

FEBRUARY 2001

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FEBRUARY 2001

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

Secretary of Labor, MSHA v. Alcoa Alumina & Chemicals LLC, Docket No. CENT 2000-101-M. (Judge Bulluck, December 26, 2000)

Review was denied in the following case during the month of February:

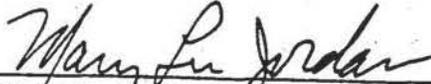
Secretary of Labor, MSHA v. U. S. Steel Mining Company, Inc., Docket No. SE 2000-100. (Judge Zielinski, January 10, 2001)

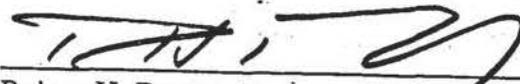
COMMISSION DECISIONS AND ORDERS

contacted MSHA and initially was informed that a hearing could be scheduled, but that it later received a letter from MSHA indicating that the matter was closed. *Id.* Ahern requests that the Commission grant its request for relief and reopen the matter so that it may proceed to a hearing on the merits. *Id.* Attached to its request is a copy of the proposed penalty assessment marked with the notation "Returned 7/24/00," and the notice of delinquent payment from MSHA. Ex. A.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Sers., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

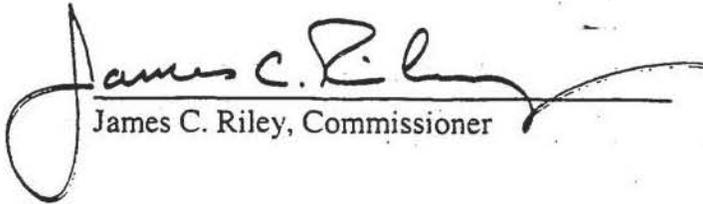
On the basis of the present record, we are unable to evaluate the merits of Ahern's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Ahern has met the criteria for relief under Rule 60(b). *See BR&D Enters., Inc.*, 22 FMSHRC 479, 481 (Apr. 2000) (remanding to the judge where operator alleged that it timely submitted green card, but never received return receipt); *W. Aggregates, Inc.*, 20 FMSHRC 745, 747 (July 1998) (remanding to the judge where operator mistakenly filed green card with MSHA's regional office, rather than with MSHA's Civil Penalty Compliance Office in Arlington, Virginia). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 7, 2001

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

RED COACH TRUCKING

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Docket Nos. YORK 2000-89-M
YORK 2000-90-M
YORK 2000-91-M
YORK 2000-92-M

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 14, 2000, the Commission received from Red Coach Trucking ("Red Coach") a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Red Coach.

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

In its motion, Red Coach, which is represented by counsel, asserts that Mr. Bennett, the owner, did not receive these proposed assessments because he was not at the plant site where they were sent. Mot. at 1. It claims that Bennett was not aware that there were additional penalty assessments totaling more than \$18,000 when he paid the first penalty assessment, which he mistakenly believed was the only penalty assessed against Red Coach. *Id.* It contends that Bennett "called Mr. Petrie's office" as soon as he received the subsequent penalty assessments,

and that the deadline for filing the green card passed during subsequent communications.¹ *Id.* at 1-2. Red Coach asserts that Bennett did not understand applicable procedural requirements. *Id.* at 2. It explains that the confusion was exacerbated by the fact that, at the time of the inspection giving rise to the penalty assessments at issue, Mr. Bennett was negotiating the sale of the plant, which was no longer in operation. *Id.*; Attachs. Attached to its request are correspondences Red Coach's attorney sent to MSHA regarding the plant's non-operational status and pending sale. Attachs. Red Coach requests that the Commission reopen the final orders, so that it may challenge the alleged violations and associated penalties. Mot. at 2.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Nat'l Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

¹ The signature page of Red Coach's motion identifies James Petrie as an MSHA District Manager.

On the basis of the present record, we are unable to evaluate the merits of Red Coach's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Red Coach has met the criteria for relief under Rule 60(b). *See, e.g., Cent. Wa. Concrete, Inc.*, 21 FMSHRC 146, 148 (Feb. 1999) (remanding where operator received penalty assessment, but such receipt was not brought to management's attention until deadline for filing green card had passed); *Ky. Stone*, 19 FMSHRC 1621, 1622-23 (Oct. 1997) (remanding where operator failed to contest penalty assessment due to its accounts payable department's internal processing error of penalty assessment); *M & Y Servs., Inc.*, 19 FMSHRC 670, 671-72 (Apr. 1997) (remanding to a judge where the operator failed to timely submit a hearing request because it allegedly did not receive assistance regarding the proper contest procedure until the deadline for filing had passed). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



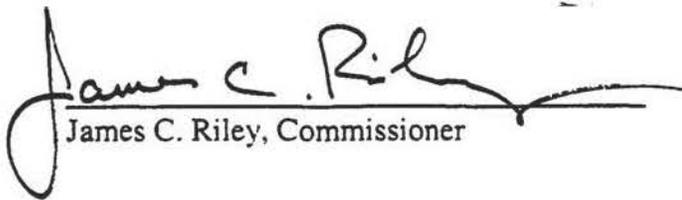
Mary Lu Jordan, Chairman



Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Commission Procedural Rule 60(b), 29 C.F.R. § 2700.60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 7, 2001

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

UPPER VALLEY MATERIALS

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Docket No. CENT 2000-434-M
A.C. No. 41-03510-05529

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

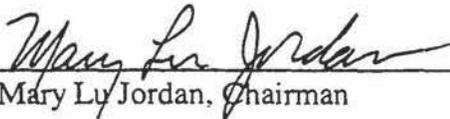
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 21, 2000, the Commission received from Upper Valley Materials ("Upper Valley") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Upper Valley.

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

In its motion, Upper Valley, which is unrepresented by counsel, asserts that the late filing of its hearing request to contest the proposed penalty was due to lack of familiarity with Commission procedure. Mot. Upper Valley contends that it is going through a transitional state and that the penalty would place a sincere burden on the company. *Id.* Upper Valley requests that the Commission reopen the final order. *Id.*

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. See *Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Upper Valley's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Red Coach has met the criteria for relief under Rule 60(b). See, e.g., *Ogden Constructors, Inc.*, 22 FMSHRC 5, 7 (Jan. 2000) (remanding to a judge where operator mistakenly believed that proceeding was suspended while under MSHA investigation); *M & Y Servs., Inc.*, 19 FMSHRC 670, 671-72 (Apr. 1997) (remanding to a judge where the operator failed to timely submit a hearing request because it allegedly did not receive assistance regarding the proper contest procedure until the deadline for filing had passed). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Commission Procedural Rule 60(b), 29 C.F.R. § 2700.60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 7, 2001

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

ECLIPSE C CORPORATION

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Docket Nos. WEST 2000-617-M
WEST 2000-618-M

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 8, 2000, the Commission received from Eclipse C Corporation ("Eclipse") a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Eclipse.

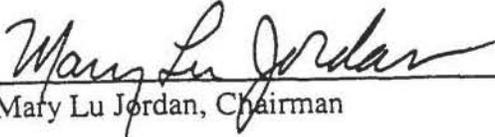
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

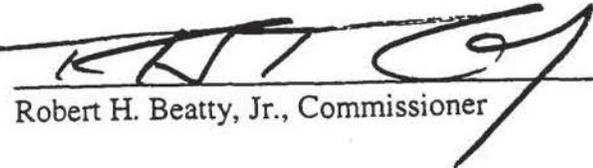
In its motion, Eclipse, which is unrepresented by counsel, asserts that it filed a hearing request to contest the proposed penalties, one which is the subject of Docket No. WEST 2000-468-M, and mistakenly believed that its request applied also to the proposed assessments which are the subjects of Docket Nos. WEST 2000-617-M and 2000-618-M. Mot. Eclipse explains that "all the tickets were given at one time." *Id.* It requests that the proposed assessments for all three dockets

be consolidated into one proceeding. *Id.* In addition, Eclipse requests that the Commission reopen the final orders. *Id.*

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Eclipse's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Eclipse has met the criteria for relief under Rule 60(b). *See, e.g., Ogden Constructors, Inc.*, 22 FMSHRC 5, 7 (Jan. 2000) (remanding to a judge where the operator failed to timely submit a hearing request due to a mistaken belief that no action was necessary because the citation was the subject of an ongoing MSHA investigation); *M & Y Services, Inc.*, 19 FMSHRC 670, 671-72 (Apr. 1997) (remanding to a judge where the operator failed to timely submit a hearing request because it allegedly did not receive assistance regarding the proper contest procedure until the deadline for filing had passed); *Rivco Dredging Corp.*, 10 FMSHRC 624, 625 (May 1988) (remanding to the judge where due to a misunderstanding of Commission procedure, the operator filed a notice of contest of the citation, but failed to separately file a hearing request to contest the proposed assessment). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

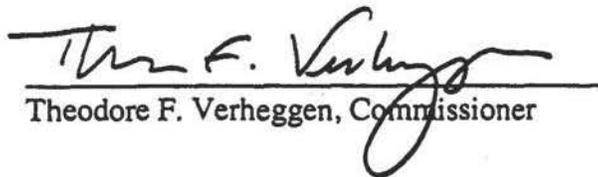

Mary Lu Jordan, Chairman


Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Commission Procedural Rule 60(b), 29 C.F.R. § 2700.60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 9, 2001

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

ISLAND CREEK COAL COMPANY

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Docket No. VA 99-11-R

BEFORE: Jordan, Chairman; Riley and Verheggen, Commissioners¹

ORDER

BY: Riley and Verheggen, Commissioners

The Commission issued its decision in this proceeding on July 31, 2000, in which, by a split vote, it affirmed in result the judge's decision that Island Creek Coal Company ("Island Creek") did not violate 30 C.F.R. § 1725(c). *Island Creek Coal Co.*, 22 FMSHRC 823, 825 (July 2000). On August 8, 2000, the Secretary of Labor filed a Motion for Reconsideration pursuant to Commission Procedural Rule 78, 29 C.F.R. § 2700.78, requesting us to reconsider our separate opinions. Island Creek filed a response opposing the petition on August 16, 2000.

This case involved an incident where a miner was standing on a belt to perform repairs to the drive mechanism of an adjacent belt. 22 FMSHRC at 823-24. When the belt on which the miner was standing, the 5-B belt, was energized and began moving, the miner was injured. *Id.* at 824. The Secretary cited the operator under section 1725(c), which requires that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." From the inception of this case, however, the Secretary has asserted that the violation occurred because the 5-B belt was not "locked and tagged out." *See* 22 FMSHRC at 826 (Comm'r Riley), 830 (Comm'r Verheggen). A belt is locked and tagged out when "a lock and tag are put on the

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

cathead of a belt at the power source [to ensure] that after the power is turned off on a belt, no one else can turn the power back on.” *Id.* at 826.

The standard under which a Rule 78 petition should be considered was mentioned briefly in *Morgan v. Arch of Illinois*, 22 FMSHRC 586 (May 2000), in which the Commission noted that the petitioner had “not raised any new arguments concerning the judge’s decisions that the Commission [had] not already considered.” *Id.* at 586. Federal appeals courts have held that under Rule 40 of the Federal Rules of Appellate Procedure, a petition for rehearing is “appropriate where . . . a petitioner believes the court has overlooked or misapprehended significant facts or legal arguments.” *Mancuso v. Herbert*, 166 F.3d 97, 99 (2d Cir. 1999). Courts construing motions for reconsideration made to district courts under Rule 59(e) of the Federal Rules of Civil Procedure have held that such motions “should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law.” *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (citations omitted, emphasis in original). Nor should such petitions “be used to raise legal arguments which could and should have been made before [a decision] was issued.” *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1267 (11th Cir. 1998). The *Lockard* court noted that “[d]enial of a motion for reconsideration is ‘especially soundly exercised when the party has failed to articulate any reason for the failure to raise the issue at an earlier stage in the litigation.’” *Id.* (citation omitted); *see also GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1387 (10th Cir. 1997) (“it is ordinarily inappropriate for a party to raise new legal arguments” in a motion for reconsideration).

Petitions made to the Commission under Rule 78 ought, at the very least, to bring to the Commission’s attention facts or legal arguments the petitioner believes were overlooked or misapprehended, *Mancuso*, 166 F.3d at 99, or point to a change in controlling law, *see United States v. Reilly*, 91 F.3d 331 (2d Cir. 1996). Such petitions should also not merely raise arguments the Commission has already considered, *Morgan*, 22 FMSHRC at 586, or attempt to raise new legal arguments, *Lockard*, 163 F.3d at 1267.

The gravamen of the Secretary’s argument for reconsideration here is that we failed to reach the issue of whether “the operator violated the standard because the 5-B belt was energized.” Mot. at 3. The Chairman also states in her dissent that the Secretary has “made clear” in prosecuting this case the requirement in section 75.1725(c) “that the belt be de-energized.” Slip op. at 5.

We find the Chairman’s assertion disingenuous. The Chairman herself recognized in the first decision in this case that “the Secretary has argued both below and on review that the regulation required Island Creek to lock and tag out the belt during maintenance work.” 22 FMSHRC at 835 (separate opinion of the Chairman and Commissioner Marks). In fact, she went to great lengths in that opinion to distance herself from the Secretary’s theory of the case when she and Commissioner Marks stated “we are not bound by the Secretary’s theory in making our determination We cannot let the Secretary’s more complicated litigation posture obfuscate

the straightforward fact that Island Creek simply did not block the 5-B belt against motion” *Id.* Indeed, nowhere in this earlier opinion does the Chairman mention much less discuss what the Secretary had purportedly “made clear throughout this litigation.” Slip op. at 4. That is because at the time the Commission first considered this case, like now, the fact was and remains that at no stage of these proceedings has the Secretary ever explicitly argued that one of the bases for her citation was that the 5-B belt was unexpectedly energized. In other words, the Secretary has never argued in the alternative, either before us (including in her petition for discretionary review) or the judge, that even if her argument that “blocked against motion” really means “locked and tagged out” was rejected, that an independent basis for finding Island Creek liable was that the 5-B belt was energized. See 30 U.S.C. § 823(d)(2)(A)(iii) (“Each issue [in a petition for discretionary review] shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon.”). Although the Chairman states that we have “overlooked” the Secretary’s argument on this point, there was not anything to overlook because such an argument simply was not there.

We find that a Rule 78 petition is an inappropriate vehicle to raise a legal argument that “could . . . have been made” in the proceedings below. *Lockard*, 163 F.3d at 1267. We find this especially true in light of the Secretary’s failure to explain in the instant petition why she failed to raise this argument earlier. *Id.* Accordingly, the Secretary’s motion for reconsideration is denied.²


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

² We note with concern that in the instant motion, the Secretary continues to confuse the issue when she states that “the 5-A and the 5-B belts were not locked and tagged out or otherwise blocked against motion.” Sec’y Mot. at 3 (emphasis added). This statement suggests that locking and tagging out is equivalent to blocking against motion, a proposition we both continue to categorically reject as contrary to the regulation at issue.

Chairman Jordan, dissenting:

In their initial opinions in this matter, my colleagues focused almost exclusively on their disapproval of the Secretary's position that the operator failed to block the conveyor belt against motion because it was not locked and tagged out. *Island Creek Coal Co.*, 22 FMSHRC 823, 825-34 (July 2000). They reiterate this view in their order denying the Secretary's motion for reconsideration. Slip op. at 3 n.2. However, as Commissioner Verheggen explained in his initial opinion in this case, the standard requires that when machinery is being maintained or repaired, "it must be (1) de-energized *and* (2) 'blocked against motion.'" 22 FMSHRC at 831 (emphasis added). Neither the operator nor my colleagues have asserted that only one of these two requirements need to be met to comply with the standard. Nonetheless, my colleagues fail to explain why their rejection of the Secretary's "lock and tag out" theory should provide the operator with immunity from disregarding the second requirement (de-energization) of this regulation.¹

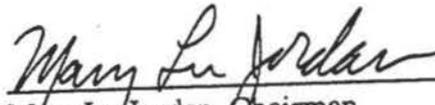
Whether or not one agrees with the Secretary's argument regarding the definition of "blocked against motion," she has nonetheless made clear throughout this litigation that compliance with both prongs of the standard is necessary. As I noted in my previous dissent in this case, "[t]he Secretary's interpretation of the standard . . . [requires] that belts on which miners are working be deenergized *and* locked out, at least where, as here, the belts are not otherwise blocked against motion" *Id.* at 836, quoting PDR at 13 (emphasis in original); *see also* Tr. 25 ("There are two requirements in the standard: That the power be off and that the machinery be blocked against motion.") (Argument of Secretary's Counsel); Sec'y Post-Hr'g Br. at 10, 12 ("Since the Contestant failed to lock out and tag out the 5-A and 5-B belts *and did not de-energize the 5-B belt*, it violated section 75.1725(c) [T]he standard requires that *two* acts must be performed . . . the power must be turned off *and* the machinery must be blocked against motion.") (emphases added); PDR at 12-13 ("The judge erred in failing to address and accept the Secretary's argument that . . . the 5B belt was required to be deenergized and blocked against motion. . . . The Secretary's interpretation of the standard . . . requir[es] that belts on which miners are working be deenergized *and* locked out, at least where, as here, the belts are not otherwise blocked against motion") (emphasis in original); Sec'y Mot. at 3 ("The Secretary's litigation position in the case has always been that the operator violated the standard both because the 5-B belt was energized *and* because the 5-A and the 5-B belts were not locked and tagged out or otherwise blocked against motion.") (emphasis in original). Thus, the Secretary has consistently maintained that even if the operator fulfills one of the requirements of the standard, it will be in violation if it fails to obey the second as well. *See L & T Fabrication & Constr., Inc.*, 22 FMSHRC 509, 514 (Apr. 2000) (Commission noted that "the two prongs of the

¹ It is undisputed that the 5-B belt was unexpectedly energized. *See Island Creek*, 22 FMSHRC at 824.

test set forth in the 1996 EAJA amendments are conjunctive (i.e., joined by the word 'and'). Thus, for an applicant to prevail, both prongs of the test must be met.”²

Although my colleagues have documented at length their firm disagreement — indeed, their undisguised pique — with the Secretary’s “lock and tag out theory,” they have failed to explain why their dispute with the Secretary over one requirement in the standard should grant the operator license to ignore the other — the explicit additional mandate that the belt be de-energized. This is the legal argument that the Secretary has steadfastly asserted and that my colleagues have clearly overlooked. *See Mancuso v. Herbert*, 166 F.3d 97, 99 (2d Cir. 1999) (petition for rehearing appropriate where significant facts or legal arguments have been overlooked).

For these reasons, and for the reasons stated in my initial opinion in this matter, I would grant the Secretary’s motion.


Mary Lu Jordan, Chairman

² The Secretary’s position that both requirements of the standard must be met to avoid liability is in accord with Commission precedent, as well as common sense. For example, in *Ozark-Mahoning Co.*, 12 FMSHRC 376 (Mar. 1990), the Commission reviewed a decision involving a violation of 30 C.F.R. § 57.12016. The first sentence of that standard required that equipment be deenergized before mechanical work is performed. 12 FMSHRC at 379. The second sentence required the operator to take appropriate measures to prevent reenergization. *Id.* The Commission upheld the judge’s ruling that the operator’s failure to comply with the first sentence was sufficient to sustain a finding of violation, concluding that the two sentences set forth conjunctive requirements. *Id.*

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 12, 2001

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

POWELL MOUNTAIN COAL
COMPANY, INC.

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Docket No. VA 2001-5
A.C. No. 44-06364-03606

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 2, 2000, the Commission received from Powell Mountain Coal Company, Inc. ("Powell") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Powell.

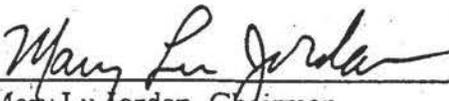
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

In its letter submitted by Powell's safety director, Foster Tankersley, Powell contends that in August 2000, it received a proposed assessment that included a penalty assessed for a citation which had been erroneously issued to it. Mot. Powell claims that upon discovering the error, it contacted the conference litigation officer in the regional office of the Department of Labor's Mine

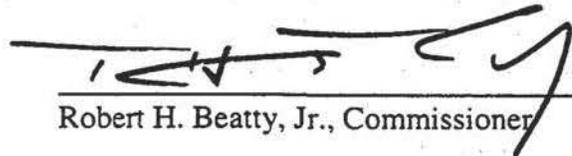
Safety and Health Administration (“MSHA”) on August 22, 2000, and was advised not to pay the proposed assessment, but to wait until it received a new proposed assessment. *Id.* Powell submits that on October 16, 2000, it received a letter from the “Director of Assessments,” confirming that the citation had been erroneously assessed. *Id.* Powell asserts that because the letter had no instructions regarding payment, it called MSHA’s Assessments Office and was told that it should continue to wait for the new assessment. *Id.* Powell alleges that on October 30, it received a notice from MSHA’s Civil Penalty Compliance Office stating that it was delinquent in the payment of the proposed assessment. *Id.* It contends that it inquired with MSHA why it was considered delinquent, and was told that the time continued to run while it awaited the new assessment. *Id.* Powell asserts that it intended to contest some of the citations in the proposed assessment, and was waiting until it received the new assessment to file a hearing request. *Id.* Powell requests that the Commission reopen the matter so that it may contest the proposed assessment and proceed to a hearing on the merits. *Id.*

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Powell's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Powell has met the criteria for relief under Rule 60(b). See *Dean Heyward Addison*, 19 FMSHRC 681, 682-83 (Apr. 1997) (remanding to a judge where movant failed to timely file hearing request due to erroneous belief that hearing for individual assessment would be automatically consolidated with pending hearing involving assessment issued to movant's employer based on movant's conference call with ALJ and the Secretary's counsel); *M & Y Servs., Inc.*, 19 FMSHRC 670, 671-72 (Apr. 1997) (remanding to a judge where operator failed to timely file hearing request due to inability to obtain assistance from MSHA about contest procedures despite repeated efforts to contact MSHA). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



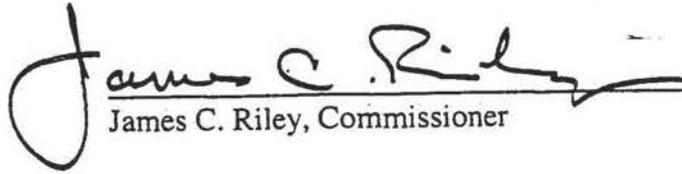
Mary Lu Jordan, Chairman



Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 12, 2001

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|-------------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. WEST 2001-23-M |
| | : | A.C. No. 04-01299-05535 |
| ORIGINAL SIXTEEN TO ONE MINE, | : | |
| INCORPORATED | : | |

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 13, 2000, the Commission received from Original Sixteen to One Mine, Inc. ("Original") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Original.

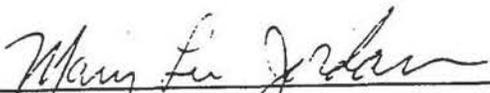
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

In its motion, Original contends that it timely submitted a hearing request to the Department of Labor's Mine Safety and Health Administration ("MSHA") on August 16, 1999, but that MSHA either did not receive or failed to record receipt of its hearing request. Mot. Original requests that the Commission grant its request for relief and reopen the matter so that it may

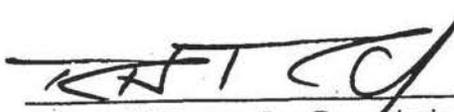
proceed to a hearing on the merits. *Id.* Attached to its request is a copy of a letter it allegedly sent to MSHA contesting numerous citations, including the subject citations, and a copy of the signed and dated green card. Ex. A.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Original's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Original has met the criteria for relief under Rule 60(b). *See BR&D Enters., Inc.*, 22 FMSHRC 479, 481 (Apr. 2000) (remanding to the judge where operator alleged that it timely submitted green card, but never received return receipt); *W. Aggregates, Inc.*, 20 FMSHRC 745, 747 (July 1998) (remanding to the judge where operator mistakenly filed green card with MSHA's regional office, rather than with MSHA's Civil Penalty Compliance Office in Arlington, Virginia). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Mary Lu Jordan, Chairman



Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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

February 12, 2001

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

HARRIMAN COAL CORPORATION

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Docket No. PENN 2000-203
A.C. No. 36-06990-03526

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

ORDER

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 7, 2000, the Commission received from Harriman Coal Corporation ("Harriman") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose Harriman's motion for relief.

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

In its motion, Harriman, through counsel, asserts that the late filing of its hearing request to contest the proposed penalty assessment was due to unfamiliarity with Commission rules and procedure. Mot. at 2. Harriman contends that it understood that the proposed assessment became final after 30 days, but that it did not understand that the final order would be non-appealable. *Id.* According to Harriman, it did not receive notice that the proposed assessment became a final action until it received a delinquency notice from the Department of Labor's Mine Safety and Health Administration ("MSHA") on July 28, 2000, which noted that the proposed assessment became final on July 14, 2000, and that the final action could not be appealed to the Commission

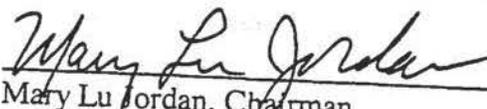
or otherwise reviewed. *Id.* Harriman notes that it has promptly filed its request to reopen less than one week after receiving the notice of finality and that given the severity of the proposed assessment, it would be prejudiced by not having an opportunity for a hearing to contest the proposed assessment. *Id.* at 3-4. Harriman requests relief under Fed. R. Civ. P. 60(b)(1). *Id.* at 4. Attached to its motion is an affidavit of Ronald Lickman, president of Harriman; a Notice of Contest for filing, in the event the Commission grants its request to reopen; the proposed assessment; and the delinquency notice. Exs.

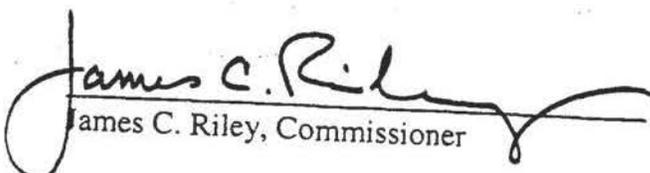
We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *See, eg., Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Nat'l Lime & Stone Co., Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

The undisputed assertions of Harriman indicate that the operator believed it would have the opportunity to appeal the proposed penalty assessment when it became a final order. Ex. 1 at 2. Under the circumstances presented here, Harriman's late filing of a hearing request could be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Peabody Coal Co.*, 19 FMSHRC at 1614-15 (reopening final order when party failed to submit hearing request due to unfamiliarity with Commission procedure). We further note that Harriman acted promptly to rectify its mistake once it discovered it, filing its motion for relief on August 3, just a few days after it received a delinquency notice on July 28 which alerted it to its mistake. *See Augusta Fiberglass Coatings v. Fodor Contracting*, 843 F.2d 808, 812 (4th Cir. 1988) (denial of 60(b) relief reversed by court of appeals in case where defendant's attorney failed to file an answer, with court emphasizing that defendant "showing awakened speed . . . moved for relief within two weeks of the entry of the judgment, well within the rule's one-year limit.").

We recognize that Harriman has been represented by counsel in this proceeding. However, the Commission has previously awarded relief in cases in which an operator represented by an attorney has failed to file in accordance with the time limits of our procedural rules. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (reopening final order and finding sufficient allegation that counsel misinterpreted deadline for filing petition for discretionary review); *Boone v. Rebel Coal Co.*, 4 FMSHRC 1232, 1233 (July 1982) (granting operator's request for permission to file late-filed petition for discretionary review when operator's prior counsel had failed to file one).

Accordingly, in the interest of justice, we grant Harriman's unopposed request for relief, reopen this penalty assessment that became a final order, accept for filing Harriman's Notice of Contest, and remand this case to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

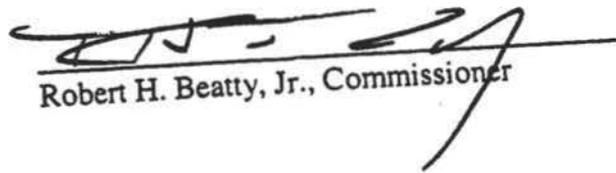

Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Harriman's position and would remand the matter for assignment to a judge to determine whether Harriman has met the criteria for relief under Rule 60(b). See *Dean Heywood Addison*, 19 FMSHRC 681, 682-83 (Apr. 1997) (remanding to judge to determine whether asserted lack of familiarity with Commission procedures met criteria for relief under Rule 60(b)); *M&Y Servs., Inc.*, 19 FMSHRC 670, 671 (Apr. 1997) (remanding when proposed penalty became final because operator was unfamiliar with procedures for requesting hearing); *REB Enters., Inc.*, 18 FMSHRC 311, 312-13 (Mar. 1996) (remanding where failure to file answer was claimed to be based upon lack of familiarity with Commission rules and procedures). I also note that, unlike the operators and individuals involved in the above-mentioned cases, Harriman was apparently represented by counsel at the time that it delayed filing its hearing request to contest the proposed penalty assessment based upon its asserted unfamiliarity with Commission rules and procedure.



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 16, 2001

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. WEVA 2000-118 |
| | : | A.C. No. 46-08102-03588 A |
| LANDON HOLBROOK, employed by | : | |
| ISLAND FORK CONSTRUCTION, LTD. | : | |

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 29, 2000, the Commission received from Pamela Taylor, an employee of Island Fork Construction, Ltd. ("Island Fork"), on behalf of Landon Holbrook, a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Mr. Holbrook.

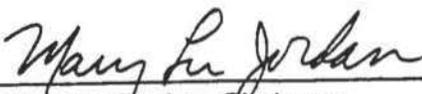
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

In her letter, Ms. Taylor states that she is in charge of payroll and human resources at Island Fork. Mot. She asserts that Holbrook has been busy caring for his ill wife, who is suffering from cancer, and their two-year old daughter. *Id.* She contends that the medical costs of his wife's cancer treatment is a financial burden on Mr. Holbrook, who does not have insurance. *Id.* She explains that the employees of Island Fork have collected donations to assist

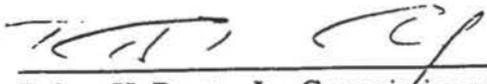
Mr. Holbrook in paying his wife's medical costs and this proposed assessment, but that they could collect only \$500 of the \$1,900 assessed for three violations. *Id.* Ms. Taylor requests that the proposed assessment be reduced to reflect the amount collected as payment in full. *Id.*

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Nat'l Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Mr. Holbrook's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Mr. Holbrook has met the criteria for relief under Rule 60(b). *See, e.g., Wolf Creek Sand & Gravel*, 21 FMSHRC 1, 1-2, 3 (Jan. 1999) (remanding where the operator claimed that it failed to timely file due to its secretary's absence as a result of her husband's health problems); *Miller employed by Mid-Wis. Crushing Co.*, 16 FMSHRC 2384, 2385 (Dec. 1994) (remanding where the movant claimed he failed to timely file his hearing request due to his secretary's absence because of her mother's terminal illness).¹ If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Mary Lu Jordan, Chairman

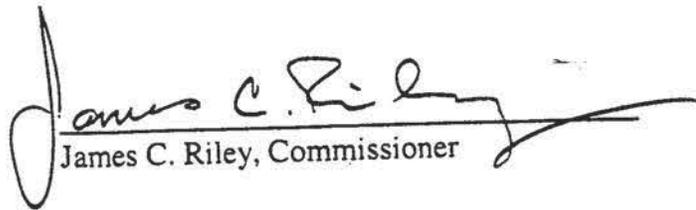


Robert H. Beatty, Jr., Commissioner

¹ In addition, it is unclear from the record whether, under the Commission's Procedural Rules, 29 C.F.R. §§ 2700.3 and 2700.6, Ms. Taylor is authorized to represent Holbrook in this case. Therefore, as a threshold matter, the judge should determine whether Ms. Taylor is authorized to represent him.

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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Department of Labor's Mine Safety and Health Administration ("MSHA"). 22 FMSHRC at 247. Steel is delivered from Northern Illinois' plant to the quarry on flatbed trucks owned or leased by Northern Illinois and operated by Northern Illinois drivers. *Id.* at 248.

Once the trucks reach the delivery point at the Lemont quarry, the steel is unloaded using Vulcan-owned and operated equipment. *Id.* Vulcan uses either a crane with a hoist, a forklift, or a loader to unload the steel from the truck. *Id.* at 249. When steel is lifted by a crane, a hook is attached to the crane's hoist line to lift the steel from the flatbed truck. *Id.* Up to and including the time of the subject inspection, a Northern Illinois driver usually facilitated the unloading process by walking around the truck and releasing the restraints binding the load. *Id.* Occasionally, the driver also climbed onto the loaded flatbed to guide the hook into the lifting chain surrounding the load, an act described as "rigging" the load. *Id.* Rigging requires someone to stand on the steel on the flatbed truck. Tr. 93. Northern Illinois has made steel deliveries to Vulcan, usually once or twice a week, for approximately two years. 22 FMSHRC at 248. On each visit to Vulcan's mine, Northern Illinois employees work approximately 20-30 minutes. *Id.* at 247; Joint Ex. 1 ¶5. In 1998, Northern Illinois employees spent a total of 68 hours at Vulcan's mine. 22 FMSHRC at 247; Joint Ex. 1 ¶5.

On January 28, 1999, MSHA inspector Denis Libertoski approached Vulcan's maintenance shop and saw a Northern Illinois flatbed truck with a load of steel parked about 100 feet from the shop. 22 FMSHRC at 249. The steel was to be used in building a catwalk, handrail, and platform at the crusher. *Id.*; Tr. 68-70. Libertoski observed a man standing on top of the steel, rigging the load so that it could be lifted from the truck. 22 FMSHRC at 249. As the inspector walked towards the truck, he saw that the man standing on the steel was not wearing a safety belt and line. *Id.* Libertoski talked with the person and determined that he was a Northern Illinois employee. *Id.* at 250. Although a Vulcan employee was running the equipment used to unload the steel and two other miners were in the area, no Vulcan supervisors were present when Libertoski saw the Northern Illinois employee on the steel. *Id.* at 249-50; Tr. 145-46, 153, 185. A Vulcan management official arrived as Libertoski walked towards the truck. 22 FMSHRC at 250. Libertoski cited Northern Illinois for a violation of 30 C.F.R. § 56.15005 because the Northern Illinois employee was working without a safety belt and line. *Id.* Northern Illinois contested the citation and related civil penalty on the ground that it was not an "operator" subject to the Mine Act's jurisdiction.

In affirming the citation, the judge concluded that Northern Illinois was an "operator" under section 3(d), 30 U.S.C. § 802(d). *Id.* at 252. The judge noted that, in enacting the Mine Act, Congress intentionally expanded the statutory definition of the term "operator" from its definition under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act") to include independent contractors, and that the Secretary retains some discretion as to whether a regulation applies to a particular independent contractor. *Id.* at 250-51. He reasoned that, because a Northern Illinois employee drove the steel truck and rigged the steel, because Vulcan was not supervising the rigging of the steel, and because Northern Illinois' delivery of steel was performed pursuant to its contract with Vulcan, Northern Illinois was an

independent contractor. *Id.* at 251-52. The judge then applied a two-pronged test — developed by the Commission in its *Otis Elevator Co.* decisions, 11 FMSHRC 1896 (“*Otis I*”), and 11 FMSHRC 1918 (“*Otis II*”) (Oct. 1989) — used to determine whether an independent contractor should be deemed an operator for purposes of Mine Act jurisdiction. Under the first prong of that test, the judge found that Northern Illinois performed a service at the Lemont quarry, and that the service was closely related to the mining process. *Id.* at 252. Under the second prong, the judge found that Northern Illinois had a significant presence at the Lemont quarry. *Id.*

II.

Disposition

Northern Illinois maintains that the judge erroneously concluded that it was performing a service by delivering its products to Vulcan. PDR at 6-7. Northern Illinois also claims that the judge, in finding that the services Northern Illinois performed were closely tied to Vulcan’s mining process, erred by focusing on the eventual use of the steel delivered rather than the relationship between the work Northern Illinois employees performed and the mining process. *Id.* at 7.²

The Secretary responds that the judge correctly determined that Northern Illinois was performing a service at the Lemont quarry on the day the citation was issued. S. Resp. Br. at 8-10. The Secretary also argues that, under any of the various legal tests that have been used by the Commission and the courts to determine independent contractor-operator status under section 3(d) of the Mine Act, Northern Illinois is an independent contractor-operator. *Id.* at 10-20.

A. Whether Northern Illinois is an Independent Contractor

The Mine Act regulates each coal or other mine affecting commerce and “each operator of such mine.” 30 U.S.C. § 803. Section 3(d) of the Act defines “operator” as “any owner, lessee or other person who operates, controls, or supervises a . . . mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). The definition of “operator” in section 3(d) of the 1969 Coal Act did not expressly include independent contractors. As the Commission has noted, Congress’ inclusion of language in section 3(d) to include independent contractors under the definition of “operator” represents an intentional expansion in the coverage of that statutory term. *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1357 (Sept. 1991).

Our first inquiry is thus to determine whether Northern Illinois is an independent contractor under the Mine Act. The term “independent contractor” is not defined in the Act, but MSHA regulations define “independent contractor” as “any person, partnership, corporation,

² Aside from disputing the judge’s conclusion that it is an operator, Northern Illinois does not contest the finding of violation or the significant and substantial designation.

subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine.” 30 C.F.R. § 45.2(c). In ascertaining whether a company is an independent contractor of a mining company, the Commission and courts have focused on the nature of the relationship between the mine and its alleged contractor. *See Joy Techs., Inc. - Coal Field Operations*, 17 FMSHRC 1303, 1306 (Aug. 1995), *aff’d*, 99 F.3d 991, 996 (10th Cir. 1996); *Joy Techs., Inc. v. Sec’y of Labor*, 99 F.3d 991, 996 (10th Cir. 1996). Under this precedent, the determination whether a company is considered an independent contractor depends on the nature and extent of services the company performed at a mine. *Joy*, 17 FMSHRC at 1306 (concluding that Joy was an independent contractor by virtue of its services performed at a mine); *Joy*, 99 F.3d at 998 (deferring to MSHA’s interpretation that “independent contractor status is to be based . . . on the performance of significant services at the mine”).

In the instant matter, Northern Illinois does not challenge the judge’s finding that its employees hauled loads of steel once or twice a week onto Vulcan’s property, or his finding that Northern Illinois’ employees usually got out of the truck and unlocked the chain holding down the steel. Also, on the day the citation issued — and on prior occasions — a Northern Illinois truck driver helped to rig a load of steel for unloading. 22 FMSHRC at 249, 252; Tr. 177. Further, the judge credited Libertoski’s testimony that Northern Illinois’ delivery and assistance in unloading steel was work which Vulcan would have had to perform had Northern Illinois not acted. 22 FMSHRC at 252.³ We therefore conclude that the activities of Northern Illinois’ employees at the Lemont Quarry taken as a whole, including delivery, unlocking, and unloading of steel for Vulcan’s benefit fall within the meaning of “services” as used in section 45.2(c) and provide substantial evidence to support the judge’s determination that Northern Illinois is an independent contractor under section 3(d).⁴

B. Whether Northern Illinois is an “Operator”

In *Otis I* and *Otis II*, the Commission set forth a two-pronged test to determine whether an independent contractor comes under the Mine Act’s definition of “operator.” First, we examined the independent contractor’s proximity to the extraction process and whether its work is “sufficiently related” to that process. *Otis I*, 11 FMSHRC at 1902. Second, we examined “the

³ Terry Croxford, manager of construction projects for Vulcan, also testified that, if Northern Illinois had not delivered the steel to the Lemont quarry, Vulcan would have had to buy or lease a flatbed truck or contract with a third party for hauling services. Tr. 40-41, 97-98.

⁴ We are also not persuaded by Northern Illinois’ contention (N. Br. at 7) that its delivery of steel and periodic assistance in the steel’s unloading constituted only completion of a sale of its own products rather than a service. The Commission and the Tenth Circuit have held that a company’s performance of work in connection with a sale may constitute “services” that qualify the company as an independent contractor under the Act. *See Joy*, 17 FMSHRC at 1304, 1306; *Joy*, 99 F.3d at 999.

extent of [the contractor's] presence at the mine." *Id.* As part of the second prong of this test, we have looked to whether the contractor's contact with the mine is de minimis. *Id.* at 1900-01.

In analyzing Northern Illinois' proximity to the extraction process — the first prong of the Commission's test — we observe that Croxford testified that steel, such as that regularly delivered by Northern Illinois, "basically holds everything together" and that the Lemont quarry's conveyors, crushers, and the platforms surrounding and supporting them are all made of steel. Tr. 44-45, 47-49. Croxford also testified that the steel delivered on the day the citation issued was to be used on several projects at the Lemont quarry, including building a catwalk, a handrail, and a platform at the crusher. Tr. 68-70.

Northern Illinois' involvement at the Lemont quarry is comparable to the involvement of operators in other cases in which we have determined that the cited independent contractor was an operator under section 3(d). For instance, in our *Otis I* decision, we stated: "We are satisfied that a mine elevator used for daily transport of the work force into and out of the mine has a sufficient proximity in nature and purpose to the extraction process to be fairly considered . . . 'an essential ingredient involved in [that] process.'" 11 FMSHRC at 1902 (alterations in original) (citations omitted). And in *Lang Bros., Inc.*, we held that, "[i]n cleaning and plugging the gas wells, Lang performed services clearly related to the extraction process." 13 FMSHRC 413, 420 (Sept. 1991) (published Mar. 1992). Thus, although the services performed by the contractors in *Otis* and *Lang Bros.* did not directly involve extraction, we held that they were nonetheless a necessary part of the extraction process. Accordingly, we conclude that substantial evidence supports the judge's finding that the services Northern Illinois provided are sufficiently close to the extraction process to satisfy the first prong of the Commission's operator test.

Northern Illinois' frequent visits to the Lemont quarry and the services it provided there to Vulcan also support the judge's finding that the extent of Northern Illinois' presence at the mine satisfied the second prong of the test.⁵ It is uncontroverted that Northern Illinois delivered steel, unlocked the restraints on the flatbed truck, and assisted in unloading the steel at the Lemont quarry for 20-30 minute increments, once or twice each week on the mine site, for a total of 68 hours during calendar year 1998. Such involvement is comparable to the involvement of other independent contractors we have determined satisfied the second prong of our operator test. For example, in *Joy* we determined that the company's four reported visits to a mine over a ten-week period constituted a sufficient presence at the mine to satisfy the second prong. 17 FMSHRC at 1304, 1308.

In *Lang Bros.*, we held that the contractor's one-time performance of services for seven to ten days was more than de minimis. 13 FMSHRC at 420. We also concluded that an

⁵ Frequency of visits to a mine is certainly a material factor to consider whether a particular enterprise's involvement at the mine is "more than de minimis." However, frequency alone is not determinative of that question or we would be sweeping parcel courier services and the local pizza delivery shop under the coverage of the Mine Act.

independent contractor's presence at a mine "may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence," and found that the importance of the contractor's services to the extraction process along with its "blanket contract" with the mine to clean and plug gas wells, satisfied the second prong of the Commission's operator test. *Id.* In this proceeding, the steel delivered by Northern Illinois is vital to the construction and repair of Vulcan's facilities used in the extraction operation. We also observe that the actions of Northern Illinois' employees along with the frequency of their visits to the mine site contribute to a presence at the Lemont quarry that is more than de minimis. *See Nat'l Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979).

The courts of appeals for the Tenth and D.C. Circuits have articulated a different approach to the determination whether an independent contractor is an operator under the statute. In *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285 (D.C. Cir. 1990), and *Joy*, 99 F.3d 991, the Tenth Circuit and D.C. Circuits held that section 3(d), "by its terms . . . extends to 'any independent contractor performing services . . . at [a] mine.'" *Otis*, 921 F.2d at 1290 (quoting 30 U.S.C. § 802(d) (emphasis added)); *see Joy*, 99 F.3d at 999 ("[T]he definition of 'operator' in section 3(d) of the Mine Act is clear and means just what it says — an operator includes 'any independent contractor performing services . . . at [a] mine.'"). Thus, under the reasoning of the courts of appeals in *Otis* and *Joy*, once a company is determined to be an independent contractor performing services at a mine, it qualifies as an operator under section 3(d). Under the rationale of the *Otis* and *Joy* court of appeals decisions, because we have determined that Northern Illinois is an independent contractor, it follows that the company is necessarily an operator under section 3(d). *See Joy*, 99 F.3d at 999-1000; *Otis*, 921 F.2d at 1289-91.

Treating Northern Illinois as an operator under the Mine Act is fully consistent with the remedial purposes of the Act. As we have previously stated, "such questions of statutory coverage must be resolved within the Act's overall purpose of protecting miners' safety and health." *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994) (citing *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1553-55 (D.C. Cir. 1984)); *see also* 30 U.S.C. § 801 (stating that goal of Mine Act is to prevent death and injury to any individual working at a mine); *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (stating that Congress "intended the [Mine] Act to be liberally construed" to protect the health and safety of miners). Here, Libertoski testified that there was a potential that the Northern Illinois worker could have fallen from the load of steel on which he was standing at the time the citation issued, a potential exacerbated by the cold, wet conditions present at that time. Tr. 144. Also, Croxford and Libertoski testified that if unloading steel is performed incorrectly, the load could fall to the ground, potentially injuring miners or other people below. Tr. 100, 142. Thus, interpreting section 3(d) to cover Northern Illinois under the particular facts of this case fully adheres to the principle that the Mine Act should be construed to protect miner safety.

In sum, based on the totality of the circumstances presented here, we affirm as supported by substantial evidence the judge's conclusion that Northern Illinois is an independent contractor-operator under section 3(d) of the Mine Act.⁶

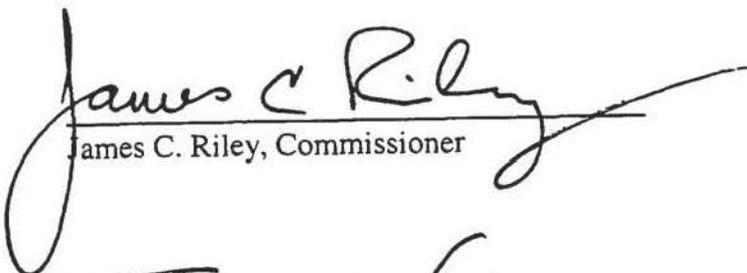
III.

Conclusion

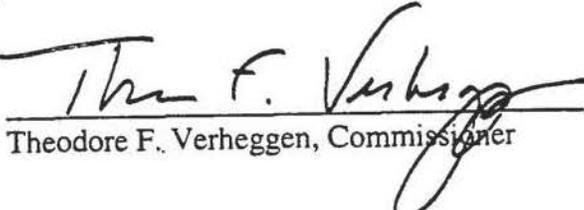
For the foregoing reasons, we affirm the judge's decision.



Mary Lu Jordan, Chairman



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

⁶ What is not at issue here, and therefore beyond the scope of this decision, is the incidental presence at a mine of delivery personnel or drivers who are not exposed to mining hazards, such as the danger of falling encountered here.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 8, 2001

| | | |
|----------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-75-DM |
| ON BEHALF OF | : | |
| JOHN NOAKES, | : | MSHA Case No. MD 99-03 |
| Complainant | : | |
| | : | Gable Quarry |
| v. | : | |
| | : | Mine ID No. 23-02064 |
| GABEL STONE COMPANY, INC., | : | |
| Respondent | : | |

SUPPLEMENTAL DECISION AND FINAL ORDER

Appearances: Jennifer A. Casey, Esq., and Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Donald W. Jones, Esq., and Jason N. Shaffer, Esq., Hulston, Jones, Gammon & Marsh, Springfield, Missouri, for Respondent.

Before: Judge Hodgdon

On September 28, 2000, a decision was issued in this proceeding determining that the Respondent had discriminated against the Complainant by discharging him in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). *Secretary on behalf of John Noakes v. Gabel Stone Co., Inc.*, 22 FMSHRC 1160 (September 2000). The parties were given 30 days to agree on the specific relief due Mr. Noakes, or to submit their separate relief proposals with supporting arguments.

The parties failed to agree on anything. In addition, the Respondent objected to an affidavit of the Complainant submitted with his brief and additional discovery was pursued. Accordingly, all unresolved issues will be disposed of in this decision.

Motion for Reconsideration

The Respondent filed a Motion for Reconsideration of the decision on liability on October 13, 2000. The Secretary responded to it on October 19. In the motion, the company argues that the decision improperly allowed negative inferences based on employer business

practices, omitted relevant facts and relied on the largely uncorroborated testimony of the Complainant. While the motion is without merit, I will discuss it briefly.

The Respondent asserts that “the ALJ found negative inferences from perceived failures of the employer in handling the poor performance of John Noakes.” (Motion at 2.) What I found was that there was no evidence that Gabel had taken any action whatsoever concerning Noakes’ alleged derelictions. Therefore, the evidence did not support Gabel’s claim, made long after the fact, that he had always intended to get rid of Noakes for poor performance. To the extent that this lack of action represents an “employer business practice,” I made no judgment on it one way or the other.

The Respondent contends that the decision did not consider Mr. Noakes’ alleged refusal to work in the quarry after the MSHA inspection. In the first place, the evidence is contradictory as to whether Noakes ever refused to work in the quarry. He says that he did not. Resolution of this issue was not necessary to deciding the case. Even if Noakes had refused to work in the quarry for safety reasons, as Gabel related, it would not change the outcome of the case.

The operator also claims that the decision ignored the deposition testimony of Inspector Allen Studenski that he had never had any problem with Gabel, who had always been cooperative and operated a safe, clean and neat quarry. To the extent that this information is relevant, it would not change the outcome of the case.

Finally, the company maintains that Noakes’ testimony is largely uncorroborated and is, therefore, not sufficient to support a finding of discrimination. In the first place, this statement is not the law. The cases cited by Respondent, none of which involve discrimination under the Mine Act, and the most recent of which is a 1971 case, all involve something more than lack of corroboration. In the second place, Noakes’ testimony is corroborated by the testimony of Inspector Sturgill and most significantly, as indicated in the decision, by the testimony of Gary Gabel.

Accordingly, the Motion for Reconsideration is **DENIED**.

Damages

As noted above, the parties were unable to arrive at an agreement on any of the remedies to which Mr. Noakes is entitled under the Act. Consequently, both parties filed briefs setting forth their respective positions. The Complainant seeks back wages in the amount of \$12,957.50. The Respondent maintains that he is not entitled to anything. Finding that Mr. Noakes will be made whole somewhere between the two extremes, I award back pay of \$9,157.50.

The Noakes Affidavit

Attached to the Complainant's brief was his affidavit providing details of his attempts to find a job after his discharge. Since this affidavit contained information not in the record, the Respondent filed a motion to strike the affidavit, or, in the alternative, to reopen the record. Concluding that the affidavit could not be considered unless the record was reopened and the Respondent given an opportunity to cross-examine the Complainant and provide rebuttal evidence, I held a telephone conference call with the parties. They agreed that the Complainant would be deposed rather than holding a supplementary hearing.

Before taking the deposition, the Respondent requested releases from the Complainant to obtain records from the various state, school and employment agencies to which the Complainant claimed to have had dealings. Counsel for the Secretary said that releases would not be necessary as they would furnish all available documentation. This documentation was mailed to the Respondent and the judge on December 19, 2000.

By letter dated December 20, 2000, counsel for the Respondent requested *subpoenas* for two employment agencies, Manpower Staffing and Penmac Personnel, in West Plains, Missouri; for Town Square Internet; the Missouri Division of Family Services, Missouri Employment and Training Program; the Missouri Department of Labor and Industrial Relations, Division of Employment Security; and Southwest Missouri State University. In a subsequent telephone conference call, I advised the parties that I would issue *subpoenas* for the two employment agencies, but would not issue them for the other entities since the documents furnished by the Secretary clearly indicated that nothing else was available.

By a letter dated January 16, 2001, counsel for the Respondent stated that, because they had not been issued all the *subpoenas* requested, they had chosen not to take Noakes' deposition. Instead, counsel renewed the objection to the affidavit, or, in the alternative, offered into evidence two statements given by Noakes to the Division of Employment Security.

The Respondent did not request a supplemental hearing when offered the opportunity to do so and elected not to take Noakes' deposition for its own reasons. Accordingly, the motion to strike Noakes' affidavit is **DENIED**. The Secretary has not responded to Respondent's offer of Noakes' statements; however, they appear to be relevant and are admitted into evidence as Respondent's Exhibits 76 and 77.

Back Pay

The company argues that Noakes is not entitled to back pay because he failed to mitigate his damages by reasonably searching for a suitable alternative job and because he became a full-time college student in January 1999. I find neither of these arguments persuasive.

Mitigation of Damages

The Commission has long held, with respect to damages in discrimination cases, that:

The central purpose of the Mine Act is to promote safety and health among the nation's miners. To accomplish that goal it is essential that miners be encouraged to report unsafe conditions free from the threat of retaliation and subsequent economic loss. Thus, we are persuaded that upon a finding of discrimination, a *presumption of the right to monetary relief arises* and such relief should be denied only where "compelling reasons" otherwise dictate. Moreover, if monetary relief is denied, the bases for the failure to make the aggrieved party whole must be articulated.

Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982) (emphasis added).

Thus, any analysis of damages due to Noakes as the result of being discriminated against begins with a presumption that he is entitled to such damages. Turning to the Respondent's first argument, the burden is on the operator to rebut this presumption by showing that Noakes did not make a reasonable job search. *Secretary on behalf of Jackson v. Mountain Top Trucking Co., Inc. et al*, 21 FMSHRC 1207, 1214 (November 1999); *Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (February 1984).

The Respondent's assertion that Noakes did not present any evidence that he looked for work, without more, falls short of rebutting the presumption. In *Metric Constructors*, the judge awarded full back pay to two complainants, neither of whom appeared at the hearing, one having died and the other serving in the Navy overseas, holding that the company had not shown a lack of reasonable effort to mitigate. The Commission held that the judge did not err, stating: "We recognize that there are circumstances, such as those at hand, under which a complainant may not appear to testify. However, an operator may prepare for that possibility by initiating pre-trial discovery relating to the issue of mitigation." *Id.* Here, the company had the opportunity to cross-examine the Complainant and did not ask him any questions concerning his efforts to find another job.

The operator has cited some federal circuit court of appeals cases which indicate, at least with regard to the Americans with Disabilities Act and employment discrimination, that the Complainant has to present some evidence of reasonable efforts to mitigate before the burden shifts to the company to show that no reasonable undertaking was made. However, even if the law in these specialized areas changes the Commission law set out above, the Respondent's argument still fails because the Complainant's affidavit filed with his penalty brief convincingly

demonstrates that he made a reasonable effort to find, and did eventually find, another job.¹ Thus, Noakes cannot be denied back pay on these grounds.

Full-time Student

The Respondent next contends that the Complainant is not entitled to back pay after he became a full-time student. Again, the burden is on the operator to show that Noakes was not looking for work while he was attending college and would not have been able to work if it became available. *Mountain Top Trucking et al*, 21 FMSHRC at 1214. In support of its

position, the company has taken two statements of the Complainant out of context and cited the general rule concerning full-time attendance in school. Neither demonstrates that Noakes is not entitled to back pay.

The company quotes the statement of Noakes in a January 25, 1999, report on his work searches to the Missouri Department of Employment Security that: "I will not quit school to go to work." (Resp. Ex. 76.) Likewise, it quotes a February 16, 1999, report that: "I would not give up my schooling to accept full time work if the work conflicted with my class hours." (Resp. Ex. 77.) Both of these, it claims, demonstrate that Noakes was neither available nor looking for work.

The fact is, however, that Noakes was attending school full-time at night, from 5:30 p.m. to 8:30 p.m. (Resp. Exs. 76 and 77.) In both reports, Noakes stated that he was seeking and available for full-time work during the day. As the Eighth Circuit Court of Appeals stated, in a case cited by the Respondent: "Some full-time students, those who attend classes at night, for example, are also full-time employees" *Washington v. Kroger Co.*, 671 F.2d 1072, 1079 (8th Cir. 1982). Thus, while the general rule is that one who is attending school full-time is neither available nor looking for work, there are exceptions to the rule. See, e.g., *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1276 (4th Cir. 1985); *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1308 (7th Cir. 1984). Indeed, the evidence in this case is that Noakes subsequently obtained a full-time job which he performed while attending school full-time.

In sum, I find that the Respondent has failed to meet its burden of establishing that the Complainant is not entitled to back pay either because he did not make a reasonable attempt to

¹ In the September 28 decision, the parties were advised that if a further hearing was needed on the remedial aspects of the case, such a request should be made. 22 FMSHRC at 1169. While it would have been better if the Secretary had followed this procedure rather than submitting an affidavit with the brief, the failure to do so does not make the affidavit inadmissible. The Respondent was given the opportunity to cross-examine the Complainant on the matters contained in the affidavit and elected not to do so.

find another job or because he was attending school full-time. Accordingly, I conclude that Mr. Noakes is entitled to back pay.

Amount of Back Pay

The Complainant has requested \$12,957.50 in back pay, as follows: \$2,660.00 from the date of his discharge, December 3, 1998, until he began working part time, February 2, 1999; \$6,780.00 from the time he began working part time until he began working full time, July 16, 1999; and \$3,517.50 from July 16 until the date of his brief, October 27, 2000.² (Comp. Br. at 2-3.) I find that the Complainant is entitled to back pay of \$9,157.50.

There is no dispute that the normal work week at Gabel Stone is 45 hours per week, performed at nine hours per day. Nor is there any dispute that Mr. Noakes was earning \$7.00 per hour for the first 40 hours and received time and one half, or \$10.50, for the five hours overtime each week.³ Consequently, he earned \$332.50 per week ($\$7.00 \times 40 \text{ hrs.} + \$10.50 \times 5 \text{ hrs.} = \332.50). The Complainant claims that he was out of work for eight weeks. (*Id.*) Consequently, he is entitled to \$2,660.00 for the eight weeks ($\$332.50 \times 8 = \$2,660.00$).

The Complainant claims \$6,780.00 for the period that he worked part time on the weekends. This was arrived at by subtracting the amount he earned on the weekends, $\$50.00 \times 24 \text{ weeks} = \$1,200.00$, from the amount he would have earned at Gabel Stone, $\$332.50 \times 24 \text{ weeks} = \$7,980.00$. (*Id.* at 3.) It appears that the Complainant has miscalculated; there were only 23 weeks between February 2 and July 16, 1999. Therefore, I will award him \$6,497.50 [$\$332.50 \times 23 \text{ weeks} (\$7647.50) - \$50.00 \times 23 \text{ weeks} (\$1,150.00) = \$6,497.50$]

The Complainant also claims \$3,517.50 as the pay differential between what he would have earned at Gabel Stone and what he earns working full time for Town Square Internet. However, I find that he is not entitled to any back pay after he began working full time. The Commission has held that a mine operator is not required to pay a former employee back pay for any period of time after which he has unequivocally indicated that he does not wish to return to his former employment. *Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2055 (December 1983).

In this case, Noakes did not request reinstatement when he filed his complaint with MSHA, (Comp. Ex. 3), nor did he request it in the Complaint of Discrimination he filed with the Commission on October 22, 1999. On the other hand, he never expressly stated that he would

² The Respondent has not made any offer as to the amount of back pay to which the Complainant should be entitled.

³ While there is evidence in the record that Gabel employees occasionally also worked on the weekend, Noakes had not done so for several months and he makes no claim for any additional overtime.

decline reinstatement. Nevertheless, taking into consideration that he did not request reinstatement, that he began attending school and taking courses in a different field than mining, and that he began working full time in a totally unrelated type of work on July 16, 1999, I conclude that he unequivocally indicated that he did not wish to return to his former employment on July 16, 1999.

Accordingly, I conclude that Mr. Noakes is entitled to back pay in the amount of \$9,157.50 plus interest calculated until the date of payment in the manner required by the Commission.⁴

Civil Penalty Assessment

The Secretary has proposed a penalty of \$10,000.00 for this violation of the Act. 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); *Secretary on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 555 (April 1996).

The Assessed Violation History Report for Gabel Stone for the two years preceding the company's discriminatory action shows that the operator was cited for 11 violations. (Comp. Ex. 1.) Eight of the citations were issued for violations observed during the inspection initiated by Noakes' 103(g) complaint. Only four of the 11 violations were designated as "significant and substantial."⁵ From this, I find that the Respondent has a good history of prior violations.

Gabel Stone has only five to seven employees, including Joyce and Gary Gabel. Consequently, I find that Gabel Stone is a very small business.

I find that the operator was highly negligent. After being specifically advised that firing a miner who filed a 103(g) complaint, 30 U.S.C. § 813(g), was a violation of section 105(c), he fired the Complainant anyway. Then he later tried to make it appear that the Complainant had quit.

⁴ The proper method of calculating interest on back pay is: *Amount of interest = The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x the short-term federal underpayment rate.* *Secretary on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (December 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (November 1988). The applicable interest rates and daily interest factors may be obtained on the Internet at: www.nlr.gov/ommemo/ommemo.html.

⁵ The "significant and substantial" terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

The company argues that a \$10,000.00 penalty would “devastate” the employer. (Resp. Br. at 8.) Unfortunately, the only evidence presented on this issue was the bald assertion by the operator that in 1999 the company “grossed 400,000 and we operate on about a 10 percent. We paid taxes forty some thousand dollars. A \$10,000 fine would take 25 percent.” (Tr. 710.) The burden is on the operator to show that the penalty will adversely affect its ability to remain in business. *Sellersburg Stone Co.*, 736 F.2d at 1153 n.14. The operator’s statement clearly is insufficient to meet this burden. *See Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (April 1977) (must submit financial information or other specific evidence to meet burden). Furthermore, even assuming that the company’s net profits were \$40,000.00, the penalty would come out of the gross, not the net. Consequently, I find that the penalty will not adversely affect Gabel Stone’s ability to remain in business.

The Secretary asserts that the gravity of this violation was serious because “a ‘chilling effect’ on protected activities naturally occurs by virtue of the very fact that the miner was punished for reporting safety problems.” (Sec. Br. at 9.) This argument is based on the legislative history of the Act. However, the Commission has held that:

Contrary to the Secretary’s assertions, this legislative history does not suggest that a chilling effect should be presumed to result from every section 105(c) violation. In our view, Congress intended that section 105(c) would protect miners against the chilling effect of employment loss they might suffer as a result of an illegal discharge. We therefore hold that the Mine Act does not support such a presumption and that a determination of whether a chilling effect resulted from a section 105(c) violation is to be made on a case-by-case basis.

Jim Walter Resources, Inc., 18 FMSHRC at 558.

The Complainant testified that he made the 103(g) complaint rather than taking the matter up with Gary Gabel because he feared Gabel’s reaction. However, he gave no basis, such as previous reactions by Gabel to such complaints, to support his belief. He also testified that he thought other employees were afraid to bring safety matters to Gabel’s attention. Contrarily, two of those employees testified that they were not afraid. Significantly, no one testified as to their concerns, or lack thereof, after the Complainant was fired.

Despite this conflicting evidence, I find that Gabel’s reaction to the complaint, manifested at the time of the inspection, and his subsequent termination of Noakes would reasonably tend to discourage the other miners at this small operation from engaging in protected activities. Therefore, I find that a chilling effect probably did result from the violation and that the gravity of the violation was serious.

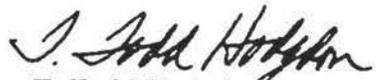
Finally, I find that the Respondent did not demonstrate good faith in abating this violation. There is no evidence that he did anything to abate it. Further, as noted previously, when discussing the matter with the MSHA District Supervisor who had advised him about section 105(c) of the Act, Gabel attempted to cover-up the matter by stating that Noakes had quit.

Taking all of these factors into consideration, I conclude that an appropriate penalty in this case is \$5,000.00. I am reducing the penalty mainly because of the size of the company. I am also taking into consideration the \$9,157.50 in back pay I am awarding, which serves two functions: "to further the purposes of the Act by deterring retaliatory actions, and to put an employee into the financial position he would have been in but for the discrimination." *Kentucky Carbon Corp.*, 4 FMSHRC at 2 (citation omitted).

Order

Accordingly, having previously found that Gabel Stone Co., Inc., discriminated against John Noakes by discharging him on December 3, 1998, it is **ORDERED** that:

1. My September 28, 2000, decision in this matter is **FINAL**.
2. The Respondent **PAY** John Noakes **\$9,157.50** in back pay, within 30 days of the date of this decision, for the period from December 4, 1998, until July 16, 1999, with interest computed using the *Arkansas-Carbona/Clinchfield Coal Co.* method.
3. Gabel Stone Co., Inc. is **ORDERED TO PAY** a civil penalty in the amount of **\$5,000.00**, for its violation of section 105(c) of the Act, within 30 days of the date of this decision.


T. Todd Hodgdon
Administrative Law Judge

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/nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 9, 2001

| | | |
|------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-110-M |
| Petitioner | : | A. C. No. 14-00164-05539 |
| v. | : | |
| | : | Docket No. CENT 2000-198-M |
| WALKER STONE COMPANY, | : | A.C. No. 14-00164-05540 |
| INCORPORATED, | : | |
| Respondent | : | |
| | : | Kansas Falls Quarry & Mill |

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing, Troup, Kaus & Ryan, L.C., Junction City, Kansas, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Walker Stone Company, Incorporated (Walker Stone). The petitions sought to impose a total civil penalty of \$507.00 for four alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines. Two of the four alleged violative conditions were characterized as significant and substantial (S&S) in nature. This matter was heard on January 23, 2001, in Fort Riley, Kansas.

At the beginning of the hearing, the parties were advised that I would defer my ruling on the four citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. At the conclusion of the hearing, the parties waived the filing of briefs. (Tr. 222). This written decision formalizes the bench decision issued with respect to the contested citations. Although Citation No. 7927263 was vacated in the bench decision, following the January 23, 2001, hearing, the Secretary filed a motion to withdraw Citation No. 7927263. The Secretary's motion, which is not opposed by

Walker Stone, is timely inasmuch as it was filed prior to the issuance of this written decision which finalizes the bench decision. Accordingly, the Secretary's motion to withdraw Citation No. 7927263 **IS GRANTED**.

With respect to the remaining three citations, this written decision contains an edited version of the bench decision issued at trial with added references to pertinent case law. The bench decision affirmed the three citations and imposed a total civil penalty of \$323.00.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the Commission's standards with respect to what constitutes a significant and substantial (S&S) violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (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 of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained its *Mathies* criteria as follows:

We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984). (Emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

The bench decision also applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In determining the appropriate civil penalty to be assessed, Section 110(i) provides, in pertinent part:

the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Walker Stone is a small mine operator that is subject to the jurisdiction of the Mine Act. The evidence reflects that Walker Stone has a good compliance history with respect to previous violations in that, although it was cited for seventeen violations of mandatory health and safety standards during the previous two years preceding the issuance of the citations in issue, only one of the cited conditions was designated as S&S (Gov. Ex. 1); that Walker Stone abated the cited conditions in a timely manner; and that the \$507.00 total civil penalty initially proposed by the Secretary in these matters will not effect Walker Stone's ability to continue in business.

II. Findings and Conclusions

Walker Stone is a moderately small mine operator that has approximately 32 employees at its Kansas Falls Quarry and Mill. The facility is an open pit crushing operation that is located in Dickinson County, Kansas. At the quarry, material is extracted and crushed into various grades of gravel. The citations that are the subject of these proceedings were issued on September 23 and September 27, 1999, by Mine Safety and Health Administration (MSHA) Inspector James William Timmons, who is assigned to the Topeka, Kansas Field Office. The citations were issued during the course of Timmons' regular bi-yearly inspection of Walker Stone's Kansas Falls Quarry and Mill facility.

A. Citation No. 7927258

Inspector Timmons conducted his regular bi-annual "01 inspection" of the Kansas Falls Quarry and Mill from September 22 through September 27, 1999. Upon arriving at the mine, Timmons met with Clifford Moenning, Walker Stone's supervisor. At Timmons' request, Moenning provided company records for review including training records, fire extinguisher inspection reports, electrical records, and accident and injury reports. Timmons testified he routinely reviews reports of accidents that occurred since the last mine inspection to determine if there were any violations of safety standards. (Tr. 113-15).

Part 50 of the Secretary's regulations governs accident notification requirements. For example, a mine operator must notify MSHA immediately after a fatal accident or an accident that results in life threatening injuries. 30 C.F.R. §§ 50.2(h) (1) and (2) and 50.10. Accidents involving occupational injuries that are not life threatening must be reported to MSHA on Accident Report Form 7000-1 within ten working days after the occupational injury occurs. 30 C.F.R. § 50.20(a).

Timmons noted a Mine Accident and Injury Report (MSHA FORM 7000-1) completed on July 19, 1999. (Gov. Ex. 3). The accident report concerned a right hand injury sustained by to Richard A. Orkzesik, a skid loader operator, on July 10, 1999. The accident occurred when Orkzesik attempted to clean mud and debris from the conveyor's return idler roller with a shovel. The moving belt caught the shovel before Orkzesik could let go catching Orkzesik's hand between the roller and the belt. As a result, Orkzesik suffered bruising and swelling to his right thumb and forefinger.

After reviewing the Orkzesik injury report, Timmons issued Citation No. 7927258 for an alleged violation of the mandatory safety standard in section 56.12016 that requires, in pertinent part, that electrically powered equipment shall be deenergized and locked out before maintenance is performed on such equipment. (Gov. 2). The citation was terminated on the same day after Timmons assured himself that Orkzesik had been trained in the importance of locking out equipment. Timmons designated the violation as S&S because of the likelihood of serious injury to the extremities of maintenance personnel exposed to the pinch points of moving equipment.

Although the negligence attributable to Walker Stone was initially determined to be moderate, Citation No. 7927258 was modified on September 24, 1999, to reduce the degree of negligence to low based on information provided to Timmons by the victim of the accident. Orkzesik told Timmons that Walker Stone had a lock out and tag out policy and that he had been trained to deenergize and lock out equipment on two occasions. Orkzesik stated that he knew better, but on the day of the accident he was in a hurry. (Tr. 39). Although David Walker, the President of Walker Stone, and supervisor Moenning were present during Timmons' September 24, 1999, interview of Orkzesik, Timmons' opined that Orkzesik did not appear to be intimidated in that his responses appeared forthright and that he admitted the accident was his fault. (Tr. 55-56). The Secretary seeks to impose a civil penalty of \$224.00 for Citation No. 7927258.

Walker Stone does not dispute the facts surrounding the accident. However it objects to the citation because Timmons did not observe the violation. Rather, Timmons used Walker Stone's admissions in its accident report to establish the cited violation. Thus, Walker Stone challenges the citation because the cited violation was not personally observed by Timmons, and because the citation is based on a "self incriminating" accident report that Walker Stone is required to file with MSHA pursuant to 30 C.F.R. § 50.20(a). In essence, Walker Stone argues that such use of routine accident reports will have a chilling effect on a mine operators' willingness to file accident reports.

The bench decision noted that Walker Stone does not deny the facts surrounding the cited violation of section 56.12016 in that it admits Orkzesik attempted to perform maintenance work on the electrically powered conveyor without deenergizing the belt and locking out the equipment. However, as a threshold matter, Walker Stone asserts that the cited violation is not supportable because Inspector Timmons did not personally observe the violation. It is well established that an MSHA inspector may cite a violation based on his reconstruction of past events. Thus, contrary to Walker Stone's assertions, an inspector does not have to personally observe a violation of a mandatory safety standard to conclude that a violation had occurred. *Emerald Mines Co. v. FMSHRC*, 863 F. 2d 51, 57 (D.C. Cir. 1988). Thus, the Secretary has demonstrated the fact of occurrence of the cited violation.

Turning to the issue of significant and substantial, it is obvious that the violation, *i.e.*, the failure to deenergize and lock out electrical equipment, significantly and substantially contributed to the cause and effect of the hazard, *i.e.*, the exposure of extremities to injury. Thus, Citation No. 7927258 was properly designated as significant and substantial.

The next issue to be addressed is negligence. The Mine Act is a strict liability statute. Thus, mine operators are liable without regard to fault. *Sewell Coal Co. v. FMSHRC*, 686 F. 2d 1066, 1071 (4th Cir. 1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). In this regard, in *Ideal Cement Co.*, 13 FMSHRC 1346, 1351, the Commission noted that, "[u]nder the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct." See also *Mar-Land Industrial Contractor, Inc.*, 14 FMSHRC 754, 757-58 (May 1992). Consequently, Walker Stone is liable despite Orkzesik's admission that he knowingly violated the company's lock out policy because he was in a hurry.

Under the penalty criteria in section 110(i) of the Mine Act, the degree of an operator's negligence, or lack thereof, is a factor to be considered in assessing the appropriate civil penalty. *Asarco, Inc.*, 8 FMSHRC at 1636. While Orkzesik's misconduct is not a defense to liability, the circumstances surrounding Orkzesik's conduct are relevant in determining whether Orkzesik's negligence should be imputed to Walker Stone. Ordinarily, the conduct of a rank-and-file miner is not imputable to the operator in determining the degree of negligence for penalty purposes. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). Rather, it is the adequacy of the mine operator's supervision, training and discipline that are the relevant factors to be considered. *Id.*; *Western Fuels-Utah, Inc.*, 10 FMSHRC at 261.

Here, the Secretary does not contend that Walker Stone's supervision, training or discipline of Orkzesik was lacking. Orkzesik simply disregarded his lock out training as well as known company policy. Consequently, there is no basis for imputing Orkzesik's negligence to Walker Stone. Accordingly, the negligence attributable to Walker Stone in

Citation No. 7927258 for the cited lock out violation of the Secretary's mandatory safety standard is reduced from low negligence to no negligence. **In view of Walker Stone's lack of negligence the \$224.00 civil penalty initially proposed by the Secretary for Citation No. 7927258 shall be reduced to \$120.00.**

As a final matter, Walker Stone objects to Timmons' reliance on Accident Form 7000-1 because it is "self-incriminating." Section 103(a) of the Mine Act, 30 U.S.C. § 813(a), authorizes the Secretary to conduct inspections to determine if there are violations of mandatory safety regulations. Section 103(d) of the Act, 30 U.S.C. § 813(d), requires mine operators to keep accident records and to make such records available to MSHA inspectors. While I am sensitive to Walker Stone's concern that MSHA's reliance on routine accident reports to impose civil liability may provide mine operators with a disincentive to strictly comply with MSHA's accident reporting requirements, I cannot conclude that Timmons' reliance on the accident report to support the cited violation is inconsistent with the Secretary's statutory mandate. However, use of accident reports to support citations must comply with the provisions of section 104(a) of the Act, 30 U.S.C. § 814(a), that require that citations must be issued "with reasonable promptness." Here, Timmons testified he only reviews reports of accidents that were made since the last mine inspection. In the instant case, the citation was issued approximately two months after the accident. Under such circumstances, the citation was issued reasonably promptly. (Tr. 223-33).

B. Citation No. 7927264

During the course of reviewing the accident reports on September 27, 1999, Timmons noted a truck accident that had occurred approximately one week before on September 16, 1999. (Gov. 6). The accident occurred when Oscar Garza, who had been hired by Walker Stone just three weeks before, lost control of his loaded 50 ton Caterpillar haulage truck that was traveling from the pit to the crusher. The haulage truck was driven off of the road as Garza was attempting to negotiate a curve on a decline, causing the truck to tip over on its side. Garza was wearing a seat belt and escaped serious injury. Garza sustained a laceration of his right ear and bruises on his right shoulder and both legs.

After reviewing the accident report, Timmons spoke to Garza and determined that Garza had received two days training at Walker Stone. Garza's previous truck driving experience reportedly consisted of "some experience" driving an oil truck in the National Guard. (Tr. 89). As a result of the information he obtained, Timmons issued Citation No. 7927264 on September 27, 1999, citing a violation of the mandatory safety standard in section 56.9101, 30 C.F.R. § 56.9101, that requires operators of mobile equipment to control the equipment while it is in motion. (Gov. Ex. 4). Timmons designated the violation as S&S given the potential injuries that could occur to the operator as a consequence of this multi-ton vehicle's rollover. Timmons characterized Walker Stone's negligence as low apparently because Garza had been given some training, and because Garza stated he had some experience.

Clifford Moenning, Walker Stone's supervisor, testified Garza told him "he didn't know anything" about why the accident happened. (Tr. 131-32). Moenning concluded Garza had fallen asleep at the wheel. Moenning testified that it is normal for newly hired truck drivers to receive one to two days training. Moenning further testified that he "believe[d] [Garza] did have some truck driving experience, but not on that large a truck." (Tr. 133, 140).

The circumstances of this accident that resulted from Garza's failure to control this multi-ton haulage truck obviously support the cited violation, as well as its significant and substantial nature. The bench decision noted the previous discussion of strict liability and imputed negligence. Here, a newly hired truck driver, with questionable truck driving experience in the National Guard, rather than suitable commercial driving experience, drove a multi-ton haulage truck off the road shortly after he was hired. When an mine operator entrusts an employee with exclusive possession and control of heavy duty equipment, the mine operator must be held accountable for ensuring that the employee is qualified to operate the equipment by virtue of adequate training and experience. In fact, Walker Stone conceded the mine operator must be held responsible for determining when a truck driver is qualified. (Tr. 145-47).

Moenning's exculpatory conjecture that Garza fell asleep is entitled to little weight. Rather, given Garza's lack of substantial truck driving experience, the brevity of his training, and his manifest inability to control the truck, it is apparent that Garza was not adequately trained or supervised. As previously discussed, under such circumstances, ordinarily Garza's negligence should be imputed to Walker Stone.

However, here, for reasons best known to the Secretary, MSHA has characterized Walker Stone's negligence as low. Although I do not view Garza's reported National Guard experience or his brief training as mitigating factors, I will not disturb the low negligence attributed to Walker Stone by the Secretary in the subject citation. **Accordingly, Citation No. 7927264 is affirmed and Walker Stone shall pay the \$173.00 civil penalty initially proposed by the Secretary.** (Tr. 233-37).

C. Citation No. 7927262

On September 23, 1999, Timmons inspected a magazine that stored explosives. The magazine consisted of a metal shed with a steel door that was built into the side of a hill. The shed measurements were approximately six feet tall by six feet long by eight feet wide. Timmons observed 63 boxes of 2 ½ by 16 inch slurry explosives that were stacked on the floor of the magazine. Each box weighed approximately 55 pounds. Timmons noted that the metal shell of the magazine had deteriorated and water was leaking into the magazine. Timmons observed someone lift a box of explosives from the ground. The box was water logged causing the bottom to fall out spilling the slurry explosives on the floor.

As a result of Timmons' observations, Timmons issued Citation No. 7927262 citing a violation of the mandatory standard in section 56.6132(a)(7), 30 C.F.R. § 566132(a)(7), that requires magazines to be kept clean and dry inside. Timmons designated the violation as non-significant and substantial (non-S&S) because the magazine only contained water slurry explosives that are designed to use in water. The water based slurry consists of hexamine sodium nitrate, nitrate acid and an aluminum based water jell. Larry Tappana, a technical representative employed by Slurry Explosives Corporation, Walker Stone's explosives supplier, testified that slurry explosives are "cap sensitive" which means there is no danger of explosion unless they are connected to, and detonated by, blasting caps. Timmons viewed the violation as a housekeeping violation rather than a significant hazard because there were no blasting caps stored in the magazine. Although the violation was characterized as poor housekeeping unlikely to cause injury, Timmons noted on Citation No. 7927262 that if injury were to occur, it was likely that it would be fatal.

Timmons explained that nitroglycerin based explosives stored in a wet environment could deteriorate and become unstable. He also stated that blasting caps stored in a wet environment could cause misfires. Since neither nitroglycerin based explosives nor blasting caps were stored in the subject magazine, Timmons considered the violation as non-S&S. The citation was terminated after a new magazine was constructed.

The bench decision noted that the undisputed evidence is that the interior of the magazine was wet due to water leakage. The plain language of the Secretary's cited mandatory standard requires that magazines be kept clean and dry. Moreover, the testimony reflects that The Bureau of Alcohol, Tobacco and Firearms (ATF) regulations also prohibit wet magazines. Finally, Tappana, a technical representative employed by Walker Stone's explosives supplier, who was Walker Stone's witness, testified it is industry practice to keep magazines dry. (Tr. 185). While the Secretary's interpretation of her own regulations normally is entitled to deference as long as the interpretation is reasonable and promotes safety, here, deference is not in issue because the meaning of the regulation is clear. The regulation requires a dry magazine. The subject magazine was wet. Accordingly, the Secretary has demonstrated the fact of occurrence of the cited section 56.6132(a)(7) violation.

With regard to gravity, the violation has been designated as non-S&S. However, Citation No. 7927262 notes that in the unlikely event of injury, such injury would be fatal. The testimony does not support Timmons' conclusion of the possibility of fatal injuries. Exposing the water based slurry product to wet conditions does not contribute to any additional hazard. Nor is there any evidence that the wet magazine could contribute to an unplanned explosion. **Consequently, the gravity of the section 56.6132(a)(7) violation is reduced to low and the \$55.00 civil penalty initially proposed by the Secretary for Citation No. 7927262 is reduced to \$30.00.** (Tr. 237-40).

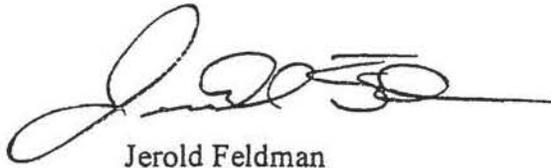
As previously noted, the Secretary's motion to withdraw Citation No. 7927263 has been granted. Consequently, Citation No. 7927263 shall be vacated.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 7927258, 7927264, and 7927262 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Citation No. 7927263 **IS VACATED**.

IT IS FURTHER ORDERED that Walker Stone Company, Inc., **shall pay a total civil penalty of \$323.00** in satisfaction of Citation Nos. 7927258, 7927264, and 7927262. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket Nos. CENT 2000-110-M and CENT 2000-198-M **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

February 9, 2001

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 2000-287-M
Petitioner : A.C. No. 29-01999-05530
v. :
: :
RIBBLE CONTRACTING INC., :
Respondent :
: Ribble Crusher #1

DECISION

Before: Judge Weisberger

Appearances: David C. Rivela, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Norman C. Ribble, Ribble Contracting Incorporated, Albuquerque, New Mexico, for the Respondent.

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") seeking the imposition of civil penalties against Ribble Contracting Inc. ("Ribble") for allegedly violating various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Subsequent to notice, the matter was heard in Los Lunas, New Mexico on November 14, 2000.

I. Citation No. 7886651

A. Violation of 30 C.F.R. § 56.14107(a)

Ribble's Crusher No. 1 Mine is a sand and gravel operation. On November 29, 1999, MSHA Inspector Abel Cisneros, Jr. inspected the mine. Cisneros observed that the tail pulley under the grizzly feeder (crusher) was completely exposed. According to Cisneros, the belt was running at the time. Cisneros concluded that this condition created the hazard of a miner becoming entangled in the moving tail pulley, and suffering a serious injury. He issued a citation alleging a violation of 30 C.F.R. Section 56.14107(a) which provides, as pertinent, that

“[m]oving machine parts shall be guarded to protect from contacting ... tail, and take-up pulleys, and similar moving parts that can cause injury.”

Barney Jones, Jr., Ribble’s Crushing Superintendent, testified that when the grizzly was in operation sizing stones, the guard was in place, and the area was cordoned off with caution tape. According to Ribble, the grizzly was a new piece of equipment, and at the time of the inspection, the guard on the tail piece had been removed in order to observe the belt in motion so it could be properly adjusted.

Joe Granillo, the crusher operator, testified that he never saw the grizzly being run without the guard in place.

It thus appears to be the position of Ribble that it was not in violation of Section 56.14107(a) supra, as the guard was not in place to allow for maintenance to be performed.

The clear language of Section 56.14107(a) supra, requires, in the absolute, that tail pulleys be guarded. Section 56.14107(a) supra, does not allow for any exception for maintenance work. Based on the uncontradicted testimony of Cisneros I find that, on the date cited, the tail pulley was in motion, it was not guarded, and persons were not protected from contacting the tail pulley. Accordingly, I find that it has been established that Ribble did violate Section 56.14107(a) supra.

B. Significant and Substantial

According to Cisneros, in essence, the violation was significant and substantial inasmuch as there was a reasonable likelihood of an injury as a consequence of the violation. He explained that because the pulley was completely exposed an employee at that site would be subject to inadvertent contact with the pulley, which could result in an injury caused by the moving pulley. He indicated that employees work in the area of the pulley in order to clean and adjust the belts. In this connection he testified that when he was on the site three days before the date in question, he saw some employees cleaning with a shovel around the tail pulley of the stacker belt. Cisneros indicated that they were within 18 inches of a guarded pulley and that the machinery was in operation at the time. He noted that when he was at the mine on the date of the inspection it was in operation. Cisneros indicated that on a weekly basis he receives reports of fatal injuries stemming from unguarded pulleys.

On the other hand, Norman C. Ribble testified that employees clean around and under the tail pulley when it is not in operation. In the same fashion Joe Granillo, the crusher operator, testified that he never saw the pulley being run without a guard when the plant was in operation. In this connection he said that when the plant is in operation and the area is marked with caution tape, as it is dangerous to be present. He indicated that a laborer cleans the area in question when it is not in operation.

Barney Jones, Jr., the crushing superintendent, who is in charge of operations at the plant, explained that the crusher at issue accepts large pieces of rock placed on top of its cone shaped upper portion. The rocks are then sized, as a result of vibration of the grizzly, and dropped onto a belt which is operated by the tail pulley at issue. He explained that the crusher was a new piece of equipment and, when cited, had not yet commenced to size large pieces of rock, but instead was being run so that the belt could be aligned properly. Jones indicated that, in normal operations, employees would not be in close proximity to the tail pulley at issue due to the hazard of being hit by large pieces of rock falling from the top of the vibrating crusher. According to Jones, small pieces of rock, ("fines"), which accumulate under and near the belt are cleaned by loaders, and not by manual labor.

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

I find, as discussed above, (I(A), infra) that the cited condition was in violation of a

mandatory safety regulation, and contributed to the hazard of an employee becoming entangled in the moving tail pulley. I also find, within the context of this record, that inasmuch as employees were in close proximity to a moving tail pulley that was totally unguarded, an injury producing event, i.e., inadvertent contact with the tail pulley was reasonably likely to have occurred. Also, I note that Cisneros' testimony that contact with the unguarded tail pulley could result in a serious injury or fatality. Since this testimony was not contradicted or impeached, I accept it. Thus, within the framework of this record, I find that the violation was significant and substantial.

C. Penalty

I find that, as discussed above, the level of gravity of this violation was relatively high. However, I find that the record supports a finding, as agreed to by the parties of the hearing, that the level of Ribble's negligence was only moderate. Also, I note the parties' stipulations that Ribble demonstrated good faith in abating the violation, and that Ribble's operation was small. Further, I have reviewed the history of violations and, significantly, find that aside from the violations at issue in this case, Ribble was not cited for any violations after the plant had become Ribble's property. There is no evidence that the imposition of a penalty would have any effect on Ribble's ability to remain in business.

Considering all the above factors, I find that a penalty of three hundred dollars is appropriate.

II. Citation No. 7886659

A. Violation of 30 C.F.R. § 56.12030

1. The Secretary's Case

Cisneros testified that during his inspection on November 29, 1999, he had observed an electrical box in a control room at the subject plant. He indicated that the box was provided with a handle on the outside door covering the box. According to Cisneros the handle was designed to be moved up or down in order to open or close a breaker located inside the box, which energized a generator that supplied electricity to the crusher. He noted that the door was open approximately three inches, which exposed 480 v. conductors that were located inside the box. Cisneros noted that the handle was broken, and that approximately 80 percent of it was missing.

Cisneros indicated that Granillo told him that because the handle was broken, the only way to energize the switch for the generator was to open the box and do it manually. According to Cisneros, Granillo also told him that the switch had to be turned on and off on a daily basis.

Cisneros concluded that the box was in disrepair and that since the off/on switch, located inside the box, had to be operated by hand, a person performing this operation would be exposed to energized conductors. Also, when the door was left open to operate the interior switch, the

box could explode, and persons in the area would not have any protection and could suffer burns.¹

Cisneros issued a citation under C.F.R. 30, Section 56.12030 which provides as follows: “[w]hen a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.”

2. Ribble’s Evidence

Granillo explained that he starts the crusher by pushing buttons that are located on another compartment. Granillo said that he never placed his hand inside the box at issue, and never opened it.

Jones explained that although a five inch portion had been broken off the handle on the outside of the box, a star shaped stump remained. Accordingly, Ribble had fashioned a wrench to place over the star shaped stump, which allowed the interior breaker switch to be turned on and off from outside the box. He explained that, in normal operations, the crusher is started and stopped by pushing “cone starter buttons”, that are located elsewhere, i.e., not inside the box and not on the box. Jones explained that the breaker switch inside the box is not switched on and off on a daily basis, and that the only time that it is switched off is in order to check voltage or amperage on the crusher. According to Jones, on the date cited, the door had been left open as the crusher had gone down, and he was in the process of checking voltage and amperage, a task performed only by him.

3. Discussion

Section 56.12030, *supra*, requires the correction of “... a potentially dangerous condition”. For the reasons that follow, I find that the record establishes that Ribble failed to correct “a potentially dangerous condition.”

The handle on the outside of the box was broken. Since it was designed to open or close a breaker inside the box, a dangerous condition was made possible thereby i.e., a person being exposed to energized conductors inside the box, after opening the door of the box to gain access to the breaker in order to open or close it. Accordingly, although Ribble had provided a wrench to be attached to the stump of the handle to allow it to be raised or lowered from the outside the box, the failure to repair the handle clearly was potentially dangerous (See *Webster’s Third New International Dictionary* (1996 Ed.), at 1775)). Hence, I find that it has been established that Ribble did violation Section 56.12030 *supra*.

4. Significant and Substantial

¹It was stipulated should Daniel Lambert, an MSHA electrical inspector, testify, his testimony would be the same as Cisneros’.

Since the record establishes that Ribble did violation Section 56.12030 supra, and a discreet safety hazard was contributed to by the violation i.e., contact with energized conductors inside the box, I find that the first two elements set forth in Mathies, supra, have been met.

Cisneros opined that it was reasonably likely that a serious injury would have occurred because the handle had been broken, and was not repaired. In this connection, Cisneros testified, based solely on what was told to him by Granillo, that because the handle was broken, the door was left open as "... the only way that they could energize the switch, off and on, was to open the box and do it by hand". (tr. 92) Similarly, he testified, based upon "... what was explained" to him by "the supervisor" (tr. 98), that the switch inside the box had to be switched on and off on a daily basis, as it was the main switch for the cone crusher. However, in this regard I place more weight on the testimony of Barney Jones, the crusher superintendent, based on his personal knowledge that, when cited, the box was open because he was checking amperage due to some difficulties that had been encountered with the crusher. Further, I place more weight on the testimony of Granillo, as it was based upon his personal knowledge and not contradicted or impeached, that he starts the crusher by pressing buttons located on another compartment. In other words, the box is not opened daily in order to start the crusher. Further, Granillo, the crusher operator, has never opened the box at issue. Also, I note the uncontradicted testimony of Jones that Ribble had fashioned a wrench to place over the stump of the broken handle which allowed the interior breaker switch to be turned on and off from outside the box. Within this context, I find that it has not been established that the hazard of contact with energized conductors inside the box was reasonably likely to have occurred as a result of the violation herein. Therefore I find that it has not been established that the violation was significant and substantial.

5. Penalty

I find that should a miner have made inadvertent contact with energized conductors inside the box as a result of the violative condition that a serious injury could have resulted. Thus I find that the gravity of the violation was relatively high. Further, since Ribble fashioned a wrench to be used because the handle had been broken, it is clear that Ribble had notice of the violative condition. I thus find that Ribble's negligence was moderate. Further, taking into account Ribble's history of previous violations, size, and good faith in abating the violation as stipulated to by the Secretary, that a penalty of \$300.00 is appropriate for this violation.

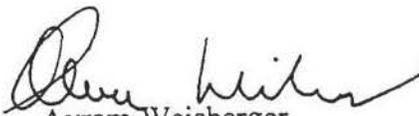
III. Citation Nos. 7886652, 7886653, 7886654, 7886655, 7886656 and 7886657.

The parties filed a joint motion seeking the approval of a settlement regarding the above citations. The Secretary originally sought a penalty for these violations of \$3,162.00. The parties proposed to settle these citations for \$1,516. 10. I have reviewed the representations in

the motion as well as the record regarding these citations and find that the settlement is appropriate under the terms of The Federal Mine Safety and Health Act of 1977 and I approve it.

ORDER

It is **Ordered** that, within 30 days of this Decision, Ribble pay a total civil penalty of \$2,116.10.



Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

February 9, 2001

| | | |
|---|---|-------------------------------|
| NOLICHUCKEY SAND COMPANY, INC., | : | CONTEST PROCEEDINGS |
| | : | |
| Contestant | : | Docket No. SE 99-101-RM |
| v. | : | Citation No. 7777862; 1/28/99 |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Docket No. SE 99-102-RM |
| | : | Citation No. 7777863; 1/28/99 |
| | : | |
| Respondent | : | Docket No. SE 99-103-RM |
| | : | Citation No. 7777864; 1/28/99 |
| | : | |
| | : | Docket No. SE 99-104-RM |
| | : | Citation No. 7777865; 1/28/99 |
| | : | |
| | : | Docket No. SE 99-105-RM |
| | : | Citation No. 7777866; 1/28/99 |
| | : | |
| | : | Docket NO. SE 99-106-RM |
| | : | Citation No. 7777867; 1/28/99 |
| | : | |
| | : | Pit No. 436 |
| | : | Mine ID 40-00806 |

DECISION

Before: Judge Avram Weisberger

Appearances: Adele L. Abrams, P.C., Calverton, Maryland, for the Contestant;
Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor,
Nashville, Tennessee, for the Respondent.

Introduction

These cases are before me based upon a decision of the Commission in this matter, 22 FMSHRC 1057 (September 2000) which vacated my initial decision, 21 FMSHRC 681 (June 1999), and remanded for "further consideration".

At issue in this proceeding is the validity of six identical citations, each alleging a violation of 30 C.F.R. Section 56.14109, which, as pertinent, provides that “unguarded” conveyors be equipped with either emergency stop devices or railings. In essence, it is the position of Nolicucky that the threshold requirement of Section 56.14109 was not met, since the conveyors were not unguarded, as they were all equipped with structural trusses measuring at least forty-two inches in height.

In its decision the Commission, noted that the term “unguarded” was not defined in 30 C.F.R. Part 56, subpart M, and that there was “... nothing in the Legislative History of Section 56. 14109 provides guidance in determining whether the cited conveyors should be considered unguarded.” (22 FMSHRC supra at 1062.) In addition, the Commission noted that “... the Secretary’s witnesses failed to present a coherent interpretation of when a belt is considered ‘unguarded’ “(22 FMSHRC supra at 1062.) In this connection, the Commission noted the testimony of MSHA Inspector Hobbs that “if a conveyor is high enough to where it doesn’t create a hazard, then a railing or stop-cord does not have to be provided”, and the Secretary’s stipulation that previous inspectors had treated all of Nolicucky’s belts as complying with the standard because the belts were equipped with forty-two inch trusses. (22 FMSHRC supra at 1062). The Commission also noted a statement in the Secretary’s Program Policy Manual that “... the conveyor installation or framework cannot be considered an allowable guard even though it may conform to the standard railing height of forty-two inches. IV MSHA, U.S. Department of Labor, Program Policy Manual, Part 56/57 at 55a - 55b (1991)”. (22 FMSHRC supra at 1062). The Commission took cognizance of its prior holding that, ... “when interpreting an ambiguous regulation, differences normally owed to the Secretary’s litigation position before the Commission. *Akzo Noble Salt, Inc. v. FMSHRC*, 212 F 3rd 1301, 1304(D.C.) Cir. 2000).” (22 FMSHRC supra at 1062).

In its Remand, the Commission specifically directed the undersigned “... to secure from the Secretary an authoritative interpretation of what constitutes an unguarded conveyor within the meaning of 56.14109 Upon obtaining the Secretary’s interpretation, we direct the Judge to apply traditional principles of regulatory interpretation to determine if the Secretary’s interpretation is reasonable and entitled to deference.” Further, the Commission, directed as follows: “[a]fter obtaining the Secretary’s interpretation, the Judge, on remand, must decide whether the operator was on notice of the regulation’s requirement. In addressing the notice issue, the Judge must also reconcile the Secretary’s claim that Inspector Hobbs provided actual notice to the operator, with her claim that it is unreasonable for operators to rely on the oral assertions of MSHA inspectors when applicable regulations and government manuals provide notice of the operators’ obligations.” (22 FMSHRC supra at 1063). Finally, the Commission ordered that if it is found that the threshold requirements of Section 56.14109 supra exist, then the undersigned “must examine both the stop cord and railing compliance options set forth in subsections (a) and (b) of the standard.” (22 FMSHRC supra at 1063).

The Secretary’s “authoritative interpretation” of what constitutes an unguarded conveyor within the meaning of Section 56.14109.

Pursuant to a directive of the undersigned to the Secretary, as set forth in a conference call with counsel for the Secretary and counsel for Nolicucky, the Secretary's counsel filed a Program Information Bulletin No. P00-15 ("bulletin") ("issue date" October 23, 2000). In a statement filed with the bulletin, the Secretary's counsel indicated that this bulletin "has been issued by the Secretary in response to the Commission's Remand Order of September 15, 2000." The bulletin, which states that it is from Earnest C. Teaster, Jr., Administrator for Metal and Non-Metal Safety and Health, sets forth that it "... restates the Secretary of Labor's 'authoritative interpretation' of 30 C.F.R. Section 56.14109(a) and (b)(1) . . . [and that] "[t]he Secretary's authoritative interpretation is the interpretation stated in the Mine Safety and Health Administration (MSHA) Program Policy Manuel (volume IV, parts 56 and 57, subpart M, 55a - 55b (June 18, 1991))." Specifically, the bulletin states that it is restating language from the PPM which "provides that neither the conveyor installation or framework can be considered an allowable guard, irrespective of its height or its conformance with standard railing heights." The record indicates that the bulletin the Secretary has filed, sets forth that the Secretary's authoritative interpretation of Section 56.14109 supra, is the interpretation set forth in its Program Policy Manual. Hence, the PPM is the Secretary's authoritative interpretation of Section 56.14109 supra.

The Secretary's interpretation is reasonable and entitled to deference.

In general, deference is warranted only when the language of the regulation is ambiguous Auer v. Robbins, 519 U.S. 452 (1997). In its decision, the Commission, in its discussion of the law regarding deference, and prior to setting forth the scope of its remand relating to obtaining from the Secretary an "authoritative interpretation", referred to Akzo Noble Salt, supra, which held that deference is normally owed to the Secretary's position before the Commission, "when interpreting an ambiguous regulation." (Emphasis added). (22 FMSHRC supra at 1062) In this connection, the Commission noted that the term "unguarded" was not defined in the regulation, and that the Legislative History of Section 56.14109 not provide any guidance in determining whether the conveyors be considered unguarded. I thus conclude that the Commission's decision sets forth, as the rule in this case, that the cited standard regarding the scope of the term "unguarded" was ambiguous. Hence, in the case at bar, deference is warranted.

The Secretary's interpretation that the conveyor belt was not guarded by the forty-two inch structural truss, is in harmony with the common meaning of the term "guarded", and the meaning of that term in the mining industry. Thus, the *Dictionary of Mining, Mineral and Related Terms* ("DMMRT") (1968 edition), defines "guarded" as, pertinent, as follows: "... covered, shielded, fenced, enclosed, or otherwise protected by suitable covers or casings, barrier rails, screens, or mats or platforms to remove the likelihood of either dangerous contact or approach by persons or objects to a point of danger." In the same fashion, *Webster's Third New International Dictionary* (1993 Ed.) ("Webster's"), defines "unguarded", as pertinent, as "1 a: unprotected by a guard". "Guard", as pertinent, is defined in Webster's as "6: a fixture or attachment designed to protect or secure against injury". Thus, under both the common

meaning of the term “unguarded”, and its meaning in the mining industry, the structural truss, which does not cover or shield the conveyor, and which is not been shown to have been designed to protect against injury, would still leave the conveyor unguarded. Hence, the Secretary’s interpretation is reasonable.

Nolichucky’s argument that since the Secretary’s interpretation, as set forth in the PPM was not arrived at after a formal adjudication, or notice and comment rule making, it is entitled only to respect and is not entitled to deference, is without merit. Nolichucky’s reliance on Christensen v. Harris County, 529 U.S. 576, (2000), is misplaced. In Christensen, supra, the issue was whether deference should be accorded an interpretation by an agency of a statute where the interpretation is set forth in a policy document. In contrast, in the case at bar, as in Auer v. Robbins, 519 U.S. 452 (1997), the issue presented was whether an agency’s policy statement interpreting its own regulation should be given deference. In Auer, supra, it was held that an agency’s interpretation of its own regulation is entitled to deference. 519 U.S. supra, at 461. Thus, under Auer supra, the Secretary’s authoritative interpretation, set forth in the PPM, is entitled to deference.

The operator was not on notice of the regulation’s requirements.

It is the law of this case, as established by the Commission, that the cited standard is ambiguous i.e., as to whether, under the regulatory standard, the conveyor at issue, whose structural trusses were forty-two inches in height, were still unguarded, and hence within the perview of the requirements of Section 56.14109 supra. The Secretary’s authoritative interpretation of this standard, as set forth in the PPM, appears to have been issued on June 18, 1991. There is no evidence that Nolichucky had either knowledge or notice of the terms of the PPM. I note the Secretary’s assertion that MSHA Inspector Hobbs provided Nolichucky with actual notice on January 1999 that the conveyors were not in compliance with Section 56.14109 supra, since they had neither railings nor stop cords. However, I do not find much merit in this argument, considering the Secretary’s stipulation that

... statements were made to Mr. Bewley or citations were not issued for violations of that standard in the past based upon this 42-inch built structure interpretation meaning that that would be sufficient to constitute a guard for the purpose of that standard. In other words, the standard refers to unguarded conveyors, and apparently inspectors, in the past, Mr. Nichols’ predecessor in the position of field office supervisor apparently okayed or acquiesced in that interpretation. (Sic.) (Tr. 26-27).

Thus, although Nolichucky had been informed by Inspector Hobbs on January 19 that the conveyors were not in compliance with Section 56. 14109 supra, and citations for these conditions were issued nine days later, there is no evidence that Nolichucky, prior to the date cited, had notice of the authoritative interpretation of the Secretary as set forth in the PPM.

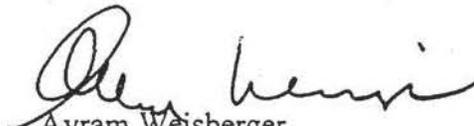
Further, it is significant to note that Nolichecky had been informed in the past by MSHA inspector that the conveyors at issue were in conformity with Section 56, 14109(a) because the forty-two inch structural truss constituted a sufficient guard, and that the MSHA Field Office Supervisor acquiesced in this interpretation. Thus, it can not be found under these circumstances that Nolichecky had notice of the Secretary's authoritative interpretation set forth in the PPM. Indeed, even the Commission noted, 22 FMSHRC supra at 1063, that "... we do not know what the Secretary's interpretation of the regulation is or what it requires, ...". If the Commission, after reviewing the record in this case had no knowledge of the Secretary's interpretation of the regulation or what it requires, then certainly, a fortiori, it would be a deprivation of due process to hold that Nolichecky, prior to litigation of this matter, and, on the date cited, had notice of the Secretary's authoritative interpretation of the cited standard, and what it required.

Conclusion

Since it is the law of the case that the cited standard was ambiguous, the Secretary's interpretation is entitled to deference. However, since Nolichecky did not have notice of the Secretary's authoritative interpretation, it can not be held responsible for having violated the cited standard (See Phelps Dodge Corp. v. FMSHRC, 681 F 2nd 1189 (9th Cir. 1982)).

ORDER

It is **Ordered** that the notices of contest are sustained, and that the citations at issue served to Nolichecky on January 28, 1999 be **Dismissed**.


Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

Adele L. Abrams, P.C., 4061 Powder Mill Road, Suite 700, Calverton, MD 20705

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862

sct

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 9, 2001

| | | |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 2000-75 |
| Petitioner | : | A. C. No. 46-01437-04052 |
| | : | |
| v. | : | |
| | : | |
| McELROY COAL COMPANY, | : | |
| Respondent | : | Mine: McElroy Mine |

DECISION

Appearances: Lynn A. Workley, Conference and Litigation Representative, Mine Safety and Health Administration, Morgantown, West Virginia on behalf of the Secretary of Labor;
Bryant J. Warren, Esq., Phillips, Gardill, Kaiser & Altmeyer, Wheeling, West Virginia on behalf of McElroy Coal Company

Before: Judge David F. Barbour

This civil penalty proceeding arises under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ((30 U.S.C. §§815, 820) (Mine Act or Act)). The case involves an alleged violation of 30 C.F.R. §75.1403, a mandatory safety standard for underground coal mines that authorizes the Secretary's inspectors to require an operator to provide specific duly authorized safeguards minimizing hazards with respect to the transportation of men and materials.¹ The citation in which the violation of section 75.1403 is alleged further charges the

¹ 30 C.F.R. §75.1403 repeats section §314(b) of the Mine Act and states:

Other safeguards adequate, in the judgement of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided (30 U.S.C. §874(b)).

The procedure by which an inspector issues a citation pursuant to section 75. 1403 is described in 30 C.F.R. §75.1403-1(b):

violation was a significant and substantial contribution to a mine safety hazard (S&S). The Secretary seeks the assessment of a civil penalty of \$277.00. The company does not contest the citation rather it denies that the underlying safeguard was properly issued in accordance with section 75.1403 (Resp. Br. 1).

A hearing was conducted in Wheeling, West Virginia, after which the representative of the Secretary and counsel for the operator submitted helpful briefs. The issues are whether the underlying safeguard is valid, and if so, the amount of any penalty that must be assessed.

STIPULATIONS

Prior to the hearing the Secretary's representative and counsel for McElroy agreed on ten stipulations. When the hearing convened the Secretary's representative read them into the record:

1. [T]he McElroy [m]ine is a large underground coal mine located near Moundsville, West Virginia, [and the mine is] owned and operated by McElroy Coal Company. [2] The mine produced over two million tons [of coal] and a controlling entity produced over ten million tons [of coal] during the relevant period.

2. [T]he history of violations for the McElroy Mine indicated 932 total number of assessed violations during the preceding twenty-four months and 737 total number of inspection days during the preceding twenty-four months. This is an average of 1.2[6] violations per inspection day.

3. [T]he operator demonstrated good faith in abating the alleged violation [of section 75.1403] within the time set . . . [by] the inspector.

The . . . [inspector] shall in writing advise the operator of a specified safeguard which is required pursuant to §75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

² McElroy Coal Co. is an affiliate of Consolidation Coal Co (Consol). Prior to the events immediately at issue, the McElroy Mine was owned outright by Consol (Tr. 157-158).

4. [T]he proposed fine . . . of \$277.00 will not effect the operating ability [of the company] to continue in business.

5. [T]he operation of the McElroy Mine . . . is subject to the jurisdiction of the . . . Act.

6. [T]he Administrative Law Judge has jurisdiction to hear and decide this matter.

7. The Mine Safety and Health Administration [(MSHA)] Inspector was acting in his official capacity as a federal coal mine inspector on the day . . . Citation [No.] 7130337 was issued.

8. The [MSHA] Inspector was acting in his official capacity as a federal coal mine inspector on the date when . . . Safeguard [No.] 7128775 [(safeguard)] was issued.

9. [T]he citation and safeguard . . . are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the purpose of establishing the accuracy of any statement[s] asserted therein.

10. [T]he citation and safeguard . . . have not been the subject of . . . previous review proceedings (Tr. 11-12).

THE FACTS

THE MINE, ITS ELEVATORS, AND THE CITATION

Ronald Taylor is a federal coal mine inspector. He has worked for MSHA and its predecessor the Mining Enforcement and Safety Administration for the past 25 years (Tr. 14). During the last five and one-half years Taylor has been inspecting coal mines in northern West Virginia, including the McElroy Mine (Tr. 16). On March 2, 2000, Taylor went to the mine to conduct a regular inspection. He reached the mine around 11:00 p.m. The oncoming shift started at 12:00 a.m. (March 3), and Taylor prepared to go underground with the crew of that shift. Accompanying Taylor was a company safety inspector and a union representative of the miners (Tr. 16-17).

There are two elevators at the mine, the Fish Creek elevator and the Blakes Ridge elevator. The Blakes Ridge elevator is the main elevator. It is the elevator miners use to access the mine (Tr. 73-74). The state permit limits the elevator's capacity to 28 persons (Resp. Exh. R-5). Miners travel up and down the Blakes Ridge elevator shaft in the elevator's cage. The cage,

which is 8-feet high and approximately 11 ½-feet wide by six-feet deep, is suspended from wire ropes in the shaft (see Tr. 38.76-77, 123-124, Resp. Exh. R5).

Taylor and the men waited for the elevator cage at the top landing of the shaft. The elevator ascended from the bottom. When it reached the top and the doors opened Taylor saw two miners on the elevator. Taylor also saw a supply cart (Tr. 17).³ Upon seeing the cart, Taylor explained to those with him that an earlier issued safeguard prohibited "transporting the cart or supplies with persons on the elevator" and therefore the presence of the two miners and the cart on the elevator violated the safeguard (Tr. 17). Taylor then issued Citation No. 7130337. It states:

Two miners, including one foreman, were observed exiting the Blakes Ridge elevator at the top landing. The men had traveled up the elevator shaft with a four-wheeled supply cart (Exh. P-1).

Taylor believed it was reasonably likely a miner would be injured by the cart if the elevator cage stopped abruptly. He envisioned several situations that would cause the elevator to stop: the elevator would descend past the bottom landing and hit the bottom of the shaft; the elevator would ascend past the top landing and crash into the headhouse [⁴]; or the elevator would go into overspeed and the brakes would set suddenly (Tr. 19). The abrupt halt of the elevator would propel the miners, the cart, and any supplies carried on the cart into one another (Tr. 19-20).

THE SAFEGUARD

Safeguard No. 7128775, the safeguard that McElroy allegedly violated, also was issued by Taylor. On May 5, 1999, while conducting an inspection at the mine, Taylor saw approximately 10 miners leave the Blakes Ridge elevator at the bottom landing. Also on the elevator was "a cart loaded with different items" (Tr. 20-21). Upon seeing the miners and the loaded cart together on the elevator, Taylor issued the safeguard. William Blackwell, the mine's

³ The cart was 4- to 5-feet long and 3-feet wide. The bed of the cart was approximately one and one half-feet off of the ground. The cart rested on four wheels (Tr. 37). According to Taylor, the cart was metal with "a sharp metal edge all the way around it" (Tr. 38). Bob Barsch, the master mechanic at the McElroy Mine, stated that the cart was typical of those at the mine. The cart was used frequently to haul supplies such as mine curtains, small equipment parts, and pumps. It was equipped with a hand brake that was set whenever it was brought on the elevator. The hand brake kept the cart from rolling back and forth (Tr. 136).

⁴ A "headhouse" is a building or structure enclosing the frame holding the pulleys raising and lowering the elevator cage (see American Geological Institute Dictionary of Mining, Mineral, and Related Terms (2nd ed. 1996) 256).

safety supervisor, was present. Blackwell emphasized that Taylor did not inspect the elevator before he acted (Tr. 148). Blackwell also emphasized that prior to May 5, 1999, the company had never been cited for any safety violations relating to the elevator (Tr. 147).

The safeguard states:

Ten miners including two [foremen] were observed on the Blakes Ridge elevator at the bottom landing, also on the elevator was a . . . cart loaded with 6 boxes of water, a belt conveyor scraper, and a pipe connector. If the elevator would stop abruptly, the cart and/or supplies could expose these men to injury from being struck. To eliminate this hazard, the following safeguard notice is hereby issued[:]

This is a notice to provide safeguards prohibiting supplies, parts or tools except small hand tools or instruments, to be transported with persons on the elevator at this mine (Gov. Exh. 2; see also Tr. 21).

By issuing the safeguard Taylor believed he had created at the mine a mandatory safety standard that did not otherwise exist. Its purpose was to protect persons on the elevator from the hazard of being hit by moving equipment, parts, or tools (Tr. 22-24). As Taylor stated, he wanted to prevent the miners from “being struck by the materials on the cart or even by the cart itself . . . [i]f that elevator . . . stops hard” (Tr. 23).

In Taylor’s opinion the elevator was “always subject to breakdown or malfunction . . . regardless of how well it [was] . . . maintained” (Tr. 23). But he added that even if the elevator did not come to a sudden, unexpected halt, miners could be injured if they tripped over the supply cart. This was especially true “at the end of the shift [when] people run and jump on the elevator” (Tr. 35). If a miner tripped he or she easily could break a leg, twist an ankle, or suffer a bad bruise (Tr. 35, 39).

EVENTS LEADING TO THE SAFEGUARD

Taylor’s decision to issue the safeguard was not solely the result of what he saw on May 5. Several years before there had been an elevator accident at the Megs No. 31 Mine (Megs or Megs Mine), a mine owned and operated by Southern Ohio Coal Co.. The accident occurred when an elevator cage traveled past the top landing and crashed into the headhouse. Four persons were on the elevator. They were seriously injured when they hit the ceiling of the elevator cage (Tr. 45-46). Taylor saw the cage after the accident. He saw the footprints of the miners on the ceiling of the cage (Tr. 46, 160-161). He was deeply impressed and concerned. The accident graphically portrayed to him what could happen when an elevator came to a sudden

stop and things within it were set in motion (Tr. 160). (“I will never forget. It is something I will never forget” (Tr. 161)). Taylor believed if supplies or a cart had been on the elevator, the miners could have been caught between the top of the cage and the equipment and their injuries could have been even more severe (Tr. 23, 44-46).

In addition, early in 1999 while inspecting Consol’s Shoemaker Mine, Taylor saw two miners, a cart, and supplies on an elevator (Gov. Exh. 3). Based on the Megs accident and on “[j]ust common sense” about elevators, Taylor concluded that action to protect such miners was warranted. Therefore, he wrote a memorandum to his MSHA district manager requesting permission to issue safeguards to prohibit the transportation of supplies or tools with miners on elevators (Gov. Exh. 3; Tr. 25, 42-43, 46-49). Taylor was given permission to issue a safeguard not only at the Shoemaker Mine but at any mine where he encountered miners and equipment on an elevator (Tr. 27-28).

THE BLAKES RIDGE ELEVATOR AND ITS SAFETY FEATURES

Taylor testified that when he issued the safeguard and the subsequent citation at the McElroy Mine he was not familiar with all of the safety features on the Blakes Ridge elevator (Tr. 59). Although he was sure that the Blakes Ridge elevator had been installed more recently than the Megs elevator and although he believed it “more than likely” that the Blakes Ridge elevator had safety features that were not installed on the Megs elevator, he could not say what those features might be (Tr. 58-59). He maintained, however, that he had spoken with an MSHA electrical inspector who was trained in elevator safety and who was familiar with the accident at Megs. Taylor could not recall whether he spoke with the inspector before he issued the safeguard or after he issued the safeguard, but he believed the inspector felt that the Blakes Ridge elevator could experience an accident similar to that at Megs (Tr. 54-55). The inspector’s opinion did not surprise Taylor who noted that although virtually all elevators were required to have safety features such as safety catches and buffers to prevent common accidents and operational faults, these features did not ensure smooth stops (Tr. 59-60). Thus, any elevator could stop abruptly.

Taylor’s opinion that any and all elevators were subject to abrupt and sudden stops was strongly disputed by the company’s witnesses. They maintained that because of its numerous safety features it was nearly impossible for the Blakes Ridge elevator to experience such halts. According to mine superintendent Thomas Coram, the elevator had safety devices which operated separately or together to control at all times the rate of the elevator’s ascent and descent, to keep its cage level, to prevent its overspeed, and to ensure that it stopped smoothly and safely (Resp. Exh R-6; see Tr. 84-86). While some of these safety features were common to all elevators, several were not common (Tr. 95). To emphasize this point the company offered a list of eleven of the elevator’s specific safety features. These features related to speed control, level detection, overspeed protection, brakes, and buffers. Five of the eleven features were noted to be in addition to the protections required by MSHA and the state (see Exh. R-6; Tr. 87). Further, they were features the Megs elevator lacked (Tr. 88).

Christopher O'Neil, the longwall maintenance coordinator, who previously had worked at the mine as an electrical and a maintenance foreman and who trained miners on the function and operation of the Blakes Ridge elevator (Tr. 104), explained that the elevator was not subject to lateral motion. It "sets in a housing and . . . [it is] held by rails and it runs up [and down] . . . with rollers on the rails" (*Id.*). According to O'Neil, the elevator travels at a computer-programmed rate of 650-feet per minute. The elevator could not be involved in a high speed, uncontrolled, rapid ascent nor rapid descent because if it exceeded its programmed rate of speed, power would be lost. When power was lost the brakes set automatically. Moreover, when the brakes set and the elevator came to a stop, a person would feel "nothing dramatic, nothing drastic" (Tr. 105). If the elevator came to an emergency stop, O'Neil calculated that everything in the cage would continue to rise for .3 seconds but "nothing would come off any cart that was on the elevator" (Tr. 115-116), nor would any person rise off the floor (Tr. 116). This kind of safe stop also would happen if a broken rail in the shaft caused the elevator to cease running (Tr. 122, 126). O'Neil therefore maintained that at a speed of 650-feet per minute, materials transported on the elevator never would be a hazard to miners (Tr. 126). Finally, if for some unforeseen reason the computer did not shut off the power, and the brakes did not set automatically, the resistors would limit the speed of the elevator to 180-feet per minute, one fourth of the elevator's normal speed (Tr. 106-109), a speed at which a safe stop would be ensured.

THE LAW

The law regarding safeguards and their interpretation is well settled. The Commission has stated that section 314(b) of the Act, "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining" (*Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (April 1985)). Because section 314(b) gives the Secretary "an unusually broad grant of regulatory power" without regard to statutory rule making procedures, the Commission has observed that the exercise of the power "must be bounded by a rule of interpretation more restrained than that accorded promulgated standards" (*Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (April 1985)). In addition, the safeguard must identify with specificity the nature of the hazard involving the transportation of miners or materials at which it is directed (*Id.*). It must also address a hazard that is not covered by an existing mandatory safety standard and that actually is present in the mine (*Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (January 1992)).

The Secretary bears the burden of establishing the validity of the safeguard by showing that the inspector evaluated the specific conditions at the mine and determined that the safeguard was warranted in order to address the actual transportation hazard (*Southern Ohio Coal Co.*, 14 FMSHRC at 14). The operator may rebut the Secretary's proof by showing, for example, that the safeguard was not based on an actual hazard at the mine or that the safeguard was issued routinely without consideration of the specific conditions at the mine (*Id.*).

If the validity of the underlying safeguard is proven then the burden of proof with regard to the citation that cites the safeguard also is on the Secretary. She must establish that the conditions for which the citation was issued came within the safeguard (see e.g., Cyprus Cumberland Resources Corp., 19 FMSHRC 1781, 1785-86 (November 1997)).

THE VALIDITY OF THE SAFEGUARD AND THE CITATION **THE HAZARD ALLEGED**

Taylor specified in the safeguard the following hazard against which the safeguard was directed: "If the elevator would stop abruptly . . . [miners] could be exposed to injury from being struck by the cart and/or supplies" (Gov. Exh. P-2).⁵ That the hazard Taylor perceived involved the sudden and abrupt halt of a moving elevator and the resulting movement of the things it carried was reiterated when Taylor testified about the reason he issued Citation No. 7130337. It was, he stated, to protect miners from "being struck hard by the material on the [supply] cart or even by the cart itself . . . [i]f [the] elevator . . . stops hard" (Tr. 23). The Commission mandated in Southern Ohio that the Secretary must establish the alleged hazard actually existed at the mine (14 FMSHRC at 14). Here, that mandate means the Secretary must prove that the cited elevator was subject to stops that would set miners, carts, or equipment in motion so as to create a danger to miners. Such sudden or abrupt stops are the sine qua non of the hazard.

THE McELROY MINE ELEVATORS AND THE SAFEGUARD

Prior to determining whether the Secretary proved the cited elevator was subject to such stops, it is necessary to clarify the scope of the safeguard at the mine. Taylor testified the safeguard applied to both the Fish Creek elevator and the Blakes Ridge elevator (Tr. 48). However, the safeguard named only the Blakes Ridge elevator and stated that it prohibited the transportation of supplies, etc., "on the elevator at this mine" (Gov. Exh. P-2 (emphasis added)). The Secretary, the company, and I are bound by the safeguard (Southern Ohio Coal Co., 7 FMSHRC at 512), and I conclude that as written, the safeguard applied only to the Blakes Ridge

⁵ As previously noted, in addition to protecting miners from the danger caused by the elevator stopping abruptly, Taylor testified the safeguard protected miners from broken bones, sprained ankles, or bruises that could result from tripping over a supply cart (Tr. 35, 39). The danger of tripping differs fundamentally from the hazard underlying the safeguard — the hazard posed by the abrupt or sudden stopping of an elevator when it carried miners, carts and supplies. Clearly, a tripping hazard was not specified in the safeguard as written. Therefore, in evaluating the safeguard's application to the conditions alleged in the citation, it cannot be considered (Southern Ohio Coal Co., 7 FMSHRC at 512 (interpretation of safeguard must be "more restrained than that accorded promulgated standards")).

elevator.⁶

THE ACTUAL HAZARD

Clearly, Taylor's belief that the safeguard applied to the Blakes Ridge elevator was based on his view the elevator was subject to sudden and abrupt stops and in this way was no different from other elevators. As he put it when discussing the reason for such stops, "an elevator is a mechanical devise that is always subject to breakdown or malfunction . . . regardless of how it is . . . maintained, there is always the possibility of failure" (Tr. 23). Taylor's belief in the universal nature of the hazard was reflected further by the permission he was given by his district manager, permission that he understood authorized him to issue a safeguard on "[a]ny elevator that was used in an underground coal mine" to transport both supplies, equipment, tools and miners (Tr. 28).

Despite Taylor's belief in the universal nature of the hazard, the Secretary's burden of proof was more particular. It required that she prove the Blakes Ridge elevator was subject to the abrupt and sudden stops Taylor feared. She did not do so. The testimonial evidence she offered was far too general and was refuted by the documents and more specific testimony offered by the company's witnesses.

Although the Secretary rested her case solely upon Taylor's testimony, it was apparent from the outset that Taylor had almost no knowledge of the devices controlling the operation of the Blakes Ridge elevator. Taylor was not an elevator expert. He never investigated an elevator accident and he never inspected the Blakes Ridge elevator (Tr. 43, 48). While he was strongly influenced by the Megs accident, it occurred several years before he issued the safeguard. As a result, and as noted previously, Taylor agreed it was "more than likely" the Blakes Ridge elevator exhibited safety features that were not present on the Megs elevator (Tr. 58- 59). Indeed, aside from a general belief that safety catches, buffers, and brakes were required to stop the cage of an elevator and that such features would not ensure the cage halted smoothly, Taylor did not indicate any awareness of other safety devices nor of how such devices might function (Tr. 62). Rather, Taylor relied upon his belief that, "all elevators . . . malfunction and . . . stop abruptly" (Tr. 49). McElroy was able to show that when it came to the Blakes Ridge elevator Taylor's belief was not true (Tr. 49).

McElroy refuted the Secretary's case by presenting credible documentary evidence and testimony about safety devices on the Blakes Ridge elevator that controlled the rate of its ascent,

⁶ Restricting application of the safeguard to the Blakes Ridge elevator is a limitation without a practical effect. Counsel for McElroy stated the company was concerned only with the application of the safeguard to the Blakes Ridge elevator (Tr. 66-67). Aside from the fact that this narrow focus was dictated by the safeguard itself, there was a very pragmatic reason for the company's limited concern. The sole elevator used to transport miners into and out of the mine was the Blakes Ridge elevator (Tr. 73-74), which was no doubt why neither party offered evidence regarding the Fish Creek elevator.

its descent, and the manner of its stops. McElroy's witnesses emphasized that several of the devices were over and above those required by state and federal regulations as well as over and above those MSHA required added to the Megs elevator after the accident. Further, McElroy indicated with specificity what the "extra" devices were and how they functioned (Tr. 84-88, 95; see Resp. Exh. 6). Indeed, mine manager Coram testified that he was aware of no extant safety devices that the Blakes Ridge elevator did not have (Tr. 87), and his testimony was echoed by O'Neil (Tr. 110).

Of particular note was testimony regarding the elevator's breaking system and its overspeed governor. O'Neil explained why there could not be an uncontrolled descent or ascent that exceeded 650-feet per minute, the normal speed of the elevator and how, when either the drum or disk brakes were applied, the elevator would not come to the sudden and abrupt halt feared by Taylor (Tr. 105-106). O'Neil's testimony also established that even if the power failed, the drum and disk brakes normally still would be applied and the elevator would come to a controlled stop (Tr. 106). Further, if for some reason the drum and disc brakes malfunctioned, the dynamic brake resistors would control fully the descent of the elevator (Tr. 107). O'Neil's testimony was compelling, and for me it was conclusive:

[It] takes power to run that [elevator] cage up and down. If for some reason during travel . . . you were to lose power, there are two brakes . . . a drum brake that is physically attached to the motor . . . and a disk brake that is attached to the shaft of the pulley. The disk brake was an add on, that was not required . . . [it] is a backup redundant safety [feature].^[7]

Most of these brakes are fail safe, which means that it takes power to release the brakes. You have to have . . . voltage to . . . release these brakes. So if you lose voltage . . . the brakes set . . .^[8]

So if you were in travel . . . and you lost power, both brakes would set. The drum brake would set and the disk brake would set.

⁷ According to O'Neil, the company, "decided to put an additional brake on and they added a disk brake as a back up to . . . [the drum brake] . . . It's just opposite the drum brake . . . So if you were to sever the shaft between the pulley and drum brake, the disk brake would stop the pulley. On the same token, if you would sever the shaft between the pulley and the disk brake, the drum brake would take over" (Tr. 127).

⁸ O'Neil also stated: "If for any unforeseen reason you would lose power, the drum brake sets on the motor which is directly attached to the pulley that the ropes are on. . . . The drum brake sits on the pulley and the ropes are not going anywhere and the ropes are attached to the [cage]" (Tr. 125-126).

In addition suppose for some unforeseen reason, the disk brake would fail and the drum brake would fail, there is [a] mechanical overs[p]ee[d] device that is attached to a governor rope that is attached to the side of the car. [The device] . . . works on centrifugal force. It has nothing to do with electrical power . . .

If that cage were to overs[p]ee[d], the centrifugal force on . . . [the] governor pulley would trip a safety mechanism on the side of the car . . . and . . . that would stop the cage

[T]here is also what they call a dynamic brake If [the] cage loses power, the brakes fail . . . the elevator descends . . . the [dynamic brake] resistors . . . are designed to limit current to control the speed on that cage to 180-feet per minute based on the current that was is allowed to flow through the resistors.

Worse case scenario, the elevator would descent into the mine at 180-feet per minute, which is a third or a quarter of . . . [the] normal full speed of the elevator (Tr. 106-109).

O'Neil also offered uncontradicted testimony that even if the elevator came to a sudden halt at its normal rate of 650-feet per minute, a rate dictated by its computers, persons or equipment in the cage only would continue moving for .3 second and "nothing would come off any supply cart" nor would any person rise off of the floor (Tr. 115-116,). Further, O'Neil testified the same was true if the elevator cage, traveling at 650-feet per minute, came to a halt after hitting a broken rail (Tr. 126). If persons and equipment on the elevator were not propelled into hazardous movement when the elevator was stopped while traveling at 650-feet per minute, it is logical they likewise would not be propelled into hazardous movement if the elevator stopped while traveling at 180-feet per minute.

Given the testimony regarding the safety features on the Blakes Ridge elevator and the effect of the features on the operation of the elevator, I conclude the company has established that there was no reasonable possibility that the elevator would come to the abrupt and sudden halt envisioned in the safeguard. The Secretary did not otherwise prove that such a hazard actually existed at the mine, and therefore accordingly, I conclude the Secretary established neither the validity of the safeguard nor that McElroy violated section 75.1403, as alleged.⁹ In reaching this

⁹ This is not to say that transportation on the Blakes Ridge elevator of miners and loaded carts, is without hazard. Both the Secretary and the company recognized a danger to miners when the elevator was crowded and miners were in a hurry (Tr. 35, 39, 75-76). However, that is not the hazard at which the safeguard was directed. Whether reliance on the company's policy to restrict the number of miners who can travel under such circumstances is adequate to guard against the broken bones, cuts, and bruises that could result, or whether another and different safeguard is warranted, is a matter for the Secretary to determine.

conclusion, I recognize that when asked whether the elevator cage could ascend through the penthouse and come to a sudden and hazardous stop, O'Neil stated that "anything was possible" (Tr. 116), but based on the record made by the parties I must conclude that such a possibility lies entirely beyond the bounds of reason.

ORDER

It is **ORDERED** that safeguard No. 7128775 is **INVALID**. It is further **ORDERED** that Citation No. 7130337 is **VACATED** and that this proceeding is **DISMISSED**.



David F. Barbour
Chief Administrative Law Judge

Distribution:

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/wd

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 13, 2001

| | | |
|--|---|------------------------------------|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of ANDREW J. GARCIA, Complainant | : | DISCRIMINATION PROCEEDING |
| | : | Docket No. WEST 2001-14-DM |
| | : | RM MD 00-12 |
| | : | |
| v. | : | |
| | : | |
| COLORADO LAVA, INC., Respondent. | : | Antonito Plant Mine ID 05-04232 |

DECISION

Before: Judge Weisberger

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant; Mark Nelson, Esq., Harris, Karstaedt, Jamison & Powers, Englewood, Colorado, for the Respondent.

This case is before me based upon a Complainant of Discrimination filed by the Secretary of Labor (Secretary) on behalf of Andrew J. Garcia against Colorado Lava, Incorporated (Colorado Lava) alleging that the latter discriminated against Garcia in violation of Section 105 of the Federal Mine Safety and Health Act of 1977 ("the Act"). Pursuant to notice a hearing was held on December 19 and 20, 2000, in Taos, New Mexico.

Summary of the Testimony

I.

Andrew James Garcia, testified that he has operated various heavy mobile equipment, and has twenty-five years experience operating front-end loaders. According to Garcia, he started to work for Mountain West Colorado Aggregates (MWCA) in January 1997 operating a front-end loader. He also received training on a CAT D-8 loader. In June 1997 he was transferred to the truck division where he drove a truck from the mine site to the bagging facility. He also operated a front-end loader up to seven times a week on occasion. In January 2000, Garcia's job was eliminated, and his bid to work at the Antonito facility at the railroad yard loading cars was accepted. At the railroad yard Garcia worked with Robert Duran operating a loader loading railroad cars, and trucks. Garcia also greased the conveyor, cleaned railroad cars, and set them in place to be loaded.

In October 1999 while working at the Mesita Hill facility, Garcia attempted to set the

parking brake on a loader, and the brake did not work. He then tagged it out. The following day Garcia filled out a work order advising Earl Gonzalez, the supervisor, that the loader was tagged out. According to Garcia, on the following day he advised David McCarroll that the loader had been tagged out because of problems with the parking brake. McCarroll told him "you guys don't need a park brake to run it. Go ahead." (Tr. 31-32). (Sic.) Garcia indicated he continued to haul material that day. The following day an MSHA inspector issued a citation for the condition of the loader's parking brake, and discussed the citation and a 110(c) violation with McCarroll.

According to Garcia, approximately a week later, in the lunch room, when he and McCarroll were alone, the latter, who was mad said, in a "high-toned voice", (Tr. 35), "[w]hat's this I hear you got an MSHA complaint of some sort on me." (Tr. 34). Garcia indicated that he denied having made a complaint because he was afraid of what McCarroll would do. According to Garcia, McCarroll then said "you know all about it ... [b]ull it will all come out in the wash" (Tr. 34). Garcia indicated that between this incident and June 5, 2000, McCarroll refused to talk to him, did not engage him in social conversation, and no longer joked with him.

According to Garcia, in March 2000 he had been ordered by McCarroll to load some marble chips with the front-end loader at the railroad yard, but was unable to do this because the material was frozen. Instead, Garcia commenced to pile stock. Shortly thereafter McCarroll approached him, hollering in a loud tone, and putting his face in Garcia's face and said as follows "you are nothing but a f---ing scum. What do you want? A free ride from the company?". (Tr. 38). When Garcia attempted to explain what happened, McCarroll did not listen and eventually drove away.

According to Garcia, on or about June 1, 2000, he was informed that MWCA had been sold, and that he would be interviewed for a position by the new owner, Colorado Lava, an unrelated corporation. Garcia testified that on June 5 he was interviewed by Terry Kissner, who asked him about the various jobs that he had performed, and whether he had any disputes with anyone in the plant. Garcia testified that he told Kissner that he and McCarroll did not get along. Garcia indicated that at the interview he was not told that the position that he was applying for, i.e., to remain at his present work site, would be eliminated. Garcia testified that at the interview on June 5, he did not apply for any specific job, and that no particular job was discussed. He also brought an application to the interview but did not turn it in. Garcia testified that he did not know how the application was handled at the interview but that at the end of the interview he (Garcia) retained it.

Garcia indicated that he would have considered a different position, and based upon his experience he could have performed the following positions: heavy equipment operator, forklift operator, mechanic, and welder. He also indicated that in June 2000 he was being trained as a bagger, and three or four days he had filled in as a bagger.

On June 5, at approximately 6:30 p.m. Kissner called Garcia's home and informed his wife that he was not hired by Colorado Lava.

The following day Garcia applied for and obtained a position with MWCA as a loader operator, and as of the date of the hearing he still works in that position. A few months after he was rehired by MWCA he was promoted to a leadman. He indicated that in order to arrive on time, he has to leave his house early in the morning, and does not get to see his children when they go to school. Also, he testified that the pay scale for his present position is less than the pay scale for a loader at the railroad yard, and there are fewer incentives. He also indicated that he had been close to the men who had worked at his former site.

Ronald Bjustrom, the eighty percent owner of Colorado Lava, learnt of the opportunity to purchase MWCA sometime in the spring 2000. He visited the subject site on four occasions prior to the time Colorado Lava purchased the site from MWCA. Bjustrom indicated that prior to June 5, based on his observations and his review of information regarding MWCA's productivity at the railroad site, he had concluded to eliminate one position at the railroad site in order to reduce the lost of unneeded labor.

On one of Bjustrom's visits at the site prior to its purchase by Colorado Lava, he asked McCarroll's opinion as to what positions could be immediately eliminated. In response, the latter indicated that a mechanic's position, and the rail loader helper position could be eliminated. Bjustrom also asked McCarroll to tell him which of Colorado Lava's employees were weak, and the latter mentioned Garcia at the railroad site and another four miners. McCarroll told Bjustrom that Garcia was not a good operator, and had filed grievances.¹ Bjustrom did not make any independent investigation to determine whether what McCarroll had told him was true or not. Bjustrom indicated that of the five employees whom McCarroll had described as weak only one was subsequently laid off by Colorado Lava. Bjustrom indicated that the conversation he had with McCarroll regarding weaknesses of employees did not have any bearing on the decision on June 5 regarding which employees of MWCA would be hired by Colorado Lava.

According to Bjustrom, although McCarroll was going to be responsible for supervising the individuals to be selected by Colorado Lava to remain on the site, he did not ask him to select these employees as he (Bjustrom) did not know him (McCarroll). Instead, Bjustrom asked Terry Kissner, who is not an employee of Colorado Lava but who had done all the hiring for Bjustrom for eight years, to make the selections. Bjustrom indicated that Kissner made the final decision regarding the selections, and he (Bjustrom) took no part in that decision.

According to Bjustrom, sometime prior to June 5, his banker, who had attended a seminar, gave him a training booklet on interviewing prospective employees. Bjustrom went over the questions in this booklet with Kissner, but otherwise did not give Kissner any direction regarding the interviews. Specifically, Bjustrom indicated that he did not give Kissner any

¹Bjustrom acknowledged that he had told an MSHA investigator that McCarroll had told him that Garcia was a trouble maker.

instructions as to what to look for, or how to rank MWCA employees at the interview.² Bjustrom indicated that he had not met Garcia prior to the date of the hearing.

Kissner testified that one or two days prior to June 5, Bjustrom told him to eliminate one rail loader and one mechanic, but that it was his (Kissner's) job to decide, specifically who would be hired by Colorado Lava. He did not have any knowledge of the applicants before he met with them on June 5. Kissner said that the only time that he talked to McCarroll had to do with ordering supplies. He stated that the questions contained in the booklet Bjustrom provided him were the same type that he normally asks.

On the morning of June 5, Kissner received a list of employees from McCarroll, but he did not consult with McCarroll before the interviews regarding the interviewees. Nor did he consult with McCarroll after the interviews. Nor did McCarroll provide him with any information regarding the interviewees. At the interview, he asked the same questions of everybody, and used the same sheet of questions, but asked the mechanics additional questions. He indicated that the interviews were a formality for most people, unless they said they did not want a job change, or did not like someone.

Kissner indicated that he wanted the best qualified employees hired for the front-end loader and mechanic positions. He reviewed all applications for the front loader and mechanic positions prior to making the decision regarding whom to hire. Kissner also looked at information regarding the applicants' work history, and how long they had been with MWCA.

According to Kissner, the first time he had heard of Garcia was the day of the interview. He asked both Duran and Garcia about their willingness to take another job, but Garcia did not say he would not accept another job. Kissner did make any determination if Garcia was qualified to work at another position. Nor did he view Garcia's personnel file, letters of recommendation, past safety record, or production levels. Kissner did not know of Garcia's work history at other sites, nor did he provide Garcia an opportunity to compare himself with Duran.

Kissner indicated that his decision to hire Duran, and not Garcia, was made after their interviews, about 3 or 4 o'clock in the afternoon on June 5. The decision was based on answers provided at the interview, their relative experience, and information contained in their applications. Specifically, he said that he decided to hire Duran because he had worked at the railroad site for three years, in contrast Garcia had only been there for six months. He indicated that the negative comments other interviewees made about Garcia were not a major factor in his decision. Kissner indicated that he did not consider Garcia for the position of a bagger because in his (Kissner's) experience this position was labor intensive, and he did not want to take the

²Subsequent to the interviews, when Kissner informed Bjustrom of the mechanic he selected, he told Bjustrom that although the other mechanic, Ernie Lucero, was not selected, it would be nice to keep him in another capacity due to his background as a mechanic. Lucero was then asked if he wanted to work at another location with a cut in pay. However, there was no discussion between Kissner and Bjustrom relating to finding another position for Garcia.

chance that Garcia would take the job, but then quit in a short time.

McCarroll, was the plant manager at the Antonito Plant for MWCA from June 1999 until June 6, 2000, when he commenced to work for Colorado Lava in the same capacity. He indicated that in October 1999 he learnt that Garcia had complained to MSHA about the parking brake on a front-end loader two days after Garcia had told him that he had tagged it out. On October 4, 1999, an MSHA inspector cited MWCA for this condition, and served the citation to McCarroll. The Inspector told McCarroll that he would be investigated. McCarroll testified that he was concerned that this could have led to a 110(c) citation being issued against him.

According to McCarroll, when Garcia had complained to MSHA regarding the parking brake he (McCarroll) was not angry, but he was upset because he felt that Garcia should be able to talk to him and resolve a problem rather than going to a third party. McCarroll conceded that from the time of this incident through June 2000 he was not on social speaking terms with Garcia, and did not like him. In essence, he agreed that he considered Garcia's having complained to MSHA as being an example of his being a troublemaker.

McCarroll indicated that during Bjustrom's second visit to the site in the spring 2000, he told Bjustrom that Garcia was a poor employee, that he tried to cause trouble between employees, that he was a poor operator, and that he had filed grievances. McCarroll indicated that Garcia had filed petty union grievances, all of which had been settled informally. McCarroll agreed that he had said nothing good to Bjustrom about Garcia. However, McCarroll testified that he did not tell Bjustrom that Garcia had made complaints to MSHA. He indicated that sometime after June 5, in the latter part of June 2000, he told Bjustrom that Garcia had filed a lawsuit based upon his not having been hired by Colorado Lava.

McCarroll indicated that he did not participate in the decision as to whether Garcia was to be offered a position with Colorado Lava. According to McCarroll, he first met Kissner on June 5, and never had any conversations with Kissner regarding Garcia.

Robert Duran, a loader operator, was assigned by MWCA to work at the rail site in January 2000 and he worked on that site through June 5, 2000. He indicated that he and Garcia switched off operating the loader.

Ernie Lucero testified but his testimony was not relevant to any of the issues.

II.

At the conclusion of the Secretary's case Colorado Lava made a motion to dismiss arguing that the Secretary had not established a prima facie case. After listening to argument, the motion was granted in a bench decision, which, except for corrections of matters not of substance, is set forth below as follows:

A complainant alleging discrimination under The Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity, and that the adverse action complained of was motivated in any part by that activity. The Secretary of Labor on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2788, (October 1980) (rev'd on other grounds, 663 F. 2nd 1211, 3rd Cir. 1981).

In the case at bar, the parties stipulated that the Complainant, Mr. Garcia, engaged in protected activity. The record establishes, that he complained to his supervisor at the time, Mr. McCarroll, regarding problems with a parking brake, and also complained to the Mine Safety and Health Administration.

There is some dispute between the parties regarding whether or not action adverse to Garcia was taken by Colorado Lava. I note that after the incident on June 5 wherein Mr. Garcia was not hired by Colorado Lava after it had taken over MWCA's assets and equipment at the site where Mr. Garcia had been working, Mr. Garcia was able to obtain another job with MWCA, his former employer, at another location, and without any loss of pay. However, Colorado Lava did make a determination on June 5 not to hire Mr. Garcia upon its assuming the operations at the subject site. That decision certainly was adverse to Mr. Garcia. It is not relevant that he was able to obtain employment from MWCA, a corporation not related to Colorado Lava and a stranger to these proceedings, without loss of wages, and without any financial loss at this point. The crux of the matter is that on June 5 Colorado Lava did take action adverse to Mr. Garcia. I thus find that it has been established that Respondent did take adverse action against Mr. Garcia.

Critically, in order to establish a prima facie case, the Secretary must establish "that the adverse action complained of was motivated in any part by that activity." Secretary of Labor v. Reading Anthracite Co., 22 FMSHRC 298, 301 (March 16, 2000).

There is some indication in the record of disparate treatment of Mr. Garcia by Respondent's agents. For instance, a Mr. Lucero, also a former employee of MWCA, was offered another job, but Mr. Garcia was not offered another job upon Colorado Lava's assumption of the equipment and assets at the subject site. Mr. Bjstrom indicated that he evaluated two jobs

upon contemplating assumption of the operations of the subject site, namely the mechanics' positions, and the positions operating the front end loader at the rail site, that being the work site of the Mr. Garcia. It can be said there was disparate treatment of Mr. Garcia because Mr. Bjustrom did not evaluate all the other jobs that were being performed at the time. Also, when a decision was made not to rehire Mr. Garcia, it was on the ground that there were two persons employed at the site operating a front end loader, Mr. Garcia and Mr. Duran, and the decision was made to retain Mr. Duran and not Mr. Garcia because Mr. Duran had more experience. On the other hand, a gentleman by the name of Mr. VanDrake was rehired, even though he had less experience than the competitor for the same job. These actions by Colorado Lava raise some inferences of disparate treatment of Mr. Garcia. However, there is a difference between establishing the existence of a fact based on an inference, as opposed to proffering evidence of sufficient probative weight to establish a fact in issue, i.e. that the adverse action taken was motivated in any part by protected activity.

In order to explore this issue we must focus next on who actually took the adverse action. The Secretary alleges that the adverse action was taken by Mr. Bjustrom in concert with Mr. McCarroll, although the Secretary has conceded that the latter did not make that determination. The record establishes that the determination to not hire Mr. Garcia was made solely by Mr. Kissner. Mr. Bjustrom was the overall majority owner of Respondent corporation. The authority in this case to hire was delegated to Mr. Kissner, and the evidence establishes that he acted alone in making a determination to retain or hire Mr. Duran, and not to hire Mr. Garcia. Mr. Kissner testified that his decision in this regard was based upon the application that Mr. Garcia had submitted, and responses to questions that were uniformly asked of all interviewees. There is absolutely no evidence in the record whatsoever that Mr. Kissner had any animus towards Mr. Garcia based upon the latter's having engaged in protected activities.

The only person among the universe of persons in this case who had animus towards Mr. Garcia regarding his protected activities was Mr. McCarroll. Mr. McCarroll, according to his own testimony, was upset when he found out that Garcia had complained to MSHA regarding the brakes. He also indicated that he had been told by the inspector at the time the citation regarding the brake condition was issued, that he (Mr. McCarroll), would be investigated. Mr. McCarroll indicated that he did not like Mr.

Garcia, and that after the incident in October of 1999 wherein Mr. Garcia had engaged in the protected activities of complaining about parking brakes he was no longer on social speaking terms with Mr. Garcia, and that these feelings had not changed in June 2000.

However, there is no evidence in the record that Mr. McCarroll in any way participated in the decision to not hire Mr. Garcia. He was not present during the interview that was conducted solely by Mr. Kissner. According to the credible testimony of Mr. Kissner and Mr. McCarroll, Mr. McCarroll did not communicate to Mr. Kissner any of his concerns regarding the fact that Mr. Garcia, when employed by MWCA, had made a safety complaint to him or to MSHA, and had engaged in protected activities.

Mr. Bjustrom, the eighty percent owner of Colorado Lava, had the ultimate authority to hire. He supported Mr. Kissner's decision on hiring Duran. There is no evidence in the record that Mr. Bjustrom had any knowledge of the fact that Mr. Garcia had engaged in protected activities when he was employed by MWCA. Mr. McCarroll had conversations with Mr. Bjustrom prior to the time that Colorado Lava assumed the operation of the subject site. During these conversations, Mr. McCarroll discussed with Mr. Bjustrom, on his own initiative, weaknesses of various employees. Mr. McCarroll indicated that Mr. Garcia was the only employee of whom he had only negative things to say. However, the negative things that he talked about had nothing whatsoever to do with the protected activities at issue. Mr. McCarroll indicated that he told Mr. Bjustrom that Mr. Garcia is a poor employee, that he causes trouble, that he talks to other employees trying to stir up trouble between them, that he is a poor operator, that he abuses his equipment, and that he has filed grievances.

In summary, there is no evidence in the record that Mr. Kissner, the person who took direct action in not offering a job to Mr. Garcia, had any knowledge, or notice, or should have known that Mr. Garcia had engaged in any protected activities when he was employed by MWCA, a corporation not related to Colorado Lava.

Although Mr. McCarroll had animus regarding these activities there's no evidence that Mr. McCarroll was engaged at all in any determination to not hire Mr. Garcia.

The Secretary relies on Secretary of Labor on behalf of Bernardyn v. Reading Anthracite Co. 22 FMSHRC 298 (2000) in support of the proposition that Mr. McCarroll's animus towards Mr. Garcia somehow should be imputed to Mr. Bjustrom in the sense that Mr. Bjustrom acted not to hire Mr. Garcia based upon information adverse to Mr. Garcia that Mr. McCarroll had provided to him. Although this information did not include any protected activities, the Secretary argues that, in essence, Mr. McCarroll's motivation in giving a negative reference about Mr. Garcia to Mr. Bjustrom was based upon his animus regarding Mr. Garcia's protected activities and somehow that should be linked up to the actions of Mr. Bjustrom. I find that Bernardyn, supra, does not provide any support for this proposition. Indeed, in Bernardyn, supra, the finding of the Commission Judge that the Secretary had established a prima facie case was not in issue. The issue before the Commission in Bernardyn, supra, was whether or not the operator therein had established its affirmative defense.

The Secretary relies upon the following language in Bernardyn, supra, at 22 FMSHRC "an 'operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.' Metric Constructors, Inc., 6 FMSHRC 226, 230 n. 4 (Feb. 1984), quoted in Wiggins v. Eastern Associated Coal Corp., 7 FMSHRC 1766, 1771 (Nov. 1985)."³ However, since the issue of whether a prima facie case was established was not before the Commission, the quoted language in Bernardyn, Supra, was strictly dictum.

The Commission in Bernardyn, supra, was not faced with the issues presented in the case at bar, namely, whether animus of a person who worked for a corporation at a time prior to the date that the adverse action was taken, may be imputed to a non-related corporation that bought the assets of the former corporation and then took the adverse action. That particular issue was not presented before the Commission, and to impute the animus of Mr.

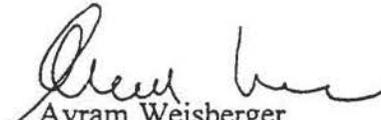
³The Commission in Wiggins, 7 FMSHRC, supra, quoted with approval from Metric Constructors, supra. However, it is significant that after quoting from Metric Constructors, supra, the Commission, in Wiggins, supra, at 1771, went on to discuss as follows: "In any event, the focus of our present analysis is not so much upon Freley's knowledge as it is upon the undoubted impact on his decision to fire Wiggins for a separate discriminatory act committed by his assistant, for which Eastern as the employing entity must assume responsibility." Hence, the principle enunciated in Wiggins, supra, quoting from Metric Constructors, supra, was not essential to its analysis and decision, and is thus dicta and not binding in resolving the issue presented in the case at bar.

McCarroll to either Mr. Bjustrom or Mr. Kissner is certainly going too far.

So for all these reasons I find that there is no authority to support the Secretary's position, and that the Secretary has not established its prima facie case.

ORDER

It is hereby **Ordered** that this case be **Dismissed**.


Avram Weisberger
Administrative Law Judge

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/sct

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 22, 2001

| | | |
|------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-298-M |
| Petitioner | : | A.C. No. 29-00708-05577 |
| | : | |
| v. | : | Chino Mine |
| | : | |
| CHINO MINES COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: Sheryl L. Vieyra, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Laura E. Beverage, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Chino Mines Company ("Chino"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Silver City, New Mexico. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Chino Mine is a large surface copper mine operated by Chino in Grant County, New Mexico. Phelps Dodge Corporation has a controlling interest in Chino. On February 2, 2000, MSHA Inspector Abel Cisneros conducted an inspection at the mine. A number of citations were issued including the single citation at issue in this proceeding.

Citation No.4450231 alleges a violation of 30 C.F.R. § 56.3131. The condition or practice section of the citation stated, as edited by me to correct spelling and grammatical errors:

Between the Lampbright Road and the North face of P-16 dump, a very large rock averaging approximately 30 tons was sitting on loose, unconsolidated material, where the weather "rainfall" had washed out approximately a third of the rock support. The rock

was sitting approximately 150 feet from Lampbright Road where employees travel on a daily basis conducting regular assigned duties in a sloped area of approximately 70/80 percent grade thus creating potential hazards to vehicles/employees of being accidentally hit by large rock, if for some reason it became loose.

By not removing potential hazards in employees' work or travel areas, injury to employees is reasonably likely to happen in a given time. Note: other very large rocks had rolled down the North face of P-26 dump and were sitting on the Lampbright Road adjacent berm thus indicating the potential hazard of being hit by rolling rocks.

(Ex. G-1; Tr. 12-13). In the citation, Inspector Cisneros determined that the violation was of a significant and substantial nature ("S&S"), and that Chino's negligence was moderate. The Secretary proposes a penalty of \$557 for this violation. The safety standard provides, as follows:

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

During his inspection, Inspector Cisneros traveled down the Lampbright Road (the "road"). The road travels alongside one of the dumps at the mine. This dump had been used to deposit waste rock from the pit, but new material was no longer being added. The road was at the bottom of this dump with a large hillside of waste rock on one side of the road and a berm on the other side. The hillside was at an angle of about 35 degrees above the road. (Tr. 134). This hillside had not been disturbed for several years. (Tr. 137).

While traveling down the road, Inspector Cisneros observed a large rock on this hillside, where he stopped to inspect. He had observed this same rock during an inspection he conducted at the mine in mid-September 1999. In September he believed that this rock was supported. (Tr. 14, 35). For that reason, he did not issue a citation at that time. He testified that at the conclusion of his September 1999 inspection, he recommended to company representatives that the rock be taken down.

When Inspector-Cisneros observed the rock in February 2000, he believed that the rock was no longer adequately supported. He believed that heavy rains that occurred after his previous inspection "had washed out about a third of the support in front of that rock." (Tr. 13-14). He looked at the rock from several angles and "observed a lot of unconsolidated material,

loose material from [adverse] weather conditions.” (Tr. 14). He determined that there had been a “heavy rainfall and [that this] rainfall had washed most of the support out from the front of the rock.” *Id.* He believed that this rainstorm occurred during the previous week. (Tr. 21). The inspector estimated that the rock weighed about 30 tons.

Inspector Cisneros also observed other rocks along the side of the road. He testified that he did not recall seeing these rocks there during his September inspection. (Tr. 18-21). He believes that many of these rocks had rolled down the hillside of the dump as a result of the heavy rains between his September and February inspections. *Id.* In short, he believes that the hillside suffered heavy erosion as a result of the rains. The inspector also stated that the muddy conditions in the area indicated recent rains. He feared that unconsolidated material, including the cited rock, could roll down the hillside and hit a vehicle using the road. (Tr. 21).

Inspector Cisneros does not dispute that Chino was complying with the first sentence of the safety standard. Although he believes that the hillside contained loose, unconsolidated material, it was sloped to the angle of repose. (Tr. 63). He cited Chino for violating the second sentence of the standard. He believes that erosion around the cited rock on the hillside created “a fall-of-material hazard to persons” who travel down the road. Inspector Cisneros believes that the violation was S&S.

For the reasons set forth below, I find that the Secretary did not establish a violation of section 56.3131. There is no question that during the relevant time period, the road was a “place where persons worked or traveled in performing their assigned tasks.” Thus, Chino was required to comply with the requirements of the standard along the road. The issue is whether the rock or the hillside presented “a fall-of-material hazard to persons.”

First, I find that conditions along the hillside had not changed significantly between Inspector Cisneros’s September 1999 and February 2000 inspections. The only witness who testified that the area around the rock had been recently eroded was the inspector. Concepcion Fierro, an hourly employee who was on the safety committee at Chino, was subpoenaed by the Secretary to testify at the hearing. He testified that there was no significant change in the support for the rock between the two inspections. (Tr. 75-77). He believed that any erosion of material around the rock occurred before the September 1999 inspection, not after. *Id.* As set forth in more detail below, the two company witnesses testified that the hillside was stable; the rock was well supported; and there had been no erosion of support for the rock between the two inspections.. (Tr. 103). All of the witnesses who worked at the mine testified that the weather had been cool and dry in the weeks preceding the February 2000 inspection. The U.S. Department of Commerce has a weather monitoring station about seven miles from the mine. Weather data from that station shows that it did not rain in the area in October or November 1999. (Ex. R-2). It rained 0.2 inches in December 1999. The data also establishes it rained 0.04 inches on January 2 and 3, 2000. *Id.* Local conditions could vary, however.

There is no evidence, other than the testimony of the inspector, that heavy rains at the mine caused the support in front of the rock to be washed out, in the weeks prior to February 2, 2000. I find that the conditions on the hillside did not change to any significant degree between Inspector Cisneros's two inspections. This finding does not end the matter, however, because the issue is whether the standard was violated on February 2, 2000, not whether any hazard presented by the rock was of recent origin. The presence of this rock on the hillside may have violated the safety standard in September 1999, even though the inspector did not issue a citation.

The language of section 56.3131 is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). A broadly written standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991). The mine operator need not have actual notice of a specific requirement, but the standard must "provide adequate notice of prohibited or required conduct." *Id.* The Commission developed the "reasonably prudent person test" to be applied in such circumstances. The test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Id.* (citations omitted). Thus, the issue is whether such a reasonably prudent person would have recognized the hazard presented by the cited rock.

Prior to the September 1999 inspection, several miners complained about the rock to the union-management safety committee or to a Chino supervisor. Inspector Cisneros testified that Mr. Fierro and others reported this condition. (Tr. 30). Around the time of the September inspection, Herby Allsup, a dozer foreman with about 23 years experience at the mine, was asked by Chino management to look at the cited rock on the dump hillside. He investigated the conditions and did not observe any evidence of cracks or movement in the area supporting the rock. (Tr. 98-99). He concluded that the "rock had not moved; it was in the same position since day one, [and that it did not present] a safety hazard." (Tr. 99). He concluded that it was safer to leave the rock in place than to bring it down. (Tr. 103-04). He testified that the particular slope on which the rock rested had a history of being very stable. (Tr. 91). This particular slope existed since about 1995. *Id.*

Terry Rigoni, the mine superintendent, who has a degree in geological engineering, testified that the hillside in the area of the rock was stable. (Tr. 138). When he was advised that Chino was going to be issued a citation, he went to observe the cited rock. He testified that there was no evidence that any of the material supporting the rock had eroded away. (Tr. 139). He believes that the rock was stable and that it was not prudent to take it down. (Tr. 143). He testified that he reached this conclusion based on the "lack of any kind of evidence of slope movement or instability...." *Id.* He stated that the hillside was "set up like concrete." *Id.* He also believes that it was not prudent to disturb the bank by bringing the rock down. As discussed below, Chino cut into the hillside to gain access to the rock in order to abate the citation.

Because this abatement exposed fresh material and steepened the hillside, Chino permanently closed the road for safety reasons after the rock was brought down. (Tr. 143-44).

Chino's witnesses testified that most of the rocks that were present along both sides of the road had been there since the road was built. They stated that some of the rocks may have fallen when an additional road was built higher up on the dump in 1998. They stated that these rocks did not represent material that had fallen from the hillside between the September and February MSHA inspections, as the Secretary contends. Mr. Allsup testified that the road was not very wide and that if rocks had fallen from the hillside many of them would have landed in the road. (Tr. 94). As the dozer foreman, Mr. Allsup was responsible for keeping the road clear of rocks and other materials. He testified that he did not send out equipment to remove rocks from the road. (Tr. 94). He believes that most of the rocks along the side of the road were deposited there around 1995 when the dump was built. (Tr. 95-96). Mr. Rigoni testified that he does not believe that the rocks along the road had recently rolled down the bank. (Tr. 142). He testified that the rock was placed there when the road and dump were built. He testified that, as the mine manager, he would have known if material was rolling off the dump slope.

It is not surprising that there were some concerns raised by miners about the rock in the summer of 1999. Chino was building a sump for its leaching solution in this area. Miners regularly traveled on this road during that summer as this facility was being built. Normally, the road was not used very frequently. Mr. Fierro testified that he and other employees raised concerns about the rock because it looked dangerous. (Tr. 78). In response to these concerns, Chino evaluated the situation and determined that the rock did not present a hazard. The rock is shown in Exhibits G-4 through G-6. These photographs were taken from the road after Chino had cut away the hillside as part of the abatement process. From that angle, it is not clear whether the rock is adequately supported. Chino determined that it was supported in September and believes that it still was when it received the citation. It investigated the stability of the rock when miners raised questions about it and when the inspector issued the citation.

Based on evidence presented by Chino, I find that the rock was supported and did not "create a fall-of-material hazard to persons" or equipment. The rock was sitting in a mini-bench that was not readily observable from the road. This bench can be seen to a certain extent in Exhibit G-6. Plastic pipelines are present throughout the dump to transport a liquid called "raffinate," which is produced during the solvent extraction process in which copper is leached from the oxide ore through the use of an acid. There is a partially buried raffinate pipeline along the road and along another road above the Lampbright Road. At one time, there was a pipeline running through the area where the rock was sitting. Indeed, the rock was sitting in this former "pipeline run," which was flatter than the surrounding hillside. (Tr. 135). This mini-bench provided support for the rock.

Chino arranges to have aerial photographs of the mine taken on a regular basis. Coincidentally, such an aerial survey was made on February 2, 2000, before Chino started to

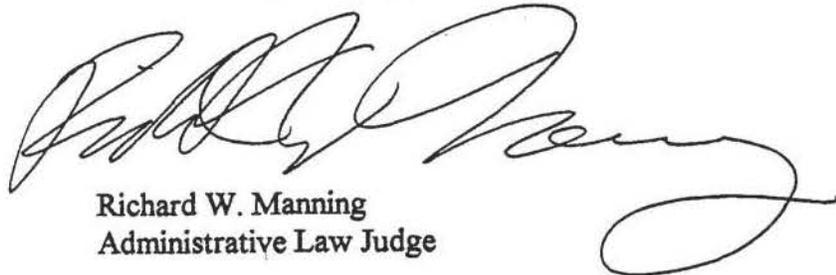
abate the citation. An enlargement of the photograph taken during this survey shows the road, the rock, the hillside, the raffinate pipelines, and the mini-beach that the rock was in. (Ex. R-2).

Chino abated the citation by removing the rock. It accomplished this task by using a front-end loader to remove some of the hillside below the rock. The loader removed about 3,000 tons of material. (Tr. 140). Chino then used a water cannon to remove the supporting material under the rock. The water cannon pumped about 300 gallons of water a minute for about ten minutes before the rock was dislodged. (Tr. 141). As stated above, Chino believes that the abatement rendered the hillside unstable so it permanently closed the Lampbright road.

Although it is understandable that someone viewing the rock from the Lampbright Road might believe that the rock presented a hazard, upon further investigation a "reasonably prudent person familiar with the mining industry and the protective purposes of the standard-would have recognized" that the presence of the rock on the hillside did not violate the "requirement of the standard." I credit the testimony of Chino's witnesses on this issue. The material on the hillside was stable rather than loose and unconsolidated; the rocks at the bottom of the hillside had not recently fallen and did not indicate a potential falling rock hazard; the support for the cited rock had not eroded away during recent rains; and the rock was sitting on a flat area that was created when a pipeline was at that location. The inspector was mistaken about some of the facts upon which he based the citation. Consequently, I vacate the citation.

II. ORDER

Citation No. 4450231 is **VACATED** and this proceeding is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

February 27, 2001

| | | |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 2000-79 |
| Petitioner | : | A. C. No. 15-14492-03802 |
| v. | : | |
| | : | Baker Mine |
| LODESTAR ENERGY, INC., | : | |
| Respondent | : | |

DECISION

Appearances: Donna E. Somner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, and Arthur J. Parks, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Madisonville, Kentucky, for Petitioner;
Richard M. Joiner, Esq., Mitchell, Joiner & Hardesty, P.S.C., Madisonville, Kentucky, 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 Lodestar Energy, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$165.00. A hearing was held in Madisonville, Kentucky. For the reasons set forth below, I vacate one citation, affirm the other two and assess a penalty of \$100.00.

Settled Citations

The parties reached a settlement with regard to Citation Nos. 7641238 and 7641286. In accordance with the agreement, the Secretary moved to vacate Citation No. 7641238 and the Respondent agreed to pay the proposed penalty of \$55.00 for Citation No. 7641286. (Tr. 5-6.) The agreement was approved and will be carried out in the order at the end of this decision.

The remaining citation, No. 7640555, was contested at the hearing.

Findings of Fact¹

Lodestar Energy, Inc., owns and operates the Baker Mine, an underground, bituminous coal mine, located in Webster County, Kentucky. Although the initial entries in a mining section are cut by a continuous mining machine, the main method of mining coal is by longwall mining unit.

Three entries are cut by the continuous miner on each side of a panel of coal that is to be mined by the longwall. Typically, the entries are 10,000 feet long and the panel is 1,000 feet wide. While the first panel is being mined by the longwall, a continuous miner is cutting three more entries along the next panel to be mined. Thus, except for the first and last longwall panels, the three intake entries on the right side of the panel, become the tailgate entries on the left side of the next panel. Of the three intake entries, the entry closest to the panel, the No. 3 entry, is the belt line entry and also serves as an alternate escape way. The Nos. 1 and 2 entries carry intake air toward the face where it mixes with air coming across the face and eventually exits the mine. The No. 2 entry also serves as the primary escape way from the section.²

On October 26, 1999, MSHA Inspector Robert A. Sims, a ventilation specialist, was assisting in a quarterly inspection at the Baker Mine. Mining was taking place on longwall panel "K" in the 11th East Gates section of the mine. At that time, intake air entered the Nos. 1 and 2 entries from a common source outby crosscut 10. At crosscut 10, a portable metal stopping, known as a "Kennedy Stopping," partially blocked the No. 1 entry. While a portion of the airflow passed through openings in the stopping and continued down the No. 1 entry, the stopping directed most of the airflow down the No. 2 entry.

From crosscut 10 to crosscut 73, a distance of about 6,615 feet, the No. 1 and No. 2 entries were separated by coal pillars and permanent stoppings.

Inspector Sims determined that although the No. 2 entry had been examined for hazardous conditions, by walking it at least every seven days, the No. 1 entry had not been so examined. Concluding that this was a violation of section 75.364(b)(1) of the regulations, 30 C.F.R. § 75.364(b)(1), he issued Citation No. 7640555, which alleged that: "The #1 entry (intake) of the 11th East Gates was not being examined from crosscut 10 to crosscut 73 at the Baker Mine." This was the first time that Lodestar had been cited for failing to examine the No. 1 entry.

¹ The parties have stipulated to most of the facts in this case. (Jt. Ex. 5, Tr. 10-13.) The facts that have not been stipulated to are not in dispute.

² The No. 1 entry serves no apparent purpose on the right side of the longwall panel. When it is on the left side, it takes air down to and then across the mining face.

Conclusions of Law

Section 75.364(b)(1) requires that: "At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator: (1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled." Section 75.301, 30 C.F.R. § 75.301, defines "air course" as: "An entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage."

The company argues that the Nos. 1 and 2 entries are a set of entries making up a single air course and that by inspecting the No. 2 entry they are complying with the regulation's requirement that "at least one entry of each intake air course" be examined. On the other hand, it is the Secretary's position that the Nos. 1 and 2 entries are separate air courses and, therefore, each one has to be examined in its entirety. I find that the facts and the law support the Secretary's position.

The thing that distinguishes one air course from another, whether it is one entry or a set of entries, is that it is separated from other entries so that the only mixing of air currents between the two is the result of leakage, not design. Thus, for a set of entries to be an air course, they would have to mix air currents and be separated from other entries. In this case, the two entries are separated from each other by stoppings and solid blocks of coal for over a mile and there is no mixing of the air between the two except by leakage.

The Respondent asserts that because common air enters the two entries at crosscut 10 and again becomes common air after leaving the entries at crosscut 73, the entries are part of the same air course. However, if this contention is taken to its logical conclusion it would mean that only one entry in the entire mine, or at least one entry for each outside air source, would have to be examined, because the same air comes into the mine at one place, proceeds down numerous entries and eventually joins back together to exit the mine.

The operator also maintains that the Secretary's interpretation of the regulation is determined by the distance over which crosscuts between entries are blocked. This is based on the inspector's testimony that if only crosscut 11 were blocked between the two entries, so that common air entered the entries at crosscut 10 and became common again at crosscut 12, the two entries would be one air course. Clearly, a rule of reason applies here. At some point the blocking of crosscuts between entries to seal the air within them changes them from one air course to two. While that may not occur if only two or three crosscuts are blocked, it undoubtedly has occurred when 63 crosscuts are blocked. Since that is what the facts are in this case, it is not necessary, for this decision, to determine exactly when one air course becomes two.

Inspector Sims testified that among the hazards that could take place in the No. 1 entry are roof falls and methane accumulations. While it is arguable that methane levels could be

discovered by monitoring the air as it exits the entry, the only way that roof falls or potential roof falls can be discovered is by walking the entry. The fact that the roof in the entry may be exceptionally well secured, as the No. 1 entry appears to be, does not change this fact.

Accordingly, I find that the Nos. 1 and 2 entries are separate air courses under the regulations and that they must both be examined for hazardous conditions. Since the No. 1 entry was not being examined, I conclude that Lodestar violated section 75.364(b)(1) of the regulations.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$110.00 for the two remaining citations. 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 the civil penalty criteria, the parties have stipulated, and I so find, that: (1) the Baker Mine produced 4,398,310 tons of coal in 1999, making it a large mine; (2) Lodestar Energy, Inc. mined 9,387,053 tons of coal in 1999, making it a large operator; (3) the proposed penalty will not affect Lodestar's ability to remain in business; and (4) Lodestar demonstrated good faith in abating the cited violations. (Jt. Ex. 5, Tr. 13-14.) Based on the Assessed Violation History Report, (Jt. Ex. 1), I find that neither the mine's nor the operator's history of violations is very good.

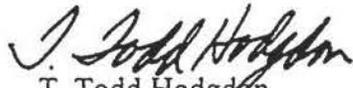
The inspector found that neither of the citations was "significant and substantial" and that in the unlikely event that an accident occurred the expected injury would result in lost workdays or restricted duty. Therefore, I find that the gravity of the violations was not very serious.

Finally, the inspector alleged that both of the violations resulted from "moderate" negligence on the part of the operator. In accordance with the settlement agreement, I find that the company's negligence in Citation No. 7641286 was "moderate." However, concerning Citation No. 7640555, the evidence is that the company had never been cited for this violation before and that even subsequent to the issuance of the citation at least one MSHA inspector did not inspect the No. 1 entry during a quarterly inspection. Accordingly, I find that the negligence for that violation was "low."

Taking all of these factors into consideration, I assess a penalty of \$55.00 for Citation No. 7641286 and a penalty of \$45.00 for Citation No. 7640555.

Order

Citation No. 7641238 is **VACATED** and Citation No. 7641286 is **AFFIRMED**, in accordance with the settlement agreement, and Citation No. 7640555 is **MODIFIED** by reducing the level of negligence from "moderate" to "low" and **AFFIRMED** as modified. Lodestar Energy, Inc. is **ORDERED TO PAY** a civil penalty of \$100.00 within 30 days of the date of this decision.


T. Todd Hodgden
Administrative Law Judge

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