DECEMBER 2004

COMMISSION ORDER

ADMINISTRATIVE LAW JUDGE DECISIONS

DECEMBER 2004

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

Secretary of Labor, MSHA v. Sedgman and David Gill, employed by Sedgman, Docket Nos. SE 2002-111, et al. (Judge Weisberger, November 5, 2004)

Secretary of Labor, MSHA v. Harvey W. Buche Road Building, Inc., Docket No. WEST 2004-397-M. (Chief Judge Lesnick, unpublished Default Order issued November 22, 2004)

No cases were filed in which review was denied during the month of December

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 23, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEST 2004-397-M A.C. No. 35-03260-28580
HARVEY W. BUCHE ROAD BUILDING, INC.	: :	

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

DIRECTION FOR REVIEW AND 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. (2000) ("Mine Act"). On September 22, 2004, Chief Administrative Law Judge Robert Lesnick issued to Harvey W. Buche Road Building, Inc. ("Buche") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of penalty. On November 22, 2004, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On December 13, 2004, the Commission received from Buche a letter, dated December 8, setting forth its reasons for failing to respond to the judge's show cause order. Mot. Buche states that, after the show cause order issued, it began negotiations with an attorney from the Solicitor's Office and reached a settlement agreement. *Id.* However, Buche continues that the agreement was inadvertently misplaced, and as soon as the matter was brought to its attention it forwarded the signed agreement to the Solicitor's Office. *Id.* Buche requests the Commission to reopen the case in order for the settlement agreement to be processed. *Id.* The Secretary has not responded to Buche's request.

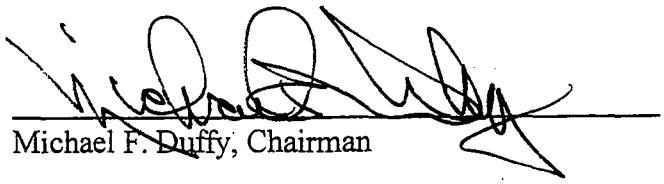
The judge's jurisdiction in this matter terminated when his decision was issued on November 22, 2004. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for

discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). We construe Buche's letter to be a timely filed petition for review, which we grant.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (July 2002). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

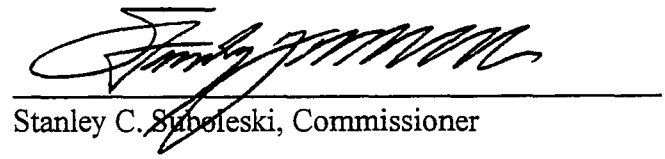
The show cause order directed Buche "to send an Answer to this Commission within 30 days or show good reason for [its] failure to do so." Order to Show Cause. However, according to Buche, it appears that the parties agreed to settle the case prior to the judge's entry of the Order to Default, but that Buche inadvertently failed to sign the settlement agreement and return it to the Solicitor's Office in a timely manner. Mot.

Having reviewed Buche's request, in the interest of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Buche's failure to timely respond to the judge's show cause order and for further proceedings as appropriate.



Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Kelly C. Moehnke, Office Manager
Harvey W. Buche Road Building, Inc.
35111 S. Wilhoit Rd.
Molalla, OR 97038

Patricia N. Drummond, Esq.
Office of the Solicitor
U.S. Department of Labor
1111 Third Avenue, Suite 945
Seattle, WA 98101-3212

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

December 8, 2004

STANLEY QUACKENBUSH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. SE 2003-83-DM
v.	:	SE MD 2002-13
	:	
KENTUCKY-TENNESSEE CLAY,	:	Kentucky-Tennessee Clay
Respondent	:	Mine ID 38-00052

DECISION

Appearances: John P. Batson, Esq., Augusta, Georgia, for the Complainant;
R. Lee Creasman, Esq., Joshua H. Viau, Esq, Elarbee, Thompson, Sapp & Wilson, LLP, Atlanta, Georgia, for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the Act). The complaint was filed by Stanley Quackenbush against the respondent, Kentucky-Tennessee Clay (KTC).[1] Quackenbush asserts that he engaged in protected activity when he complained about a hazard caused by tree limbs that protruded over train tracks traveled by company railcars. Quackenbush contends that his complaint motivated the company to issue a retaliatory disciplinary write-up on July 12, 2002, following a July 9, 2002, on-site MSHA inspection conducted in response to an employee complaint. The disciplinary action was taken because of Quackenbush's alleged failure to report the tree limb problem to the company in a timely manner. Quackenbush also asserts that he was ordered to clear the overgrowth from the tracks on August 2, 2002, in retaliation for his safety complaint. Quackenbush alleges that he sustained carpal tunnel injuries as a result of his track clearing assignment.

In response, KTC contends its July 12, 2002, disciplinary action, and its decision to assign Quackenbush to trim the trees and bushes alongside the train tracks, were not motivated by Quackenbush's protected activity. With respect to the job assignment, KTC alternatively maintains that Quackenbush was assigned to clear the tracks for business reasons that were unrelated to his protected activity.

---

[1] Quackenbush's complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor on August 22, 2002, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). The complaint was investigated by the Mine Safety and Health Administration (MSHA). On February 11, 2003, MSHA advised Quackenbush that the facts disclosed during its investigation did not constitute a violation of section 105(c). On March 6, 2003, Quackenbush filed his discrimination complaint with this Commission which is the subject of this proceeding.

This case was heard on July 13 and July 14, 2004, in Augusta, Georgia. The record was left open for the teleconference testimony of Glenn Mealer, Quackenbush's co-worker, who was unable to attend the hearing. Mealer's testimony was taken on July 20, 2004, at which time the record was closed. The parties' post-hearing briefs have been considered in the disposition of this matter.

For the reasons discussed below, Quackenbush's discrimination complaint with respect to his July 12, 2002, disciplinary notice shall be granted. However, Quackenbush's branch trimming job assignment was motivated by an independent business decision that would have been taken even if Quackenbush had not engaged in protected activity. Accordingly, Quackenbush's complaint regarding his assigned duties on August 2, 2002, shall be denied.

I. Findings Of Fact

a. KTC Operations

KTC processes kaolin clay at its Langley, South Carolina facility where it employs approximately fifty people. At all times relevant to this proceeding, Murray Penner was the Plant Manager, Teresa Bolin was the Safety Manager and Bob Wiley was the Production Supervisor. The clay processed at Langley is extracted from three different mine locations in Aiken County, South Carolina that are located one, seven and twenty-six miles away from the Langley facility. At these mine sites, overburden, consisting of dirt, sand and other debris, is removed from the top layer of earth to expose the kaolin. This is done through a process called "stripping" which involves the use of tractors and scrapers. After kaolin is exposed, it is dug out with a track hoe, loaded into dump trucks, and transported to the Langley plant storage area.

At the storage area, the clay is processed through hoppers and slicers from boulder size to small pieces varying in size from one to two feet in diameter. The clay is then transported to one of two mills, one a roller, and the other a set of huge hammers, that break and de-conglomerate the clay. The clay is then classified and prepared for shipment.

Once ready for shipping, the clay is loaded into rail cars by the bulk loading crew, which consists of an engineer and a switchman. The railcars are backed into a shed where large pipes load clay into the top of the railcars. Upon leaving the shed, the train travels about 1,000 to 1,500 feet to a switch where the switchman washes excess clay or spillage from the outside of the railcars. After washing, the railcars are taken by locomotive, usually three or four at a time, to the mainline where the clay filled cars are decoupled for shipment to customers.

The rail line running from the plant to the mainline is approximately one and one half miles long and crosses two public roads. The first leg of the trip is approximately one mile during which time the train travels downhill at approximately ten miles per hour, with the locomotive in front, until it reaches Huber Clay Road. At that point the switchman, who had been riding in the engineer compartment, exits the train to stop traffic so that the train can cross Huber Clay Road. The switchman then climbs aboard the side or rear of the train while the train

travels an additional 1,000 feet where the tracks cross Highway 421. The train travels at speeds of approximately two to four miles per hour between Huber Clay Road and Highway 421.

At Highway 421 the switchman once again gets off the train to stop traffic so the train can cross. The switchman climbs back aboard the side or rear of the train for a distance of a few hundred feet until the train arrives at the mainline drop-off site. When riding on the ladder attached to the side of the train, the switchman has the greatest exposure to being struck by overgrown branches. (Tr. 238). Upon arriving at the mainline, the cars are decoupled and empty cars are connected to the locomotive. The empty cars are transported uphill back to the processing plant with the locomotive in the back, to begin the cycle over again.

b. Quackenbush's Employment

Stanley Quackenbush was 40 years old during the relevant times in this proceeding. He is approximately five feet eight inches tall and weighs about 193 pounds. (Tr. 36). Quackenbush's employment history includes working from 1987 until 1999 as a carpenter in construction jobs that included framing houses. Prior to working in carpentry, Quackenbush was a production forklift operator from 1982 to 1987. (Resp. Ex. 1; Tr. 201). Quackenbush also has a history of self-employment in the remodeling business that includes construction of porches and decks. (Tr. 160).

Quackenbush testified that he had a "slight case" of carpal tunnel since a 1999 automobile accident. (Tr. 133-34, 180-81). He initially learned of his condition after it was identified in a February 1, 1999, electromyography (nerve conduction study) conducted shortly after his accident. The electromyography revealed evidence of "a slight case of carpal tunnel in [his] left hand." (Tr. 181-83; Comp. Ex. 8). Although the diagnostic test showed evidence of a mild condition, prior to August 2, 2002, Quackenbush was never treated for carpal tunnel. Despite any history of relevant treatment, he reportedly experienced "tingling" in his hands and arms when operating his weed-eater at home. (Tr. 178-80). After he recovered from his car accident, Quackenbush had no physical impairment that interfered with his activities. (Tr. 179). In this regard, Quackenbush testified he was able to perform construction work without difficulty at Kelly Construction Company when he returned to work in 1999 after his accident. (Tr. 185-86).

Quackenbush began working for KTC in April 2000 as a utility worker. As a utility worker, his duties consisted of cleaning the plant, which included lifting forty-five to fifty pound bags of clay, sweeping, and shoveling clay weighing up to twenty pounds per shovel when wet. Later, Quackenbush held the position of "super sacks" which required him to fill and weigh sacks of clay, and load the sacks onto a pallet with a forklift. At no time during his employment in these general laborer positions did Quackenbush notify anyone that he had any physical limitations that prevented him from performing the full range of his job duties. (Tr. 200-01).

On or about September 10, 2001, KTC posted a job opening notice for the "bulk loader" position. The duties of the bulk loader, which were listed in the notice, included "making sure

the railroad track is kept clean and safe," "performing the duties of a switchman when the train is being operated," and "performing other duties that may be assigned by your supervisor." (Resp. Ex. 2; Tr. 160-01). On September 17, 2001, Quackenbush submitted a bid for the bulk loader position and he was selected for the job. (Resp. Ex. 3; Tr. 161).

Glenn Mealer also held the position of bulk loader and he operated the locomotive. Quackenbush assumed the role of switchman when the train was in use. As bulk loaders, Quackenbush and Mealer were responsible for maneuvering the rail cars in the loading area, and for transporting the cars to the mainline for delivery to customers. While there were three shifts at Langley, at all times relevant to this proceeding, Mealer and Quackenbush were the only bulk loaders as the train was only operated for a single shift. Both Mealer and Quackenbush reported to Bob Wiley. As with his duties as a utility man and "super sacks," Quackenbush was able to perform his bulk loader/switchman job without any restrictions or physical limitations until his reported injury on August 2, 2002. (Tr. 179, 200-01).

c. July 9, 2002, MSHA Track Inspection

On July 9, 2002, MSHA Inspector James Enoch visited the Langley site to investigate a written complaint MSHA had received from an employee regarding overgrowth over the train tracks. (Tr. 335). Wiley, Bolin and Penner testified this was the first time they learned of hazardous tree limbs. (Tr. 224, 336, 403). Both Quackenbush and Mealor deny that they were the source of the MSHA complaint. (Tr. 166, 515). The identity of the complainant has not been revealed.

Both Quackenbush and Mealer testified they repeatedly communicated verbal complaints to management. (Tr. 42-50, 52, 61, 64, 169-70, 511). In this regard Mealer testified "I mentioned it to [Wiley] plenty of times about the trees need cutting, but it's just like they don't listen to you." (Tr. 511). Mealer testified Wiley and Bolin told them to write a work order if they wanted anything done about the overgrowth. (Tr. 508-09, 533, 535-36). Consequently, Mealer left a written work order for cutting tree limbs in Bolin's mailbox on July 8, 2002. (Tr. 340, 512-13). Quackenbush believed the write-up occurred on June 28, 2002. (Tr. 48-49). Bolin, who had just returned from vacation, was not aware of the work order when Enoch arrived at the mine site on July 9, 2002, because she had not read her mail. (Tr. 339-41).

Enoch rode the train with Quackenbush, Mealer, Bolin, Wiley and Penner. In addition to observing the track conditions, Enoch reviewed work orders from the previous three months to determine if hazardous track conditions had been reported. With the exception of the work order written by Mealer the previous day, Enoch did not find any relevant written complaints about overgrown trees. (Tr. 339, 343).

As a result of his inspection, Enoch issued Citation No. 6111950 on July 9, 2002, citing a violation of the mandatory safety standard in section 56.11001 that requires that a safe means of access to all working places must be provided and maintained. 30 C.F.R. § 56.11001.

Citation No. 6111950 stated:

> Tree limbs growing out over the railroad tracks constitutes (sic) unsafe access for the switchman who rides out on the end of the bulk railcar from the mainline to the loadout area. The slapping action of the limbs as he passes by could cause serious injury.

(Comp. Ex. 1).

The violation was designated as non-significant and substantial (non-S&S). A violation is non-S&S if it is unlikely that the hazard contributed to by the violation will result in the occurrence of a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). Inspector Enoch established July 22, 2002, as the abatement date for the cited track violation. (Comp. Ex. 1). The abatement date was subsequently extended through the first week of August 2002. (Tr. 76).

d. July 12, 2002, Disciplinary Action

Wiley, Bolin and Penner testified neither Quackenbush nor Mealer had reported any tree limb problems before Enoch's July 9, 2002, inspection. (Tr. 224, 336, 404, 425-26). Each employee is responsible for reporting potential safety hazards in their work area. Penner did not consider Mealer's July 8, 2002, written work order as timely given the long term nature of the hazardous condition. Thus, on July 12, 2002, Wiley issued written warnings to Quackenbush and Mealer, which were removed from their files after thirty days, for "failure to report a hazard in your work area in a timely manner." (Comp. Exs. 3, 4; Tr. 424). Quackenbush conceded his file no longer contained any reference to the July 12, 2002, disciplinary notice and he did not suffer any loss of pay, demotion or other adverse action as a result of the warning. (Tr. 168-69).

e. Abatement of Citation No. 6111950

Upon receiving the citation, Penner began to consider options for trimming the overgrowth. Penner had never been involved with controlling the track vegetation. In the past, tree cutting arrangements were made by Oscar Rhoades, KTC's Purchasing Manager. Rhoades had hired contractors to cut limbs that impeded the track. Rhoades retired at the end of 2001. (Tr. 336-37). Penner requested an estimate from a local contractor. The estimate was between $8,000 and $10,000. Because the bid seemed high, Penner obtained a second bid that was similar to the initial estimate. (Tr. 415).

Penner considered the estimates to be extremely high. Penner believed the company could avoid the expense by assigning KTC employees to trim the branches using equipment that could be purchased for less than $1,000. Penner ordered a commercial weed-eater with a hedge trimmer attachment to perform the pruning. (Tr. 415). The weed-eater without the hedge trimming attachment weighs approximately 11 pounds. (Comp. Ex. 5). It is unclear how much additional weight is added with the attachment.

While waiting for the weed-eater to be delivered, realizing that MSHA had established July 22, 2002, as the abatement date, Penner enlisted the help of maintenance mechanics Earl Morris and Wes Taylor. Morris and Taylor volunteered to work on a Saturday using their personal chain saws to clear the brush along the side of the track. Morris and Taylor cut back the brush while standing on the front platform of the locomotive while Cliff Jones operated the train. However, they were unable to clear all of the branches because the chain saws lacked the reach of the weed-eater/hedge trimmer. (Tr. 415-16).

Once the hedge trimmer arrived, Penner decided that Quackenbush and Mealer were the logical choices to trim the branches because they routinely traveled the train tracks. (Tr. 420-21). Penner explained his decision followed normal plant policy that kept maintenance mechanics free to perform repairs while production employees were responsible for maintaining their own work areas. (Tr. 420-22, 434; Resp. Ex. 2). Moreover, once Quackenbush and Mealer were trained to use the brush trimmer, they could take care of overgrowth as the need arose during the course of their trips to and from the mainline. (Tr. 421).

Based on Penner's decision, on August 1, 2002, Wiley told Mealer that he and Quackenbush were going to be task trained on the new trimmer, and that they were to cut the branches the following day. (Tr. 231). The next day, on Friday, August 2, 2002, Wes Taylor, a maintenance mechanic, went down to the pit area to get Mealer and Quackenbush to task train them on the new equipment. (Tr. 298-99). Mealer and Quackenbush were non-responsive, so Taylor returned to the office and informed Wiley that Mealer and Quackenbush did not want to cut the limbs. (Tr. 233). Taylor returned to the pit area with Wiley. Wiley asked Mealer and Quackenbush if there was a problem. He explained to the men that Taylor was going to task train them, and he emphasized that they were responsible for cutting the branches. (Tr. 234).

Quackenbush and Mealer testified that Wiley pointed his finger at Quackenbus and told him he would be cutting the branches while Mealer operated the train. (Tr. 132, 520). Taylor testified that he did not see Wiley point his finger. (Tr. 302). Quackenbush also testified that he expressed concerns to Wiley regarding the adequacy of the tie-off on the train handrail, and the lack of a radio on the train to report an injury. (Tr. 135, 519). Mealer stated Wiley was unresponsive to Quackenbush's safety concerns in that he continued to insist that Quackenbush and Mealer cut the limbs even if they did not want to. (Tr. 520).

At approximately 9:00 a.m., Taylor took the newly purchased trimmer and safety equipment, including a harness, safety goggles, and gloves, down to the tracks with Mealer and Quackenbush. (Tr. 298). Taylor showed them how to start the equipment and he told them to read the operational manual. (Tr. 302-04; Comp. Ex. 5). Taylor testified it took only a few minutes to task train them, and that starting and operating the weed-eater with the hedge trimmer attachment "was not very hard at all." (Tr. 320-22). As Quackenbush began reading the manual, he showed Taylor that the manual cautioned that prolonged use of the equipment can cause carpal tunnel syndrome. (Comp. Ex. 5). Quackenbush told Taylor that he had been diagnosed with carpal tunnel in the past. (Tr. 133-34). Taylor asked Quackenbush if he had notified anyone at the company, or if he had a doctor's note. (Tr. 103, 302). Quackenbush responded that he had not. (Tr. 103, 302-03; Comp. Ex 6). Taylor suggested that Quackenbush could talk to Bolin if he had a problem operating the trimmer. (Tr. 303). Taylor also suggested Quackenbush take a break if he felt tired. (Tr. 522).

Mealer and Quackenbush took turns cutting the branches as the train stopped while moving down the track. (Tr. 528). They cut the branches by extending the weed-eater with the hedge trimmer attachment over the top and to the side of the train as they stood on the platform at the front of the locomotive. They tied-off on the handrail surrounding the platform with a rope that was four feet long. As they leaned out from the train, the rope would prevent them from hitting the ground if they fell, but it would not prevent them from falling against the side of the train. (Tr. 135, 526). Mealer felt it was unsafe to stand on the train and hold the heavy trimmer out away from his body. (Tr. 529). Mealer and Quackenbush cut the limbs for approximately three hours. (Tr. 528). Although both Mealer and Quackenbush took turns cutting the brush, Mealer believed Quackenbush cut more often than Mealer did. (Tr. 530-31). At no time did Mealer or Quackenbush refuse to perform the work. Quackenbush did not complain to Taylor about carpal tunnel-like pain while using the equipment. (Tr. 303). Quackenbush believed he would be fired if he refused to trim the branches. (Tr. 144).

When Quackenbush went to lunch, his arms were bothering him. Quackenbush tried to contact Bolin on Friday afternoon on August 2, 2002, but she did not return his call. When Quackenbush returned to work on Monday, August 5, 2002, he told Bolin that his arms were hurting since using the weed-eater the previous Friday. (Tr. 371). Bolin immediately took Quackenbush to the Family Medical Center in Aiken, South Carolina. Quackenbush did not return to work after August 5, 2002, and he subsequently had surgery on both hands. He received workers' compensation until April 2003. Quackenbush returned to work at KTC from April 2003 until October 2003, at which time he again reported he could no longer work because of pain in his arms. Quackenbush is currently receiving workers' compensation benefits and he has not worked since October 2003.

Mealer, Donald Thurmond who currently is Mealer's switchman, and Earl Morris from the maintenance department, continue to periodically trim the brush with the weed-eater. (Tr. 539-40, 542-43). Since August 2, 2002, KTC has designed and constructed a platform extension that attaches to the train. This new platform is placed on the existing platform on the

front of the locomotive after the train's handrail is removed. The new platform overlaps the train making it easier to reach out and cut the branches. (Tr. 527, 539-40).

II. Further Findings and Conclusions

a. Statutory Framework

Section 105(c)(1) of the Mine Act provides, in pertinent part:

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

30 U.S.C. § 815(c)(1).

Quackenbush has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, he must establish that he engaged in protected activity, and that the aggrieved action was motivated, in some part, by that protected activity. *See Sec'y of Labor o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). Quackenbush relies on his tree limb complaints as the protected activity. The adverse actions complained of are the July 12, 2002, disciplinary notice and Quackenbush's August 2, 2002, job assignment.

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

b. July 12, 2002, Disciplinary Notice

A fundamental element of a discrimination complaint is the mine operator's knowledge of the protected activity. Mealer and Quackenbush assert they repeatedly complained about tree limbs hitting the train. Penner, Wiley and Bolin deny any knowledge of hazardous track conditions prior to Enoch's July 9, 2002, inspection. Assuming, *arguendo*, that relevant complaints were not verbally communicated to company officials in the weeks preceding

Enoch's inspection, it is undisputed that Penner, Wiley and Bolin were aware of a protected safety related complaint by virtue of the July 8, 2002, work order.[2] Moreover, Wiley reluctantly conceded that it was reasonable to conclude that Mealer and Quackenbush were responsible, directly or indirectly, for the MSHA complaint since they were the most familiar with, and affected by, the track conditions.[3] (Tr. 251-55). Notwithstanding the fact that Mealer and Quackenbush were the logical MSHA informants, their participation in Enoch's July 9, 2002, inspection, alone, is protected activity.

The July 12, 2002, disciplinary notice charging Quackenbush with failing to report a hazard *in a timely manner* occurred shortly after the protected work order and participation in the MSHA inspection. Protected activity is unqualified. It does not lose its statutory protection simply because a mine operator considers the activity to be untimely. With respect to the suspected MSHA complaint, a miner has an unfettered right to advise MSHA of a hazardous condition. Section 105(c) of the Mine Act protects a miner's right to inform MSHA of a hazardous condition even if the miner had not brought the condition to the mine operator's attention. To allow a mine operator to insist on prior notice before a miner is allowed to contact MSHA would create a chilling effect. Thus, the July 12 discipline was motivated by protected activity, regardless of the timing of the July 8 work order. Accordingly, the disciplinary notice violated section 105(c) of the Mine Act.

c. August 2, 2002, Job Assignment

Quackenbush's protected complaint about a hazardous condition does not, alone, insulate him from being assigned to remedy that condition. Rather the issue is whether Quackenbush was the victim of discriminatory retaliation manifest by disparate treatment because of an unreasonable job assignment.

In determining whether a mine operator's action violates the statutory protection accorded to miners, the scope of a discrimination proceeding is limited to whether the operator's reported rationale for the adverse action complained of is a pretext to mask prohibited retaliation. In this regard, the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

---

[2] Although the work order was written by Mealer, it was clear that the work order was also filed on behalf of Quackenbush. (Tr. 48-49, 513).

[3] The identity of the MSHA complainant has not been revealed. The Commission has held that ". . . discrimination based upon a suspicion or belief that a miner engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Sec'y o/b/o Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1982), *aff'd. sub nom, Whitley Dev. Corp. v. FMSHRC*, 770 F.2d 168 (6th Cir. 1985).

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

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2516-17 (November 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission subsequently further explained its analysis as follows:

> [T]he reference in Chacon to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed."

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

Thus, resolving whether the selection of Quackenbush was a pretext to conceal a retaliatory motive requires analyzing whether KTC's proffered business justification is plainly credible and plausible. As an initial matter, it is undisputed that clearing the train track was a legitimate business necessity as it was required to abate an MSHA citation, as well as to maintain safe track conditions. Penner's decision to minimize company expense by performing the job

in-house rather than contracting it out is a decision committed to company discretion that is not amenable to judicial micromanagement.

Having concluded that the decision to use employees rather than a contractor to trim overgrowth was an independent and legitimate business decision, the focus shifts to whether the selection of Quackenbush evidenced disparate or otherwise inappropriate treatment. On August 2, 2002, Quackenbush was a 40 year old physically fit individual with a job history of manual labor, including work as a construction laborer. Quackenbush had performed all job duties at KTC without any physical limitations.

Although "slight" carpal tunnel in Quackenbush's left wrist was revealed by a clinical nerve conduction study in 1999, he had never been treated for carpal tunnel. Significantly, although he mentioned a carpal tunnel history to Taylor, Quackenbush concedes that neither Wiley nor any other management person was aware that he had any physical impairment on August 2, 2002. Having failed to communicate his carpal tunnel condition to management, his previously diagnosed carpal tunnel is not relevant to the issue of alleged retaliatory conduct.

While the initial method of cutting branches left room for improvement, as evidenced by the new platform attachment currently in use, there is no evidence to suggest Penner, Wiley or Bolin, intended to harass or intentionally inflict injury. Moreover, the retaliatory claim based on the assertion that Wiley knew the job obviously was unsafe is undermined by Quackenbush's assertion that Taylor, Morris or other Maintenance Department employees should have performed the work instead of Quackenbush. (Comp. Br. 19).

The specific task of tree pruning was not within any company job description as this function had been performed by outside contractors. However, Quackenbush's job history as a utility man performing general labor made him a suitable candidate to use a hedge trimmer. Moreover, Quackenbush and Mealer were the logical choices to trim the branches because they were familiar with track conditions. (Tr. 420-21). In this regard, production employees were responsible for maintaining their own work areas. In fact, the responsibilities detailed in the "bulk loader" job description included "making sure the railroad track is kept clean and safe." (Resp. Ex. 2). In addition, selecting bulk loaders to trim the branches kept maintenance mechanics free to perform repairs. Once Quackenbush and Mealer were trained to use the brush trimmer, they could take care of the overgrowth on an as needed basis during the course of their round trips to the mainline. In fact, Mealer and Thurmond continue to operate the hedge trimmer from the train periodically. Consequently, Penner's justification for selecting Mealer and Quackenbush is credible and plausible.

Commission judges may not substitute their view for a mine operator's business judgment on whether a particular business practice is "just" or "wise." *Chacon,* 3 FMSHRC at, 2516-17. While, with the benefit of hindsight, the August 2, 2002, method of trimming the train tracks may not have been prudent, there is no evidence the job assignment was motivated by a desire for retaliation.

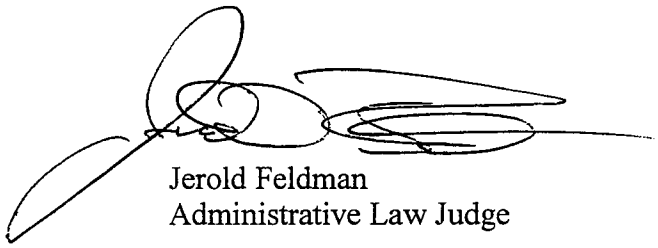
In the final analysis, Quackenbush has failed to demonstrate that the August 2, 2002, job assignment was in retaliation for his protected safety related complaints. Even if Quackenbush had shown that the assignment was partially motivated by his complaints, KTC has affirmatively demonstrated that it would have assigned Mealer and Quackenbush to clear the brush from the train tracks even if they had not engaged in protected activity. Accordingly, Quackenbush's discrimination complaint with regard to his August 2, 2002, job assignment shall be denied.[4]

ORDER

In view of the above, Stanley Quackenbush's discrimination complaint with respect to his August 2, 2002, work assignment **IS DENIED.**

Stanley Quackenbush's discrimination complaint with respect to his July 12, 2002, disciplinary notice **IS GRANTED. IT IS ORDERED** that Kentucky-Tennessee Clay shall expunge, within thirty (30) days of the date of this decision, any reference to the disciplinary action from Quackenbush's personnel file, and that no reference to the discipline shall be disclosed to any prospective employer or other interested party.

IT IS FURTHER ORDERED that upon timely expungement of Quackenbush's personnel records, the discrimination proceeding in Docket No. SE 2003-83-DM **IS DISMISSED.**



Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

John P. Batson, Esq., 303 Tenth Street, P.O. Box 3248, Augusta, GA 30914-3248

R. Lee Creasman, Jr., Esq., Elarbee, Thompson, Sapp & Wilson, LLP, 800 International Tower, 229 Peachtree St., Atlanta, GA 30303

/hs

---

[4] Having concluded that Quackenbush's work assignment was not motivated by protected activity, I have not addressed the issues of whether damages for pain and suffering are recoverable under section 105(c) of the Mine Act, and, if so, whether South Carolina's Workers' Compensation Act bars the recovery of such damages.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268
December 10, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-332
Petitioner	:	A.C. No. 42-02263-03503
	:	
	:	Bear Canyon No. 3 Mine
v.	:	
	:	Docket No. WEST 2004-148
	:	A.C. No. 42-01697-14546
C. W. MINING COMPANY,	:	
Respondent	:	Bear Canyon No. 1 Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl F. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against C. W. Mining Company ("CW"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve 18 citations issued at the Bear Canyon Nos. 1 and 3 Mines in Emery County, Utah. The Secretary proposes a total penalty of $21,150.00 in these cases. An evidentiary hearing was held in Salt Lake City, Utah. The parties introduced testimony and documentary evidence.

I. WEST 2003-332

In August 2002, CW was in the process of developing the Bear Canyon No. 3 Mine as an underground coal mine. This mine is very close to the Bear Canyon No. 1 Mine, which was an operating underground coal mine. Both mines used the same surface structures, including the office and bathhouse. Miners working for CW had driven entries about 200 feet into the mountain. As the crew mined into the mountain, they installed a canopy along the roof for about 20 feet inby the portal. (Tr. 82). This canopy consisted of H beams installed along the ribs and across the roof with steel plating between the beams. CW miners had been in the No. 3 portal on August 28, 2002, working on this project. Prior to the beginning of that shift, a preshift examination had been conducted and the date, time, and initials of the person who conducted the exam were written on a board near the entrance of the portal (the "D, T & I board").

On August 29, 2002, Donald E. Durrant, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") was at the Bear Canyon No. 1 Mine conducting an inspection. He had been inspecting this mine for several weeks. At about 10:00 a.m., he decided to go look at the Bear Canyon No. 3 Mine. When he arrived, he observed about eight individuals working in the vicinity of the portal. He believed that some of these individuals were working inside the portal, including Mr. Felix Ramirez who was arc-welding metal. Inspector Durrant noticed that the yellow plastic tape warning people to keep out of the mine was on the ground but that the D, T & I board did not show that a preshift examination had been performed.

The eight individuals working at the portal were employees of Advance Technical Research and Engineering ("Advance"), an independent contractor of CW. According to Charles Reynolds, an engineer with CW who was responsible for supervising the contract, Advance was hired to construct a number of items at the portal including a canopy that would extend out from the portal to protect people and equipment from any rocks that might fall down the side of the mountain. Advance's employees were not miners and were not certified to conduct preshift examinations. Kenneth Defa, the mine superintendent, testified that a specific CW employee had been designated to perform any required examinations and tests at this mine.

A. Citation No. 7612553

Inspector Durrant issued Citation No. 7612553 under section 104(d)(1) of the Mine Act alleging a violation of section 75.360(a)(1) of the Secretary's safety standards. The body of the citation states as follows:

> Eight contract miners were working in the #3 portal area doing construction work without the mine being preshifted. The miners entered the portal at around 9:00 AM. The miners were sent there by Mr. Robert Putnam, but C.W. Mining Co. personnel have been conducting the preshifts as the contractor has no certified employees to perform the examinations. The mine operator did not insure that the preshift was conducted prior to work being performed in the mine.

The inspector determined that the gravity was serious, that the violation was of a significant and substantial nature ("S&S"), and that the negligence was high. The safety standard provides, in part, that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of an 8-hour interval during which any person is scheduled to work or travel underground." The Secretary proposes a penalty of $1,200.00 for this citation.

Inspector Durrant testified that several of the eight contract workers were inside the mine when he arrived at the portal. Mr. Ramirez was using an arc welder to fabricate supports for the canopy. It was obvious to the inspector that no preshift examination had been performed. CW

does not dispute that fact, but argues that the men were not inside the mine. Mr. Defa testified that all of the work that day was being performed under the canopy that was being constructed outby the mine portal and that the contract employees were not scheduled to work or travel underground that day. As a consequence, CW contends that a preshift examination was not required.

I conclude that CW violated the safety standard. Inspector Durrant credibly testified that he observed miners working inby the underground portal. He observed that the plastic warning tape had been torn down. In addition, whether these contract employees were underground at the exact time the inspection party arrived is largely irrelevant. The portal was open and it is foreseeable that the contract employees would enter the mine at some point while performing their work. There was no demarcation under the canopy as to where the underground mine began and the surface canopy ended. Consequently, a preshift examination was required.

I find that CW's negligence was low, however. The inspection party consisted of Durrant and Defa. Durrant credibly testified that Defa was genuinely surprised to see contract employees at the No. 3 Mine. Defa testified that he had no idea they were at the mine that day. Defa subsequently checked at the mine office and discovered that the contract employees had not checked in when they arrived at the site that day, as required by CW. Advance had been working at the No. 3 mine off and on for about a week. In the past, CW assigned one of its own employees to perform a preshift examination when contract employees arrived. Since Defa did not know that Advance employees were there, no preshift examination had been performed.

Charles Reynolds, an engineer with CW, was responsible for managing the work Advance was performing. He credibly testified that Advance was instructed to check in at the mine office each day prior to commencing any work. He testified that Advance failed to check in on August 29. In addition, Reynolds credibly testified that Advance was hired to perform work on the surface and was not engaged in work underground. Reynolds stated that Advance was constructing a canopy outside the mine portal and a housing for a fan outby the portal. As a consequence, the Secretary did not establish that the violation was the result of CW's unwarrantable failure to comply with the safety standard. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991). I find that CW's conduct does not reach that level of negligence. Indeed, I find that CW's negligence can most accurately be characterized as less than ordinary negligence. It had procedures in place to ensure that preshift examinations were performed whenever anyone worked in or around the No. 3 mine. Advance failed to follow these procedures on August 29. This citation is modified to a section 104(a) citation with low negligence.

Whether the violation was S&S is a closer issue. Inspector Durrant determined that the violation was S&S because the area had not been tested for oxygen or methane, the roof and ribs

had not been examined, and the mine fan was not operating. He believed that because the contract workers had limited underground experience it was reasonably likely that someone would suffer a serious injury as a result of the violation.

Mr. Defa testified that the contract employees were not working underground but were working under a canopy outby the mine portal. He also testified that, even if they ventured inby the portal, they would have been protected by the steel plates that were installed between the H beams inby the portal.

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

I find that the Secretary established that the violation was S&S. The Advance employees were not experienced miners. Because Advance employees are not familiar with the hazards present in a mine environment, they might easily overlook potential hazards. For example, the CW preshift examiner would have turned on the mine fan before allowing people to work in or around the portal to ensure that air quality met MSHA standards. The Advance employees did not turn on the fan. A preshift examination is especially critical in this circumstance because the qualified CW examiner would have made sure that the area was free of hazards. It is reasonably likely that, with continued normal mining operations, one of the Advance employees would be injured and that such injury would have been contributed to by the violation. The contract employees could have been injured by falling rock and they could have encountered excess methane or an oxygen deficiency. Such injuries or events would not have been likely if a CW mining employee had performed the required preshift examination. A penalty of $200.00 is appropriate.

B. Order No. 7612554

The inspector also issued Order No. 7612554 under section 104(d)(1) of the Mine Act alleging a violation of section 75.1106 of the Secretary's safety standards. The body of the citation states as follows:

> Contract miners were performing arc welding on the tunnel liner in the #3 portal without a means to detect methane. One miner testified that they had entered the mine between 9:00 and 9:30 AM and began the welding operations. The miner stated that they had been welding on and off until the authorized representative arrived. That would be between 45 and 75 minutes. They had been assigned to work in this area by Robert Putman, their supervisor. Mine management failed to insure that a certified individual was present with an approved device to test for methane.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in part, that "[w]elding, cutting, or soldering with an arc or flame in other than a fireproof enclosure shall be done under the supervision of a qualified person who shall . . . , immediately before and during such operations, continuously test for methane . . . ." The Secretary proposes a penalty of $1,600.00 for this order.

Inspector Durrant testified that he observed one Advance employee, Mr. Ramirez, performing arc-welding in the portal and he determined that no tests had been conducted to determine if a dangerous level of methane was present. He believes that Ramirez was about 15 to 20 feet inby the portal, at the third or fourth H beam. (Tr. 54). Durrant stated that the welding was not occurring inside the steel canopy that was being constructed outby the portal, but was occurring inside the mine. (Tr. 55). He testified that the standard has been interpreted to require a methane test prior to welding and a methane test at least every 20 minutes thereafter. (Tr. 44).

Mr. Defa testified that Ramirez was welding the steel structure that was being constructed outby the portal. He states that the steel being welded at that time was part of this structure. He testified that CW's own miners constructed the canopy that was underground inby the portal as they developed the entries. (Tr. 76). Advance was only contracted to construct that part of the canopy that was outby the portal. Defa testified that Ramirez was welding just outby the portal under the steel canopy. (Tr. 78).

Defa's testimony that Ramirez was welding on the canopy that was being constructed outside the mine is credible because it is consistent with the work that Advance was retained to do. Advance was not working on the steel structure underground so it is highly unlikely that Ramirez was welding on the steel structure that was already in place underground. Ramirez was welding two beams together on the outer canopy. The first sentence of section 75.1106 makes clear that the standard only applies underground. It states "[a]ll welding . . . with arc or flame in all underground areas of a coal mine shall, whenever practicable, be conducted in fireproof enclosures." The second sentence of this standard, set forth above, modified the first sentence, and its requirements are also limited to the underground areas of coal mines.

Inspector Durrant was very vague about where this welding was occurring in relation to the portal. It was his belief that Ramirez was underground, but his testimony was rather weak in

this regard. It appears that he estimated distances from where he entered the outby canopy, yet he did not know the length of the outby canopy. (Tr. 54-55). I find that the Secretary failed to establish that the arc-welding that the inspector observed was occurring in the underground portion of the mine. Consequently, I vacate this citation.

II. WEST 2004-148

The Bear Canyon No. 1 Mine is an underground coal mine located near the No. 3 Mine. On July 9, 2002, Fred Marietti, an electrical inspector with MSHA, was inspecting the underground shop at the mine. He was accompanied by Cyril Jackson, the assistant mine foreman. Chris Grundvig, a mechanic and electrician, was in the shop at the time of the inspection. As the inspector was looking over the shop, he became concerned that a portable heater was not protected in the event of a ground fault because fuses rather than a circuit breaker were present. (Tr. 97, 130). Inspector Marietti's examination of the heater led him to inspect the electrical system in the shop. As a result of this inspection, he issued numerous citations under section 104(a) of the Mine Act for alleged electrical violations in the shop. The Secretary proposed the penalties for these citations under her special assessment regulations at 30 C.F.R. § 100.5. The underground shop has a concrete floor and the walls and ceiling are covered with fire-retardant material. (Tr. 371, 428).

Power enters the mine at 12,470 volts. It is stepped down to 480 volts at the section power center (the "transformer"or "power center"). The power center is underground and is about 300 feet from the shop. (Tr. 357). A shielded power cable enters the shop from the transformer through a rigid metal conduit that runs down the wall of the shop to the 100 amp fused disconnect (the "fused disconnect"). This shielded cable contains five conductors as follows: three power wires, two ground wires, and a pilot wire. The pilot wire is part of the ground check system that will open the circuit breaker at the transformer in the event the circuit loses ground protection. Because the cable could not fit into the ridged metal conduit with the outer jacket, this outer jacket was removed when the circuit was installed. On the load side of the fused disconnect, eight branch circuits split off through a cable tray. Two of these branch circuits are spare circuits which were not in use and not at issue in this case. A transformer is attached to one of the branch circuits that steps down the voltage to 110 volts and 220 volts so that hand-operated equipment, such as drills, can be used in the shop. (Tr. 179-80). The remaining five branch circuits are used for the following equipment: a 460 volt welder, a 460 volt grinder, a 460 volt air compressor, and two rubber-wheeled 460 volt wheel-mounted heaters. These circuits are diagramed at Exhibit G-1, pages 2 and 3. (Tr. 105-117, 119-122).

During his inspection, Inspector Marietti opened the fused disconnect box and discovered that the two ground wires that entered the shop through the rigid metal conduit were not attached to the grounding lug inside the box. Instead, they were taped up with electrical tape. (Tr. 117-18). He testified that he noticed this condition as soon as he opened the box. (Tr. 132). The pilot wire for the ground monitor system was properly connected at the fused disconnect box.

A. Citation No. 7612350

Based on the condition he observed in the box for the fused disconnect, the inspector issued Citation No. 7612350 under section 104(a) of the Mine Act alleging a violation of section 75.701 of MSHA's safety standards. The body of the citation states:

> The 480 VAC, three phase, 100 amp fused Main Disconnect metal enclosure that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by the authorized representative of the Secretary. The enclosure was not grounded by a solid connection to the resistance ground conductors provided by the energized power cable supplying power to the enclosure. The two ground conductors were taped together with insulated tape and laying in the enclosure, not connected to a grounding lug. There were ground conductors to six other metal enclosed electric equipment connected in the main enclosure relying on a ground system from these resistance ground conductors. There was some grounding provided due to the metallic shielding on the 2/0 power cable where it had the outer jacket removed and pulled through a rigid conduit and touching the ground conductors through skin effect along the cable to the transformer feeder circuit breaker. Miners touch the enclosure parts when operating fused disconnect.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides that "[m]etalic frames, casings, and other equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by the authorized representative of the Secretary." The Secretary proposes a penalty of $1,400.00 for this citation.

1. Summary of the Evidence

Inspector Marietti testified that the safety standard requires that metal frames of electric equipment, including electrical boxes, must be properly grounded. (Tr. 136-37). He stated that this electrical box could have become energized in the event of a fault in the circuit because the box was not properly grounded. If the circuit were grounded at the box, the circuit breaker at the transformer would trip in the event of a fault and the electrical box would not become energized. The inspector testified that with the grounding wires disconnected, the grounding circuit was open, which would not allow the current to flow back to the transformer in the event of a fault. He stated that a "resistance ground system" is what MSHA requires under this safety standard. (Tr. 138-39). Thus, makeshift grounding, such as through water pipes, is not approved.

The outer jacket for the cable coming into the shop from the transformer had been stripped off when it was inserted into the rigid metal conduit. The individual wires within the cable twist like the strands of a rope. As a consequence, the grounding wires and the metal shielding for the cable were making contact with the rigid metal conduit. Inspector Marietti testified that using the metal conduit and cable shielding is not an approved method of grounding the circuit. The contact between the metal conduit and the cable shielding or the grounding conductors may not be sufficient or effective enough to protect miners from energized equipment if there were to be a fault.

Inspector Marietti testified that Mr. Grundvig, who performed the weekly electrical examinations in the shop, never opened the fused disconnect box during his examinations. Marietti said that he could see that the ground wires were not connected as soon as he opened the box because it was obvious. He also stated that Mr. Defa told him that the condition must have existed since the underground shop was constructed 15 years earlier. (Tr. 148). The inspector testified that he was amazed that nobody had detected this problem in that 15-year period. Inspector Marietti issued Imminent Danger Order No. 7612349, under section 107(a) of the Mine Act, along with the citations at issue in this case. He also issued other citations that were not contested by CW. Inspector Marietti determined that it was highly likely that an accident would occur. (Tr. 149). He determined that the violation should be designated as S&S because, based on the type of work being done in the shop, it was reasonably likely that someone would be seriously injured as a result of the violation. (Tr. 142-49).

During an MSHA health and safety conference with CW on June 12, 2003, the gravity of the citation was lowered with the following language:

> There was grounding provided through cable shielding and the rigid conduit. Tests indicated that the system was grounded. However, this is not an acceptable ground because this condition has the potential of failure. The gravity is reduced to reasonably likely.

Cyril Jackson accompanied Inspector Marietti on the inspection of the shop. He testified that when the fused disconnect box was opened, he had to pull the ground wires out from behind other cables to see that the ends were not connected to the grounding lug. (Tr. 329). He states that only then did the inspection party realize that the ends of the ground wires were taped up. Mr. Grundvig testified that the ends of the ground wires were not visible until they were pulled out from behind other components in the box. (Tr. 379). At that point, the inspector wanted to find out why the breaker at the power center had not tripped. Marietti declared that this condition created an imminent danger so they went to the transformer and turned off the power.

According to CW's witnesses when the power was turned back on, the circuit breaker stayed set, in the closed position. Jackson testified that Marietti began to troubleshoot by unplugging the cable coupler at the transformer and examined the plug, which was not shorted.

The inspector then tested the circuit breaker. First, he tested the breaker with the plug out and it would not set. Next, Marietti plugged the cable coupler back in, set the circuit breaker and it remained set. When he pulled the plug out, the circuit breaker tripped. The prong on the plug for the pilot wire is the shortest so that it will disconnect first, and the prong for the ground is the longest. (Tr. 372). The breaker should trip as soon as the prong for the pilot wire disengages.

Jackson testified that they all went to the office, where Kenny Defa asked whether the breaker tripped when the pilot wire was disconnected at the fused disconnect box. The circuit for the shop was equipped with a ground monitoring system which is designed to detect a problem in a circuit's grounding system. Low voltage power travels from the transformer to the fused disconnect box through the pilot wire. Ordinarily, this power would travel back to the transformer via the grounding wires. If the grounding wires are disconnected, the ground monitoring system will detect this break in the grounding circuit and the circuit breaker will trip. The ground monitoring system did not trip the circuit breaker in this instance even though the ground wires were not connected at the grounding lug on the fused disconnect box. The reason why the circuit breaker did not trip is contested by the parties. Inspector Marietti testified that, in this instance, the ground wire and the pilot wire were touching on the cable coupler (plug) at the transformer. (Tr. 153-54). Thus, the ground monitoring circuit was short-circuited where the cable was attached to the transformer at the cable coupler. CW disagrees with this assessment.

After their discussion with Defa, Marietti, Grundvig, and Jackson went back to the shop to test the circuit with a meter to determine if it was grounded. The meter showed that the circuit was grounded. (Tr. 331, 357, 385). They observed that the pilot wire was properly connected at the fused disconnect box. Jackson testified that when the pilot wire was disconnected from the lug on the box, the circuit breaker tripped. (Tr. 333). Jackson testified that he is absolutely certain that when the pilot wire was disconnected at the fused disconnect box, the circuit breaker tripped to an open position. (Tr. 355). Grundvig testified that the power went off in the shop when the pilot wire was lifted from the box. (Tr. 382-83, 393). When Grundvig went to the breaker to try to reset it, it would not set because the pilot wire had been disconnected. (Tr. 383). When the pilot wire was reconnected to the box, the circuit breaker set properly. Mr. Defa testified that he was told that the breaker tripped when the pilot wire was lifted from its bracket on the fused disconnect box. (Tr. 432-33).

Jackson further testified that when the power cable entering the shop was installed, the outer jacket was removed where it passed through the metal conduit. The shielding and the two grounding wires made contact with the metal conduit. (Tr. 336, 385). The cable was very tight inside the metal conduit. (Tr. 356). The metal conduit was screwed into a metal plate which was bolted to the top of the fused disconnect box. (Tr. 337). As a consequence, when Inspector Marietti used a meter to test the ground, the meter showed that the circuit was grounded, even though the grounding wires were not connected at the fused disconnect box in the shop. Jackson concluded that, although this installation did not comply with the safety standard, the circuits in the shop were effectively grounded. Mr. Jackson, who has been certified through the College of Eastern Utah as a mine electrician, testified that the violation did not present a hazard to miners.

(Tr. 340). Mr. Grundvig testified that because the metal conduit was about four feet long with an elbow, good contact had been established between the uninsulated grounding wires and the conduit. (Tr. 392).

Jackson testified that the shop was constructed about 15 years ago and the electrical system had not been changed since that time. He also stated that CW had not experienced any ground faults or electrical injuries in the shop since the shop was constructed. Jackson also stated that MSHA inspectors had inspected the shop in the past and no citations had been issued concerning the manner in which the electrical system was wired or grounded. (Tr. 339).

Mr. Jackson further testified that he met with MSHA officials in Price, Utah, including Inspector Marietti, to discuss the electrical citations. When Marietti mentioned that the pilot wire was shorted at the cable coupler (plug) at the power center for the shop, Jackson "reminded him" that a plug for a different circuit at the power center was shorted out, not the plug that controlled the circuit for the shop. (Tr. 355). Jackson also reminded him that he issued a citation for that condition. Jackson testified that Inspector Marietti replied that it was possible that he was confused about which plug at the power center had a problem. Grundvig and Defa testified similarly. (Tr. 411-12, 435). Jackson testified that he is absolutely certain that the plug at the power center for the shop was correctly wired and was not shorted out in any way. (Tr. 355-56, 362). Grundvig also testified that when the plug was examined by the inspection party, there was nothing wrong with it. (Tr. 384). Grundvig testified that another plug at that same transformer was "messed up pretty bad," but it was not the plug for the shop. (Tr. 412). Jackson further stated that Inspector Marietti would have written a citation for the faulty plug if, in fact, it was not correctly wired. On rebuttal, Inspector Marietti testified that he was not at that meeting in Price and that, although other plugs were also poorly wired at the transformer, he remembers that the shielding for the cable to the shop was touching the pilot wire in the plug for the shop and that he immediately corrected the problem. (Tr. 455-457).

Arnold Pratt, a consulting professional electrical engineer, testified for CW. He testified that, although the cited condition violated the standard, the violation did not create a safety hazard. He reached this conclusion based on the fact that the bare shield on the power conductor entering the shop made a tight connection with the metal conduit through which it passed. (Tr. 245, 248; Ex. R-1). He believes that this condition existed since the shop was built. As a consequence, the cable was adequately grounded. This fact is supported by the grounding test that was performed which showed that there was a "good low resistance connection between the . . . shield on the power conductor and the conduit." *Id.* He believes that the shielding had enough "ampacity" to adequately ground the circuit. (Tr. 299-300, 318-19). He stated that his conclusion is supported by the fact that this condition had existed for at least 15 years without incident. (Tr. 249). Electrical tests would not have revealed the problem because grounding was provided through the conduit. Pratt contends that if, at any time during this 15-year period, grounding through the conduit had failed, the breaker would have tripped and the problem would have been detected during troubleshooting.

2. Analysis

As discussed above, the parties do not dispute that the cited condition violated section 75.701. The ground wires from the power center were not connected to the grounding lug on the fused disconnect box. CW contends that the violation was neither serious nor S&S. The Secretary contends that it was reasonably likely that someone would be seriously injured by the cited condition. For the reasons discussed below, I find that the violation was somewhat serious but that it was not S&S.

Inspector Marietti is a highly qualified and experienced electrical inspector. Witnesses for CW testified that he has been very helpful in suggesting improvements to the electrical systems at the mine. He provided instruction on installing proper electrical installations to abate the citations he issued. Much of the testimony and evidence presented by the Secretary was very technical in nature. I have only briefly summarized the evidence presented and I have not discussed all of the conflicts in the evidence because I do not believe that it is necessary to do so. Whether the pilot wire was shorted out at the plug at the power center is largely irrelevant. I find that Inspector Marietti discovered that the cable shielding was not connected to the plug at the transformer in a proper manner. As a consequence, some of the thin stray wires of the shielding were touching the pilot wire. (Tr. 455-457). Thus, the ground monitoring system was short circuited. I find that Marietti removed the stray shielding wires from the pilot wire before the troubleshooting described by Jackson began. Once the faulty condition in the plug was corrected, the ground monitoring system still did not trip the circuit breaker because the ground wires were connected to the fused disconnect box via the metal conduit. Because this conduit was connected to the fused disconnect box, the power in the ground monitoring circuit could travel back to the transformer through the grounding wires in the cable via the metal conduit. I credit the testimony of Jackson and Grundvig concerning the results of troubleshooting that occurred after Inspector Marietti fixed the plug. When Marietti tested the ground, his meter showed the fused disconnect box was grounded.

I find that the Secretary did not establish that the violation was S&S. The fused disconnect box was effectively grounded through the metal conduit. I credit the testimony of Jackson that the cable was snug within the conduit. The bare ground wires and the shielding for the cable were in direct contact with the conduit. Given that this condition had existed for about 15 years without incident, it is highly unlikely that the ground would have failed assuming continued normal mining operations. Although this connection violated the safety standard, I find that there was not a reasonable likelihood that the hazard contributed to by the violation would result in an injury. If the conduit became loose from the fused disconnect box, Mr. Grundvig would have detected that condition during his normal examinations in the shop. There was a slight safety hazard, however, because the grounding connection in the metal conduit could deteriorate over time.

I find that the violation was the result of CW's high negligence. The ends of the ground wires were not attached to the lugs in the fused disconnect box and these ends were taped up. The

failure to connect the ends of the ground wires when the box was initially installed demonstrates a high degree of negligence. It should have been obvious to the miner installing the box that the ground wires were taped up and that they needed to be connected to the grounding lug. CW argues that, because the system was grounded through the conduit, the violation was never detected and its failure to detect the violation demonstrates low negligence. I base my negligence finding on the failure to properly wire the box when it was installed. A penalty of $800.00 is appropriate for this violation.

B. Other Citations under Section 75.701

Inspector Marietti issued six other citations under section 75.701. The citations related to each of the active branch circuits. For example, Citation No. 7612352 states, in part:

> The 480 VAC, three phase, 5 HP, 7 amp bench grinder metal enclosure that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by the authorized representative of the Secretary. The enclosure was not grounded to a solid connection to the resistance ground conductors provided by the energized power cable supplying power to the 100 amp Main Disconnect enclosure. The ground conductors were taped together with insulated tape and laying in the enclosure, not connected to a grounding lug. The grinder ground conductor was connected in the main enclosure relying on the ground system from these resistance ground conductors that were not solidly connected providing a mechanical and electrically efficient connection. There was some grounding provided due to the metallic shielding on the 2/0 power cable where it had the outer jacket removed and pulled down through a rigid conduit and touching the ground conductors through skin effect along the cable to the transformer feeder circuit breaker. There was rigid metal conduit to the grinder from the main disconnect . . . . Miners touch the enclosures when working with equipment.

This citation is merely stating that, although a grounding wire connected the grinder to the fused disconnect box, the ground wires from the transformer were not connected at that box, so the grinder circuit was not properly grounded with resistance ground conductors. (Tr. 155). Inspector Marietti issued similar citations for each piece of electrical equipment in the shop. (Citation Nos. 7612351 - 7612356) (Tr. 160-82). None of these citations would have been issued if the grounding wires had been attached to the lug in the fused disconnect box. In each instance, the gravity was lowered on June 26, 2003, following a safety and health conference. The citations were designated as S&S and CW's negligence was listed as high. Inspector Marietti

testified that the violative conditions and the hazards presented were the same for each piece of equipment (Tr. 177-78). The Secretary proposes a penalty of $1,400.00 for each citation.

Mr. Jackson testified that all of these citations relate back to the fact that the ground wires were not connected to the fused disconnect box. For the same reasons as discussed above, he does not believe that these conditions created a hazard. As stated above, no miner had ever been shocked as a result of the conditions described in the citations. He believes that these citations repeat the same condition for each piece of equipment in the shop. Mr. Grundvig's testimony supports Jackson's testimony. (Tr. 393-98).

Mr. Pratt testified that the ground connection between the welder, grinder, and the other equipment in the shop was properly made to the fused disconnect. (Tr. 250-55). It was the fused disconnect that was not properly grounded as set forth in Citation No. 7612350. The system was grounded because the fused disconnect was grounded through the metal conduit. Thus, no hazard was presented by the conditions described in these citations. In addition, because there were ground wires running from the fused disconnect to each piece of equipment on these branch circuits, there was no separate violation for each branch circuit. The only violation was at the fused disconnect where the grounding wire from the power center was not attached at the grounding lug.

The first issue presented by these citations is whether they are unlawfully duplicative. The Commission has addressed this issue in cases where the Secretary has issued several citations under different safety standards for the same condition. The Commission held that "citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator." *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997) (citations omitted). All six of these citations were abated when CW abated Citation No. 7612350. Inspector Marietti issued a separate citation for each piece of electrical equipment in the shop. Each piece of equipment was properly grounded to the fused disconnect box, but the fused disconnect box was not properly grounded to the transformer, as discussed above. All of these citations relate back to the violation in Citation No. 7612350. Nevertheless, I find that it was within the Secretary's enforcement discretion to issue a separate citation for each piece of equipment because each piece of equipment was not properly grounded back to the transformer. Grounding back to the transformer is necessary in order for the circuit breaker to trip. A fault at the bench grinder, for example, could injure a miner using the bench grinder because of the lack of grounding to the transformer.

My findings with respect to negligence, gravity, and S&S are the same for these citations as for Citation No. 7612350. The equipment was, in fact, grounded because of the way the power cable entered the shop through the fixed metal conduit. As a consequence the violations were not S&S and were not particularly serious. CW's negligence was high. Because the violative condition was fully addressed in Citation No. 7612350 and each citation only affected one piece of equipment, I find that a penalty of $200.00 for each citation is appropriate for these

violations. I find that a cumulative penalty of $2,000 for the violations of section 75.701 is appropriate.

C. Citation No. 7612358

Inspector Marietti issued Citation No. 7612358 under section 104(a) of the Mine Act alleging a violation of section 75.902 of MSHA's safety standards. The body of the citation states:

> The 480 VAC, three phase, 55 amp welder and fused disconnect metal enclosures were not provided with a fail safe ground check circuit to monitor continuously the resistance ground system circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check is broken. The pilot conductor from the feeder circuit breaker at the transformer supplying power to the main enclosure from the resistance grounded system was connected in parallel to six other circuits in use and two others that had the load cables removed but the pilot conductors were still hanging open in the fused disconnect enclosures. These circuit grounds and pilot conductors were in parallel and if a ground opened as in the one fused disconnect that was removed from the ground check circuit that was opened, it would not open the circuit breaker. The parallel circuitry would require that all the individual grounds would have to be open to open the feeder circuit breaker. This would create a hazard to the miners for no resistance ground protection if the enclosure became alive from a fault. Miners touch the enclosed parts when operating the fused disconnect.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in pertinent part, that "[l]ow and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken . . . ." The Secretary proposes a penalty of $325.00 for this citation.

Pilot wires, which make up part of the ground check monitoring system, carry low voltage current. As described above, this current flows through the pilot wires to the equipment, then back through the grounding wires to the circuit monitor. (Tr. 185-86). If the low voltage power in this ground monitoring circuit is interrupted for any reason, the circuit breaker for the circuit supplying power to the equipment is opened, thereby de-energizing the power. The power in the ground monitoring circuit can be interrupted if the ground wire is broken or the pilot wire is broken. The citation states that the pilot wires to the welder and the other equipment in the

shop were incorrectly installed. As installed, the grounding system for each piece of equipment in the shop would have to fail before the circuit breaker would open. For example, if the ground wire going from the fused disconnect to the welder were to break or fail, the ground check monitoring system would not detect this failure.

An easy way to visualize the issue is to think of the two types of Christmas tree lights. Most lights are now wired in parallel so that if one light fails, the entire string of lights does not go out. Older Christmas tree light strings were wired in series with the result that if one light burned out, the entire string of lights went out. In the case of this ground check monitoring system, the pilot wires should have been wired in series so that if there were to be a problem anywhere in the system, the circuit breaker would to cut the power. The citation alleges that the ground check monitoring system was not fail-safe because the circuit breaker would not open in the event the pilot wire or ground wire for the welder broke.

Inspector Marietti determined that the negligence was high because CW should have done a better job of making sure that the electrical system in the shop was installed in accordance with the requirements of the standard. (Tr. 190-91). During an MSHA health and safety conference with CW on June 12, 2003, the gravity of the citation was lowered with the following language:

> A ground circuit, between the 100 amp disconnect and the stationary electrical equipment, was provided by a properly connected internal conductor and by rigid metal conduit attached to the frames. Tests indicated that the system was grounded. However, because the ground monitor circuits were wired in parallel . . . , the monitor would not open if one ground circuit lost continuity. The condition is violative but not reasonably likely to cause an accident resulting in injury. The citation gravity was reduced to non-S&S.

Mr. Jackson agrees that the pilot wire was not properly installed. (Tr. 345). He does not believe that this condition created a hazard. This condition had existed since the shop was constructed without creating any problems. Mr. Grundvig also confirmed that the pilot wires to the equipment were not wired correctly. (Tr. 378-79, 398).

Mr. Pratt testified that this condition violated the safety standard but it did not present a hazard. (Tr. 255-56; Ex. R-1). A hazard was not present because the pilot wire had a good connection to all of the circuits and therefore also acted as a ground wire by itself. Thus, if the grounding system ceased to function, the pilot wires would provide adequate ground. (Tr. 257-58). The pilot wire had a sufficient ampacity to act as a ground wire. Thus, two grounding systems would have to be broken in order for a hazard to be presented by the violation.

The parties do not dispute that this citation should be affirmed. The Secretary modified the citation during a conference. I find that the gravity was somewhat serious and that it was not

S&S. I accept the evidence presented by CW that the violation did not present a significant safety hazard. CW's negligence was high when it improperly installed the electrical system in the shop. I find that a penalty of $150.00 is appropriate for this violation.

D. Other Citations under Section 75.902

Inspector Marietti issued a total of six citations under this standard, one for each of the six active branch circuits in the underground shop. (Citation Nos. 7612358, 7612359, 7612360, 7612421, 7612422, 7612423) (Tr. 191-202). Each citation contains the same allegations with respect to each separate piece of equipment in the shop. At the MSHA conference, three of the citations were modified to non-S&S citations and the gravity of the heater citations was reduced. It should be noted, that when CW abated the citations at issue in this case, it completely redesigned the electrical circuits in the shop. With respect to the ground check monitoring system, it installed a separate ground monitor for each branch circuit so that if there were a failure in the resistance ground circuit for the welder, for example, it would shut down the power to the welder. As a consequence, the pilot wires were not connected in series because it installed a separate and an independent ground monitoring system for each branch circuit. (Tr. 197-98).

Mr. Jackson testified that the conditions cited in these citations were identical to the conditions cited in the previous citation. Grundvig agrees. (Tr. 400-05). Mr. Pratt testified that the conditions described in these citations would not present any hazard for the same reasons as described above. (Tr. 259-62). I find that each citation presented a discrete safety hazard with respect to the specific piece of equipment listed. Consequently, I find that the citations are not duplicative. I also find that the violations were somewhat serious and that CW's negligence was high. I find that a penalty of $150.00 for each citation is appropriate for these violations. I find that a cumulative penalty of $900.00 for the violations of section 75.902 is appropriate.

E. Citation No. 7612424

Inspector Marietti issued Citation No. 7612424 under section 104(a) of the Mine Act alleging a violation of section 75.601 of MSHA's safety standards. The body of the citation states, in part:

> The 480 VAC, three phase, No. 1 and No. 2 portable wheeled floor heaters trailing cables were not provided with a circuit breaker with instantaneous short circuit protection as required. The No. 1 with an AWG 8/5 trailing cable was protected with a 20 amp fuse. No. 2 with an AWG 10/5 trailing cable was protected with a 10 amp fuse. The cables get strung out on the floor in the shop with heavy metal and materials being moved and used that can damage the trailing cables.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in pertinent part, that "[s]hort circuit protection for trailing cables shall be provided by an automatic circuit breaker or other no less effective device approved by the Secretary of adequate current-interrupting capacity in each ungrounded conductor." The Secretary proposes a penalty of $450.00 for this citation.

During an MSHA health and safety conference with CW on June 12, 2003, the gravity of the citation was lowered with the following language:

> Although not provided with circuit breakers, the trailing cables for the portable shop heaters were protected by correctly sized fuses. Also, the circuits were protected by the circuit breaker at the power center. The condition described in the citation is not likely to cause an accident resulting in serious injury. The citation gravity was reduced to non-S&S.

Inspector Marietti determined that the heaters were portable equipment so that the power cables were trailing cables within the meaning of the safety standard. (Tr. 203). Section 75.601 requires all trailing cables be protected with an automatic circuit breaker that provides instantaneous short circuit protection. Inspector Marietti testified that trailing cables are required to be protected because they are subject to damage while being pulled around. (Tr. 205). The cables for the heaters were protected by fuses. Fuses do not meet the requirement of the standard because they do not provide instantaneous protection. A fuse will provide some degree of protection, but it will not automatically open the electrical circuit when a fault occurs. (Tr. 206). A fuse will only open a circuit after a period of time based on the design specifications of the fuse. Inspector Marietti does not know the amount of time it would take before these particular fuses would open the circuit in the event of a fault. (Tr. 233). The inspector testified that, in the alternative, CW could have relied on the circuit breaker at the power center for the shop, since the cables for the heaters were simply branch circuits of the shop circuit. To be effective, however, the circuit breaker would have to be set at 150 amps magnetic to provide the degree of protection required by the standard. (Tr. 208). In this case, the potentiometer at the circuit breaker for the shop was set at the maximum number of amps, which was considerably above 150 amps. (Tr. 168-70, 208-09). As a consequence, the circuit breaker would not trip in the event of a fault in the cables for the heaters.

Mr. Jackson testified that the fuses were installed when the shop was constructed. (Tr. 350). He stated that this condition has never created any problems. He does not believe that this condition created a shock hazard. He believes that the fuses used did not have delay and, if they did, it would not be enough to notice. (Tr. 351). Grundvig admitted that fuses would not disconnect all phases at once since each phase has a separate fuse. (Tr. 405).

Mr. Pratt testified that the condition violated the safety standard but that no safety hazard was presented. (Tr. 262). He based this conclusion on the fact that the circuit breaker at the

power center would adequately protect the circuit. In addition, he testified that it takes a fuse only a hundredth of a second longer to blow than a circuit breaker to open a circuit. (Tr. 264).

I find that the Secretary established a violation of the safety standard. The citation was modified to a non-S&S citation at the MSHA conference. I find that, because the potentiometer at the circuit breaker was out of adjustment, the circuit breaker might not provide adequate protection. The potentiometer adjusts the sensitivity of the circuit breaker. I credit the testimony of Inspector Marietti on this issue. I find that the citation was moderately serious. I also find that CW's negligence was high because it improperly installed fuses rather than circuit breakers in the two heater branch circuits. This violation was obvious. The Secretary's proposed penalty of $450.00 is appropriate for this violation.

F. **Citation No. 7612425**

Inspector Marietti issued Citation No. 7612425 under section 104(a) of the Mine Act alleging a violation of section 75.900 of MSHA's safety standards. The body of the citation states, in part:

> The energized 480 VAC, three phase circuits for the welder, bench grinder, air compressor, No. 1 and No. 2 portable wheeled floor heaters and 5 KVA transformer were not provided with a circuit breaker to provide undervoltage, grounded phase, short circuit and overcurrent [protection]. They were provided with fused disconnects.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in part, that "[l]ow- and medium-voltage power circuits serving three-phase alternating current equipment shall be protected by suitable circuit breakers of adequate interrupting capacity . . . ." The Secretary proposes a penalty of $325.00 for this citation.

During an MSHA health and safety conference with CW on June 12, 2003, the gravity of the citation was lowered with the following language:

> Although not provided with separate circuit breakers, the circuits were protected by correctly sized fuses. Also, the circuits were protected by the circuit breaker at the power center. The condition described in the citation is not likely to cause an accident resulting in serious injury. The citation gravity was reduced to non-S&S.

Inspector Marietti testified that the branch power circuits in the shop were low voltage and were covered by the standard. These circuits were protected by fuses rather than circuit breakers. Section 75.900 goes on to state that the required circuit breakers "shall be equipped

with devices to provide protection against undervoltage, ground phase, short circuit, and overcurrent." The inspector testified that fuses cannot provide undervoltage and ground fault protection. (Tr. 212). He further stated that the circuit breaker at the power center could have provided the necessary protection if it were properly adjusted. In this case, however, the potentiometer was "set all the way up and the ground fault wasn't working." (Tr. 212).

Jackson testified that if a fuse blew out one of the phases, the motors would stop and hum. (Tr. 352). The motor might get a little hot, but the condition would likely trip the circuit breaker at the power center. He does not believe that the conditions described in this citation posed a hazard to miners. Grundvig testified that he had never opened the fuse boxes, so he did not know what type of fuses was used. (Tr. 407). He believes that if there had been a fault of any kind, the breaker at the power center would have tripped.

Mr. Pratt testified that there was some protection provided by the circuit breaker at the power center. (Tr. 264). If you had a short circuit in one of these pieces of equipment, there might not be enough current to trip the circuit breaker, but a fuse would blow. He did not see a danger presented in the conditions set forth in the citation. He admitted, however, that when a fuse blows, only one phase may be opened with the result that equipment could have current running through it. (Tr. 265). Because most people are used to circuit breakers, which cut off all power when tripped, they may troubleshoot equipment without knowing that it is still hot.

I find that the Secretary established a violation. The citation was modified to a non-S&S citation at the MSHA conference. I find that, because the potentiometer at the circuit breaker was out of adjustment, the circuit breaker might not provide adequate protection. I credit the testimony of Inspector Marietti on this issue. I find that the citation was moderately serious. I also find that CW's negligence was high because it improperly installed fuses rather than circuit breakers in these circuits. This violation was obvious. The Secretary's proposed penalty of $325.00 is appropriate for this violation.

G. **Citation No. 7612426**

Inspector Marietti issued Citation No. 7612426 under section 104(a) of the Mine Act alleging a violation of section 75.512 of MSHA's safety standards. The body of the citation states, in part:

> The welder fused disconnect, 480 VAC three phase rated at 480 for 30 amp fuses maximum was provided with two 60 amp fuses and one 50 amp fuse. The physical size is bigger around than a 30 amp and the holders were spread open to the point that the holder was not making adequate contact with the fuse. The A phase had been forced in breaking the insulated load side fuse holder. The holder was not bolted to the enclosure. The bench grinder fused disconnect was rated for 15 amp fuses at 480 VAC, there were 30

> amp fuses installed. These two enclosures were not being maintained in safe operating condition. This with all the [other] violations . . . contribute to an inadequate weekly electrical examination. The examination was conducted on 07/02 and previous weeks. The individual equipment was not identified . . . in the book provided. The examiner said, "I look to see if covers are on and any cables are cut, I have not checked inside the panels or for anything else."

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in part, that "[a]ll electric shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." The standard also provides that when a potentially dangerous condition is found, the equipment shall be removed from service and a record of electrical examinations must be kept. The Secretary proposes a penalty of $2,000.00 for this citation.

Inspector Marietti testified that he issued this citation based on all of the other electrical citations he issued in the underground shop. Marietti stated that the person who most recently performed the weekly electrical examinations, Mr. Grundvig, told him that he was never taught how to perform electrical examinations. (Tr. 213). The inspector testified that Mr. Grundvig told him that he never opened electrical boxes to examine the fuses or other components. Grundvig simply made sure that the covers for electrical boxes were closed and that electrical cables entering the boxes were not damaged. Marietti testified that such a cursory examination is inadequate under the standard. (Tr. 218). Many of the fuses inside the electrical boxes were of an incorrect size. For example, the fused disconnect for the welder had a rating of 30 amps, but CW used 50 and 60 amp fuses. The holder for the 50 amp fuse had to be spread out to such an extent that it was not longer providing adequate electrical contact. (Tr. 215). Inspector Marietti testified that if an electrical examiner had opened the cover for the fuse box, the condition would have been obvious. He further stated that he issued 78 electrical citations and 7 electrical orders of withdrawal during his inspection of the mine. (Tr. 220). The inspector testified that, although he had previously conducted electrical inspections at the mine, he had never inspected the underground shop. (Tr. 223). Marietti did not know if the shop had been subject to any comprehensive MSHA electrical inspections in the past 15 years.

Inspector Marietti testified that the violation was serious and S&S, because if these conditions were allowed to continue, it was highly likely that someone would be seriously injured. CW was highly negligent because the examinations were totally inadequate to comply with the requirements of the safety standard.

Mr. Grundvig testified that he performed a general safety inspection of the shop every week. (Tr. 386). He examined each piece of equipment in the shop for safety defects. He looked for slip and fall hazards, fire hazards, and he checked the ventilation. He testified that he did not open electrical boxes because CW had never experienced any electrical problems in the

shop. (Tr. 387, 409). Grundvig testified that other MSHA inspectors looked at his examination books without advising him that his examinations were insufficient. (Tr. 410).

Mr. Pratt testified that this condition "was really scary" when he first heard about it. (Tr. 266). He was concerned about using a 30 amp disconnect with 60 amp fuses. As a consequence, he performed an experiment using the same types of fuses. (Tr. 266-76). As a result of this experiment, he concluded that the condition did not present a real hazard. (Tr. 278). There was enough contact between the fuse and the bent fuse holder to provide adequate protection. He admitted that he did not consider other aspects of concern to Inspector Marietti.

I find that the Secretary established a violation of the safety standard. I also find that the violation was S&S. The weekly examinations that were being conducted in the shop were completely inadequate to discover latent safety defects. CW's failure to conduct competent electrical examinations created a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. I also find that CW's negligence was high. This violation was obvious. Inspector Marietti discovered numerous violations during his inspection. The fact that other MSHA inspectors may have been in the shop does not reduce CW's negligence. It is the duty of the mine operator to comply with safety standards. In addition, it is not clear whether an MSHA electrical inspector had ever conducted an electrical inspection of the underground shop. CW argues that, because it had not experienced any problems with the shop's electrical system, it was not remiss in failing to conduct more thorough examinations. The purpose of electrical examinations is to make sure that problems do not arise. Waiting for a problem to develop before performing adequate examinations for potential hazards creates a serious risk that someone will be killed or injured. The Secretary's proposed penalty of $2,000.00 is appropriate for this violation.

III. APPROPRIATE CIVIL PENALTIES

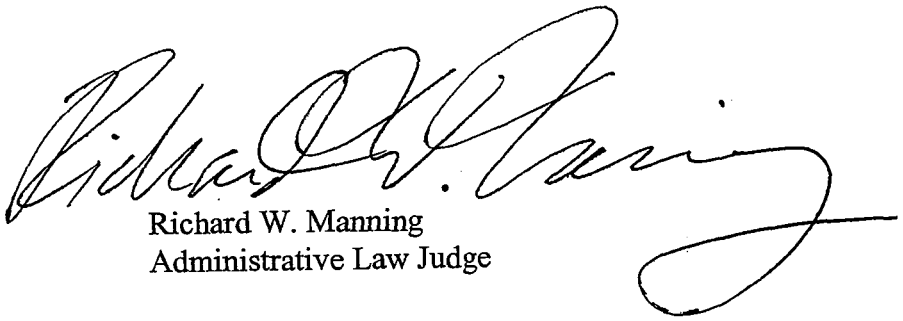
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that CW has a history of about 55 violations at the Bear Canyon No. 1 Mine and no violations at the Bear Canyon No. 3 mine in the two years prior to the inspections. Bear Canyon No. 1 Mine produced about 952,000 tons of coal in 2002 and Bear Canyon No. 3 produced about 3,500 tons of coal in 2002. All of the citations were abated in good faith. The gravity and negligence findings are discussed above. The penalties assessed in this decision will not have an adverse effect on CW's ability to continue in business. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

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

Citation No.	30 C.F.R. §	Penalty
WEST 2003-332		
7612553	75.360(a)(1)	$200.00
7612544	75.1106	Vacated
Citation No.	30 C.F.R. §	Penalty
WEST 2004-148		
7612350	75.701	800.00
7612351	75.701	200.00
7612352	75.701	200.00
7612353	75.701	200.00
7612354	75.701	200.00
7612355	75.701	200.00
7612356	75.701	200.00
7612358	75.902	150.00
7612359	75.902	150.00
7612360	75.902	150.00
7612421	75.902	150.00
7612422	75.902	150.00
7612423	75.902	150.00
7612424	75.601	450.00
7612425	75.900	325.00
7612426	75.512	2,000.00
	TOTAL PENALTY	$5,875.00

For the reasons set forth above, Citation No. 7612544 is **VACATED**; the other citations are **AFFIRMED** or **MODIFIED** as set forth in this decision; and C.W. Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of $5,875.00 within 30 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Certified Mail)

Carl E. Kingston, Esq., 3212 South State Street, Salt Lake City, UT 84115-3882 (Certified Mail

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 17, 2004

NATIONAL LIME & STONE COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 2004-43-RM
	:	Citation No. 6148346; 01/13/2004
v.	:	
SECRETARY OF LABOR, Mine Safety and Health Administration, MSHA, Respondent	:	Lima Plant Mine ID 33-00120

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case is before me on a Notice of Contest filed by National Lime & Stone Company against the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The notice challenges the issuance of a citation alleging a single violation of a regulation requiring the reporting of mine accidents, illnesses and injuries. 30 C.F.R. § 50.20(a). The parties have stipulated to relevant facts and have filed cross-motions for summary decision. For the reasons set forth below, I find that there exists no genuine issue as to any material fact and that the Secretary is entitled to summary decision as a matter of law. Accordingly, the Notice of Contest is dismissed.

Facts

On January 13, 2004, an authorized agent employed by the Secretary's Mine Safety and Health Administration ("MSHA"), issued Citation No. 6148346 to National Lime charging it with a violation of 30 C.F.R. § 50.20(a), which requires that mine operators report "each accident, occupational injury, or occupational illness at the mine." Following amendment, the "Condition or Practice" portion of the citation described the violation as follows:[1]

> A miner, (payroll # 08-396), performing work at the Lima Plant mine, was exposed to poison ivy on or about May 22, 2003, and was treated by a physician on May 31, 2003, following his reaction to the poison ivy, but did not lose any

[1] Order dated August 23, 2004, granting the Secretary's unopposed motion to amend the citation.

workdays. The mine operator did not report this as an occupational illness to MSHA and did not complete and submit an MSHA Form 7000-1, Mine Accident, Injury, and Illness Report.

National Lime, which received a copy of the citation on or about January 26, 2004, duly filed a Notice of Contest, which the Secretary answered. Thereafter, the parties stipulated to the following facts:

On or about May 22, 2003, a miner was performing work at National Lime's Lima Plant, at which time he was exposed to poison ivy. The miner experienced an adverse reaction to the poison ivy and, on or about May 31, 2003, he received an injection of Methylprednisolone from a physician. The miner did not require additional injections and did not lose any work days because of his reaction to the exposure to poison ivy. National Lime did not report to MSHA either the fact of the miner's exposure to poison ivy or his subsequent office visit to a doctor, which resulted in the injection. Poison ivy is a dermatitis-producing "sensitizing plant." Allergic contact dermatitis is a delayed hypersensitivity reaction to the sensitizing plant, poison ivy.

The issue is whether National Lime was obligated to report the miner's reaction to poison ivy as an occupational illness under the subject regulation. The regulations define occupational illness as:

> *Occupational illness* means an illness or disease of a miner which may have resulted from work at a mine or for which an award of compensation is made.

30 C.F.R. § 50.2(f).

The reporting obligation imposed by 30 C.F.R. section 50.20, provides, in pertinent part:

> Each operator shall report each accident, occupational injury, or occupational illness at the mine. . . . If an occupational illness is diagnosed as being one of those listed in § 50.20-6(b)(7), the operator must report it under this part. . . .

The referenced section, 30 C.F.R. § 50.20–6(b)(7), provides instructions on filling out various items on the prescribed reporting form and provides, in part:

> (7) Item 23. Occupational Illness. Circle the code from the list below which most accurately describes the illness. These are typical examples and are not to be considered the complete listing of the types of illnesses and disorders that should be included under each category. In cases where the time of the onset of the illness is in doubt, the day of diagnosis of illness will be considered as the first day of the illness.

(i) Code 21 – *Occupational Skin Diseases or Disorders.* Examples: Contact dermatitis, eczema, or rash caused by primary irritants and sensitizers or poisonous plants; oil acne; chrome ulcers; chemical burns or inflammations.

The Secretary argues that the plain wording of the regulation dictated that the miner's reaction to poison ivy be reported as an occupational injury. National Lime argues that the regulation, taken as a whole and as discussed in MSHA publications, is contradictory and vague with respect to conditions such as reactions to poison ivy, and that its original decision not file a report was correct.

Commission Procedural Rule 67, 29 C.F.R. §2700.67, provides that a motion for summary decision shall be granted if the entire record shows that there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1944). Here, the parties have stipulated to the facts material to the question of law presented for decision, i.e., whether National Lime violated the regulation by failing to report the miner's reaction as an occupational injury.

Under the regulation there is a significant difference between "occupational injuries" and "occupational illnesses." An occupational injury is defined as:

> *Occupational injury* means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

30 C.F.R. § 50.2(e).

Minor *injuries* that do not result in certain lost time from work and are treated only with first aid, as opposed to medical treatment, are not required to be reported. Except in the case of eye injuries, a single visit to a doctor and administration of prescription medication do not constitute medical treatment that would render reportable an otherwise non-reportable minor *injury*.[2] *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148 (Nov. 1989).

In contrast, the definition of an occupational *illness*, quoted above, contains no language excluding minor illnesses. As is evident from the definition, and as explained in MSHA publications cited by National Lime, all occupational illnesses are reportable whether or not

---

[2] The term "first aid" is defined as "one-time treatment, and any follow-up visit for observational purposes, of a minor injury." 30 C.F.R. § 50.2(g). Section 50.20-3 specifies differences between medical treatment and first aid for a number of injuries.

medical treatment is provided.[3]

In making its argument that the regulation is contradictory and vague, National Lime points out that the citation, as originally written, referred to the miner's allergic reaction as an "injury," and stated that it was reportable because it was "medically treated." Those assertions were erroneous in several respects. Most importantly, the reaction, a "rash" or "contact dermatitis" caused by the "sensitizing" or "poisonous" plant, was clearly an occupational *illness* under the regulation, not an occupational *injury*. Because it was an illness, whether or not medical treatment was administered was irrelevant to the issue of whether it was reportable under the regulation. Moreover, the treatment received by the miner would clearly have been first aid, rather than medical treatment, such that the condition would not have been reportable had it been an injury.

These misconceptions were apparently perpetuated during various conversations with MSHA personnel around, and shortly after, the time the citation was issued, some seven months after the illness should have been reported. Counsel for the Secretary recognized that the citation erroneously alleged that the reaction was an injury and moved, with National Lime's consent, to amend it to allege an unreported occupational illness. That motion was granted.

I agree with National Lime's assertion that the regulation may appear complex, contradictory, or vague, on the issue of whether certain types of conditions should be categorized as injuries or illnesses. However, I do not find the regulation vague or misleading as to the condition at issue here. As noted above, the miner's reaction to the poison ivy fit so squarely within the regulation's language setting forth examples of occupational skin diseases or disorders, that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the regulation, i.e., that the miner's reaction was an occupational illness, which the regulation required to be reported. *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996); *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

National Lime contrasts regulatory language addressing distinctions between first aid and medical treatment with respect to the inhalation of toxic or corrosive gasses – indicating that such conditions are injuries – with other language describing "respiratory conditions due to toxic agents" as examples of occupational illnesses. It also makes reference to an MSHA publication counseling that elevated levels of lead in the blood, an occupational illness, would become reportable if the miner, *inter alia*, receives treatment for lead poisoning or to lower blood-lead levels, as contradictory of previously quoted language mandating the reporting of all occupational illnesses, whether or not medical treatment is provided.

Some conditions, especially minor ones, could certainly present difficult questions for an operator attempting to comply with its reporting obligations. National Lime has cited some

---

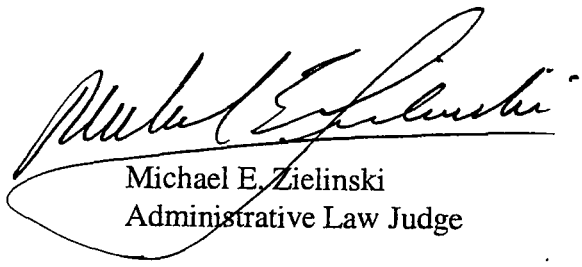
[3] Contestant's letter-brief at 4.

examples. There may also be a question of whether an illness is so de-minimis that reporting would not be required, e.g., would the instant miner's reaction have been reportable if it was nothing more than a small rash that cleared up in a day or two? Presumably, MSHA representatives are available for telephonic consultation on such issues, and would provide guidance on interpretation of the regulation.

This, however, was not such a case. The miner's reaction was clearly not de-minimis, and fell squarely within one of the descriptions of occupational illnesses in the regulation. National Lime apparently was aware of the miner's condition around the time that it occurred. There is no claim that it consulted MSHA and was mislead at that point. In failing to seek guidance, it acted at its peril, because an operator is strictly liable for violations of the Act, and mandatory health and safety standards and regulations enacted pursuant thereto. *ASSARCO, Inc.*, 8 FMSHRC 1632 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989); *Western Fuels - Utah, Inc., v. FMSHRC*, 870 F.2d 711 (D.C.Cir. 1989).

ORDER

Based upon the foregoing, I find that there is no genuine issue as to any material fact and that the Secretary is entitled to summary decision as a matter of law. National Lime violated the cited regulation by failing to report the miner's occupational illness within ten days of its being diagnosed. Accordingly, the Notice of Contest is **DISMISSED**.



Michael E. Zielinski
Administrative Law Judge

Distribution (Certified Mail):

Kevin Kitzler, Safety Compliance Officer, The National Lime & Stone Co., P.O. Box 120, Findlay, OH 45840

Christine M. Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 21, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2004-109-M
Petitioner	:	A.C. No. 41-03266-18191
	:	
v.	:	Docket No. CENT 2004-186-M
	:	A.C. No. 41-03266-28177
KERR ENTERPRISES, INC.,	:	
Respondent	:	Docket No. CENT 2004-201-M
	:	A.C. No. 03266-30940
	:	
	:	BEECO Mine

ORDER LIFTING STAY
CONSOLIDATION ORDER
ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION
DECISION APPROVING SETTLEMENT
AND
ORDER TO PAY

Docket No. CENT 2004-109-M was stayed on August 4, 2004, to enable the parties to reach factual stipulations for the filing of cross-motions for summary decision on the question of whether the BEECO Mine operated by Kerr Enterprises, Inc. (Kerr), is covered by the Federal Mine Act Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (Mine Act). The motions for summary decision having been filed, the stay in Docket No. CENT 2004-109-M **IS LIFTED**. Docket Nos. CENT 2004-186-M and CENT 2004-201-M also involving the BEECO facility, were recently assigned. Accordingly, these three docketed civil penalty proceedings concern the same jurisdictional issue and **ARE CONSOLIDATED** for disposition.

These cases contain a total of nine citations issued by the Mine Safety and Health Administration (MSHA) for alleged violations of mandatory safety standards in Parts 47 and 56 of the Secretary's regulations governing surface mines. 30 C.F.R. Parts 47 and 56. The violations cited in eight of the nine citations were designated as non-significant and substantial (non-S&S) in nature. A violation is non-S&S if it is unlikely that the hazard contributed to by the violation will result in the occurrence of a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a civil penalty of $60.00 for each of the eight non-S&S citations, and $875.00 for the remaining citation in Docket No. CENT 2004-201-M. Thus, the Secretary proposes a total civil penalty of $1,355.00.

During a July 30, 2004, telephone conference, Kerr's counsel represented that the fact of the occurrence of the violations in Docket No. CENT 2004-109-M is not in dispute. In a subsequent telephone conference on December 14, 2004, Kerr's counsel stated, if it is determined that Kerr's facility is subject to Mine Act jurisdiction, Kerr will pay the $480.00 civil penalty proposed by the Secretary for the eight non-S&S citations in Docket Nos. CENT 2004-109-M and CENT 2004-186-M. With respect to the citation in Docket No. CENT 2004-201-M, on December 15, 2004, the Secretary's counsel reported that the parties have agreed to reduce the civil penalty from $875.00 to $650.00. Thus, the parties have agreed on a total civil penalty of $1,130.00 if the facility is covered by the Mine Act. I construe the parties' representations to be a contingent joint motion for the approval of settlement.

Specifically, the jurisdictional question is whether Kerr's BEECO facility is a "borrow pit" subject to Occupational and Health Administration (OSHA) jurisdiction as contemplated by the 1979 OSHA-MSHA Interagency Agreement on Jurisdiction, 44 *Fed. Reg.* 22827 (April 17, 1979). Kerr's Motion for Summary Decision was filed on October 25, 2004. The Secretary's motion was filed on October 27, 2004. The factual stipulations in the parties' motions are based on the August 3, 2004, deposition testimony of Melvin Keith Turner who is the manager of the BEECO facility. The transcript of Turner's testimony will be referred to in this decision.

I. Background

The BEECO facility in Orange County, Texas, has been operated by Kerr for more than five years. During this period activities have remained relatively unchanged. Turner has been employed by Kerr since 1992, and he is the senior on-site person at the BEECO facility. (Tr. 5-7). The facility is a full-time operation that operates fifty weeks a year and employs four full-time employees. (Tr. 21).

At BEECO, Kerr extracts earthen material from a pit. The extracted material consists of clay, sand, topsoil, and a sand/clay mix which occurs naturally in the soil. Excavation is by means of trackhoes or front-end loaders. The only "processing" that is performed at the facility is through the use of a power grid or scalping screen, on about 20 percent of the materials, in order to remove roots and other wood debris. No sizing of materials is otherwise performed. (*Resp. Mot.* 1).

Material extracted from the BEECO site is sold to more than fifty customers, none of whom are organizationally affiliated with Kerr. (Tr. 29). The customers, situated throughout the Beaumont-Port Arthur-Orange metropolitan area, are located as far as twenty-five miles away from the BEECO location. (Tr. 29-30). BEECO's customers include landscape companies, refinery contractors, construction contractors and concrete companies. (Tr. 22-26).

II. Findings and Conclusions

As a threshold matter, the *Dictionary of Mining, Mineral and Related Terms* 62 (2nd ed. 1997) defines a "borrow pit" as:

> (a) *The source of material taken from some location near an embankment where there is insufficient excavated material nearby on the job to form the embankment.* Borrow-pit excavation is therefore a special classification, usually bid upon as a special item in contracts. It frequently involves the cost of land or a royalty for material taken from the land where the borrow pit is located; it also often requires the construction of a suitable road to the pit. This type of excavation therefore usually runs higher in cost than ordinary excavation.
> (b) An excavated area where borrow has been obtained.

(Emphasis added).

In 1979, MSHA and OSHA, divisions of the Department of Labor, entered into an Interagency Agreement to provide guidance to affected employers on the principles and procedures for distinguishing between Mine Act and Occupational Safety and Health Act (OSH Act) jurisdiction. *Interagency Agreement, supra*; *see also Sec'y v. Island Constr. Co.*, 11 FMSHRC 2448, 2453 (Dec 1989) (ALJ Broderick). The Interagency Agreement addresses the jurisdictional parameters of "borrow pits." Paragraph B.7 of the Interagency Agreement provides:

> "Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). "Borrow Pit" means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earthen material overlying bedrock is extracted from the surface. *Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted.* No milling is involved, except for use of a scalping screen to remove large rocks, wood and trash. *The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.*

44 Fed. Reg. at 22828. (Emphasis added).

MSHA adopted interpretive guidelines in 1996 to clarify the 1979 Interagency Agreement with respect to borrow pits. The Interpretation and Guidelines provides in pertinent part:

> Thus, if earth is being extracted from a pit and is used as fill material in basically the same form as it is extracted, the operation is considered to be a "borrow pit." For example, if a landowner has a loader and uses bank run material to fill potholes in a road, low places in the yard, etc., and no milling or processing is involved, except for the use of a scalping screen, the operation is a borrow pit. The scalping screen can be either portable or stationary and is used to remove large rocks, wood or trash. In addition, whether the scalping is located where the material is dug, or *whether the user of the material from the pit is the owner of the pit or a purchaser of the material from the pit, does not change the character of the operation, **as long as it meets the other criteria**.*

I, MSHA, U.S. Dept. Of Labor, *Program Policy Manual*, Section 4, I.4-3 (1996). (Emphasis added).

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each "coal or other mine" shall be subject to the Act. Section 3(h)(1) of the Mine Act defines "coal or other mine" as "an area of land from which minerals are extracted . . . and lands . . . used in . . . the milling of such minerals . . . ." 30 U.S.C. § 802(h)(1). Although the Mine Act does not define "extracted" or "milling," the Commission and courts have recognized the legislative history called for activities conferring Mine Act jurisdiction to be broadly construed. *Drillex, Inc.*, 16 FMSHRC 2391, 2394 (December 1994). (Citations omitted). As a general proposition, the term "extraction" means the separation of a mineral from its natural deposits in the earth. *Id.* at 2395. Extraction includes the removal by excavation of a composite of minerals, even if the minerals are not individually separated from the earthen material. *Id.*

Either mineral extraction or milling independently provides a basis for Mine Act jurisdiction. *Id.* Thus, pit excavation and/or scalping would ordinarily give rise to Mine Act jurisdiction. However, the Interagency Agreement exempts a "borrow pit" from the broad reach of the Mine Act if certain conditions are met. The Secretary's 1996 Interpretation and Guidelines extend the exemption even if the user of the material extracted from the pit is a purchaser of the material rather than the owner of the pit. However, while the Secretary's interpretive guidelines extend the borrow pit exemption even if the extracted material is sold to a third party, the guidelines retain "the other criteria" in the Interagency Agreement that must be met to qualify as a "borrow pit."

I am unpersuaded by Kerr's assertion that the nature and extent of its BEECO operations satisfy the criteria for a "borrow pit." As noted, the industry considers a "borrow pit" to be a "special classification" where "source of material [is] taken from some location near an embankment where there is insufficient excavated material nearby." Similarly, the Interagency Agreement notes that borrow pit material ". . . is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit." In other words, borrow pit material is fill material that is extracted for the limited purpose of providing bulk fill at a nearby location.

Moreover, to qualify as a "borrow pit" the Interagency Agreement requires extraction "on a one-time only basis or only intermittently as need occurs." 44 Fed. Reg. at 22828. The full time continuous extraction and commercial sale at the BEECO facility to numerous customers, for a variety of uses, some of whom are located twenty-five miles away, is a far cry from the one time, or intermittent, local fill dirt activity contemplated for OSHA jurisdiction in the Interagency Agreement.

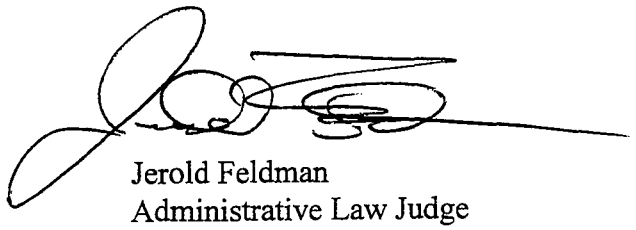
The only activity at BEECO that can occur at a site that is properly characterized as a "borrow pit" is Kerr's use of a scalping screen to remove debris. However, the use of a scalping screen does not alter the routine, commercial surface mine nature of the BEECO operation. Rather, as the Secretary suggests, the BEECO facility is no different than sand and gravel operations, rock quarries or clay pits that sell extracted material to customers. (*Sec'y Mot.* 5-6). *See, e.g., Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (April 1994). Moreover, since the BEECO facility is not a 'borrow pit," the on-site scalping constitutes "milling" under Section 3(h)(1) that provides an additional basis for Mine Act jurisdiction. Thus, the "borrow pit" exception to Mine Act jurisdiction, that also excludes jurisdiction of limited milling activity, does not apply to the BEECO facility.

As a final matter, Kerr argues that it is the victim of selective enforcement because MSHA has not asserted jurisdiction over similarly situated competitors. Section 103(a) of the Mine Act authorizes the Secretary to "make frequent inspections and investigations in coal or other mines each year." 30 U.S.C. § 813(a). In this regard, section 103(a) *requires* the Secretary to "make inspections . . . of each surface or other mine in its entirety at least two times a year." *Id.* Thus, although MSHA has the prosecutorial discretion not to exercise enforcement authority with respect to a particular condition or practice at a mine site, MSHA *must* exercise its jurisdiction over all mine sites. *Air Prods. and Chems., Inc.*, 15 FMSHRC 2428, 2435 n.2 (December 1993) (concurring opinion). Consequently, allegations of selective enforcement cannot provide a basis for exemptions from Mine Act coverage.

ORDER

In view of the above, the BEECO facility operated by Kerr Enterprises, Inc., is subject to Mine Act jurisdiction. Consequently, the Secretary's Motion for Summary Decision **IS GRANTED** and Kerr Enterprises, Inc.'s Motion for Summary Decision **IS DENIED**.

With respect to the civil penalty to be assessed, I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the parties' settlement agreement **IS APPROVED,** and **IT IS ORDERED** that Kerr Enterprises, Inc., pay a total civil penalty of $1,130.00 within 45 days of this Decision in satisfaction of the nine citations in issue. Upon receipt of timely payment, the captioned civil penalty cases **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Charles R. Hairston, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Kerwin B. Stone, Esq., Moore Landry, LLP 390 Park Street, Suite 500, Beaumont, TX 77701

/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

December 30, 2004

R S & W COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS Docket No. PENN 2005-58-R[1] Order No. 7007058; 12/15/2004
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	R S & W Drift Mine ID 36-01818

DECISION

Appearances: Randy Rothermel, President, R S & W Coal Company, Inc., Klingerstown, PA, for the Complainant;
Andrea Appel, Esq., U.S. Department of Labor, Philadelphia, PA, for the Respondent.

Before: Judge Weisberger

At issue in this proceeding is an imminent danger order issued on December 15, 2004, pursuant to Section 107(a) of the Federal Mine Safety and Health Act of 1977 (The Act). The matter was heard, on an expedited basis on December 21 & 22, 2004, in Harrisburg, Pennsylvania.

After the hearing, a bench decision was issued. The decision, except for corrections of matters not of substance and omissions of language not relevant to this decision, is set forth as follows:

I.

R S & W operates a coal mine. The imminent danger order relates to various conditions observed along a 70 foot length haulage track. The track was traversed by a locomotive and five cars, either loaded with approximately five tons of coal or three tons of rock. These cars also regularly ran on the tracks when transporting miners.

---

[1]This matter is **Ordered** severed from Docket Nos. PENN 2005-55-R *et al.*

On December 15, 2004, MSHA Inspector Michael Dudash observed a number of conditions that he indicated contributed to his finding of an imminent danger.

1. Crack in the rail and inadequate fishplate.

Dudash observed a crack in a rail that was approximately four inches from the south end of the rail. The crack went all the way through the rail. A fishplate connected this rail and the adjacent rail to the north. According to the inspector, the fishplate was connected to these two rails by four bolts, but only three of the four bolts were effective; two on the north side and only one on the south side. The inspector indicated that the rail was subject to various stresses. The dumping of coal or rocks by the cars created torsion stress on the rails. Another type of stress was created by downward pressure, and its release caused when the cars ran on the tracks.

Additionally the inspector testified that the fishplate was not in contact with the vertical web of the track.

The inspector indicated that it was reasonably likely that due to the various stresses the track could shift causing the cars to derail or overturn. In such an event, an injury of a reasonably serious nature was reasonably likely to occur because the west side of the track was over an opening which would lead to somebody falling 25 feet and landing on top of coal or rock.

David Winand, who works for R S & W worked on the site for six years. He testified that the fishplate, which he termed a splice bar, had been installed one to one and a half years ago. He said it had not been previously cited. Also, he never saw it stretch or flex.

Randy Rothermel, R S & W's superintendent testified that he never saw the track move, and has not seen any signs of stress.

2. Unsupported rail ties.

In addition, along a 36 foot length of track ten railroad ties that had been installed perpendicular to the tracks extended 14 inches beyond a wall that supported the rails and the ties. As a consequence, 14 inches of the each tie, designed to support the rail, was over a void twenty feet above the ground, and as a consequence, the rail resting on these ties also was unsupported.

3. The lack of a device to prevent cars from overtravelling or overturning.

Further, in the area where coal was dumped, which extended approximately 30 feet, there wasn't anything present to prevent cars from overtravelling and/or overturning if a rail would dislodge or if support would fail.

4. The lack of rails to prevent a person from falling.

Additionally, there were no protective rails along the elevated west side of the tracks in an area of the tracks where miners shovel, and remove wheels from cars when they are dumped. Due to the absence of protective rails a person could have stumbled on the ties or coal and rocks between the ties, and fallen off the west side of the tracks and landed on the ground 25 feet below.

5. A gap between rail ties.

Lastly, the inspector observed that a 14 inch gap between the ties that extended 30 feet and was five feet above the surface along one of the dumping areas.

II.

The inspector issued a Section 107(a) imminent danger order. He indicated that each of the above conditions contributed to the finding of an imminent danger.

Additionally, the inspector indicated that more rail spikes were needed to anchor the rails. However, he did not indicate the basis for his conclusion that additional ties were needed. He indicated that also a basis for the imminent danger order, was that the outside (western) rail was reasonably likely to fail, connections were exposed, and there was no support under the rails.

Gregory Mehalchik, an MSHA engineer, testified that the outside rail was subject to torque tension. According to him; it needed two adequate supports, but there was only one. He didn't indicated any basis for that conclusion.

Mehalchik opined that the track was highly likely to fail due to the weight on it and the torsion effect. He also referred to erosions which deprive support and the freeze-thaw effect.

Mehalchik testified that in his opinion all of the five conditions set forth above would contribute to an accident. He was asked a number of times to

explain the reason for his opinion that there was an imminent danger of an accident occurring within a short period of time. His testimony is not very persuasive with regard to meeting that burden.

He first indicated his opinion was based on the existence of gaps between the rails, the absence of and hand rails along with the fact that people work in the area , the presence of a danger of falling through the gap, or going over the side of the track, the possibility of a sudden failure of the rail which could lead to a derailment, and the possibility of a failure of a fishplate or rail which could occur suddenly due to fatigue caused by the placing of loads on and off the rails.

In another portion of the testimony Mehalchik was asked to explain the basis for his conclusion that there was an imminent danger. He explained that in the area of the crack there was a connecting bar over a void, also that there was a lack of support for rails where the ties extended unsupported 14 inches beyond the wall, which causes a lack of support for the rails, which causes a bending effect. Further, that fishplates were not supported.

At another point in his testimony he was asked to explain that basis for the imminent danger, and he explained that fatigue could come into play, that this occurs over time, and that there was some erosion. He indicated that signs of fatigue on various items of metal are observable. However, he did not see any fatigue or evidence of bolt shearing.

It certainly can be argued that all the conditions in combination add up to a series of conditions that can lead to a conclusion that an accident injury-producing event was reasonably likely to have occurred at some time given continued mining operations. It could have occurred within the next couple of minutes, or it could have occurred over a number of years. These are considerations when deciding if cited conditions are significant and substantial. Dudash and Mehalchik found that the conditions cited reasonably would have led to an injury-producing event within a short period of time, but they didn't provide a basis for their conclusion.

In deciding whether the Secretary established the existence of an imminent danger, I'm guided by a number of factors. (1) Section 3(j) of the Act that defines imminent danger. (2) more importantly, an analysis of Commission law, briefly referred to by the Secretary, Utah Power & Light, 13 FMSHRC 1617, 1621 (1991), followed by Wyoming Fuel Co., 14 FMSHRC 1282 (1992), which is followed by Island Creek, 15 FMSHRC 339 (1993) and the more recent case of Blue Bayou Sand & Gravel, 18 FMSHRC 853 (1996) cited by the Secretary. Considering all these cases and putting weight on the most recent case, Blue Bayou, supra, I conclude that the test of an imminent danger is the existence of a hazardous condition or conditions that have a reasonable potential to cause death

or serious injury within a short period of time. I don't find that spelled out in the Secretary's case or in the evidence.

In this connection, I refer to a number of matters brought out by the Company. First of all, with regard to some specifics, the splice bar that was cited, according to the testimony of Winan, had been in place a year and a half or two years. Second, Winand, who is at the site daily and has been there for the last six years, has never seen any stretching or flexing of rails.

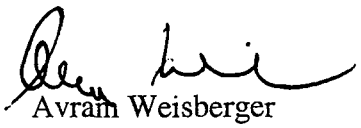
Rothermel testified that he laid a level perpendicular to the rails, and ". . . it was level" (Tr. 260). The splice bar used by the Company was, according to the Company's uncontradicted testimony, thicker than an L-shaped bar. I find that testimony of the Company's witnesses credible as it is logical that the bar in question has the effect of connecting three pieces of a rail; the broken piece, the solid piece to the south, and the solid piece to the north. I find Rothermel's testimony credible that he never saw the joint move. There aren't any signs of stress on any part. The fishplates, according to the testimony of the Company's witness, which was not contradicted, were bolted on both sides of the track. Also, although14 inches of the 100 inch long ties extended over unsupported area, the remaining 86 inches of the ties was supported, at grade connected to the wall, and attached to cement, all of which provides a high degree of support.

More importantly, I note that none of the conditions referred to by the Secretary's witnesses, have just occurred. They've been in existence some time. According to the uncontradicted testimony of the Company's witnesses, the crack has been in existence more than five years. The amount of extension of the ties over unsupported area existed since 1990. The other cited conditions have existed since 1990, a period of more than 15 years. This is very significant evidence negating a finding of any imminence of an accident or injury-producing event leading to someone being injured.

For all these reasons I find that it has not been established that there was any imminent danger as defined in the case law, and 107 order shall be dismissed.

ORDER

It is **ORDERED** that the Notice of Contest is sustained. It is further **ORDERED** that Order 7007058 be dismissed.



Avram Weisberger
Administrative Law Judge

Distribution:

Randy Rothermel, President, R S & W Coal Company, Inc., 207 Creek Road, Klingerstown, PA 17941

Andrea Appel, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

/sb

Federal Mine Safety & Health Review Commission
Calendar Year 2004 Index

This index of decisions and orders issued during the calendar year 2004 is divided into two parts: decisions and orders issued by the Commission, followed by those issued by the Administrative Law Judges (ALJ's). The listings include title, docket number, date of issuance, and page number in the Federal Mine Safety & Health Review Commission's Bluebook (FMSHRC), volume 26. Where the Secretary of Labor, Mine Safety and Health Administration is a party, listings are under the name of the opposing party.

Commission Decisions and Orders

Commission Decisions and Orders

Commission Decisions and Orders

Commission Decisions and Orders

Commission Decisions and Orders

Case Name	Docket Number	Date	Page Number FMSHRC Vol. 26
Southwest Concrete & Paving, Inc.	CENT 2004-49-M	08-10-2004	Pg. 631
Southwest Concrete & Paving, Inc.	CENT 2004-192-M	08-20-2004	Pg. 635
Stillwater Asphalt	PENN 2003-40-M	04-06-2004	Pg. 341
Stillwater Mining Co.	WEST 2004-140-M	03-19-2004	Pg. 167
Tacoma Diesel & Equipment, Inc.	WEST 2003-112-M	03-23-2004	Pg. 218
Twentymile Coal Co.	WEST 2000-480-R	08-12-2004	Pg. 666
U.S. Quarried Slate Products, Inc.	YORK 2004-20-M	03-19-2004	Pg. 194
Van Buren County Road Dept.	CENT 2003-187-M	03-29-2004	Pg. 272
Virgin Islands Quarry, Inc.	SE 2003-112-M	03-29-2004	Pg. 260
Washington Rock Quarries, Inc.	WEST 2004-345-M	08-30-2004	Pg. 699
Wildey, employed by Stewart Excavating, Inc.	WEST 2004-157-M	04-05-2004	Pg. 333
Youngquist Brothers Rock	SE 2004-111-M	05-25-2004	Pg. 399

Federal Mine Safety & Health Review Commission
2004 Index

ALJ Decisions and Orders

ALJ Decisions and Orders

ALJ Decisions and Orders

Case Name	Docket Number	Date	Page Number FMSHRC Vol. 26
Jim Walter Resources	SE 2003-160	10-14-2004	Pg. 830
Kerr Enterprises, Inc.	CENT 2004-109-M	12-21-2004	Pg. 953
Kinnaman (Sec'y of Labor on behalf of) v. 3M Corp.	WEST 2003-402-DM	05-13-2004	Pg. 443
Maple Creek Mining, Inc.	PENN 2002-116	06-18-2004	Pg. 539
Martin County Coal Corp.	KENT 2002-42-R	01-14-2004	Pg. 35
Melgaard Construction Co.	WEST 2003-264-M	08-24-2004	Pg. 720
Miller v. TXU Mining Co.	CENT 2003-307-D	06-04-2004	Pg. 510
Mullins v. U.S. Steel Mining Co.	WEVA 2003-155-D	01-28-2004	Pg. 65
National Lime & Stone Co.	LAKE 2004-43-RM	12-17-2004	Pg. 948
Ohio Valley Coal Co.	LAKE 2002-61	08-31-2004	Pg. 729
Original Sixteen to One Mine, Inc.	WEST 2002-224-M(A)	01-05-2004	Pg. 21
Palmer Coking Coal Co.	WEST 2003-392-M	06-04-2004	Pg. 504
Pollock v. Kennecott Utah Copper Corp.	WEST 2003-182-DM	01-21-2004	Pg. 52
Quackenbush v. Kentucky-Tennessee Clay	SE 2003-83-DM	12-08-2004	Pg. 913

ALJ Decisions and Orders

*U.S. GOVERNMENT PRINTING OFFICE: 2005/310-984/15912