

JANUARY 2003

THERE WERE NO COMMISSION DECISIONS OR ORDERS

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

January 6, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-210-M
Petitioner	:	A.C. No. 23-00759-05519
	:	
v.	:	
	:	Southwest Quarry
SOUTHWEST QUARRY AND	:	
MATERIALS, INC,	:	
Respondent	:	

DECISION

Before: Judge Manning

The Secretary filed a petition to assess a civil penalty of \$9,500 against Southwest Quarry and Materials, Inc., (“Southwest Quarry”) in this case. This penalty was proposed for Citation No. 4458601, which alleges that Southwest Quarry denied duly authorized representatives of the Secretary the right to inspect its quarry on December 11, 2001, in violation of section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (“Mine Act”). Southwest Quarry filed an answer to the Secretary’s petition which states that it assumes that the proposed penalty is a “misprint.” It further answered as follows:

We went to Federal Court and settled this matter. If you people think that I’m going to keep paying you, you had better think again.

The answer did not deny the allegations contained in the citation. This case was set for hearing.

On November 20, 2002, the Secretary filed a motion for summary decision. In the motion, the Secretary states that the precise issue contested by Southwest Quarry in this case was “actually and necessarily decided” by the United States District Court for the Eastern District of Missouri in *Chao v. Chester McDowell*, 198 F.Supp.2d 1093 (2002). As a consequence, the Secretary argues that, under the doctrine of collateral estoppel, the fact that Southwest Quarry denied entry on December 11, 2001, may not be relitigated before the Commission. The Secretary also contends that the statutory criteria used to assess a civil penalty were either addressed by the district court or are not in dispute. Accordingly, she contends that a violation of section 103(a) of the Mine Act has been established and she seeks the assessment of an appropriate civil penalty.

On November 21, 2002, in response to the Secretary's motion, I issued an order canceling the hearing. I also ordered Southwest Quarry to file a response to the motion. In the order, I advised Southwest Quarry of the provisions contained in the Commission's procedural rule on motions for summary decision and stated that, if it did not respond to the Secretary's motion, a decision may be entered against it. I also enclosed a copy of 29 C.F.R. § 2700.67 with the order. Southwest Quarry did not respond to the Secretary's motion or to my order to respond.

In his memorandum and order, District Court Judge Webber explained that on November 24, 1998, the district court entered a permanent injunction which enjoined Quarry Superintendent Chester McDowell and Southwest Quarry, their agents and employees, from directly or indirectly denying inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") entry into the quarry for purposes of carrying out the provisions of the Mine Act. 198 F.Supp.2d at 1094. The injunction also set forth remedies in the event that Southwest Quarry violated the terms of the injunction. The injunction provided that if Chester McDowell was not present when MSHA inspectors arrived, another person shall be designated as the person in charge. *Id.* at 1095.

Judge Webber described in detail the events that occurred at the quarry on December 11, 2001, when Larry Feeney and Michael Davis, two authorized representatives, arrived to inspect the quarry. *Id.* at 1095-96. An employee of Southwest Quarry, Virginia Gaddy, informed the inspectors that the inspection could not proceed because Chester McDowell was not present. When they asked for Troy Gaddy, an employee listed as a walk-around representative, Ms. Gaddy responded that he was operating the crusher so he could not accompany them. The inspectors waited for McDowell, but when he did not appear and the inspection was again prohibited by Ms. Gaddy, they issued the subject citation. Apparently, McDowell was on the property in his pickup truck and, when the citation was given to him by Ms. Gaddy, McDowell became furious and tore it up. McDowell approached the inspectors, threw the torn citation into Feeney's face, and verbally abused them. *Id.* at 1096. The inspectors issued a section 104(b) order of withdrawal because Southwest Quarry refused to comply with the citation and left the quarry. Judge Webber's description of these events provides more detail. The judge also described previous incidents in which Southwest Quarry refused entry to MSHA inspectors. *Id.* at 1096-98.

Judge Webber determined that the Secretary had met its burden to adduce clear and convincing evidence that Southwest Quarry* had violated the November 1998 injunction. The court noted that it was "struck by the gravity" of the situation, that Southwest Quarry had impeded the ability of MSHA "to conduct normal, regulatory inspections" of the quarry on four separate occasions, and that McDowell had "threatened physical harm" to MSHA inspectors. *Id.* at 1100. Judge Webber imposed civil contempt sanctions on Southwest Quarry in the amount of \$100,000

* The respondents in the district court case were Chester McDowell, Virginia Gaddy, and Southwest Quarry & Materials, Inc. I refer to them collectively as Southwest Quarry in this decision.

and sentenced Mr. McDowell to a “thirty-day period of incarceration” *Id.* The judge suspended both sanctions so long as Southwest Quarry complies with the court’s injunction of November 24, 1998. The judge ruled that if Southwest Quarry “should, in the future, impede in any fashion a lawful inspection conducted by MSHA inspectors” the suspension will be removed. *Id.* Southwest Quarry did not appeal the district court’s order.

There can be no dispute that the Secretary and Southwest Quarry fully adjudicated the events that lead to the issuance of Citation No. 4458601 in the district court proceeding. Southwest Quarry was represented by counsel and the court entered detailed findings of fact. Under the doctrine of collateral estoppel, a judgment on the merits in a prior suit may preclude the relitigation in a subsequent suit of any issues actually litigated and determined in the prior suit. *BethEnergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992) citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Identity of issues is a fundamental element that must be satisfied before collateral estoppel may be applied. “[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.” *U.S. v Mendoza*, 464 U.S. 154, 158 (1984). Collateral estoppel serves “the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy by preventing needless litigation.” *Parkland Hosiery* 439 U.S. at 326. The district court determined that Southwest Quarry violated the terms of the injunction by prohibiting a lawful inspection of the quarry on December 11, 2001.

I find that collateral estoppel should be applied because the issues in the two cases are identical, the district court judgment was a final adjudication on the merits, the two cases involve the same parties, and Southwest Quarry was given a full and fair opportunity to be heard in the district court action. Jurisdictional issues are subject to collateral estoppel in Mine Act cases. See *Mechanicsville Concrete, Inc.*, 17 FMSHRC 483 (March 1995) (ALJ); *Associated Electric Cooperative, Inc.*, 20 FMSHRC 424 (April 1998) (ALJ). The district court held that the quarry is a mine subject to inspection by duly authorized representatives of the Secretary and that Southwest Quarry unlawfully impeded an MSHA inspection when it refused to allow the inspectors to enter the quarry on December 11, 2001, to carry out an inspection. These are the same issues that must be resolved in this case when determining whether Southwest Quarry violated section 103(a) of the Mine Act. Consequently, I find that Southwest Quarry is precluded from relitigating the issue of whether it violated section 103(a) of the Mine Act when it refused to allow Inspectors Feeney and Davis entry into the quarry on December 11, 2001. The Secretary satisfied the Commission’s requirements for summary decision. 29 C.F.R. § 2700.67.

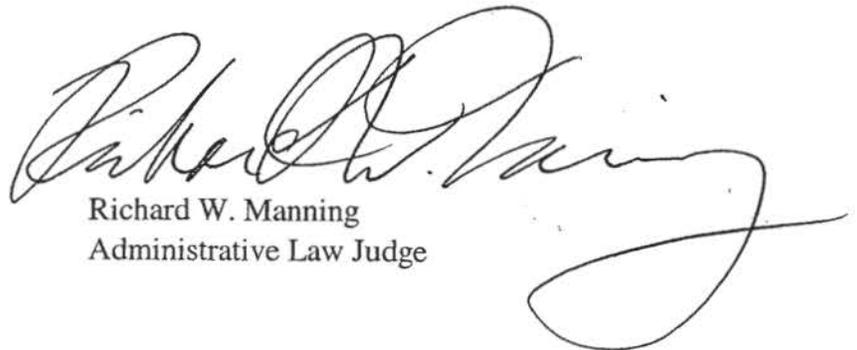
Although the parties did not directly litigate what civil penalty should be assessed, taking into consideration the criteria set forth in section 110(i) of the Mine Act, the district court’s findings and conclusions preclude relitigating any of the court’s findings that bear directly on the penalty criteria. In addition, by failing to respond to the Secretary’s motion for summary decision and by failing to respond to my order of November 21, 2002, Southwest Quarry waived its right to present evidence

on the civil penalty criteria. Accordingly, I enter the following findings with respect to the six statutory penalty criteria.

MSHA's records presented with the Secretary's motion show that no citations were issued to Southwest Quarry between December 11, 1999, and December 10, 2001, but that 56 citations had been issued prior to that time. MSHA's records show that the quarry worked 10,875 production hours in 2001 indicating that it is a relatively small mine operator. The violation occurred in the face of a permanent injunction that was issued by the district court in November 1998. In the contempt proceeding, the district court determined that Mr. McDowell engaged in a "pattern of persistent interference with the lawful actions of MSHA inspectors." 198 F.Supp.2d at 1100. Consequently, Southwest Quarry's negligence was high. Southwest Quarry did not make good faith efforts to abate the condition that gave rise to the citation as evidenced by the fact that the Secretary was forced to issue a section 104(b) order after Southwest Quarry continued to refuse entry to the inspectors. *Id.* at 1096. Southwest Quarry did not present any evidence as to its ability to continue in business if required to pay the Secretary's proposed penalty. Finally, the violation was serious because, by denying MSHA inspectors the right to conduct a lawful inspection, Southwest Quarry exposed its employees to hazards that would have been corrected if the inspection had been conducted. The district court recognized the gravity of the violation. *Id.*

ORDER

For good cause shown, the Secretary's motion for summary decision is **GRANTED**. Southwest Quarry violated section 103(a) of the Mine Act on December 11, 2001, when it denied entry to MSHA inspectors. Citation No. 4458601 is **AFFIRMED** as written. Taking into consideration the penalty criteria in section 110(i) of the Mine Act, especially the negligence, gravity, and good faith criteria, I find that the Secretary's proposed penalty of \$9,500 is reasonable and appropriate. Consequently, Southwest Quarry & Materials, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$9,500 within 40 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

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January 13, 2003

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 2002-110
Petitioner : A. C. No. 15-16011-03527
v. :
 : Mine: No. 1
HIGHLANDS MINING & PROCESSING :
COMPANY, INC., :
Respondent. :

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

This case concerns a proposal for assessment of civil penalty filed pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 815(d), the Act, seeking civil penalty assessment for 7 alleged violations of mandatory safety standards found in Parts 75 and 77 Title 30, Code of Federal Regulations.

The parties have settled the matter and the Solicitor has filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement. The proposed settlement is as follows:

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
7529460	07/25/01	75.400	\$ 259.00	\$ 259.00
7529461	07/25/01	75.400	259.00	259.00
7529462	07/31/01	75.400	259.00	259.00
7529466	07/31/01	75.370(a)(1)	259.00	259.00
7529467	07/31/01	75507-(1)(a)	259.00	259.00
7529470	08/01/01	75.1106-(5)(a)	317.00	259.00
7529471	08/01/01	77.1110	259.00	184.00
Total:			\$ 1,871.00	\$ 1,738.00

Citation No. 7529460 was issued because it is alleged that dry, black, float coal had accumulated at various locations throughout the #2 Conveyor Belt for a distance of approximately 400 feet.

Citation No. 7529461 was issued because it is alleged that dry, black, float coal had accumulated at various locations throughout the #1 Conveyor Belt for a distance of approximately 300 feet.

Citation No. 7529462 was issued because it is alleged that dry, black, float coal had accumulated at various locations throughout the #3 entry of the 002 MMU immediately inby the last open cross cut which had not had rock dust applied to the roof, ribs, and floor for a distance of approximately 76 feet outby the face area.

Citation No. 7529466 was issued because it is alleged that the approved ventilation, methane, and dust control plan was not being followed as required.

Citation No. 7529467 was issued because it is alleged that a piece of non-permissible equipment was being used extensively throughout the 002 MMU immediate and main return outby the last open cross cut.

The Respondent has agreed to pay the proposed penalties for the aforementioned citations.

Citation No. 7529470 was issued because it is alleged that the compressed gas cylinder gages located outby the 002 MMU face belt drive were not maintained in safe operating condition. The parties propose to modify the gravity to "no lost workdays" and to reduce the penalty because they agree that the cylinders and gages were not in service at the time of inspection.

Citation No. 7529471 was issued because it is alleged that the fire extinguisher provided for the sub station located on the surface was not provided with a record of inspection within the prior 6 months. The parties propose to modify the negligence to "low" and to reduce the penalty because they agree that the extinguisher was fully charged and because the Solicitor is unable to refute the Respondent's claim that the tag provided on the extinguisher was damaged by the weather.

In support of the proposed settlement, the Solicitor has submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, including information regarding the Respondent's size, ability to continue in business and history of previous violations.

After review and consideration of the pleadings, arguments and submission in support of the settlement motion, I find the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

ORDER

The Respondent **IS ORDERED** to pay a civil penalty of \$1,738.00 in satisfaction of the violations in question. Payment is to be made to MSHA within 30 days of the date of this proceeding. Also, within the same 30 days the Secretary **IS ORDERED** to modify the gravity for Citation No. 7529470 to "no lost work days" and to modify the negligence for Citation No. 7529471 to "low." Upon receipt of full payment and modification of these citations, this proceeding is **DISMISSED**.


David F. Barbour
Chief Administrative Law Judge

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Charles Robert Stump, President, Highlands Mining & Processing Company, Inc., P.O. Box 280, Whitesburg, KY 41858

/mvc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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January 14, 2003

HAZEL OLSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-305-D
	:	DENV CD 2001-09
	:	
v.	:	Mine I.D. 48-00997
	:	Jacobs Ranch Mine
JACOBS RANCH COAL COMPANY,	:	
Respondent	:	

**DECISION GRANTING RESPONDENT’S MOTION TO DISMISS
ORDER OF DISMISSAL**

Before: Judge Manning

This proceeding was brought by Hazel Olson against Jacobs Ranch Coal Company (“Jacobs Ranch”) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (“Mine Act”) and 29 C.F.R. § 2700.40 *et seq.* The complaint alleges that Ms. Olson was terminated from her employment at the Jacobs Ranch Mine (the “mine”) for engaging in activities protected under the Mine Act. In its answer, Jacobs Ranch denies that it discriminated against Ms. Olson and raises other defenses.

Jacobs Ranch filed a motion to dismiss this case on the grounds that Ms. Olson failed to timely file her complaint of discrimination as required by section 105(c)(2) of the Mine Act. Olson opposes the motion. For the reasons set forth below, the motion is granted and this case is dismissed.

I. FINDINGS OF FACT

Ms. Olson was hired by Kerr-McGee, Inc., on May 17, 1979, to work as a laborer at the mine. Ms. Olson engaged in protected activity while employed by Kerr-McGee. On August 8, 1994, she filed a complaint under section 103(g) of the Mine Act. She also filed two complaints under section 105(c) of the Mine Act, one dated October 5, 1994, and the other dated May 25, 1995. The Department of Labor’s Mine Safety and Health Administration (“MSHA”) investigated her discrimination complaints and determined that Ms. Olson was not discriminated against. She did not file discrimination complaints on her own behalf under section 105(c)(3) of the Mine Act.

On July 23, 1998, Kennecott Energy Company (“Kennecott”) became the owner of the mine. On June 4, 1999, Ms. Olson filed another discrimination complaint with MSHA. When MSHA determined that she was not discriminated against, she did not file a section 105(c)(3) case. Kennecott is the parent company of Jacobs Ranch.

Jacobs Ranch terminated Ms. Olson from her employment on December 4, 1999. It maintains that she was terminated for providing false and misleading statements during a company investigation into two incidents involving her at the mine. Ms. Olson was on a final step disciplinary warning at the time of this incident. Olson believed that she was fired for her protected activity.

On February 16, 2001, Ms. Olson filed a discrimination complaint with MSHA alleging that she was terminated for filing the complaints discussed above under sections 103(g) and 105(c) of the Mine Act. She filed the discrimination complaint after her husband, Emmett Olson, suffered a stroke on January 22, 2001. This stroke caused him to quit his job at the mine. Ms. Olson states that she delayed filing her discrimination complaint with MSHA because she feared that Kennecott would harass and intimidate her husband. She explains that, at the time she was terminated from her employment, she and her husband discussed whether she should file a discrimination complaint. They believed that “Mr. Olson would replace her as a victim of harassment and intimidation because of the protected activity [she engaged in] prior to her termination.” (Olson Opposition 1-2). Olson also believed that if she filed a discrimination complaint with MSHA, her son, Josh Olson, would not be able to obtain a summer job at the mine.

Section 105(c)(2) of the Mine Act provides that any miner who believes that he has been discharged in violation of the Mine Act “may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.” Ms. Olson filed her discrimination complaint more than 14 months after she was terminated.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

The 60-day period for filing a discrimination complaint under section 105(c)(2) is not jurisdictional. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff’d mem.*, 750 F.2d 1093 (D.C. Cir 1984). The Commission has held that a “miner’s late filing of a discrimination complaint may be excused on the basis of justifiable circumstances, including ignorance, mistake, inadvertence, and excusable neglect.” *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996) (citations omitted). “[T]imeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.” *Id.* at 1922.

In this case, Ms. Olson was well aware of the 60-day period for filing discrimination complaints. (Olson Dep. at 111-12, Ex. 2 of Motion; Olson Opposition at 8). She was fully aware of her section 105(c) rights. Ms. Olson contends that she delayed filing her complaint out of fear

that Jacobs Ranch would retaliate against her husband and her son. She did not file her complaint until her husband could no longer be adversely impacted by filing such a complaint.

I find that Ms. Olson's stated reason for failing to file her complaint on a more timely basis is inconsistent with the facts. She had filed several other section 105(c) complaints while her husband Emmett was employed at the mine. At her deposition, Ms. Olson admitted that Emmett had not been threatened in any way after she filed those discrimination complaints. (Olson Dep. at 109-10, Ex. 2 of Motion). She did not express any specific reasons why she believed that Emmett would suffer any adverse action by the company as a result of her complaint, other than the fact that she no longer worked at the mine. In addition, her son did not apply for a job at the mine until after she filed her discrimination complaint in this case. (Olson Dep. at 6, Ex.2 of Motion). Olson sat on her rights knowing that she had an obligation to file her complaint in a timely manner.

Mines are usually located in rural, sparsely populated areas with the result that close friends and relatives are often fellow employees as well. As a general matter, a miner cannot knowingly delay filing a discrimination complaint because she fears that the filing of the complaint may adversely affect friends and relatives who work at the mine. A delay *may* be justified upon a showing that the fear of serious reprisal can be supported by facts. Speculation that the relative may be the butt of jokes or teasing is not enough. I find that Olson's stated reason for not filing her complaint within 60 days does not qualify as "excusable neglect." A vague, unsubstantiated concern that Emmett would "replace her as a victim of harassment and intimidation" is an insufficient justification for the knowing delay. (Opposition at 1-2).

It is important to keep in mind that this case does not present a situation in which the complainant misunderstood the time constraints in section 105(c). In addition, Olson was not in any way misled about the filing requirements. Thus, the facts presented here are not at all similar to the examples set forth in the legislative history for excusing a late filing: "Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60 day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act." (S. Rep. 95-181, at 36, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)).

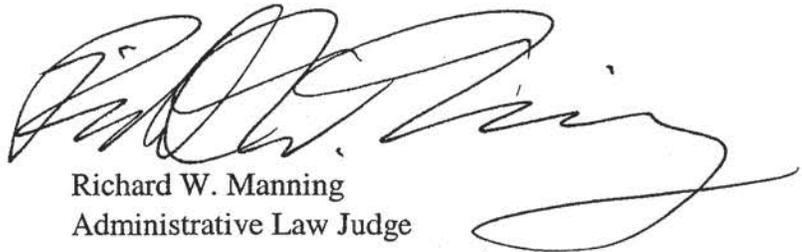
"Even if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal." *Perry*, 18 FMSHRC at 1922 (citation omitted). The time limit was placed in section 105(c) to avoid "stale claims being brought." *Legis. Hist.* at 624. Jacobs Ranch maintains that it was prejudiced by the delay in this case. It states that during her deposition, Ms. Olson could not offer specific testimony regarding events that she maintains form the basis of her discrimination complaint. Respondent explains that Ms. Olson stated about 70 times during her deposition that she was unable to recall specific facts.

Moreover, two key witnesses for Jacobs Ranch, Chad Anderson and Robert Hammond, now live in Australia. Chad Anderson was the Human Resources Manager for Jacobs Ranch from July 23, 1998, until April 1, 2002. (Aff. of Stephan Carlisle, Ex. 1 of Motion). Robert Hammond was the General Manager at Jacobs Ranch from May 18, 1999, to May 1, 2001. *Id.* Anderson investigated the circumstances that led to Ms. Olson's termination and also investigated her discrimination complaint. The complaint that Ms. Olson filed with MSHA is short and simply states: "Chad Anderson said that I was fired for giving false information in a Kennecott investigation, I believe I was fired for filing 103s and 105s in the past." Although other individuals were involved in the events that led to her termination, Olson does not dispute that Anderson and perhaps Hammond made the ultimate decision to terminate her. (Olson Dep. at 186, Ex.2 of Motion). These two individuals would not be totally unavailable to testify at a hearing, but the passage of time and the fact that they live and work on the other side of the world will severely constrain the ability of Jacobs Ranch to defend its actions in this case.

Ms. Olson's initial complaint filed with MSHA on February 16, 2001, is found to be excessively stale. The reasons set forth for the delay do not demonstrate any justifiable circumstance for the delay, such as excusable neglect, and Jacobs Ranch suffered at least some degree of legal prejudice because of the delay.

III. ORDER

For the reasons set forth above, the hearing in this case scheduled for February 19, 2003, is **CANCELED**; Jacobs Ranch Coal Company's motion to dismiss is **GRANTED**; and the complaint filed by Hazel Olson against Jacobs Ranch Coal Company under section 105(c) of the Mine Act in this case is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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601 New Jersey Avenue, N.W., Suite 9500
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January 28, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-184
Petitioner	:	A. C. No. 15-14492-03877
v.	:	
	:	Docket No. KENT 2002-238
	:	A. C. No. 15-14492-03881
	:	
LODESTAR ENERGY, INC.,	:	
Respondent	:	Baker Mine

DECISION

Appearances: Thomas Grooms, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of Petitioner;
Stanley Dawson, Esq., Fulton & Devlin, Louisville, Kentucky, on behalf of Respondent.

Before: Judge Melick

These cases are before me upon Petitions for Civil Penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994), the "Act," charging Lodestar Energy Inc. (Lodestar) with multiple violations and seeking civil penalties for those violations. The general issue before me is whether Lodestar has violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.¹

Citation No. 7647114 (Docket No. KENT 2002-238)

Citation No. 7647114 alleges violations of an approved petition for modification and charges as follows:

¹ Only two citations remained at issue for disposition at hearing. Other citations in these dockets were the subject of a partial settlement decision issued October 22, 2002. Disposition of Citation No. 7646149 has been stayed pending approval of a settlement motion by the Bankruptcy Court.

The circuit breakers for the P65 and P53 roof bolters were not sealed breakers. This was observed on #3 unit located in the 23rd east gates. P65 bolter was found to have approximately 599 feet of cable and the P53 roof bolter had approximately 744 feet of cable when measured. The instantaneous settings for the P65 breaker was set at 700 amperes and the P53 breaker was set at 300 amperes. These breakers were not sealed breakers set at 300 amperes as required by page 2 of 101 c petition M-98-028-C. All circuit breakers used to protect the no.6 awg trailing cables that supply power to the Fletcher single boom roof bolters that exceed 550 feet in length shall have instantaneous trip units calibrated to trip at 300 amperes. The unit mechanic was not aware of said petition or of any requirements that the petition contained. The petition became final for this mine on 1/15/1999.

By way of background, Lodestar had petitioned the Secretary of Labor on March 18, 1998, for modification of the application of the standard at 30 C.F.R. § 75.503.² The petition was granted on December 16, 1998, with certain conditions. (See Government Exhibit No. 7). In relevant part the order granting the petition provided as follows:

GRANTED, for the extended length, 480-volt, three-phase alternating current trailing cables, used to develop the three and four entry longwall development panels at the Baker Mine, conditioned upon compliance with the following terms and conditions:

1. The maximum length of the 480-volt, three phase alternating current trailing cables, supplying power to the Fletcher single boom roof bolters shall not exceed 750 feet in length and the trailing cable shall have a 90 degree centigrade insulation rating.
2. The trailing cable for the Fletcher single boom roof bolters shall not be smaller than a No. 6 AWG cable.
3. All circuit breakers used to protect the No. 6 AWG trailing cables that supply power to the Fletcher single boom roof bolters that exceed 550 feet in length shall have instantaneous trip units calibrated to trip at 300 ampères.
4. The trip settings of these circuit breakers shall be sealed after they are

² The parties acknowledge that the modified standard more specifically involved 30 C.F.R. Part 18, Table 9, which sets forth specifications for portable cables longer than 500 feet.

calibrated and these circuit breakers shall have permanent, legible labels.

* * * *

- I. Within 60 days after this Proposed Decision and Order becomes final, the Petitioner shall submit proposed revisions for its approved 30 C.F.R. Part 48 training plan to the Coal Mine Safety and Health District Manager for the area in which the mine is located. These proposed revisions shall specify task training for miners designated to verify that the short-circuit settings of the circuit interrupting device(s) that protect the affected trailing cables do not exceed the specified setting in Item Nos. 3 and 5. The training shall include the following elements:
 - A. The hazards of setting the short-circuit interrupting device(s) too high to adequately protect the trailing cables;
 - B. How to verify that the circuit interrupting device(s) protecting the trailing cable(s) are properly maintained;
 - C. Mining methods and operating procedures that will protect the trailing cable(s) against damage; and
 - D. Proper procedures for examining the affected trailing cable(s) to ensure that the cables are in safe operating condition.

While conceding that it had successfully petitioned the Secretary, pursuant to Section 101(c) of the Act, for modification of the application of the mandatory standard at 30 C.F.R. § 75.503, Lodestar baldly asserts, without citing any legal authority, that it may, in effect, thereafter choose at any time to accept or ignore the approved modification.³ Under the Secretary's standard implementing Section

³ Section 101(c) of the Act provides as follows:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of such operator or representative or other interested party, to enable the operator or the representative of miners in such mine or other interested party to present information relating to the

101(c) however, *i.e.*, 30 C.F.R. § 44.4(c), once a petition for modification is granted, that granted petition is enforceable as a mandatory safety standard.⁴ The language of 30 C.F.R. § 44.4(c) is unambiguous and leaves no doubt that compliance with the granted modification is mandatory and not voluntary. Within the framework of the granted petition then, once the trailing cables supplying power to the Fletcher single boom roof bolters exceed 550 feet in length, the procedures set forth in the granted petition must be followed.

The issue then, is whether Lodestar violated the terms of the granted petition. It is undisputed that when Robert Simms, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA), was at the mine premises on April 4, 2001, the trailing cables for the P-65 and P53 Fletcher single boom roof bolters were 599 feet and 744 feet in length, respectively. In accordance with the terms of the granted petition for modification, Lodestar must therefore have set the amperage of the corresponding unit circuit breakers at 300 amperes, sealed the trip settings of these circuit breakers after they were calibrated and provided training in accordance with the terms of the granted petition.

It is undisputed that the P-65 circuit breaker was set at 700 amperes and that there were no seals on either of the circuit breakers. It is also clear from the credible record that at least several employees working on the unit were not trained on the terms of the granted petition. Thus, all three of the violations have been proven as charged. In regard to the latter violation, Michael Smith, a Lodestar employee of 23 years and a unit mechanic for 17 years, testified that he was unfamiliar with the petition for modification at issue. Indeed, Smith acknowledged that the breakers had not been sealed in 23 years and that he had periodically adjusted the settings on the circuit breakers without any knowledge as to the appropriate amperage on those settings. I find this testimony credible and certainly sufficient

modification of such standard. Before granting any exception to a mandatory safety standard, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected mine. The Secretary shall issue a decision incorporating his findings of fact therein, and send a copy thereof to the operator or the representative of the miners, as appropriate. Any such hearing shall be of record and shall be subject to section 554 of Title 5.

⁴ 30 C.F.R. § 44.4(c), provides as follows:

All petitions for modification granted pursuant to this part shall have only future effect: *Provided*, That the granting of the modification under this part shall be considered as a factor in the resolution of any enforcement action previously initiated for claimed violation of the subsequently modified mandatory safety standard. Orders granting petitions for modification may contain special terms and conditions to assure adequate protection to miners. The modification, together with any conditions, shall have the same effect as a mandatory safety standard.

to establish the third violation charged in the citation.

The citation herein was issued by the Secretary, pursuant to Section 104(d)(1) of the Act.⁵ Accordingly, the Secretary has the burden of proving that the violation was “significant and substantial” and the result of “unwarrantable failure.” A violation is properly designated as “significant and substantial” if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel*

⁵ Section 104(d)(1) 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 cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

Mining Co., 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In her post-hearing brief the Secretary argues in this regard that the first two violations alleged in the citation constitute a “significant and substantial” violation of the granted petition.⁶ The testimony of the issuing inspector in support of such a conclusion is deficient however in that he based his assessment of the event upon a mere “possibility” rather than the requisite “reasonable likelihood” standard. Charles Baird, Lodestar’s maintenance foreman, also clearly had the more thorough knowledge of the mine’s electrical system and his credible testimony further negates a “significant and substantial” finding. Accordingly, I do not find that the violation was “significant and substantial.”

While the Secretary also alleges that the violation was the result of Lodestar’s “unwarrantable failure” to comply with the modified standard, that issue is now moot in the absence of a “significant and substantial” violation. See fn. 5. Nevertheless I find that the violation was the result of significant negligence. In this regard I find that Lodestar should have been on heightened awareness of the requirements of the granted petition having made significant efforts in filing the petition. It is noted, moreover, that the petition was granted more than two years before the citation at bar was issued. The undisputed testimony of Michael Smith, the unit mechanic, also clearly establishes operator negligence. Smith admitted that he had no knowledge of the requirements of the granted petition, that the breakers had not been sealed in 23 years and that he had periodically adjusted the settings on the circuit breakers without any knowledge as to the proper amperage. Lodestar’s training of Smith was therefore clearly deficient and the result of its own negligence. The negligence of Smith, a rank-and-file miner, may therefore also be imputed to Lodestar for purposes of assessing a civil penalty, *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (January 1983); *Southern Ohio Coal Co.*, 4 FMSHRC 1459 (August 1982).

Under all the circumstances, Citation No. 7647114 must be modified to delete the “significant and substantial” findings and modified to a citation under Section 104(a) of the Act.

Order No. 7647121 (Docket No. KENT 2002-184)

⁶ In her post-hearing brief the Secretary does not argue or claim that the third violation charged in the citation - - *i.e.*, failure to train the unit mechanic in the requirements of the granted petition - - constituted a “significant and substantial” violation. Accordingly any such allegation is deemed to have been waived.

Order No. 7647121, issued April 17, 2001, alleges a violation of the standard at 30 C.F.R. § 75.342(a)(4) charges as follows:

The methane monitor for the M21 miner located on #3 unit in the 23rd East gates was not being maintained in a proper operating condition. When 2.5 percent of methane was applied, the digital read out for the monitor showed 0.1 percent methane. The continuous miner had only cut approximately 10 feet from the 2 left face before the methane monitor was tested. It was determined by a maintenance foreman that the dust cap was stopped up. The methane monitor had been calibrated the shift before on 4/17/2001 during an examination.

The cited standard, 30 C.F.R. § 75.342(a)(4), provides in relevant part that “methane monitors shall be maintained in permissible and proper operating condition . . .” MSHA Inspector Robert Simms testified that on April 17, 2001, while conducting an inspection at the subject mine, he observed that, as the continuous miner cut into the face on the No. 3 unit, its methane monitor was registering zero methane. Simms found this to be suspicious because he had previously detected methane at a nearby location. He requested that the suspicious monitor be checked. A known 2.5% methane sample was presented to the sensing head of the monitor and the monitor registered .1% methane. In Simms’ presence, mechanic Barry Utley then cleared the dust cap covering the sensing head. This procedure did not correct the problem so Charlie Willett, the third shift maintenance boss, then helped change the sensing head. A known sample of methane gas was again presented and again the sensor failed to register correctly. According to Simms, Willett then cleaned the screen in the dust cap and washed it out with a spray. The sensor then worked properly upon testing. Since there is no dispute that the cited methane monitor for the M21 continuous miner was in fact not properly functioning, the violation is proven as charged.

The Secretary also alleges that the violation was “significant & substantial” and the result of “unwarrantable failure.” The analysis to establish a “significant and substantial” violation has previously been discussed. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that “unwarrantable failure” is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of “unwarrantable” (“not justifiable” or “inexcusable”), “failure” (neglect of an assigned, expected or appropriate action”), and “negligence” (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by “inadvertence,” “thoughtlessness,” and “inattention”). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” indifference” or a “serious lack of reasonable care.” 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a “knew or should have known” test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of *Emery* was that unwarrantable failure results from aggravated conduct, constituting more than ordinary

negligence. *Secretary v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

According to Inspector Simms, after the monitor was properly functioning, he returned to the surface and checked the operator's examination books. It is undisputed that it was reported in the books that the monitor had been calibrated the night before. It is undisputed that only 10 feet to 15 feet of coal had been cut since the purported calibration. Simms concluded however that the amount of dust in the dust cap was in excess of the amount that should have been there based on the amount of mining that had occurred. Simms opined that this amount of mining could not have caused the monitor's dust cap to have become so clogged.

Charlie Willett was the maintenance foreman on the subject shift. According to Willett they replaced the sensing head (sniffer) and blew out the dust cap. He could not recall whether he sprayed any water onto it. Willett claimed at hearing that the dust cap was not in fact clogged and that he only blew through it. He denied that he told Simms that the dust cap was clogged and maintained that he only said that it was "possible" that it was stopped up. Willett noted that sensors break down all the time.

Lodestar argues that it was the sensor that was defective and that since sensors break down all the time Lodestar suggests that the defect had occurred only shortly before it was discovered by the inspector. I do not find this scenario credible, however, in light of the undisputed sequence of events cited by Inspector Simms. According to that sequence, after the defect was discovered, the sensor was replaced and the monitor still did not function. It was only after the dust cap was then cleaned that the monitor began properly registering methane. Thus, whether or not the sensor was defective, the dust cap was in fact so clogged that it prevented any methane from reaching the sensor. Considering that only one cut of coal of about 10 to 15 feet had been taken since the monitor had been calibrated and reported in the corresponding examination book and considering Simms' unchallenged testimony that the dust generated by this limited cut would not be sufficient to clog the sensor to the extent found, it may reasonably be inferred that the defect in the monitor had existed prior to the time it was reported as calibrated in the examination book. This is evidence of gross negligence and "unwarrantable failure."

As noted, the Secretary also alleges that the violation was "significant and substantial." In this regard the following colloquy occurred at hearings:

Q. Mr. Simms, you marked this 104(d)(1) order as being characterized - - the gravity being characterized as significant and substantial. Why did you do that, sir?

A. Because the methane monitor - - 2 ½ percent methane was applied and would not read but .1.

Q. Are you saying 1/10?

A. One tenth of one percent, .1. The No. 1 and the No. 2 units had been liberating methane earlier between the 4th and the 17th when I had visited those other two units. There's an increased likelihood that with the methane monitor not working and them up in the face cutting coal, it would be possible to cause an ignition.

Q. How would that happen?

A. The churning of the bits against the mine roof and the face. The methane accumulation not being detected by a bad sensor and the sparking of the bits could possibly cause an ignition.

Q. Now, I think it's probably known by the Judge as many cases as he's heard, but what's the methane monitor supposed to do?

A. The methane monitor is supposed to give a warning of 1 percent and knock the power at 2 percent.

Q. An explosive range is 5 percent to 15 percent?

A. Yes.

(Tr. 219-220).

To find a violation "significant and substantial" there must be a finding of a "reasonable likelihood" of injury. The inspector's testimony that an ignition was "possible" is therefore not sufficient. In addition, Lodestar section foreman Varney Coleman opined that the likelihood of a methane ignition here was "very very slim." Lodestar compliance coordinator Kevin Vaughn testified that, of the 13 prior violations of this standard cited by MSHA, the only one found to be "significant and substantial" was the one at issue herein. Vaughn opined that injuries were not likely to occur on the facts herein. He observed that many circumstances must come together to result in an explosion. In this regard he noted that a place is only cut for 15 minutes and then the continuous miner is moved. He further noted that methane was unlikely because of water sprays, adequate ventilation, the scrubber and the fact that the area is checked for methane before mining.

Under all the circumstances I am not satisfied that the Secretary has sustained her burden of proving the violation herein to be "significant and substantial."

Civil Penalties

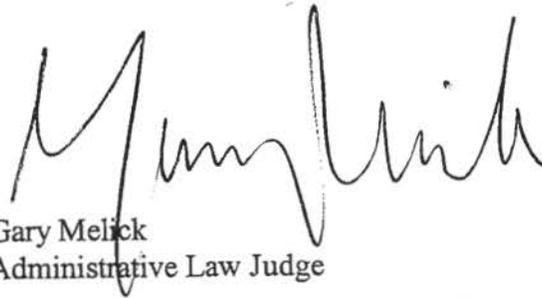
Citation No. 7647114 - considering the high negligence and moderate gravity of the violation, the fact that the violation was abated in good faith, that the operator is large in size, that it has a

significant history of prior violations, and that it has been stipulated that the penalty would not effect the ability of the operator to remain in business, I consider a civil penalty of \$1,000.00, appropriate.

Order No. 7647121 - considering the high negligence, moderate gravity, good faith abatement of the violation, the large size operator, the significant history of violations and the fact that it has been stipulated that the penalty would not effect its ability to remain in business, I find a civil penalty of \$1,000.00, appropriate.

ORDER

Citation No. 7647114 is hereby modified to delete its "significant and substantial" findings and modified to a citation under Section 104(a) of the Act. Lodestar Energy Inc., is directed to pay a civil penalty of 1,000.00, within 40 days of the date of this decision for the violation charged therein. Order No. 7647121 is hereby modified to delete the "significant and substantial" findings. Lodestar Energy Inc., is directed to pay a civil penalty of \$1,000.00, within 40 days of the date of this decision for the violation charged therein.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Washington, D.C. 20001

January 29, 2003

DALLAS CROASMUN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. PENN 2002-162-D
v.	:	PITT CD 2002-02
	:	
CONSOL PENNSYLVANIA COAL CO.,	:	Enlow Fork Mine
Respondent	:	Mine ID 36-07416

DECISION

Appearances: Michael J. Healey, Esq., Healey & Hornack, Pittsburgh, Pennsylvania, and Gregory Hook, Esq., Hook & Hook, Waynesboro, Pennsylvania, on behalf of Complainant;
Carl J. Smith, Jr., Esq., Richman & Smith, Washington, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by Dallas Croasmun, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994) the "Act," alleging that he was discharged on March 8, 2002, by the Consol Pennsylvania Coal Company (Consol) in violation of Section 105(c)(1) of the Act.¹ In particular, in his initial complaint to

¹ Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

the Department of Labor's Mine Safety and Health Administration (MSHA), Mr. Croasmun alleges that he "became aware that the real reason [for his discharge] was a statement made the week of February 18, 2002, that I would no longer continue to send people on an elevator that I did not feel was safe to operate." Croasmun seeks reinstatement and damages including an award for back pay.²

Croasmun has worked in the mining industry since 1976 and holds a number of state certifications including those for mine foreman, maintenance foreman and mine superintendent. He has also received specific training in elevator repairs and inspections. During relevant times he was the surface maintenance supervisor at the Enlow Fork Mine. In that capacity he was in charge of authorizing all repairs on the surface and authorizing purchase orders for equipment in amounts up to \$5,000.00.

According to Croasmun, a new elevator was being installed at the 3 North Portal beginning in mid 2001. The elevator was tested and inspected by the state and was placed in service on December 15, 2001. At that time 400 miners were using the elevator each day. The elevator holds 35 miners and has a weight load of 9,000 pounds. It transports personnel between the surface and 600 feet underground at a speed of 600 feet per minute. There is no dispute that the elevator continued to have problems with unexpected stoppages. These stoppages, known as "tripping," were caused by over-speeding which triggered the safety devices. According to Croasmun, the elevator was tripping dozens of times per shift and that he had therefore stationed a person at the elevator to override the faults. Croasmun testified that on some occasions he had to adjust or disable safety devices in order to override the tripping mechanism. State and federal inspectors were aware of the problems and, whenever the elevator was down for 30 minutes or more, state officials were contacted pursuant to state requirements. The problems continued into January and, in the latter part of that month, a meeting was held with the various elevator contractors to discuss those problems. The contractors were advised by Croasmun at this meeting that payments under their contracts would be withheld until the problems were corrected. Croasmun maintains that he kept mine superintendent Thomas Coram, apprised of the elevator problems.

The problems continued and a second meeting was held among Consol officials without any contractors present. Croasmun maintains that he told everyone at the meeting that the elevator was unsafe.³ Others at the meeting, including Lou Barletta, felt that it could never be fixed and should be replaced. According to Croasmun, only Consol electrical engineer John Burr believed the elevator could be operated. Croasmun also maintains that later the same or the next day he told Coram, with no one else present, that he would no longer send people on the elevator and that he did not feel it was

² These proceedings have been bifurcated so that issues regarding damages have been deferred.

³ Croasmun also prepared a list of specific problems with the elevator which he maintains was presented at the January and February meetings (See Exh. C-13).

safe to operate. Coram purportedly did not respond. Croasmun acknowledged however that he continued to try to repair the elevator and never in fact prevented anyone from using it. He further acknowledged that he never filed a "Section 103(g)" complaint regarding the elevator. At the conclusion of the meeting, Rick Weaver and Tim Shell were to remedy the elevator problems by carrying out the proposal set forth in Exhibit C-14.

Edward Kocerka, an electrical engineer for Integrated Mill Systems Inc., testified that Croasmun complained to him in February 2002, of an unreliable elevator and asked him to check it out. During the six hours Kocerka observed the elevator, it tripped and came to a sudden stop at least three times. Another contractor employee was on-site to return the elevator to service. Following his study, Kocerka presented Croasmun with a repair estimate (Exh. C-1). Consol had not yet responded to his proposal.

On February 24, Croasmun left for a business related conference in Phoenix, Arizona, and for a vacation in Las Vegas. Upon returning to his office on March 5, he noted that his desk had been broken into, his papers were strewn about, a ledger was missing and a note was left on his desk directing him to see Superintendent Coram. Croasmun proceeded to Coram's office and maintains that Coram immediately confronted him about a load of belt that had been removed from the property on February 20th or 21st and said that someone was going to federal prison for what he had done. According to Croasmun, Luke Gianato, Consol's supervisor of human resources then entered the office. Croasmun testified that he told Coram that he had given the belt to a truck driver. Croasmun admitted that this statement was a lie. He did not then tell Coram that he had traded the belt in return for services performed by a Consol contractor nor did he suggest calling the contractor to confirm that the belt was indeed payment for services. Croasmun claimed at hearing that he had arranged with one of Consol's contractors, B&M, to exchange the used belt to pay for services performed by that contractor. Croasmun conceded that this agreement was not in writing and that there were no specific terms for the transaction. He claimed that trading used belt to pay contractors had been done before and that former mine superintendent, Jim McCaffrey, had engaged in similar transactions.⁴

At hearing, Croasmun maintained that on February 21, 2002, he had nine rolls of used belt loaded onto a truck driven by Greg Lemley. Lemley had been hired by Melinda White of B&M. Croasmun admits that he told the guard at the mine gate that he had completed the paperwork and that Lemley was authorized to leave mine property with the belt. At hearing, Croasmun also acknowledged that he knew the belt was going to be sold to Tracy Yarber, and that the proceeds would go to Melinda White. He maintained that he had no idea how much Melinda White was to be paid for the belt but

⁴ McCaffrey testified that as former mine superintendent he once initiated an exchange with the Conveyor Services Company of used conveyor belt for new belt. It was handled however by Consol's purchasing group. According to McCaffrey, Croasmun was not authorized to perform such transactions.

that Consol owed her a little over \$10,000.00. According to Croasmun, he expected that White would report to him how much she obtained for the belt and that if it was more than \$10,000.00, she would owe Consol additional services to make up the difference.

Following the meeting with Coram, Croasmun was told to go home. On March 8, 2002, Croasmun again met with Coram and Gianato, at which time he was told that he was being fired for violating company Rule No. 8, *i.e.*, for theft. Croasmun acknowledges that at no time did he tell Coram that he was actually being fired because of his complaints about the safety of the elevator.

Pennsylvania mine inspector Thomas Schumaker testified that he was the regular inspector of the Enlow Fork Mine. According to Schumaker, state procedures require that when a mine elevator is out of service for 30 minutes, it must be reported to the state. He had received such a report on March 4, 2002. Schumaker noted that since the elevator is the primary route of the escape in the event of an emergency, if it is not functioning it removes a means of escape from the mine. It may reasonably be inferred from this testimony that when the elevator was not functioning miner safety was indeed compromised.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), *rev'd on grounds, sub nom. Consolidated Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra*; *Robinette, supra*. See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

From the record in this case I conclude that indeed, Croasmun engaged in protected activity by complaining of the unreliability of the north portal elevator. This is credibly established through the testimony of electrical engineer Edward Kocerka and by the clear evidence that the reliability of that elevator was discussed at the February 18, 2002 meeting of Consol officials. The problem with the elevator was, however, common knowledge among Consol personnel and it appears that many Consol employees were complaining about it. It is accordingly highly unlikely that retaliation would only have been against taken maintenance supervisor Croasmun.

Croasmun also alleges however, that he made a specific complaint to mine superintendent Coram, following the February 18th meeting that was of such a provocative nature, i.e., that he would no longer send personnel on the elevator because it was unsafe, as to illicit a retaliatory response. However I do not find Croasmun's representations in this regard to be credible. First, Coram denied that any such exchange ever occurred. Second, Croasmun admits that he never did prevent anyone from using the elevator nor did he ever shut the elevator down. Third, Croasmun's supervisor, Mike Stewart, testified that he himself had shut down the elevator because of safety concerns and no retaliatory action was taken against him. Finally, the credibility of Croasmun's testimony in this regard is severely impacted by his admissions that he lied to Coram regarding his part in the ostensible theft of Consol property. Within this framework of evidence, I conclude that the discharge was not motivated by protected activity.

In reaching this conclusion I have not disregarded Croasmun's claims that unlawful motivation may be inferred by the relatively close proximity in time between his protected activity, purportedly on February 18, 2002, and his suspension on March 5, 2002, and his discharge on March 8, 2002. However any such inference is completely negated and superceded by the intervening discovery of Croasmun's apparent participation in the theft of Consol property. Moreover, even assuming, *arguendo*, that Consol had been motivated in part by Croasmun's protected activity, Consol presented overwhelming evidence to support the affirmative defense that it was also motivated by Croasmun's unprotected activity (apparent participation in the theft of Consol property) and that it would have taken the adverse action for the unprotected activity alone. *See Pasula*, 2 FMSHRC at 2799-800; *See also Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

In *Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (June 1982), the Commission discussed several indicia of legitimate non-discriminatory reasons for an employer's adverse action - - including the violation of personnel rules forbidding the conduct in question. The Commission has also stated that an affirmative defense should not be "examined superficially or be approved automatically once offered," *Haro v. Magma Copper Company*, 4 FMSHRC 1935, 1938 (November 1982), and has further enunciated that in reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. Consol in this case has established such an affirmative defense by abundant credible evidence. Clearly it was motivated to discharge Croasmun by evidence of his participation in the theft of Consol property.

In this regard I first note the credible testimony of Consol warehouse supervisor Steven Crouse. Crouse saw the rolls of conveyor belt being loaded onto a trailer on February 21, 2002. A Consol employee also told Crouse that truck driver Lemley later told him that he could not remember where he had taken the nine rolls of belt. Crouse then checked to determine whether the proper paperwork had been filed in the shipping warehouse. According to Crouse, a copy of the form, MM-18, must be filed at his warehouse for anything that leaves mine property. The form must also be signed

by the superintendent. There was no such form in the warehouse file. Crouse then reported his suspicions to superintendent Coram.

Coram testified that Crouse reported to him around February 28th that belt had been removed from mine property under suspicious circumstances. Private Investigator Ronald Pearson was then called. Pearson testified that he was asked by Coram on March 4, 2002, to investigate the disappearance of the belt. After his investigation, Pearson reported back to Coram and Gianato on March 5 and 6. According to Pearson, Croasmun told the mine security guard that the paperwork had been taken care of and that he was to permit the truck to drive onto mine property and remove the belt. An employee of B&M contracting, George Kelly, told Pearson that he and Croasmun put red numbers on the belt to be loaded onto Lemley's truck. Kelly was also told by Croasmun that the paperwork had been taken care of. Truck driver Greg Lemley told Pearson that he picked up the belt as a favor to the mine and that he delivered it to Yarber. Yarber purportedly wrote checks for 5,000.00 and \$4,800.00, payable to Melinda White, and gave them to Lemley to return to Pennsylvania. Pearson attempted to obtain relevant records from Melinda White but she refused to produce them.

Luke Gianato, Consol's supervisor of human resources, was present with Coram at the March 5 meeting with Croasmun. According to Gianato, Coram made no threats or statements to the effect that someone would go to jail over the matter. Coram merely stated to Croasmun that the belt had left mine property without authorization and that they were trying to find out what happened. According to Gianato, Croasmun explained that he had given the belt to Lemley to use for horse stalls in his barn because Lemley had done favors for him. At the end of the meeting, Croasmun was told to go home and stay off mine property until contacted. Gianato was also present at the March 8th meeting. Coram asked Croasmun if he had anything else to say and Croasmun responded: "do I have to destroy others to save myself?" Coram then told Croasmun that he was terminated and that he was not to return to Consol property.

Superintendent Coram corroborated Gianato's testimony concerning the March 5 and March 8 meetings. According to Coram, Croasmun never recanted his statement at the March 5 meeting that he gave the belt to Lemley in return for favors and that Lemley purportedly wanted the belt for barn stalls. Coram further testified that Croasmun had no authority to trade the belt. Coram maintains that he in fact did not recommend that Crouse be discharged but merely passed the investigative results on to higher officials. He subsequently learned from Consol's manager of human resources, Mark Hurtkey, that the decision to terminate Croasmun had been made. The March 8th meeting with Croasmun followed, and he then informed Croasmun of the decision to terminate.

Within this framework of evidence it is clear that Consol officials had, at the time of Croasmun's discharge, possession of credible evidence that Croasmun had participated in the theft of Consol property and that he had lied about it. Under these circumstances I have no difficulty concluding that, even had Consol been motivated in part by protected activities, it clearly would have discharged Croasmun for his unprotected activities alone.

Under the circumstances this discrimination case must be dismissed.

ORDER

Discrimination Proceeding Docket No. PENN 2002-162-D, is hereby dismissed.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 31, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2002-46
Petitioner	:	A. C. No. 46-01271-03852
	:	
v.	:	
	:	
EASTERN ASSOCIATED COAL CORP.,	:	Harris No. 1
Respondent	:	

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, PC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Eastern Associated Coal Corporation, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges four violations of the Secretary’s mandatory health and safety standards, one violation of the Secretary’s mandatory training regulations and seeks a penalty of \$1,473.00. A hearing was held in Charleston, West Virginia.¹ For the reasons set forth below, I vacate three citations, affirm the other two and assess a civil penalty of \$874.00.

Background

Eastern Associated Coal Corporation operates the Harris No. 1 Mine, an underground coal mine in Boone County, West Virginia. The mine produces 3.9 million tons of coal per year.

¹ The record was kept open to admit two depositions that the parties were to take subsequent to the hearing. (Tr.422-25.) The depositions of Tyler Pawich and Joseph Deoskey were filed as Government Exhibits 15 and 16 and are admitted as such.

In October 2001, Eastern was planning to use the No. 4 entry in the mine's 4 East section to set up the face conveyor and shield for a longwall mining machine. To do this, it was necessary that the entry be 24 feet wide. However, because of a roof fall in the entry one crosscut outby, the entry had been narrowed to 18 feet and longer roof bolts had been installed in the roof. Because the roof was determined to be layered and had cracks in it, the company decided to have polyurethane grout injected into the roof as additional support before widening the entry to the necessary 24 feet.²

The Respondent hired ESS/Micon, a company that specializes in injecting the roof grout, to perform that function for it. At about 5:10 a.m., during the midnight shift on October 17, 2001, two Micon employees, Joe Deoskey and Tyler Pawich, were "gluing" the roof when two pieces of the roof fell and struck Pawich. The first, smaller piece hit him in the head, stunning him and knocking him to the ground. Then, a larger piece landed on his right knee, crushing it and pinning him to the ground. Pawich received emergency treatment and was transported from the mine.

Two MSHA inspectors, David Sturgill and T. L. Workman, began conducting an investigation of the accident around 10:00 a.m. on the 17th. After viewing the accident scene and interviewing witnesses, the five citations being contested in this proceeding were issued.

Findings of Fact and Conclusions of Law

Citation No. 7195725

This citation charges a violation of section 75.211(d), 30 C.F.R. § 75.211(d), in that:

During an [*sic*] non-fatal accident investigation it was determined that a proper tool was not used for taking down loose rib/roof materials. Bars provided for taking down loose material shall be of a length and design that will allow the removal of loose material from a position that will not expose the person performing this work to injury from falling material.

(Govt. Ex. 4.) Section 75.211(d) provides that:

A bar for taking down loose material shall be available in the working place or on all face equipment except haulage equipment. Bars provided for taking down loose material shall be of a length and

² The grout seeps into the cracks and open spaces in the roof and sets up like a glue to hold the roof together.

design that will allow the removal of loose material from a position that will not expose the person performing this work to injury from falling material.

The evidence on this citation is undisputed. Joe Deoskey, the senior Micon employee, admitted that he scaled down loose roof and rib with a piece of drill steel. He said that he did not look for a scale bar nor did he ask any Eastern employee for one. Eastern miners testified that there was a scale bar on the roof bolting machine in the No. 3 entry. They also testified that one was available on the continuous miner on the section and at the tailpiece.

The regulation requires that the bar be available in the working place *or* on the face equipment. The bar was clearly available on the face equipment. That is all the regulation requires. It does not prohibit using a drill steel to scale loose rocks. If Deoskey had bothered to try to obtain a scale bar he would have been able to. Consequently, I conclude that the Respondent complied with this regulation and will vacate the citation.

Citation No. 7195727

This citation alleges a violation of section 75.360(f), 30 C.F.R. § 75.360(f), stating that:

A proper pre-shift examination for the MMU 064-0 section was not conducted and recorded for the evening shift of 10-16-2001 for the oncoming midnight shift working 10-17-2001.

Several hazardous conditions were discovered during an [*sic*] non fatal accident investigation, that were obvious.

The approved roof control plan was not complied with during the grouting of the mine roof by employees of contractor ESS/Micon QK5[.] Supplemental supports were not installed within a 15 foot radius of holes already grouted and current holes being grouted at time of accident, sag devices were not used as per the plan[,] page 30[,] Part E[,] No. 1, 2, and 3.

A kettle bottom measuring 10 inches by 10 inches of undetermined thickness was present in the No. 4 entry just outby left of half crib without additional support being installed.

(Govt. Ex. 2.)³

³ The citation was amended on July 3, 2002, to change the regulation alleged to have been violated from section 75.363(b), 30 C.F.R. § 75.363(b). (Govt. Ex. 2, p. 3.) The Secretary's motion to amend the citation was granted, over the Respondent's objection, at the hearing. (Tr. 6-10.)

Section 75.360(f) requires that:

A record of the results of each preshift examination, including a record of hazardous conditions and their locations found by the examiner during each examination and the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine.

This citation was issued based on the inspectors' view of the entry some 11 hours after the preshift examination was completed and after the accident had occurred. They did not interview the miner who conducted the preshift examination. (Tr. 211, 272.) They also apparently did not question any other miners concerning the condition of the No. 4 entry during the preshift examination. (Tr. 133.) The evidence does not support the inspectors' conclusion that what they observed sometime after 10:00 a.m. on the 17th was present during the preshift examination on the evening of the 16th.

Everyone agrees that grouting was performed during the midnight shift on October 16 and during the midnight shift on October 17 and that it was not performed during the morning or afternoon shifts on October 16. The Respondent's Roof Control Plan requires that temporary roof supports be installed on five foot centers within a minimum radius of 15 feet around the injection hole during injection and for at least one hour after completion of injection. (Govt. Ex. 6, p.30.) Since no injecting was going on at the time that the preshift examination was performed, and more than one hour had elapsed since the completion of the last injection on the previous midnight shift, the failure to have temporary roof supports installed was not a violation of the plan and their absence was not an obvious hazard.

Similarly, the plan calls for the installation of at least two sag devices "during injection." (Govt. Ex. 6, p.30.) As no injection was being performed during the preshift examination, not having sag devices was neither a violation of the plan nor their absence an obvious hazard.

Whether the kettle bottom was an obvious hazard is problematical. Inspector Sturgill testified that "[i]t wasn't easy to see." (Tr. 45.) Inspector Workman did not notice it until he was advised to watch out for it. (Tr. 168, 373-74.) This testimony is all the more significant because at the time the inspectors were in the area, the accident had occurred and they were looking at the roof to see where the fall had happened.

Donnie Stafford, the section foreman who performed the preshift examination, testified that he visually examined the roof in the No. 4 entry. He stated:

I looked at the roof in there. I didn't see anything abnormal that hadn't been there, you know, the previous times that I had been in there and I saw no need to – I didn't see anything.

Q. Did you see any kettle bottoms by that half crib that was in the center of the entry?

A. No, I did not.

Q. What would you have done if you had seen a kettle bottom?

A. Well, I'd either brung [*sic*] a bolt crew over there and put a bolt in it or dangered the entry off so somebody else would.

(Tr. 270-71.) Ed Laxton, who performed an on-shift examination of the No. 4 entry at about 12.45 a.m., testified that “the roof conditions looked pretty good. There was some cracking at the right-hand rib. I did not observe anything hazardous, no kettle bottoms, nothing like that.” (Tr. 232.)

Finally, Deoskey testified that he observed the kettle bottom while drilling injection holes before the accident. He said that the kettle bottom “was obvious because I was up there to drill a hole. When I went up to drill a hole, I looked on the right and it was there. If I wouldn't have drilled a hole there, I probably wouldn't have seen it.” (Govt. Ex. 16 at 45.) He later appeared to state that if one were performing a preshift exam the kettle bottom would have been easy to see. (Govt. Ex. 16 at 45-6.) It is not clear, however, whether he meant that it was easy to see from where he was up drilling a hole, or whether he meant it was easy to see from the floor. If he meant the latter, then his testimony is inconsistent and cannot be reconciled. Deoskey's testimony is further impeached by his statement that he told Pawich to look out for the kettle bottom. (Govt. Ex. 16 at 24.) Pawich claimed that while he had heard of kettle bottoms, he had never seen one and did not know if there was a kettle bottom in the No. 4 entry. (Govt. Ex. 15 at 22.)

The state of the evidence, then, is that no one saw the kettle bottom until Deoskey did when he was on a ladder drilling a hole right next to it. However, his testimony cannot be relied upon as to whether it was obvious or not. Since there is no direct evidence to contradict Stafford's and Laxton's claims that they did not observe a kettle bottom, I conclude that if it was present during the preshift examination, it was not, based on the inspectors' observations a half day later, immediately obvious.

Perhaps realizing the weakness of the case as set out in the citation, the Secretary now argues that there were adverse roof conditions, specifically cracks, broken top, loose and hanging roof, loose rib, and water running out of the roof, which should have been reported by the preshift examiner. Disregarding the questionable practice of the government expressly detailing specific “obvious hazardous conditions” in a citation and then ambushing the Respondent with additional allegations at the

hearing, I find that the Secretary has not proved that these were obvious hazards that should have been discovered.

Inspector Sturgill testified that on arriving at the No. 4 entry he “observed water coming from the top, a rib roll, which is where the rib was pulled out I found out later, cribs in the area, water on the bottom, a half crib was constructed.” (Tr. 44.) He later added that there were cracks in the roof. (Tr. 50.) Inspector Workman testified that there was “loose roof” which had not been scaled down. (Tr. 180.)

In considering these allegations, it must be kept in mind that the roof in the No. 4 entry had been extensively roof bolted and had four cribs providing additional support. (Resp. Ex. 21.) Inspector Workman testified in describing the roof conditions that he observed in the No. 4 entry on November 15: “They looked just about like they did when I was there before. I mean they had some little breakage here and there, but, just as I said, *they had already put additional bolts in, and that’s what the law says, when it’s encountered, then additional support shall be installed.*” (Tr. 156 emphasis added.) Clearly, the company was installing additional support as needed. There is nothing to suggest that by the next day the roof top was drastically different than the one Workman saw on the 15th.

In addition, it appears that much of the water coming out of the roof, was either on one side or coming out around the roof bolts. The two examiners were aware of the water, but did not consider it a hazard. (Tr. 254, 275-76.) In this connection, Inspector Sturgill agreed that water coming out of the roof is not always something that has to be recorded in the preshift book. (Tr. 112.)

Further, the Secretary does not contend that the cribs were a hazard.⁴ The rib roll “was loose rock encountered there and they pulled it so it wouldn’t be a falling hazard.” (Tr. 48.) Therefore, the roll itself was not a hazard.

Finally, as noted above, the conditions in the No. 4 entry that were observed by the inspectors were those that existed after a roof fall. Thus, the conclusion that the same conditions were present during the preshift examination is conjectural at best. Furthermore, if these conditions were so obviously hazardous, it is curious that they were not listed in the citation, or the inspectors’ notes. (Govt. Exs. 9 & 10.) , Ultimately, I find it very significant that the inspectors participated in the investigation in the No. 4 entry with their entourage of company employees without requiring that any roof be scaled down, that any additional support be installed, or indeed, that the entry be “dangered off.”

⁴ The half crib in the entry apparently was just that, an uncompleted crib. It appears to have served no useful purpose, but it certainly was not a hazard. The attention paid to it during the trial was completely out of proportion to its relevance.

For these reasons, I find that the evidence does not support the allegation that an improper preshift examination was performed. Accordingly, I conclude that section 75.360(f) was not violated and will vacate the citation.

Citation No. 7195726

This citation charges a violation of section 75.362(a)(1) because:

A proper on-shift examination for the MMU 064-0 section was not conducted and recorded for the midnight shift of 10-17-2001.

Several hazardous conditions were discovered during a non fatal accident investigation, that were obvious.

The approved roof control plan was not complied with during the grouting of the mine roof by employees of contractor ESS/Micon QK5[.] Supplemental supports were not installed within a 15 foot radius of holes already grouted and current holes being grouted at the time of the accident, sag devices were not used as per the plan[,] page 30[,] Part E[,] No. 1, 2, and 3.

A kettle bottom measuring 10 inches by 10 inches of undetermined thickness was present in the No. 4 entry just outby left of half crib without additional support being installed.

The on-shift examiner stated that he walked to Tyler's [*sic*] position (14' to 16' outby the face area), but did not proceed on to the face in the #4 entry.

On-shift examiners are required to go all the way to the face in performing the exam.

The on-shift exam was also in violation of 75.362(d), because no methane reading was taken at the face. Further the on-shift examiner's report did not have any methane readings or air readings, and it said "section idle" even though people were working on the section.⁵

(Govt. Ex. 1.)

Section 75.362(a)(1) requires that:

⁵ The last three paragraphs were added to the citation as the result of a Motion to Amend made by the Secretary on the day of the hearing. The motion was granted over the objection of the Respondent. (Tr. 10-20.)

At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift The certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

Except for substituting “on-shift” for “preshift” and the date and time of the examination, the first four paragraphs of this citation are identical to the previous citation. For many of the same reasons, the Secretary has also failed to prove this citation.

Laxton, the certified person performing the on-shift, examination, testified that he performed an examination of the No. 4 entry at about 12:45 a.m. He stated that Deoskey and Pawich were not present in the entry at that time, but were in the dinner hole. (Tr. 230.) They had not started to work, because they asked Laxton to get some drill bits for them. (Tr. 230.) No grouting had been done since the midnight shift on the day before.

In these circumstances, there was no requirement in the Roof Control Plan that supplemental supports or sag devices be installed. Thus, their absence was not a hazardous condition.

For the same reasons that the kettle bottom, and the other embellishments added by the Secretary during the trial, were not obvious hazardous conditions that should have been recorded with regard to the previous citation, I conclude that they were not obvious hazardous conditions that should have been recorded with regard to this citation.

At the hearing, the Secretary also asserted that the on-shift exam was not proper because Laxton did not go all the way to the face of the No. 4 entry when performing the exam. As the Respondent correctly notes, there is nothing in section 75.362(a)(1) that requires going to the face. Section 75.362(c)(3), 30 C.F.R. § 75.362(c)(3), requires that the velocity of air at each end of the longwall or shortwall face be checked. However, since coal was not being mined in the No. 4 entry and had not been for at least a week, there were no mining machines of any type in the entry and, therefore, no longwall or shortwall face to go to. Otherwise, there is nothing in any section of 75.362, except section 75.362(d)(2), 30 C.F.R. § 75.352(d)(2), that even mentions the face. Although apparently relied on by the Secretary, section 75.362(d)(2) is not applicable to this situation.

In the first place, section 75.362(d) is required in addition to and not as part of the on-shift examination. In the second place, it only comes into play when electrical equipment is being used in the working place. If such equipment is being used, then section 75.362(d)(2) requires that methane tests be made at the face. “Working place” is “[t]he area of a coal mine inby the last open crosscut.” 30 C.F.R. § 75.2. The only equipment being used to grout the roof was a glue pump which, according to the mine map, was located outby the last open crosscut. (Resp. Ex. 21.) Therefore, even if section

75.362(d)(2) were part of the on-shift examination requirement, it was not required in this case because no electrical equipment was being used in the working place.

Laxton testified that he did test for methane in the No. 4 entry in “the place most likely that methane would be, farthest away from the curtain, closest to the top” and that he received a reading of “zero.” (Tr. 229, 250.) He said that he did not observe any hazardous conditions. (Tr. 232.) He stated that he determined that the air was moving in the proper direction. (Tr. 251.) He was never asked whether he tested for oxygen deficiency, however, since there is no evidence that he did not and since he was an experienced examiner, I will assume that he did. In short, Laxton did everything required of him by section 75.362(a)(1). In fact, except for contending that Laxton did not take a methane reading at the face, the Secretary’s main thrust on this citation is that his findings were not properly recorded.⁶

Unfortunately, nowhere in section 75.362 is there a requirement that the results of an on-site examination be recorded. Section 75.363(b), 30 C.F.R. § 75.363(b), requires that a “record shall be made of any *hazardous* condition . . . in a book maintained for this purpose on the surface . . .” (Emphasis added.) It further states that: “This record shall not be required for shifts when no hazardous conditions are found or for hazardous conditions found during the preshift or weekly examinations” Inasmuch as Laxton found no hazardous conditions, he was not required to make any report.

In sum, it appears that a proper on-shift examination was conducted for the MMU 064-0 section. It further appears that since no hazards were found, particularly the ones alleged by the Secretary, nothing had to be recorded in the on-shift book. Consequently, I conclude that the Respondent did not violate section 75.362(a)(1) and will vacate the citation.

Citation No. 3568565

This citation asserts a violation of section 75.220(a)(1), 30 C.F.R. § 75.220(a)(1), because:

During a non-fatal accident investigation it was determined that the Approved Roof Control Plan for this mine dated February 20, 2001 was not complied with on the MMU 064 East Mains Section in the No. 4 entry where a non-fatal accident occurred on 10-17-2001. Loose, mine roof was present beginning 12' outby spad 30223 and extending inby for a distance of 30' and had not been scaled down. Adequate temporary supports were not installed on 5' centers with a minimum radius of 15' around the hole being injected, and roof sag

⁶ While Laxton apparently did not go right up to the face, he came within four to ten feet of it. [Tr. 229, Resp. Ex. 21 (as measured on the mine map, he was within four feet of the face).]

devices were not installed around the No. 5 hole being injected with grout material. See page No. 30 Part E No. 1, 2, 3 of approved roof control plan.

(Govt. Ex. 5.) Section 75.220(a)(1) requires that: “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.”

There is no dispute that the Micon employees did not install temporary supports or sag devices while injecting the roof with grouting material.⁷ This would appear to be a violation of the roof control plan as cited. Nonetheless, the Respondent argues that the sections in the plan concerning grouting were “improperly imposed” on Eastern and, therefore, cannot serve as a basis for the alleged violation. (Resp. Br. at 39.) Specifically, the company argues that the grouting provisions are neither mine specific nor the result of good faith negotiations. The facts, however, indicate that Eastern did not try to negotiate the provisions with MSHA as to whether they applied to the specific requirements of the Harris Mine, or on any other basis, but instead acquiesced in including them in the plan.

The five pages in the Roof Control Plan were originally included at the direction of MSHA. Inspector Workman told Eastern that grouting could not be performed at the mine unless it was covered in the roof or ventilation control plan. (Tr. 218.) Danny Spratt, the manager for safety and training, asked him how they could get such provisions in the plan and he told them he had a copy of some that he would fax to them. (Tr. 337.) On receiving the faxed provisions, Eastern’s management looked them over, then typed them up, put on a cover letter and had the plan approved by MSHA on May 11, 2001. (Govt. Ex. 6, p.2, Tr. 337.) No negotiations were had with MSHA over the provisions.

The company now claims that it did not object to the provisions because it needed the grouting being done at the time to be completed so the longwall could be moved. Even if that is true, it does not explain why Eastern did not object to them later. In fact, it was not until the yearly review of the plan, apparently in January or February 2002, that the company revisited the provisions.⁸ (Tr. 338.) Even then, the Respondent did not try to renegotiate or object to the provisions, instead they proposed “to condense those five pages into two pages.” (Tr. 338.) Danny Spratt and others met with the MSHA

⁷ To the extent that the allegation in the citation concerning loose roof material is intended to be a violation of the roof control plan separate from the requirements concerning grouting, it is rejected for the same reasons it was rejected in the two previous citations.

⁸ It is not clear from the evidence exactly when the mine’s yearly review was, however, based on the fact that the previous year’s review was approved on February 20, 2001, I am assuming that the 2002 yearly review occurred at about the same time. (Govt. Ex. 6, p.3.)

Assistant District Manager and “had quite a lengthy meeting and the results of that meeting, our plan was not changed.” (Tr. 338.)

The Commission has stated, with regard to the negotiating of roof control and ventilation plans, that:

The requirement that the Secretary approve an operator’s mine ventilation plan does not mean that the operator has no option but to acquiesce to the Secretary’s desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, *review of the dispute may be obtained by the operator’s refusal to adopt the disputed provision, thus triggering litigation before the Commission.*

Carbon County Coal Co., 7 FMSHRC 1367, 1371 (September 1985)(emphasis added) (citation omitted).

Here, Eastern did not attempt to negotiate the grouting requirements when they were originally included in its plan. Nor did it raise the issue after completing the grouting which it maintains prevented it from challenging the provisions initially. Further, there is no evidence that it raised the issue after receiving the instant citation in November, 2001. When it did finally get around to raising it, the company did so not by objecting to the provisions, but by proposing to “condense” the provisions. After one meeting, the company assented to continue including the five pages in its plan. Thus, it appears that what little negotiations there were resulted in the two parties agreeing. Certainly, there is no evidence that the company tried to take the matter to the district manager or to anyone else in the MSHA hierarchy. Nor did Eastern refuse to adopt the provisions to trigger litigation before the Commission.

Consequently, I find that while the company now claims that the grouting requirements were imposed on it, in fact it put up little or no fight, instead agreeing to the inclusion of the provisions in its roof control plan. Since the grouting provisions were not imposed upon the Respondent, it was required by section 75.220(a)(1) to comply with their requirements and to insure that others working in the mine did also. By not doing so, the company violated section 75.220(a)(1).

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Applying the *Mathies* criteria, I make the following findings. The violation of section 75.220(a)(1), by not installing temporary roof supports and sag devices during grouting, created the distinct safety hazard of a roof fall. In view of the fact that the grouting was being performed to shore up a weak roof and the fact that the injection of the grouting material put the roof under additional pressure until the grout "set up," a roof fall resulting in an injury to someone standing under the affected roof was reasonably likely to occur. Finally, the resulting injury was likely to be of a reasonably serious nature, such as a crushed knee. Clearly, the failure to use temporary roof supports and sag devices was a significant contributing cause to the accident, making it "significant and substantial." *Walker Stone Co., Inc.*, 19 FMSHRC 48, 53 (January 1997). Accordingly, I so find.

Citation No. 7195722

This citation alleges a violation of section 48.11 of the Secretary's mandatory training requirements, 30 C.F.R. § 48.11, because: "At an AFB investigation it has been determined that Tyler Pawich and Joe Deoskey, Micon employees, contracting for Eastern Associated Coal Corp., Harris

No. 1 Mine, had not been properly trained in the General Safety Precautions and Guidelines for Polyurethane Grouting for roof Strata and Rib consolidation of the approved Roof Control Plan.” (Govt. Ex. 3.)⁹ Section 48.11 requires that:

(a) Operators shall provide to those miners, as defined in § 48.2(a)(2) (Definition of miner) of this subpart A, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:

- (1) Hazard recognition and avoidance;
- (2) Emergency and evacuation procedures;
- (3) Health and safety standards, safety rules, and safe working procedures;
- (4) Use of self-rescue and respiratory devices, with self-contained self-rescue device training that includes complete donning procedures in which each person assumes a donning position, opens the device, activates the device, inserts the mouthpiece or simulates this task while explaining proper insertion of the mouthpiece, and puts on the nose clip; and
- (5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine.

Section 48.2(a)(2), 30 C.F.R. § 48.2(a)(2), states that a *miner* is, “for the purposes of § 48.11 (Hazard training) of this subpart A, any person working in an underground mine, including any delivery, office, or scientific worker or occasional, short-term maintenance or service worker contracted by the operator”

It is the Secretary’s position that paragraphs (a)(1) and (a)(3) of section 48.11 required that the hazard training given Pawich and Deoskey include pages 29 through 34 of Eastern’s Roof Control Plan. Those pages are entitled “General Safety Precautions and Guidelines for Polyurethane Grouting for Roof Strata and Rib Consolidation” and cover such topics as: Notification of Use, Training, Personal Protection, Roof Control, Equipment, Storage and Handling, Injection Process, Ventilation, Fire Protection, Spills and Disposal. (Govt. Ex. 6, pp. 29-34.) On the other hand, the Respondent argues that training on these subjects would be task training, not hazard training. The Secretary has the better argument on this issue.

⁹ The citation originally alleged a violation of section 48.5(a), 30 C.F.R. § 48.5(a), but was amended on November 24, 2001 (the modification is actually dated October 24, 2001). (Govt. Ex. 3 at 2.)

While some of the guidelines may sound like the types of things covered in task training, training concerning the guidelines would not be covered by section 48.7, 30 C.F.R. § 48.7, which governs task training. In the first place, task training is only required for those newly assigned to work as “mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations.” *Id.* In the second place, section 48.7(e), 30 C.F.R. § 48.7(e), states that “[a]ll training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks.” The Respondent always hires a specialist to perform roof grouting. Thus, the company has no one in a position to perform the task training and, indeed, knows less about the task of roof grouting than do the experts hired to do it.

The type of training given to employees of independent contractors such as Micon, depends on the frequency or length of their time in the mine. Section 48.2(a)(1), 30 C.F.R. § 48.2(a)(1), includes in its definition of *miner*, “a maintenance or service worker contracted for by the operator to work at the mine for frequent or extended periods.” If such a miner is at the mine frequently or for extended periods, he would receive “Experienced miner training” under section 48.6, 30 C.F.R. § 48.6, the first time he came to the mine. That training would include *health and safety aspects of the tasks to which the experienced miner is assigned.* 30 C.F.R. § 48.6(a)(11).

However, if the employee of an independent contractor is only at the mine infrequently, for short periods of time, the only training he receives is hazard training under section 48.11. Nonetheless, section 48.11 clearly requires training in health and safety standards, safety rules and safe working procedures, which are applicable to the miner’s duties. Thus, it is reasonable to expect that when an operator has safety provisions in its roof control plan which specifically apply to the task that the contract employee is going to be performing, the operator will go over those provisions during hazard training.¹⁰ While not all of the guidelines in the roof control plan involved health and safety aspects of roof grouting, enough of them do that the training comes within section 48.11(a)(3) of the regulation.

It is undisputed that the Respondent did not provide such training to Deoskey and Pawich.¹¹ Operators have the overall compliance responsibility for insuring that independent contractors comply with the standards and regulations applicable to the work being performed by them in the operator’s mine. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1996); *Mingo Logan*

¹⁰ Accordingly, I find that the Respondent’s additional argument that the standard is impermissibly vague or does not meet the “reasonably prudent person involved in the mining industry” test is without merit.

¹¹ It appears that one of the reasons, if not the main reason, why no training was given on the grouting provisions was that John Knabb, who gave the hazard training, was not familiar with the grouting procedures in the roof control plan. (Tr. 317.)

Coal Co., 19 FMSHRC 246, 250 (February 1997). Proper hazard training would have fulfilled that obligation. Accordingly, I conclude that the Respondent violated the regulation by not doing so.

Significant and Substantial

I find that the “significant and substantial” designation is not applicable to this violation. As section 104(d)(1) clearly states, only violations of “mandatory health or safety standard[s]” can be S&S. Section 3(l) of the Act, 30 U.S.C. § 802(l), defines “mandatory health or safety standard” as “the interim mandatory health or safety standards established by titles II or III of the Act, and the standards promulgated pursuant to title I of this Act.” Mandatory health and safety training is not included in either title II or III of the Act, nor is it included in the Secretary’s mandatory health and safety standards promulgated pursuant to title I of the Act, which are clearly labeled as such. 30 C.F.R. Parts K, M and O. Since this citation is not a violation of a mandatory health or safety standard, it cannot be S&S. *Cyprus Cumberland Resources v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

Therefore, I conclude that the violation was not “significant and substantial.” The citation will be modified accordingly.

Civil Penalty Assessment

The Secretary has proposed penalties of \$874.00 for the two violations I have found that the company committed. However, it is the judge’s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with these criteria the parties have stipulated that the Harris No. 1 Mine produces 3.9 million tons of coal a year and that Eastern and its affiliated companies produce 149 million tons of coal a year. (Jt. Ex. 1.) Therefore, I find that the mine is a very large mine and Eastern a very large company.

The parties have also stipulated that in the previous 24 month period the Harris mine had 119 assessed violations during 438 inspection days. (Jt. Ex. 1.) In addition, Inspector Sturgill testified that: “This company is a very good company, a very safety conscious company.” (Tr. 60.) And Inspector Workman said that the company had “always worked with me every way they can to eliminate accidents” and “I just wish we had a lot more like them to work with.” (Tr. 188.) I find that this indicates that the operator has a very good history of previous violations.

I further find based on the absence of any evidence to the contrary, that payment of the proposed penalty will not adversely affect Eastern's ability to remain in business and that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

In view of the serious knee injury sustained by Pawich, I find that the gravity of both violations was fairly serious.

Finally, I agree with the conclusions of the inspectors that the company was moderately negligent in committing these two violations.

Taking all of these factors into consideration, I conclude that the penalties of \$475.00 for Citation No. 7195722 and \$399.00 for Citation No. 3568565, proposed by the Secretary, are appropriate.

Order

In view of the above, Citation Nos. 7195725, 7195726 and 7195727 are **VACATED**, Citation No. 7195722 is **MODIFIED** by deleting the "significant and substantial" designation and is **AFFIRMED** as modified and Citation No. 3568565 is **AFFIRMED**. Eastern Association Coal Corporation is **ORDERED TO PAY** a civil penalty of **\$874.00** within 30 days of the date of this decision.



T. Todd Hodgdon
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 8, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
ON BEHALF OF DANNY FOUST,	:	Docket No. KENT 2002-203-D
Complainant	:	BARB CD 2001-15
v.	:	
	:	Preparation Plant
MANALAPAN MINING COMPANY,	:	Mine ID 15-12602
Respondent	:	

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT'S MOTION TO STRIKE, FOR SANCTIONS AND ATTORNEY'S FEES

This case is before me on a complaint of discrimination filed by the Secretary of Labor on behalf of Danny Foust under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("the Act"). A hearing was duly scheduled and held on September 10-12, 2002, in Harlan, Kentucky. After the parties rested, the record was closed and a briefing schedule was established. Attached to the Secretary's post-hearing brief were copies of a January 19, 2001, Order of the Commission approving a settlement agreement and dismissing a discrimination proceeding brought, *inter alia*, against Respondent, and several orders by Commission Administrative Law Judges approving settlements of discrimination actions brought against Respondent and/or other allegedly related entities. Also attached were an Order of Temporary Reinstatement by a Commission ALJ and copies of records from the State of Kentucky purporting to establish that Respondent's chief executive officer had an interest in the entities that were the subject of the orders.

Respondent moved to strike the exhibits and related portions of the Secretary's brief, arguing that they were submitted after the record was closed, were not disclosed in pre-hearing proceedings, involved matters that had been settled through confidential agreements including sealing of the records, and that the attempt to submit such evidence after the hearing deprived it of procedural due process. Respondent sought sanctions against the Secretary's representative and an award of attorney's fees. Respondent also requested an opportunity to present evidence regarding the circumstances of the various orders, in the event its motion to strike was denied.

The Secretary's position is not entirely clear. In her most recent filing, a response to Respondent's reply to her opposition to the motion, she argues that the Commission orders and decisions are simply "case law" cited for "legal precedent," and that they are relevant to Respondent's history of violations.¹ However, in her opposition to the motion, and in her brief, at pp. 94-96 and related portions of her reply brief, she went considerably further, asserting that the materials were relevant to evaluating the credibility of Respondent's witnesses. In essence, that the decisions establish that Manalapan (and other entities in which Manalapan's chief executive officer has, or has had, an interest) has previously discriminated against miners in violation of the Act, which tends to prove that Manalapan discriminated against Foust. In making that argument, the Secretary relies on factual matters that are not contained in, nor discernable from, the reported decisions. While it may be correct, as the Secretary asserts (without citation to authority), that legal and factual findings of earlier decisions are routinely discussed by courts, the ALJ decisions approving settlement contain no adjudicated facts. They establish only that discrimination cases were brought against the named respondents and that they were settled on largely undisclosed terms, with the respondents agreeing to pay a civil penalty.

I must reject any attempt by the Secretary to use the materials in dispute as substantive proof of discrimination. Such an attempt would violate orders establishing prehearing procedures in this case and would unduly delay resolution of this case by requiring that Respondent be given an opportunity to be fully heard on the asserted circumstances of the prior cases. In addition, the Secretary has completely failed to demonstrate that the mere fact of settlement of a prior allegation against Respondent, much less settlement of an allegation against a different entity, would have any relevance to the credibility of witnesses who testified on behalf of Respondent, or any other issue in this case.

The Notice of Hearing, issued May 9, 2002, directed the parties to submit prehearing reports containing, *inter alia*, a list of all exhibits they intended to offer into evidence at the hearing. The notice further provided that: "Failure to comply with any part of this order may result in sanctions against the defaulting party. . . . Absent good cause shown, no party will be permitted to offer an exhibit that has not been identified in the party's prehearing report and made available for inspection and copying by opposing parties prior to the scheduled hearing."

The documents submitted with the Secretary's brief were not identified on her prehearing report, were not made available to Respondent for inspection and copying prior to the hearing and were not offered, or even alluded to, during the course of the hearing. The hearing record closed after the parties rested and a briefing schedule was established. The Secretary has not requested that the

¹ Commission Procedural Rule 72, 29 C.F.R. § 2700.72, provides that unreviewed decisions of ALJ's are not binding precedent. The only Commission order relied upon simply dismissed a case based upon a settlement agreement between the parties.

record be re-opened to allow the submission of additional evidence. Nor has she offered any explanation for waiting until the filing of her brief to submit the challenged documents. Absent a showing of good cause for failure to comply with the Notice of Hearing, the proposed exhibits would not have been admitted at the hearing. Here, in the absence of a showing of good cause, they cannot be made a part of the record after the hearing record has closed.²

As noted above, in her most recent filing the Secretary asserts only that the orders and decisions are relevant to Respondent's violation history. A violation of the Act, or a safety or health standard contained in or created pursuant to the Act, is a necessary predicate to the imposition of a civil penalty. It also appears that evidence of all previous violations, including cases resolved through settlement, must be considered in evaluating an operator's history of violations for purposes of determining an appropriate civil penalty. *See, Sec'y of Labor on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 556-57 (April 1996). As noted above, the ALJ decisions approving settlement establish that a civil penalty was imposed on the respondents in those cases. It would, therefore, be permissible to consider prior violations in cases resolved against Respondent through settlement, and the fact of such settlements may properly be established by citation to final decisions of the Commission. Because the fact of settlement and the imposition of a civil penalty pursuant thereto, as reflected in final decisions of the Commission, could not be reasonably disputed, it would also be appropriate to take judicial notice of them.

² While the Secretary has not specifically requested that judicial notice be taken of the alleged circumstances of the prior settlements, it would be inappropriate to do so. Aside from the fact that in some of the decisions, a civil penalty was imposed upon Respondent pursuant to a settlement agreement, the decisions establish virtually no adjudicative facts not subject to reasonable dispute. Moreover, if the Secretary's assertions regarding the circumstances of the prior cases were to be considered, Respondent would, in fairness, have to be afforded an opportunity to be heard on those matters.

ORDER

Based upon the foregoing, it is **ORDERED** that Respondent's Motion to Strike, for Sanctions and Attorney's Fees is **granted in part and denied in part**. The materials submitted as Exhibit A to the Secretary's brief, as well as related portions of the brief and reply brief, shall not be made a part of the evidentiary record in this case and will not be considered in deciding the merits of the discrimination allegations advanced in the complaint. If Respondent is found to have violated the Act and a civil penalty is imposed for such violation, final orders of the Commission, including decisions approving settlement issued by ALJ's, in which a civil penalty was imposed against the Respondent, Manalapan Mining Co., will be considered solely for purposes of evaluating Respondent's history of violations. In all other respects, Respondent's motion is **denied**.


Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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January 10, 2003

AGGREGATE INDUSTRIES, WEST	:	CONTEST PROCEEDINGS
CENTRAL REGION, INC.,	:	
Contestant	:	Docket No. WEST 2002-317-RM
	:	Citation No. 7914271; 01/22/2002
v.	:	
	:	Docket No. WEST 2002-318-RM
	:	Citation No. 7914268; 01/24/2002
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2002-319-RM
ADMINISTRATION (MSHA),	:	Citation No. 7914269; 01/24/2002
Respondent	:	
	:	Docket No. WEST 2002-320-RM
	:	Citation No. 7943951; 01/31/2002
	:	
	:	Fort Collins Plant
	:	Id. No. 05-04733
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-32-M
Petitioner	:	A.C. No. 05-04733-05501
	:	
v.	:	Docket No. WEST 2003-33-M
	:	A.C. No. 05-04733-05502
AGGREGATE INDUSTRIES, WEST	:	
CENTRAL REGION, INC.,	:	Fort Collins Plant
Respondent	:	

**ORDER GRANTING SECRETARY’S MOTION TO AMEND CITATION
TO ALLEGE VIOLATIONS OF TWO ALTERNATIVE SAFETY STANDARDS**

The Secretary filed a motion to amend Citation No. 7914271 and the penalty petition for WEST 2003-33-M to allege, in the alternative, that Aggregate Industries, West Central Region, Inc., (“Aggregate Industries”) violated 30 C.F.R. § 56.14105 in addition to the allegation in the citation that Aggregate Industries violated section 56.12106. The Secretary is not seeking to substitute the one allegation for the other but is seeking to have the citation and penalty petition amended to allege

violations of both safety standards, in the alternative. In support of her motion, the Secretary states that under Fed. R. Civ. P. 8(e)(2) “a party may set forth two or more statements of a claim . . . alternately . . . either in one count . . . or in separate counts . . .” The Secretary also relies upon the decision of former Commission Administrative Law Judge Lasher in *Mid-Continent Resources, Inc.*, 10 FMSHRC 191, 202-03 (Feb. 1988), and my order in *CDK Contracting, Inc.*, 23 FMSHRC 783 (July 2001).

Aggregate Industries opposes the motion. As grounds for its opposition, Aggregate Industries states that the Secretary failed to comply with Commission Rule 2700.10, which requires that a moving party confer with the opposing party before filing a motion. Furthermore, it argues that the Secretary’s motion is unfairly prejudicial to Aggregate Industries. It maintains that the Secretary’s responses to its discovery were misleading and disingenuous at best. Aggregate Industries argues that the Secretary is bound by her statements and responses to discovery. The Secretary knew or should have known that the safety standard that she originally cited did not support the alleged violation set forth in the citation. “Now the Secretary wants to continue the charade by arguing that the Secretary may plead alternative violations.” (Opposition at 4). The Secretary’s motion is not based on the “sudden discovery” of new evidence. *Id.* at 5. Aggregate Industries is unfairly prejudiced by its reasonable reliance on the Secretary’s discovery responses and her belated attempt to “take advantage of her previously inconsistent and misleading representations after substantial discovery.” *Id.* Granting the Secretary’s motion “would deny justice to Aggregate [Industries] by rewarding the Secretary’s abusive pleading and discovery tactics.” *Id.* at 6.

The Secretary denies that her motion is prejudicial to Aggregate Industries. She states that counsel for Aggregate Industries questioned the issuing inspector about both safety standards during his deposition. In addition, she notes that a hearing has not yet been scheduled in these cases and the parties have ample time to conduct further discovery. Finally, the Secretary argues that Aggregate Industries misconstrues the Secretary’s responses to written discovery and ignores the “legitimate bases for the objections she interposed to them.” (S. Reply at 2).

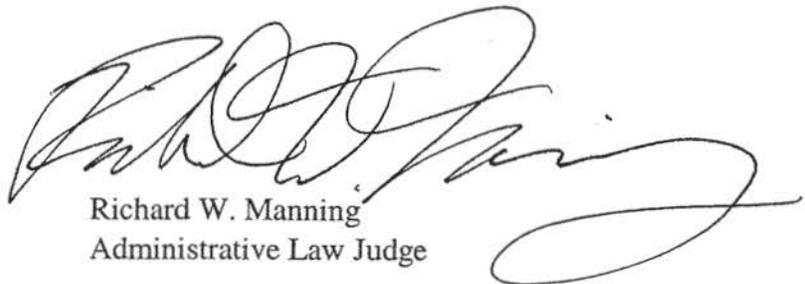
I conclude that the Secretary is authorized to amend her pleadings to allege violations of two alternative safety standards. It is well settled that administrative pleadings are liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party. The civil penalty proceeding at issue, WEST 2003-33-M, was assigned to me on December 17, 2002, so it is still in the prehearing stage and no hearing has yet been scheduled. As a consequence, adequate notice has been provided. The only issue is whether Aggregate Industries is prejudiced by the amendment. The proposed amendment does not seek to change the underlying condition or practice described in section 8 of the citation. “When an amendment puts no different facts in issue than did the original [OSHA] citation, reference to an additional legal standard is not prejudicial.” *Donovan v. Royal Logging Co.*, 645 F.2d 822, 827 (9th Cir. 1981) *citing So. Colo Prestress v. Occup. Safety & H. R. Comm.*, 586 F.2d 1342, 1346-47 (10th Cir. 1978).

The contested citation alleges that a fatal accident occurred on January 21, 2001, when an employee accidentally bumped the start button in the control room for the log washer while another employee was in the log washer unplugging the drain. The MSHA inspector cited section 56.12016, which provides, in part, that electrically powered equipment shall be de-energized before mechanical work is performed on such equipment. The Secretary seeks to add, in the alternative, a violation of section 56.14105, which provides, in part, that repairs or maintenance of machinery or equipment shall be performed only after the power is off. The proposed amendment does not place different or new facts in issue. In addition, Aggregate Industries has sufficient time to serve additional discovery and prepare alternative defenses. I find that there is no inherent prejudice in the proposed amendment.

Although counsel for the Secretary should have discussed the motion with counsel for Aggregate Industries as required by Commission Rule 10(c), the fact the he did not do so should not defeat the motion, especially where it is obvious that the parties would not have reached an agreement on the issues raised by the motion. Rule 10(c) is designed to require a moving party to try to reach an accommodation with the opposing party before filing a motion.

Aggregate Industries contends that the Secretary's discovery responses are misleading and inconsistent with her proposed amendment. It argues that she should be bound by her discovery responses. If its allegations are true, Aggregate Industries can present these responses at the hearing in an attempt to rebut the Secretary's case.

For the reasons set forth above, the Secretary's motion to amend Citation No. 7914271 and her petition for assessment of penalty in WEST 2003-33-M is **GRANTED**.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 14, 2003

HAZEL OLSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-302-D
	:	DENV CD 2001-01
	:	
v.	:	Mine I.D. 48-01355
	:	North Rochelle Mine
TRITON COAL COMPANY,	:	
Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION

On December 27, 2002, Triton Coal Company (“Triton”) filed a motion for summary decision in this case. In the motion for summary decision, Triton maintains that its decision not to hire Hazel Olson could not have been motivated by her protected activity at the Jacobs Ranch Mine because Triton did not know about this protected activity. The motion is supported by two affidavits and deposition testimony. Ms. Olson filed a response in which she states that two witnesses will contradict the affidavit testimony presented by Triton. Her response is supported by a copy of an interview conducted by the Department of Labor’s Mine Safety and Health Administration (“MSHA”).

The Commission’s Procedural Rule at 29 C.F.R. § 2700.67(b) sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

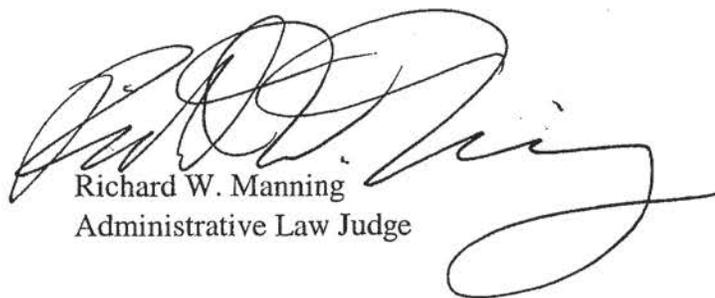
- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

The Commission has long recognized that summary decision is an “extraordinary procedure.” *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The Commission adopted the Supreme Court’s holding that summary judgment is authorized only “upon proper showings of the lack of a genuine, triable issue of material fact.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)).

After reviewing the entire record, I find that Triton did not establish that “there is no genuine issue as to any material fact.” Because Ms. Olson is proceeding on her own behalf, the fact that her statement is not contained in an affidavit should not be grounds for dismissal. Ms. Olson states that she has witnesses who will testify that she was not interviewed for a temporary position at the North Rochelle Mine (the “mine”) because she had filed safety and discrimination complaints at the Jacobs Ranch Mine operated by another company in northeast Wyoming. She states that she has evidence that Debbie Noonan, a Triton employee, was well aware of her protected activity. She also states that Charlotte Terry, Human Resources Manager for the mine, conferred with Ms. Noonan when deciding whom to interview for temporary haul truck driver positions. She states that a witness will testify that when presented with Olson’s resume, Terry immediately rejected it without reading or reviewing it.

The Federal Mine Safety and Health Review Commission recognizes that it is very difficult to establish “a motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). In determining whether a mine operator’s adverse action was motivated by the miner’s protected activity, the judge must bear in mind that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir 1983). “Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.” *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991). In this case, Olson is alleging that the adverse action was Triton’s failure to hire her in spite of her 20-years experience in the mining industry. If she can present credible evidence to support what she has offered in her response to Triton’s motion, she may be able to establish a *prima facie* case of discrimination. Key facts at the heart of this case are in dispute.

For the reasons set forth above, Triton’s motion for summary decision is **DENIED**. The motion fails to establish that there is no genuine issue as to any material fact or that Triton is entitled to summary decision as a matter of law.



Richard W. Manning
Administrative Law Judge

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