NOTICE

BEGINNING WITH THE 2006 CALENDAR YEAR, THE COMMISSION WILL BE PRINTING ON A BI-MONTHLY SCHEDULE.

BOOKS WILL BE PRINTED FOR THE FOLLOWING MONTHS:

JANUARY- FEBRUARY
MARCH - APRIL
MAY - JUNE
JULY - AUGUST
SEPTEMBER - OCTOBER
NOVEMBER - DECEMBER - 2006 INDEX

DECEMBER 2005

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

DECEMBER 2005

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

Secretary of Labor, MSHA v. Sherwin Alumina Company, Docket No. CENT 2005-180-M. (Chief Judge Lesnick, unpublished Default Order issued November 2, 2005).

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 2003-160. (Judge Barbour, November 1, 2005).

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

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 8, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 2006-18 A.C. No. 15-18808-60638
v.	:	
PREMIER ELKHORN COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On October 14, 2005, the Commission received from Premier Elkhorn Coal Company ("Premier Elkhorn") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On June 29, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Premier Elkhorn for a citation issued to the company by MSHA on May 19, 2005. Mot. at 1. Premier Elkhorn states in its motion that it had already timely contested the citation. *Id.* That contest is the subject of Docket No. KENT 2005-307-R, which is currently on stay before Commission Administrative Law Judge Avram Weisberger. Premier Elkhorn states that it failed to timely contest the proposed penalty assessment at issue because the assessment erroneously included another citation and Premier Elkhorn believed that a corrected assessment would follow. *Id.* The Secretary states that she does not oppose Premier Elkhorn's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2006-4
	:	A.C. No. 12-02215-54343
v.	:	
GIBSON COUNTY COAL, LLC	:	

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

ORDER

BY THE COMMISSION:

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

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

On April 12, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Gibson for an order issued to the company by MSHA on January 26, 2005. Mot. at 1. Gibson states in its motion that it had already timely contested the order, which is the subject of Docket No. LAKE 2005-68-R. *Id.* at 1-2. This proceeding is currently on stay before Commission Administrative Law Judge T. Todd Hodgdon. Gibson states that it failed to timely contest the proposed penalty assessment at issue due to an oversight by its interim safety director and a member of its accounting staff. *Id.* at 2-3; Aff. of G. Timmons. The Secretary states that she does not oppose Gibson's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 8, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 2006-1 A.C. No. 36-07059-63884
v.	:	
CHESTNUT COAL	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On October 4, 2005, the Commission received from Chestnut Coal ("Chestnut") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On August 10, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Chestnut for citations and orders issued to the company by MSHA on February 1 and 14, 2005. Mot. at 1. Chestnut states in its motion that it had already timely contested the citations and orders, which are the subject of Docket Nos. PENN 2005-120-R through PENN 2005-123-R and PENN 2005-125-R through PENN 2005-129-R.[1] Mot. at 1. Those proceedings are currently on stay before Commission Administrative Law Judge Gary Melick. Chestnut states that it failed to timely contest the proposed penalty

[1] On August 4, 2005, Chestnut's contest in Docket No. PENN 2005-124-R was dismissed because the Secretary had vacated the citation at issue.

assessment at issue because Joe Shingara, Chestnut's management representative, believed that the company's contests of the citations and orders obviated the need to respond to the proposed penalty assessment. *Id.* at 1-2; Aff. of J. Shingara. The Secretary states that she does not oppose Chestnut's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 8, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2006-10-M
	:	A.C. No. 04-00011-39628
v.	:	
RIVERSIDE CEMENT COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On October 4, 2005, the Commission received from Riverside Cement Company ("Riverside") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 6, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Riverside for a citation issued to the company by MSHA on July 12, 2004. Mot. at 1. Riverside states in its motion that it had already timely contested the citation. *Id.* That contest is the subject of Docket No. WEST 2004-420-RM, which is currently on stay before Commission Administrative Law Judge Richard W. Manning. Riverside states that it failed to timely contest the proposed penalty assessment at issue because it had called MSHA about discrepancies in the assessment and MSHA had told it to wait to file its hearing request until it received a revised assessment. *Id.* at 2-3; Aff. of D. Fionda. According to Riverside, however, it received no revised assessment or other

communications from MSHA regarding the matter. *Id.* The Secretary states that she does not oppose Riverside's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 2005-232
	:	A.C. No. 36-00958-58520 A
JOHN J. STECH, employed by EIGHTY-FOUR MINING CO.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On August 8, 2005, the Commission received a motion made by counsel on behalf of John J. Stech, employed by Eighty-Four Mining Co., to reopen a penalty assessment against Stech under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Counsel filed an amended motion on August 12, 2005.

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

On June 6, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") mailed a proposed penalty assessment to Stech alleging that he was personally liable under section 110(c) of the Mine Act for a citation (No. 7018563) issued to his employer, Eighty-Four Mining Co. Am. Mot. at 1-2. MSHA mailed the proposed penalty assessment to Stech at the office of his counsel, though addressed simply to Stech, not to or in care of counsel.

Id. at Ex. 1.[1]

Stech's counsel states that the return receipt for the proposed assessment indicates that it was delivered to and signed for by Penny Reddy, who according to counsel is employed by a company in the same building as his firm, but which is on a different floor altogether and is not related to his firm in any way. *Id.* at 2. Counsel for Stech only learned of the proposed assessment on August 1, 2005 when counsel for the Secretary in a related matter provided him a copy. *Id.* In his motion, Stech states that he "intended to contest the penalty and underlying citation." *Id.* The Secretary does not oppose Stech's request for relief.

Here, the proposed penalty assessment was delivered to the wrong address. Under these circumstances, we conclude that Stech was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until at least August 1, 2005. In his motion to reopen this matter, filed with the Commission on August 8, 2005, Stech clearly states his intent to contest the proposed penalty assessment against him. We conclude from this that Stech timely notified the Secretary that he wished to contest the proposed penalty, once he had actual notice of the proposed assessment. *Id.*

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[1] In another case we are deciding today, *Neil et al. employed by Elk Run Coal Co.*, Docket Nos. WEVA 2005-173 through WEVA 2005-176, we note that Commission Procedural Rule 25 states that the "Secretary, by certified mail, shall notify . . . any other person against whom a penalty is proposed of the violation alleged." Slip op. at 2 (citing 29 C.F.R. § 2700.25). In *Neil*, and now in this case, confusion has arisen from the manner in which proposed penalty assessments were sent to section 110(c) respondents. If the Secretary had sent the penalty proposal at issue here to Stech at his home address or "in care of" counsel at counsel's address, the confusion would presumably have been avoided.

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 8, 2005

SECRETARY OF LABOR,	:	Docket No. WEVA 2005-173
MINE SAFETY AND HEALTH	:	Case No. 00057242 A
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2005-174
v.	:	Case No. 00052743 A
	:	
GARY D. NEIL, and	:	Docket No. WEVA 2005-175
DEMPSEY W. PETRY, and	:	Case No. 00052744 A
STEPHEN L. FRUSH, and	:	
RICHARD C. KIM,	:	Docket No. WEVA 2005-176
employed by ELK RUN COAL CO.	:	Case No. 00052745 A
	:	Mine ID 46-07009

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On July 18, 2005, the Commission received separate (though largely identical) motions made by counsel on behalf of Gary D. Neil, Dempsey W. Petry, Stephen L. Frush, and Richard C. Kim, all employees of Elk Run Coal Co. ("the respondents"), to reopen penalty assessments against each employee under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2005-173, WEVA 2005-174, WEVA 2005-175, and WEVA 2005-176, in which all the respondents are employees of Elk Run Coal Co., and which all involve similar procedural issues. 29 C.F.R. § 2700.12.

of the Commission. 29 C.F.R. § 2700.27.

In the respondents' motions to reopen, their counsel states that she did not discover that the Department of Labor's Mine Safety and Health Administration ("MSHA") had proposed penalties against the respondents until May 26, 2005, when Commission Administrative Law Judge Gary Melick lifted a stay in related proceedings, *Elk Run Coal Co.*, WEVA 2005-30. Mot. at 2. Upon investigation, counsel determined that MSHA mailed proposed penalty assessments to each of the respondents at her office (addressed simply to the respondents, not to or in care of counsel), and that the assessments were signed for by her receptionist on March 21, 2005. *Id.* at 3. Counsel further states that she and her firm have "conducted a thorough internal investigation and have been unable to locate the documents or determine what happened to them." *Id.* The Secretary does not oppose any of the respondents' requests for relief.

Commission Procedural Rule 25 states that the "Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment." 29 C.F.R. § 2700.25. (emphasis added). Counsel states that as a result of the penalty proposals being lost, none of the respondents ever "received the assessment documents." Mot. at 4. Though the respondents at some point in time received actual notice of the proposed assessments, it cannot be determined from the pleadings when such notice was received.[2]

The Commission possesses jurisdiction to reopen uncontested assessments that have become final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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[2] The confusion generated in this matter arises, in large part, from the manner in which the proposed penalty assessments were sent to the respondents. That confusion could have been avoided had the Secretary sent the penalty proposals to the respondents at their home addresses or "in care of" counsel at counsel's address.

Having reviewed the respondents' motions, in the interests of justice, we remand these matters to the Chief Administrative Law Judge to determine whether good cause exists to reopen these proceedings. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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December 12, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2003-149
ELK RUN COAL COMPANY, INC.	:	

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

DECISION

BY THE COMMISSION:

This case involves a civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Elk Run Coal Company, Inc. ("Elk Run"), charging it with a violation of 30 C.F.R. § 75.220(a)(1), as a result of failing to comply with its roof control plan.[1] Administrative Law Judge Avram Weisberger affirmed the citation but determined that the violation was not the result of the operator's unwarrantable failure and that it was not significant and substantial ("S&S"). 26 FMSHRC 761, 762-69 (Sept. 2004) (ALJ). The Secretary of Labor filed a petition for review limited to the judge's S&S determination, and the Commission granted review. For the reasons that follow, we vacate the judge's decision on the S&S issue and remand the proceeding for further consideration.

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[1] Section 75.220 provides in pertinent part:

> (a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

I.

Factual and Procedural Background

Elk Run operates the Black King I North Portal Mine, an underground coal mine located in Boone County, West Virginia. 26 FMSHRC 761. During July 2002, Elk Run was pillar mining in an area of the mine designated 013-014 MMU. *Id.* The area contained seven entries,[2] numbered one to seven, reading from left to right.[3] *Id.* The rows of pillars were designated by letters A to F (with A being the most inby row), and ran perpendicular to the entries. *Id.* Each row was comprised of six blocks of unmined coal, or pillars, numbered one to six, again reading from left to right *Id.* Each block was identified by referencing its location by row and seriatim order within that row; for example, in the first row the first block between the first and second entry is row A block 1p. *Id.* at n.1.

Elk Run utilized pillar mining in this section of the mine. On advance, the continuous miner mined seven entries on 55-foot centers and connecting crosscuts on 90-foot centers, 20-feet wide, leaving six unmined pillars standing in each row, each 70-feet long by 35-feet wide. Tr. 321, 350-52. Then, when the miner had advanced as far as it could go, it retreated by mining the pillars as it proceeded outby by "splitting the block," or mining through the center of the pillars with a 35-foot long and a 20-foot wide cut. Tr. 145, 165, 349-50. Elk Run used two continuous miners in the area, each operating from right to left.[4] 26 FMSHRC at 761. The left side miner usually mined in entries one to three,[5] while the right side miner mined in entries four through seven. *Id.* at 761-62. In a normal mining sequence, after the continuous miner completed the cutting of its assigned pillars in a row, it retreated and mined the next row outby. *Id.* at 762; Tr. 209.

Elk Run's approved roof control plan addressed several conditions in the mine pertinent to the instant proceeding. In specifying the sequence of pillar mining, the plan provided, "No more than 2 rows of blocks shall be started until inby blocks are completed." Gov't Ex. 4 at 11. In addition, the plan required that, once mining had been completed on a pillar inby, eight

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[2] An entry in coal mining generally serves as "a haulage road, gangway, or airway to the surface." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 188 (2d ed. 1997).

[3] A drawing of the relevant area of the mine was produced at trial and admitted into evidence. Tr. 42-44, 78; Gov't Ex. 2. A copy of the exhibit is attached.

[4] Gov't Ex. 2 shows only the left side miner, which is designated "CM." Tr. 66, 71-72, 101.

[5] In this area of the mine, the blocks between the first and second entries in all of the rows (designated 1p on Gov't Ex. 2) were not cut. Tr. 329.

breaker posts must be set in the entry in the next outby row. *Id.* at 19. According to MSHA inspector Danny Meadows, the posts served two purposes – impeding traffic to the area that had been mined and providing support for the roof once the roof had been weakened by the splitting of the pillars. Tr. 92-95. Nothing in the roof control plan required the operator to take a complete cut out of a pillar. Tr. 137.

During July 2002, Elk Run operated two production shifts: one in the day, which ran from 6:30 a.m. to 3:30 p.m., and one in the evening, which ran from 4:00 p.m. to 1:00 a.m. 26 FMSHRC at 762. In addition, a midnight maintenance shift, during which no coal was mined, generally started between 11:00 p.m. and midnight and lasted until 8:00 a.m. *Id.* On each production shift, the section foreman filled out the "Foreman's Production Report," which indicated where coal was being cut and the times at which mining began and ended in each cut. *Id.* at 764; Gov't Ex. 5. Entries on the report were made generally in the order in which the coal was mined. Tr. 229-30.

On July 23, MSHA inspector Meadows was at the mine to conduct a quarterly inspection. 26 FMSHRC at 762; Tr. 31-32. He first went to the mine office where he met with mine superintendent Gary Neil and examined the mine map and pre-shift books. Tr. 33-34. Meadows then went underground to inspect the pillar line, where he met day shift section foreman Phil Saunders. 26 FMSHRC at 762; Tr. 40-42. When Meadows arrived at the pillar line around 9:45 a.m., the left side miner was parked in the number 2 entry between rows C and D. 26 FMSHRC at 762. The left side miner was not mining any coal at that time, although a room off to the side of the number 1 entry had been mined earlier that morning. *Id.*; Tr. 258-259; Gov't Ex. 5 at 2. The right side miner was not mining any coal that day. Tr. 273.

Meadows and Saunders observed that, in row B, block 3p (identified as "f" on Gov't Ex. 2) and block 4p (identified as "e" on Gov't Ex. 2) had been mined through, as had blocks 5p and 6p. 26 FMSHRC at 762; Gov't Ex. 2. Also, in row B, block 2p (identified as "a" on Gov't Ex. 2) had been cut but not mined all the way through. 26 FMSHRC at 762. There were no timbers set in entry 2 outby row B. *Id.*

In row C, the only blocks that had been mined were block 5p, which was between the number 5 and 6 entries, and block 6p, which was between the number 6 and 7 entries. *Id.* In row D, block 6p, which was between the number 6 and 7 entries, was the only block that had been mined, and it had been cut all the way through. *Id.* The production report for the evening shift on July 22 indicated that the left side miner was out of service during some of the shift. Tr. 222; Gov't Ex. 5 at 1.

Around 10:00 a.m. that morning, Meadows issued a citation alleging a violation of 30 C.F.R. § 75.220(a)(1). The citation charged Elk Run as follows: "The operators (sic) roof control plan is not being complied with on the 013-014 MMU in that pillars are not being extracted as the plan requires. Three rows of blocks were started at the same time." Gov't Ex. 3.

The inspector designated the violation as S&S and charged that the violation occurred as a result of the operator's unwarrantable failure. *Id.*

Elk Run filed a notice of contest, and the case was assigned to a judge. The case proceeded to trial, and the judge subsequently issued a decision in which he affirmed the citation. The judge initially noted that the parties agreed that rows C and D had been started but not completed, and the central issue was whether the Secretary had established that Elk Run's cutting of block 2p in row B was incomplete. 26 FMSHRC at 762-63. On this point, the judge noted conflicts between the testimony of MSHA inspector Meadows and Elk Run foreman Saunders. The judge concluded that there was no evidence of any mining in rows B, C, or D during the morning of July 23, when Meadows issued the citation, and that by then Elk Run had determined that mining in row B was completed and there was no intent to go back and finish the cut in block 2p. *Id.* at 763-64. Contrary to Elk Run's position, however, the judge concluded that his inquiry was not limited to that morning, but rather he could find a violation if, at any time prior to the issuance of the citation, the record established that row B and the two outby rows, C and D, had been started but not completed. *Id.* at 763-64.

Because there was no testimony concerning the sequence of cutting or what Elk Run intended to do at the conclusion of the evening shift on July 22, the judge examined the Production Reports (Gov't Ex. 5) that were in evidence. 26 FMSHRC at 764. On July 22, the Foreman's Production Report indicated that the right side miner had completed cuts on blocks 6p and 5p (in row C) and block 6p (in row D).[6] *Id.*; Gov't Ex. 5 at 1. On the basis of the production reports and the fact that breaker posts "had not been set in Entry No. 2 row C outby row B block 2P," the judge concluded that it "might reasonably be *inferred* that, at the conclusion of the July 22 evening shift, row B had not been completed, . . . , and rows C and D had been started, but not completed." 26 FMSHRC at 764-65 & nn.5-6 (emphasis in original). The judge further noted that Elk Run failed to produce any probative evidence to rebut the inferences.[7] *Id.* at 765. Therefore, the judge concluded that at the end of the evening shift on July 22, row B had not been completed, and outby rows C and D had been started and not completed. *Id.* Accordingly, the judge found that Elk Run was in violation of its roof control plan and section 75.220(a). *Id.*

In examining the designation of the citation as due to Elk Run's unwarrantable failure, the judge noted foreman Saunders' prompt efforts to abate the violative condition. *Id.* at 767. On this point, the judge credited Saunders' testimony that he had ordered timbers to block the entry off shortly after he arrived in the section on the morning of July 23. *Id.* at 766-67 & n.7. He further noted the short duration during which the condition had existed. He also considered that Elk Run had not been placed on notice that greater efforts were necessary for compliance, that the degree

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[6] As the judge noted, the production report does not indicate the row in which the particular block listed in the report was located. 26 FMSHRC at 764 n.5. *See* Gov't Ex. 5.

[7] Ralph Williams, the section foreman on the evening shift, left his employment with Elk Run at the end of his shift on July 22 and moved to Alabama. Tr. 167, 203-04.

of danger caused by the violation was mitigated by its existence primarily during a non-production shift, and that there was no production in the area on the morning of July 23. The judge then concluded that the violation was not due to Elk Run's unwarrantable failure.[8] *Id.* at 767.

With regard to the S&S designation, the judge relied on the criteria in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The judge found that there was a violation of the roof control plan and section 75.220(a). 26 FMSHRC at 768. He further found that pillar mining weakens roof support and that by leaving three rows of blocks that had not been completed, Elk Run had exacerbated the problem. *Id.* He further noted that Elk Run's failure to install breaker posts to prevent any roof fall from continuing outby further contributed to the hazard. *Id.* Therefore, he concluded that the first and second elements of *Mathies* (the presence of an underlying violation of a mandatory safety standard and a discrete safety hazard contributed to by the violation, *Mathies*, 6 FMSHRC at 3-4) had been met. 26 FMSHRC at 768. In addressing the third element of *Mathies*, whether there was a reasonable likelihood that the hazard contributed to will result in an injury, the judge found that there was no evidence presented that the roof was undergoing any specific type of stress and that there was no evidence that the roof had ever fallen in this section of the mine. *Id.* at 768-69. The judge concluded that the Secretary had failed to establish that there was a reasonable likelihood of a roof fall and that the violation was not S&S. *Id.* at 769.

In assessing a penalty for the violation, the judge examined the penalty criteria and concluded that a penalty of $1,000 was appropriate. *Id.*

II.

Disposition

As noted above, the judge found that Elk Run violated its roof control plan, and the operator has not appealed that finding. The Secretary has, however, appealed the judge's adverse S&S determination, arguing that the judge erred, as a matter of law, in concluding that, because there was no evidence that the roof was undergoing any specific types of stress that could lead to a roof fall, there was not a reasonable likelihood that the hazard contributed to by the violation would result in an injury. PDR at 7-8.[9] The Secretary adds that she did present testimony credited by the judge that the violation made a roof fall reasonably likely because of the additional stress placed on the mine roof by pillar mining. *Id.* at 8-10. The Secretary further states that she presented evidence that specific stress on the roof was created because each time a pillar was mined in one of the three uncompleted rows, additional stress was placed on the roof of the mine. *Id.* at 10-13. The Secretary also argues that the judge erred in concluding that the violation was

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[8] Neither the judge's finding of violation nor his unwarrantable failure determination is before the Commission on appeal.

[9] The Secretary designated her petition for discretionary review as her brief and submitted an additional citation of supplemental authorities ("Sup'l Br.").

not S&S by relying on the fact that there had not been a roof fall in this section of the mine. *Id.* at 14-15. Finally, the Secretary asserts that the judge erred by failing to address testimony demonstrating that Elk Run's failure to adhere to its roof control plan made it more likely that a roof fall would occur, creating a risk of a serious injury. *Id.* at 15-17. The Secretary concludes by requesting that the Commission vacate the judge's decision and remand the case back to the judge for application of the correct legal standard. *Id.* at 17-18.

In response, Elk Run argues that the judge's decision followed Commission precedent and is supported by substantial evidence. E.R. Br. at 6-7. It asserts that the judge properly rejected the testimony of the MSHA inspector because his opinions were not tied to any specific conditions of the mine but were general assertions of hazards. *Id.* at 7-8. Further, the operator argues that the Commission, in determining S&S, has considered the conditions surrounding a violation and the history of injuries associated with the type of violation at issue. *Id.* at 8. Elk Run also contends that the brief duration of the violation, primarily during the non-production shift, mitigated the degree of danger presented by the violation. *Id.* at 8-9. The operator states that the Secretary's position in the case is that she should be able to prove that an accident is reasonably likely to cause an injury through an inspector's opinion without presenting evidence to support it. *Id.* at 9. Elk Run concludes by asking the Commission to affirm the judge's decision. *Id.* at 10.

The requirement for each underground coal mine to develop a roof control plan is a fundamental directive of the Mine Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976). *See* 30 U.S.C. § 862(a) (setting forth general requirements for plans "to protect persons from falls of the roof or ribs."). The intent of this provision was "to afford comprehensive protection against roof collapse – the 'leading cause of injuries and death in underground coal mines.'" *UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989) (citations to legislative history omitted).[10]

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a

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[10] "[T]hese plans were intended to be more comprehensive than uniform mandatory standards because in addition to a 'nucleus' [] of practices that are necessary to prevent roof collapse in any mine, they were to include whatever unique measures were necessary to address the unique attributes of a particular mine." 870 F.2d at 669 (emphasis omitted).

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

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

With regard to the first and second elements of the *Mathies* test – the judge's findings of a violation of the roof control plan and section 75.220(a)(1), and a discrete safety hazard, i.e., the hazard of a roof fall – are not in dispute. On the issue of a discrete safety hazard, the judge credited MSHA inspector Meadows' testimony that pillar mining weakens roof support and places stress on the section. The judge further noted that leaving three rows of blocks uncompleted exacerbates the hazard and the fact that breaker posts had not been installed to prevent any roof fall continuing outby further contributes to the hazard. 26 FMSHRC at 768.

With regard to the third element of *Mathies*, the judge initially noted the MSHA inspector's testimony concerning the dangers associated with retreat mining: "numerous people have been killed as a result of retreat mining." *Id.*[11] The judge also found that the presence of three incomplete rows without supporting timbers increases the risk of exposing miners to a roof fall. *Id.* However, the judge further found that there was "not any evidence adduced that the roof was undergoing any specific type of stress that could lead to a roof fall. Nor does the record contain evidence that the roof had ever fallen in this particular section of the mine." *Id.* at 768-69. The judge concluded that the Secretary had failed to establish by a preponderance of the evidence that *there was a reasonable likelihood of a roof fall*. *Id.* at 769 (emphasis added).

In *U.S. Steel*, the Commission addressed several defenses to the designation of a violation as S&S, including the operator's argument that its violation of a ventilation plan was not S&S because at the time of the violation the level of methane was low and not at explosive levels. In rejecting those defenses, the Commission explained that "the question [of whether the violation is S&S] must be resolved on the basis of the circumstances as they existed at the time the violation was cited and as they might have existed had normal mining operations continued." 7 FMSHRC at 1130. In a later case, the Commission further explained, "The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

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[11] The judge also stated in his unwarrantability determination, "As explained by Meadows, the hazard of a roof fall is inherent in pillar mining." 26 FMSHRC at 766.

Here, the judge clearly failed to examine the record evidence relating to the reasonable likelihood of injury during the operative time frame, examining instead the reasonable likelihood of a roof fall based solely on mine conditions prior to the violation. Thus, as part of the third element of *Mathies*, the judge imposed an affirmative obligation on the Secretary to prove that, prior to the violation, a roof fall had occurred or that adverse roof conditions existed that could have led to a roof fall. However, as the Commission has noted, "The third *Mathies* element requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *Bellefonte Lime Co., Inc.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998). In concluding that the Secretary failed to carry her evidentiary burden by not presenting evidence of roof falls or stress on the roof, the judge erred. *See id.*

This is not to say that a history of roof falls in a mine is not pertinent to the consideration of the reasonable likelihood of an injury.[12] The Commission has long held that whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).[13] However, conditions in the mine prior to the citation are not *dispositive* of the S&S designation.[14] *See also Buffalo Crushed Stone, Inc.*, 10 FMSHRC 2043, 2046 (Oct. 1994) (in considering whether the failure to provide a berm at a stockpile was S&S, the fact that the stockpiles were flat and that there were no equipment problems does not establish that an accident was not reasonably likely to occur).

We thus agree with the Secretary, Sup'l Br. at 1-2, that the absence of an injury-producing event when a cited practice has occurred does not preclude an S&S determination. *See Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998) (the Secretary does not have to show that a violation caused an accident in order to prove that a violation was S&S); *Buffalo Crushed Stone,* 10 FMSHRC at 2046 (the absence of previous instances of overtravel does not establish that an accident would not be reasonably likely to occur, given the nature of hazards presented). It

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[12] *See, e.g., Lion Mining* Co., 18 FMSHRC 695, 699 (May 1996) (judge erred in failing to consider the history of roof falls in the area); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2012 (Dec. 1987) (history of unstable roof at mine considered in relation to S&S determination).

[13] As the Commission noted in *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997), "When evaluating the reasonable likelihood of a *fire, ignition, or explosion*, the Commission has examined whether a 'confluence of factors' was present based on the particular facts surrounding the violation," quoting *Texasgulf*, 10 FMSHRC at 501 (emphasis added). In contrast, no Commission case has required the Secretary to show adverse roof conditions in a mine as a prerequisite to finding that a violation of a roof control plan is S&S.

[14] Clearly, conditions in a mine created by a violation need not be so grave as to constitute an "imminent danger," which could reasonably be expected to cause death or serious injury before the condition can be abated. *National Gypsum*, 3 FMSHRC at 828. *Accord Enlow Fork*, 19 FMSHRC at 10 n.9.

follows then, as the Secretary argues, that the absence of evidence of stress or prior roof falls cannot be determinative of whether the cited condition is reasonably likely to cause an injury. *See also Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (operator's assertions that it had no history of accidents and that equipment had been driven for many months in cited condition is not dispositive of S&S determination).

In the instant proceeding, the presence of adverse roof conditions may increase the likelihood of a roof fall but the absence of such adverse conditions does not necessarily eliminate the possibility that a roof fall might occur when an operator fails to follow its roof control plan. Moreover, requiring the Secretary to prove an S&S violation by establishing that the mine roof is under "any specific type of stress that could lead to a roof fall," 26 FMSHRC at 768-69, places an onerous burden of proof on the Secretary. Similarly, any implication that the Secretary needs to show that there had been a roof fall in this section of the mine before a violation can be designated S&S would unreasonably restrict the ability of the Secretary to prove that a roof control violation is S&S. None of these evidentiary points detracts from the existing core requirement that a roof control plan take into account the specific conditions of the mine in seeking to prevent roof fall accidents[15] and the Congressional intent to provide comprehensive protection against roof falls through adherence to MSHA-approved safety measures tailored to the individual mine.

We find that the judge erred by grounding his S&S determination solely on the Secretary's failure to prove adverse roof conditions prior to the violation, while failing to address the remainder of the evidentiary record. On remand, therefore, the judge must weigh the record evidence and, assuming that normal mining were to continue, determine whether any miner on any shift would have been exposed to the hazard arising out of the violation, so as to create a reasonable likelihood of injury.

The judge also made findings elsewhere in the decision that are inconsistent with his conclusion with regard to S&S. In his penalty determination, the judge found that the violation contributed to the hazard of a roof fall which could have caused serious injury to miners. There, the judge concluded that "the gravity of the violation was relatively high." 26 FMSHRC at 769. In a similar case, in which the judge found that the gravity of the violation was high, the Commission, in vacating and remanding the judge's determination that a violation was not S&S, explained, "Although the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same factual circumstances." *Enlow Fork*, 19 FMSHRC at 10-11, *citing Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). Here, the judge failed to reconcile his finding of high gravity with his determination that the violation was not S&S. *Enlow Fork*, 19 FMSHRC at 11. *See also Youghiogheny & Ohio*, 9 FMSHRC at 2013. Therefore, a remand is also necessary to resolve this internal inconsistency.

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[15] MSHA regulations require that the criteria in a mine's roof control plan which set forth roof control practices address the unique conditions of the mine. *See* 53 Fed. Reg. 2354, 2369-70 (Jan. 27, 1988) (streamlining MSHA's Roof Control Standards, 30 C.F.R. Part 75).

Finally, Elk Run contends that the violation was of brief duration and occurred primarily during a non-production shift, thereby mitigating the danger posed by three uncompleted rows. E.R. Br. at 8-9. It is apparent that the violation existed for some period on the evening shift on July 22 and during the morning shift on July 23 in addition to its duration through the entire maintenance shift. Moreover, the third, uncompleted, inby row in which the partial cut had been taken on block 2p (designated as "a" on Gov't Ex. 2) remained accessible to *all* miners because breaker posts had not been set. *Compare Youghiogheny & Ohio*, 9 FMSHRC at 2013 (no S&S where danger signs were posted at the entrance to rooms where roof control violations occurred) *with Halfway, Inc.*, 8 FMSHRC 8, 12-13 (Jan. 1986) (S&S found because the cited area remained accessible and travelways to the area would be used by miners). We reject Elk Run's argument to the extent that it suggests that miners on the maintenance shift were less exposed to the potential hazards than those on the production shifts.[16] *See also Bellefonte Lime*, 20 FMSHRC at 1255 (contrary to the judge's finding, S&S allegation not ameliorated by short term exposure of miners to the cited hazard).

Because the judge failed to address comprehensively the record testimony (Tr. 93-103), consistent with Commission precedent to determine whether the Secretary established a reasonable likelihood that an injury would occur, a remand is necessary.[17] *See Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992).

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[16] The question surrounding the duration of the violation goes to the matter of whether Elk Run "promptly" set the breaker posts, as the roof control plan required.

[17] Commissioner Jordan notes that the judge's examination of inspector Meadows' testimony, (Tr. 93-103), should include a review of the inspector's statements regarding the danger of having three open rows and pulling support out from a miner who is inby (Tr. 98) and the particular danger to the left side continuous miner operator (Tr. 99-101).

Commissioner Suboleski, with Chairman Duffy's concurrence, notes that the judge, on remand, must analyze the record facts relating to the violation at this mine, as well as the MSHA inspector's general testimony concerning the dangers of retreat mining. With regard to roof control, the issue is not the hazards of pillar mining – Elk Run was permitted to recover pillars under its roof control plan; rather, it is about whether an additional hazard, sufficient to meet the *Mathies* criterion, was introduced by the manner in which the pillars were mined. In this regard, if mining is completed on pillar 6p in row D to the right of the sixth entry, the roof control plan does not require that breaker posts be set in any other entry (entries five, four, three, two, or one). Thus, upon mining the pillar 6p, in row D, the plan clearly does not require that any breaker posts be set to assist support in entry 2, row B. Further, only a partial cut of 10 feet was taken out of pillar 2p, and the MSHA inspector testified that breaker posts would not have been needed in entry 2, outby row B, if the third row had not been started. Tr. 151. The judge must also consider that, upon completion of the cut in row B on pillar 2p, the roof control plan requires Elk Run to set the breaker posts "promptly."

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision regarding S&S and remand the issue to the judge for further consideration and, if necessary, for reassessment of the penalty.

Michael F. Duffy, Chairman

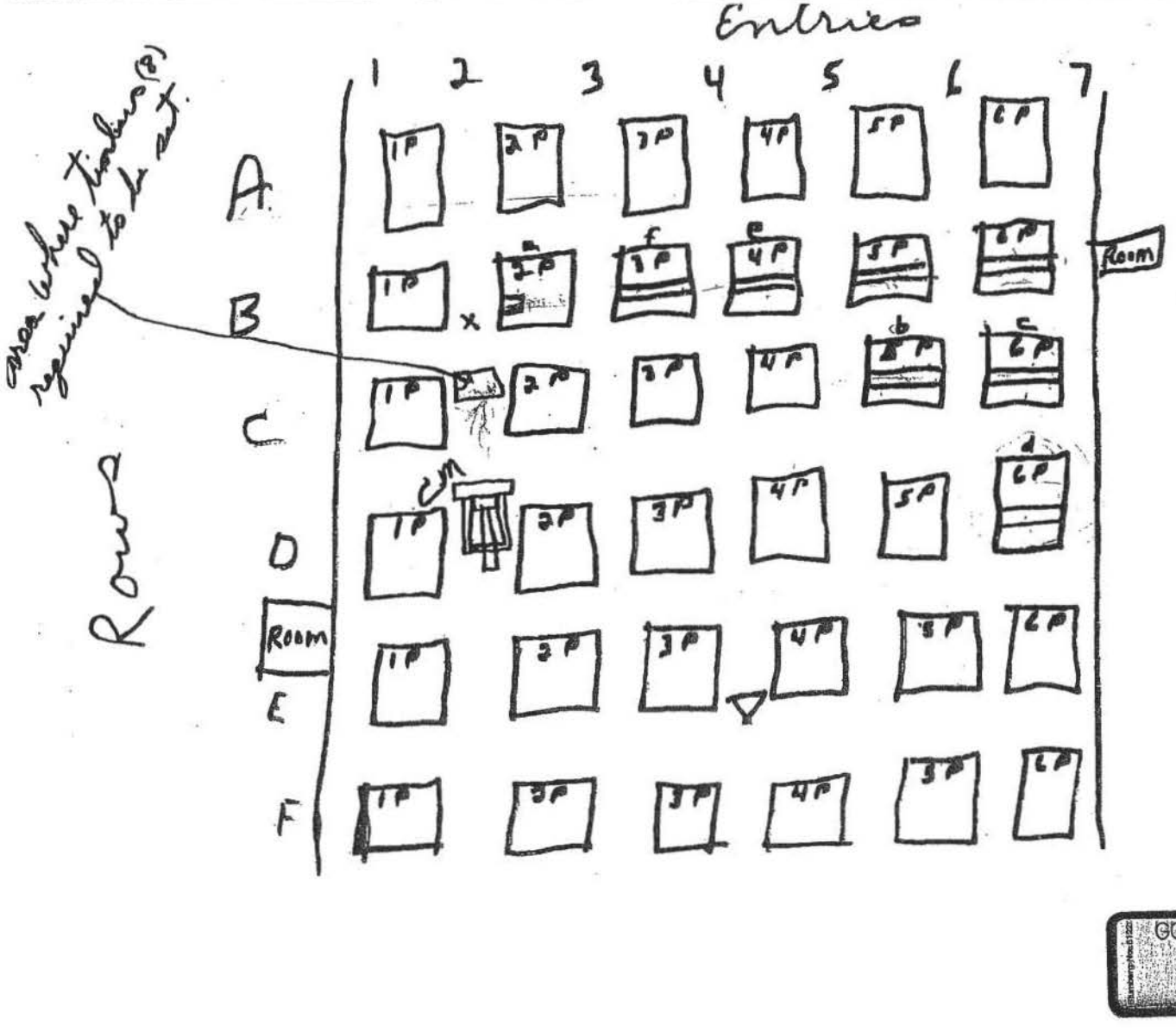
Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

The attached Government Ex. 2 is not available the electronic version of the decision.

The attached Government Ex. 2 is not available on the electronic version of the decision.



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December 14, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2005-254-M A.C. No. 39-01424-45596
v.	:	
LIEN TRANSPORTATION COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 19, 2005, the Commission received a letter from the safety director of Lien Transportation Company ("Lien") requesting that the Commission reopen a penalty assessment that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 4, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued several citations to Lien, which the company timely contested. These six contests are currently on stay before Commission Administrative Law Judge Richard Manning. Docket Nos. CENT 2005-31-RM through CENT 2005-36-RM. Lien states that it "thought that until [it] could defend the citations . . . the entire process was 'on hold.'" Lien thus failed to timely contest the penalty subsequently proposed by the Secretary of Labor, who states that she does not oppose Lien's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 14, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2005-262-M
	:	A.C. No. 41-02810-60764
v.	:	
CAPITOL AGGREGATES, LTD.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 21, 2005, the Commission received from Capitol Aggregates, LTD ("Capitol Aggregates") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On March 8, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6256167 to Capitol Aggregates' Fairland Quarry. Mot. at 2. The company timely contested the citation. The contest proceeding is currently on stay before Commission Administrative Law Judge David Barbour. *Id.* at 3 (citing Docket No. CENT 2005-171-RM). When MSHA subsequently proposed a penalty for Citation No. 6256167, Capitol Aggregates paid it. Mot. at 4. The company now contends that it made the payment inadvertently, and asserts that it had always intended to contest the validity of the citation. *Id.*; Aff. of Don Patrick. The Secretary states that she does not oppose Capitol Aggregates' request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 14, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2006-27-M
v.	:	A.C. No. 46-00007-67183
RIVERTON INVESTMENT CORP.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 9, 2005, the Commission received from Essroc Cement Corp. ("Essroc")[1] a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Counsel filed an amended motion on November 14, 2005.

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

On or about September 14, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the proposed penalty assessment to Essroc. Am. Mot. at 1-2. In its motion, Essroc states that during the period when the penalty contest was due from Essroc, the employee responsible for handling such matters, David Wiley, was absent and that the employee who assumed responsibility for the proposed assessment was unfamiliar with contest procedures. *Id.* at 2. By the time Wiley discovered the error, the contest deadline had passed. *Id.*, Aff. of Randy Emery at 3. Essroc further states that it had intended to contest eight of the proposed penalties. Am. Mot. at 3, 5-6. The Secretary states that she does not oppose Essroc's

[1] Essroc filed its motion under the name Riverton Investment Corp.

request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 14, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2006-2-M
	:	A.C. No. 04-05164-57178
v.	:	
GRANITE ROCK COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On October 3, 2005, the Commission received a letter from the safety and health services manager of Granite Rock Company ("Granite Rock") requesting that the Commission reopen a penalty assessment that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 20, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued three citations to Granite Rock. The company asserts that when MSHA subsequently proposed penalties for the citations, it paid two of the penalties[1] but indicated that it wished to contest the remaining proposed penalty. Granite Rock further states that on September 22, 2005, it received a collection notice for the proposed penalty the company wished to contest.

[1] Attached to Granite Rock's letter is a copy of a cancelled Granite Rock check payable to MSHA dated June 10, 2005 which the company states was tendered in payment for the two penalties. Also attached is a copy of the penalty proposal form from MSHA with three assessed penalties, indicating that Granite Rock wished to contest the penalty at issue here.

Granite Rock contacted MSHA and was told that the agency did not have a copy of the company's contest. The Secretary of Labor states that she does not oppose Granite Rock's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 16, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2006-36
v.	:	A.C. No. 36-02053-66821
R&D COAL COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On December 7, 2005, the Commission received from R&D Coal Company, Inc. ("R&D") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On September 9, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to R&D. Mot. at Ex. A. In its motion, R&D states that on September 16, 2005, it timely contested the proposed penalties. *Id.* at 1; Aff of D. Himmelberger. The company subsequently discovered that MSHA apparently had not received its contest when the assessed amount of penalty it had attempted to contest was shown on an unrelated proposed assessment form as an outstanding balance. Mot. at 1-2. R&D states that it had fully intended to contest the proposed penalty. *Id.* at 2. The Secretary states that she does not oppose R&D's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

December 16, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 2006-24 A.C. No. 01-00851-63443
v.	:	
OAK GROVE RESOURCES, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 18, 2005, the Commission received a letter from the safety director of Oak Grove Resources, LLC ("Oak Grove") requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its letter, Oak Grove states that it received a letter from the Department of Labor's Mine Safety and Health Administration ("MSHA") denying as untimely the company's contest of a proposed penalty assessment (A.C. No. 01-00851-63443). Oak Grove further states that it failed to timely contest the proposed penalty because the employee assigned to handle the proposed assessment was "a new employee and unfamiliar with the MSHA penalty . . . procedures [and] time frame." The Secretary of Labor states that she does not oppose Oak Grove's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

December 16, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2006-129-M A.C. No. 45-02667-67075
v.	:	
JONES QUARRY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 17, 2005, the Commission received from Jones Quarry, Inc. ("Jones Quarry") a letter requesting that the Commission reopen a penalty assessment that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its letter, Jones Quarry states that the Department of Labor's Mine Safety and Health Administration ("MSHA") rejected its contest of the proposed penalty, asserting that Jones Quarry had mailed it beyond the 30-day limit to file such contests. The company further explains that although the proposed penalty assessment form stated that it had "30 days to respond," the form did not state whether the 30-day limit referred to business days or calendar days, noting that "[i]t was 36 consecutive [i.e., calendar] days when I sent the request to contest and only 25

business days."[1] The Secretary of Labor states that she does not oppose Jones Quarry's request for relief.

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

[1] MSHA's proposed penalty assessment form cover sheet states "you [have] 30 days to either pay the Proposed Assessment or contest [it]."

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

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Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
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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 20001-2021

December 2, 2005

SPEED MINING, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 2005-20-R
	:	Citation No. 7208383; 10/18/04
	:	
	:	Docket No. WEVA 2005-21-R
	:	Citation No. 7208384; 10/18/04
	:	
	:	Docket No. WEVA 2005-22-R
	:	Citation No. 7208385; 10/18/04
	:	
	:	Docket No. WEVA 2005-23-R
	:	Citation No. 7208386; 10/18/04
	:	
	:	Docket No. WEVA 2005-24-R
	:	Citation No. 720387; 10/18/04
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2005-25-R
MINE SAFETY AND HEALTH	:	Citation No. 7208388; 10/18/04
ADMINISTRATION (MSHA)	:	
Respondent	:	Mine: American Eagle Mine
	:	Mine ID: 46-05437
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2005-97
Petitioner	:	A.C. No. 46-05437-52979
v.	:	
	:	
SPEED MINING, INC.,	:	American Eagle Mine
Respondent.	:	Mine ID: 46-05437

DECISION

Appearances: Robert S. Wilson, U.S. Department of Labor, Office of the Solicitor, West, Arlington, Virginia, for the Respondent/Petitioner.
Daniel W. Wolff, Crowell & Moring, Washington, D.C. for the Contestant/Respondent;

Before: Judge Weisberger

These consolidated proceedings are before me based on Notices of Contest filed by Speed Mining Inc. ("Speed") challenging the issuance to it of various citations alleging violations of certain mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. In addition, the Secretary of Labor ("Secretary") filed a Petition for Assessment of Civil Penalty seeking the imposition of civil penalties for the alleged violation by Speed of these mandatory standards.

I. INTRODUCTION

Speed is the Operator of the American Eagle Mine, an underground coal mine, located in Dry Branch, West Virginia. In 2004, Speed contracted with Cowin & Company Inc., ("Cowin") to conduct an elevator shaft sinking operation at the Eagle Mine. Cowin began constructing the elevator shaft in August, 2004. On September 29, 2004 an accident occurred on the site involving a link-belt crane used to conduct the shaft sinking operation. As a result, the Secretary issued five citations to Speed, relating to the condition of the crane, and one citation alleging failure to train the crane operator. Additionally, six citations and/or orders were issued to Cowin, and these are not at issue in the instant proceeding. The citations issued to Speed were for the same violations alleged in the citations issued to Cowin.

The parties agreed that the violative conditions alleged in the citations issued to Speed are not at issue. Additionally, the parties agreed to bifurcate the proceedings and to initially litigate only the threshold issue of whether the Secretary abused her discretion in citing Speed. A hearing in this matter was held in Charleston, West Virginia. Subsequent to the hearing, the parties filed proposed findings of fact along with a brief, and replies thereto.

II. THE AUTHORITY OF THE COMMISSION TO REVIEW THE SECRETARY'S DECISION TO CITE SPEED FOR VIOLATIONS INVOLVING COWIN, ITS INDEPENDENT CONTRACTOR WORKING ON THE PROPERTY

In essence, it is the Secretary's position that, based on prosecutorial discretion, her decision to cite an operator and/or an independent contractor is not reviewable by the Commission. However, in a recent decision, *Twentymile Coal* , 27 FMSHRC 260 (March, 2005), the Commission considered and rejected this position. The Commission took cognizance of the Secretary's reliance upon *Heckler v. Chaney*, 470 US 821, 830-32 (1985), and its progeny, also relied on by the Secretary herein, which preclude review under Section 701, (a)(2) of the Administrative Procedure Act. The Commission found such authority to be inapplicable. The Commission, 21 FMSHRC supra, at 265-266 set forth its holding as follows:

As the Commission has previously recognized, Section 507 of the Mine Act [7] expressly provides that Section 701 of the APA does not apply to Commission proceedings. *Old Ben*, 1 FMSHRC at 1483-84. Thus, we find such authority cited by the Secretary to be inapplicable.

Furthermore, the Mine Act does not contemplate that the Secretary's enforcement decisions are unreviewable by the Commission. Section 113 of the Mine Act, 30 U.S.C. § 823, contains no limits on the Commission's review on questions pertaining to the exercise of the Secretary's enforcement discretion.[8] To the contrary, the breadth of the Commission's review is broad. The Commission, in its discretion, may grant review if a "substantial question of law, policy or discretion is involved" (30 U.S.C. § 823(d)(2)(A)(ii)(IV)), and the Commission's review authority extends to cases in which no party has filed a petition for review (30 U.S.C. § 823(d)(2)(B)).[9]

The Commission has explained that these powers were given to the Commission as the "'ultimate administrative review body'" under the Act in order to "enable [the Commission] to 'develop a uniform and comprehensive interpretation of the law,' providing 'guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law.'" *Old Ben,* 1 FMSHRC at 1484 (citations omitted). As the Commission has reasoned, these "provisions demonstrate that the Commission was intended to play a major role under the [Mine] Act by reviewing the Secretary's enforcement actions and formulating mine safety and health policy on a national basis." *Id.* Given the Commission's unique and independent role under the Mine Act, we reaffirm our prior holdings and conclude that the Commission's review of the Secretary's action in citing an operator is appropriate to guard against an abuse of discretion. *Id.*; W-P, 16 FMSHRC at 1411.

The Secretary argues, in essence, that Twentymile, supra, should not be followed, as it "runs counter to several established legal principles" (Secretary's brief, pages 16-23 and cases cited therein). The Commission's decision in Twentymile is currently on appeal before the Court of Appeals. *Secretary of Labor v. Twentymile Coal Company and FMSHRC,* D.C. Cir. No. 05-1124 (D.C. Cir. docketed Apr. 15, 2005). To date, a decision has not been rendered. Thus, in the absence of a Court of Appeals decision reversing the Commission's decision in Twentymile, supra, the latter is binding on Commission Judges.

Accordingly, applying binding Commission precedent set forth in Twentymile, supra, I reject the Secretary's argument that it's decision to cite Speed for violations committed by its independent contractor working on the property is not reviewable by the Commission.

III. WHETHER THE SECRETARY ABUSED HER DISCRETION IN CITING SPEED FOR VIOLATIONS INVOLVING COWIN, ITS INDEPENDENT CONTRACTOR

A. Principles Set Forth in Twentymile, supra

In Twentymile, supra at 266, the Commission set forth the general test to be applied in determining whether an operator has been improperly cited for violations of its contractor, as follows:

> The Commission has held that the general test to be used in determining whether a production-operator has improperly been cited for violations committed by its independent contractor is whether the Secretary has committed an "abuse of discretion" in issuing such citations.[10] *Mingo Logan*, 19 FMSHRC at 249; *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (Jan. 1998). In applying this general test, the Commission must determine whether the Secretary's decision to cite the production-operator for violations committed by its independent contractor "was made for reasons consistent with the purpose and policies" of the Mine Act. *Old Ben*, 1 FMSHRC at 1485; *Phillips Uranium Corp.*, 4 FMSHRC 549, 551 (Apr. 1982); *Extra Energy*, 20 FMSHRC at 5.

After setting forth the general test to Be used to determine whether the Secretary abused her discretion in citing an operator for the violations of its contractor, the Commission went on to summarize four basic principles previously considered by the Commission in determining if the citation of the operator was consistent with the purpose and policies of the Mine Act. The Commission set forth as follows:

> Over the years, the Commission has considered a number of factors on a case-by-case basis in determining whether the Secretary's citation of a production-operator is "consistent with the purpose and policies" of the Mine Act. The principal factors are summarized below:
>
> (1) Whether the production-operator, the independent contractor, or another party was in the best position to affect safety matters. E.g., *Phillips*, 4 FMSHRC at 553; *Bulk*, 13 FMSHRC at 1360-61; *Extra Energy*, 20 FMSHRC at 5. In this regard, one of the key questions is whether the independent contractor has adequate size and mining experience to address safety concerns. *Calvin Black Enter.*, 7 FMSHRC 1151, 1155 (Aug. 1985);
>
> (2) Whether, and to what extent, the production-operator had a day-to-day involvement in the activities in question. E.g., *Extra Energy*, 20 FMSHRC at 5-6. A closely related factor is "the nature of the task performed by the contractor." *Calvin Black*, 7 FMSHRC at 1155;

(3) Whether the production-operator contributed to the violations committed by the independent contractor. E.g., *Calvin Black,* 7 FMSHRC at 1155; and

(4) Whether the production-operator's actions satisfy any of the criteria set forth in the Secretary's Enforcement Guidelines.[1] "In addition [to the factors above], the Commission has considered whether any of the criteria of the Secretary's Guidelines for proceeding against an operator have been satisfied." *Extra Energy*, 20 FMSHRC at 5. The guidelines provide that enforcement action may be taken against a production operator for violations committed by its independent contractor in any of the following four situations: "(1) when the production-operator has contributed by either an act or an omission to the occurrence of the violation in the course of the independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement." 45 Fed. Reg. at 44,497. As explained below, the four criteria overlap in certain respects with the factors separately applied by the Commission in such cases.

1. Whether Speed or Cowin was in the Best Position to Affect Safety Matters

a. The Secretary's Initial Argument

Initially, I note the Secretary's argument relating to the first factor summarized in Twentymile, supra, at 267, that Speed was in "as good" a position as Cowin to prevent the

[1]The Enforcement Guidelines were issued by the Secretary in 1980 as an appendix to regulations requiring that independent contractors provide certain information to production-operator's before beginning work and establishing procedures under which independent contractors could obtain MSHA identification numbers. 45 Fed. Reg. at 44,494, 44,497. The Enforcement Guidelines set forth four criteria to be used by MSHA inspectors in determining whether to cite a production-operator for the violations of its independent contractor. The Commission has repeatedly recognized that the Enforcement Guidelines are policy statements that are not binding on the Secretary and do not alter the compliance responsibilities of production operator's or independent contractors. E.g., *Mingo Logan*, 19 FMSHRC at 250-251.

violations (Secretary's brief, p. 32). However, in Twentymile, supra, at 267, the Commission clearly set forth that the proper analysis is whether the production-operator, the independent contractor "... was in the best position to affect safety matters". (Emphasis added.) Hence, to prevail herein, I find that the Secretary must establish that Speed was in the best position to have prevented the violative conditions that were cited.

b. Further Discussion

In support of its position, that Speed was in as good a position to prevent the violation at issue as Cowin, the Secretary refers to the testimony of Pete Hendrick, Speed's President, who admitted that Speed had the authority to require Cowin to correct safety conditions, and to enforce the provisions of the contract. Further, it is maintained that the violations were obvious and only a minimal level of oversight would have revealed many of the cited conditions.[2]

On the other hand, according to Hendrick, whose testimony in this regard was not contradicted or impeached, Speed does not have any expertise in sinking a shaft, whereas Cowin and its supervisor are considered very experienced in shaft sinking operations. Further, according to Hendrick, the equipment at the site was not owned by Speed. Indeed, according to the contract between Cowin and Speed the former is to furnish all equipment. (GX 28, par.1.1). Lastly, there is no evidence that Speed had any authority to direct Cowin's day-to-day activities.

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[2]In essence, according to Dennis Joe Holbrook, an MSHA Inspector, who was the lead Accident Investigator of the accident at issue, among the violative conditions cited in Citation No. 7208383, both the defective rope and bypass of a computer to monitor safety features were obvious. According to Holbrook and MSHA Inspector, Donald William Fink, who also observed these conditions, the defect in the rope was located in a portion of the rope only eight feet from where a worker would be when connecting the rope to a bucket. Also, the computer bypass would be indicated by a red light and an audible warning in the cab of the crane. In addition, the violative condition described in Citation No. 7208385 the use of one rope during hoisting operations in violation of the approved plan, was readily observable. Similarly, according to Fink and Holbrook the violative condition cited in Citation No. 7208388, the operation of the crane with a maximum load in excess of twelve thousand pounds, was obvious as it would have been noted in a computer digital read out located in the cab in front of the crane operator. Also, the violative conditions cited in Citation No. 7208386, were obvious, i.e., the failure to remove the crane from operation in spite of pre-operational reports which showed that the crane and two-block safety switch was not functional.

In Twentymile, supra, the Commission concluded that the independent contractor rather than the operator was in the "best" position to prevent the violations in question. The Commission found, *inter alia*, the following factors supported citing the contractor: the violations all involved equipment owned and maintained solely by the contractor, the contractor carried out its work without direct or continuing supervision from the operator, and, that under the terms of the contract between the contractor and the operator, the former was required to comply with all MSHA safety and health standards. Twentymile, supra, at 268.

Similarly, in the case at bar, aside from one citation regarding the failure to train the crane operator, all the citations at issue relate to conditions on equipment that was not owned by Speed, but was to be furnished and maintained by Cowin. Also, Cowin was contractually required to comply with applicable federal regulations. Additionally, Cowin was required to provide supervision of work performed under the contract. Lastly, in the case at bar, as in Twentymile, supra, there was not any evidence adduced that Speed had any authority to direct the day-to-day activities of Cowin.

I find that the relationship between Cowin and Speed relating to the provision of equipment and its maintenance, and supervision of day-to-day operations are essentially the same as those noted in Twentymile, supra, as supporting the citation of the contractor, and not the operator. Hence, I conclude, applying the authority of Twentymile, supra, that between Cowin and Speed, it has not been established that the latter was in the best position to have prevented the violations at issue herein.

2. The Extent of Speed's Involvement in Relevant Activities

a. The Secretary's Position

In arguing that Speed had significant involvement in activities at the shaft sinking site, the Secretary relies on the testimony of Hendrick that he required, as a condition of contracting with Cowin for the performance of the work at issue, that it hire Earl Brindel as the supervisor on the job. The Secretary further relies on evidence that Hendrick worked with Cowin to develop the specifications for the shaft, and that Speed's employee James Smith, was at the site on a regular basis "... to insure that the shaft was being constructed properly." (Secretary's brief, p. 33). Lastly, the Secretary cites the presence of Speed's employee, Doug Shorter, who operated a bull dozer to spread muck material that had been removed from the shaft.

b. Twentymile, supra

In Twentymile, 27 FMSHRC supra at 270, the Commission held that the operator "... did not have a significant, continuing involvement in the work being performed [at the cited area]".(Ephasis added.) The Commission noted the following as the basis for its holding: that the Contractor was hired because of its expertise with the work at issue and was

responsible for providing the equipment to be used at the work site and operating it; that no operator employees worked at or near the work site except for a Supervisor who checked the contractor's practice once a day to a day and one-half; that the contract between the parties provided that the contractor was responsible for complying with safety requirements; and the lack of evidence that the operator ignored the safety defects or actively created them.

The Commission, next concluded as follows:

> In the context of the relationship between the parties, [the operator's] involvement appears to be nothing more than prudent oversight of the contractor's compliance with the contract for services at the refuse pile, including the safety and health provisions of the contract. Punishing a production operator for such steps taken to "ensure" contractor compliance is contrary to the intent of the Mine Act and our precedent in these cases. *See, e.g., Phillips,* 4 FMSHRC at 553. The Secretary asserts that [the operator] should be liable for failing to either inspect the equipment or ensure that Precision would do so. Oral. Arg. Tr. 35-38. But there is no standard requiring production operator's to inspect each piece of equipment every time it enters a mine site, and as will be further discussed under factor 3, *infra,* [the operator] did, through the contract, require that Precision inspect the equipment. Given [the operator's] limited involvement in the activities at the refuse pile, we cannot say that this factor supports the decision to cite the [operator] in this case. id.

c. Twentymile supra, as Applied to Speed's Involvement in Cowin's Activities

In the case at bar, as in Twentymile, supra, the operator hired a contractor because of its expertise and the contractor was required by contract to provide necessary equipment and comply with safety regulations. Further, in the case at bar the contractor was contractually required to maintain the equipment. Additionally, in the case at bar and in Twentymile, supra, there was no evidence that the operator ignored defects[3] or was directly involved in creating violative conditions.

In Twentymile, supra, the Commission, in concluding that the operator did not have a significant continuing involvement in the contractor's work, noted that none of the contractors employees worked at or near the site at issue except for a supervisor who checked the contractor's progress once a day to a day and a half. In the case at bar, the degree of involvement of Speed's employees in Cowin's activities was even less. None of Speed's

[3]This issue is discussed in more detail, III (a)(c) *infra.*

supervisors were present every day to a day and a half to check on Cowin's progress on the project. Smith, a surveyor, was present not as a supervisor to check the projects progress, but only to ensure that the shaft was being sunk in a straight line. He did not have supervisory responsibility. A bulldozer operator was present, but his activities were limited to the removal of muck that had been taken from the sinking of the shaft. However, there is not any evidence as to where he worked in relation to the crane at issue, or that it was within the scope of his duties to check Cowin's equipment for safety defects. There is not any evidence that these employees checked on the progress of any of Cowin's project activities or inspected any of its equipment.

Within the context of the facts in this case, I conclude, based on the holding and analyses in Twentymile, supra, that Speed did not have any "significant continuing involvement" in Cowin's activities. (Twentymile, supra, at 270)

3. Whether Speed Contributed to the Violations

a. The Secretary' Position

The Secretary argues that Speed contributed to the violations herein, because it failed "... to act in a reasonably prudent manner." (The Secretary's brief, p. 33). The Secretary asserts that Speed had been put on notice that Cowin and another contractor at the adjoining substation site, were in need of greater oversight and guidance. In this connection, MSHA Inspector, Donald Fink testified that when he cited Speed on September 29, for the violations at issue, he had previously cited Speed for failure to provide hazard training to employees of contractors working at the site in issue and at a substation construction site. Additionally, according to Fink, on September 2, he had told Speed's employees, Morris Niday and Heath Beichner that he continued to observe hazardous conditions at the Cowin shaft site, and that Speed "...should have some type of program or some type of proactive action that they would conduct at the shaft site to ensure the health and safety of the contractors working on their property." (Tr. 85) He also told them that he had issued a citation to Cowin which alleges a violative condition of men working under unconsolidated shaft wall. However, I note the uncontradicted and unimpeached testimony of Hendrick, that Niday was a purchasing agent and did not have any managerial responsibility. Also, I accept Hendrick's testimony that was not impeached or contradicted that Beichner, a bulldozer operator employed by Speed, was not considered management, and was not in a position to direct other Speed employees in any fashion.

In further arguing that Speed did not exercise due oversight of Cowin, the Secretary relies on Hendrick's testimony on cross-examination that it did not make any effort to determine Cowin's history of citations or reportable accidents and injuries. According to Fink, these are contained in MSHA records, and are available on its computer site. These reports indicate that Cowin received 31 citations in the two-year period from September 29, 2002 through September 28, 2004, and in the four year period preceding September 29, 2004,

Cowin had 79 reportable accidents, injuries or illnesses. Fink opined that Cowin's non-fatal days lost incident rate was much greater than the national rate. The Secretary argues that Cowin had a significant history of citations and accidents which Speed did not make any effort to determine. Also, that Speed did not provide any written safety materials to Cowin, and did not perform any safety audit or inspection of Cowin's work.

Thus, the gravamen of the Secretary's position that Speed contributed to the violations herein is that it did not provide adequate oversight and guidance over Cowin.

b. Twentymile, supra, and its Applicability to the Case at Bar

In Twentymile, supra, the Commission considered the issue of whether the production operator therein contributed to the violations at issue. The Commission commenced its discussion of this issue, by first considering the operator's activities as follows:

> "The record establishes, foremost, that Twentymile did not directly contribute to the violations that are involved in these citations. The violations involved Precision's equipment at the refuse pile, and no Twentymile employees were involved in any way in operating or maintaining that equipment. Tr. 85-86. There is no other evidence that Twentymile took any action that directly contributed to the violations.
>
> Moreover, the record does not establish that Twentymile contributed to the violations through any significant omission on its part." (Emphasis added.) (29 FMSHRC supra, at 270-271).

Thus it is clear that based on the above language in Twentymile, supra, that 1) in order for an operator to contribute to a violation, the contribution must be a direct one; and 2) if the contribution is based on the operator's omission, then the omission must be significant.

In the case at bar, as in Twentymile, supra, five of the citations at issue involve violative conditions relating to the equipment furnished and operated by the contractor.[4] As in Twentymile, supra, none of Speed's employees were involved in either operating or maintaining the cited equipment. Also, as in Twentymile, supra, there is not any evidence that Speed took any action that "directly contributed to the violations" (Twentymile, supra, at 271).

The Commission, in Twentymile, supra, *id*, continued its discussion of the operator's

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[4]One additional citation cites a failure to have properly trained the operator of the crane at issue.

contribution to the violations as follows:

> Moreover,[5] the record does not establish that [the operator] contributed to the violations through any significant omission on its part. In order for a production operator to contribute to a violation through an omission, that omission must be a significant one. Whenever an independent contractor commits a violation, there is almost always some action that a production operator could theoretically have taken that might have prevented the violation. Without a "significant" threshold, the production operator could be found to have contributed to the violation in virtually every situation, and this contribution factor essentially would be a meaningless test. (Emphasis added. id.) (27 FMSHRC supra, at 271). (Emphasis added.)

Thus, Twentymile, supra, clearly establishes that in order to find that an operator contributed to a contractor's violation through omission, the omission must be significant. The Commission concluded that the operator's failure to inspect the contractor's equipment before it entered the mine site, or subsequently, did not constitute a significant omission (id.).

As an initial matter, the Commission noted that the regulations do not require such inspections (i.d.). The Commission indicated that it was "... reluctant to impose [such a requirement]" (i.d.).

The Commission set forth the following test it applied in evaluating an operator's contribution through omission.

> ... we believe that the appropriate test in such a case is whether the production operator took reasonable steps under the circumstances to ensure that the independent contractor's equipment is safe, either by inspecting the equipment itself or by requiring that the independent contractor conduct inspections of the equipment. (Twentymile, supra, at 271-272).

In Twentymile, supra, the Commission concluded that the operator had taken reasonable measures to ensure that the contractor inspected its equipment by requiring in its contract that the latter comply with MSHA's safety standards, giving the contractor a safety guide which required it to conduct pre-shift examinations and correct any safety defects, and by having mine management regularly check on the contractor's project. Similarly, in the case at bar, I find it significant that Speed provided in its contract with Cowin that the latter was required to furnish and maintain the crane at issue, and abide by all federal standards. Within this context, I find that the failure of Speed to provide Cowin with a safety guide, was

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[5]It thus appears that in analyzing the factor of an operator's contribution to the contractor's violations, the prime issue is whether its activities were a direct contribution, and that whether there were any significant omissions on its part is only a secondary issue.

not a significant omission. I note that the provision of a guide is not mandated by any regulations, and I am reluctant to impose such a requirement. (See, Twentymile, supra, at 271)

Lastly, I reject the Secretary's argument that Speed contributed to the violations herein through omission by not making any effort to determine Cowins' history of citations, reportable accidents and injuries. The regulations do not impose such a duty upon an operator who has hired an independent contractor, and I do not have any authority to impose such a requirement. (See, Twentymile, supra, at 271).

For all the above reasons, I find that under the criteria and rationale set forth in Twentymile, supra, it has not been established that Speed contributed to the violations at issue.

4. Whether any Criteria in the Secretary's Enforcement Guidelines Were Satisfied.

In analyzing whether the criteria have been met it is critical to consider the following language from the Commission as set forth in Twentymile, supra, at 273.

> Before discussing the four individual criteria in the Enforcement Guidelines, we reiterate that a particular criterion should be found to be satisfied only if a significant threshold has been reached. In other words, a criterion is not satisfied unless the production Operator's involvement in the violation extends beyond the minimal level that would be found with regard to virtually every independent contractor violation. For example, as discussed above, in virtually every case it would be possible to find some action that the production operator could have taken that might have prevented the independent contractor's violation, thereby arguably showing that the production operator contributed to the violation through omission. Similarly, the fourth criterion is whether the production operator had "control" over the actions of the independent contractor. Because virtually every agreement between a production operator and independent contractor will give the production operator some minimal control over the independent contractor's activities, e.g., the ability to order the independent contractor to leave the production Operator's property, the degree of control must also be significant in order to satisfy that criterion.[20] If the guidelines were construed so broadly as to be satisfied with regard to essentially every independent contractor violation, the test based on the four criteria would be meaningless. Accordingly, we conclude that a particular criterion is satisfied only if the production Operator's involvement is in some way "significant," i.e., it exceeds the minimal level that would be present with regard to virtually every

independent contractor violation.

a. Whether Speed Contributed Either to the Violations in Question or to Their Continued Existence

In support of its argument regarding the contributions of Speed to the violations in question, the Secretary relies on arguments it made in discussing the first criteria set forth by the Commission in Twentymile, supra, (III (A), *infra*). As such, these arguments are rejected for the reasons set forth above, (III (A)*infra*).

The Secretary's argument that Speed contributed to the continued existence of the violations is based solely upon Holbrook's testimony. He was asked to explain how the cited conditions "... could have been in continued existence" (Tr. 299) if the violations did not occur until September 29. He testified as follows: "Because the pre-op record showed that it was in existence for two days, the day before the accident and the day of the accident." (Tr. 299).

Thus, it appears to be the Secretary's position that Speed's contribution to the continued existence of the violative conditions is predicated upon its failure to examine the pre-op reports and ensure that Cowin had corrected the noted conditions. However, the regulations do not require that an operator examine its independent contractor's pre-op reports. Hence, the failure of Speed to have inspected these reports, by itself , does not constitute a significant omission contributing to the continuing existence of any violative condition. (See, Twentymile, supra, at 271).

b. Whether Speed's Employees Were Threatened by the Hazards.

In discussing this criteria, the Secretary asserts that Smith was exposed to conditions at the shaft site on numerous occasions.

The violations at issue relate to the conditions of the crane and the training of its operator. The crane was used to remove material from the shaft. Clearly, Smith had to work in close proximity to the shaft when he lowered a plumb line to ensure it was being aligned in a straight line as provided in the construction plans. However, there is not any evidence that when Smith performed this work, the crane was positioned in close proximity to him as to expose him to any of its hazardous conditions. Indeed, there is not any evidence indicating the position of the crane relative to Smith when he checked on the alignment of the shaft. Nor is there any evidence that he performed other duties that would have exposed him to hazards created by the safety defects in the crane. Further, there is not any specific evidence that any other of Speed's employees were exposed to and threatened by the hazards of the crane. Thus, I find that it has not been established that Speeds' employees were threatened by the hazards.

c. Whether Speed had Significant Control over the Conditions of the Crane.

The cited conditions all relate to the crane and lack of training of its operator. The crane was not owned by Speed. According to its contract with Cowin, the latter was required to furnish the equipment. Further, Speed did not have any responsibility to inspect or maintain the crane. To the contrary, Cowin by contract was required to maintain, in good condition, equipment used on the project. Also, Cowin was required to provide supervision of work performed under the contract, and to comply with all applicable federal regulations. Significantly, Speed was not contractually obligated to take steps to ensure that Cowin properly maintained the crane.

I note that under the contract, if Speed determined that Cowin's performance of work on the project would result in unsafe conditions, violation of any applicable law, or damage to persons or property, it had the right to immediately stop Cowin's work. Also, under the contract, Speed had the right to terminate its agreement with Cowin should Cowin disregard any governmental regulations.

In Twentymile, supra, the Commission noted that in *Cathedral Bluffs Shale Oil Co.* (6 FMSHRC 1871 August 1, 1984), rev'd 796 F 2nd 533 (D.C. Cir., 1986), it had concluded that "...standard contract language (reserving the right to monitor work and terminate the contract if an independent contractor disregarded applicable law) was not sufficient to satisfy the control criterion in the Secretary's Enforcement Guidelines." (Twentymile, supra, at 274-275).

Hence, based on Twentymile, supra, I find that Speed's contractual right to terminate Cowin's contract, is not sufficient to satisfy the control criterion in the Secretary's Guidelines.

For all the above reasons, applying Commission precedent as established in Twentymile, supra, I find that it has not been established that Speed was properly cited by the Secretary. Specifically based on Twentymile, supra, I find that the Secretary's decision to cite Speed was an abuse of discretion, and that it was not consistent with the purpose and policies of the act,[6]

ORDER

[6]Accordingly, because the decision herein is based on Twentymile, supra, which is binding precedent, I reject all of the Secretary's arguments that rely on Appendix A to Part 45 regulations and the Secretary's Program Policy Manual as these are inconsistent with Twentymile, supra.

It is **ORDERED** that the Notices of Contest filed by Speed, Docket No.s WEVA 2005-20-R, 2005-21-R, 2005-22-R, 2005-23-R, 2005-24-R and 2005- 25-R, are **SUSTAINED.**

It is further **ORDERED** that Docket No. WEST 2005-97 is **DISMISSED.**

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 9, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2005-71-M A.C. No. 39-01323-45049
v.	:	Docket No. CENT 2005-72-M A.C. No. 39-01022-45029
T.F. LUKE & SONS, INC., Respondent	:	Portable Nos. 1 & 2

DECISION

Appearances: Gregory Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, 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 T.F. Luke & Sons, Inc. ("T.F. Luke"), 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 eight citations issued by the Secretary under section 104(a) of the Mine Act. The Secretary seeks a total penalty of $2,583.00 for the alleged violations. An evidentiary hearing was held in Sioux Falls, South Dakota. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

T.F. Luke operates several small sand and gravel mines in southeastern South Dakota. The citations at issue in these cases were issued during inspections conducted in September and October 2004 at T.F. Luke's Portable No.1 and No. 2 plants. T.F. Luke moves these plants from site to site on a regular basis. (Tr. 62). These plants operate on an intermittent basis.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 7937754

On September 9, 2004, MSHA Inspector Robert Lindeman inspected the Portable No. 1 mine. The mine was operating with two end loaders and a dozer. The shaker and

screener/crusher was operating. (Tr. 17). The inspector issued Citation No. 7937754 under section 104(a) of the Mine Act alleging a violation of section 57.12008 as follows:

> The 480 volt power cable entering the field conveyor drive motor is not properly bushed. The cable enters the junction box under the lid of the junction box. The motor is approximately 20 feet off the ground. If the lid were to cut into the energized conductor, it could energize the frame of the conveyor. A person contacting an energized conveyor could be fatally injured.

Inspector Lindeman determined that an injury was unlikely and that any injury could reasonably be expected to result in a fatal accident. He determined that the violation was not of a significant and substantial nature ("S&S") and that T.F. Luke's negligence was moderate. The safety standard provides, in part, that "[w]hen insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Lindeman testified that he observed wires entering the junction box between the lid and the box. (Tr. 20, 33-34; Ex. G-1). Vibration from the motor could have caused the insulation on the wires to wear away. The inspector believed that it was unlikely that the violation would contribute to an injury because it was 20 feet off the ground and miners were not working around the conveyor. He admitted that the equipment was properly grounded. (Tr. 35-36).

Thomas F. Luke, an owner of T.F. Luke, testified that all of the electrical equipment at the mine was tested for resistance and continuity. (Tr. 46). He also testified that employees at the mine operate mobile equipment when the plant is running and they are not walking around the plant.

I find that the Secretary established a non-S&S violation of the safety standard. T.F. Luke argues that no hazard was created by the condition. The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

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

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). In this case, the Secretary contends that the likelihood that a miner would be killed or injured as a result of the violation was not very great. The gravity of the violation was low and T.F. Luke's negligence is moderate. A penalty of $60.00 is appropriate for this violation.

B. Citation No. 7937755

This citation alleges a violation of section 57.12025 as follows:

> The 110 volt receptacle in the generator trailer is not grounded to protect a person from electrical shock if a fault were to occur. The scale on the conveyor is plugged into this energized receptacle. This receptacle is 14 inches off the floor on the south side of the trailer. A person using a tool or equipment that is plugged into this 110 volt receptacle could be fatally injured if a fault were to occur.

Inspector Lindeman determined that an injury was unlikely but, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that T.F. Luke's negligence was moderate. The safety standard provides, in part, that "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Lindeman testified that the receptacle did not have a ground conductor or another system for grounding it. (Tr. 27; Ex. G-3). He used a tester to determine that the ground circuit was open. He further testified that if a piece of equipment plugged into the receptacle developed a fault, there would be no place for the fault current to go. If someone were to grab the equipment he could receive a fatal shock. The inspector determined that the violation was not serious because the generator trailer had a wooden floor and it was dry. (Tr. 29).

Mr. Luke testified that T.F. Luke did not install the cited receptacle but that an electrical contractor installed it. (Tr. 45). He assumed that the contractor had properly installed it with a grounding circuit.

I find that the Secretary established a non-S&S violation of the safety standard. I credit the testimony of Mr. Luke that it relied on an electrical contractor to correctly ground the receptacle. I find that the violation was not serious and that T.F. Luke's negligence was low. A penalty of $60.00 is appropriate for this violation.

C. Citation No. 7938236

MSHA Inspector Shane Julien inspected Portable No. 2 mine on October 26, 2004. He described it as a "little roller-crusher-screener operation . . . where a bulldozer would push material into the trap, into a slow moving conveyor, and that feed conveyor would subsequently

feed the screen, and then the screen would disperse [material] out from there on various transfer and stacker conveyors." (Tr. 55). The facility was operating when he arrived at the mine, but it was shut down during his inspection. He issued Citation No. 7938236 under section 104(a) of the Mine Act alleging a violation of section 56.14108 as follows:

> The overhead drive belts on the screen feed conveyor drive motor are not guarded to prevent whipping of persons if the belts broke. The belts are located above a main walkway and miners travel through the area several times per shift. Footprints were observed in the area. If the belts broke and whipped a miner, severe head and face injury could occur to persons.

Inspector Julien determined that an injury was reasonably likely and, if an accident did occur, the injury could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that T.F. Luke's negligence was moderate. The safety standard provides, in part, that "[o]verhead drive belts shall be guarded to contain the whipping action of a broken belt if that action could be hazardous to persons." The Secretary proposes a penalty of $629.00 for this citation.

Inspector Julien issued the citation because a long, horizontal, overhead drive belt was present and he believed that, if the belt broke, it would whip into the walkway of a person coming underneath the conveyor. (Tr. 58-61; Ex. G-4). He estimated that the belt was about ten feet above the berm and the belt was about nine feet long. (Tr. 65, 107). The conveyor sits up on a large berm that is about five feet above the surrounding land. (Tr. 59, 106). The berm is necessary to give the conveyor the necessary height to feed the crusher. (Tr. 102). The inspector observed footprints in the area and he saw Dennis Soulek, the foreman at the site, walk through the area. (Tr. 59, 65) Inspector Julien issued the citation because Soulek told him that employees walk through the area. (Tr. 157). On direct examination, the inspector testified that the cited belt was running during his inspection. (Tr. 72).

Inspector Julien determined that the violation was serious and S&S because there was a footpath under the area where the belt could break. (Tr. 61). If a belt were to break, it was reasonably likely that someone would be hit by the broken belt.

Inspector Julien discussed abatement with Mr. Soulek. Soulek decided to abate the condition by enclosing the area in expanded metal. (Tr. 66). On November 8, 2004, Inspector Julien issued Order No. 7938258 under section 104(b) because T.F. Luke had not abated the cited condition. (Tr. 67; Ex. G-6). The order stated that no apparent effort had been made to guard the overhead drive belt. (Ex. G-6). T.F. Luke had moved the plant to a new location between October 26 and November 8. (Tr. 68-69, 155). Mr. Soulek stated that he did not have any acetylene for the welders at the site to abate the condition. (Tr. 69). T.F. Luke had not asked for an extension of the abatement time. A guard was installed in response to the order. (Tr. 74).

On cross-examination, Inspector Julien admitted that the berm under the conveyor is only about three feet wider than the structure for the conveyor on each side. (Tr. 103). The berm is slightly longer than the length from the dumping point to the wheels on the conveyor. Inspector Julien testified that every time the plant is moved, it would be set up in the same basic configuration. It is possible, however, that the belts could have been higher off the ground at other locations. (Tr. 153, 166). He admitted that the conveyor was shut down during his inspection so the motor and belts were not operating when he saw Mr. Soulek walk through the area. (Tr. 110, 156). He also admitted that he has no knowledge that anyone walked under or near the overhead drive belts while they were operating. (Tr. 111-13). Inspector Julien believes that, because the violation was open and obvious, the condition should have been observed by MSHA during previous inspections. (Tr. 116).

Thomas Luke testified that the conveyor sits on a similar berm every time the plant is moved. (Tr. 172-73; Ex. B). The berm is usually the same height at every mine site. (Tr. 177). He estimated that the berm was five to six feet high and that the belts were about nine to ten feet above the berm. (Tr. 173; Ex. A). He testified that miners cannot reach the belt with their hands if they are standing on the berm. The overhead belts on the conveyor can be seen all over the plant. (Tr. 177). No previous citations have been issued for these unguarded belts. T.F. Luke has been using the field conveyor for about 20 years. (Tr. 181).

Mr. Luke testified that there is no walkway on or near the berm supporting the conveyor. (Tr. 179). Miners walk around the area before the equipment is started for a pre-operational check and to grease the equipment and check bearings. (Tr. 179-81). Miners also walk around at night after the plant is shut down to clean up. The tools shown on the photo taken by the inspector are used to clean out the hopper when the plant is shut down. (Tr. 182-83). The berm supporting the conveyor is about three feet wider than the wheels on the conveyor structure on each side and the berm slopes steeply to the ground. (Tr. 180). There is no need for any miner to walk up on the berm while the conveyor is operating and Luke has never seen anyone on the berm during operations. (Tr. 180-81).

Dennis Soulek testified that he runs a loader for T.F. Luke. (Tr. 233). He accompanied Inspector Julien on the inspection and was acting as the foreman. He testified that the berm for the conveyor is always about the same height so that the top of the conveyor can go over the crusher. (Tr. 234-35). The cited belts have been unguarded for 20 years, the belts are easy to see, and they have never been cited by MSHA. He cannot reach the belt when standing on the berm. (Tr. 237).

Dennis Soulek testified that miners never walk up on the berm when the conveyer is running and that there would never be a reason for a miner to do so. (Tr. 237). All of the maintenance on the conveyor is done before or after the operating shift. He denied ever telling the inspector that miners walk up on the berm under the belt while the conveyor is operating. (Tr. 238-39).

Jesse Soulek testified that he operates a loader at the plant. (Tr. 272). He testified that employees do not walk on top of the berm while the conveyor is operating and there is no reason for anyone to do so. (Tr. 276). The cited drive belt has never broken, but it has been replaced. Robert Kuntz, a dozer operator at the plant, also testified that nobody walks up on the berm when the conveyor is operating. (Tr. 289-90).

The Secretary argues that Dennis Soulek admitted the violation when he told the inspector that miners walk under the overhead drives as a shortcut to the other side of the plant. Footprints and tools were also found in the area. She also argues that T.F. Luke had adequate notice of the requirements of the safety standard.

T.F. Luke argues that the Secretary failed to establish that anyone walked under the belt while the conveyor was operating. The footprints were made while the equipment was shut down. In addition, the evidence shows that Dennis Soulek did not tell Inspector Julien that miners walk on the berm or under the belt while it was operating. Finally, it argues that T.F. Luke did not have fair notice that the guard was required because the evidence clearly shows that the condition had existed for 20 years, MSHA inspectors have previously observed the condition, and no citations were previously issued.

I find that the Secretary did not establish a violation of the safety standard. The standard requires a guard on overhead belts only when the whipping action of a broken belt "could be hazardous to persons." Here the inspector incorrectly determined that a walkway or footpath was in the zone of danger. I credit the evidence of T.F. Luke that miners do not walk under the belt or on the berm supporting the crusher when the plant is operating.

Although Inspector Julien initially testified that the cited drive belt was running at the time of his inspection, on cross-examination he admitted that it was not. (Tr. 72, 110, 156). Thus, his testimony that he observed Dennis Soulek walk through the area is meaningless. The footprints in the area could have been made when the plant was shut down and the tools were used when cleaning out the hopper. The plant must be shut down for that maintenance. The cited horizontal belt was 10 feet above the berm and more than 15 feet above the ground. Only three people work at the mine: two loader operators and one bulldozer operator. The area under the cited belt was not a walkway or a working surface during operation of the plant. It was highly unlikely that anyone would ever be in that area while the plant was operating. The height and size of the belt and the amount of foot traffic in the area should be considered when determining whether a broken belt could be hazardous to persons. *See Chrisman Ready-Mix Inc.*, 22 FMSHRC 1256, 1262-63 (Oct. 2000) (ALJ).

I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the safety standard would not have recognized that a guard was required on the overhead drive belt on the screen feed conveyor at this plant. The fact that no MSHA inspector has ever cited this condition for the past 20 years provides additional support for this conclusion, especially since all witnesses agreed that the condition was open and obvious.

Consequently, I vacate Citation No. 7938236 and Order No. 7938258. Because I am vacating the citation and order on the merits, I have not considered the notice issues raised by T.F. Luke.

D. Citation No. 7938237

MSHA Inspector Julien issued Citation No. 7938237 under section 104(a) of the Mine Act alleging a violation of section 56.12008 as follows:

> The 460 volt power cable for the crusher rollibrator is not bushed where the cable passes into the drive motor weatherhead. Miners travel in the area several times per shift. Foot prints were observed on the area. Approximately 2 inches of cable is pulled out, exposing the inner conductors. If a miner were to contact the energized unbushed conductors, a fatal electrocution could occur.

Inspector Julien determined that an injury was reasonably likely and, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that T.F. Luke's negligence was moderate. The Secretary proposes a penalty of $247.00 for this citation.

Inspector Julien testified that the 460-volt cable was pulled out from the weatherhead on the crusher rollibrator. (Tr. 75; Ex. G-7). This cable provided power to the equipment. He testified that the crusher vibrates while it operates with the result that the copper conductors could make contact with the frame of the equipment. (Tr. 76, 162). If the copper conductors make contact with the metal frame, anyone who comes in contact with the equipment could suffer an electrical shock. Miners generally perform routine maintenance while the equipment is shut down. (Tr. 77). Inspector Julien determined that the violation was serious and S&S because miners pass by the area during the shift. (Tr. 77-78). He believed that it was reasonably likely that the violation would contribute to a serious or fatal accident.

Inspector Julien admitted that the crusher was properly grounded. (Tr. 120). He did not know when the bushing slipped out. Copper conductors were not exposed. If miners do not walk or work near the crusher, there is little chance that anyone would be injured. (Tr. 123, 125). Inspector Julien testified that, if there were a fault in the grounding system, there would be no protection in the event that bare conductors were to come in contact with the weatherhead.

Mr. Luke testified that the company tests for continuity and resistance on a regular basis, including every time the plant is moved. (Tr. 183). This testing established that the equipment was properly grounded. He further testified that miners do not work or walk in the area when the plant is operating. (Tr. 184). Dennis Soulek testified that miners do not travel or work near the crusher during the shift and that he never told the inspector that they did. (Tr. 239). He further testified that there would be no reason to perform any cleanup around the crusher while it was operating. (Tr. 240). Soulek testified that when he performed the most recent continuity test,

the test showed that the equipment was grounded. He also said that, when he did the pre-shift examination of the equipment on the morning of October 26, 2004, the bushing was in place. (Tr. 241; 263).

The Secretary argues that Dennis Soulek admitted to Inspector Julien that, although accumulations are generally cleaned up at the beginning or at the end of the shift, if conditions get "bad enough," cleaning occurs during the shift. (Tr. 77). Given that the equipment vibrates, it was reasonably likely that the copper conductors would make contact with the metal components of the weatherhead. The inspector reasonably determined that the violation was S&S because the unbushed 460-volt power cable posed a significant risk to miners. The crusher rollibrator was in the main part of the plant where miners work and travel during operation. A serious injury was reasonably likely even though the system was grounded.

T.F. Luke argues that the citation should be vacated because no miners were exposed to the hazard. It further argues that, if a violation is found, the Secretary failed to establish that the violation was S&S. It contends that the evidence establishes that the crusher was grounded, miners do not work or travel near the crusher while the plant is operating, the insulation around the conductors was intact, and the condition had only existed for a short time. T.F. Luke maintains that there was not a reasonable likelihood that anyone would be injured by this violation.

I find the Secretary established a violation. There is no question that the required bushing was not in place. The seriousness of the violation is a closer question. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary established the first, second, and fourth elements of this test. A discrete safety hazard was contributed to by the violation and, if a miner were hurt by the violation, the injury in question would be of a reasonably serious nature. The more difficult issue is whether the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury.

I conclude that the Secretary met her burden of proof, taking into consideration the particular facts involved. The cited crusher was an integral part of the plant. Because the crusher vibrated as it ran, it was reasonably likely that bare conductors would come into contact with the metal parts of the crusher, assuming continued normal mining operations. The Secretary is not required to establish that the crusher was not properly grounded. If this particular crusher had not been grounded at the time the inspection, the violation would have likely created an imminent danger because the cited condition could reasonably be expected to cause death or serious physical harm before the it could be abated. *See 30 U.S.C.* 802(j).

The Secretary is also not required to show that it was more probable than not that an injury would result from the violation. Although miners do not work on or near the crusher on a regular basis during the shift, miners are in the area from time to time during the shift. I find that the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. The violation was S&S and T.F. Luke's negligence was moderate. A penalty of $275.00 is appropriate.

E. Citation No. 7938238

MSHA Inspector Julien issued Citation No. 7938238 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows:

> The plant main drive pulley and belts are not guarded to protect persons from contacting the moving machine parts. The pulley is approximately four feet in diameter and spins at high RPMs. Miners travel through the area several times per shift and footprints were observed in the area.

Inspector Julien determined that an injury was reasonably likely and, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that T.F. Luke's negligence was moderate. The cited safety standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The Secretary proposes a penalty of $1,033.00 for this citation.

Inspector Julien determined that the main drive pulley was not adequately guarded. (Tr. 81; Ex. G-8). He testified that there was "a substantial opening in the pinch points on the return idler pulley . . . and also at the bottom where the drive belts return back into the main drive pulley." (Tr. 82; Ex. G-8). The pulley was about four feet in diameter and the opening was about one and a half feet wide. The bottom was also not guarded. The inspector determined that an accident was reasonably likely because there were footprints in the area and Soulek told him the miners sometimes clean up accumulations in the area during the shift. (Tr. 83-84). Inspector Julien believed that a miner could be killed if he became entangled in the fast moving pulley.

On November 8, 2004, Inspector Julien issued an Order No. 7938257 under section 104(b) of the Act because the cited condition had not been abated. (Tr. 85-86; Ex. G-9). Mr. Soulek explained that the condition had not been corrected because he did not have acetylene for the torches. (Tr. 87). Thomas Luke testified that, although the necessary materials to abate the citation were at the company's disposal, it did not immediately abate the condition because it received an oral extension of time from Joe Steichen, the MSHA field office supervisor. (Tr. 200-02, 230). A guard was installed to terminate the citation and order.

Inspector Julien admitted that he did not know whether the pulley had ever been guarded in the cited location. (Tr. 126). He also admitted that the other sides of the pulley were guarded, including what he referred to as the "walk side." (Tr. 127). He also admitted that the pulley was recessed about three and a half feet. (Tr. 128). Inspector Julien believes that the safety standard required a complete enclosure around the pulley. (Tr. 130). The belts travel around the pulley from the bottom to the top so that the pinch point would be on the opposite side of the pulley from the area cited. (Tr. 134). The only reason anyone would be near the cited area would be for cleanup and maintenance. (Tr. 139).

Thomas Luke testified that he has owned the crusher containing the cited pulley since 1975 and there has never been a guard in the area cited by Inspector Julien. (Tr. 185). MSHA inspectors have never stated that a guard was required in that location and they have never issued citations for lack of a guard. MSHA has inspected the equipment of T.F. Luke on a regular basis. (Tr. 186-87). When the plant is moved, it is set up in the same configuration.

Mr. Luke testified that the guarding on the other sides of the pulley protected miners from any moving parts. He also testified that, with so many other pieces of equipment surrounding the cited pulley, it is difficult to gain access to the area cited by the inspector. (Tr. 189-91; Exs. C & D). He believes that Inspector Julien's implication that miners walk through the area while the plant is in operation is without support. (Tr. 193). Miners do not travel near this area while the equipment is operating. (Tr. 200). In addition, the equipment kicks up a lot of dust making travel through the area even more unlikely. (Tr. 190). Equipment in the area is serviced after the plant is shut down. (Tr. 200). The existing guards on the equipment extend out sufficiently to protect anyone from the moving machine parts. (Tr. 195-96; Exs. D, F, G & H). The opening was only 12 to 14 inches wide. (Tr. 200). It was not reasonably likely that anyone would slip and fall in the area or that they would be injured in such an event by the cited pulley. (Tr. 198).

Dennis Soulek testified that the crusher and conveyors are set up in the same configuration whenever the plant is moved. Soulek testified that nobody walks or works near the cited pulley when the plant is operating. (Tr. 248). Jesse Soulek testified that miners are not near the pulley when the plant is operating. (Tr. 278-79). He denied telling Inspector Soulek that employees worked or cleaned up around the pulley while the plant was operating. (Tr. 250).

The Secretary argues that there was a substantial unguarded opening exposing pinch points on the drive pulley. The open area was more than a foot wide and the bottom was not

guarded. The pulley was four feet in diameter and spun at a high rate of speed. Dennis Soulek told the inspector that miners use shovels to clean up under the pulley to prevent the build up of materials under the belts. The unguarded area was quite obvious. As a consequence, the citation should be affirmed.

T.F. Luke argues that every time the No. 2 plant is moved to a new site, the crusher is set up in the same basic configuration. The main drive pulley has been protected by guards in the same manner since the crusher was purchased by the company. The crusher has been inspected at least annually by MSHA and no warnings, notices, or citations have been issued because of the opening cited by Inspector Julien.

It further argues that the evidence establishes that miners would not be in the area because there is no travelway by or near the cited opening. "It would be extremely difficult for people to walk through even if there were a reason. . ." because of the obstructions created by conveyors and other equipment. (Luke Br. 14). Someone would be required to walk over frames and axles of these conveyors to reach the unguarded area. This area is also extremely dusty during operation which would further discourage entry. The plant was not operating when Inspector Julien observed the cited condition.

In addition, there were no pinch points on the unguarded side of the pulley. The moving parts were recessed about four feet behind the guard that covers the side of the pulley. If a miner were to slip while walking or working in the area while the pulley was in motion, he would not come into contact with a pinch point. As a consequence, T.F. Luke contends that the citation should be vacated.

The language of the standard states that moving machine parts which can cause injury, including drive, head, tail, and take-up pulleys, must be guarded. Thus, the moving machine parts must present a hazard to miners to be covered by the standard. In the preamble to the final rule, the Secretary emphasized the broad construction of this safety standard. The preamble states:

> [T]he final standard requires the installation of guards to protect persons from coming into contact with hazardous moving machine parts. The standard clarifies that the objective is to prevent contact with these machine parts. *The guard must enclose the moving parts to the extent necessary to achieve this objective.*

53 Fed. Reg. 32496, 32509 (Aug. 25, 1988) (emphasis added). The preamble further provides:

> Under the final rule, the standard applies where the moving machine parts can be contacted and cause injury. Some commenters believed that guards should provide protection against inadvertent, careless, or accidental contact but not against

> deliberate or purposeful actions. They consider guards which totally enclose moving parts as counter-productive to other safety considerations such as proper work procedures, training, and general attention to hazardous conditions.

Id. In rejecting these comments, the Secretary stated that most injuries caused by moving machine parts occur when persons are "performing deliberate or purposeful work-related actions with the machinery" and that the installation of a guard would have prevented these injuries. *Id.* The Secretary stated that "[g]uards provide a physical barrier, which offers the most effective protection from hazards associated with moving machine parts." *Id.* Thus, the Secretary provided notice to the regulated community that she would interpret this safety standard very broadly to protect persons from coming into contact with moving machine parts and that the standard covers deliberate actions by employees.

In construing the standard as applied to coal mines, the Commission stated:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries*, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case] basis.

Thompson Bros. Coal Co., 6 FMSHRC 2094, 2097 (Sept. 1984). Thus, the standard protects a miner who, contrary to his employer's instructions, attempts to perform minor maintenance or cleaning near an unguarded pinch point without first shutting it down. The fact that no employee has ever been injured by an unguarded pinch point is not a defense because there is a history of such injuries at crushing plants throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

The Secretary bears the burden of proving an alleged violation by a preponderance of the evidence. In this case, I find that the Secretary did not meet her burden, for the following reasons. First, it is important to understand that the cited pulley was substantially guarded. The side of the pulley was guarded with a substantial metal screen that covered the entire area. (Ex.

D). The other side of the pulley and belts were covered with sheet metal that prevented anyone from contacting the moving parts. (Ex. G). The area under the pulley was protected by the guard on the side which extended down below the level of the pulley. This side guard extended down to within two feet of the ground. In addition, the area cited by the inspector was about a foot wide and was recessed about four feet. One side in the recessed area was protected by the side guard and the other side of the recessed area was protected by the body of the crusher.

Second, the witnesses agreed that the applicable pinch points were on the opposite side from the area cited by Inspector Julien. It would be almost impossible for anyone to contact the pinch points from the area cited. These pinch points were protected by existing guards.

Third, the cited opening was not very accessible. A miner would be required to walk over, under, and through various pieces of equipment to reach the area. Although I relied on the testimony in reaching this conclusion, the photographs illustrate these obstacles. (Exs. G-8, C & D). The crusher creates a great amount of dust so that travel through the area would be unpleasant. It is quite clear that no miner would voluntarily walk by the area to get from one place to another. A miner would only be in the area to clean and perform maintenance. The evidence establishes that miners perform these tasks before and after shift when the plant is shut down. Only three miners work at the plant. Inspector Julien's statement that Dennis Soulek told him that miners often clean up under the pulley while the plant is operating was not substantiated. The citation was abated without the installation of a guard under the pulley.

In conclusion, I find that the Secretary did not establish that there was "a reasonable possibility of contact and injury" at the cited location. *Thompson* at 2096. A reasonably prudent person familiar with the mining industry and the protective purposes of the safety standard would not have recognized that a guard was required at the cited location, especially since no MSHA inspector has ever issued a citation for this condition. Consequently, I vacate Citation No. 7938238 and Order No. 7938257. Because I am vacating the citation and order on the merits, I have not considered the notice issues raised T.F. Luke.

If T.F. Luke changes the configuration of the conveyers and the crusher so that the cited area is more accessible, a guard would be required. In addition, if miners work or walk near the cited area while the plant is operating, a guard would be required. Work would include cleaning up accumulations while the plant is operating.

F. <u>Citation No. 7938239</u>

MSHA Inspector Julien issued Citation No. 7938239 under section 104(a) of the Mine Act alleging a violation of section 56.12008 as follows:

> The 460 volt cable that powers the jaw crusher startup box is not bushed where it passes into the metal case. Approximately two inches of cable is pulled out exposing the inner conductors. The

box is used to start and stop the plant. Miners contact [the box] several times per shift.

Inspector Julien determined that an injury was reasonably likely and, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that T.F. Luke's negligence was moderate. The Secretary proposes a penalty of $247.00 for this citation.

Inspector Julien testified that the wires entered the startup box at the bottom. There was no bushing where the wires entered the box. (Tr. 90; Ex. G-10). This box contains the start and stop switch for the jaw crusher. This box allows miners to operate the jaw crusher without having to go to the main disconnect panel in the generator trailer. If rock clogs the crusher, a miner can turn it off with this switch. This box hangs on a piece of wire and it is exposed to the elements. (Tr. 91, 143). If the insulation on one of the wires is scraped off due to the movement of the box, the metal frame of the box would become energized.

He determined that the violation was S&S because this box is used up to several times a day, which exposes miners to the hazard of electric shock. (Tr. 92-93). The fact that the electrical system was grounded does not eliminate the hazard of an electric shock. (Tr. 92, 141, 163).

Thomas Luke testified that all of the electrical equipment is tested for resistance and continuity. (Tr. 204). The cited control box was grounded. Miners can shut down the crusher at the box or shut down the entire plant at another location. Dennis Soulek testified that miners are not normally around the cited box and that a miner would usually shut down the entire plant if a clog developed in the system. (Tr. 251). At the time of the inspection, Soulek was not aware that the wires were not protected by a bushing where they entered the box. No bare conductors were exposed.

The Secretary argues that the citation should be affirmed because she met her burden of proof. The cited electrical box was next to a walkway and employees often turned the equipment on and off during the shift. The wires were hanging free so the insulation was subject to being cut by the metal frame of the box. If the bare conductors were exposed, the frame would become energized.

T.F. Luke contends that the citation should be vacated because the electrical equipment at the mine was fully grounded and the cited box was not often used to stop and start the plant. No bare conductors were exposed so no hazard was created.

For the reasons set forth with respect to Citation No. 7938237, above, I find that the Secretary established an S&S violation of the safety standard. The required bushing was not in place. It is undisputed that the box was grounded. I credit the testimony of T.F. Luke's witnesses that miners often shut down the entire plant at another location when a clog develops

in the system. I also accept their testimony that the crusher is powered by a separate V-12 Detroit engine. Nevertheless, insulated wires were protruding out of the cited electrical box. These wires were carrying 440 volts of electricity. The wires were not protected by a bushing or other device to keep them from rubbing against the metal frame of the box. It was reasonably likely that bare conductors would come into contact with the metal frame, assuming continued normal mining operations. It was also reasonably likely that a miner coming into contact with the metal parts would suffer a serious injury. T.F. Luke's negligence was moderate. A penalty of $275.00 is appropriate.

G. Citation No. 7938240

MSHA Inspector Julien issued Citation No. 7938240 under section 104(a) of the Mine Act alleging a violation of section 56.4201(a)(1) as follows:

> The 4.5 pound ABC fire extinguisher for the tool van has not had a monthly visual operability inspection. The last recorded inspection was dated July of 2003. The extinguisher was empty and the gauge showed that it [is] in need of recharging. The extinguisher is stored in an area with oil, sprays, and lubricants.

Inspector Julien determined that an injury was unlikely but, if an accident were to occur, the injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that T.F. Luke's negligence was moderate. The safety standard provides that "[f]ire extinguishers shall be inspected visually at least once a month to determine that they are fully charged and operable." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Julien testified that the fire extinguisher was empty and that it had not been inspected since 2003. (Tr. 94; Ex. G-11). The extinguisher was in a company van. He believed that if a miner were to try to fight a fire with the extinguisher, he could suffer smoke inhalation or burns. The inspector determined that the violation was not serious because two other extinguishers were located nearby, including one in the front of the truck. (Tr. 94, 144). Dennis Soulek told the inspector that the company had planned to discard the extinguisher. (Tr. 95).

Thomas Luke testified that the company had six other fire extinguishers in the area. (Tr. 205). He does not deny that the cited extinguisher was empty and that it has not been inspected since 2003. (Tr. 231). Dennis Soulek testified that every vehicle at the plant has at least one fire extinguisher. (Tr. 251-52). He believes that there were about six extinguishers at the plant.

The Secretary argues that the evidence established a violation. T.F. Luke admits that the facts alleged in the citation are accurate. I find that the Secretary established a non-S&S violation of the safety standard. T.F. Luke's negligence was moderate. A penalty of $60.00 is appropriate.

H. Citation No. 7938241

MSHA Inspector Julien issued Citation No. 7938241 under section 104(a) of the Mine Act alleging a violation of section 56.14132(b)(1) as follows:

> The Chevrolet C50 fuel truck was not provided with an automatic reverse activated backup alarm. The truck is used at the beginning of every shift to fuel up the crusher drive motor. The truck has an obstructed rear view and travels across foot and mobile equipment paths.

Inspector Julien determined that an injury was reasonably likely and, if an accident were to occur, the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that T.F. Luke's negligence was moderate. The safety standard provides that "[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have an automatic, reverse-activated signal alarm." The Secretary proposes a penalty of $247.00 for this citation.

Inspector Julien testified that Dennis Soulek told him that the truck is used to fuel the generator as needed and that a ground man is not used when the truck is in use. (Tr. 96). The back-up alarm did not work when the truck was put in reverse. The large tank on the truck totally obstructed the rear view. (Tr. 98). This violation created a hazard because anyone behind the truck would not know if the driver intended to back up. He determined that the violation was serious and S&S based on the fact that "if a miner was unaware of the backing motion of the truck, it would [result in] a fatal crushing injury." (Tr. 99). Inspector Julien admitted that he did not see the truck in operation and he did not have any specific knowledge as to how and when it is used. (Tr. 145-49).

Thomas Luke testified that the cited fuel truck never backs up. (Tr. 206). The dozers and loaders to be fueled are driven to the fuel truck when they need to be refueled. When the crusher is refueled, the fuel truck operator drives the fuel truck forward to the crusher, fills it up, and then drives forward, back to its parking spot. (Tr. 207). The fuel tank for the generator is filled by the company's fuel provider. No miner ever backs the fuel truck up. He has a fuel truck at another property that does not have an operating reverse gear because it never needs to travel in reverse. The cited truck is capable of backing up. (Tr. 231). Dennis Soulek testified that the fuel truck always goes forward in a circle. (Tr. 252). He admitted that the truck travels in reverse sometimes when necessary to "back it out of the hole." (Tr. 269). Jesse Soulek testified that the truck travels in a circle and that it does not back up. (Tr. 282).

The Secretary argues that the evidence established a violation. It argues that the violation was S&S because miners were regularly exposed to the hazard created by the violation. The truck was capable of backing up and employees did in fact back the truck up. T.F. Luke contends that the violation was not S&S because the truck never backs up. It has 30 feet of hose. All

mobile equipment is driven to the truck for refueling. The crusher is refilled at night and the truck is never put into reverse when performing this task.

I find that the Secretary established a violation. The rear view was totally obstructed and the back-up alarm was not working. I find, however, that it was not reasonably likely that the hazard contributed to by the violation would have resulted in an injury. Although I conclude that the fuel truck was put in reverse from time to time, it normally did not back up. Because only three individuals worked at the plant, the risk of an injury was very low. It was unlikely that the truck would back up while pedestrians were present. T.F. Luke's negligence was moderate. A penalty of $100.00 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

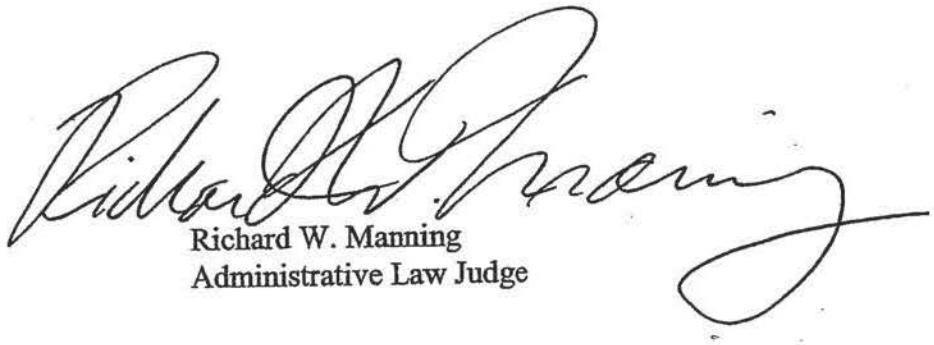
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the Portable #1 Plant and Portable #2 Plant each had a history of nine paid violations in the 24 months preceding the inspections. T.F. Luke is a small mine operator. All of the violations that were affirmed in this decision were abated in good faith. The penalties assessed in this decision will not have an adverse effect on T.F. Luke's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

Citation No.	30 C.F.R. §	Penalty
CENT 2005-71-M		
7938236	56.14108	Vacated
7938237	56.12008	$275.00
7938238	56.14107(a)	Vacated
7938239	56.12008	275.00
7938240	56.4201(a)(1)	60.00
7938241	56.14132(b)(1)	100.00
CENT 2005-72-M		
7937754	56.12008	60.00
7937755	56.12025	60.00
	TOTAL PENALTY	$830.00

For the reasons set forth above, the citations and orders are **AFFIRMED**, **MODIFIED,** or **VACATED**, as set forth above. T.F. Luke & Sons, is **ORDERED TO PAY** the Secretary of Labor the sum of $830.00 within 30 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 20, 2005

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. SE 2005-28-R
v.	:	Citation No. 7682362; 10/14/04
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 7 Mine
ADMINISTRATION (MSHA),	:	Mine ID 01-01401
Respondent	:	

DECISION

Appearances: Guy W. Hensley, Esq., Jim Walter Resources, Inc., Brookwood, Alabama; Warren B. Lightfoot, Jr., Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for Contestant; Anne G. Paschal, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Respondent.

Before: Judge Bulluck

This case is before me on a Notice of Contest filed by Jim Walter Resources, Incorporated ("JWR") against the Secretary of Labor, acting through her Mine Safety and Health Administration, ("MSHA"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). JWR challenges a citation that MSHA issued under section 104(a) of the Act, alleging a violation of the Secretary's safety regulation found at 30 C.F.R. § 75.507-1.

A hearing was held in Birmingham, Alabama. The parties' Post-hearing Briefs and Reply Briefs are of record. For the reasons that follow, the citation shall be vacated.

I. Stipulations

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this contest proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977;

2. Jim Walter Resources, Incorporated, is a mine operator subject to the jurisdiction of the Federal Mine Safety and Health Administration;

3. Jim Walter Resources is the owner and operator of the No. 7 Mine located at 18069 Hannah Creek Road, Brookwood, Alabama, 35444;

4. Operations at the No. 7 Mine are subject to the jurisdiction of the Mine Safety and Health Act;

5. MSHA Inspector Charles Carpenter was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 7682362;

6. Citation No. 7682362 was served on Jim Walter Resources or its agent, as required by the Act;

7. Citation No. 7682362 is authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the purpose of establishing the accuracy of any statements asserted therein;

8. The submersible pump which resulted in the issuance of the citation herein is non-permissible;

9. If the Administrative Law Judge upholds Citation No. 7682362, a single penalty assessment of $60.00 should be imposed;

10. The penalty proposed in paragraph 9 will not affect Jim Walter Resources' ability to remain in business; and

11. Jim Walter Resources is a large operator within the meaning of the Mine Act.

II. Factual Background

JWR owns and operates three underground coal mines, Nos. 4, 5, and 7, in Brookwood, Alabama. Thirteen submersible ("deep well") pump systems, located on the surface with components underground, have been used at JWR's facilities since 1987 to remove vast accumulations of water from underground permanently sealed, worked-out areas where coal has formally been mined.[1] Tr. 154. Once the permanent seals are erected, the sealed areas are totally

[1] A "worked-out" area of a mine is a large section from which all mineral coal or ore has been taken. American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 630 (1997). The regulations define "worked-out area" as an area where mining has been completed, whether pillared or nonpillared, excluding developing entries, return air courses, and

isolated and inaccessible; they cannot be traveled, examined, inspected or ventilated. The water that collects in the sealed area at issue forms a large underground lake that requires constant management, so as to prevent the water from compromising the seals and inundating the active workings of the No. 7 Mine. Tr. 163. The pumps, therefore, are situated at the lowest elevations of the sealed areas in natural water collection basins. Tr. 163, 198. In addition to the pumps, as part of its methane drainage system, JWR has numerous degas wells situated at intervals throughout the sealed area, which are the sole means of determining atmospheric conditions in the otherwise inaccessible area.[2] Tr. 206–07, 211-12, 240-42.

Typical of JWR's 13 active electric submersible pumps, the pump at issue is one of five operating to dewater the sealed area in the No. 7 Mine, and was installed in 1997. Tr. 31, 155; ex. R-5. It is situated 6,022 feet south and 2,994 feet west of the nearest seal. Tr. 28, 118, 194; ex. J-1. The area was sealed in October of 2002. Tr. 208. All electric controls for the pump are housed above ground in a pump starter unit. Ex. R-2, R-3. From the starter unit, a high voltage power conductor cable, encased in a steel pipe, runs some 2,000 feet underground to the original mine floor, and an additional 200 feet beneath that surface, where the electric motor and pump assembly are situated in a sump.[3] The steel casing, at ground level on the surface, is capped by a metal well head. The motor sits at the bottom of the sump and is 30 feet high, there is a 5-foot seal between the motor and the pump, and the pump, itself, also 30 feet high, sits on top of the seal. According to the manufacturer's specifications, in order for the pump to operate, there must be at least 30 feet of water ("head") above the inlet of the pump, so that the motor and pump assembly require 65 feet of water in which to operate. Inside the steel casing is also a metal discharge pipe. The casing is slotted just below the water level, allowing water into the casing where it is forced down to a second set of slots at the bottom, where it cools the electric motor. The pump, with a 500-gallon-per-minute capacity, then transports the water up the discharge pipe to a surface settlement pond. A vacuum sensor, located on the surface, automatically shuts off the power from the pump starter to the entire system, if it detects that the water level has dropped below 30 feet of head above the pump. Additionally, JWR has installed a redundant safety system, undercurrent protection, that will also disable the system. Tr. 33-35, 156-64, 245-46.

JWR's submersible pumps, utilized in sealed areas since 1987, had always been inspected by MSHA under Part 77 regulations applicable to surface areas of underground mines, and the

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intake air courses. 30 C.F.R. § 75.301. "Sealing" refers to a routine method of shutting-off areas utilized by some mines to secure the active areas against flowing or escaping gas, air or liquid, by erecting permanent barriers. *Dictionary of Mining, Mineral, and Related Terms* at 487.

[2]A degas well is a vertical borehole through which methane and other contaminants are removed from the atmosphere of a mine.

[3]A "sump" is an excavation made underground to collect water, from which it is pumped to the surface or to another sump nearer the surface. *Dictionary of Mining, Mineral, and Related Terms* at 551.

National Electric Code ("NEC"). Tr. 54-57, 99-100, 125, 167. Under Part 77, the pumps were not required to be permissible.[4] Sometime in 2003, in response to inconsistent enforcement in the districts, i.e., some were inspecting submersible pumps under Part 75 while others were applying Part 77, MSHA's Safety Division decided to impose uniform, nationwide compliance under Part 75. Tr. 101-104. As a consequence, in order to continue use of nonpermissible pumps behind the seals underground, operators who had been inspected under Part 77 were required to file Petitions for Modification under section 101(c) of the Act.

JWR opposed MSHA's application of Part 75 underground standards and when extensive informal discussions about the safety of JWR's pumps proved unfruitful, JWR filed a Petition for Modification with MSHA on July 22, 2003, seeking approval to continue operation of its nonpermissible submersible pumps in sealed areas of its Alabama mines, including No. 7 herein at issue. Ex. C-1. In the meantime, before issuing its decision on the Petition, MSHA issued Program Information Bulletin No. P03-26 ("PIB"), clarifying compliance requirements for nonpermissible electric submersible dewatering pumps installed in sealed areas, return air courses or bleeder entries in underground coal mines. The PIB notified the mine industry of MSHA's application of section 75.507 to submersible pumps, that the pumps are located in return air for purposes of the regulation, and that they are required to be permissible, unless a modification is approved by MSHA. Ex. R-6.

MSHA issued its Proposed Decision and Order ("PDO") on June 17, 2004, authorizing JWR to continue use of its submersible pumps under specific detailed conditions. Ex. C-1. JWR found the conditions unacceptable and appealed the PDO, arguing, *inter alia*, that section 75.507 does not apply to the pumps at issue.[5] The appeal has been stayed, pending the outcome of the instant matter.

On October 14, 2004, MSHA Inspector Charles Carpenter conducted a AAA inspection of JWR's No. 7 Mine. Tr. 26. Of the five submersible pumps installed in the sealed area, only the one at issue in this case was running. Tr. 31. Upon inspecting the pump, Carpenter determined that it was nonpermissible and operating in return air, in contravention of the

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[4]The regulations define permissibility: "(1) As applied to electric face equipment, all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment." 30 C.F.R. § 75.2.

[5]There is credible testimony that the modifications mandated by the PDO for all the pumps would cost JWR an estimated $1.3 to $1.4 million. Tr. 171. Moreover, there is no dispute that it is impossible for JWR to make the existing pumps permissible. Tr. 110, 115, 167.

provisions of the PIB. Consequently, he issued section 104(a) Citation No. 7682362, alleging a non-significant and substantial violation of 30 C.F.R. § 75.507-1, and describing the hazardous condition as follows:

> The operator is operating a nonpermissible 3,200-volt alternating current (VAC) submersible pump with nonpermissible electric power connections in the southwest sealed area of the Jim Walter Resources, Inc., No. 7 mine. The pump with its connections is not being ventilated with intake air by the No. 7 mine ventilation system.

Ex. R-1; tr. 26-27. JWR timely contested the citation, challenging the PIB and MSHA's application of the underground regulation to what JWR considers surface equipment.

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

In pertinent part, the cited regulation provides as follows:

> (a) All electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible . . . .

30 C.F.R. § 75.507-1.

It is well settled that the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F. 2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 44 U.S. 102, 108 (1980). Where the language of a regulatory provision is clear, its terms must be enforced as written, unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results. *See id.*; *Utah Power and Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, the meaning is ambiguous, deference has been accorded by the courts to the Secretary's reasonable interpretation of the regulation. *See Udall v. Tallman*, 30 U.S. 1, 16-17 (1965) (finding that the reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1995)); *Exportal Ltda. v. United States*, 902 F. 2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face.") (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)). The parties both take the position that section 75.507-1, including "return air" as defined by section 75.301, is unambiguous. Cont. Br. at 14; Sec. Br. at 7. I agree, and find that the plain meaning of the regulation requires that the electric submersible pump at issue be

permissible, if it is operating in return air.[6] *Assuming arguendo*, that the regulation were ambiguous, the Secretary's interpretation would not be entitled to deference because, for the reasons that shall be discussed below, it is unreasonable.

As a threshold matter, JWR argues that, by definition, the sealed area is not a part of the mine, because the permanent barriers break the connection between the active mine workings, including worked-out areas, and the former mine workings.[7] The company reasons that, as a practical matter, the solid barriers formed by the seals and ribs prevent working, traveling ventilating, examining and inspecting behind the seals. Cont. Br. at 1, 11-13. The Secretary, conversely, maintains that the sealed area results from the work of extracting bituminous coal and is, therefore, a mine, required to be depicted on the mine maps in accordance with 30 C.F.R. § 75.1200(b). Sec. Br. at 9-10. Recognizing that the Act requires broad interpretation to effectuate its protective purposes, JWR's reliance on the permanent separation between the sealed area and active mine workings to advance this argument is misplaced, especially in view of the water's potential to break through the seals and flood the active mine. JWR, itself, minimizes the significance of the physical barriers when it comes to the questions of liability and responsibility, by the very emphasis and diligence it places on water removal within the contained areas. No construction of the cases JWR cites as authority for its position exempts the sealed area from mine status, absolves JWR of its responsibility to maintain the sealed area, or short-circuits the analysis required to determine whether section 75.507 is applicable to the sealed area. *See Bushy Creek Coal Co.*, 17 FMSHRC 966 (June 1995) (ALJ); *Apex Minerals, Inc.*, 19 FMSHRC 796 (April 1997) (ALJ). Accordingly, I find that the sealed area is a "mine" subject to regulation under the Act.

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[6]"Return air" is air that has circulated the workings and is flowing towards the main mine fan. *Dictionary of Mining, Mineral, and Related Terms* at 457. The regulations define "return air" as " [a]ir that has ventilated the last working place on any split of any working section or any worked-out area whether pillared or nonpillared. If air mixes with air that has ventilated the last working place on any split of any working section or any worked-out area, whether pillared or nonpillared, it is considered return air. For purposes of § 75.501, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air." 30 C.F.R. § 75. 301.

[7]Section 3(h)(2) of the Act defines "coal mine" as: "an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities." 30 U.S.C. § 802(h)(2). By regulation, a coal mine "[i]ncludes areas of adjoining mines connected underground." 30 C.F.R. § 75.2.

The parties do not dispute that the submersible pump at issue is located outby the last open crosscut. Ex. J-1; Resp. Br. at 6. They also agree that the pump is nonpermissible. Stip. 8. The point of controversy, then, is whether this pump, with its underground components, is operating in return air. At the heart of this question is MSHA's concern that the pump poses a potential ignition source for an underground fire or explosion.

JWR contends that the pump's controls are located above ground, the underground motor/pump assembly is operating underwater and, because the steel casing connecting the motor to the surface components is situated in stagnant, "otherworldly" atmosphere rather than return air, Part 77 surface standards should apply. Cont. Br. at 2, 9. The Secretary, on the other hand, maintains that the worked-out area contained return air at the time it was sealed, the resultant atmosphere constitutes return air, and that the exchange of air at the seals pulls return air from the active mine into the sealed area. Sec. Br. at 7. Furthermore, the Secretary argues, as a single unit, linked from the surface controls to the submersed underground motor by the steel encased electric cable, the electric components are situated in return air. *Id.* at 10. While I agree with the Secretary that the submersible pump system constitutes a single unit of electric equipment operating underground, the evidence in its entirety does not support her contention that the pump is being operated in return air.

a. Testimony of the Secretary's Witnesses

MSHA Inspector Charles Carpenter testified that once prior to October 2003, he had inspected the pump at issue under Part 77 and the NEC. Tr. 54-56. According to Carpenter, there was "no real direction" or "no clear-cut way" provided to the districts to inspect the submersible pumps until MSHA issued the PIB. Tr. 56-57. The operation of the pump did not change between the two inspections, he acknowledged, but he issued the instant citation based on the change in enforcement policy set forth in the PIB. Tr. 57-60. When asked whether the five pumps in No. 7 are located in return air, in replying "yes and no," he explained that "[t]he area that's sealed is separated from the mine atmosphere, the normal mine atmosphere, by a set of seals which basically stagnates that area. However, based upon pressure differential as well as the mechanics of the pump, it would draw that return air into the sealed area, or vice-versa, depending on pressures." Tr. 31-32, 63. Moreover, while he opined that water pumped from the reservoir would be displaced by air seeping through the seals from the active workings, he conceded that he did not consider the air within the seals to be return air, and that the air exchanged at the seals probably would not travel very far. Tr. 32-33, 47, 50. In fact, Carpenter acknowledged, Part 75 only requires testing of the air/gas mixture 15 feet on the other side of the seal. Tr. 50-51. Carpenter also attested to lacking knowledge of the air/gas mixture in the vicinity of the pump. Tr. 51-52. Moreover, he conceded that he knew of no event that would cause an explosion to a pump submersed in a large body of water. Tr. 54.

Specialist Robert Phillips oversees the petition program for MSHA's Division of Safety. The PIB at issue was drafted primarily by Phillips. Tr. 76. He also drafted the PDO that has

been appealed to the Secretary. Tr. 114. Phillips testified that there are only two types of air underground, intake or return, and that the air passing by the seals is return air. Tr. 77.[8] He stated that, although the pump is submerged in 30 feet of water, the metal pipe is conductive, and the electric wiring and associated circuitry present hazards. Tr. 78-79. According to lightning experts, he asserted, the mine is located in a lightning-prone area. Tr. 89. In support of MSHA's mandate that the submersible pump be permissible, Phillips referenced several mine explosions that occurred in sealed areas, occasioned by lightning striking surface metal equipment and igniting methane underground. Tr. 79-81. These incidents were investigated, he stated, and resulted in a report by the National Institute for Occupational Safety and Health ("NIOSH"), aimed at reducing the danger of gas explosions in sealed areas of mines.[9] Tr. 81. Phillips described the transition zone at the seals and well heads, where intake and exhaust of air occurs due to differences in atmospheric pressures, and methane accumulates in the explosive range from 5 to 15%. Tr. 82-83. While he framed the hazard as operating a nonpermissible piece of equipment in a sealed area somewhere near a transition zone, where the oxygen/methane mixture goes through the explosive range, he conceded that the regulations require only a 15-foot transition zone behind the seals for monitoring air/gas mixtures. Tr. 102, 116-18. According to Phillips, he was unaware of MSHA applying Part 75 to JWR's pump systems prior to the issuance of the PIB, and conceded that in so doing, MSHA had been aware that it was making illegal what had previously been legal operation of these pumps. Tr. 99, 103-105. He gave conflicting testimony, however, as to whether MSHA had applied Part 75 regulations to submersible pumps in general, before it issued the PIB. Tr. 125; but see 127-28. Phillips admitted that MSHA had not studied whether there had been fires or explosions in conjunction with operation of submersible pumps prior to issuance of the PIB, and that none of his references to explosions behind seals caused by lightening strikes, involved deep wells operating in flooded areas. Tr. 106-07. Phillips also acknowledged that the pump is a great distance from the nearest seal, and that he does not know the content of the air/gas mixture above the water where the pump is located. Tr. 118-19, 133. Furthermore, he conceded that if the oxygen content were less than 1%, an explosion would be impossible. Tr. 134. Finally, when asked to refer to the NIOSH report, Phillips conceded that if the methane concentration is above 15%, "lightning has no effect." Tr. 136.

Dean Skorski, supervisory electrical engineer in the Mine Electrical Systems Division at MSHA's Pittsburgh Safety and Health Technology Center, testified that he had conducted an evaluation of the pump's surface grounding system. Tr. 147. When asked about underground

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[8]"Intake air" is "[a]ir that has not yet ventilated the last working place on any split of any working section, or any worked-out area, whether pillared or nonpillared." 30 C.F.R. § 75.301.

[9]In recommending methods of reducing the probability of occurrence of explosions from lightning penetrations into underground sealed (gob) areas, NIOSH Technology News No. 489, issued May 2001, concludes that methane concentrations greatly above the upper flammable limit of 15% will be unaffected by lightning or other potential sources that might exist in the gob, such as old batteries, roof falls and spontaneous combustion. Ex. C-2.

hazards associated with operating the pump, he stated that "there's one system in place, and it extends from the utility through the transformer station to the underground area. And not knowing what the environment is underground, the hazards are hard to define." Tr. 142. Skorski conceded that, in case of an electrical problem caused by a lightning strike or fault going into the pump system, if the underground environment contains less than 1% oxygen, or a significant body of water, an explosion will not occur. Tr. 147-48.

b. Testimony of JWR's Witnesses

Randy Watts, senior electrical maintenance engineer since 1990, is involved with the design and installation, maintenance and testing of all electrical equipment at JWR. Tr. 153-54. Watts described in great detail the operation of the electric submersible pumps, and stated that JWR has not experienced significant problems since the company began using them in 1987. Tr. 169. He could not imagine an ignition or explosion occurring, he asserted, because of the motor's submersion in at least 60 feet of water. Tr. 165-66. When asked specifically how the pump at issue would fare in the event of a lightning strike, he opined that it would dissipate the energy very quickly because of its contact with wet earth and the water at the very bottom of the mine. Tr. 173-74. Watts also expressed his belief that Part 77 addresses any hazards associated with operation of the pump. Tr. 175-76.

Thomas McNider has been directly involved in ventilation or in its oversight since beginning work at JWR in 1976 and, in that capacity, has been directly responsible for most of the ventilation design for all the mines and insuring compliance with Part 75.300 ventilation standards. Tr. 184-87. He testified about his extensive experience in seal construction, and that he works with the mines in designing the layout of the seals for worked-out areas. Tr. 187-89. Using a map of No 7, McNider located the pump at issue in the sealed area, 2,994 feet west and 6,022 feet south of the nearest seals. Tr. 194. He located the nearest degas wells 1,634, 3,008, and 3,574 feet away from the pump. Tr. 195-96; ex. C-3, J-1. McNider explained the utility of the degas wells, in determining the composition of the atmosphere above the water, by stating that "[w]e produce these wells on an ongoing basis, seven days a week, 24 hours a day. . . . We sample these periodically. After this area is sealed for a certain period of time, these wells will reflect the atmosphere that the deep well would see, in time. And what I mean by 'in time' is after it's gone through a period to where you reach a stable atmosphere back here, which can be very short." Tr. 197; ex. C-3. McNider stated that a major distinguishing factor between sealed and unsealed areas is that Part 75.334 requires that worked-out areas be either ventilated or sealed, but not both. Tr. 200. McNider opined that the sealed area does not contain intake air, by testifying that "[i]n my definition of 'return air' is as it's used to describe under Part 75, and in a working sense air that is intake air or air that is used to ventilate either a working section or some other piece of equipment or whatever defined under Part 75, as it's coursed away into the fan, then it becomes return air. When you are in a sealed portion, that air does not work. It is not moved, it's stagnant. So to me, that is a distinction between sealed and unsealed." Tr. 205-06; see 234-37. According to McNider, samples were collected from the degas wells and analyzed

the day before the hearing. Tr. 206. He reported the atmosphere in the vicinity of the pump to contain 90% methane and less than 1% oxygen - - an atmosphere well beyond the 5 to 15 % explosive range. Tr. 206-08. He dated the contained atmosphere at approximately two and a half years old, since the seals were completed around October 2000.
Tr. 208. McNider also elaborated on the composition of the non-circulating atmosphere by stating that "[basically, after you seal an area, the oxygen is depleting because it is oxidizing with the carbon in the area, and either typically it forms carbon dioxide, and the residual left is nitrogen and the methane is building up. It takes a little bit of - - that was what I referred to earlier about a certain amount of time, which would be in my estimate a few months, for it to reach this steady state. And then basically what you have there is methane, nitrogen and carbon dioxide." Tr. 208-09; see 232-33, 299-40. In responding to questions about whether the atmosphere had remained essentially the same after settling into its steady state, he asserted that, typically, the samples yield the lowest methane concentration at 60%, with residual nitrogen and less than 1% oxygen. Tr. 209-11. On cross-examination, McNider acknowledged that there is no way to ascertain the exact methane concentration in the atmosphere around the pump, but opined that it would be similar to the concentrations measured at the degas wells. Tr. 231, 240-41.

David Hicks, planning manager of No. 4 Mine since 1998 and familiar with the submersible pump at issue, testified that he is unaware of the head of water above the pump ever dropping below 30 feet. Tr. 244-45. Hicks also explained that the pump only functions with a continuous supply of water and that, coupled with the force of gravity, it could never remove all the surrounding water. Tr. 245-46.

B. Disposition

The Secretary's enforcement action is based on her interpretation of return air, as defined by section 75.301. Therefore, what is at issue here is the interpretive policy applying the regulation, rather than the regulation, itself. Under the plain language of section 75.507-1, the electric pump, located outby the last open crosscut, must be permissible if it is being operated in return air. The Secretary's contention that the air within the sealed area has to be return air, since it cannot be intake air, would apply to the active mine and not the worked-out sealed area. By definition and operation, intake and return air circulate and work, consistent with the demands of active mining in the accessible parts of the mine. Sealing causes dramatic atmospheric changes within an enclosure, within a relatively short period of time, such that the resultant stagnant environment is entirely dissimilar to that in the active mine. By standing steadfast on the position that underground atmosphere, without exception, must be the one simply because it cannot be the other, the Secretary is ignoring the distinctly different environmental properties of sealed and active areas in the mines. All air changes underground; return air, after all, was intake air, before it performed the cleansing function for which it was brought into the mine. Likewise, it undergoes further change when it is shut off from ventilation in the active mine. The Secretary's inspector, in fact, wavered from her position that the sealed area contains return air.

Tr. 31-32, 47. Testimony that the methane/oxygen mixture behind the seals is at a level far beyond the explosive range, was wholly unrebutted by the Secretary. McNider gave credible testimony that the degas wells yield methane concentrations ranging from 60% to 90%. Furthermore, the Secretary did not challenge the NIOSH report that lightning and any other potential ignition sources pose no hazard to methane in concentrations greatly beyond the upper flammable limit of 15%. In focusing on the air exchange at the seals, she did not establish that any contamination by return air migrates appreciably beyond the 15-foot transition zone to create an explosive atmosphere where the pump is located. Moreover, the Secretary launched no challenge to JWR's argument that, notwithstanding the methane concentration, the lake-sized body of water in the sealed area is not conductive to lightning. Based on the evidence in its entirety, it is my finding that JWR's submersible pump in the No. 7 Mine is not operating in return air. Therefore, section 75.507-1 is inapplicable and the pump is not required to be permissible.

Because I find that the Secretary's interpretation of section 75.507-1, as applied to worked-out sealed areas, is at odds with the regulation she seeks to enforce by impermissibly expanding the unambiguous definition of return air, and that her policy erroneously applies a permissibility standard to electric equipment that is not being operated in return air, no violation has been committed by JWR and Citation No. 7682362 is hereby vacated.

ORDER

Accordingly, it is **ORDERED** that Citation No. 7682362 is **VACATED.**

Jacqueline R. Bulluck
Administrative Law Judge
(202) 434-9987

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

December 21, 2005

SPARTAN MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2002-111-R
v.	:	Citation No. 7191145; 05/15/2002
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 2002-112-R
	:	Citation No. 7191146; 05/15/2002
	:	Mine ID 46-08159
	:	Shadrick Mine

ORDER OF DISMISSAL ON REMAND

Before: Judge Hodgdon

This case is before me on remand from the Commission. *Spartan Mining Co.*, 27 FMSHRC ___, slip op. at 2, No. WEVA 2002-111-R (Nov. 16, 2005).[1] Noting that Cannelton Industries, Inc., the previous owner of the mine, paid the civil penalty assessed for this violation prior to selling the mine, Spartan Mining has requested leave to withdraw the Notice of Contest. Commission Rule 11, 29 C.F.R. § 2700.11, provides that "[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission."

The motion notes that the Secretary has no objection to this request. Accordingly, the motion for leave to withdraw is **GRANTED** and it is **ORDERED** that this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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[1] To be published as *Spartan Mining Co.*, 27 FMSHRC 718 (Nov. 2005).

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 30, 2005

CRIMSON STONE,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2005-325-RM
v.	:	Citation No. 6088368; 08/25/2005
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Crimson Stone
ADMINISTRATION, (MSHA),	:	Mine ID No. 01-02945
Respondent	:	

DECISION

Appearances: Bruce H. Henderson, Esq., Phelps, Jenkins, Gibson & Fowler, L.L.P. Tuscaloosa, Alabama, on behalf of the Contestant;
Amy R. Walker, Esq., Office of the Solicitor, U.S. Dept. of Labor, Atlanta, Georgia, on behalf of the Respondent.

Before: Judge Melick

This case was filed by Crimson Stone pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," to challenge Citation No. 6088368 issued by the Secretary on August 25, 2005. The citation was issued under Section 104(d)(1) of the Act and, as amended, alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 56.14107(a).[1] The general issue before me is whether

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[1] Section 104 (d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to

Crimson Stone violated the cited standard and, if so, whether the violation was "significant and substantial" and the result of "unwarrantable failure."

Citation No. 6088368 alleges as follows:

> The guard that provided protection of persons from the tail pulley, head pulley and chain drive and on the conveyors that take the rock from the dry plant crusher to the screen deck, was not being maintained. The guard was hanging and it was easy to come into contact with the moving machine parts. Employees working/traveling near this area were exposed to the possibility of injury, from entanglement hazards, and/or pinch points. Employees work and travel this area daily.
>
> This area has been cited for guarding in the previous two inspections and the foreman should have been aware of the condition. This condition shows unwarrantable failure of management to provide and maintain a secure guard at this location.

The cited standard, 30 C.F.R., § 56.14107 (a), provides that:
"[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, fly wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Inspector Doniece Schlick of the Department of Labor's Mine Safety and Health Administration (MSHA), has a Bachelor of Science degree in mining engineering from the University of Alabama, prior mining industry experience and 15 years experience with MSHA. Ms. Schlick began her inspection of the Crimson Stone operation on August 25, 2005.

The Crimson Stone mine is comprised of three plant operations: the wet plant, dry plant and excavator. Before commencing her inspection of the dry plant, Ms. Schlick "believed" that the noise she heard from the direction of that plant indicated that it was operating. Admittedly however, she did not actually see the plant in operation and at the time of her actual inspection it was in fact not operating. At the time of her inspection she observed "particles" falling off of the belt. She therefore surmised that the belt had recently been operating.

Upon inspection of the dry plant, Schlick noted that a guard on the right side of the conveyor was "worn out" and hanging loose, exposing pinch points at the chain drive, head pulley and tail pulley (See Exhibit G-4). She noted that the head pulley pinch point was located about chest high above ground level, the chain drive elbow high and the belt and tail pulley knee

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> cause all persons in the area affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

high. She testified that she stood 5 foot 5 inches in height. She further testified that the dry plant was "energized" and not "locked out."

Inspector Schlick testified that even if the guard had been properly bolted in position, it would still not have provided adequate protection. It had lost several rows of protective wire mesh and would have been of insufficient size to have provided adequate guarding of the noted pinch points. The cited condition was abated by constructing additional guarding as depicted in photographic exhibits G-5 and G-7.

Mine supervisor William Hunter testified that he was responsible for safety at the mine. Hunter testified that the last time he had seen the guard it had been bolted into position. He acknowledged in reference to the size and shape of the guard that there was no other difference from the time he had last seen it. It may therefore reasonably be inferred that no other guarding had been provided on the top or that side of the pinch points cited herein. Miller noted that material is cleaned up beneath the belt once or twice a day and that rollers and bearings must be greased.

Recalled as a witness for the operator, Hunter testified that the dry plant was not operating at the time of the inspection and indeed it had last operated some two to three weeks before. Hunter also testified that not only was the dry plant not operating that day but the power to the dry plant was not on. According to Hunter, it was company policy not to run two crushers at the same time and he believed there was inadequate power to run two crushers at the same time. Since the wet plant crusher was admittedly operating on that date it may be inferred from Hunter's testimony, if credible, that the dry plant crusher was not operating that day.

Crimson Stone President James Sanders was not present at the mine when the citation was issued. He testified that the dry plant is never operated while other plants are operating at the mine because of the high cost of doing so. He also believed that there was inadequate power to operate more than one plant at the same time.

Crimson Stone maintenance man Donald Hughes testified that he cleans up accumulations under the dry plant by using a "skid loader". Hughes testified that he does not use a shovel to clean under the plant but rather remains inside the "skid loader". According to Hughes, on the day before the citation was issued, he struck the guard with the "skid loader" and tore it loose. He claims that the dry plant was not operating on August 25th, the date of the citation and that the "main breaker" had shut off the power to that location.

Respondent does not dispute the condition of the cited guard or that contact with the pinch points could cause injury. It also acknowledges in its brief that "[t]he guard had clearly been pulled off at the bottom and was hanging by one bolt that attached the wire mesh guard to the conveyor" (Respondent's Brief p.5). Within this framework of undisputed evidence, I conclude that the violation is proven as charged. In reaching this conclusion I have not disregarded Respondent's argument that the Secretary failed to prove that the dry plant was

actually operating with the defective guard when it was cited. The standard at bar does not, however, require such proof.

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

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (August 1984). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In attempting to prove that the violation was "significant and substantial" the Secretary elicited testimony from Inspector Schlick as found in the following colloquy:

Q. You cited - - you assessed the citation as an [S&S] citation; is that right?
A. **Yes, I did.**
Q. And have you received any training from MSHA about pinch point guards?
A. **Yes, I have.**
Q. Have you investigated any accidents in relation to inadequate guards?
A. **Yes, I have.**
Q. Have you reviewed any accident reports related to inadequate guards?
A. **Yes, I have.**
Q. In that experience, what sorts of injuries are likely to occur as a result of inadequate guards?
A. **The injury that occurred with the guards are always severe and fatal.**
Q. Can you give us some examples?
A. **This year we've had three guards - -**

MR. HENDERSON: Objection. Relevance, Your Honor.
MS. WALKER: Your Honor, I'm trying to establish S&S.
THE COURT: Over ruled. Do you recall the question?

Q. I asked for examples of injuries that you're familiar with.
Mr. HENDERSON: And I - - okay, Your Honor.
THE COURT: Over ruled.

A. **This year alone we've had three different fatality incidents regarding one of them that we had in Mississippi in a plant that would have been similar to the one at the Crimson Stone Plant. A gentleman's raincoat was caught in the bottom roller and it broke his neck.**

Q. In the accidents related to insufficient guarding, do all of those accidents occur like inadvertent contact pinch points?

A. **No.**

Q. What other sorts of situations have occurred?

A. **Actually - -**
MR. HENDERSON: Objection, Your Honor. Now, we're in general testimony that offers nothing.
THE COURT: Over ruled.

A. **This year we have data that shows actually maintenance people and foramen [sic] are coming in to contact with moving parts because they are trying to eliminate a problem from pieces of rebar getting caught in the tail pulley. They'll try to reach in and jerk it out.**

Q. You're aware of accidents that have resulted as intentional contact?

A. **Yes.**

Q. You assess the citation again as S&S?

A. **Guarding accidents are our highest area of fatalities and incidents right now. That's why we're discussing guards when we go on inspections.**

Q. What did this particular plant made injury reasonable likely?

A. **This area as depicted in Government's 6 is an easily accessible area. The vehicle is less than five feet from the guard. This here is a traveled area. You have to walk by this area where the vertical curves are open. They are close within 10 or 15 feet. One of the main roadways around the plant is right there so I would assume that with it's proximity and the traveled ways being close. You have to grease these pulleys and that's usually maintenance that's done three or more times a week.**

Q. Did you see any evidence in the work area depicted - - well, in all of the pictures that we've introduced so far that there was actually that human beings actually worked in that area?

A. **There was. It's obvious that is well traveled or beaten down. There was a shovel laying up against the trailer.**

Q. Approximately how far away from the cited area was the shovel?

A. **Ten feet, five feet.**

Q. How many employees to your knowledge - - how many employees does Crimson Stone have?

A. **Four.**

Q. And does the number of employees affect your assessment of the likelihood of a injury - - sorry. Let me rephrase. To your opinion in your experience does the low number of employees make an injury less likely?

A. **No, it does not.**

Q. Why?

A. **The likelihood that an accident would happen is that people traveled that frequently.**

While the Secretary could no doubt have provided more particularized testimony to support her findings herein I find that this evidence considered in conjunction with the corroborative photograph in evidence (Exhibit G-4) and the inferences to be drawn therefrom are sufficient to sustain the Secretary's findings that the violation was "significant and substantial".

I also find that the violation was the result of the operator's "unwarrantable failure". Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991); *see also Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent).

In finding that the violation was the result of "unwarrantable failure" I have not disregarded the testimony of maintenance man Hughes that on the afternoon of the day before the violation was cited he had torn the cited guard loose and the testimony of Supervisor Hunter that he did not see the damaged guard before the citation was issued at 9:45 the next morning. Ordinarily such circumstances would mitigate against the high level of negligence required for an unwarrantable finding. However, based on the credible evidence that the guard was in such an obviously degraded condition that it would have been deficient even if it had been properly in position, I conclude that Supervisor Hunter had prior knowledge that the guarding at the location was seriously deficient and that he failed to remedy that condition. In sum, it may reasonably be inferred that Supervisor Hunter had seen the pinch points at issue at a time when only protected by the badly deteriorated guard, yet failed to provide fully adequate guarding. Under the circumstances I conclude that an agent of the operator knew of a violative condition well before

the day it was cited and yet failed to take corrective measures. This evidence constitutes the level of gross negligence necessary to support unwarrantable findings.

I also note that this operator had twice before, in August 2004 and January 2005, been cited for inadequate guarding on the same conveyor as cited herein. Prior similar violations place mine operators on heightened alert for similar violative conditions and notice that greater efforts are required to assure compliance. See *Peabody Coal Company*, 14 FMSHRC 1258 at 1263-4 (August 1992) and *Deshetty employed by Island Creek Coal Company*, 16 FMSHRC 1040, 1051 (May 1994). The evidence herein of two recent similar violations thus provides an independent basis for finding "unwarrantable failure".

Under the circumstances, I find that the violation is proven as charged, that it was "significant and substantial" and that it was the result of the operator's "unwarrantable failure."

ORDER

Citation No. 6088368 is hereby affirmed as a citation issued pursuant to Section 104 (d)(1) of the Act. Contest Proceeding Docket No. SE 2005-325-RM is therefore dismissed.

Gary Melick
Administrative Law Judge
202-434-9977

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/lh

Federal Mine Safety & Health Review Commission
Calendar Year 2005 Index

This index of decisions and orders issued during the calendar year 2005 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 27. 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

Case Name	Docket Number	Date	Page Number FMSHRC Vol. 27
Northern Gravel Co.	CENT 2005-223-M	08-11-2005	Pg. 541
O/N Minerals (St. Clair) Co.	CENT 2005-185-M	08-09-2005	Pg. 524
Oak Grove Resources, LLC	SE 2005-27 SE 2006-24	05-18-2005 12-16-2005	Pg. 458 Pg. 928
Pollock v. Kennecott Utah Copper Corp.	WEST 2003-182-DM	10-25-2005	Pg. 651
Prairie Material Sales, Inc.	LAKE 2004-94-M	05-18-2005	Pg. 454
Premier Elkhorn Coal Co.	KENT 2006-18	12-08-2005	Pg. 879
Premier Chemical, LLC	WEST 2005-188-M	03-18-2005	Pg. 256
R & D Coal Co.	PENN 2006-36	12-16-2005	Pg. 925
Radford, employed by DiCaperl Minerals	WEST 2005-111-M	03-07-2005	Pg. 201
Riverside Cement Co.	WEST 2006-10-M	12-08-2005	Pg. 888
Riverton Investment Corp.	WEVA 2006-27-M	12-14-2005	Pg. 918
Rizzuto, employed by Tilcon New York, Inc.	YORK 2005-124-M	07-21-2005	Pg. 515
Rogers Group, Inc.	CENT 2005-25-M	03-01-2005	Pg. 173
Sequatchie Concrete Service	SE 2005-247-M	08-09-2005	Pg. 531
Service Transport, LLC	LAKE 2005-121-M	09-20-2005	Pg. 614
Sidney Coal Co.	KENT 2005-177	05-04-2005	Pg. 425

Commission Decisions and Orders

Federal Mine Safety & Health Review Commission
2005 Index

ALJ Decisions and Orders

ALJ Decisions and Orders

Case Name	Docket Number	Date	Page Number FMSHRC Vol. 27
Gray (Sec'y of Labor on behalf of) v. North Star Mining, Inc.	KENT 2001-23-D	04-22-2005	Pg. 398
Hanson Aggregates New York, Inc.	YORK 2005-22-M	11-21-2005	Pg. 833
Harvey W. Buche Road Building, Inc.	WEST 2004-397-M	04-15-2005	Pg. 395
Heetland (Sec'y of Labor on behalf of) v. Smasal Aggregates & Asphalt, LLC	CENT 2006-43-DM	11-29-2005	Pg. 874
Herren	WEST 2004-311-M	08-17-2005	Pg. 597
Higman Sand & Gravel	CENT 2005-54-M	09-30-2005	Pg. 641
Holden v. Ross Island Sand & Gravel	WEST 2004-264-DM	04-28-2005	Pg. 400
Hubble Mining Co.	VA 2005-17	09-28-2005	Pg. 639
James Carney Construction	WEST 2005-51-M	08-15-2005	Pg. 595
Jim Walter Resources, Inc.	SE 2003-160 SE 2005-28-R	11-01-2005 12-20-2005	Pg. 757 Pg. 968
Leeco, Inc.	KENT 2004-65	01-21-2005	Pg. 39
Lone Mountain Processing	KENT 2004-164	04-29-2005	Pg. 414
Lowe v. Aggregate Industries	WEST 2001-246-DM	09-08-2005	Pg. 629

ALJ Decisions and Orders

Case Name	Docket Number	Date	Page Number FMSHRC Vol. 27
McClain (Sec'y of Labor on behalf of) v. Misty Mountain Mining	KENT 2005-96-D	10-21-2005	Pg. 690
Morales (Sec'y of Labor on behalf of) v. Arenero Rafael Colon, Inc.	SE 2005-71-DM	02-11-2005 02-24-2005	Pg. 160 Pg. 129
National Cement Co. of California	WEST 2004-182-RM	01-12-2005 02-07-2005 06-01-2005	Pg. 84 Pg. 157 Pg. 506
Ondreako v. Kennecott Utah Copper Corp.	WEST 2004-141-DM	03-28-2005	Pg. 334
Original Sixteen to One Mine, Inc.	WEST 2004-330-M	08-19-2005	Pg. 600
Perry County Coal Corp.	KENT 2004-190	05-17-2005	Pg. 481
Placerville Industries, Inc.	WEST 2004-256-M	02–04-2005	Pg. 115
R & D Coal Co.	PENN 2005-213-R	09-16-2005	Pg. 653
Randolf (Sec'y of Labor on behalf of) v. Christy Minerals Co.	CENT 2005-68-DM	01-11-2005	Pg. 21
Southwest Concrete & Paving	CENT 2004-49-M	03-11-2005	Pg. 293
Spartan Mining Co.	WEVA 2002-111-R	12-21-2005	Pg. 979
Speed Mining, Inc	WEVA 2005-20-R	12-02-2005	Pg. 935
T. F. Luke & Sons, Inc.	CENT 2005-71-M	12-09-2005	Pg. 950
Tamko Roofing Products, Inc.	YORK 2004-72-RM YORK 2005-87-RM	05-31-2005 11-04-2005	Pg. 486 Pg. 829

ALJ Decisions and Orders

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