquy from his deposition demonstrates this contradiction:

Q. But in your conversation with Mr. Palmer and Mr. Strahin, is that right, Strahin?-

(Deponent indicating)

Q. - they indicated to you in no uncertain terms that they though that you needed prior approval; is that right?

A. That's correct.

Q. Which would have indicated that you needed a response before the job could go forward?

A. If I agreed to what they were saying, that's correct.

Q. Did you express to Mr. Ammons that the MSHA inspectors had said that to you?

A. Yes ma'am.

Q. What was his response?

A. He agreed with me.

* * * *

Q. I may have misheard before, but I heard you say you communicated to Mr. Ammons the MSHA sense that this was to be communicated to MSHA, correct?

A. I told Mr. Ammons that they had requested me to submit something for approval, that the cap was going to be put on the shaft.

* * * *

Q. So you clearly made it clear to Mr. Ammons that it was their opinion this needed to be approved by MSHA, Since that this was to be communicated to MSHA, correct?

A. Yes sir, I believe I said that before.

Q. You certainly understood that to mean approval before the cap, not after the cap, didn't you?

A. Well, any time you apply for approval it means before. (Gov't Exh. No. 52, pp. 83-84, 108-09)

In addition, Yerkovich never stated in his deposition that he was told by Strahin that written notification was sufficient. Significantly, Yerkovich also admitted at hearing that he told both Ammons and Bain that MSHA's position was that prior approval for capping the production shaft was required (Tr. 1219, Gov. Exh. No. 51 p. 128). This testimony further undermines Yerkovich's denials that he was told that prior approval for capping the production shaft was required. I therefore find that Consol, through its agent, John Yerkovich, was specifically placed on notice that capping the production shaft was a revision to the ventilation plan therefore requiring prior submission of plans and MSHA approval for the capping. Under the circumstances, Consol's deliberate failure to have submitted plans for capping the shaft and proceeding to cap the shaft without such approval, constituted a violation of the cited standard.

It is reasonably likely that Consol's action in capping the shaft without prior review of such action by MSHA would lead to the inadequate ventilation of the production shaft and a fatal

methane explosion. The violation was therefore of high gravity and "significant and substantial." Since I find that an agent of Consol was directly and specifically told of the necessity of obtaining MSHA's prior approval for the capping job and that Consol deliberately disregarded this directive, operator negligence was of a particularly aggravated nature showing reckless disregard. The violation was clearly therefore the result of Consol's gross negligence and "unwarrantable failure" to comply.

Order No. 3109524

This order, also issued pursuant to section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.322, (1991) and charges as follows:

> Consolidation Coal Company (Consol) conducted a change in ventilation on March 13, 1992 and again on March 17, 1992. The changes had a cumulative effect which materially affected the split of air ventilating the Production shaft. Miners were allowed to work before the effects of the changes were fully ascertained by mine management or a certified person.
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> On March 13, 1992, Consol directed the Production shaft to be capped. The capping of the shaft reduced ventilation in the shaft to the amount entering through two 6-inch diameter pipes and through a 22-inch diameter hole in the cap. Calculations indicate that the airflow in the shaft was reduced by the placement of the cap from approximately 200,000 cubic feet of air per minute (cfm) to approximately 7,500 cfm. Mine officials treated the capping operation on March 13, 1992 as a major air change. All electric power was removed from the affected area during the capping operation. Consol evaluated the ventilating changes underground: however, Consol did not evaluate the change to the air split ventilation the Production shaft itself before allowing miners to return to work.
>
> On March 17, 1992, Consol directed a second material change to the air split ventilating the Production shaft when a plugged length of 16-inch diameter casing was installed through the 22-inch diameter hole in the Production shaft cap and the remaining portion of the 22-inch diameter hole was sealed. In addition, one of the 6-inch diameter pipes was cut off and sealed. Calculations indicated that the changes made on March 17, 1992 reduced the ventilation of the Production shaft from approximately 7,500 cfm to approximately 400 cfm. The March 17, 1992, change was conducted while miners were working underground and on top of the capped Production shaft. Consol did not make an evaluation of the split of air ventilating the Production shaft following the changes made on March 17 and miners were permitted to continue to work both underground and on the Production shaft cap following the change.
>
> The mine has a known history of methane liberation and, in addition, methane was being liberated from within the shaft itself. Consol's failure to determine that the Production shaft had a significant methane liberation rate and

whether the shaft was adequately ventilated following the ventilation changes allowed an explosive methane-air mixture to accumulate undetected in the shaft while work was being performed on the shaft cap and in the underground mine. On March 19, 1992, the methane accumulation was ignited as employees of M. A. Heston, Inc., an Independent contractor, performed welding operations during the installation of the 16-inch casing through the Production shaft cap. This violation was determined from information gathered during the investigation of the explosion at the Production shaft of the Blacksville No. 1 Mine that occurred on March 19, 1992, which resulted in four fatalities.

The cited standard, 30 C.F.R. § 75.322, (1991), which tracks section 303(u) of the Act, provides as follows:

> Changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when then the mine is idle. Only those persons engaged in making such changes shall be permitted in the mine during the change. Power shall be removed from the areas affected by the change before work starts to make the change and shall not be restored until the effect of the change has been ascertained and the affected areas determined to be safe by a certified person.

The requirements of Section 75.322 are applicable when both parts of the first sentence of the standard are met, i.e., the change must materially affect a split of air and it must affect the safety of persons in the mine. There is no dispute in this case that the reduction of airflow within the production shaft affected the safety of persons in the mine. It is the first part of the standard, requiring that the change in ventilation "materially affect the main air current or any split thereof" that is at issue.

The order at bar charges in essence that Consol made ventilation changes on March 13 and on March 17 that materially affected the split of air ventilating the production shaft and that miners were allowed to work before the effect of the changes was fully evaluated.[2] It is undisputed that on March 13, the cap over the production shaft was completed and that this change reduced the airflow in the production shaft from approximately 187,000 cfm to approximately 7,350 cfm. It is further undisputed that on March 17, the plugged 16-inch casing was inserted into the 22-inch hole in the cap and sealed with steel plates and Thermoglass cloth. In addition, on that date one of the two 6-inch diameter vent pipes was cut and stuffed with Thermoglass cloth or some other material which caused a further reduction of air flow within the production shaft to approximately 400 cfm.

[2]While Consol expressed some disagreement in its post-hearing brief that the Production Shaft could be characterized as a "split" of air, even its own vice-president for the Blacksville operations, Donzel Ammons, conceded that it was a "split" of air.

Consol argues, in essence, that the ventilation changes on March 13 and March 17 must be considered separately not cumulatively and that the March 17 reduction in airflow from about 3,750 cfm to about 400 cfm did not materially affect the split of air ventilating the production shaft. The term "materially" is not defined in the Act or pertinent regulations. It is defined, as relevant hereto, in Webster's New Third International Dictionary (unabridged) as "to a significant extent or degree." By application of this common definition it is clear that a reduction in airflow from approximately 7,350 cfm to 400 cfm, more than a 94% percent reduction, would have affected the airflow in the production shaft to a "significant degree." Indeed, even Consol's expert witness, Donald Mitchell, agreed that the reduction from 7,350 cfm to 400 cfm was a large reduction and would have a material affect (Tr. 2302, 2309). Within this framework of evidence, it is clear that Consol was therefore required to follow the procedures set forth in the cited standard following the reduction in air flow on March 17, 1992. When it failed to do so it was in violation of that standard.

In reaching these conclusions I have not disregarded Consol's claims that the reduction on March 17, was not material because the change was less than 9,000 cfm. Consol relies in part upon MSHA's Program Policy Manual relating to §75.322, which provides as follows:

> Any ventilation change in which any split of air is to be increased or decreased by an amount equal to or in excess of 9,000 cfm shall be made only when the mine is idle. Before mine power can be restored in all areas affected by such ventilation changes, an examination is required in accordance with Section 75.303.

While this language does provide that any change of 9,000 cfm or more triggers the requirements of the standard it clearly does not preclude application of the standard to ventilation changes of less than 9,000 cfm. Consol further relies, in support of its argument herein, upon statements by MSHA Inspectors Palmer, Sperry and Dinning and former MSHA subdistrict manager William Reid, that they considered 9000 cfm as the threshold for triggering the applicability of §75.322. However, each of these individuals except Sperry clarified that, depending upon the circumstances, the requirements of §75.322 may also apply to ventilation changes of less than 9,000 cfm (Tr. 1164, 1175, 1414, 1538, 1856). While there is also some disagreement among Consol witnesses, both Bane and Wooten admitted that the purpose of the standard, to prevent exposure to potentially hazardous conditions resulting from ventilation changes, may be furthered even when an air change is less than 9,000 cfm (Tr. 1718, 1799).

Under the circumstances however, I conclude that the provisions Section 75.322 were triggered on March 17, so that all persons other than those making the changes were required to be removed from the mine, the power removed from the affected areas and the effects of the change ascertained. Consol's failure to follow these procedures constituted a violation of the cited standard. The violation was, under the facts at bar, also clearly "significant and substantial" and of high gravity.

I do not find however, that the violation was the result of unwarrantable failure. The Secretary argues that several Consol officials (including Levo, Moore, DeBlossio and Baird), were aware that one of the 6-inch vent pipes had been cut. It may also reasonably be inferred

that Baird and DeBlossio also knew that the pipe had been sealed, thereby limiting the ventilation of the shaft. The Secretary further argues that Consol officials failed to notify those actually working on the project presumably including Baird and DeBlossio, of the importance of the two vent pipes, and that this failure constituted aggravated conduct amounting to unwarrantable failure. However, because four of the miners working on the project were killed, the Secretary cannot sustain her burden of proving what was communicated to those miners or what knowledge those miners had regarding the importance of the vent pipes. Her argument herein is therefore without the necessary evidentiary support. Consol was not, however, without negligence because of its failure to maintain the level of supervision and control warranted by the activities at the production shaft.

Civil Penalty Assessments

In assessing a civil penalty under Section 110(i) of the Act, consideration is to be given to the operator's history of previous violations, the appropriateness of the penalty to the size of its business, the effect on the operator's ability to continue in business, good faith abatement, negligence, and gravity. Consol is a large company and there is no evidence that its ability to continue in business would be affected by a penalty as high as that proposed by the Secretary. The Secretary acknowledges that all charging documents were satisfactorily abated. The gravity and negligence relating to these violations have previously been discussed. Within this framework of evidence I assess the civil penalties set forth in the Order below.

ORDER

Citation No. 3109521 is hereby vacated. Order No. 3109522 is modified to a "significant and substantial" citation under Section 104(a) of the Act and Consolidation Coal Company is directed to pay a civil penalty of $10,000 for the violation charged therein. Order No. 3109523 is modified to a citation under Section 104(d)(1) of the Act and Consolidation Coal Company is directed to pay a civil penalty of $50,000 for the violation charged therein. Order No. 3109524 is modified to a "significant and substantial" citation under section 104(a) of the Act and Consolidation Coal Company is directed to pay a civil penalty of $10,000 for the violation charged therein.

Gary Melick
Administrative Law Judge

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 8, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 97-284-M A.C. No. 24-01501-05510
v.	:	
STS GRAVEL, Respondent	:	STS Gravel

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
John M. Kauffman, Esq., Kasting, Combs & Kauffman, P.C.,
Bozeman, Montana,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges STS Gravel with four violations involving the brakes on a rubber tired front-end loader. Three of the citations allege a violation of 30 C.F.R. § 56.14101(a) and the fourth citation alleges a violation for failure to report the defects in the braking system that are cited in the first three citations. The total proposed penalty for these 4 violations involving the brakes on the 980-B front-end loader is $12,500.00.

The STS Gravel Mine is a multiple bench open pit sand and gravel operation located near Livingston, Park County, Montana. It is owned and operated by Larry Stands. Mr. Stands is a working owner-operator and had only one other employee who did actual mining work rather than indoor clerical work. Thus, STS Gravel is essentially a small two-man mining operation consisting of the working owner operator, Mr. Stands, and the decedent Mr. Beagle.

Basically, the accident involved a rollover of a front-end loader as it traveled in first gear down the grade of the cut into the gravel pit. Mr. Beagle, the operator of the front-end loader, involved in the accident had been repeatedly driving the loader down into the pit and extracting material from the pit which he then transported and fed to the crusher. Tracks could be seen where the loader had proceeded down the cut into the pit. The accident occurred at the steepest grade near the bottom of the cut when the right front tire of the loader hit and climbed the wall of the pit as the left front tire continued to travel down the decline. The action of the right front wheel climbing the pit wall and the left front wheel continuing down the decline caused the loader to turn over on its left side. It is undisputed that the loader was traveling forward in first gear and that the maximum speed of the loader in first gear is 4 to 5 miles per hour.

Two days after the accident, MSHA inspected the braking system on the front-end loader and found inadequate service brakes and parking brakes. MSHA also found a small air leak in the diaphragm of the air-activated service brake mechanism, and also found a low air pressure warning device located on the instrument panel of the loader was nonfunctional. The purpose of the warning device was to indicate to the operator that the air pressure of the braking system was dropping. If it continued to leak and the air pressure dropped below a certain point (40 psi), it would activate the parking brake in a manner that would "halt" the loader.

It is the operator's contention that the accident was not caused by the defects in the braking system but by the fact the operator of the loader, who was in poor health, was unconscious or severely distracted and for this reason, failed to steer the loader that was traveling in first gear at only 4 or 5 miles per hour in a manner that would have avoided striking the pit wall and, thus, would have easily avoided the accident.

Respondent entered in evidence the reports and testimony of the Park County undersheriff Henry Tashijian and the testimony and report of the deputy coroner, Mr. Mike Fitzpatrick. The report and testimony of both of these officers tend to support Respondent's contention that the defects in the braking system was not the cause of the accident.

The report of the county undersheriff (Res. Ex. F-2) states in part:

> Faint tracks could be seen where the loader proceeded down into the pit at approx. 20-30 degrees to the wall of the pit, causing the right tire of the loader to climb the wall, which overturned the loader. The accident appeared to have happened at slow speed as there were no marks made by the loader to indicate that it had rocked or bounced after it overturned, or that it hit the wall at a high rate of speed. It also appeared that Beagle was unconscious after the loader came to rest, as the position of one of his arms was on the door frame, and any movement of Beagle trying to extricate himself or just the movement of his arm would have left visible marks in the dust on the frame. It appears that no action was taken

> by Beagle (steering, dropping the bucket) to avoid hitting the wall or stopping the loader. I had Stands explain the gear shift pattern on the loader to me before I had him check (with me present) to see what gear the loader was in. The loader was in first gear, forward.

The report of Mr. Fitzpatrick, the deputy coroner, (Res. Ex. E) states in part:

> The physical evidence at the scene indicated there was no speed or erratic action of the loader. It appeared the operator was completely distracted or possibly unconscious at the time of the accident. Due to the appearance of no action taken by the operator to steer off the bank or later to try to extract himself from the loader, I believe the operator was unconscious at the time of the accident and died at the scene of mechanical asphyxiation.

The coroner's report states that the autopsy by the county coroner revealed that there were no external or internal injuries. It is also undisputed Mr. Beagle had one lung and part of the right rib cage surgically removed prior to the accident. His remaining lung showed some signs of emphysema. Due to his diminished capacity to breathe and the position his body was in after the accident, the coroner concluded that Mr. Beagle's death was caused by mechanical asphyxiation.

STIPULATIONS

Stipulations entered into the record at the request of the Respondent are as follows:.

A. STS Gravel operates a gravel quarry near Livingston, Montana.

B. On or about October 11, 1996, it was issued citations by the Mine Safety and Health Administration, and that these citations are 7921013, 7921014, 7921015 and 7921016.

C. Prior to the accident, Mr. Beagle had one lung removed and his remaining lung showed signs of emphysema.

D. At or about the time of the accident, Mr. Beagle was operating a 980-B Caterpillar front-end loader.

E. Mr. Beagle was an experienced operator of the 980-B Caterpillar front-end loader.

Stipulations entered into the record at the request of the Petitioner are as follows:

1. Respondent engaged in the mining and selling of gravel in the United States, and its mining operations affect interstate commerce.

2. Respondent is the owner and proprietor of the STS Gravel Mine, MSHA Number 24-01501-S.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, (the Act).

4. The Administrative Law Judge has jurisdiction in the matter.

5. Respondent is a mine operator with 3,016 tons/hours of production in 1996 as reported in quarterly reports by Respondent to MSHA.

Citation No. 7921013 (service brakes) and Citation No. 7921014 (parking brakes)

The 980-B front-end loader had air-actuated drum/shoe service brakes. It was equipped with an air-actuated service brake mechanism and a spring-actuated emergency parking brake mechanism in each brake chamber. There were six air brake chambers, four on the front axle (two per wheel) and two on the rear axle (one per wheel). The brake system automatically provided positive braking at all four wheels when the system air pressure dropped to approximately 40 pounds per square inch (psi). The spring-actuated mechanism could also be applied manually with a dash-mounted control valve when setting parking brakes.

Measurements were taken of the distance that each air chamber push rod traveled upon applying the service brake. The four front rods each traveled 2.5 inches, the left rear push rod traveled 2.75 inches, and the right rear push rod traveled 3 inches. These measurements were in excess of the manufacturer's service manual recommendation which states that brake adjustment is needed when travel of a brake chamber rod exceeds a maximum of 2 inches.

Both Citation No. 7921013 and Citation No. 7921014 allege a violation of 30 C.F.R. § 56.14101(a). Section 1 of the regulation concerns service brakes and in pertinent part reads as follows:

> (a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

Section (2) of the above regulation concerns parking brakes and provides:

> (2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

The steepest grade on which the loader traveled was 25 degrees which was located at the bottom of the cut into the pit where the accident occurred.

MSHA performed appropriate tests of the loader braking system. These tests clearly establish a violation of this mandatory minimum requirement of both the service brake system and the parking brakes. Neither the service brake or the parking brake was capable of holding the front-end loader on the maximum grade it traveled.

I credit the testimony of Inspector Laufenberg and Inspector Marti explaining how and where the tests were conducted. I credit their testimony that these tests clearly demonstrated violations of the cited safety regulations. Both violations are affirmed. Both violations were significant and substantial (S&S) violations

S&S violations and the appropriate penalty will be discussed below under appropriate headings.

Citation No. 7921015

This citation alleges an S&S violation of the third section 30 C.F.R. § 56.14101(a). The third section in its entirety simply provides "All braking systems installed on the equipment shall be maintained in functional condition."

The citation in pertinent part states:

> The recovery of the loader from the accident site and the mechanical inspection was made on October 11, 1996. The inspection revealed defects in the audio and visible air pressure indicator unit, a component part of the braking system. Because of the defects, the operator would not have audio warning on low air pressure.

Inspector Laufenberg testified that the front-end loader had a warning air pressure indicator that was not functional. This indicator is a component of the braking system. In the event the braking system air pressure drops below 77 psi, a light and buzzer are activated. The inspector conceded that failure of this warning indicator to work does not affect the functioning of the service brake or parking brake. This warning device is a separate component, which gives a warning that the air pressure is dropping and that "if it continues to drop, the parking brake is going to set up." When the air pressure drops to around 40 psi, there is a spring in a cannister that automatically applies the parking brake that "halts" the equipment. (Tr. 28).

On cross examination Inspector Laufenberg admitted that the loader had another component of the braking system, an air pressure gauge, that was fully functional. This functioning pressure gauge visually shows the operator the amount of air pressure in the braking system by merely looking at the pressure gauge. Thus, the operator can tell the status of the braking system's air pressure without the non-functioning component that was cited. It is also

noted there is no specific legal requirement that the front-end loader be equipped with either the functional air pressure gauge or the non-functioning component that was cited.

Everything considered, I find the failure to maintain the cited audio-visual air pressure indicator unit a non S&S violation of the cited safety standard.

Citation No. 7921016

This citation alleges an S&S violation of 30 C.F.R. § 56.14100 which provides as follows:

> (D) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

The citation alleges that the inspection revealed several safety defects that were not reported to the mine owner. It is undisputed that no defects were reported to the mine operator.

The mine owner, Larry Stands, testified that he had only one employee that worked in the outdoor areas of the mine and that employee was the decedent, John Beagle. Beagle had worked for Mr. Stands for more than ten years. Beagle's main job was operating the 980-B loader and doing the maintenance work on that loader. He lubricated the loader every day, checked the oil and air cleaner and did other maintenance work on the loader including adjustment of the brakes. Part of his assigned job responsibility was to see that the loader was in good functional condition. One of the defects found on mechanical inspection of the front-end loader was a small leak in the diaphragm of the braking system. It was undisputed that leak may have first occurred the day of the accident. There was a replacement diaphragm in the shop and Beagle knew how to replace a diaphragm in the brake system.

A couple of months before the accident the whole front end of the loader was "torn out", and the differential completely rebuilt along with installation of a new carrier bearing. At that time the brakes were adjusted and were functioning properly. After that mechanical work was completed, Beagle never indicated to Mr. Stands that there was any problem with the loader. It is undisputed that Beagle never complained or reported any defects in the braking system of the loader and, thus, there was no record of defects available to show the inspector. Under these facts I find the failure of the decedent to report the defects of the braking system to the mine operator constituted a non S&S violation of the cited safety standard.

Discussion

Significant and Substantial Violations

A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contributed to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825(April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4(January 1984), the Commission explained:

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

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988) *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

MSHA designated all four citations issued to STS Gravel on October 11, 1996, as significant and substantial violations. All four citations concern the inadequacy of the brakes on the 980-B Caterpillar front-end loader in question.

I agree with the inspector's findings that the violations of section (1) (service brakes) and section (2) (parking brakes) of 30 C.F.R. § 56.14101(a) were significant and substantial violations. I base my S&S findings on the testimony of Richard Laufenberg, Supervisory Mine Inspector in the Denver field office and Inspector Marti. I find the inadequacy of the service and parking brakes of the loader particularly in view of the steep grades of the roadway into the pit were significant and substantial violations of the cited safety standards. (Tr. 63-65 and Tr. 67-70).

Assessment of Civil Penalties

In assessing a civil penalty under section 110(i) of the Act, the judge is required to give consideration to the appropriateness of the penalty to the size of the operator's business, the probable effect on the operator's ability to continue in business, the operator's history of previous violations, the operator's negligence, the gravity of the violations and the operator's good faith abatement.

The size of the business was small. The operator was the working owner, Mr. Stands. It was essentially a two man mining operation. Other than indoor clerical help, this working operator had only one other employee, his friend, the decedent. The mine worked one shift a day. It was stipulated the mine had "3,016 tons/hours of production" in 1996 as reported in quarterly reports by Respondent to MSHA. Mr. Stands testified the mine had less than 10,000 hours work. (Tr. 166). With respect to history of prior violations the parties stipulated that there were more than 2.1 violations per inspection over the last 24 months. All citations were abated in good faith and timely manner.

In all four citations MSHA has properly alleged moderate negligence The mine operator, Mr. Stands, has the ultimate legal responsibility to see that the equipment and the required reports are in compliance with the safety regulations and standards. The operator cannot avoid this legal responsibility by assigning the job or the responsibility to an employee. Thus, the negligence of the designated employee, in this case, the decedent Mr. Beagle, in failing to report defects in the braking system is attributed to the operator. In my *de novo* review I agree with the inspector's evaluation of the operator's negligence in all four violations as "moderate."

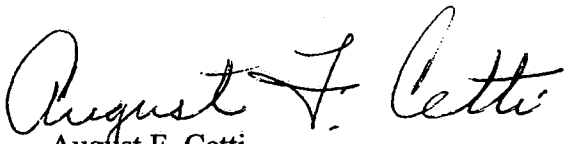
Taking into consideration all the statutory criteria set forth in section 110(i) of the Act I find the following civil penalties appropriate for the violations charged:

CFR Section Violated	
56.14101(a)(1)	$3,000.00
56.14101(a)(2)	1,300.00
56.14101(a)(3)	100.00
56.14100	200.00

ORDER

Accordingly, Citation Nos. 7921013 and 7921014 including the S&S findings are **AFFIRMED** AND Citations Nos. 7921015 and 7921016 are **MODIFIED** by deleting the S&S designation and as so modified are **AFFIRMED**.

It is further **ORDERED THAT RESPONDENT PAY** civil penalties of $4,600.00 within 40 days of the date of this decision. On receipt of payment, this case is dismissed.



August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 9, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On behalf of DANNY W. BROWN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 97-88-D
	:	VINC CD 96-03
v.	:	
	:	Rend Lake
CONSOLIDATION COAL COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On behalf of DAVID R. GULLEY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 97-99-D
	:	VINC CD 96-03
v.	:	
	:	Rend Lake
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Gay F. Chase, Esq., Christine Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Complainants; David J. Hardy, Esq., Julia K. Shreve, Esq., Jackson & Kelly, Charleston, West Virginia for Respondent.

Before: Judge Barbour

These cases are before me upon complaints of discrimination brought by the Secretary of Labor ("Secretary") on behalf of Danny W. Brown and David R. Gulley 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" or "Act"). The complaints allege that Consolidation Coal Company ("Consol") violated section 105(c) of the Act when it deprived Brown and Gulley of their section 103(f) (30 U.S.C. § 813 (f)) rights to accompany a federal coal mine inspector. Consol denied the allegations, and the complaints were consolidated for hearing and decision. Following a trial at Mt. Vernon, Illinois, counsels filed helpful briefs and statements of position.

STIPULATIONS

At the commencement of the hearing, the parties stipulated as follows:

1. The . . . Commission has jurisdiction over [the] proceeding.

2. The Rend Lake [M]ine is a bituminous coal mine located in or near Sesser, Illinois.

3. The Rend Lake [M]ine is owned and operate by [Consol].

4. [Consol] and its Rend Lake [M]ine are subject to the jurisdiction of the . . . [Act].

5. [Consol's] Rend Lake facility . . . is a facility that processes coal and which affects commerce within . . . [s]ections 3(b), 3(h) and 4 of the [Act].

6. The Rend Lake [M]ine produced in excess of three million tons of bituminous coal in 1966.

7. [Consol] produced in excess of ten million tons of bituminous coal at all of its mines in 1996.

8. At all times relevant, Joseph Wetzel was the superintendent of the . . . mine.

9. At all times relevant, Richard Harris was the assistant superintendent at the . . . mine.

10. At all times relevant, Mickey Samples was the general mine foreman at the . . . mine.

11. At all times relevant, Dean Parsons was the assistant mine foreman at the . . . mine.

12. At all times relevant, L.A. Smith was supervisor-safety at the . . . mine.

13. At all times relevant, Dennis Bacon was safety

inspector at the . . . mine.

14. At all times relevant, Tim Martin was foreman at the . . . mine.

15. At all times relevant, Terry Crisp was shift foreman, C-turn, at the . . . mine.

16. The miners working at the . . . mine are represented by the United Mine Workers of America ["UMWA"].

17. The Nason [P]ortal of the . . . mine was open[ed] on July 6, 1996.

18. Danny Brown was employed by [Consol] as an underground mechanic assigned to the Sesser [P]ortal of the . . . mine on July 19, 1996, and is a "miner" as defined by the Act.

19. Brown began his employment at the . . . mine on February 2, 1976.

20. On July 19, 1996, Mine Safety and Health [Administration] ["MSHA"] Inspector James Britton presented himself at the Nason Portal to conduct an inspection of the underground mine workings.

21. On or about July 30, 1996 . . . Brown filed a timely complaint of discrimination with MSHA.

22. David Gulley was employed by [Consol] as a shuttle car operator assigned to the Nason [P]ortal of the . . . mine on July 25, 1996, and is a miner as defined by the Act.

23. Gulley began his employment at the . . . mine on February 14, 1974.

24. On July 26, 1996, [MSHA] Inspector James Britton presented himself at the Nason [P]ortal to make an inspection of the underground mine workings.

25. On or about July 30, 1996 . . . Gulley filed a timely complaint of discrimination with MSHA.

26. Citation [No.] 30339498 was issued on October 1, 1996, for a violation of section 103(f) of the Act which occurred on July 25, 1996.[1]

27. Citation [No.] 3039498 was not contested nor was a formal hearing requested and the assessed penalty was paid.

28. Exhibit C is a certified copy of R-33-Assessed Violation History Report - summarized by mine for the Rend Lake [M]ine for the period October 1, 1994 to September 30, 1996 (Tr. 12-15; see Joint Exh. 1).

SUMMARY OF THE RELEVANT FACTS

Each complaint arises out of incidents that occurred shortly after the opening of the Nason Portal, the second portal at the mine. Each complaint involves a situation where an MSHA inspector arrived at one portal and the representative of miners (the "walkaround") was at the other portal. As a result, the representative was required to travel from one portal to the other to join the inspector.

To understand the resulting controversies, it is helpful to understand the geographic layout of the mine. Also, it is helpful to understand the way in which miners' representatives were chosen at the mine.

The Nason Portal is located on the east side of the mine, and the Sesser Portal is located on the west side (Tr. 76). The surface distance between the two portals is approximately thirteen miles. The underground distance is approximately four and one half miles. Travel time between the two portals is between 20 to 25 minutes, whether travel is undertaken on the surface or underground (Tr. 583-584, 602, 736).

For many years the mine had a single portal, and all miners, inspectors, and management

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[1]Citation No. 3039498 states in part:

A violation of section 103(f) occurred on July 25, 1996, when a representative of the miners was denied the opportunity to accompany an MSHA inspector during the physical inspection of the mine. During this inspection, the representative of the miners, who had accompanied the inspector since the start of the shift, was directed by mine management to return to his normal duties. The inspector was not accompanied by a representative of the miners . . . while the designated miners' representative was traveling underground from the Sesser Portal to join the inspection party (Joint Exh. 1, Exh. A).

personnel entered the mine at the Sesser Portal. After the Nason Portal opened, both portals were used to enter the mine (Tr. 46). During July 1996, there were three crews (or "turns") working in the mine, the A, B, and C turns. Each turn worked a shift, and the work force for each turn was sometimes split. Some miners were assigned to enter the mine at Sesser and some were assigned to enter at Nason. Although most miners worked on the side of the mine they entered, there were miners whose work assignments required them to travel from one side of the mine to the other (Tr. 46-47).

At the mine, the miners selected union safety committeemen for each turn (Tr. 42). The committeemen for A, B, and C turns were respectively Melvin Filkins, Tommie Sweeten, and Danny Brown (Tr. 285; Gov. Exh. 5). In most instances it was the committeemen who acted as the walkarounds and accompanied the inspectors. However, there also were alternate representatives of miners (Tr. 284). The alternates usually were selected by the committeemen (Tr. 282, 373, 560-561). The alternates served as the walkarounds if the safety committeemen were not available to accompany the inspectors (Tr. 281-282). The alternates were named on a list that was posted at the mine. Mine management was aware of the list (Gov. Exh. 5; Tr. 284-285). There were eight or nine alternates for each turn (Tr. 373). The alternates were selected the same way before and after the Nason Portal opened (Tr. 374). There were times when the alternates could not accompany the inspectors, and at those times the committeemen might ask an unlisted miner to act as the walkaround.

INCIDENTS RELATED TO BROWN

Danny Brown, an underground miner and union member, worked as a mechanic at Sesser Portal (Tr. 39-40). Brown was appointed the safety committeeman for the C turn in 1995 (Tr. 42). As the safety committeeman for C turn, his duties included representing C turn miners on safety issues and accompanying inspectors during their inspections of the mine (Tr. 43). Shortly after his appointment, Brown was introduced as the C turn safety committeeman to the mine's then safety director and to several other management representatives, including Wetzel, the superintendent. (Tr. 42-43).

As the opening of the Nason Portal approached, the miners discussed what to do with regard to the walkarounds if the inspector came to a portal other than the one where the walkaround was working. Brown described how the miners decided to handle the problem:

> [W]e . . . approached management before the opening of the portal. These were informal meetings between myself, Dennis Bacon [the company safety inspector], [and] L.A. Smith [management's safety supervisor]. . . .[There were] [s]everal meetings [and] we explained to . . . them . . . [i]f there w[ere] two inspectors, wherever the safety committeeman was assigned, he would stay at that portal. If there was only one inspector, no matter where he was at . . . the safety representative would

accompany the inspector. We would travel from one portal to the other if there was only one inspector present (Tr. 50-51).

Brown maintained that the miners "did not want to create a problem for the company[,]" that the miners' representatives were "not going to pick and choose where we want[ed] to go[,]" but that the miners sought to make clear to the company that when there was one inspector at the mine, it was the safety committeeman who was the miners first choice to accompany the inspector (Tr. 51).

Melvin Filkins, who had been a union safety committeeman at the mine for fourteen or fifteen years, agreed that the "primary walkaround representative for the miners" was the safety committeeman, and that this was true both before and after the Nason Portal opened (Tr. 373-374). Filkins concurred with Brown that the miners discussed with management, including Smith, what would be done after the Nason Portal opened. He claimed that Smith was told if the inspector came to one portal and the walkaround was working at the other portal, the miners' representative would travel to join the inspector (Tr. 375-376, 379-380).

During the day shift of July 18, 1996, Brown was working at Sesser when he was advised an MSHA inspector was at Nason and was preparing to conduct an inspection. Brown asked Smith if he could use Smith's scooter to travel to Nason. According to Brown, Smith had "no problem," but Smith advised Brown that before he left he had better check with another management person (Tr. 55).

Therefore, Brown went to the assistant mine superintendent, Rick Harris, and told him there was a federal inspector at the Nason Portal, and that he needed to travel to that portal. Harris asked Brown if someone else could take care of the situation. Brown stated that he, Brown, was the representative of miners, that this kind of a situation had been discussed previously with mine management, and that he should be the one to travel with the inspector. Brown claimed that Harris told him to go underground and find a ride (Tr. 55).

Brown went back to Smith and told Smith about the conversation with Harris. Brown also asked Smith to call Dennis Bacon, the company safety escort at Nason, and tell Bacon that he, Brown, was on his way to the portal. Smith gave Brown the keys to the scooter, and Brown drove to Nason (Tr. 56).

Once there, he went to the portal office where he met Bacon and Jane Hamby, a C turn miner who sometimes acted as an alternate walkaround if the primary representative could not go with the inspector (Tr. 56, 59). Brown felt Bacon was surprised to see him.[2] Brown felt Bacon was upset because he was there. Brown testified that several times Bacon said, "This is not right. This is not right. You should not be here"(Tr. 57). Brown replied, "[W]e've talked about this in

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[2]Later, Brown asked Bacon if Smith had called, and Bacon stated he had not (Tr. 56-57).

the past. We told you how we were going to handle it. Why are you so upset?" (Id.). Brown testified that Bacon said to him "I just want you to know for every action there is a reaction" (Id.). After this discussion Hamby went underground to her regular job, and the inspector and Brown began the inspection (Tr. 60).

The following day, Brown again was working at Sesser when an inspector arrived at Nason. Brown asked Smith if he could use Smith's scooter to go to Nason. According to Brown, Smith replied he did not care but that Brown should talk to Wetzel, the mine superintendent, or to the assistant mine foreman, Dean Parsons, because there was "some sort of a problem" (Tr. 60). Parsons appeared and Brown asked him whether in fact there was a problem. Parsons responded he was not sure, but that he would ask Wetzel (Tr. 61).

Parsons left and spoke with Wetzel, who told him to tell Brown to go to his regular job assignment, because there was already a walkaround at Nason (Tr. 725-726, 729). When Parsons returned, he told Brown he could not go to Nason. Brown asked if Parsons was denying him the right to accompany an inspector, and Parsons replied "Somebody else will have to handle it" (Id.). (According to Scott Stella, an alternate walkaround, who was with Brown when Brown spoke with Parsons, Parsons also told Brown "You can't go" (Tr. 252).) Brown then went underground to work at his assigned job, a job that incidentally required him to travel to Nason (Tr. 62, 252).

Wetzel agreed that on July 19, Brown asked for transportation and permission to travel to Nason to accompany the inspector. However, as Wetzel recalled, he learned about Brown's request when Rick Harris telephoned him, and asked whether Brown was allowed to go. Harris told him that Jane Hamby, an alternate walkaround representative, was at Nason. According to Wetzel, he denied the request "Because there was already a designated walkaround at the Nason [P]ortal" and he "thought that the request was unreasonable" (Tr. 562). Wetzel stated he did not want "to do all the switching around [of personnel]" that would be necessary to accommodate Brown's request (Id.). Wetzel maintained that Hamby already had advised management that she was going to travel with the inspector (Tr. 563-564). Wetzel told Parsons to tell Brown to go to work (Tr. 563). Therefore, Hamby, not Brown, accompanied the inspector on July 19 (Tr. 564).

After telling Parsons to deny Brown's request, Wetzel spoke with Gerald Kowzan, Consol's supervisor for human resources. Wetzel asked Kowzan if his decision to deny Brown permission to travel to Nason was correct. Kowzan advised Wetzel to let Brown travel to Nason "[b]ecause Brown was a safety committeeman" (Tr. 572). Kowzan's advice was based on a conversation he had with Elizabeth Chamberlin, a Consol attorney. Wetzel and Kowzan had telephoned Ms. Chamberlin to discuss the situation (Tr. 572). According to Kowzan, Chamberlin said there could not be two walkarounds, that management should find out "who is actually declaring themselves [sic] to be the designated walk-around . . . and if one person steps forward and says . . . 'I am that person,' then . . . to look into . . . is it reasonable for that person to travel" (Tr. 807).

Shortly thereafter, Wetzel orally instructed management personnel that in the future Brown should be given transportation to go to the Nason to accompany the inspector (Tr. 573-575). However, Wetzel maintained that allowing Brown to travel to Nason contrasted with the practice at other two-portal mines operated by Consol. At those mines the walkaround "came from the portal [where] the inspector showed up" (Tr. 552).[3]

INCIDENTS RELATED TO GULLY

David Gulley is a shuttle car operator at the Rend Lake Mine. In July 1996, Gulley was assigned to the Nason Portal (Tr. 209-210). Gulley was not a union officer or a union committee member (Tr. 210). However, on several occasions prior to July 1996, he acted as an alternate representative of miners (Tr. 214).

On July 24, 1996, Brown was notified by Gulley that Hamby would not be at the mine the next day. Gulley asked Brown who would accompany the inspector if one came to the Nason Portal on July 25. Brown responded if there was only one inspector, he, Brown, would be the walkaround. He would come to Nason and join the inspector as soon as he could, but Gulley should start out with the inspector. Gulley could return to his job after Brown arrived (Tr. 69).

Brown instructed Gulley to ask management if it was all right for Gully to go "on union business" until Brown arrived (Id.).[4] When a miner was on "union business" he or she was paid by the union, not by the company (Tr. 82-84). Therefore, the union would pay Gulley for his time and the company "would not be out any money" (Tr. 70). Brown testified he telephoned Otis Callis, a mine examiner and treasurer of the union local, and asked Callis to go with Gulley when Gulley talked to mine management (Tr. 69-70).

On the morning of July 25, Gulley reported for work at the Nason Portal (Tr. 211). Around 7:30 a.m., MSHA Inspector Britton arrived at the portal (Tr. 216). State mine inspector Willard Dane also arrived around the same time. After finding Britton was there, Gulley went to meet with Bacon. Gulley told Bacon that he, Gulley, would travel with Britton and that another miner, James Key, would accompany the state inspector. (Tr. 218). Britton also spoke with Bacon. He told Bacon that he was at the mine to conduct an inspection (Tr. 476). Britton asked who would be the representative of miners, and Bacon told him it would be Gulley (Id.).

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[3]The practice was confirmed by MSHA Inspector Britton (Tr. 49, 500).

[4]Kenneth Dawes, the president of the union local, explained there was no "set procedure" for requesting permission to go on union business. At times, when there was "ample time" the request was made in writing. At other times, the request was made orally (Tr. 296, see also Tr. 298). Brown added there also were times when a union member simply told management what he or she is going to do and stated to that he or she would be on union business (Tr. 83).

While this was going on, Dane went to the safety department office. At the office, Samples, the mine foreman, said he would accompany Dane (Tr. 613). Samples testified he went back to his office where he received a telephone call from assistant superintendent Rick Harris. Harris told him that Brown was coming to Nason from Sesser and that Gulley needed "to go below and go to work" (Tr. 614). There would not be two walkarounds for Britton.

Meanwhile, Gulley and Key met Filkins and Callis. They went to Samples's office (Tr. 443). Someone (Gulley could not recall who) asked Samples if it would be alright if Gulley went on union business to accompany Britton until Brown arrived from Sesser (Tr. 221). Gulley maintained Samples told him he could go. Gulley stated, "There is no doubt in my mind that I had permission to go" (Tr. 222). Gulley maintained he would not have gone without permission because had he done so he might have been fired (Id.).

As Filkins remember the visit with Samples, Filkins asked Samples if there was a problem with letting Gulley accompany the inspector. Filkins maintained Samples replied that Brown was on his way and the company was "not going to pay for two people for the same inspector" (Tr. 390-391, 394). Filkins testified he told Samples the union would pay for Gulley until Brown arrived and that Samples indicated this would be acceptable, just so the company did not have to pay two walkarounds (Id.).

Callis also testified the group assured Samples that the union would pay Gulley (Tr. 444). Callis stated Filkins asked Samples if Gulley could return to his job as a shuttle car operator once Brown arrived, and Samples stated he could (Tr. 443-444). Callis believed that everything had been resolved, that Gulley would be able to act as the walkaround until Brown reached the inspector, and that Gulley then would resume his normal duties (Tr. 444). Key also believed any disagreement had been resolved during the discussion and that Samples said it was "Okay" for Gulley to accompany the inspector (Tr. 846). Britton too understood that Gulley would be with him until Brown arrived (Tr. 481).

However, Samples testified he told Gulley and Key that one of them had to go to his regular work assignment because Brown was on the way. Although he stated, "Okay" when he was told Gulley was going on union business, "Okay" did not mean that Gulley was free to go with Britton (Tr. 615). Rather, he used the word simply to acknowledge he heard what was said. He had no authority to approve Gulley going on union business (Tr. 616-617).

Samples called Harris to tell him Gulley wanted to go on union business (Tr. 616). Harris called Wetzel, who called Kowzan (Tr. 743, 810). According to Kowzan, he and Wetzel discussed Gulley's request, and Wetzel stated he thought it should not be granted. Kowzan agreed (Tr. 810). Wetzel did not believe it was a valid request because Brown had "presented himself to go with . . . Britton . . . and [Brown] was on his way" (Tr. 596). Moreover, the request to go on union business was not in writing, and it was unreasonable because "it tied up two people, where one person would have suffice[d]" (Tr. 579, 595-596). Wetzel believed management of the mine would be chaotic if miners could declare themselves to be on union

business with no approval from the company (Tr. 598). Kowzan added it could have cost the company at least two hours or more of productivity to let Gulley go because there was no one to fill Gulley's position (Tr. 811-812). Subsequently, Kowzan and Wetzel called Harris and told him Gulley's union business was not approved and that Gulley should go to work (Tr. 743-744, 811, 813).

Samples went to the safety office to advise Gulley he had to go to work, but Gulley already had gone underground with Britton and Bacon (Tr. 617). Samples summoned Filkins and Callis to his office and told them Gulley's union business request was not approved (Tr. 617-618). After they left, Samples called Kowzan and advised him Gulley was underground. Kowzan said Samples should send someone to find Gulley and send Gulley to work. Around 8:30 a.m., Samples asked Terry Crisp, the C turn shift foreman, to locate Gulley, and Crisp went underground (Tr. 138, 234, 618).

Meanwhile, Gulley, Bacon, and Britton were proceeding with the inspection. As they approached the mouth of the 7E working section, Terry Crisp reached them. Crisp told Gulley he had to go to his assigned job. Gully replied, "I'm on union business . . . I'm supposed to stay with this federal inspector until . . . Brown arrives from the other side" (Tr. 225). When Crisp insisted Gulley go to his job, Gulley asked Crisp if he was ordering him to leave the inspector. Crisp stated he was, and Gulley went to his job (Tr. 136, 225-226). Gulley testified he left because he feared if he did not, he would be fired (Tr. 226).

Crisp drove Gulley to work (Tr. 138, 484-485). The union paid Gulley for the time he spent with the inspector. The decision to pay Gulley was in accordance with the union's understanding that if two persons were needed for walkaround purposes at the same time, the company only was required to pay one and that the union would "pick up the time" for the other (See Tr. 172). The company paid Gulley for the time from when he left the inspector to the end of the shift (Tr. 228).

When Brown arrived for work at Sesser he learned that Britton was at Nason (Tr. 79). Brown went underground around 8:00 a.m. (Id.). Because there was no inspector at Sesser and Britton was at Nason, Brown wanted a ride to Nason. The company did not provide him with transportation, so he rode with another miner who was going to work at Nason (Tr. 81).[5] When he reached Nason he went to the surface where he was met by two union members. They told Brown that Gulley had gone underground with the inspector and that management was going to remove Gulley from the inspection (Tr. 70-71). According to Brown, Samples, the general mine foreman, came out his office and Brown asked Samples about the situation. Samples replied "I had Terry Crisp remove . . . Gulley from the inspector" (Tr. 71).

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[5]The Secretary did not maintain the failure to provide Brown with transportation was a violation of the Act (Tr. 81-82).

Brown then went underground with Samples and others and when the elevator reached the bottom, he asked Samples where the inspector was. Samples replied "I don't know" (Tr. 72). A foreman offered Brown a ride, and Brown and the foreman want to find Britton (Tr. 75).

After Gulley left him, Britton, accompanied only by Bacon, continued toward the 7E section (Tr. 485-486). As he traveled, Britton "inspected the roof . . . the travel roads . . . the cross-cuts, [and the] roof conditions" (Tr. 485). Once in the section he traveled to the faces to check for methane and to observe the section's roof. He also checked to make sure that company mine examiners visited the areas. Finally, he took an air reading and began to inspect a continuous mining machine (Tr. 486). Brown reached Britton between 9:45 a.m. and 10:00 a.m. and remained with him for the rest of the inspection (Tr. 79, 486-488).

THE LAW

A miner seeking to establish a prima facie case of discrimination under section 105(c) of the Act bears the burden of proof that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity (Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 Fed 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Coal Co., 3 FMSHRC 803, 817-818 (April 1981)). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone (Pasula, supra; Robinette, supra; See also Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 958-959 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 19830 (specifically approving the Commission's Pasula-Robinette test)).

RIGHTS, RESPONSIBILITIES, AND PRIORITIES UNDER SECTION 103(f)

An understanding of the rights, responsibilities, and priorities inherent in section 103(f) is key to resolving the issues of whether the company deprived Brown and Gulley of their statutorily protected walkaround rights. The rights and responsibilities are of fundamental importance in meeting the objectives of the Act. The legislative history makes clear Congress viewed the participation of the representative of miners as necessary to effectuate fully the inspection process. As the Senate Committee that drafted the Act stated, the representative who accompanies the inspector "assist[s] in conducting a full inspection" (S. Rep. No. 181, 95th Cong., 1st Sess. 50 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616 (1978), (Legis. Hist.)). The overall goal of the walkaround right is to help miners "understand the safety and health requirements of the Act and . . . enhance miner safety and

health awareness" (Id.). Exercise of the right is protected, and any attempt by an operator to restrict the right may run afoul of section 105(c) of the Act.

When, the right was enacted Congress fully realized the right's exercise could cost the operator in production and in wages paid for time not worked ("To encourage . . . miner participation it is . . . [Congress's] intention that the miner who participates in such inspection . . . be fully compensated by the operator for time thus spent" (Legist. Hist. at 616). Additionally, in granting the right Congress necessarily limited an operator's freedom to direct its work force in that a miner who is accompanying an inspector is not performing duties to which he or she otherwise would be assigned.

Finally, the question of who will accompany an inspector is for the miners to resolve. The Commission has stated that section 103(f) "unambiguously provides that miners possess the right to choose their representatives for section 103(f) inspections" (Secretary on behalf of Truex v. Consolidation Coal Co., 8 FMSHRC 1293, 1298 (September 1986)), and although the operator is not required to go through scheduling contortions to accommodate unreasonable assertions of the right, the miner's choice otherwise has priority.

DANNY BROWN AND THE INCIDENT OF JULY 19

I find the testimony established that before the Nason Portal opened it was the practice at the mine to proceed as follows with regard to the walkaround right: (1) to have the designated UMWA safety committeeman for each turn accompany the MSHA inspector; (2) to have an alternate UMWA safety committeeman for each turn accompany the inspector if the designated committeeman could not go; (3) to have the safety committeeman delegate someone else to go with the inspector, if the committeeman or an alternate could not go (Tr. 42, 282, 560-561). I conclude because Brown was the designated safety committeeman for the C turn, he was the miners' first choice as their walkaround representative. Further, I find mine management knew he was the first choice and therefore the primary walkaround (Tr. 42-43).

I also find that prior to the opening of the Nason Portal, the miners discussed with management the issue of who would represent the miners when an inspector was at one portal and the safety committeeman was at another (Tr. 50-51, 375-376, 379-380). I credit Brown's and Finkin's testimony about the informal talks between the union and management. Everyone knew the portal was going to open, and it is logical that the problem, which was foreseeable, would have been anticipated. The solution — that the designated safety committeeman would travel to the inspector — was consistent with past practice at the mine in that the designated safety committeeman remained the first choice of the miners as their representative. Equally, it was not facially unreasonable, and it therefore was one the miners were entitled to make

(Truex, 8 FMSHRC at 1827; (Tr. 50-51)).[6]

I further find that any doubt in management's mind about who would be the primary representative when an inspector arrived at the Nason Portal, should have been clarified by the events of July 18, when Brown traveled from Sesser to Nason to accompany the inspector. Smith knew why Brown went to Nason, and management knew that in similar circumstances he would want to do so again. Hence, Wetzel's and Kowzan's conversation with Chamberlin.

On July 19, when the inspector again arrived at Nason, Wetzel denied Brown permission to travel to accompany the inspector. Wetzel justified his refusal by stating he believed Hamby, who was at Sesser, had declared herself to be the walkaround and that it was unreasonable to "do all the switching around" necessary to accommodate Brown's request (Tr. 562, 563). The reasons do not support denying Brown permission to join the inspector.

As I have found, it was or should have been clear to the company that Brown was the miners' first choice. As the designated safety committeeman, Brown's request had priority. If there was confusion over who was to act as the walkaround representative, the responsibility for clarifying the situation rested initially with the company, which totally controlled the communication and transportation systems at the mine. Wetzel, or another management representative, could have called Nason and had Brown speak with Hamby or with others to dispel any misunderstanding as to who was to be the walkaround. Initiation of the call would have been consistent with Chamberlin's advice that management should find out "who is actually declaring themselves [sic] to be the designated walkaround" (Tr. 807).

The "switching around" to which Wetzel objected might have been inconvenient for the operator, but it would have been an inconvenience the Act anticipates as sometimes necessary for full effectuation of the walkaround right. As I have noted, section 103(f) contemplates a diminution of the operator's right to direct its workforce and gives priority to the miner's choice. Here, that choice was Brown.

Therefore, I conclude the Secretary established a prima facie case of discrimination by proving that Brown engaged in protected activity on July 19 when he advised Consol management personnel he wanted to travel to Sesser to join the inspector. I also conclude that Wetzel's (and though him, Consol's) denial of permission was an adverse action that effectively blocked the exercise of Brown's section 103(f) right.

I reject Consol's argument that the Secretary failed to prove it was illegally motivated in denying Brown permission to travel to Sesser. I believe the company either understood or should have understood that Brown was the primary choice of the miners to act as the

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[6]In finding the solution was not facially unreasonable I note there were occasions when miners traveled from one portal to another for work purposes (Tr. 46-47, 81).

walkaround, and even if there was confusion regarding who was designated, the company's control of the means of communication and transportation placed the responsibility on the company to make initial efforts to dispel the confusion, efforts it did not undertake.

Finally, to the extent Consol is arguing that letting Brown join Britton unreasonably dislocated its work priorities, I conclude Consol did not prove the assertion. As a general rule it was not unreasonable for the miners' representative to travel from one portal to another. Although in specific instances such travel might have been an unwarranted burden, it was incumbent upon Consol to prove it. At the very least, the company should have established the critical nature of the walkaround's duties and the lack of any other personnel to fulfill those duties. Ordinary inconvenience is not enough. Here, Consol did not establish that Brown's normally assigned duties on July 19 were critical to the functioning of the C turn and that others were not available to fill in for Brown.

DAVID GULLEY AND THE INCIDENT OF JULY 25

I have found that it was a practice at the mine for a committeeman to delegate his or her walkaround responsibilities to an alternate or to another miner if the committeeman or alternate could not accompany the inspector. I also have found the company fully understood this was the practice. It is clear from the testimony that Brown was aware Hamby (the usual alternate) would not be at the Nason Portal on July 25, and that Brown asked Gulley to act as the walkaround either for the entire inspection or until he, Brown, arrived (Tr. 69, 213, 218). In addition, it is clear Brown instructed Gulley to tell management that Gulley would be on union business until Brown arrived so the company would not have to pay two walkaround representatives for one inspection (Tr. 69-70). Additionally, it is certain that Gully told management's safety escort, Dennis Bacon, that he, Gulley, would be the walkaround with Britton (476, 676).

I recognize there is a dispute about whether or not Samples was told that Gulley was going on union business in order to accompany Britton. Gulley maintained he, and others, met with Samples and that Samples understood Gulley would be accompanying the inspector while on union business (Tr. 221-222). Samples maintained he was only told that Gulley was going on union business, that Gulley did not state he was accompanying Britton. Thus, when Samples responded "Okay," he was acknowledging he heard the statement that Gulley was going on union business. He was not authorizing Gulley to go with Britton or to be away from his job and be paid by the union. (Tr. 615-616).

It is difficult for me to believe that Bacon, the company representative, understood Gulley was going to act as the walkaround and that Samples did not. Moreover, given the context of Gulley/Filkins/Calis conversation with Samples, I find that Samples used the word "Okay" as it is used normally — that is, as a term of approval or authorization. It is highly unlikely Samples would have approved something without knowing its purpose. I infer from all of this that Samples gave Gulley permission to go underground and that Samples fully understood that Gulley was going to accompany Britton and would be paid by the union while doing so (Tr. 480-

481).

When he allowed Gulley to go with Britton, Samples knew Brown was on his way (Tr. 614). Consol's miners had a right to have someone accompany the inspector from the moment the inspection began. "Accompany" is defined as "To go with or attend as an associate or companion" (Webster's Third New International Dictionary (1986) at 12). Brown had not reached Nason when Britton was ready to leave. Britton was not required to wait for him. Gulley, as the designated walkaround, had a right "to go with" Britton until Brown arrived. It follows that Gulley was exercising his section 103(f) right when he went underground with Britton. Section 103(f) was not satisfied when Brown left Nason to join Britton. The walkaround must accompany the inspector, not be on the way to do so.

Therefore, I conclude that Gulley was engaging in protected activity when the inspection was interrupted and Crisp ordered Gulley to go to work (Tr. 136-138, 225, 618). Although Britton continued the inspection after Gulley left, he did so for approximately an hour without the aid of a miners' representative (Tr. 484-488).

By ordering Gulley to leave Inspector Britton before Brown arrived, Consol unlawfully discriminated against Gulley. Wetzel objected to having "two people [tied up]," that is to having one employee traveling to join an inspector while another employee was "filling in," but as I have stated, section 103(f) impinges upon an operator's authority to direct its work force, and the right to accompany prevails when it is not unreasonably exercised. Given the configuration of the mine, the fact that Brown was the miners primary choice, and the fact that Britton was not required to wait for Brown, I conclude it was reasonable to have Gulley exercise the right until Brown reached Britton, and I reject Consol's argument to the contrary (Consol Br. 8). Gulley was the representative of miners until Brown got there. Either Gulley went with Britton or there would have been no walkaround with the inspector. The miners' right to be represented trumped any employee dislocation and loss of production that might have resulted.[7] While Kowzan testified Gulley's absence from work could have cost the company two hours or more of productivity (Tr. 811-812), this was not an unreasonable price to pay given the priority of the miner's choice.

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[7]I also reject Consol's argument that "[a]ny 'right' of the union to require that only certain of the designated walkarounds act in a given situation is contractual in nature and beyond the jurisdiction of the . . . Commission and . . . [the] judge" (Consol Br. 7). The argument is contrary to a fundamental precept of section 103(f), that miners are entitled to select whomever they wish as their representative (Truex, 8 FMSHRC at 1298), subject to certain qualifications set forth by the Secretary and which are not applicable here (Emery Mining Corp., 10 FMSHRC 276, 280 (March 1988); Secretary on behalf of Wayne v. Consolidation Coal Co., 11 FMSHRC 483, 487 (April 1989). To hold otherwise would be to place potential restrictions on the miners' freedom of choice.

REMEDIES

The Secretary requests I find Consol's actions "to have a chilling effect on the miners' exercise of their statutorily protected rights" and that I order Consol "to post . . . a notice stating it recognizes the right of its miners of file complaints of discrimination and to not interfere in any manner with such rights" (Sec. Br. 52). Although I share the Secretary's concern that Consol's actions may make miners reluctant to serve as walkarounds in the future, I decline to order Consol to post the notice requested by the Secretary.[8] I am not convinced posting an open-ended statement that recognizes existing rights and requirements serves much of a purpose. I believe the Act itself provides a better remedy in that under section 109 (30 U.S.C.§ 819) Consol may be required to post this decision on the mine bulletin board where it will be a specific and public reminder of the company's duties under section 103(f) and of the statutory protections the Act affords miners who exercise their rights under these particular circumstances. In addition, I am persuaded the civil penalties assessed below will serve as an incentive to Consol for future compliance.

CIVIL PENALTIES

In assessing civil penalties for the two violations of section 105(c), section 110(i) of the Act (30 U.S.C. §820(i)) requires consideration of the following six criteria:

PREVIOUS VIOLATIONS

The Secretary asserts, and the company does not dispute, that during the relevant time period prior to the violations, 1,126 violations were cited at the mine, including 15 violations of section 105(c) (Sec. Br. 49; Joint Exh. 1 (Exh. C)). This is a large history of previous violations.

SIZE

As the stipulations make clear, the mine is large in size and Consol is a large operator (Joint Exh. 1, Stips. 6 & 7).

NEGLIGENCE

The company was negligent in discriminating against Brown. The company knew or should have known Brown was the first choice of the miners, and if there was confusion in management's mind as to who was to travel with the inspector, it was the company's

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[8]I note Gulley's credible testimony that he felt he was "having to put [his] job on the line to accompany a federal inspector"and that he has refused to act as a walkaround since the July 25 incident (Tr. 230).

responsibility under the circumstances of this case to initiate action to resolve the question. The company, not the miners, controlled the means of communication and transportation. In denying Brown the right to travel with the inspector, the company failed to exhibit the care required of it.

The same is true of the Company's treatment of Gulley. Samples knew Gulley was going to act as the walkaround until Brown arrived. He knew Brown was on the way. He either knew or should have known that in accompanying the inspector, Gulley was exercising a protected right, since Brown, the miners first choice, was not yet there. By having Gulley removed from the inspection party before Brown arrived, Samples and through Samples mine management, failed to exhibit the care require of it.

I also find, however, that the company's negligence was mitigated by the fact these two incidents involving section 103(f) rights were among the first to confront the company following the opening to the Nason Portal. That the company was uncertain of its responsibilities under the new configuration existing at the mine, is shown by Wetzel's and Kowzan's conversation with Chamberlin (Tr. 572, 807). It may be that the company was mislead by the manner in which walkarounds were designated at its other two-portal mines (Tr. 49, 500), but whatever the cause, I conclude the company's responses were more misguided than purposeful.

ABILITY TO CONTINUE IN BUSINESS

No evidence was offered by Consol that the size of any penalties assessed will affect adversely its ability to continue in business, and I conclude that they will not.

GRAVITY

Both violations were serious. I have noted the fundamental importance of section 103(f) in meeting the objectives of the Act. Denying Brown and Gulley their rights interferes with the inspection process, a process that is key to enforcement of the Act.

GOOD FAITH ABATEMENT

The Secretary does not contend otherwise, and I find that Consol exhibited good faith in abating the violations.

The Secretary proposes a civil penalty of $5,000 for each violation of Section 105(c). After considering all of the criteria and given the mitigated negligence of the company, I conclude penalties of half that amount are appropriate.

ORDER

In view of the foregoing, it is ORDERED that:

1. Consol post a copy of this decision on the mine bulletin board or other location readily available or accessible to miners and that the decision remain posted for thirty days or until it becomes final.

2. Consol pay the Secretary's Mine Safety and Health Administration a civil penalty of $2,500 for each violation of section 105(c) of the Act ($5,000 in total), and payment be made within thirty days of the date of this decision.

David Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 10 1998

JOHN D. LEHOUX,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. YORK 98-36-DM
	:	NE MD 98-03
PLOURDE SAND & GRAVEL,	:	
Respondent	:	Mine ID No. 27-00094
	:	Plourde Sand & Gravel

DECISION

Appearances: Susanna G. Robinson, Esq., Douglas, Robinson, Leonard & Garvey, P.C.
Concord, New Hampshire for Complainant;
Frank P. Spinella, Jr., Esq., Hall, Morse, Anderson, Miller, & Spinella, P.C.
Concord, New Hampshire for Respondent.

Before: Judge Bulluck

This discrimination proceeding is before me on a Complaint of Discrimination brought by John D. Lehoux against Plourde Sand and Gravel ("Plourde"), under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c). The complaint alleges unlawful discharge in retaliation for safety complaints raised with the Secretary's Mine Safety and Health Administration ("MSHA") during a fatality investigation.

John Lehoux filed his discrimination complaint with MSHA pursuant to Section 105(c)(2) on February 6, 1998 (Ex. C-5).[1] On April 28, 1998, MSHA notified Lehoux that, based on its investigation of the allegations, it had concluded that a violation of Section 105(c) had not occurred. Lehoux, through counsel, instituted this proceeding before the Commission on May 18, 1998, under Section 105(c)(3), 30 U.S.C. §815(c)(3).[2]

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[1]Section 105(c)(2) provides, in pertinent part, that "Any miner...who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[2]Section 105(c)(3) provides, in pertinent part, that "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission...."

A hearing was held in Concord, New Hampshire. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that while Lehoux engaged in protected activity, he was not discharged by Plourde for engaging in that, or any other, protected activity.

I. Stipulations

The parties stipulated to the following facts:

1. Lehoux was hired by Plourde on November 11, 1996, and fired by Plourde on December 12, 1997.

2. Lehoux was initially hired as a salesman, but served as plant superintendent and safety officer for Plourde from March to December 1997.

3. Brent Blackey died in a fatal accident at Plourde's Hooksett plant on December 3, 1997.

4. After the accident, Lehoux was interviewed by MSHA investigators.

II. Factual Background

Plourde is owned and operated by the Plourde brothers; Oscar is the president of the company and Lawrence is the vice-president and treasurer (Tr. 19, 164; Vol. II: 50). Lawrence Plourde had functioned as manager of the Hooksett plant for approximately 30 years, until Lehoux became the first "outsider" plant superintendent (Tr. 187; Vol. II: 51).

Lehoux applied for a position in aggregate sales with Plourde, was interviewed, and was hired as a salesman to replace Tom Woodley on November 11, 1996 (Ex. C-1; Tr. 14). Richard Weed, financial consultant to the Plourdes, assisted them in hiring Lehoux (Tr. 308-12). Lehoux also functioned as the company's safety coordinator during part of his tenure (Tr. 21). Dissatisfied with employment elsewhere, Tom Woodley sought reinstatement and was rehired as Plourde's salesman in March 1997, at which time Lehoux vacated that position and accepted reassignment to the position of plant superintendent (Tr. 12, 21, 166, 312-14).

As superintendent of the Hooksett plant, Lehoux supervised and worked alongside Larry Champhene, Brent Blackey and Kenny Publicover, who was terminated during Lehoux's tenure (Tr. 42, 277-79). Oscar Plourde was Lehoux's supervisor (Tr. 31). At some point in the Fall of 1997, Oscar Plourde, dissatisfied with Lehoux's job performance, requested that Tom Woodley discretely "put the word out" in the industry that the Plourdes were looking for a replacement for Lehoux (Tr. 316; Vol. II: 12-13). As a result of those efforts, Don Davis was referred to Tom Woodley, was interviewed by Woodley and the Plourdes, and within two weeks of his application for the plant superintendent position, was offered the job in early to mid November

1997 (Tr. 198-200, 317-18; Vol. II: 14-16). Don Davis' report-to-duty date at Plourde was delayed a week or so, in order for him to complete a project for his current employer before his departure; Davis reported to duty at Plourde on December 8, 1997 (Tr. 214, 234, 318; Vol. II: 17-18). In the meantime, on December 3, 1997, Brent Blackey was involved in a fatal accident at the Hooksett plant. Lehoux was not at work the day Blackey was killed (Tr. 47-48, 55). An MSHA accident investigation ensued, during which Lehoux, among other employees, was interviewed (Tr. 84-86). Upon conclusion of the MSHA investigation, on December 12, 1997, Lehoux was discharged by Plourde.

III. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,[3] a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F. 2d 1211 (3rd Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F. 2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC* 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC,* 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

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[3] Section 105(c)1 of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint...of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101; (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or, (4) he has exercised "on behalf of himself or others...any statutory right afforded by this Act."

Lehoux has met the first step in establishing a *prima facie* case of discrimination. The record establishes that Lehoux cooperated with MSHA during its investigation of Brent Blackey's death in early December 1997, and according to Lehoux's testimony, he "started squawking like a pigeon" because he was extremely upset about Brent Blackey's death (Tr. 50, 54-57). Lehoux further testified that he and Larry Champhene had led the MSHA investigators around the plant, pointing out safety concerns, and that he, himself, showed them an electrical box that did not have an emergency shut-off, which he believed had something to do with Blackey's death (Tr. 57-59). Indeed, Plourde concedes that Lehoux engaged in protected activity (Resp. Br. at 1-2).

Lehoux has ultimately failed to establish a *prima facie* case, however, because he has not met his burden of proving the second step--that Plourde's decision to discharge him was, in any part, motivated by his cooperation with MSHA. Lehoux attempted to establish a causal connection between his safety complaints in early December 1997, following Blackey's death, and his discharge shortly thereafter on December 12th, through circumstantial evidence of his satisfactory work performance and Oscar Plourde's animus toward MSHA. While bearing in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect," the evidence presented does not establish an intent to discriminate. *See Secretary of labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F. 2d 86 (D.C. Cir. 1983).

Looking first to Lehoux's performance, Lehoux argues that absence of any disciplinary action in his personnel file establishes that he had been meeting the expectations of the Plourdes, or had otherwise been performing his duties satisfactorily (Ex. C-1). However, lack of documented performance deficiencies must be analyzed in the broader context of the manner in which the Plourde brothers have operated over the extensive life of the company. There is considerable testimony that the Plourdes do not follow the company's written safety program policy, deal with their employees orally, and otherwise run a very informal operation (Tr. 179-80; Vol. II: 59; Ex. C-2). For example, in response to questioning on cross-examination as to whether Lehoux had ever received a written reprimand, salesman Tom Woodley testified to his view of how Oscar Plourde ran the company:

> A. Unfortunately, Plourde Sand and Gravel has never done it that way, and so there are no written records to show that. Since this has come about, they realize that we're going to have to, and we're now going ahead and doing written reprimands and that sort of thing. Unfortunately, Mr. Plourde has been in business since 1929 or whatever, never had to do that sort of thing. This is the first time it's happened, and he's kind of described as old school. He's always--you understand where you stand with Mr. Plourde, if you know him. He's very vocal

(Tr. Vol. II: 40-41). Indeed, Lehoux expressed a similar view by testifying, on cross-examination, as follows:

Q. Would you agree that at Plourde Sand and Gravel many things are done informally?

A. Yes, I would.

Q. It's a seat-of-the pants operation in some respects, is it not?

A. Yes.

Q. Would that be a fair characterization?

A. Yes.

Q. And you'd agree that oftentimes Oscar Plourde and Larry Plourde will not create paperwork but rather speak to people, sometimes in Oscar's case, with some passion?

A. Uhm-hmm, yes.

Q. But would you agree it's more likely that someone would get a verbal warning than a written one at Plourde Sand and Gravel?

A. Yes, I would.

Q. And in fact, in your experience, they're fairly lax on the paperwork aspect of things?

A. Yeah, they are

(Tr. 90-1). Oscar Plourde referenced the way he and his brother conducted business in the following testimony:

Q. Did you ever think of putting it in writing, if it was a disciplinary action?

A. We never issued any writing, very, very--I don't remember issuing anybody a citation [reprimand] (Tr. 179).

****

Q. And you didn't think, in those months between July and August of '97, to when you were going to terminate him, to start showing in his personnel file, documenting, performance issues?

A. Never entered my mind.

Q. Never did that?

A. No, never did it to nobody (Tr. 208; see also 212).

****

A. We're construction people, we're not paper people (Tr. 224).

****

A. And his father [Lehoux's] ran a bigger operation than we have. We always worked together and hand in hand when we do that, we're of the 60's and the 70's and the 50's, we're not of the 90's. Paper is tough for us

(Tr. 229-30). This cumulative testimony, unrebutted, leads me to conclude that lack of written reprimands in Lehoux's personnel file is not dispositive of whether the Plourdes were satisfied with his job performance.

On the issue of Lehoux's performance, the evidence establishes that Lehoux had problems in both the sales and plant superintendent positions. It is clear from the record that, despite Lehoux's assertions to the Plourdes that he could handle the positions, Lehoux had very little experience in sales and management when they hired him, and received no formal training from them throughout his tenure with the company (Tr. 15, 17, 30-31, 168-71, 195-96, 253-58, 311-14, 339-41; Vol. II: 86-87, 96-98, 129; Ex. C-9). In fact, there was no job description for either position and Lehoux was told what to do on the job (Tr. 258-59, 341; Vol. II: 86). Lehoux, himself, corroborates the testimony of Oscar Plourde and Dick Weed that Lehoux was uncomfortable and performing poorly in sales (Tr. 30, 167, 313). Respecting the plant superintendent position, both Plourde brothers testified to Lehoux "slacking off" some time around May 1997, and to their increasing dissatisfaction with Lehoux's ability to effectively manage and distance himself from subordinate employees, repair and maintain equipment and produce material (Tr. 167, 174-75, 188-89, 191-92, 211-12, 241-42; Vol. II: 51-58, 60-63, 70-71). Tom Woodley testified to having observed the plant running below capacity under Lehoux, and to having personally spoken to Lehoux about preventing his subordinates from loafing (Tr. Vol. II: 28-32). Moreover, the Plourdes testified to having made constant verbal complaints to Lehoux about deficiencies in his work, including, but not limited to, his failure to have safety guards replaced on equipment immediately after repair (Tr. 178-83, 185-86, 238, 241-43; II: 57-60, 85). Lehoux agrees, on cross-examination, that Oscar and Larry Plourde had been unhappy with the pace at which he addressed maintenance problems (Tr. 102, 109-10). Lehoux's witness, Larry Champhene, testified that Oscar was generally disagreeable, that he was constantly on the employees' "backs," and that he routinely "bitched out" the employees, including Lehoux (Tr. 274-75). Despite numerous assertions that he had never been told by the Plourdes of

dissatisfaction with his performance, Lehoux also agreed, on direct examination, that Oscar got aggravated often, had a bad temper, yelled and screamed, and pushed the employees pretty hard (Tr. 38). Furthermore, he conceded that the Plourdes were unhappy with his supervision of his subordinates:

> Q. Was there ever an issue about you working side-by-side with the people you were supervising?
>
> A. Yeah. I don't think they--they saw it as, like, I was trying to be buddy-buddy with everybody. But I'd always been taught, if you could, to work with your employees a little bit. It shows them that you're willing to help out, it's not just something that you're going to hand to someone because you don't want to do it. I shoveled right side-by-side with Lawrence Chemphene and Brent and Kenny all the time. I did most of the welding, cutting.
>
> Q. And was that an issue; in other words, was that something that you were disciplined for doing?
>
> A. I wasn't disciplined, but I knew they didn't--they frowned on it a little bit. Larry Plourde's son, Philip, we talked about a couple times, that I should back off a little bit, but it's hard with three men, which I considered doing a four, five-man job, to try and really keep that place up to par.
>
> Q. Were you ever told that your job was in jeopardy if you didn't stop working side-by-side with--
>
> A. No, never.
>
> Q. Were you told that you were not allowed to work side-by-side with the men or that they just wanted you to stand back a little bit more?
>
> A. No, nobody ever said that to me. I just could tell, the way things went, you know, the body language, the way we talked sometimes. I needed to be more of a supervisor than a plant helper, but what was I going to do? We needed it. It's either that or it doesn't run

(Tr. 42-43). Moreover, Lehoux testified to frustration with the job by May of 1997, based on frequent disagreements with Oscar Plourde because of pervasive unsafe work conditions, and Oscar Plourde's tendency to drive the workers to produce at the expense of their safety (Tr. 32, 35-42, 48, 50-51, 108, 118-19, 121, 126-27, 154-55). His dissatisfaction escalated to a level that caused him to begin searching for employment elsewhere, he asserted, sometime around August/September 1997 (Tr. 105-07). Lehoux further testified that he "started feeling hostility from Oscar before, maybe, you know, in those weeks prior to the death [Brent Blackey's]" (Tr.

63). Consequently, based on the evidence, I conclude that throughout most of his tenure, Lehoux was not meeting the Plourdes' expectations, of which he was made aware, especially through verbal confrontations with Oscar Plourde and that, by May of 1997, the dissatisfaction had become mutual.

The question raised by Lehoux, at this juncture, is whether Oscar Plourde initially intended to demote him, then changed his mind when Lehoux cooperated with MSHA's investigation of Brent Blackey's death. For the following reasons, I think not. As the president of the company, Oscar Plourde, without question, is the decision-maker. The evidence clearly establishes that Oscar Plourde complained to his management team during the Summer of 1997 about Lehoux's performance and requested that Tom Woodley "look around, keep an eye out" for a replacement superintendent in or around late September (Tr. 187, 197, 205, 240, 315-16; Vol. II: 12-13, 64-65). Lawrence Plourde testified credibly that, despite his earlier desire to give Lehoux another chance by demoting him to a loader operator or other lesser position, he had become convinced by September of 1997, that replacing Lehoux was necessary and he ultimately concurred in his brother's decision to fire him (Tr. Vol. II: 64-69, 73-75, 84).

The record also establishes that Don Davis' original report-to-duty date in November 1997, as the new plant superintendent, was delayed until December 8th, in order for Davis to accommodate his former employer (Tr. 214, 232, 318; Vol. II: 17-18, 100-01, 106-07). Oscar Plourde testified credibly that he had always intended to fire Lehoux as soon as he brought a replacement on board, but following the advice of his attorney, he had kept Lehoux on the job for the first week of Davis' tenure as the new plant superintendent, until MSHA had concluded its fatality investigation (Tr. 190, 197, 215, 217, 223, 227, 236). Lawrence Plourde, Richard Weed and Tom Woodley corroborated Oscar Plourde's testimony that the decision to fire Lehoux had been made prior to hiring Don Davis and Brent Blackey's death (Tr. 318-19, 325; Vol. II: 19-20, 68-71, 91). Furthermore, Richard Weed's testimony, that the office manager, Maria LaRocca, had been asked to process a final payroll check for Lehoux before Brent Blackey's death, was unrebutted (Tr. 318). Davis testified credibly that on his first day at Plourde, he and Lehoux were told that Davis would be the plant superintendent and that Lehoux would be a working foreman (Tr. Vol. II: 100). Tom Woodley testified likewise (Tr. Vol. II: 18-20). This evidence is consistent with Oscar Plourde's testimony that he never intended to give Lehoux advance warning of his termination, and leads me to conclude that what Lehoux and the other workers were told about the new work arrangement was merely a ruse to maintain Lehoux on board until his availability for MSHA was no longer necessary (Tr. 190, 227-29).

Lehoux's theory of discrimination focuses, as well, on Oscar Plourde's well-documented dislike of MSHA, and the proximity between Lehoux's cooperation with the fatality investigation and his discharge (Tr. 71-75, 86, 89, 162, 175-78, 183-85, 276, 288, 296-97, 344-45; Vol. II: 42-45, 92). Lehoux cites an incident between Oscar Plourde and himself, around December 9th or 10th, in which Lehoux admitted that he had disclosed electrical safety violations to MSHA during the fatality investigation (Tr. 58-60). While Oscar Plourde's rendition of the incident differs as to whether it was he or Lehoux who had raised the subject with the other, they

are in agreement that Plourde essentially walked off without arguing (Tr. 219-21, 244). To surmise that Oscar Plourde was angered by Lehoux's admission based on his dislike of MSHA, contrary to his displayed nonchalance, is speculative, at best. I credit Oscar Plourde's testimony as to his state of mind at the time:

> Q. Did you walk away after he told you?
>
> A. He told me he told 'em. I says, "Yeah." Then I went upstairs. He told them, I just walked off, that's all.
>
> Q. You didn't try to argue with him?
>
> A. No.
>
> Q. Were you unhappy that he had disclosed this or anything to MSHA?
>
> A. At this point, no, because the investigation was on. Whatever was, was. That's the way I look at it

(Tr. 144-45). Indeed, no evidence has been presented that Oscar Plourde's hostility toward MSHA was transferred to any of his employees, respecting their cooperation with MSHA, during the time period in question or any other time (see also Tr. Vol. II: 129-40, 142-44). The evidence establishes that the employees were advised by management of their right to cooperate fully with MSHA free of harassment, that they were made available to MSHA without interference, and that management was unaware of the content of the employees' discussions with the investigators (Tr. 74-75, 87-90, 230, 244-46, 281-88, 321-22, 324; Vol. II: 91-92, 122).

If anything, the Plourdes were consistent throughout Lehoux's tenure with the company: the same lack of prudent management skills that afforded him the benefit of employment and was utilized in his supervision, became the very weapon that struck him down. My function is to determine whether Lehoux's discharge was discriminatory, not whether he was treated unfairly, although I am moved to comment that he was. It appears likely that Lehoux was "given a chance" to work in positions for which his skills were sorely lacking because, in part, his father had been well-liked and respected in the industry by the Plourdes and because of other reasons, not necessarily job related, that Richard Weed put aptly:

> A. I knew him personally. He grew up in our neighborhood. He grew up with my kids, same neighborhood, same school; had knowledge of his mother and father. And as a result of sort of understanding where he had been in life, Marine Corps, I had been in the Marine Corps, so we had a lot in common, a lot to talk about. And that sort of blended into the process

(Tr. 310; see also 229-30). For perhaps the best of intentions, Lehoux was programmed to fail

from the start, insufficiently trained to master his duties with the resources made available to him, and denied formal, progressive discipline, that would have put him on notice, with specificity, of his deficiencies and the consequence of failure to timely improve. For the lack of sufficient circumstantial evidence, as explained above, I am unwilling to take the broad leap necessary to conclude that the absence of professionalism and fairness attendant Lehoux's employment at Plourde was, in any part, due to his cooperation with MSHA. Accordingly, it is my finding that Lehoux's discharge was in no part motivated by his protected activity.

Assuming, *arguendo*, that Lehoux had established a *prima facie* case of discrimination under Section 105(c), Plourde has clearly rebutted his case by proving that Lehoux was terminated for a legitimate, business-related reason: that he was not performing to the Plourdes' satisfaction and would have been terminated for that reason alone prior to Brent Blackey's death, had Don Davis reported to duty in November 1997, as had been originally scheduled.

ORDER

Accordingly, inasmuch as Lehoux has failed to establish, by a preponderance of the evidence, that he was terminated for engaging in protected activity under the Act, it is **ORDERED** that the complaint of John D. Lehoux against Plourde Sand and Gravel, under Section 105(c) of the Act, is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 11 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 95-467
Petitioner	:	A. C. No. 36-07172-05513
v.	:	
	:	Gentzel Quarry
BELLEFONTE LIME COMPANY, INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

On November 30, 1998, the Commission issued a decision in the above captioned case remanding it for "consideration of whether the violation had been caused by Bellefonte's unwarrantable failure to comply with the standard, and for the reassessment of the civil penalty if appropriate" (slip op., p.2, 20 FMSHRC __).

In analyzing the level of Respondent's negligence, I note that none of Petitioners witnesses who observed falling rocks brought this hazard to the attention of Respondent.[1]

Also, I note that none of Respondent's witnesses observed materials falling from the cited areas, no reports concerning falling materials were ever made by the employees, no precursors to a slope failure were visible prior to the issuance of the citation, and that Respondent expected that miners would be out of the areas in about one shift's time.

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[1]/ Moerschbacher was asked whether he told his supervisor about rocks that fell down, and he said that he did. However, his testimony regarding what he specifically told his supervisor, Jim Peters is as follows: "I told him that I thought it would be smart to try to bench that to try to make it safer" (sic) (Tr. 173). His testimony is thus somewhat ambiguous as to whether he explicitly told Peters about rocks that had fallen down. I note that Peters who acknowledged that he sent a bulldozer into the cited area at the suggestion of an employee, denied that any employee informed him that the cited areas were unsafe. I observed Peters' demeanor, and find his testimony credible on this point.

On the other hand, Peters indicated that it was company policy that miners not work in the cited areas when it rained. According to Peters, one of the reasons for this policy was the possibility that rain could loosen material on the pile. Hence, it might be inferred that Peters was aware of the possibility that the cited area was hazardous. There is no evidence that Respondent took any specific precautions to mitigate the possible hazards. In addition, 5 months prior to the inspection at issue, a section 107(a) imminent danger order was issued to Respondent citing Respondent for violating section 56.3200, supra, in another part of the quarry at issue. Within this framework of evidence, I find that the level of Respondent's negligence to have been more than ordinary, and reached the level of aggravated conduct. I thus conclude that the violation resulted from its unwarrantable failure.

Since this conclusion is based on the same factors previously set forth in my initial decison in discussing the level of Bellefonte's negligence for purpose of assessing a penalty, I find that it is not appropriate herein to reassess the penalty I previously assessed.

Avram Weisberger
Administrative Law Judge

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December 22, 1998

ISLAND CREEK COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 99-11-R
	:	Order No. 7297950; 10/14/98
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	VP 8 Mine
	:	Mine ID 44-03795

DECISION

Appearances: Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania, for the Contestant;
Robert S. Wilson, Esq., Howard N. Berliner, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, and
Larry Coeburn, Conference and Litigation Representative, Mine Safety and Health Administration, Norton, Virginia, for the Respondent.

Before: Judge Weisberger

I. Statement of the Case

This case is before me based upon a Notice of Contest filed by Island Creek Coal Company ("Island Creek") challenging the issuance by the Secretary of Labor ("the Secretary") of an order issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("the Act") alleging a violation of 30 C.F.R. § 75.1725(c). On October 21, 1998, Island Creek filed a Motion for Expedited Hearing. A conference call was convened on October 22, 1998, with counsel for both parties and it was agreed that the matter be scheduled for hearing on November 12, 1998. On that date a hearing was held in Abingdon, Virginia.

II. Findings of Fact and Discussion

On September 20, 1998, Elmer L. Deel, Jr., Island Creek's general maintenance foreman, was responsible for supervising all maintenance work being performed at the VP 8 Mine. In this capacity he was supervising the installation of a new roller on the 5A belt which was

deengerized, but was not locked and tagged.[1] Deel noted that the speed reducer which was a part of the drive mechanism of the 5A belt, and attached to that belt, needed oil. Deel told Ronnie Maggard, a maintenance foreman, that he should add oil to the speed reducer. Deel did not tell Maggard to make sure that the 5A belt was tagged and locked, although Deel was aware that it was company policy to have the belt tagged and locked prior to the performance of maintenance. Maggard in turn told Charles David Miller, a rock dust motorman, to add oil to the speed reducer, but did not tell him to lock and tag out the belt. Miller climbed on a I beam located within arms length of the speed reducer, and at a point 4 to 5 feet above the 5B belt which is located above the 5A belt and dumps material on the 5A belt. Thomas K. Ray, an electrician, was asked by Miller to assist in the task. Ray stood on the 5B belt, which had been deenergized, in order to pump oil into a hose that Miller had placed in the speed reducer to fill it with oil. The 5B belt was unexpectedly energized and it traveled 400 feet carrying Ray with it before it was stopped. Ray injured his hand, and as of the date of the hearing had been off from work since September 20, 1998.

The order at issue, issued subsequent to an investigation, alleges a violation of 30 C.F.R. § 75.1725(c)[2] in that maintenance was being performed on the 5A conveyor belt drive ". . . while the injured employee was positioned on top of the 5B conveyor tail piece. The 5B conveyor belt drive was not locked against motion. The 5B conveyor drive was started from a remote location, ..." (Emphasis added). At the hearing, counsel for the Secretary in his opening argument alleged as a basis for the violation, that maintenance was being performed on the 5B belt as an employee was on it, and that the 5B belt was not locked and tagged. He also argued that the 5A belt was not locked and tagged while it was being worked on.

III. Discussion

A. Maintenance on the 5B Belt

It is the Secretary's position, in essence, that maintenance was being performed on the 5B belt, which was not locked and tagged. The assertion that maintenance was being performed on this belt is predicated upon the fact that, in adding oil to the speed reducer, Ray was standing on 5B belt. I take cognizance of the holding by the Commission that the purpose of section

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[1]/ According to Deel, he had told Tommy Lee Proffit, the section mechanic on the day shift, to lock and tag out the 5A belt and the latter nodded his head. Proffit, in contrast, testified that he had asked Deel if everything was tagged and locked and the latter said "lets go" (Tr. 96). Later in his testimony, he testified that Deel said that "[E]verything is locked out. Lets go" (Tr. 103). In light of my finding (III, infra) sustaining Island Creek's contest of the order at issue, it is not necessary to resolve this conflict in testimony relating to Island Creek's negligence.

[2]/ 30 C.F.R. § 75.1725(c) provides, as follows: "[R]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

75.1725(c), supra, is to prevent "to the greatest extent possible," accidents in the use of equipment, and that "the manifest intent of the regulation is to restrict repair of machinery while the power is on." (*Arch of Kentucky, Inc.*, 13 FMSHRC 753, 756 (1991)). Nontheless, in order for section 75.1725(c), supra, to apply to the situations presented at the 5B belt herein, it must be established by the Secretary that "repairs or maintenance" were being performed on that belt. There is no evidence that any repairs were being performed on that belt. The Secretary must thus establish that the action of Ray in standing on the 5B belt in order to assist in the addition of oil to the speed reducer located on the 5A belt, constituted "maintenance" of the 5B belt.

In *Southern Ohio Coal Company*, 14 FMSHRC 978, 983 (June 25, 1992), the Commission set forth the essence of the term maintenance as follows:

> That essence, as the dictionary indicated is that maintenance means 'the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . . [p]roper care, repair, and keeping in good order . . . [t]he upkeep, or preserving the condition of property to be operated.' See Webster's Third New International Dictionary, Unabridged 1362 (1971); A Dictionary of Mining, Mineral, and Related Terms 675 (1968); and Black's Law Dictionary 859 (5th ed. 1979).

Since no action was being taken by any miner to care for the condition of the 5B belt, I find that it has not been established that any maintenance was being performed on that belt.

The plain language of section 75.1725(c), supra, does not contain any words that could reasonably be interpreted as prohibiting a person from standing on one piece of equipment in order to assist in the maintenance of another piece of equipment. I thus find that no maintenance was being performed on the 5B belt. Since neither repair nor maintenance was being performed on the 5B belt, any conditions or circumstances relied upon by the Secretary relating to that belt can not be the basis of any violation under section 75.1725(c), supra.

B. The 5A Belt

The record establishes that on September 20, repairs were being made to the 5A belt in the nature of replacement of a roller. Also, maintenance was being performed in the addition of oil to the speed reducer, a part of this belt. According to section 75.1725(c), supra, if these activities are performed it is mandated that: 1. The power be off, and 2. the machinery be blocked against motion.[3] Hence, a violation is established where maintenance is performed either with the power on, or where the machinery is not "blocked against motion." The parties have agreed that during the time in question the power was off at the 5A belt. It appears to be the Secretary's position that the latter requirement in section 75.1725(c), supra, for "machinery" to

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[3]/ Section 75.1725(c), supra, provides for an exception "where machinery motion is necessary to make adjustments." Both parties agree that this exception does not apply to the instant case.

be "blocked against motion," was not being complied with because the 5A belt was not "locked and tagged." It is true that imposing such a requirement would fulfill the broad intent of section 75.1725(c), supra, as described by the Commission in *Arch of Kentucky*, supra. However, in evaluating the scope to be accorded the language of a regulatory standard, the test to be applied is whether the regulation gives a reasonably prudent person notice that it prohibits the cited conduct. (*Southern Ohio Coal Co.*, 14 FMSHRC 978 (June 1992). Section 75.1725(c), supra, does not give notice that it prohibits the cited conduct. The plain language of section 75.1725(c), supra, requires that "machinery" being repaired or maintained shall be "blocked against motion." There is no requirement that the equipment or circuits energizing the equipment be tagged and locked out. The mere fact that it is the policy of Island Creek to require that the power source to the belt be tagged and locked prior to performing nonelectrical work on the belt does not, per se establish that Island Creek was on notice that section 75.1725(c), supra, requires tagging and locking the power source. There is nothing in the record regarding Island Creek's intent in establishing such a policy. It is entirely possible that such a policy was adopted by Island Creek in order to require a higher standard of conduct than that set forth in section 75.1725(c), supra.

I note the testimony of Thomas K. Ray, an electrician, Charles David Miller, a motor man, and Tommy Lee Proffit, an electrician, all employed by Island Creek that, in essence, they were told by "management" that the "law" required locking and tagging prior to working on belts. However, in reaching a decision regarding the scope of section 75.1725(c), supra, I place more weight upon the Commission's interpretation of the requirement of this standard. I am guided by the Commission's decision in *Mettiki Coal Corp.* 13 FMSHRC 760 (1991) interpreting 30 C.F.R. § 77.404(c), which pertains to surface coal mines, and contains the exact same language as section 75.1725(c), supra. In *Mettiki*, the operator was cited for an improperly functioning electrical breaker in that the lock out device on the switch did not function as it was designed. The Commission found that at the time of MSHA's inspection that led to the issuance of the citations at issue therein, there was no electrical work in progress, but rather miners were making nonelectrical repairs to the speed reducer for the belt that was powered by the breaker in question. The Commission emphasized the distinction between electrical work requiring devices to be locked out and tagged pursuant to 30 C.F.R. § 77.501,[4] and mechanical repairs which require, under section 77.404(c), supra, which parallels section 75.1725(c), supra, that the power be off and the machinery blocked against motion. The Commission, in setting forth that locking and tagging out is not required, stated as follows: "A lock out of the equipment or circuit is not required. Thus, when mechanical repairs are being made to mechanical equipment and there is no danger of contacting exposed energized electrical parts, MSHA requires only that the power be turned off and the machinery be blocked against motion." (*Mettiki*, supra, at 766). Although the Commission's above analysis may be construed to constitute dictum, nontheless it constitutes a clear sound pronouncement of regulatory interpretation, and accordingly should be followed.

Therefore, for the all above reasons, I conclude that there is no requirement set forth in

---

[4]/ The parallel requirement regarding underground coal mines is forth in 30 C.F.R. § 75.511.

the Commission's above analysis may be construed to constitute dictum, nontheless it constitutes a clear sound pronouncement of regulatory interpretation, and accordingly should be followed.

Therefore, for the all above reasons, I conclude that there is no requirement set forth in section 75.1725(c), supra, that locking or tagging of a circuit is required prior to mechanical work on a belt.[5] Accordingly, Island Creek did not violate section 75.1725(c), supra, when its employees added oil to the 5A belt and repaired it while the power was off, but when it was not locked and tagged. Hence, the Contest is **SUSTAINED**.

ORDER

It is **ORDERED** that Island Creek's Notice of Contest is **SUSTAINED**, and Order No. 7297950 shall be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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dcp

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[5]/ I find that the contrary interpretation argued the Secretary is not reasonable, and it not entitled to difference especially since it has not been embodied in any policy statement.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 24 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of PAUL MIDDLETON, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. KENT 99-60-D
v.	:	BARB CD 98-19
J & C MINING, L.L.C., Respondent	:	Mine No. 1 Mine ID 15-17707

DECISION APPROVING SETTLEMENT

Appearances: Brian Dougherty, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Complainant
Susan Lawson, Esq., Harlan, Kentucky, for the Respondent.

Before: Judge Weisberger

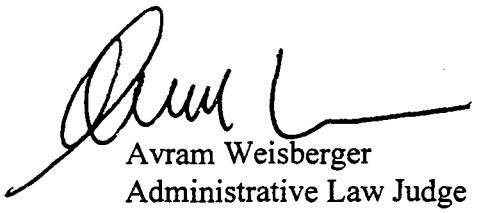
On April 27, 1998, Paul Middleton filed a Discrimination Complaint with the Mine Safety and Health Administration (MSHA) alleging that he was discharged by J & C Mining, L.L.C. ("J & C") from his position as a day-shift foreman as a result of his refusal, on two occasions, to instruct his crew to work in unsafe conditions, and his complaint to J & C's owner regarding his direct supervisor's unsafe instructions.

On November 17, 1998, the Secretary filed an Application for Temporary Reinstatement alleging, in essence, that the Complaint of Discrimination filed by Middleton was not frivolous. On November 17, 1998, the Commission's Docket Office received a statement from J & C alleging that Middleton was terminated for just cause with no discriminatory intent. In its statement, J & C also requested a hearing. On November 30, 1998, the undersigned arranged a telephone conference call between the Secretary and J & C's representative in order to arrange a hearing date. After discussion, the Secretary agreed that the hearing should be scheduled to commence December 16, 1998. The matter was heard in Kingsport, Tennessee, on December 16-17, 1998.

At the hearing, the Parties reached a settlement that disposes of the Application for Temporary Reinstatement. The terms of parties' settlement, are set forth in the transcript of this proceeding, and are incorporated herein. I find that the settlement is appropriate considering the record in this case, and it is approved.

ORDER

It is ordered that the Parties shall abide by all the terms of the settlement. It is further ordered that, based on the parties' agreement and interest of justice, the transcript of the hearing in this proceeding be included in the record of the companion discrimination proceeding, Docket No. KENT 99-61-D. It is further ordered that the Application of Temporary Reinstatement be **DISMISSED**.



Avram Weisberger
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D.C. 20006-3868

November 17, 1998

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. YORK 98-56-M A. C. No. 27-00094-05535
v.	:	
PLOURDE SAND & GRAVEL, Respondent	: :	Plourde Sand & Gravel

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of four civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlements. A reduction in the penalties from $200,000 to $40,000 is proposed.

The violations were issued after a fatality occurred at a sand and gravel operation. Order No. 4434213 was issued for a violation of 30 C.F.R. § 56.14204 because a miner was greasing gears on a classifier while the gears were in motion. The originally assessed penalty was $50,000 and the proposed settlement is $30,000. Order No. 4434214 was issued for a violation of 30 C.F.R. § 56.11001 since a safe means of access was not provided to grease and service the gears on the classifier. The originally assessed penalty was $50,000 and the proposed settlement is $3,500. Order No. 4434215 was issued for a violation of 30 C.F.R. § 56.14107(a) because guards were not installed on the gears for the classifier. The originally assessed penalty was $50,000 and the proposed settlement is $3,500. Order No. 4434216 was issued for a violation of 30 C.F.R. § 56.18006 because the victim had not been indoctrinated in safe work procedures. The originally assessed penalty was $50,000 and the proposed settlement is $3,000.

The operator's very small size and its good faith abatement are noted as grounds for the proposed penalties.

The facts as set forth by the Solicitor are as follows:

> This case concerns a single fatality which occurred on December 3, 1997. A four-man crew assembled an old classifier which was being put back into service in order to meet demand. At the end of the workday, the crew with the exception of the victim, was conducting a test run of the now fully assembled machine. At the time of the fatal accident, the owner/operator and his supervisory agents were absent from the site and had been for most of the workday. Prior to conducting the test run the crew discussed the remaining assignments. The victim expressed a desire to grease the bull gears of the classifier. According to the statements of the three surviving employees at the site when the fatality occurred, the senior miner, a non-supervisory worker, told the three other employees, including the decedent, that the full gears of the classifier would be greased the next morning prior to start up for the day. While a test run of material was being processed, the decedent, who was out of sight of the other three employees, apparently climbed up the rear of the machine, attempted to grease the gears, and was pulled into the mechanism and killed. The rest of the crew was at the front of the machine and first learned of a hazard when they heard the victim scream to turn off the machine. The victim was found crushed in the large gears. The decedent had been employed for about eighteen months and had performed numerous tasks related to the operation of a mine. He had not received new miner training but this sand and gravel operation was exempt from enforcement of that standard pursuant to a rider to the MSHA budget appropriation. He had received an eight-hour refresher training course from the New Hampshire Sand and Gravel Association, but that training does not appear to have covered either the safe and proper procedures to access and (sic) elevated location or the safe and proper procedures to performed (sic) required greasing or other maintenance. The gears were not guarded. However, the gears were about 99 inches above the ground and about 51 inches above the surface of concrete blocks adjacent to the newly erected classifier. Unless one were performing a maintenance function in the area around the gears, one would not be exposed to any hazard from exposure to the gears.

It is well established that penalty proceedings before the Commission and its judges are de novo and that the Secretary's proposed penalties are not binding on the Commission and its judges. Sellersburg Stone Company, 5 FMSHRC 287, 290-292 (March 1983); aff'd, 736 F.2d 1147 (7th Cir. 1984); U.S. Steel Mining Co., 6 FMSHRC 1148, 1150 (May 1984); Missouri Rock Inc., 11 FMSHRC 136, 140 (February 1989); Doss Fork Coal Company, 18 FMSHRC 122, 130 (February 1996); Wallace Brothers Inc., 18 FMSHRC 481, 483-484 (April 1996); Mechanicsville Concrete, Inc., 18 FMSHRC 877, 881, (June 1996).

As already noted, Order No. 4434213 charges a violation of 30 C.F.R. § 56.14204 because the decedent miner was greasing the gears while they were in motion. I find that the violation occurred as charged. I also find that the violation was extremely serious because it was

the immediate cause of the fatality. The decedent was extremely negligent because in greasing the gears he ignored the statement of the leadman that greasing would be done on the following day. There is no dispute that the decedent was a rank and file miner, but since he was not trained and no supervisors were present, his very high negligence is attributable to the operator. U.S. Coal Inc., 17 FMSHRC, 1684, 1686 (October 1995); Fort Scott Fertilizer-Cullor, 17 FMSHRC 1112, 1116 (July 1995). On this basis the unwarrantable finding must be upheld. In his motion the Solicitor does not demonstrate awareness of the law applicable to imputation of negligence under these circumstances. The Solicitor describes the leadman as a senior miner who is a non-supervisory worker. It does not appear that the leadman was negligent. In view of the findings set forth herein I conclude that an appropriate penalty is $30,000.

Order No. 4434214 cites a violation of 30 C. F. R. 56.11001 due to the failure to provide safe access to the gears. I find the violation occurred as charged. Accessing the gears in this manner presented a slip and fall hazard. Although in this instance that hazard did not occur, I find the violation still was serious because of the risk involved and that the operator was negligent. I conclude that an appropriate penalty is $3,500.

Order No. 4434215 cites a violation of 30 C.F. R.14107 for failure to guard the gears. I find the violation occurred as charged. Lack of guarding can cause serious injuries although it did not in this case. The violation was therefore, serious and the operator was negligent. I conclude that an appropriate penalty is $3,500.

Order No. 4434216 was issued for a violation of 30 C. F.R. § 56.18006 because the decedent had not been sufficiently trained in safe work procedures. The lack of indoctrination constituted a serious violation and the operator was negligent. I conclude that an appropriate penalty is $3,000.

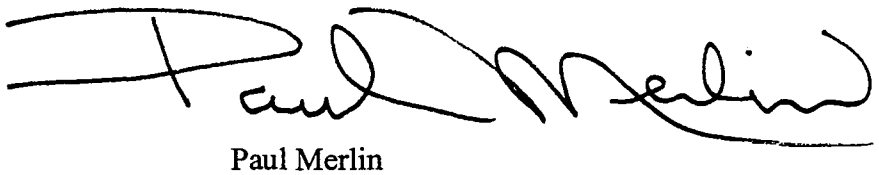
The Solicitor has called my attention to the operator's very small size and to its substantial efforts at good faith abatement. According to the Solicitor in an effort to assist the mining community in learning from these types of tragic accidents, the operator has agreed to allow MSHA to make a videotape at the mine in connection with a training film addressing the multiple facets of many common accidents. I have taken these factors in to account in determining the amount of penalties under section 110(i) of the Act.

What the Solicitor does not call my attention to is the operator's poor history of prior violations as indicated by the assessment sheet attached to the penalty petition. As required by section 110(i), I have carefully considered this history in determining the above penalty amounts. The operator should realize that any future violation of the Act will result in even more substantial penalties and I will not be amenable to recommendations for reductions of the magnitude allowed here. If the operator is to conduct operations under the Mine Act, it must comply with the requirements of the Act or suffer the consequences. I trust that MSHA will closely monitor the operator's activities.

Wherefore, the motion for approval of settlements is **GRANTED**.

It is **ORDERED** that Order Nos. 4434214, 4434215 and 4434216 be **MODIFIED** from 104(d)(2) orders to 104(a) citations and to delete the unwarrantable failure findings.

It is further **ORDERED** that the operator **PAY** $40,000 in accordance with the payment plan set forth in the settlement motion.



Paul Merlin
Chief Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D.C. 20006-3868

November 10, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 98-98-M
Petitioner	:	A. C. No. 26-01621-05546
	:	
v.	:	Jerritt Canyon
INDEPENDENCE MINING	:	
COMPANY INCORPORATED,	:	
Respondent	:	

ORDER TO SHOW CAUSE

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. On August 3, 1998, an order was issued disapproving the settlement motion submitted by the parties for the two violations in this case and directing them to submit additional information to support their motion. On November 2, 1998, the parties filed a response to the order to submit information.

Citation No. 7951067 was issued under section 104(d)(1) of the Act for a violation of 30 C.F.R. § 56.6306(b). According to the citation, several loaded blast holes were driven over by mobile equipment. The violation was designated significant and substantial and the result of the operator's unwarrantable failure. The parties again propose to modify this citation from a 104(d)(1) citation to a 104(a) citation, to delete the unwarrantable failure finding and to make no change in the original assessed penalty $4,000. The parties represent that the modification is warranted because there is no evidence that the lead blaster had knowledge that a driver had driven over an unfilled loaded blast hole or an uncoiled detonator cord or that the company condoned such a practice. The parties state that it is company policy to use a spotter while driving through a blast pattern when a hole is loaded, the detonator is sticking out and the hole is not backfilled. Finally, the parties aver that the penalty is warranted because the violation was obvious.

Order No. 7951068 was issued under section 104(d)(1) of the Act for a violation of 30 C.F.R. § 56.6303(c). According to the order, two drills were drilling blast holes within twenty feet of holes that contained a detonator and booster and within forty feet of holes that had been fully loaded and stemmed. The violation was designated non-significant and substantial, but the result of the operator's unwarrantable failure. The parties re-propose to modify this order from a 104(d)(1) order to a 104(a) citation. The modification to a 104(a) citation is necessary because once the underlying 104(d)(1) citation is modified and no longer exists, the statutory predicate for a 104(d)(1) order is not present. A modification of this order to a 104(d)(1) citation

is not possible because the violation was designated non significant and substantial. The negligence and gravity findings remain unchanged. The same reduction in the original assessed penalty from $2,000 to $50 is proposed.

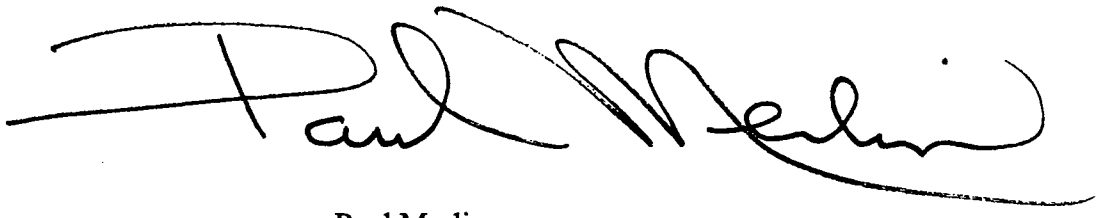
The reasons set forth in the August 3 order rejecting the original settlement motion apply to the second submission. The motion still does not make sense. On the one hand the deletion of an unwarrantable failure finding results in no change in the penalty while on the other hand the same modification results in a 97.5% reduction.

It is well established that penalty proceedings before the Commission and its judges are de novo and that the Secretary's proposed penalties are not binding on the Commission and its judges. Sellersburg Stone Company, 5 FMSHRC 287, 290-29 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); U.S. Steel Mining Co., 6 FMSHRC 1148, 1150 (May 1984); Missouri Rock, Inc., 11 FMSHRC 136, 140 (February 1989); Doss Fork Coal Company, 18 FMSHRC 122, 130 (February 1996); Wallace Brothers Inc., 18 FMSHRC 481, 483-484 (April 1996); Mechanicsville Concrete, Inc., 18 FMSHRC 877, 881 (June 1996). In light of the representations and documentation provided by the parties, I find that negligence for Citation No. 7951067 is ordinary and that a $4,000 penalty is excessive. A penalty of $2,000 is appropriate based on the statutory criteria of 110(i). With respect Order No. 7951068, I agree that the order must be modified to 104(a) citation and that the unwarrantable failure finding deleted because the statutory predicate for a 104(d)(1) order is no longer present. However, I find that a $50 penalty for a violation that is characterize as due to high negligence is inadequate and that a penalty of $100 is appropriate.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED**.

It is further **ORDERED** that within 21 days of the date of this order the parties show cause why this case should not be settled for the amounts designated above.

It is further **ORDERED** that if the parties do not respond within 21 days an order will be issued directing the operator to pay $2,100.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 14, 1998

THE DOE RUN COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. CENT 98-83-RM Citation No. 7859812; 2/24/98
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Casteel-Buick Mine Mine ID No. 23-00457
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 98-277-M A. C. No. 23-00457-05589
v.	:	
THE DOE RUN COMPANY, Respondent	:	Casteel Buick Mine

PARTIAL SUMMARY DECISION

Before: Judge Melick

These proceedings involve Order No. 7859812 issued pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 *et seq.*, the "Act." The order alleges a violation of 30 C.F.R. § 57.3202 and charges as follows:

> A fatal accident occurred at this operation on 1/19/98, when a large slab fell on a miner who was setting up a surveying instrument at intersection 3113b in slope 81V20. The slab was approximately 10 feet wide, 20 feet long and was up to 17 inches thick. The ground at this location had been visually examined, but testing for loose ground had not been done. Significant amounts of loose ground had been scaled in the intersections east and west of the fall during the weeks prior to the accident, which was indicative of loose ground conditions in this area of the mine. The mine operator was aware of the loose ground conditions in this part of the mine and failed to provide a scaling bar for the surveying crew at this location for scaling the back and ribs. This is an uwarrantable failure to comply with a mandatory safety standard. (Emphasis supplied)

The cited standard provides as follows:

> Where manual scaling is performed, a scaling bar shall be provided. The bar shall be of length and design that will allow the removal of loose material without exposing the person performing the work to injury. (Emphasis supplied)

In a motion for summary decision pursuant to Commission Rule 67(b), 29 C.F.R. 2700, 67(b), the Doe Run Company (Doe Run) sets forth the following background:

> 1. Doe Run operates the Casteel Mine, an underground lead and zinc mine near Boss, Missouri.
>
> 2. Mining is conducted by room and pillar mining by a process of drilling and shooting the faces and then loading the material into trucks for transport.
>
> 3. Roof control at the mine involves scaling, primarily by using a mechanical scaler, and installation of roof bolts at appropriate locations.
>
> 4. Headings and crosscuts are mined a maximum of 32 feet wide and typical heights ranged from 16-18 feet.
>
> 5. Spot bolting involves the use of 6-foot long fully grouted resin bolts. Areas to be bolted are primarily brows and areas of concern identified by the miners.
>
> 6. This case arose out of an accident at Doe Run's Casteel Mine on January 19, 1998. Surveyor Jeff Sadler and his assistant, Jason Wruck, were performing work in the 81V20 section of the mine where three drifts or headings were advancing in a southeasterly direction. They performed duties detailing the mining progress in this area that morning in all three headings as well as areas back from these three faces. At the time of the accident they were in the process of setting up their instruments to survey in the middle heading. They had not performed their duties in this heading earlier in the shift because a mechanical scaler was operating at the face of that heading.
>
> 7. While performing their survey duties in center of the three headings, a portion of the roof failed and fatally injured Mr. Sadler.
>
> * * * *
>
> 9. MSHA conducted an investigation of the accident. A citation and two orders were issued pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1) . . . . Order No. 7859812 alleged a

violation of 30 C.F.R. § 57.3202 and that the operator failed to provide a scaling bar for the surveying crew. This Motion applies only to Order No. 7859812. [References Omitted]

In its Motion for Summary Decision, Doe Run argues that the cited standard requires the presence of scaling bars only when hand scaling is done. It further argues that the intent of the standard is not, as the order suggests, to require a scaling bar to be present at all times but rather to require the use of a scaling bar if hand scaling is done, as opposed to using some other instrument (such as a shovel, pick, drill steel or similar tool), the use of which might place the miner in danger. Doe Run maintains therefore that the standard is clearly intended only to insure that the proper tool is used if hand scaling is done, not to insure that one is available at all times. It concludes therefore that since it is undisputed that no manual scaling was performed in this case the requirement for the use of a scaling bar did not exist. In other words, it argues that a violation cannot exist unless a scaling bar is not available when hand scaling is actually performed.

In support of its argument Doe Run cites the decision of Judge Fauver in *Asarco Inc.*, 12 FMSHRC 2073, 2092-3 (October 1990), rev'd on other grounds, 14 FMSHRC 941 (June 1992). In that case Judge Fauver vacated a similar citation, stating:

> These citations allege a violation of 30 C.F.R. § 57.3202, which provides: "Where manual scaling is performed, a scaling bar shall be provided. This bar shall be of a length and design that will allow the removal of loose material without exposing the person performing the work to injury."
>
> Citation No. 3253703 alleges that a "scaling bar of sufficient length to place the user out of danger of falling material was not provided" at the accident site where Mr. Norton was killed. ASARCO contends that § 57.3202 does not apply because "Norton was not manually scaling, but rather scaling with a jumbo drill." ASARCO Br. 29.
>
> It is clear that Mr. Norton was not engaged in manual scaling, because he did not take a scaling bar to his work site. If he did any scaling at all, he probably tried to use the jumbo drill. Although the jumbo drill can be used to scale certain kinds of loose material, it is not designed as a scaler; a mechanical scaler or a scaling bar used on foot or on elevated equipment can reach, angle into, and take down loose material that cannot be taken down by a jumbo drill. Thus, it is not a safe practice for an operator to rely solely on the jumbo drill for scaling - - because loose material could be missed. Nonetheless, since Mr. Norton was not engaged in manual scaling on the day of the accident, § 57.3202 did not apply. Citation No. 3243703 will be vacated.

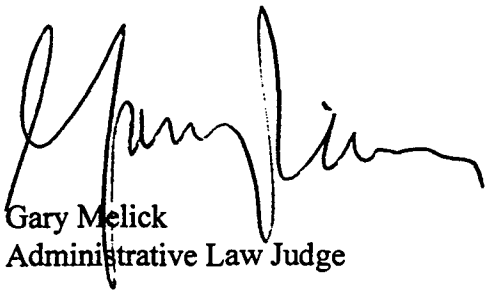
Under Commission Rule 67(b), a summary decision may be granted if no genuine issue of material fact exists and if the moving party is entitled to summary decision as matter of law.

Doe Run is here entitled to summary decision with respect to Order No. 7859812 because the undisputed facts do not establish that a violation existed under the language of the cited standard.

I find the language of the standard at issue to be clear and unambiguous and its terms must therefore be enforced as written without further analysis. *Utah Power & Light Co.*, 11 FMSHRC 1926 (October 1989); *Chevron U.S.A. v. NRDC*. 467 U.S. 837, 845 (1984), *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). I conclude from the language of this standard, as did Judge Fauver in the Asarco case, that a suitable scaling bar must be provided only if manual scaling is performed. Since it is undisputed that no manual scaling was in fact here performed, the alleged absence of a suitable scaling bar is irrelevant. A violation exists only if manual scaling is done without a proper bar. Accordingly, there was no violation here of 30 C.F.R. § 57.3202.

In reaching this conclusion, I have not disregarded the Secretary's argument that, while the language of the standard is clear and unambiguous, the standard should be read to require "miners to have a scaling bar present so that if loose material is observed while in the course of other duties, the miners would be more likely to take it down right then, rather than attempt to complete their assigned job duties and then go and find someone else to take care of the loose material." However, under this interpretation, the presence of a scaling bar would be mandated at all times. If this was the Secretary's intent, there would have been no need for the standard to have been qualified, but rather the presence of a scaling bar at all times would have been mandated.

Under the circumstances, Order No. 7859812 must be vacated. Contest Proceeding Docket No. CENT 98-83-RM is GRANTED. Civil Penalty Proceeding Docket No. CENT 98-277-M is modified to delete Order No. 7859812 and the civil penalty proposed for the violation therein.



Gary Melick
Administrative Law Judge

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