

FEBRUARY 2002

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FEBRUARY 2002

No cases were filed in which Review was granted during the month of February

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 19, 2002

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

v.

UNITED METRO MATERIALS

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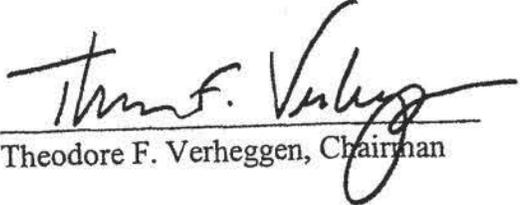
Docket Nos. WEST 2000-35-RM
WEST 2000-36-RM
WEST 2000-180-M

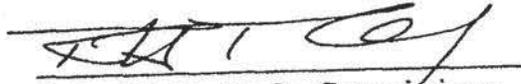
BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman, and Beatty, Commissioner

The Secretary of Labor has filed a motion to vacate the direction for review in which United Metro Materials joins. The Secretary states that she has vacated the citations in the above-captioned proceeding and that she will not enforce the citations. In light of the representations made in the joint motion, the Commission grants the motion and vacates the direction for review.


Theodore F. Verheggen, Chairman


Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, concurring:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). In August 1999, a laborer working at a plant operated by United Metro was fatally injured after he was caught in a conveyor belt roller while attempting to clear it with a hoe. 23 FMSHRC 1085, 1086. (Sept. 2001) (ALJ). After investigating the accident, MSHA cited the operator for violations of several regulations. One citation charged the operator with a failure to adequately guard the return roller, in violation of 30 C.F.R. § 56.14107(a). The second citation alleged a failure to shut off the conveyor prior to cleaning the rollers, as required by 30 C.F.R. § 56.14202. *Id.* at 1086; Narrative Findings for a Special Assessment. Fourteen months later the Secretary proposed a penalty of \$40,000 for the first citation and \$35,000 for the second. 23 FMSHRC at 1086-1087. The operator contested these citations and the proposed penalties.

In an order dated September 28, 2001, Judge Cetti dismissed the proceedings. 23 FMSHRC at 1089. Relying on section 105(a) of the Act,¹ the judge concluded that the Secretary had failed to notify the operator of the civil penalty proposed within a reasonable time after the termination of the investigation that resulted in the issuance of the citations. *Id.* By order dated October 26, 2001, the Commission, on its own motion, directed review of the judge’s decision. The Secretary has notified the Commission that the citations under review were vacated on November 8, 2001 and she now moves the Commission to dismiss these proceedings as moot. Sec’y Notice of Vacating of Citations and Motion to Vacate the Direction for Review at 1-2. United Metro Materials joins in this motion. United Metro Letter of November 14, 2001.

The Commission initially ordered review of this matter because the judge’s decision raised significant legal and policy issues. Although the Secretary’s actions raised eyebrows, I nevertheless conclude that this proceeding must now be dismissed as moot.

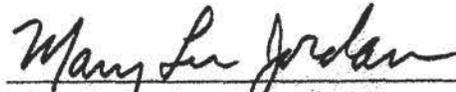
¹ Section 105(a) provides:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

30 U.S.C. § 815(a).

The Supreme Court in *Cuyahoga Valley Railway Co. v. United Transportation Union*, 474 U.S. 3, 7-8 (1985) (per curiam) held that the Secretary's decision to withdraw a citation against an employer under the Occupational Safety and Health Act was not reviewable by the Occupational Safety and Health Review Commission. The Court pointed out that allowing the Commission to overturn the Secretary's decision to withdraw a citation would amount to allowing the Commission "to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend." 474 U.S. at 7. Following *Cuyahoga*, this Commission in *RBK Construction Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993), concluded that it lacked the authority to overturn a Secretarial decision to withdraw or vacate a citation.

Accordingly, in light of the Secretary's vacation of the citations at issue, I join the majority in vacating our direction for review and dismissing these proceedings.



Mary Lu Jordan, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 25, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2001-42
v.	:	A.C. No. 44-06889-03502 A TQI
	:	
TONY M. STANLEY, employed by	:	
MINE MANAGEMENT	:	
CONSULTANTS, INCORPORATED	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 25, 2001, the Secretary of Labor filed with the Commission a petition for assessment of civil penalties against Tony M. Stanley, employed by Mine Management Consultants, Inc. ("MMC"), alleging that, as an agent of MMC, Stanley should be held liable pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), for knowingly authorizing, ordering, or carrying out an alleged violation of 30 C.F.R. § 75.202(b) by MMC. Sec'y Proposed Assessment, Ex. A at 3. On November 13, 2001, the Secretary filed with Administrative Law Judge T. Todd Hodgdon a motion to consolidate the subject proceeding with the civil penalty proceeding involving MMC (Docket No. VA 2001-37). The judge did not rule on the motion to consolidate. He issued an Order to Show Cause on December 18, 2001, directing Stanley to file within 21 days an answer or an explanation of his failure to do so. On January 17, 2002, the judge issued a Default Decision dismissing this civil penalty proceeding for Stanley's failure to answer the Petition for Assessment of Penalty or the show cause order. The judge assessed the civil penalty of \$600 proposed by the Secretary.

Stanley responded to the show cause order in a letter to the judge dated January 16, 2002, one day before the judge's default order issued. The Commission received the letter on January

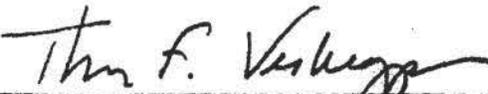
22, 2002. In the letter, Stanley explained that he did not timely respond to the judge's show cause order because he mistakenly believed that it was not necessary for him to do so if his case was consolidated with the case involving MMC. Stanley also answered the Secretary's allegations in the letter.

The judge's jurisdiction in this matter terminated when his decision was issued on January 17, 2002. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Stanley's response to the show cause order as constituting a timely petition for discretionary review of the judge's default order,¹ which we grant. *See, e.g., Upright Mining, Inc.*, 9 FMSHRC 206, 207 (Feb. 1987).

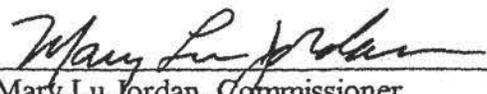
We have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for a failure to respond to an order, the failure may be excused and proceedings on the merits permitted. *Mohave Concrete & Materials, Inc.*, 8 FMSHRC 1646, 1647 (Nov. 1986). On the basis of the present record, however, we are unable to evaluate the merits of Stanley's position. In particular, it is unclear from his request why he mistakenly believed that his case had been consolidated, or how such consolidation would relieve him of his obligation to file an answer in this case. In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Cent. Mt. Materials*, 23 FMSHRC 907, 907-09 (Sept. 2001) (remanding to judge where operator did not respond to Secretary's petition or judge's show cause order because apparently confused about Commission procedures); *Gen. Rd. Trucking Corp.*, 17

¹ Stanley is proceeding pro se, and the Commission has generally held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

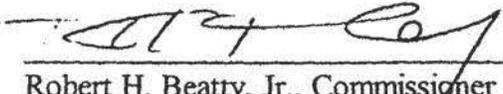
FMSHRC 2165, 2165-66 (Dec. 1995) (same). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Theodore F. Verheggen, Chairman



Mary Lu Jordan, Commissioner



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 27, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 2000-63-M
	:	2000-78-M
ORIGINAL SIXTEEN	:	2000-195-M
to ONE MINE, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

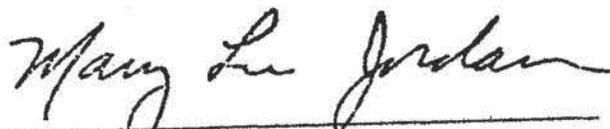
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On November 26, 2001, the Commission received from Original Sixteen to One Mine, Inc. (“Original”) a petition for discretionary review challenging the decision issued on October 19, 2001, by Administrative Law Judge Michael Zielinski. On November 28, 2001, a majority of the Commission granted the petition for the limited purpose of affording Original an opportunity to amend its petition to comply with the requirements of section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). On December 17, 2001, Original filed an amended petition for discretionary review. On January 2, 2002, the Commission received an opposition from the Secretary of Labor. After complete consideration of the operator’s amended petition for review, on January 30, 2002, we declined to grant review of the amended petition for discretionary review and vacated the direction for review issued on November 28.

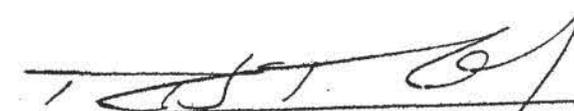
On February 8, 2002, Original filed with the Commission a petition for reconsideration, requesting that the Commission reconsider its denial of Original’s amended petition on January 30. It submits that its request is based on “irrational, arbitrary, and capricious attitudes and actions” of inspectors with the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Mot. at 2. Original explains that its relationship with MSHA has become increasingly antagonistic and that the citations it wishes to challenge were subjectively written by inadequately trained MSHA inspectors. *Id.* In addition, Original set forth an identical version of

the amended petition for discretionary review that it had filed on December 17. *Id.* at 2-5. On February 12, 2002, the Secretary filed an opposition to the petition for reconsideration, setting forth the same grounds of opposition that she previously had submitted in response to Original's amended petition for discretionary review.

In its petition for reconsideration, Original has not provided the Commission with facts or legal arguments that it believes we failed to consider or misapprehended in denying the amended petition for review, but has merely reiterated arguments that it made to the Commission in its amended petition for discretionary review. With respect to petitions for reconsideration, our case law requires that the petitioner must bring to the Commission's attention facts or legal arguments he or she believes we overlooked. In other words, the petition for reconsideration must do more than merely raise arguments we have already considered. *See Island Creek Coal Co.*, 23 FMSHRC 138, 139 (Feb. 2001). In its petition for reconsideration, Original has failed to provide any new information. In its amended petition for discretionary review, Original alleges that the citations issued by the inspectors were subjective (Amended PDR at 2, 3); that citations demonstrated inconsistent enforcement action (*id.* at 5); and that citations reflected MSHA's antagonistic attitude (*id.* at 5-6). We considered such arguments in declining to accept review of Original's amended petition, and see no reason to reconsider that exercise of our discretion. *See* 30 U.S.C. § 823(d)(2)(A)(i) ("Review by the Commission shall not be a matter of right, but of the sound discretion of the Commission"); *Eagle Energy, Inc. v. Sec'y of Labor*, 240 F.3d 319, 324-25 (4th Cir. 2001) (providing that Mine Act contemplates that Commission sometimes will not consider issues presented for its review).

For the foregoing reasons, having considered Original's request, the Secretary's response, and the Commission's January 30 order, we deny Original's petition for reconsideration.¹


Mary Lu Jordan, Commissioner


Robert H. Beatty, Jr., Commissioner

¹ Chairman Verheggen voted in favor of accepting the operator's amended petition for discretionary review, and therefore would grant the petition for reconsideration.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

February 1, 2002

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket Nos. PENN 99-129-D
on behalf of : PENN 99-158-D
LEONARD M. BERNARDYN, :
Complainant :
v. :
READING ANTHRACITE COMPANY, : Wadesville Pit
Respondent : Mine ID 36-01977

PARTIAL DECISION ON REMAND

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant; Martin J.. Cerullo, Esq., Cerullo, Datte & Wallbillich, Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

This case is before me based on a decision issued in this matter by the Commission, 23 FMSHRC 924 (2001), which vacated my decision of August 1, 2000, 22 FMSHRC 951, and remanded the matter to me for further analysis of whether the discharged miner, Leonard Bernardyn, had suffered any disparate treatment, as that concept was analyzed in Secretary of Labor on behalf of Cooley v. Iowa Silica Co. 6 FMSHRC 516 (1984).¹ A summary of the facts in this case are set forth in the Commission's decision is as follows:

Bernardyn had worked for Reading for nineteen years, including working as a haulage truck driver at Reading's Pit 33, a coal mine in Wadesville, Pennsylvania, for approximately four and a half to five years before his discharge. 22 FMSHRC at 299. Around 7:00 a.m. on November 10, 1998, Bernardyn began driving his 190-ton Titan haulage truck on his usual route. Id. Overall, the road has a grade of

¹Reading does not dispute my initial finding that the Secretary had established a prima facie case as set forth in the case of the Secretary of Labor on behalf of Robinette v. United Castle Coal Co. 3 FMSHRC 803, 817-18 (April 1998).

approximately 8%, and parts of it are as steep as 10.3%. *Id.* When Bernardyn began driving, the weather was foggy and misty, and slippery road conditions caused Bernardyn to drive slower than usual. *Id.*

After prompting from Reading's general manager Frank Derrick, who had seen the Titan driving slowly, mine superintendent Stanley Wapinski stopped Bernardyn and asked him why he told Bernardyn to drive faster. *Id.* Approximately 20 minutes later, Derrick again noticed a Titan truck driving slowly and asked Wapinski whether it was the same truck. *Id.* When Wapinski answered yes and identified Bernardyn as the driver, Derrick told him to remove Bernardyn from the haulage run. T. Tr. at 85-86. Wapinski met Bernardyn at the pit and told him he was holding things up, and directed him to meet Wapinski at the dump after his current run. 22 FMSHRC at 299.

After the second conversation with Wapinski, Bernardyn used the C.B. radio in his truck to call Thomas Dodds, the United Mine Workers of America ("UMWA") safety committeeman. *Id.* Dodds was driving a truck on the same shift as Bernardyn. *Id.* Bernardyn told Dodds he was being asked to drive at a higher speed than he believed was safe given the poor road conditions. *Id.* During his 8-10 minute complaint to Dodds, Bernardyn repeatedly cursed and, referring to Wapinski, said "I'll get the little f---r." *Id.* Derrick overheard Bernardyn's complaints and profanity on the C.B. radio, but he testified that "it never crossed my mind to pick up the CB and tell him to stop." T. Tr. 116. Derrick fired Bernardyn after he had dumped the load in his truck, assertedly for profanity and threatening a supervisor over the C.B. radio. 22 FMSHRC at 299-300.

Within 30 minutes after Bernardyn's termination, road conditions worsened, and a layer of ice had formed on the road. *Id.* At 300 n.2. After a foreman's truck slid down the haulage road, the road was shut down due to the slippery conditions. *Id.* 23 FMSHRC, supra, at 924-295 (footnotes omitted.)

In essence, in my prior decision, I found that Reading had established an affirmative defense, which had not been refuted by the Secretary who had asserted that Bernardyn had been the victim of disparate treatment. On remand, the Commission directed me, to apply Commission precedent as established in Cooley, supra, at 521 and Hicks v. Cobra Mining Inc., 13 FMSHRC 523 (532-33) (1991), wherein, in the context of analyzing whether a discharged miner was disparately treated in the context of using offensive language "... the Commission has looked to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and how the operator treated other miners who had cursed". 23 FMSHRC at 929-930. Specifically, the Commission, Id., at 930 directed me to reconsider my determination that Bernardyn did not suffer disparate treatment and discrimination under Section 105(c), according to the following principles:

(1) **Complainant's Prior Use of Profanity.**

In *Bernardyn I*, 22 FMSHRC 298 (March 2000), the Commission, at 303, found that “the record does not contain any evidence of prior difficulties Reading may have had with Bernardyn swearing”. Hence, this finding becomes the law of the case regarding an analysis of Bernardyn’s prior use of profanity as one of the Cooley, supra, factors, and hence, becomes the law of the case in this remanded decision.

(2) **Disciplinary Policy on Cursing**

In its decision, the Commission concluded that substantial evidence supported my initial finding that Reading’s 1987 Disciplinary Policy was in effect at the time Bernardyn was discharged, and that there was no provision in Reading’s 1987 Code of Conduct “establishing either cursing or threatening language as an offense warranting immediate termination”. 23 FMSHRC, supra, at 931. The Commission, after analyzing Reading’s 1987 policy, found that Reading “... had no established practice for disciplining workers for cursing in the absence of accompanying insubordinate acts, or of treating cursing as conduct warranting immediate discharge.” *Id.* The Commission, then went on to conclude that “Reading violated its policy in terminating Bernardyn.” *Id.* At 932. These findings become the law of the case in this remanded proceeding.

(3) **Treatment of Similarly situated miners.**

a. **Use of C.B. Radio.**

Critical to my initial decision and decision on remand, was a finding that Bernardyn’s use of profanity was distinguished from use of profanity by other miners, first of all, because it was broadcast over a C.B. radio. However, the Commission, *Id.* at 933, concluded that, to the contrary, “... substantial evidence does not support the judge’s finding that Bernardyn’s broadcast of his cursing over the C.B. Radio materially distinguished his cursing episode from previous cursing incidents.” This conclusion becomes the law of the case in this remand decision.

b. **Duration of Cursing.**

The second critical element which provided the basis for my decision that Bernardyn’s use of profanity was distinguished from previous incidents, consisted of my finding that Bernardyn had cursed 8 to 10 minutes over the CB. In contrast, the Commission referred to Commission precedent, as establishing “that it is not the duration of various single incidents that is most relevant to disparate treatment analysis, but whether there was a prior problem with misconduct involving the complainant.” In addition, the Commission found that the record established “that Reading could have terminated Bernardyn’s outburst at any time.” *Id.* Further, critical to my decision that Bernardyn was not subject to disparate treatment was my finding that whereas other individuals made a profane remark only once, Bernardyn used profanity nonstop for

approximately 8 to 10 minutes. In contrast, the Commission found that substantial evidence does not support this finding. *Id.* The Commission found that another miner who had received at least two warnings for three separate incidents of verbal abuse was not terminated, and that, in contrast, Bernardyn had no such history of cursing. These findings now become the law of the case.

Bernardyn's Threat.

The third finding that was critical to my decision that Bernardyn's conduct was more egregious and not in the same category of other miners who had used profanity, was a finding that Bernardyn had threatened his supervisor. In contrast, the Commission, *Id.*, concluded that "substantial evidence does not support the judge's finding that Bernardyn threatened his supervisor." In conclusion, the Commission, *Id.*, at 935, held as follows:

In light of our determination that Bernardyn's use of the C.B. radio and the duration of the cursing incident do not meaningfully distinguish Bernardyn from other Reading employees who were not terminated for cursing, we conclude that substantial evidence does not support the judge's finding that Bernardyn was not similarly situated to these employees. Consequently, as to the third *Cooley*, we conclude that substantial evidence fails to support the judge's finding that Reading did not treat Bernardyn more harshly than similarly situated employees.

These conclusions of the Commission become the law of the case.

Conclusion

In light of the Commission's findings and conclusions regarding Bernardyn's prior use of profanity, disciplinary policy on cursing, and treatment of similarly situated miners, I am constrained to conclude that under the law of the case, as set forth by the Commission, the Secretary has established that Bernardyn was subject to disparate treatment, and that accordingly Reading's affirmative defense is defeated. Thus, I am constrained to conclude that the Secretary has established that Bernardyn was discharged in violation of Section 105(c) of the Act.

Order

It is Ordered that:

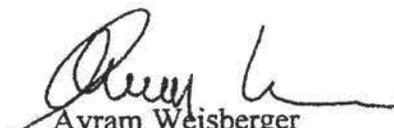
(1) The parties shall, within 10 days of this decision, confer to discuss settlement regarding all elements of the specific relief requested by the Secretary on behalf of the Complainant, including the amount claimed as back pay, if any, along with interest to be calculated in accordance with the formula in the Secretary on behalf of Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).

(2) Within 10 days of the date of this decision, the parties shall confer and attempt to reach a settlement, either regarding the amount of the civil penalty sought by the Secretary from the Respondent, or agree to a set of stipulations regarding the various factors set forth in Section 110(i) of the Act.

(3) If the parties reach a settlement regarding the matters set forth in either paragraphs (1) or (2) of this Order, then such a settlement shall be filed no later than 10 days from the date of this Decision.

(4) Should the parties not reach any settlement with regard to any of the matters set forth in paragraphs (1) and (2) of this Order, then the Secretary shall convene a conference call with counsel for the Respondent and the undersigned, to take place at either 10:30 a.m. or 2:30 p.m. during the week of February 11, 2002, in order to set a date for an evidentiary hearing to resolve any outstanding issues regarding the scope of relief to be awarded Complainant, or the factors set forth in Section 110(i) of the Act.

(5) This Decision is not final until a further order is issued with respect to Complainant's relief and the amount of Complainant's entitlement to back pay, if any, and the amount of civil penalty to be assessed against Respondent.


Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

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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 5, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2001-20
Petitioner	:	A. C. No. 44-01696-03501 4FT
v.	:	
	:	Mine No. 2
MINING PROPERTY SPECIALISTS, INC.,	:	
Respondent	:	

DECISION

Appearances: Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Harry W. Meador, III, President, Mining & Property Specialists, Inc., Big Stone Gap, Virginia, *pro se*, 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 Mining Property Specialists, Inc. (MAPS), under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of \$500.00. A hearing was held in Big Stone Gap, Virginia.¹ For the reasons set forth below, I modify the citation and assess a penalty of \$100.00.

Background

MAPS is an engineering and environmental services firm located in Big Stone Gap, Virginia. Among other things, it provides surveying services for various underground coal mines in the area.

¹ Subsequent to the hearing, the Respondent requested that the September 7, 2001, deposition of MSHA Inspector John Godsey be admitted into evidence. There being no objection by the Secretary, the deposition is admitted into evidence as Respondent's Exhibit D.

On August 25, 2000, MAPS employees William Johnson, transit man, and Chad Huff, rod man, went to the Fork Ridge No. 2 mine in Wise County, Virginia, to install a survey station indicating the direction of an entry. On arriving at the mine, the surveyors checked in with mine management and then proceeded to the No. 1 entry to install Survey Station 208. At the time they entered the mine, and while they performed their duties, the mine was not producing coal because there was a problem with the belt line. It took the surveyors 15 to 20 minutes to complete their work.

As the surveyors were leaving, sometime between 8:00 a.m. and 8:30 a.m., they encountered MSHA Inspectors Gary Roberts and John Godsey, who were arriving to inspect the mine. The inspectors went into the mine to conduct their inspection accompanied by Hagy "Bear" Barnett, the Mine Superintendent. For most of the time they were underground, the mine was down. Mining was resumed sometime between 10:00 a.m. and 11:00 a.m.

At about 12:00 noon, Inspector Godsey went to inspect the face in the No. 1 entry. He discerned that the last row of roof bolts in the entry did not appear to be within five feet of the face, as required by the mine's roof control plan. He also observed that a warning reflector, or streamer, had been placed on the right hand side of the last row of bolts. He called Roberts and Barnett, who were still in the No. 2 entry, to come and verify what he had seen.

Although it was not as obvious to him, Roberts agreed that the last row of bolts appeared to be farther than five feet from the face. When Godsey measured the distance, he found that the last row was six feet, nine inches, from the face on the left side and six feet, one inch, on the right side. Roberts and Barnett both saw the warning reflector on the right side.

All three observed, after measurement, that Survey Station 208 was 20 inches in by the last row of roof bolts. From this, Godsey and Roberts concluded that the surveyors had gone under unsupported roof. Consequently, they issued Citation No. 7305588 to MAPS, under

section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1),² alleging a violation of section 75.202(b) of the Secretary's regulations, 30 C.F.R. § 75.202(b), because:

Based on evidence present in the face of the number 1 entry 001-0 active section at survey station number 208, survey stations have been installed inby the last row of permanent roof supports. William Johnson, Supervisor [,] and Chad Huff, surveyor [,] were present at the mine site on August 25, 2000. A reflectorized warning device was installed on the last row of permanent roof supports.

(Govt. Ex. 1.) Section 75.202(b) provides that: "No person shall work or travel under unsupported roof unless in accordance with this subpart."

Findings of Fact and Conclusions of Law

MAPS asserts that at the time the surveyors installed the survey station they were not under unsupported roof. The Secretary, of course, argues that they were. Because of the time lapse between the installation of the survey station and the inspection of the area, both sides rely on circumstantial evidence to sustain their positions. The preponderance of the evidence, however, supports the Secretary.

The surveyors testified that when they entered the mine they were not advised of any hazardous conditions in the mine. They maintained that when they arrived at the face of the No. 1 entry, they did not observe any warning reflector or streamer. Not seeing any warning, and not having been informed of any hazardous conditions, and not observing any obviously hazardous conditions, they assumed the area was safe and performed their work. They both admitted to having been inby the last row of roof bolts at some time during the installation of the survey station.

² Section 104(d)(1) provides, in pertinent part:

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

Based on this testimony, it is the Respondent's position that at the time the surveyors were working, the last row of roof bolts was within five feet of the face and, therefore, the surveyors were not under unsupported roof. This theory is premised on the fact that the roof control plan requires a warning device at the last row of roof bolts if the area inby them is hazardous.³ Hence, if there was not a warning device the area inby was not hazardous.

The company explains the fact that the area inby the last row measured more than five feet at 12:00 by surmising that some time between when the surveyors were present and the inspection, one foot, one inch, to one foot, nine inches, of coal was mined from the face. Unfortunately, there is no evidence to support this argument.

It is undisputed that no mining was performed, after the surveyors finished, until sometime between 10:00 a.m. and 11:00 a.m. There is no evidence that anyone observed mining in the No. 1 entry between that time and the inspection. Barnett testified that to the "best of [his] knowledge" no mining was done in the No. 1 entry before the inspection. (Tr. 73.)

The Respondent hypothesizes that a small amount of coal may have been mined to facilitate the mining of the bleeder to the left of the No. 1 entry. However, even the Respondent admits that such a cut, if it were made, would be nine and one quarter feet deep, not six feet, nine inches. (Resp. Br. at 13-14.) Thus, the depth of the entry does not support this theory. Furthermore, there does not appear to be any reason, from a mining standpoint, to mine such a small amount of coal.

While it would have been nice to have evidence from someone who was actually present in the mine during the time in question, e.g. the section foreman or the continuous miner operator, the preponderance of the evidence in this case supports a finding that there was no change in the No. 1 entry between the installation of the survey station and the inspection.

Since the area inby the last row of roof bolts was unsupported roof both at the time the surveyors were present and the time of the inspection, and the surveyors admit that they were inby the last row of roof bolts, it follows that they worked under unsupported roof. The Act provides that an operator is liable for the violative acts of its employees. *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991). Accordingly, I conclude that MAPS violated section 75.202(b) as alleged.

Significant and Substantial

³ Barnette testified that although the roof control plan only requires the placement of a warning device at the last row of roof bolts if the area inby is more than five feet from the face, and thus unsupported, or to indicate some other hazardous condition, the company customarily places such a device at the last row whether the condition inby is hazardous or not. (Tr. 85-86.)

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is "significant and substantial" must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

MAPS asserts that the violation was not "significant and substantial" because the area of unsupported roof varied from 13 inches on one side to 21 inches on the other, the mine was noted as having "good top" and the surveyors were only 20 inches in by the last row of roof bolts. (Resp. Br. at 17.) Therefore, the Respondent argues, the violation does not meet the second and third *Mathies* criteria. I find to the contrary.

In *Consolidation Coal Co.*, 6 FMSHRC 34 (January 1984), the Respondent made the same type of argument. In that case, the company contended that spacing roof bolts farther apart than permitted in the roof control plan contributed neither to a hazard nor a reasonable likelihood that such a hazard would result in injury. In rejecting this contention, the Commission held that: "Mine roofs are inherently dangerous and even good roof can fall without warning." *Id.* at 37. It went on to say that "despite the generally good conditions and the absence of reportable injuries in the previous six months, these over-wide bolts created 'a measure of danger to safety or health.'" *Id.* at 38. Similarly, I find that working under unsupported roof created a measure of danger, i.e. being struck by a roof fall, to safety or health.

Turning to the third element, there is little evidence to support the Secretary's position. Inspector Roberts testified on this issue as follows:

It's dangerous to be under unsupported roof, especially inby the last row of permanent supports, at any time . . . [because] the roof is not supported and there is a good possibility that you could have a roof that's not supported that could fall at any given time.

It's highly likely that unsupported roof could fall. Perhaps, I guess, looking at the history of roof falls and being involved with roof – I gave a safety talk the other day of the fatalities that we've had this year.

I think almost half of the fatalities of people that have been killed with roof falls or falling pieces of rock have incurred [*sic*] inby the last row of permanent supports, so it's very serious, what we consider no man's land. It's no place to be.

(Tr. 30-31.) No other evidence was offered by the Secretary on the issue.

On the other hand, the company did not offer any evidence to rebut the inspector's assertions. The inspector's judgment is an important element in an S&S determination. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (December 1998). Therefore, considering the inspector's testimony along with the understanding that mine roofs are inherently dangerous, I find that it was reasonably likely that the unsupported roof would fall and result in an injury.

I also find that a disabling injury or death would be the likely result a roof fall. Accordingly, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Secretary's argument that this violation involved an unwarrantable failure is based on the theory that Johnson was "acting in a supervisory role when he went to" the mine. (Sec. Br. at 10.) The evidence, however, does not support this theory.

The Commission has long held that the negligence of a “rank-and-file” miner cannot be imputed to the operator, in this case the contractor, for penalty assessment purposes. *Fort Scot Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982) (*SOCCO*). To determine whether such a miner was an agent of the operator, whose negligence can be imputed to the operator, “the Commission examines whether the miner was exercising managerial or supervisory responsibilities at the time the negligent conduct occurred. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995).” *Wayne Supply Co.*, 19 FMSHRC 447, 451 (March 1997).

It is the Secretary’s position that the following factors made Johnson a supervisor: (1) He was the transit man; (2) The inspectors and, perhaps, the mine superintendent thought he was a supervisor;⁴ (3) He testified that he was responsible for a project while at the mine site; (3) When the mine superintendent had a problem he went to the transit man; (4) He told the mine superintendent who needed hazard training; (5) He marked the mine maps, although the maps had to be certified by the company president; and (6) He directed the activities of the rod man.

In *Wayne Supply*, the Commission rejected a similar argument by the Secretary as “lacking legal and evidentiary support” because “[a]lthough the record evidence indicates that [the miner] was a highly experienced repairperson who needed little supervision and helped less experienced employees, this does not convert him into a supervisor, much less a manager.” *Id.* The Commission further found that there was no evidence that he “exercised any of the traditional indicia of supervisory responsibility such as the power to hire, discipline, transfer, or evaluate employees. Nor was there any evidence that [the miner] ‘controlled’ the mine or a portion thereof; rather he merely carried out routine duties involving the repair of Caterpillar machinery.” *Id.*

Likewise, in this case there is no evidence that Johnson exercised any of the traditional indicia of supervisory responsibility. Indeed, the evidence is that he did not have such authority, did not think he had such authority and did not exercise such authority. The two man crew performed routine surveying work which was “pretty much the same every time when you go in.” (Tr. 96.) Directing the activities of the rod man, i.e. telling him where to stand with the rod, and marking the mine map are part of the normal, routine surveying duties. Such actions do not make him a supervisor anymore than do the actions of the continuous miner operator directing the activities of the miner helper make him a supervisor.

Further, Johnson did not determine who needed hazard training, direct him to get it or tell the mine superintendent who needed hazard training; rather if a new employee was with him he “would take them to get their hazard training if they didn’t know to get it.” (Tr. 97, emphasis added.) In addition, Barnett stated: “I know when it’s a touchy situation you’ve got to know for

⁴ Barnett said: “As far as just ever thinking about it, I’d really never give it a thought.” (Tr. 78.)

sure, you know, Bill [Huff] is usually the one that comes to the problem.” (Tr. 79.) Bill Huff was the person in MAPS office who sent the surveyors on their missions. Thus, mine personnel did not go to the transit man for consequential problems.

Consequently, I conclude that Johnson was not a supervisor whose conduct, if it was aggravated, can be imputed to MAPS. However, that does not end the inquiry because the Commission has further held that: “[W]here a rank-and-file employee has violated the Act, *the operator’s* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *SOCCO* at 1464. While this standard is normally applied in determining the operator’s negligence for penalty purposes, the Commission has also confirmed that it applies in determining whether an operator can be held responsible for an “unwarrantable failure.” *Whayne Supply* at 452-453.

Nonetheless, the Secretary did not present any evidence concerning MAPS supervision, training and disciplining of its employees. Nor is there sufficient evidence in the record to make such a determination. Since the Secretary has failed to show that the Respondent’s supervision, training and discipline of its employees was deficient, it must be concluded that the company had taken reasonable steps to prevent the violative conduct.

Finally, it is uncontroverted that no MAPS supervisor was present when the violation was committed. *Cf. Midwest Material Co.*, 19 FMSHRC 30, 35 (January 1997). Accordingly, inasmuch as neither Johnson’s nor Chad Huff’s negligence can be imputed to MAPS and there is no evidence that the company engaged in aggravated conduct, I conclude that the violation was not the result of an “unwarrantable failure.” The citation will be modified appropriately.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$500.00 for this violation. 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).

With regard to the penalty criteria, the parties have stipulated, and I so find, that the penalty will not adversely affect MAPS’ ability to continue in business. (Tr. 9.) I also find that MAPS is a very small company and that, since its Assessed Violation History Report shows that it had no previous violations within the two years preceding this violation, it has an excellent history of previous violations. (Govt. Exs. 5 and 6.) I further find that the Respondent

demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

Turning to the question of gravity, I find this to be a serious violation. Working or traveling under unsupported roof is one of the more dangerous activities that can occur in a coal mine. On the other hand, as discussed in the section on "unwarrantable failure" there is no negligence that can be imputed to the Respondent.

Therefore, taking all of these criteria into consideration, I assess a penalty of \$100.00.

Order

Citation No. 7305588 is **MODIFIED** by reducing the level of negligence from "high" to "none," by deleting the "unwarrantable failure" designation and by making it a 104(a) citation, 30 U.S.C. § 814(a), instead of a 104(d)(1) citation. The citation is **AFFIRMED** as modified. Mining Property Specialists, Inc., is **ORDERED TO PAY** a civil penalty of **\$100.00** within 30 days of the date of this decision.



T. Todd Hodgson
Administrative Law Judge

Distribution: (Certified Mail)

Karen Barefield, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203

Harry W. Meador, III, President, Mining & Property Specialists, Inc., 1912 Wildcat Road, Big Stone Gap, VA 24219

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 13, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-102
Petitioner	:	A.C. No. 29-01825-03553
v.	:	
	:	
SAN JUAN COAL COMPANY,	:	
Respondent	:	La Plata Mine

DECISION APPROVING SETTLEMENT

Before: Judge Schroeder

This matter is before me on a Petition by the Secretary for the assessment of a Civil Penalty for the alleged violation of mine safety regulations. The Petition alleged five violations based on one citation and four orders issued by a mine safety inspector. The Secretary sought, using the special assessment procedure, a total Civil Penalty of \$36,000.00. Pursuant to my prehearing order, the parties have discussed and agreed upon a settlement of this controversy which they have submitted for my approval. Under the proposed settlement, the parties have agreed that the facts which would be demonstrated at a hearing show no aggravated conduct was involved in the four Orders and that mitigating conduct was present in connection with the citation. These facts would support the conclusion that the 104(d) Orders should be modified to 104(a) citations and that the 104(a) citation should warrant a lesser penalty. The Secretary has agreed to accept a Civil Penalty reduced to \$23,500.00 and the Respondent has agreed to pay the reduced amount. I have reviewed the proposed settlement and find it is consistent with the Mine Safety Act and is in the public interest. Therefore, it is

ORDERED that the Motion to Approve Settlement is granted. The Respondent is directed to pay a Civil Penalty of \$23,500.00 within 30 days of the date of this Order. The parties are to bear their own costs. Upon receipt of the Civil Penalty directed in this Order, the Petition is **DISMISSED**.



Irwin Schroeder
Administrative Law Judge
703-756-5232

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 14, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-284-M
Petitioner	:	A. C. No. 23-02207-05501
	:	
v.	:	
	:	
NELSON BROTHERS QUARRIES,	:	
Respondent	:	Jasper Quarry

DECISION

Appearances: Daniel J. Haupt, Conference & Litigation Representative, U.S. Department of Labor, Mine Safety & Health Administration, Dallas, Texas, on behalf of Petitioner;
Paul M. Nelson, President, Nelson Brothers Quarries, Jasper, Missouri, on behalf of Respondent.

Before Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994) *et seq.*, the "Act," charging Nelson Brothers Quarries (Nelson Brothers) with seven violations of mandatory standards and proposing civil penalties of \$472.00, for those violations. The general issue before me is whether Nelson Brothers violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Both parties filed post hearing briefs. It is noted however that the brief of the Respondent, contains statements that are not supported by the trial record. To the extent that such statements are without such record support they cannot, of course, be given evidentiary weight.

Citation No. 6205045 alleges a violation of the standard at 30 C.F.R. § 56.14107(a) and charges as follows:

The drive coupling for the electric water pump located in the pit was not guarded to prevent employee contact. The coupling and keyed shaft were approximately 6-inches long. This condition created an entanglement hazard to employees.

The cited standard, 30 C.F.R. § 56.14107(a), provides that “moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and take-up pulleys, flywheels, couplings, shafts, fan blades and similar moving parts that can cause injury.” Wesley Hackworth, an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA) testified that on March 13, 2001, he was performing an inspection of the Jasper Quarry, accompanied by Paul Nelson, Nelson Brothers’ President. According to Hackworth, the drive coupling for the electric water pump, located in the pit and used to drain water out of the west pit, was not guarded. The coupling was not smooth and 1/8 to 1/4 inch projections protruded from it. In addition a small keyed area on the shaft was exposed which also created an entanglement hazard .

Hackworth credibly testified that a person becoming entangled in the unguarded coupling could suffer permanently disabling injuries. He opined however that injuries were unlikely since no employees were required to be in the cited area. Within the above framework of evidence I conclude that the violation is proven as charged but that such violation was of low gravity. The Secretary’s finding of low negligence, based on Mr. Nelson’s good faith but incorrect belief that the coupling was smooth, is accepted for purposes of assessing a civil penalty herein.¹

In reaching these conclusions I have not disregarded the testimony of Foreman Ralph Carter, that he was unable to see, in the Respondent’s photographs in evidence (Exh. R-1 and R-2), any of the projections in the coupling described by Inspector Hackworth. Indeed, the cited photos do not appear to depict any projections. However, the photos also do not appear to show all 360 degrees of the shaft and, in particular, the area described by Hackworth in Petitioner’s Exhibit No., 1 p. 2. Under the circumstances and in light of Inspector Hackworth’s credible affirmative testimony I can give Carter’s inability to see the violative conditions in the Respondent’s photographs but little weight.

I have also not disregarded Mr. Nelson’s argument, presented at hearing, that the cited standard is in conflict with the Occupational Safety and Health Administration’s (OSHA) standard at 29 C.F.R. § 1910.219(h)(1)(i)(2) and that it therefore is incompatible with the “Interagency Agreement” between MSHA and OSHA, dated March 29, 1979. In particular, Mr. Nelson cites Section D of that agreement which provides as follows:

MSHA and OSHA will endeavor to develop compatible safety and health standards, regulations and policies with respect to the mutual goals of the two organizations including joint rulemaking, where appropriate. This interagency coordination may also include cooperative training, shared use of facilities, and technical assistance.

¹ The Secretary appears to have modified the inspector’s initial findings of “moderate” negligence to “low” negligence.

The above statement does not, however, provide any basis to invalidate the standard cited herein. I also note that, while the OSHA standard cited by Mr. Nelson is more specific in describing the hazard to be protected against, the standards are not at all inconsistent. Under the circumstances the Respondent's arguments in this regard are rejected.

Citation No. 6205046, as amended, charges a violation of the standard at 30 C.F.R. § 56.12004, and alleges as follows:

The 480-volt power cable supplying power to the electric water pump was not properly fitted at a female termination plug. The inner conductors were exposed out from the outer jacket and were clamped into the plug. There was no apparent damage to the insulation on the inner conductors. This condition created a hazard of the inner conductors being damaged and an employee being shocked.

The cited standard, 30 C.F.R. § 56.12004, provides in relevant part that "electrical conductors exposed to mechanical damage shall be protected."

Inspector Hackworth testified that the inner conductors were indeed exposed as identified in the photograph in evidence (Exh. P-2). Although no bare wires were exposed, the insulation on the wires was soft and could be damaged from pump vibrations or from repeated unplugging. Hackworth opined that the condition would not likely cause injury since there was no apparent damage or exposed wires. He noted however, that if the wires should become exposed there was a hazard of fatal injuries by electrocution. The testimony of Foreman Carter, that the electrical wiring was deenergized before being handled and that it was the unwritten company policy that employees do not touch the plug until the wires are deenergized, reinforces the Secretary's conclusion that the cited condition was of low gravity. While the operator's evidence does tend to reduce the exposure potential, and I agree that gravity was low, I do not find sufficient credible evidence to negate the violation itself.

Even assuming, *arguendo*, that the condition created no hazard, as Respondent argues in its brief, it is the established law that the Mine Act imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. *See Allied Products Inc.*, 666 F.2d 890, 892-93 (5th Cir. 1982).

Inspector Hackworth found the operator chargeable with low negligence since the condition was not highly visible. I accept those findings, which are supported by the record, for purposes of assessing a civil penalty.

Citation No. 6205047, as amended, alleges a violation of the standard at 30 C.F.R. § 56.12040 and charges as follows:

There were three filler plates missing from the 120 volt breaker box in the crusher control booth. The breakers in the box were in use except for one. This condition created a shock hazard to employees when turning the breakers on or off.

The cited standard, 30 C.F.R. § 56.12040, provides that “operating controls shall be installed so that they can be operated without danger of contact with energized conductors.” Inspector Hackworth testified that he observed that three filler plates were missing from the 120-volt breaker box in the crusher control booth. The existence of this condition is not disputed by the operator and accordingly the violation is proven as charged. Hackworth described the hazard created by the cited condition as exposure of employees to electrical shock when turning the breakers on and off. According to Hackworth there was a hazard of shock or electrocution if any employee’s fingers should slip or an employee could fall with his hand contacting the energized conductors. Hackworth concluded, however, that injuries were unlikely explaining that the door to the breaker box was kept closed and that the exposed openings were small.

The testimony of Foreman Carter confirms the low gravity of the violation. Carter testified that the circuit breaker was located on a wall behind the crusher control operator and that it was company policy to keep the door shut on the breaker box. Carter also testified that when occasional work is performed on the electrical system it is company policy to shut down the main power source.

Respondent argues in its post hearing brief that the cited circuit breaker box does not have “operating controls” within the meaning of the cited standard. Inspector Hackworth credibly testified however that the tags or handles (little red handles) on the breakers constituted “operating controls.” There is no contrary evidence and Respondent’s argument is accordingly without record support. To the extent Respondent also argues based other alleged evidence not in the record, those arguments must also be rejected.

The Secretary found low operator negligence apparently based on the fact this was the mine’s first inspection. This finding is accepted for purposes of assessing a civil penalty.

Citation No. 6205048 alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.14112(b) and charges as follows:

The top and back sections of the guards for the self cleaning tail pulley on the 7-8 concrete conveyor were off missing. The guards had been removed for cleaning and were not put back on. The condition was highly visible and should have been noticed and corrected. This condition created an entanglement hazard to employees.

The cited standard, 30 C.F.R. § 56.14112(b), provides as relevant hereto that “guards shall be securely in place while machinery is being operated . . .” Inspector Hackworth testified, and it

is undisputed, that the guards had been removed from the tail pulley for cleaning and had not been replaced at the time of his inspection. Since it is undisputed that the cited guards were not in place while the conveyor was in operation the violation must be affirmed.

According to Hackworth there was an entanglement hazard presented by the violation since the pulley had wings and splines on it. He concluded that it was reasonably likely for an employee to become entangled since the area was readily accessible to employees. Foreman Carter testified however that the cited area was effectively inaccessible. To gain access one would have to "climb over things" to get to it. According to Carter it was therefore unlikely for someone to walk into or fall into this area. Carter also testified that he had never seen anyone in the plant area and employees are not allowed in that area while the plant is in operation. Moreover, according to Carter, if a customer should stray into the plant area the operator shuts the plant down. He also noted that maintenance is not performed while the plant is in operation. When the plant is started the operator waits for the startup signal and no one is then in the plant.

In light of Mr. Carter's first hand knowledge as to the plant operations I give his testimony significant weight and conclude that indeed, the cited area was generally not easily accessible and that therefore injuries from the unguarded tail pulley were not reasonably likely. Under the circumstances I do not find that the violation was "significant and substantial." In her post-hearing brief the Secretary appears to now concede the issue also based upon Foreman Carter's greater knowledge of the operating conditions.

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

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to

abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

I do find however that the violation was the result of significant operator negligence. It is not disputed that the guards had been removed for the purposes of cleaning the area and had not been replaced for a week. Respondent Nelson, also admitted that he had been in the area during the startup and under such circumstances should have seen the absence of the guards - - an obvious condition according to Inspector Hackworth. The condition was abated by replacing the guards.

Citation No. 6205050 alleges a violation of the standard at 30 C.F.R. § 56.20003(a) and charges as follows:

The motor control trailer was not kept clean and orderly. The floor of the trailer was cluttered with tools, extension cords, nuts, bolts and belt splicing materials. The materials were in the middle and west end of the trailer. This condition [*sic*] created a trip or fall hazard to employees.

The cited standard, 30 C.F.R. § 56.20003(a), provides that at all mining operations “workplaces, passageways, store rooms and service rooms shall be kept clean and orderly.”

Inspector Hackworth testified that in the motor control trailer he found a number of items laying on the floor including, as depicted in his diagram, nuts, bolts, hand tools, extension cords, belt fasteners and plates used for splicing belts. According to Hackworth the items were readily visible and presented a slipping, tripping and falling hazard. The items were located in the middle of the floor and affected access to the trailer. He concluded that injuries were reasonably likely to an employee who might slip or fall in attempting to retrieve tools or parts and that the injuries would likely result in lost work days and restricted duty, from strains, sprains and twisted ankles.

According to Foreman Carter, the trailer is entered twice daily, usually by way of the side door, to turn the power on and off. In addition, once or twice a week one would turn left to reach for parts or tools. Carter admitted that the floor was cluttered but maintained that there was walking space in between the clutter and that it took him only 20 minutes to clean it up. Carter also observed that the condition had existed for several weeks and that he was sure that everyone knew that the material was on the floor.

The Secretary in her post-hearing brief now concedes that Carter had greater knowledge of the conditions and requests a corresponding modification of the citation and penalty. While I do find that a violation in fact existed as charged, under the circumstances I find that the violation was neither “significant and substantial” nor of significant gravity.

Hackworth concluded that the operator was moderately negligent because the condition was readily visible. This finding is not disputed and is accepted for purposes of assessing a penalty. Carter also acknowledged that the cluttered condition had existed for a couple of weeks and this acknowledgment further supports these negligence findings.

Citation No. 6205051, alleges a violation of the standard at 30 C.F.R. § 56.12001 and charges as follows:

The screening conveyer disconnect box was not provided with proper fuse protection. There were three different size fuses in the disconnect box. There was one-20 amp fuse, one-25 amp fuse and one-30 amp fuse. This condition created a hazard of an employee being injured should the circuit protection fail to break the circuit.

The cited standard, 30 C.F.R. § 56.12001, provides that “circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.”

Inspector Hackworth testified that the disconnect box indeed did not have proper fuse protection for the screening conveyer circuit which had a ten-horse power motor. According to Inspector Hackworth the National Electrical Code, the accepted industry standard, provides that a 24.5-ampere fuse would be required under the circumstances. A 30-ampere fuse was being used here. According to Hackworth such a fuse would not break the circuit in the presence of an excessive overload. Based on Hackworth’s credible testimony I find that the violation is proven as charged.

In its post-hearing brief Respondent argues that the National Electric Code actually permits a 31.5 ampere fuse. Respondent also encloses a portion of a document (not introduced at hearing) purporting to be extracted from the National Electric Code. Respondent failed however to support this argument at the evidentiary hearing with the necessary testimony, under oath and subject to cross examination, and with properly authenticated documentary evidence. I therefore cannot give any weight to the Respondent’s argument herein.

Hackworth found gravity to be low and injuries unlikely because a short or fault would have to occur with an employee near the motor circuit in order to cause injuries. If an injury occurred however, the electrical shock could result in fatal injuries. Hackworth found the operator chargeable with moderate negligence since it had received two warnings in a prior compliance assistance visit regarding the same condition. Within this framework of evidence I find that the violation is proven as charged, that gravity was low and that negligence was moderate.

Citation No. 6205053 alleges a violation of the standard at 30 C.F.R. § 56.14132(a) and charges as follows:

The backup alarm on the Caterpillar D8K Dozer, was not maintained in functional condition. The wire to the battery was pulled loose and the alarm would not work. This condition created a hazard to an employee being backed over by the dozer.

The cited standard, 30 C.F.R. § 56.14132(a) provides that “[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.”

Inspector Hackworth testified without contradiction that the backup alarm on the cited dozer would not sound when the dozer was placed in reverse. It appears that the wire connections to the battery had corroded, causing the malfunction. Respondent argues in its brief that it should not be charged with violations resulting from corrosion because that is something beyond its control. No evidence has been presented however to suggest that corrosion cannot be controlled through proper maintenance or that such a condition could not be discovered upon proper inspection. In any event it is the well-established law that violations under the Act may be found regardless of whether the operator is at fault. *See e.g., Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). Accordingly I find the violation proven as charged.

Hackworth found that the violation was of low gravity concluding that injuries were unlikely since the equipment operated in an area where there were no other employees. He did note, however, that injuries could be fatal if a pedestrian was run over. Hackworth also found the operator chargeable with low negligence in reliance upon Mr. Nelson’s statement that the alarm was functioning the last time the dozer was driven. The violative condition was abated when Carter repaired the alarm by clipping off the corroded end of the wire conductor and reconnecting it. According to Carter, this procedure took only two minutes. The inspector’s findings of gravity and negligence are accepted for purposes of assessing a civil penalty herein.

Civil Penalties

Under Section 110(i) of the Act, Commission judges must consider the following criteria in assessing a civil penalty; the operator’s history of previous violations, the appropriateness of such penalties to the size of the business of the operator charged, whether the operator was negligent, the affect 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.

The gravity and negligence relating to each violation have previously been discussed. Respondent has a significant history of violations as evidenced by Petitioner’s Exhibit No. 8. It has been stipulated that the operator herein is a metal/non-metal mine operator with 1,960 hours worked in the last two quarters of the year 2000. The operator is therefore small in size. There is no dispute that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. The operator has the burden of proving that a particular civil

penalty would affect its ability to remain in business. *Broken Hill Mining Co.*, 19 FMSHRC 673 (April 1997). In the absence of specific proof that the penalties would affect the operator's ability to continue in business it is presumed that there would be no such adverse affect. See *Sellersburg Stone Company*, 5 FMSHRC 287 (March 1983) *aff'd* 736 F.2d 1147 (7th Cir. 1984).

ORDER

Citations No. 6205048 and 6205050 are hereby modified to delete the "significant and substantial" findings. All remaining citations are affirmed and Nelson Brothers Quarries is directed to pay the following civil penalties within 40 days of the date of this decision: Citation No. 6205045 - \$55, Citation No. 6205046 - \$55, Citation No. 6205047 - \$55, Citation No. 6205048 - \$75, Citation No. 6205050 - \$65, Citation No. 6205051 - \$55, Citation No. 6205053 - \$55.



Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 14, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. KENT 2000-133
	:	A.C. No. 15-18030-03507
	:	
v.	:	
	:	
COUGAR COAL COMPANY, INC., Respondent	:	Mine No. 8
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. KENT 2000-277
	:	A.C. No. 15-18030-03508A
	:	
	:	
v.	:	
	:	
	:	
LESLIE B. COMBS, employed by COUGAR COAL COMPANY, INC., Respondent	:	Mine No. 8
	:	

DECISION

Appearances: Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary;
Michael J. Schmidt, Esq., Wells, Porter, Schmidt & Jones, Paintsville, Kentucky, for the Respondents.

Before: Judge Weisberger

INTRODUCTION

In June 1999, the Cougar Mine No. 8 site at issue was no longer producing coal, as it's coal had been depleted, and the site was in the process of having it's equipment dismantled and moved to another location. Among the pieces of equipment to be moved was a power center. A high line cable that extended from a utility pole ("A-1 pole") provided the source of electricity to

the power center, which in turn supplied electricity to various underground equipment. Each of the three phases located inside the high line cable that ran from the A-1 pole to the power center was connected, respectively, to one of the three disconnect switches located 22 feet above the ground on the middle cross-arm of the A-1 pole. The top of each of these three disconnects was connected to a phase that extended 1.2 miles to the main line located at the mouth of Butcher Hollow. When the disconnect switches were closed, electric current was then allowed to flow from the main line to the power center. When the disconnects at the A-1 pole were open, electric current could not flow from the main-line to the high line cable located at the bottom of the disconnect and then to the power center.

On June 16, 1999, Paul Preece, who was not a qualified electrician, was at the site to assist in the removal of equipment owned by the Cougar Coal Company ("Cougar"). He opened a series of disconnect switches, and disconnected a series of capacitors that were mounted on the B-1 utility pole located midway between the A-1 pole and the main line at Butcher Hollow. Preece then used the boom of a boom truck to ascend the A-1 pole. Preece, who was not wearing a hat or any kind of restraining device that would have kept him from falling, climbed onto one of the cross-arms of the pole, and began to undo the terminals connecting the phases from the high line cable to the bottom of the disconnect switches. He inadvertently came in contact with one of the phases, and was subjected to 7,200 volts of electricity. Preece then fell 22 feet from the cross-arm. Before he landed on the ground, his head had struck the edge of the power center. He was found unconscious and without any pulse. Preece was revived, but as a result of the shock and fall, suffered lacerations to his head, serious burns, a fractured vertebra in his neck, and had to be hospitalized for several weeks. As of July 17, 2001, he had not returned to work.

After the accident, Cougar moved the boom truck from the accident site without first obtaining permission from MSHA, and failed to notify MSHA of the accident.

Subsequent to an investigation, MSHA Inspector Mark V. Bartley, issued, to Cougar, three Section 104(d) orders alleging violations of 30 C.F.R. §§ 77.807-2, (Order No. 7352787), 77.1710(g), (Order No. 7352788), and 77.501, (Order No. 7352789), respectively. He also issued a Section 104(d) citation alleging a violation of 30 C.F.R. § 77.704-1(b), (Citation No. 7352786), and two Section 104(a) citations alleging violations of 30 C.F.R. §§ 50.12, (Citation No. 7352790) and 50.10, (Citation No. 7352791), respectively. The Secretary in the proceeding seeks civil penalties to be imposed as a result of these violations. Additionally, the Secretary seeks the imposition of a civil penalty under Section 110(c) of the Act against Leslie B. Combs¹ in connection with the alleged violation by Cougar of Section 77.501, supra.

A hearing was held regarding these proceedings in Louisa, Kentucky.

¹Combs was the general manager of Eagle Rock, and was authorized to be responsible for the removal of the mine equipment at the site at issue.

DISCUSSION

I. Citation No. 7352786, and Order Nos. 7352787, 7352788, 7352789 and Combs' Liability Under Section 110(c) of the Act.

A. Violation of Section 77.501, supra (Order No. 7352789)

Order No. 7352789 alleges a violation of 30 C.F.R. Section 77.501 which, as pertinent, provides as follows: “[n]o electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person.” Cougar, in its brief, indicates that it does not dispute that the actions of Preece were a violation of Section 77.501, supra. Since Cougar does not dispute the Secretary’s assertion and proof in this regard, I find that Cougar did violate Section 77.501, supra.

1. Combs' Liability Under Section 110(c) of the Act Regarding the Violation of Section 77.501, supra, and Cougar's Unwarrantable Failure in Connection With This Violation

a. Combs' Actions and His Liability Under Section 110(c) of the

Act

In order for the Secretary to establish Combs’ liability under Section 110(c) of the Act in connection with the violation of Section 77.501, supra, it must be proven by the Secretary that Combs “knowingly authorized, ordered or carried out such violation” (Section 110(c) supra). There is no evidence that Combs ordered or carried out the violation. Thus, to prevail, the Secretary must establish that Combs “knowing authorized” the violation. In Freeman United Coal Mining Co. v. FMSHRC 108 F. 3rd 358, 363 (D.C. Cir 1997), the D.C. Civil Court of Appeals found reasonable the Commission’s definition of “knowingly” set forth in Secretary of Labor v. Richardson 3 FMSHRC 8, 16 (1981), aff’d 689 F. 2nd 632 (6th Cir. 1981) as follows:

“Knowingly,” as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means *knowing or having reason to know*. A person has reason to know when he has such information as would lead a person exercising reasonable case to acquire knowledge of the fact in question or to infer its existence. (Internal quotations omitted.)

The only evidence² relied on by the Secretary in support of her position that Combs authorized Preece to climb the A-1 pole and remove the high line from the disconnects, consists of two hearsay statements made by Preece.

On July 15, 1999, in his hospital room, Preece told MSHA Inspector Mark Bartley, and Kentucky Department of Mines and Minerals, Inspector Wes Gerhard, that when he suggested to Combs that the high line could be saved by taking it down from the utility pole, Combs instructed Preece to take a hot stick and pull the fused disconnects located at the mouth of the hollow. (Gx. 6).

MSHA Special Investigator, Douglas Fleming, testified that on October 17, 1999, he interviewed Preece at his home. According to Fleming, Preece told him that when Combs told him (Preece) to cut the high line at the power center, he (Preece) told Combs that the high line could be saved by disconnecting it from the utility pole, and that Combs responded by telling him (Preece), that, in essence, if he (Preece) took this action, to make sure that the disconnects were pulled. Although Preece's hearsay statements to the inspectors were recorded, I find them unreliable, inasmuch as they were not corroborated by any other witness. Also, significantly, they were essentially recanted by Preece in his sworn testimony at the hearing.

In contrast to Preece's hearsay statements relied on by the Secretary, Combs, who was Preece's supervisor, testified that on June 15, 1999, in the evening, he told Preece that the power center on the subject site was to be removed, and that all electric power to the power center had been disconnected. Combs told Preece to disconnect the high line from the power center by cutting it with a hacksaw at a point about six to eight inches from the place where the high line entered the power center, or to loosen a wire from inside the power center. According to Combs, Preece said, in response, that he would probably take the wire down from the A-1 pole disconnect, as that was an easier task to perform. Combs testified that he then told Preece that should McCoy Contractors be present at the site, to let them disconnect the wire from the pole. According to Combs he told Preece that should McCoy Contractors not be at the site, then Preece should disconnect the high line at the power center. Combs denied telling Preece that if Preece were to disconnect the high line at the pole, he was to make sure that the disconnects were pulled at the main line located in the hollow. Combs stated that the following day, in the shop, he again informed Preece, to cut the high line at the entrance to the power center. Since Preece, in his

²The Secretary argues that her finding of unwarrantable failure regarding Cougar's violation of Section 77.501, supra, (Order No. 7352789), and the 110(c) action against Combs, is based "at least [in] part", on the instructions that Combs, who was the general mine manager and was responsible for the removal of the equipment at the subject site, gave to Preece, to cut the high line cable near the power station even though he knew that Preece was not a qualified electrician. This argument is without merit, inasmuch as Preece never did cut the high line cable near the power station, and the 77.501 supra violation was based only on Preece's action, not on action not taken by him. Hence, Combs' instructions can not form the basis of a 110(c) violation in connection with the violation of Section 77.501 supra at issue.

testimony did not contradict Combs' version of the conversations at issue, I accept Combs' version.

For the reasons set forth above, and placing most weight upon the testimony of Combs, whom I found credible, I find that the Secretary has not established that Combs authorized Preece's actions that constituted violations of Section 77.501, supra. Further, I find that there is no evidence that Combs had actual knowledge of these actions.

The Secretary further asserts, in essence, that an additional basis for a finding of Section 110(c) liability on Combs' part is his failure to have been on the site on June 16 to carefully supervise Preece. In this connection, the Secretary argues that since Preece had expressed to Combs, on June 15, and again on June 16, his interest in ascending the A-1 pole to remove the high line at the disconnect in order to save the line, it should be inferred that Preece might disregard his (Combs') order not to take this action. The Secretary argues that, accordingly, Combs should have been on the site on June 16 to carefully observe Preece. There is no evidence to suggest that Preece had on any occasion, disregarded an order of a supervisor or had proceeded to act contrary to such an order. Thus, I find the Secretary's argument too speculative to support a finding that Combs demonstrated "aggravated conduct" as opposed to "ordinary negligence".

For all the above reasons I conclude that it has not been established that Combs violated Section 110(c), supra, See, Beth Energy Mines, 14 FMSHRC 1232, at 1245 (1992)).

2. Cougar's Unwarrantable Failure

a. Jarvis' Actions

In essence, the Secretary argues that a finding of unwarrantable failure may be based on the following assertions regarding Rick Jarvis, the mine foreman supervising the dismantling of the equipment at the site: (1) that Jarvis gave Preece a hot stick for the purpose of de-energizing the main circuit; (2) that Jarvis instructed Preece what to do with the hot stick; (3) that accordingly, Jarvis knew that Preece was intending to climb the A-1 pole to disconnect the high line from the disconnect terminals and; (4) that Jarvis knew that Preece was not a qualified electrician.

The Secretary adduced a statement signed by Rick Jarvis, that on June 16, "Paul said he would pull the disconnects." (Gx. 17, p. 2) In addition, Preece, in his testimony as part of the Secretary's case, and in a recorded statement, indicated that prior to his ascending the A-1 pole, he had obtained a hot stick from Jarvis, and the latter told him "[t]o make sure I push the button to ground the capacitors." (Tr. Vol III, 37) Further, the Secretary's witnesses testified that the only use for a hot stick is to open or close fuse disconnects. Since none of these facts were impeached, contradicted or rebutted by Cougar, an inference may be drawn that Jarvis, being the supervisor on the site, should reasonably have taken steps to ensure that the hot stick would be used only by a qualified electrician. The Secretary argues that Jarvis' conduct, in this regard,

rose to the level of aggravated conduct inasmuch as he knew that Preece was not a qualified electrician. However, Jarvis was not called to testify by the Secretary or by Cougar, to establish that he had personal knowledge of this fact. Nor did any person testify that Jarvis was either informed that Preece was not a qualified electrician, or was provided with written documentation of that fact. Hence, there is insufficient evidence in the record to predicate a finding that Jarvis knew or reasonably should have known that Preece was not a qualified electrician.

The Secretary argues, in essence, that since, according to Preece, Jarvis told the latter to make sure to push the buttons on the capacitors when he gave him the hot stick, it is to be inferred that Jarvis opined that Preece did not have expertise in de-energizing electrical lines, and had to be instructed how to perform such a procedure. Hence, according to the Secretary, it is to be concluded that Jarvis did not believe the Preece was a qualified electrician. I find that this inference, going to Jarvis' state of mind, to be too speculative to predicate a finding that Jarvis knew or should have known that Preece was not a qualified electrician. I thus conclude the Secretary has failed to establish that a finding of unwarrantable failure can be based on Jarvis' actions.

b. Combs' Actions

For the same reasons set forth above, regarding the analysis of the analysis of the level of Combs conduct pertaining to Section 110(c) liability, I(A)(1)(a), infra, I conclude that the Secretary failed to establish that Combs' actions rose to the level of aggravated conduct relating to the violation of Section 501, supra.

Accordingly, after evaluating the actions of Jarvis and Combs, I find that the Secretary has not established that Cougar's violation of Section 77.501, supra, was as the result of its unwarrantable failure.

3. Significant and Substantial

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).

The evidence clearly establishes that the violation herein, Pierce's pulling disconnects, contributed to the risk of the hazard of contact with high voltage electric lines or equipment. Also, inasmuch as this resulted in an injury of a reasonably serious nature to Preece, I conclude that all the elements set forth in *Mathies*, *supra*, have been met and therefore it has been established that the violation was significant and substantial.

4. Penalty

I find that the level of gravity of the violation to have been extremely high inasmuch as it did in fact result in contact with equipment energized at 7,200 volts, which could have caused a fatal injury. I find this a significant element in analyzing the matrix of the factors set forth in Section 110(c) of the Act. I have considered Cougar's violation history, the fact that there is not any evidence that the imposition of the penalty would adversely affect its ability to continue in business, the lack of any evidence of non-good faith abatement, and the fact that Cougar is a small mine. I note, however, that the Secretary has asserted that Cougar's negligence rose to the level of unwarrantable failure, which, in essence, is equated with aggravated conduct. For reasons discussed above, (I)(A)(1), *infra*, I find that Cougar's negligence did not reach this level and was not more than moderate. Accordingly, the high penalty sought by the Secretary is to be reduced significantly, as the record establishes that the level of Cougar's negligence to be considerably less than that asserted by the Secretary, which had formed one of the bases for the penalty it was seeking. I conclude that a penalty of \$30,000 is appropriate for the violation of Section 77.501, *supra*, (Order No. 7352789).

B. Citation No. 7352786

1. Violation of Section 77.704-1(b), supra

The parties stipulated that the Cougar did violate Section 77.704-1(b), *supra*, and I accept this stipulation and so find.

2. Unwarrantable Failure

The specific violative acts of Preece, attributed to Cougar that have been stipulated to as constituting the violation of Section 77.704-1(b), are as follows: (1) attempting the de-energize the three phase power line supplying power to the mine, and (2) ascending the A-1 utility pole

and trying to undo the terminals connecting the high line to the disconnect switches. The record is devoid of any evidence tending to establish that on June 16 Jarvis could reasonably have anticipated that any of Cougar's employees were going to disconnect a high line from the fused disconnect on the A-1 pole.³ Accordingly, there is no basis to predicate a finding that Jarvis, in his capacity as supervisor on the site, could reasonably have anticipated Preece's unauthorized action removing the high line at the disconnect on the A-1 pole. Further, as discussed above, the record does not support a finding that Combs either authorized or approved Preece's action in this regard and had, indeed, indicated his opposition to it. I find that the Secretary has not established that Cougar's violation of Section 77.704-1(b) was the result of its aggravated conduct, and thus can not be determined to be an unwarrantable failure (see Emery, supra).

3. Significant and Substantial

For the reasons set forth above regarding the violation of Section 77.501, supra, ((I)(A)(2), infra), inasmuch as the underlying act and location of both these violations were the same, I find that the violation of Section 77.704-1(b), supra, was significant and substantial (see Mathies, supra).

4. Penalty

I note that the Secretary seeks a penalty of \$55,000 for the violation of Section 77.704-1(b), supra. Since the acts and conditions surrounding the violation were the same, essentially as that which gave rise to the violation of Section 77.501, supra, I find that for the reasons discussed therein that the violation herein, which could have led to a fatality was of a very high level of gravity. I note, however, that the Secretary has asserted that Cougar's negligence rose to the level of unwarrantable failure, which, in essence, is equated with aggravated conduct. For reasons discussed above, (I)(B)(2), infra, I find that Cougar's negligence did not reach this level and was not more than moderate. Accordingly, the high penalty sought by the Secretary is to be reduced significantly, as the record establishes that the level of Cougar's negligence to be considerably less than that asserted by the Secretary, which had formed one of the bases for the penalty it was seeking. The additional factors set forth in 110(i) of the Act were discussed regarding the violation of Section 501, supra, (I)(A)(4), infra, and are common to all the matters at issue herein, and I reiterate those findings. Thus, taking into account all the above factors, placing considerable weight on the act that Cougar's negligence was significantly less than that asserted by the Secretary, I find that a penalty of \$30,000 is appropriate for this violation.

³Indeed, the unimpeached and uncontradicted testimony of Dennis Jewel, one of Cougar's electricians, Johnny McCoy, one of the principals of McCoy Contractors, Inc., and Billy R. Cantrell, the president of Azar Coal Corporation, who oversees the installation and removal of electric lines at various companies including Cougar, established that it is standard procedure for McCoy Contractors to dismantle and remove Cougar's high line wires, and this activity is not done by any of Cougar's electricians.

C. Order Nos. 7352787 and 7352788

1. Violation of Sections 77.807-2, supra, and 77.1710(g), supra.

Cougar was cited with violations of 30 C.F.R. Section 77.807-2 and 77.1710(g), supra. It was stipulated by the parties that in using the boom of a truck to ascend the A-1 pole, Preece was operating the boom of the truck within 10 feet of energized power lines in violation of Section 77.807-a, supra. It was further stipulated that while ascending the A-1 pole, and climbing onto the cross-arm, Preece was not using any kind of safety or harness device which would have prevented him from falling, which was a violation of Section 77.1710(g), supra. In light of these stipulations, I find that Cougar did violate Section 77.807-2, supra, and Section 77.1710(g), supra

2. Significant and Substantial

Since Preece's actions in violating Section 77.807-2 and Section 77.1710(g), supra, were all, essentially, a part of the same action and activity as the actions constituting violations of Sections 501 and 1704-1(b), supra, and since the former two violations were found to be significant and substantial, for the same reasons set forth above, I find that the violations of Section 77.807-2, supra, and Section 77.1710(g), supra, similarly to be significant and substantial.

3. Unwarrantable failure

The Secretary argues that a finding of unwarrantable failure should be predicated on Combs' action in authorizing Preece to climb the pole at issue, which led to the violations cited, and which evidenced Combs' inadequate supervision. This argument had been advanced by the Secretary and rejected above in the analysis of Combs' liability under Section 110(c) of the Act. (I)(A)(1)(a), infra.

The Secretary also argues that since Jarvis gave Preece a hot stick and told him what to do with it, he therefore knew Preece intended to climb the pole. The Secretary asserts that Jarvis was within clear sight of Preece during the entire time that Preece moved the boom within 10 feet of the energized lines, raised himself up to the cross-arms at the A-1 pole without a harness or restraining device, and began to loosen the high line from the A-1 disconnects.

In addition, the Secretary argues that these violations were the direct result of Jarvis' inadequate supervision. In this connection, Combs, in a signed statement, indicated that he had told Jarvis, on June 16, that "we would be moving that day", and that Preece and another worker would be bringing the boom truck. This hearsay statement was not impeached when Combs testified, nor was Jarvis called to testify to contradict this statement. Accordingly, I find that Jarvis, was aware that a boom truck was going to be brought on the site, and should reasonably have assumed some responsibility in supervising that the boom truck would be used properly.

According to the uncontradicted testimony of Preece, Jarvis gave him a hot stick. Thus, Jarvis should have ensured that it would be used by a qualified electrician to open the disconnects. However, there is no evidence that Preece used the hot stick in any actions that led to the two specific violations at issue herein. There is not any evidence that Jarvis knew or reasonably should have been expected to know that Preece would initiate the action of climbing the A-1 pole to work on the middle arm, which directly led to these violations. In this connection, the Secretary relied upon inspector Bartley's testimony that Jarvis, on June 16, most certainly would have to have seen the boom extended from the surface of the property, and thus was, in essence, guilty of aggravated conduct in not making sure that the boom truck was not within 10 feet of the high line. Bartley's testimony is at best speculative since he was not on the site at the time, and did not have personal knowledge of Jarvis' location, vis a vis the A-1 pole during the events at issue. Nor is there any testimony by any other witness placing Jarvis, during the time of the events at issue, in a location which would have given him a direct unobstructed line of sight to the portion of the pole at issue. The only evidence relating to Jarvis' location at that time, consists of a written statement signed by him to the effect that at the time of the accident he was loading the belts structure on the scoop. There is no evidence in the record, relating the location of the belt structure on the scoop to the A-1 pole, either in terms of horizontal or vertical distance. Nor is there any evidence relating to the contour of the site, or the presence or absence of obstructions between these two locations.

Accordingly, for all the above reasons, I find that although Jarvis was negligent in his supervision it has not been established that the level of this negligence reached aggravated conduct. Accordingly, I find that it has not been established that these violations resulted from Cougar's unwarrantable failure. (See Emery, supra)

4. Penalty

a. Violation of Section 77.1710(g), supra.

The evidence clearly establishes that the violation herein of not using a safety belt or a harness device while climbing onto the cross-arm of the A-1 pole, in close proximity to a energized high voltage electrical equipment, was a violation of a very high level gravity, as it could have resulted in a serious injury. However, the penalty sought by the Secretary, appears to be predicated upon a level of negligence equal to aggravated conduct. For the reasons set forth above, (I (C)(3)), infra, I find that although Cougar was negligent, the level of its negligence was not as high as aggravated conduct. Hence, the penalty sought by the Secretary is to be mitigated to a significant degree. Taking into account the additional factors set forth in Section 110(i) of the Act, as discussed above, (I(A)(3)), infra, which are the same for this violation, I find that a penalty of \$30,000 is appropriate for the violation of Section 77.1710(g), supra.

b. Violation of Section 77.807-2, supra

I find that the level of gravity of this violation was high, inasmuch as it provided access to

the pole for Preece, and thus facilitated contact with high voltage energized equipment which could have led to a fatality. However, I find that the penalty sought by the Secretary, is predicated to some degree upon the level of Cougar's negligence, which is asserted to have been high enough to have constituted aggravated conduct. For the reasons set forth above, (I(C)(3)), infra, I find that although Cougar was negligent, the degree of its negligence did not reach aggravated conduct. Accordingly, the penalty sought by the Secretary is to be reduced to a significant amount. Taking into account the additional factors set forth in Section 110(i) of the Act which are the same as discussed above, (I(A)(3)), infra, I find that a penalty of \$16,350 is appropriate for this violation.

II Citation Nos. 7352790 (Violation of 30 C.F.R. § 50.12) and 7352791 (Violation of 30 C.F.R. § 50.10)

A. The Violation of 30 C.F.R. §§ 50.12 and 50.10

30 C.F.R. § 50.10 provides, as pertinent, that “[i]f an accident occurs, an operator shall immediately contact ... MSHA.” (Emphasis added.) 30 C.F.R. § 50.12 provides, in essence, as pertinent, that “[u]nless granted permission by ... MSHA ..., no operator may alter an accident site or an accident related area until completion of all investigations”. (Emphasis added.)

The facts relating to both these Citations are not at issue. Relating to Section 50.10, supra, the parties stipulated that after the accident, Cougar failed to notify MSHA of the accident. Relating to Section 50.12, supra, the parties stipulated that after the accident, Cougar moved a boom truck and high voltage power center from the accident site without first obtaining permission from MSHA.

In order for the Secretary to establish that these acts of the operator violated Sections 50.10, supra, and 50.12, supra, respectively, it must be established that there was an “accident” as that term is defined in the regulations. 30 C.F.R. § 50.2 sets forth definitions of terms used in part 50 of the Code of Federal Regulations. 30 C.F.R. § 50.2(h)(2) provides, as pertinent, that an accident means “an injury to an individual at a mine which has a reasonable potential to cause death.” (Emphasis added.) The common meaning of the word injury means either an act that harms, or the damages suffered as a result of an act. However, inasmuch as in the regulatory scheme at issue an accident is defined, inter alia, as pertinent, as an injury having a reasonable potential to cause death, it is clear that the word injury as used in Section 50.2(h)(2), supra, defining an accident, means not the act itself, but rather the harm resulting from the act. In this context, an operator's responsibilities under Sections 50.10 and 50.12, supra, must be evaluated not in terms of an analysis of the act at issue i.e., coming in contact with 7,200 volts of electricity and falling at least 18 feet. Rather, the nature and extent of Preece's injuries must be evaluated as to whether they had a reasonable potential to cause death.

The parties stipulated that Preece received an electric shock of exposure to 7,200 volts and as a result fell 18 feet to the ground, and hit his head on the edge of the power center before

hitting the ground; that he was found on the ground with no pulse; that C.P.R. was administered to him and he revived; and that as a result of the electric shock and fall, he suffered lacerations to his head, serious burns, and a fractured vertebrae in his neck, and he had to be hospitalized for several weeks. In the Secretary's brief, the Secretary asserts that "it is within the realm of common knowledge that these injuries entail a reasonable potential to cause death." However, the Secretary did not adduce any medical evidence or cite any recognized medical authorities to support this conclusion. In support of her conclusion, the Secretary refers to the testimony of Inspector Bartley, who was trained as an accident investigator. However, there is no evidence that Inspector Bartley has any medical degree or received any medical education.

Further, Bartley's testimony related solely to the nature of the accident. He testified that based upon his investigations, most people die after coming in contact with 7,200 volts of electricity. He also testified that persons fall from heights lower than 18 feet, and suffer fatal injuries. This testimony, which relates to analysis of the act of the accident, is not relevant to an analysis of whether Preece's injuries had a reasonable potential to cause death.

The Secretary also asserts, referring to Preece's having broken his neck, that it is common knowledge that a broken neck can cause death. The Secretary, additionally, refers to Preece's testimony that his treating physicians told him that he was lucky that he didn't die as a result of having broken his neck. There is not any medical evidence cited by the Secretary, nor is any found in the record that supports the Secretary's assertion that it is common knowledge that a broken neck "can" cause death. Preece's hearsay testimony that his physician told him that he was lucky that he didn't die as a result of breaking his neck, is not accorded much weight as there is no medical evidence in the record to support a conclusion that Preece's injuries had a reasonable potential to cause death.

The record does not contain any evidence from any of the ambulance medical personnel who observed Preece at the site of the accident, regarding their observations and opinions relating to Preece's prognosis. Preece was taken from the accident site to the Emergency Department at the Paul B. Hall Regional Medical Center in Paintsville, Kentucky. The records from this department list the various signs of injury noted upon examination of Preece, as well as interpretation of tests taken, and diagnoses. However, no opinion was set forth regarding whether these injuries had a reasonable potential to cause death. Later on that day, Preece was transferred, by helicopter, to Cabell Huntington Hospital in Huntington, West Virginia. It is significant to note that when transferred Preece's condition was described in the emergency record as "serious". Thus, this medical evidence fails to establish that Preece's injuries were deemed either critical, or very serious by the emergency department.

The hospital records from Cabell Huntington Hospital indicate that the admitting physician noted various signs on examination, also, laboratory and x-ray findings were described. The assessment, upon admission was electrical injury, third degree burns, trauma patient, and multiple contusions. However, the physician did not set forth any opinion that the injuries were such that there was reasonable potential to cause death. It is significant that the admitting

physician noted that he had monitored Preece "constantly" during his emergency room stay, and Preece did not have any arrhythmia.

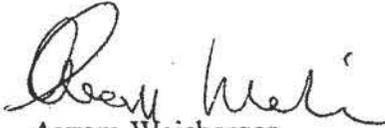
A consultation prepared on the same date noted that the extent of burns and findings were suggestive that an electric current may have followed a neurovascular tract down the right leg. However, the consulting physician set forth in his ASSESSMENT AND PLAN, a plan to treat Preece's burns. There is no indication that the assessment found there was any potential of these injuries to cause death.

Accordingly, I find that the Secretary has not adduced sufficient evidence to establish that Preece's injuries sustained on June 16 were such as to have had a reasonable potential to cause death. Nor does the record establish that Cougar's agents should reasonably have concluded that Preece's injuries had such a potential. Cougar's witnesses testified that when they observed Preece they were unable to observe the extent of his injuries, but that he was conscious, alert, responsive and coherent. Their testimony was not impeached or contradicted.

For these reasons, I find that it has not been established that on June 16 there was an "accident" at the site, as defined in Section 50.2(g)(2), supra. Thus, Cougar was not under any responsibility to fulfill the requirements of Sections 50.10 and 50.12, supra, which must be followed only in the event of any "accident". Accordingly, I find that Cougar did not violate Sections 50.10, supra, and did not violate Section 50.12, supra.

ORDER

It is **ORDERED** that (1) the following Citation and Orders be modified to indicate that they are not the result of Cougar's unwarrantable failure: Citation No. 7352786, and Order Nos. 7352787, 7352788 and 7352789; (2) Citation Nos. 7352790 and 7352791 be dismissed; (3) Docket No. KENT 2000-277 be dismissed; and (4) within 30 days of this Decision, Cougar shall pay a total civil penalty of \$106,350.


Avram Weisberger
Administrative Law Judge

Distribution (Certified Mail)

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/sc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

February 20, 20002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-20-M
Petitioner	:	A.C. No. 29-00762-05515
	:	
v.	:	
	:	SX/EW
CHINO MINES COMPANY,	:	
(previously captioned as Burro	:	
Chief Copper Company)	:	
Respondent	:	

DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor
Dallas, Texas, for Petitioner;
Katherine Shand Larkin, Esq., JACKSON & KELLY, PLLC,
Denver, Colorado, for Respondent;
Lawrence J. Corte, Esq., PHELPS DODGE CORPORATION, Legal
Department, Phoenix, Arizona, for Respondent.

Before: Judge Cetti

CHINO MINES COMPANY

The Chino Mines Company is owned and operated by Phelps Dodge Chino, Inc., and employs nearly 570 miners. The company's Solvent Extraction Mining Plant (SX/EW) is an open pit copper mine which employs approximately 40 miners. The location of the accident was the Motor Control Center (MCC) of the SX/EW plant tankhouse where the main 480-volt, 1200 amp current breaker exploded. (Tr. 22). There is no dispute as to the material facts of how, when, and where the accident occurred and the identity of the three employees who were injured.

I

THE ACCIDENT

On Saturday, June 7, 1997, at approximately 6:15 a.m., power was lost to the SX/EW tankhouse. The SX/EW Shift Supervisor, Larry Filkins and Solvent Extraction Operator, Bruce Shannon, requested a shift electrician to determine the cause of the power failure and to restore power. The Motor Control Center (MCC) consists of a large number of breakers and motor starters, variable frequency drives, and lights on the SX and EW plants. Upon initial inspection of the Motor Control Center, the employees noted that the auxiliary breaker for the tankhouse tripped. The main 480-volt, 1200-amp circuit breaker was manually turned off during Shannon's inspection. After several initial but unsuccessful attempts, Filkins was able to reset the main breaker but did not attempt to reset the auxiliary breaker.

The electrical supervisor, R. McSherry, and the shift electrician, Virgil Biambernandi, responded to the call for assistance and began to trouble-shoot the MCC. McSherry disengaged the main circuit breaker and Giambernandi isolated individual breakers to the SX/EW plant. McSherry then opened the outer cabinet of the main circuit breaker and began metering the main breaker to check voltage. He metered both the top and bottom of the breaker. After closing the cabinet doors, he again attempted to reset the breaker without success. McSherry followed the same procedure two more times. On the third attempt, an explosion and fire occurred at the main breaker at 6:45 a.m., seriously burning Filkins, Walter Gomez, and McSherry. Giambernandi was not injured. McSherry died early the next morning, June 8th, as a result of his burn injuries.

MSHA commenced its inspection and investigation of the June 7th accident about 3 p.m. on Monday, June 9. As a result of the inspection and investigation, Petitioner issued three 104(a) citations to Respondent. Citation No. 7859009 alleges a violation of 30 C.F.R. § 56.12002; Citation No. 7850488 alleges a violation of 30 C.F.R. § 50.10; and Citation No. 7850489 alleges a violation of 30 C.F.R. § 56.12.

II

STIPULATIONS.

At the hearing, the parties entered the following stipulations into the record:

1. Respondent is an operator within the meaning of the Mine Act.
2. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Administration.
3. The Administrative Law Judge has jurisdiction over this matter.

4. The contested citations were properly served by a duly authorized representative of the Secretary of Labor for the Mine Safety and Health Administration upon an agent of the respondent on the dates and places stated herein.
5. The gravity findings for Citation No. 7859009 are appropriate, based upon the alleged factual findings stated by the inspector in the citation.
6. The facts as alleged by the inspector in Citation No. 7859009 would, if proven, establish that the circuit breaker was not properly installed.
7. Because the Respondent cannot disprove the facts alleged in the citation, it will stipulate to the facts of the violation based upon the allegation stated in Citation No. 7859009.
8. The total proposed penalty in the amount of \$60,000.00 will not affect respondent's ability to continue in business.
9. The operator took immediate abatement steps in good faith and addressed each of the three violations. (Tr. 128; lines 22-24)

III

CITATIONS

Citation No. 7859009

This citation is issued under Section 104(a) of the Act. The citation alleges a significant and substantial violation of 30 C.F.R. § 56.12002. That standard provides as follows:

Electrical equipment and circuits shall be provided with switches or controls. Such switches or controls shall be of approved design and construction and shall be properly installed. (Emphasis added.)

Respondent does not contest the material facts set forth in the citation which states the following:

On 6/7/97 an accident occurred at the Siemens Motor Control Center. The main circuit breaker in the Siemens Motor Control Center, located west of the tank house, was not properly installed. The design of the circuit breaker was altered by the covers for the bottom and top electrical terminals not being in place. The covers provide insulation between phases and grounded metal parts near the breaker. A short circuit to ground was created by the black test lead of multi-tester being used to troubleshoot the electrical

problem at the motor control center, when it came in contact with the bottom electrical terminal and the extended metal nut used for securing the breaker to the motor control center.

Respondent did not contest the fact that the main circuit breaker was not properly installed in that the fiberglass covers for the bottom and top electrical terminals were not in place. The covers had been taken off at some unknown point in time and never replaced. The main breaker involved in the accident was installed in 1992. When last inspected by MSHA Inspector Lambert in 1993, the fiberglass covers were in place. (Tr. 73). None of the employees interviewed by Inspector Lambert could recall seeing the covers prior to the accident. (Tr. 35). These covers provide insulation between energized phases and grounded metal parts near the breaker. As stated in Petitioner's Exhibit 7, page 2,

"The decedent Mr. McSherry may have grounded his meter lead between an energized phase connection located at the base of the breaker and a grounded mounting bracket located immediately adjacent to the energized phase. The grounding electrical spark may have triggered a phase-to-phase power reaction which would instantly create an ionized air explosion and fire."

Mr. Sherry had been employed as an electrician by Phelps Dodge Chino Mines Company since 1992. He worked on and was familiar with all aspects of the Mine and SX/EW electrical systems. He was certified to work on 480-volt high amperage systems. Prior to working for Phelps Dodge Chino Mines Company, he was an electrician for the United States Navy. (Ex. P-7).

The citation was issued as a Section 104(a) moderate negligence citation. It was nevertheless specially assessed and a penalty of \$50,000.00 was proposed. The operator contends that the proposed \$50,000.00 penalty is "clearly excessive in light of the factors to be considered under 30 C.F.R. § 100.5," and states that MSHA Agency completely disregarded the numerous mitigating factors. Evidence was presented that Respondent did not know and had no reason to know that the top and bottom covers for the main breaker were missing at the time of the accident. Only the middle cover was in place. The main breaker is enclosed in the mobile control center and is not open to view without opening both the outer and inner panel of the enclosure. (Tr. 48). The main panel doors have to be opened to gain access to the breaker covers which can then be unscrewed by an electrician. Both McSherry and Giambernandi were electricians qualified to work on 480-volt equipment. Witness statements obtained by Inspector Lambert during his investigation of the accident disclosed that unless the breaker malfunctions, there is no reason for the panel covers to be removed. Respondent thus contends that the evidence supports its position that the breaker had been functioning properly for over five years after it was installed in May 1992 by qualified hourly electricians. Witness statements obtained by Inspector Lambert during his investigation of the accident indicated that no one was aware of any malfunction of the main breaker between the time of its installation by Respondent's hourly electricians in May 1992 until the time of the accident. Witness statements obtained by Inspector

Lambert also disclosed that there was no maintenance reason for any Chino Mines' employee to have observed that circuit breaker between May of 1992 and the date of the accident. (Tr. 49).

Respondent, however, does not stipulate to the citation finding of negligence as "moderate" and implies the negligence was less than "moderate." (Tr. 43). I do not find any sound basis for diminishing the Inspector's finding of moderate negligence. It is self-evident that an employee or someone under Respondent's control removed the fiberglass covers enclosing the main breakers and failed to replace them at some time between Inspector Lambert's inspection of 1993 and the date of the accident. The absence of the covers appears to be a significant factor in the fatal accident. Respondent's investigation after the accident indicated that the decedent, Supervisor McSherry, may have caused the accident by working on the main breaker without the fiberglass covers for the bottom terminals in place and inadvertently permitted the grounding of his meter lead between an energized phase connection located at the base of the breaker and a grounded mounting bracket located immediately adjacent to the energized phase. (Ex. P-7). There was no need to remove the protective cover to test this breaker. Tr. 158, lines 8-15. I find no reason to modify or reduce the inspector's finding of "moderate" negligence in the citation. I agree and accept all the findings in the citation, including negligence, gravity, and S&S findings. The penalty for this citation along with the remaining two citations will be discussed below under Section IV with the heading "Penalty."

Citation No. 7850488

This citation was issued pursuant to Section 104 (a) of the Act and alleges a non-S&S violation of 30 C.F.R. § 50.10. The citation states the following:

On June 7, 1997, at 0645 hours, two shift supervisors from Burro Chief Copper Company, SX/EW, received serious burn injuries, and an electrician supervisor from Phelps Dodge Corporation, Chino Mines Company mine, received critical burn injuries, when a 480-volt electrical circuit breaker exploded. The 480-volt circuit breaker was located in the Siemens Motor Control Center west of the tank house at the SX/EW plant. On June 8, 1997, at 0700 hours¹, the electrical supervisor died of his burn injuries.

The operator did not immediately contact the MSHA District nor the Subdistrict office having jurisdiction over the SX/EW plant, or call the MSHA headquarters office in Arlington, Virginia. On June 7, 1997, at 1257

¹ It is undisputed that death occurred June 8, 1997, at 1:10 a.m. not at 0700 hours, as alleged in the citation.

hours the operator did call the MSHA Albuquerque, New Mexico, field office, and left a message on the answering machine. The message stated that there had been an "unplanned explosion when a switch blew up, and it burned an electrician. The employee had been burned enough to where he had to go to the hospital."

The cited standard 30 C.F.R. § 50.10 provides as follows:

§ 50.10 Immediate notification.

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Arlington, Virginia, by telephone, at 800-746-2554.

"Accident" as used in the cited standard quoted above is defined in § 50.2(h) as

An injury to an individual at a mine which has a reasonable potential to cause death;

Supervisor McSherry died from his burn injuries early Sunday morning, June 8th, at 1:10 a.m. Thus he died within 19 hours after the accident. Sadly, his death from the burn injuries he sustained in the June 7th accident establishes beyond any doubt or debate that the injury caused by the accident was an injury that had a reasonable potential to cause death.

Respondent contends that its agents were not aware that McSherry's injuries were so serious that the injury had a reasonable potential to cause death. Immediately after the accident, McSherry was taken by ambulance to the emergency room of the Gila Medical Center Hospital in Silver City. Accompanying McSherry in the ambulance was Respondent's Emergency Medical Team EMT, Mark Osborne. Dr. Neely was McSherry's attending physician in the emergency room at the Gila Hospital. Dr. Neely told the mine's EMT Osborne, that McSherry had second degree burns over 70 to 80 percent of his body. Dr. Neely also told Osborne that he thought McSherry "had a chance to survive." (Tr. 98). By 8 a.m. they were already making arrangements to airlift McSherry to the Burn Center in Albuquerque, New Mexico. By 9 a.m. McSherry was being transported by air to the Albuquerque Burn Center. Tr. 107.

Among other employees of the Respondent who were at the Gila Medical Center before McSherry's flight to Albuquerque commenced was Mr. Steve Holmes, who at that time was manager for Chino Mines. Holmes was the coordinator of the company's investigation of the accident. (Tr. 158, lines 10-11). Upon hearing of the accident about 7 a.m. on June 7, Holmes

immediately traveled to the Gila Regional. Medical Center. He testified his first priority was to determine the condition of the employee, Rob McSherry. At this hospital, just outside the emergency room, Holmes met Respondent's EMT, Mark Osborne. Holmes testified that Osborne told him that McSherry had first and second degree burns over 60 to 70 percent of his body and that McSherry was talking coherently when he was being transported by ambulance to the Gila Medical Center. Holmes testified that Osborne told him that he thought McSherry was going to be okay. Holmes did not try to talk to McSherry as McSherry's family members came to the hospital and were talking to McSherry while he was being prepared for air transport to Albuquerque. Unfortunately, Holmes as coordinator of the investigation whose first priority was to determine the condition of McSherry, did not talk to Dr. Neely to ascertain McSherry's condition or to determine whether the injury had a reasonable potential to cause death.

Later the same day, about 11 p.m. at the Albuquerque Burn Center, McSherry's condition took a decided turn for the worst and in spite of all efforts to save him, he died two hours later at approximately 1:10 a.m.

David Hays, Respondent's safety director, was kept advised of McSherry's condition by the EMT Osborne during the period of time McSherry was at the Gila Medical Center. Hays had basic first aid training and testified he knew second degree burns could cause shock that could cause death. He testified that Lillian Medina, an employee, was dispatched to the Albuquerque Burn Center to be in contact with McSherry and to see how McSherry was progressing. About 11 p.m. Hays received a disturbing call from Medina that McSherry's condition changed for the worst, and a second call at 1:30 a.m. notified Hays that McSherry was dead. Hays waited until 7 a.m. that same Sunday morning, June 8th, to phone Mr. McLloyd at his residence to report that McSherry died. Hays testified that in the 7 a.m. phone call, McLloyd acknowledged that he was already aware of the recorded message concerning the June 7th accident that Respondent put on MSHA's Field Office telephone recorder on Saturday, June 7th, about 1 p.m.

Dr. Neely was McSherry's attending physician in the emergency room at the Gila Medical Center. Both parties point to Dr. Neely's statement that McSherry "had a chance to survive," in support of their respective positions. That statement by the attending emergency room doctor clearly demonstrates that the injury had the potential to cause death. I find that a reasonable person with basic first aid training on receiving the information from Dr. Neely or Osborne should have known that the injury was one that had a reasonable potential to cause death. Respondent should also have known from the extensive burns on such a large area of McSherry's body, that the injury had the potential to cause death. That, along with the statement of Dr. Neely indicating only a chance to survive should have made Respondent aware by 9 a.m., June 7th, that the injury had a reasonable potential to cause death. Respondent should have called the Arlington office at the 800 number set forth in the cited standard.

The evidence presented clearly established that the injury McSherry sustained in the accident had a reasonable potential to cause death and, in fact, the potential became a reality with death occurring at the Burn Center within 19 hours of the time of the accident. I find that Respondent's general manager, Holmes, the EMT man Osborne, and Respondent's safety

director Hays knew or should have known the injury had a reasonable potential to cause death and should have made the immediate notification to MSHA, required by the cited standard by 9:30 a.m. on June 7th, the day of the accident. There are mitigating circumstances which will be discussed below under Section IV with the heading "Penalty".

Citation No. 7850489

This citation is issued pursuant to Section 104(a). It alleges a non-S&S violation of: 30 C.F.R. § 50.12 and charges as follows:

On June 7, 1997, at 0645 hours, two shift supervisors from the Burro Chief Copper Company, SX/EW plant, received serious burn injuries, and an electrical supervisor from the Phelps Dodge Corporation, Chino Mines Company mine, received critical burn injuries, when a 450 volt electrical circuit breaker exploded. The 480-volt circuit breaker was located in the Siemen Motor Control Center west of the tank house at the SX/EW plant.

The operator did not preserve the accident site. On June 7, the circuit breaker that had exploded was removed and was replaced by another circuit breaker. On June 8, 1997, the Operator called the MSHA, Albuquerque, New Mexico, field office supervisor and informed him that the electrical supervisor had died. The operator was told not to change anything at the accident site. On June 9, 1997, when the accident investigation began by MSHA, the operator had already removed the replacement circuit breaker.

The cited standard, 30 C.F.R. § 50.12, provides as follows:

Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

The accident involving the explosion of the 480-volt electric circuit breaker occurred at 6:45 a.m. Saturday morning, June 7, 1997. No attempt was made to call the District Manager whose office is in Dallas, Texas. However, testimony was presented that the Albuquerque field office had jurisdiction over the mine in question since there are no subdistrict offices in the South Central District.

At 12:57 p.m. Respondent dialed the Albuquerque Field Office phone number. There was no response. That office is not open on Saturdays or Sundays so a message was left on the field office telephone recorder. The second phone call to MSHA was on June 8 at 7 a.m. This was a courtesy call by Hays to Tom Lloyd, Supervisor of the field office. The call informed Lloyd that McSherry died at 1:10 a.m. that morning. In the conversation Lloyd told Hays not to change anything at the accident site. However, the respondent, by the time of that call, had already replaced the defective circuit breaker by 10:30 a.m. on June 7th. The MSHA investigation commenced about 3 p.m. on Monday, June 9. Clearly there was a violation of the cited standard. There are mitigating circumstances, however, that will be discussed below under the Penalty heading.

IV.

PENALTY ASSESSMENT

Section 110(i) set forth six criteria to be considered in the assessment of penalties under the Act:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve a rapid compliance after notification of a violation.

In addition, Commission Procedural Rule 29 C.F.R. § 2700.30a emphasizes the need for a finding on each of the statutory criteria contained in section 110(i).

30 C.F.R. § 100.5(a) under the heading of "Determination of Penalty special assessment provides as follows:

(a) MSHA may elect to waive the regular assessment formula (§ 100.3) or the single assessment provision (§ 100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment. Although an effective penalty can generally be derived by using the regular assessment formula and the single assessment provision, some types of Violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty under these provisions. Accordingly, the following categories will be individually reviewed to determine whether a special assessment is appropriate.

Citation No. 7859009**Penalty Assessment**

The violation charged in Citation No. 7859009 involves a fatality. Consequently, MSHA under 30 C.F.R. § 100.5(a)(1) is on solid ground for special assessment of the penalty for that violation. MSHA has less solid ground or reason for special assessment of the penalty for the violations charged in Citation No. 7850488 concerning notification of the accident and Citation 7550488 involving alteration of the accident site prior to the completion of the MSHA investigation.

With respect to Citation No. 78559009, I have discussed above why I found no reason to modify any of the findings in the citation. There is no reason to diminish the Inspector's finding of "moderate" negligence in view of the hazard created when the covers for the main breaker were not replaced after they had already been removed at some time after Inspector Lambert's inspection in 1963, and the fact that Respondent's electrical supervisor on the morning of June 7 went ahead and worked on the main breaker without the required covers for the electric terminals. Because of the violation, it took only a second of inadvertent lack of careful attention on the part of McSherry to cause a serious accident that resulted in the tragic death of McSherry and serious injury to three employees. The gravity of the violation was very high.

The parties stipulated that Respondent demonstrated good faith in taking immediate abatement steps addressing each of the violations. (Stip. No.9). The size of the Respondent's business is large. The annual number of hours worked by its mine's controlling entity is approximately six million and the annual hours worked at the mine were 1,647,574. I do find as a mitigating factor the fact that Respondent had a very good history of previous violations. Tr. 52; Tr. 212, line 1-12, Resp's Ex. 7. Respondent, in the two years preceding the issuance of the citations, paid penalties on ten violations. (Pet. Ex. 1).

Respondent has a good Preventive Maintenance Program that was effective and resulted in the good prior history. The main breaker, however, was enclosed and needed no maintenance. It was a breaker that either worked or did not work. It functioned without any problem during the five years preceding the accident. The parties stipulated the proposed penalties would not affect Respondent's ability to continue in business. (Stip. No. 8)

Everything considered, I find the appropriate penalty for this serious S&S violation of the cited standard, 30 C.F.R. § 56.1200 is \$27,000.00.

Citation No. 7850488**Penalty Assessment**

The evidence presented established that Respondent did not immediately contact any MSHA personnel at the Albuquerque Field Office, the District Office in Dallas, Texas, nor the MSHA headquarters in Arlington, Virginia. Apparently, Respondent were under the impression that as long as they believed McSherry would not die, they did not have to make immediate notification of the accident to MSHA. That is not the proper interpretation of the cited standard.

The standard requires immediate notification of an accident that causes an injury which has a reasonable potential to cause death.

Respondent made a feeble attempt to contact MSHA by a telephone call to the Albuquerque Field Office. They did not contact any MSHA personnel until Sunday, June 8, after McSherry died. The MSHA investigation commenced about 3 p.m. Monday, June 9. In many cases the violation of the regulation could be much more serious than it is under the facts in this case. Under the facts of this case there is no showing of any potential harm by the failure to notify MSHA immediately. Under the facts and circumstances in this case the violation in some respects is more akin to a paper violation. Respondent showed good faith but misjudged the requirements of the standard and misjudged the severity of McSherry's injury caused by the accident. On evaluating of all the facts, I find that negligence was "moderate" rather than high. I would affirm every other factor in the Inspector's evaluation as set forth in Section II of the citation. In view of all the above, including Respondent's very good history of prior citations, I assess a penalty of \$800 for this violation of 30 C.F.R. § 50.10.

Citation 7850489

Penalty Assessment

Within two hours of the accident, Respondent commenced his investigation of the accident. Respondent took photographs of the entire accident scene to preserve all the associated evidence and made it available to the inspectors. Respondent removed and replaced the main breaker that exploded. Respondent preserved the main breaker and all the equipment and paraphernalia associated with the accident. MSHA began the investigation on Monday, June 9.

Before writing the citation, the Inspector never questioned the reason why the breaker that exploded was replaced within a few hours after the accident. One important reason was that Respondent was concerned with a potential environmental hazard. When the main breaker is inoperable, the entire SX-EW plant is down and the plant's holding dam (Dam 8) is at risk of overflowing its acidic bleaching fluid. (Tr. 125-126, 131, 190). There is no downstream protection for the pool at Dam 8 to prevent the acidic bleaching overflow to move into the environment and damage plant life and possible animal life. If the bleaching solution in the deep ponds were to overflow, the acidic solution, in addition to harming the environment, would constitute a violation of Respondent's water discharge permit issued by the state of New Mexico.

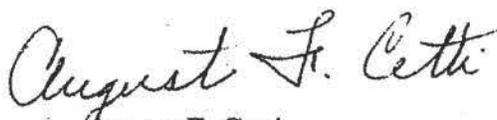
Respondent fully cooperated with MSHA in the investigation. It appears from the record that Respondent did not intend to hinder or delay MSHA's investigation in any way.

Everything considered, including Respondent's very good prior history, Respondent's cooperation with MSHA in its investigation, and the need to protect against the potential harm to the environment, I assess a penalty of \$600.00 for the violation of the cited safety standard 30 C.F.R. § 5012.

ORDER

Citation No. 7859009 with its S&S finding is **AFFIRMED**. Citation Nos. 7850488 and 70850489 are **MODIFIED** by changing the negligence factor from "high" to "moderate" and, as so modified, are **AFFIRMED**.

Respondent, Chino Mines Company is **ORDERED TO PAY** a civil penalty of \$28,400.00 within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

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/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D. C. 20006-3867
Telephone No.: 202-653-5454
Telecopier No.: 202-653-5030

February 21, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-368-M
Petitioner	:	A. C. No. 35-02479-05509
	:	
	:	Docket No. WEST 2000-437-M
	:	A. C. No. 35-02479-05510
	:	
	:	Docket No. WEST 2000-446-M
	:	A.C. No. 35-02479-05511
	:	
v.	:	Docket No. WEST 2000-519-M
	:	A. C. No. 35-02479-05512
	:	
	:	Docket No. WEST 2000-561-M
	:	A.C. No. 35-02479-05513
	:	
	:	Docket No. WEST 2001-76-M
	:	A.C. No. 35-02479-05514
TIDE CREEK ROCK INCORPORATED,	:	
Respondent	:	Mine: Tide Creek Rock Incorporated

DECISION

Appearances: Deia W. Peters, Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for the Secretary;
Agnes Petersen, Esquire, Tide Creek Rock, Incorporated, Deer Island, Oregon, for the Respondent.

Before: Judge Barbour

These cases are before me on petitions for the assessment of civil penalties filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration (MSHA) against Tide Creek Rock, Inc. (Tide Creek), pursuant to sections 105, 110 and 113 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§§ 815, 820 and 823 (the Act or the Mine Act)). The petitions allege 24 violations of the Secretary's mandatory safety and health standards for surface metal and nonmetal mines and they seek the assessment of civil penalties that total \$2,492. In

addition, six of the citations contain findings that the alleged violations were significant and significant contributions to mine safety hazards (S&S violations).

Tide Creek challenges the Secretary's jurisdiction and alternatively argues that in many instances the allegations of violation and the S&S findings are invalid. Further, Tide Creek asserts that several of the inspectors' findings regarding the gravity of the alleged violations and the company's negligence are inaccurate. Finally, it contends the amount of any penalties assessed will affect adversely its ability to continue in business.

The cases were consolidated, and a hearing was held in Portland, Oregon. The parties presented testimony and documentary evidence. They also filed post-hearing briefs. The issues are whether the Secretary has jurisdiction; whether the violations occurred as alleged; whether the inspectors' S&S and other findings are valid; and the amount of any civil penalties that must be assessed for the violations in light of the statutory civil penalty criteria (30 U.S.C. § 820(i)).

THE TIDE CREEK MINE AND THE MINE'S INSPECTION HISTORY

The Tide Creek Mine is a small, crushed stone operation located in Columbia County, Oregon. The mine is operated by Tide Creek Rock, Inc., a company owned and run by the Petersen family. Presently, three persons work intermittently at the mine, including John Petersen and his nephew, Robert Petersen. John Petersen directs the day-to-day functioning of the facility.

The mine includes a pit, a haul road, a crusher, a caterpillar tractor and three caterpillar loaders. At the mine stone is excavated, crushed to size, and stockpiled. The crushed stone is trucked from the mine. Among other things, the stone is used in road construction.

JURISDICTION

The facility has been inspected by MSHA for several years, and it has been the site of previous violations whose validity has been litigated before the Commission (*See Tide Creek Rock, Inc.*, 18 FMSHRC 390 (March 25, 1994) (ALJ Manning); *John Petersen, d/b/a/ Tide Creek Rock Products*, 12 FMSHRC 2241 (December 1982) (ALJ Koutras); *John Petersen d/b/a/ Tide Creek Rock Products*, 11 FMSHRC 3404 (November 1980) (ALJ Vail)). Despite the fact that in each instance, jurisdiction has been found to exist, the company continues to contend it is not subject to the Act.

The Mine Act provides that "each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such a mine, and every miner in such a mine shall be subject to the provisions of [the Act]" (30

U.S.C. §803). Although Tide Creek asserts that the Secretary failed to elicit testimony on the company's affect on interstate commerce (Resp. Br. 5), the record fully supports finding that Tide Creek's products enter commerce and that its operations affect commerce.

At trial, John Petersen stated that rock extracted at the mine sometimes is used as a base in the construction of public roads (Tr. 256). An operator whose product is used in the construction of public roads plays an inevitable part in interstate transportation and thus in interstate commerce (*See Soothsay Construction Co.*, 6 FMSHRC 174, 176 (January 1984) (ALJ Carlson)). John Petersen also stated that the front-end loaders used at the mine were manufactured in Illinois. It has been held that the use of equipment manufactured in another state is an indicia of interstate commerce (*U.S. v. Dye Construction Co.*, 510 F.2d 17, 83 (10th Cir. 1975); *Mechanicsville Concrete*, 16 FMSHRC 1444, 1446047 (July 1994) (ALJ Amchan)). It is true that Tide Creek is small and most of its product is sold locally. However, even under these circumstances, it has been found that interstate commerce is affected because of the cumulative effect small scale operations can have in interstate pricing and demand (*See U.S. v. Lake*, 985 F. 2d 265 (6th Cir. 1993)). Therefore, the mine and its operator come within the jurisdiction of the Act.¹

ALLEGED VIOLATIONS WITH S&S ALLEGATIONS

The Commission has stated that if, based upon the particular facts surrounding a violation, there exists a reasonable likelihood that a hazard contributed to will result in an injury or illness of a reasonably serious nature, the violation is S&S (*Cement Div. Nat. Gypsum Co.*, 3 FMSHRC 822,825 (April 1981)); (*see also, Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 13 (January 1995)). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission outlined the elements of proof for an S&S determination when it stated:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary

¹ Tide Creek contends if its facility comes within the Act, res judicata bars consideration of the allegations in Citation No. 7978130 (Docket No. West 2000-159). Tide Creek's argument appears to be that Citation No. 7978130 is "basically the same" as another citation that has become "final"; in other words, that Citation No. 7978130 duplicates a previous citation (Resp. Br. 9). Tide Creek's argument fails. While I would vacate any citation at issue that was shown to duplicate a previously assessed and paid citation, I cannot do so on the basis of a mere assertion. Tide Creek did not introduce into evidence the citation it claims was duplicated. Accordingly, there is nothing in the record which I can compare to Citation No. 7978130. Further, to the extent that Tide Creek is arguing that the same allegations have been alleged previously—this argument also fails. The Secretary, may and frequently does, cite repeated violations of repeated violative conditions.

. . . must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The determination of whether a violation is S&S is made in the context of continuing mining operations.

DOCKET NO. 2000-561-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978438	3/29/2000	56.9301

The citation alleges that the lower dump area of the mine was not provided with a device to stop mobile equipment from traveling over the edge and overturning. The dump area was composed of loose rock material. Section 56.9301 states: "berms . . . or other impeding devices shall be provided at dumping locations where there is a hazard of over-travel or overturning."

I conclude the violation existed as charged. The inspector testified that the lower dump area contained an embankment that was approximately 60-feet long and 20- to 25-feet high. Haulage trucks operated on the embankment and there was nothing along the edge of the embankment to hinder a haulage truck from going over the edge (Tr. 422). Tide Creek argues that restraints in the form of rock berms were in place around the area when dumping occurred but that they were removed and the rock was crushed when dumping was finished (Resp. Br. 43). While that may have been the case, the inspector's undisputed testimony established that no berms were in place when he observed the embankment. Further, the inspector testified, without dispute, that he saw tire tracks leading to the very edge of the embankment (Tr. 427). With no berms to warn a driver that his or her truck was at the edge of the embankment, the truck was in danger of dropping 20 to 25 feet and overturning.

The violation was S&S and serious. Berms partially restrain a vehicle. They also alert a driver how close the vehicle is to the edge of the dumping area. With no restraints or warnings at the edge of the 20- to 25-foot drop, it was reasonably likely that a driver would move too close and travel over the edge of the embankment. This was especially so because the dumping area was composed of loose material which was more likely to give way. The inspector testified that the haulage truck weighed between 30 and 40 tons (Tr. 428). He also testified that miners were working in the area below the embankment. If the haulage truck fell off the embankment, not only was the driver of the truck reasonably likely to suffer a serious injury, but any miner working below who was hit by the falling truck or its load was likely to be killed.

In addition, the lack of berms in the dumping area and the fact that the truck was operating on the embankment were visually obvious. If Tide Creek management officials had exercised the care required of them, then the berms or restraints would have been present; or if they had been removed, then the embankment would have been made "off-limits" until the berms were replaced. Tide Creek's lack of care resulted in the violation and establishes the company's negligence.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978439	3/29/2000	56.9300(b)

The citation alleges that the berms along the mine's main haulage road were not of the mid-axle height of the largest vehicle using the road. Section 56.9300(b) requires "[b]erms or guardrails . . . [to] be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." The citation further alleges that the haulage road, which had a three percent grade, ran from the plant toward the pit area and that for about 30 feet—the berms ranged in height from zero to 12 inches. There were drop-offs of up to 10 feet along the road. The mid-axle height of the largest haulage truck traveling the road was 18 inches. When materials were transported from the pit, the road was used several times a day.

I conclude, the violation existed as charged. Tide Creek did not dispute the height of the berms ranged from zero to 12 inches and that this was less than the mid-axle height of the largest vehicle that traveled the road. In fact, Robert Petersen who regularly traveled the road, conceded the berms were inadequate along the cited portion (Tr. 496).

Rather than challenge the violative conditions, Tide Creek argued that the berms along the road were inadequate to help ensure proper drainage. Tide Creek asserted that the Secretary bore the burden of proving that the cited area was not needed for drainage and that she failed to do so (Resp. Br. 34).

It may be true that the berms were inadequate in order to provide proper drainage. Indeed, the inspector testified it was likely (Tr. 451). However, the standard makes no exception for drainage. If Tide Creek believed it was safer to eliminate or to lower the berms in order to facilitate drainage, its recourse was not to violate the standard but rather to seek its modification pursuant to section 101(c) of the Act (30 U.S.C. §811(c)). It did not do so.

The violation was S&S and serious. The road had a three-percent grade. The road was regularly traveled. During rains (which happen frequently in Oregon) the grade and the road's slippery condition could cause a vehicle to slip through the inadequate berms and off the road (Tr. 438-439). In the context of continuing mining I find that such an accident was reasonably likely and that a drop of up to 10 feet could be expected to cause a serious or critical injury to the driver of the affected vehicle.

Finally, Tide Creek failed to meet the standard of care required. It chose not to comply and in so doing it caused the violation.

DOCKET NO. WEST 2000-159-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978123	9/27/1999	56.14107(a)

The citation alleges that the counterbalance on the right side of a shaker screen was not guarded to prevent employee contact. The standard requires "[m]oving machine parts . . . [to] be guarded to protect persons from contacting gears, sprockets, chains . . . [various specified types of] pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Section 56.14107(b) exempts from guarding "exposed moving parts that are at least seven feet away from walking or working surfaces." Tide Creek does not argue about the lack of guarding, but rather contends that the counterbalance was more than seven feet from any working surface or walkway and that the Secretary failed to show otherwise (Resp. Br. 13). I find, however, that the Secretary proved the violation.

At trial, the inspector credibly testified that although the counterbalance was guarded on its front, top and back sides, it was not guarded on its right side and that there was room for a miner to gain access to the moving counterbalance while the screen was in operation. He also testified that the counterbalance was approximately 30-inches above the walkway that ran along the right side of the shaker and that miners were required to be in the area of the screen when the shaker was in operation (Tr. 134). Despite the company's assertions, the record contains no convincing evidence to the contrary.

I also find that the violation was S&S and serious. The lack of a guard on one side of the counterbalance was reasonably likely to cause death or serious injury as mining continued. The guarding of moving machine parts is among the most important of the Act's safety requirements. Numerous serious injuries and fatalities have occurred when miners became caught in unguarded parts. Here, there was a walkway adjacent to the unguarded machine part. While mining was in progress, miners occasionally were required to be in the vicinity of the screen. The unguarded area was of a size (approximately 29 inches by 30 inches) and location (approximately 30-inches above the walkway) that if a miner slipped when the walkway was wet, or otherwise tripped and fell, and reached toward the counterbalance, the miner could be seriously injured by the moving machinery.

The lack of a guard was visually obvious. The presence of guards on the top, front and back of the counterbalance indicated that Tide Creek was aware of the guarding requirement.

Had Tide Creek exercise the care required, a guard would have been present. It did not, and in failing to guard the part, the company exhibited its negligence.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978126	9/27/1999	56.14103(b)

The citation alleges that the two top door windows and the left front window on a front-end loader were broken and sharp edges were exposed. Section 56.14103(b) states:

If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

Tide Creek concedes that the windows were broken but contends that they did not create a hazard because Robert Petersen, the only person operating the equipment, was aware of their condition. In addition, he kept the door open so that visibility through the door windows was not obscured (Resp. Br. 20). Despite the company's argument, I conclude the broken windows were hazards and that they should have been replaced or removed.

No one takes issue with the fact that the windows were damaged, and I find that the inspector accurately described their state. The inspector believed that at some point Robert Petersen had to clean the windows, and in so doing, he could cut his hand on the sharp edges of the glass (Tr. 166-167). The inspector's testimony established that the operator of the loader was subject to the possibility of a cut hand. This established the presence of a safety hazard, and the broken windows, combined with the hazard they created, established the violation.

Although the Secretary proved the violation, I agree with Tide Creek that she failed to prove the violation was S&S. The inspector based his S&S finding on the fact that when it rained and the ground became muddy, the loader's tires tended to "kick up" mud on the windows. This meant that the windows had to be cleaned often, which in turn made it reasonably likely that Robert Petersen would cut his hand (Tr. 166-167). However, Robert Petersen testified that the windows in the doors almost never were cleaned because when he used the loader he always tied back the doors and that the other cited window (the left front window) also rarely had to be washed. Further, he stated that on the occasions when he washed the windows, he used a squeegee and he did not touch the windows (Tr. 295-296).

Robert Petersen's testimony was not contradicted. Therefore, I conclude that the lack of a

need for regular cleaning and the use of a squeegee meant that as mining continued it was unlikely Petersen's hands would come in contact with the broken windows. In addition, because there was only a remote chance of injury to one person, the violation was not serious.

The condition of the windows was obvious, and if Tide Creek had exercised the care required then the windows would have been removed or replaced. Therefore, the company was negligent.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978130	9/28/99	56.14132(b)

The citation alleges that the back-up alarm on a haulage truck was not audible above the surrounding noise level. Section 56.14132(b)(2) provides that an audible alarm on self-propelled mobile equipment, "shall be audible above the surrounding noise level." The inspector testified that at approximately 9:47 a.m. on September 28, 1999, he was in the area where the rock crusher is located. As he looked around, he saw a haulage truck begin to back-up. The truck was used to haul material from the storage bunker to the crusher. The inspector did not hear the truck's back-up alarm (a bell) sound when the truck began to move (Tr. 186), and at almost the same time, a front-end loader backed into the middle of the truck.

The inspector's first-hand testimony was not refuted. The company did not produce any witness who testified the alarm was heard. Nor did it produce any witness who countered the inspector's testimony that a front-end loader backed into the middle of the truck. Given the fact the inspector could not hear the alarm and the fact that the loader backed into the truck, the conclusion that the alarm was not audible above the surrounding noise level was reasonable, is credited, and establishes the violation (Tr. 186, 188).

The inspector found that the violation was S&S, and he was right. Audible back-up alarms are required because the visibility of mobile equipment operators frequently is restricted when equipment moves in reverse. Also, miners working in the vicinity of mobile equipment may be more intent on the job they are doing than on equipment moving near them. The sound of an alarm warns those working nearby or traveling behind a moving vehicle.

Here, the haulage truck was operating in an area where other mechanized moving equipment was present. The fact that a front-end loader backed into the moving haulage truck does not in itself establish the violation as the actual cause of the accident, but it is the type of accident that is reasonably likely to occur when a back-up alarm cannot be heard. Moreover, when a haulage truck strikes another piece of equipment or strikes a miner working or traveling behind the truck, it is reasonable to expect the operator of the other equipment or the miner will be seriously injured. Therefore, in addition to being S&S, the violation was serious.

The violation should have been detected and corrected by Tide Creek. It was audibly obvious. I conclude the violation existed because Tide Creek failed to exercise the care required.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978131	9/28/99	56.14107(a)

The citation alleges that the v-belt drives and the cooling fan on a haulage truck (the same truck that lacked the audible backup alarm) were not guarded in that the front hood of the truck was missing. The inspector found the conditions to constitute an S&S violation. As noted previously, section 56.14107(a) requires moving machine parts, that can cause injury, to be guarded. Tide Creek concedes the hood was missing (John Petersen testified that it was lost in a flood (Tr. 361)), but argues that the inspector's S&S finding was erroneous. It was not reasonably likely that anyone would be injured because few miners worked around the truck; the hood had to be removed or raised in any event to change the oil; and no one ever had been injured changing the oil (Resp. Br. 31; Tr. 363-364).

I conclude, however, that the inspector's findings should stand. The hood had to be raised or removed to change the oil, which does not negate the fact that a person could slip or trip or lose his or her balance and catch a hand or an arm in the pinch points of the v-belts or be cut by the fan. According to John Petersen, the only person around the truck was the driver (Tr. 361). Yet, John Petersen also testified that when the truck was idling the driver occasionally checked the oil (Tr. 361-362). When the truck was idling, the v-belts and fan were moving. Thus, the driver was in the immediate vicinity of the pinch points and the fan when he checked the oil. The lack of a hood means that the driver was subject to the danger of slipping, tripping or otherwise inadvertently coming in contact with the v-belts' pinch points or with the fan's blades. Nothing was present to prevent such contact. An accident easily could have happened because, as the citation makes clear, the pinch points of the v-belts and the blades of the fan were within reach.

The standard is designed to guard against just such an inadvertent accident. As mining continued and the truck continued to be operated, I conclude an accident was reasonably likely to occur. Moreover, anyone entangled in a pinch point or hit by a fan blade could expect to suffer the loss of a finger and/or a severe cut. Thus, the violation was both S&S and serious.

In addition, Tide Creek was negligent. The fact that the hood was missing was visually obvious, and was known to John Petersen (Tr. 361). If Tide Creek had exercised the care required, the violation would not have existed.

OTHER ALLEGED VIOLATIONS

DOCKET NO. WEST 368-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7973902	9/28/99	56.12008

The citation alleges that a power cable entering a junction box on the back side of the load-out bin was not provided with a proper fitting where it entered the box. Section 56.12008 requires power wires to enter the metal frames of electrical compartments "only through proper fittings." The inspector testified that he observed the junction box and found that an oversized bushing had been used where the power cable entered the box. In addition, the inner conductor wires of the cable were exposed. On the day of the inspection the load-out bin was not in operation. In fact, it had not been operating for the past two to three weeks.

I conclude the violation existed as charged. Tide Creek presented no evidence refuting the inspector's first-hand observation that the bushing used where the cable entered the box was oversized and thus improper (Tr. 40-42). Indeed, John Petersen conceded that the power cable was not provided with proper fitting (Tr. 61).

The inspector found that the violation was unlikely to cause an injury and I agree. The junction box was located in an infrequently traveled area of the mine, and miners rarely came in contact with it. In addition, although the load-out bin was not out of service at the time the violation occurred, the bin was infrequently operated. Thus, the possibility of an injury, caused by the violation, was very remote.

Tide Creek argues that there is no proof of its negligence because the junction box is far from usual work areas and no one was aware of the condition of the fitting (Resp. Br. 44). I reject this contention. Regardless of the location of the junction box, Tide Creek had a duty to ensure it was in proper working order. Equipment cannot be neglected because it is located in places that are only occasionally visited. The junction box had to be inspected by Tide Creek, and the company should have known of its condition. The violation was due to the company's failure to exercise the care required.

DOCKET NO. WEST 2000-446-M

<u>Citation No.</u>	<u>Date</u>	<u>30 U.S.C. §</u>
7973999	1/19/00	814(b)

The citation alleges that Tide Creek allowed a front-end loader to be used even though it

had been removed from service by an order issued pursuant to section 104(b) of the Act (30 U.S.C. § 814(b)). In response to Tide Creek's pending motion to dismiss, counsel for the Secretary explained that the citation was vacated prior to the hearing and that the alleged violation of the Act should not have been assessed (Tr. 16-17). Therefore, I advised counsels that I would grant the motion (Tr. 17).

DOCKET NO. WEST 2000-437-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978127	1/27/00	56.14101(a)(3)

The citation alleges that the front brakes on a front-end loader were not working because the air lines to the front brakes cams were disconnected. However, the rear brakes were operable. Section 56.14101(a)(3) requires that “[a]ll braking systems installed on equipment . . . be maintained in functional condition.”

Tide Creek did not contest the existence of the cited condition. In fact, John Petersen admitted that the front brakes air lines were disconnected (Tr. 97-98). Petersen thought the company had no choice but to disconnect the air lines because when the ground conditions were muddy, the front brakes continually clogged and locked. In his opinion, the only way to ensure that the back brakes would continue to work was to disable the front brakes (Tr. 97-98, 100).

I conclude that the violation existed as charged. The testimony established that the front brakes were not functional. Tide Creek asserted that disabling the front brakes did not create a hazard because the loader was used on flat land 99 percent of the time and the back brakes alone were sufficient to stop the equipment (Tr. 111). However, the assertion was confounded by the testimony of Robert Petersen, who admitted that the brakes did not work at their full capacity as he brought the loader down a hill on the day the citation was issued (Tr. 112). The record also reflects that the loader was used on a hill on other days, too (*Id.*). Even if these instances represent only one percent of the loader's use, they nonetheless establish the seriousness of the violation. An accident easily could have occurred as the result of using the loader on a hill when the front brakes were not functioning. The driver of the loader could have been injured seriously.²

² As I have noted previously, to the extent that Tide Creek believed maintaining the front brakes in functional condition diminished the safety of its miners, its recourse lay in petitioning the Secretary of Labor to modify application of the standard, not in unilaterally disconnecting the front brake air lines (30 U.S.C. § 811(c)).

Moreover, the violation was due to Tide Creek's negligence. It is clear from the testimony that John Petersen was aware of the condition of the brake lines, yet he did nothing about it. His failure represented a lack of care that was required of him.

Tide Creek was given until the following day to reconnect the brake lines and to comply with section 56.14101(a)(3). When it failed to do so the Secretary issued an order removing the loader from service until the front brakes were operable. As a result of the order, the Secretary charged that Tide Creek failed to make a good faith abatement effort. Tide Creek, on the other hand, argued that due to a family illness it was unable to abate in a timely manner (Tr. 96, 100). At that time John Petersen's mother-in-law, who lived in the Petersen's home near the mine, required a great deal of on-site assistance and attention due to a stroke and a broken hip.

I conclude the company established good cause for its failure to timely abate the citation. The company is small and family oriented. The testimony of John Petersen, the statements of John Petersen's counsel and wife, Agnes Petersen, and the testimony of the Petersens' daughter, Mary Ann Anderson — established that at the time of the violation the illness of John Petersen's mother-in-law was causing the family a great deal of stress. Frequent trips to the hospital for medical attention, disrupted not only the Petersen's family life but also the conduct of their business.³ Had it not been for the illness, I conclude the condition of the brake lines would have been attended to within the time required. As it were, the requirements of the citation became "lost in the shuffle" of the Petersen's then more immediate worries and concerns.

DOCKET NO. WEST 2000-561-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7973901	9/27/99	56.11001

The citation alleges that a safe means of access was not provided on the path to the crusher control platform. The traveled path was composed of loose, unconsolidated material and uneven ground. Section 56.11001, requires "a safe means to access [to] be provided and maintained to all working places."

I conclude the Secretary proved the violation. First, the crusher control platform was the place where the controls for the crusher were located. The area had to be visited from time to time. Thus, the platform was a working place and the path was the means by which miners accessed the platform. The inspector testified that the path, which at one point narrowed to 12 inches, not only was loosely composed, but also dropped to a 14-inch deep pool of water on one side while on the other side there was a low, overhanging metal piece. There was no handrail along the path (Tr. 373-374).

³ Some of the trips were necessitated by sudden medical emergencies.

The nature of the path; the drop to the water on one side; and the overhanging metal on the other, made the path hazardous—especially after a rain when the danger of slipping increased. John Petersen sometimes used the path and he testified he has “two bad knees” and only one toe on one of his feet (Tr. 95). These conditions, which made him more prone to slipping and falling than a miner without similar disabilities, heightened the danger. I conclude that any person traveling the path, but most especially John Petersen, easily could have tripped or slipped and fallen into the pool of water or could have struck the overhanging metal. Access to the platform was not safe. The violation was serious.

I also conclude that Tide Creek was negligent. The nature of the path and the hazards associated with it were visually obvious. Due care required the path be made safe. Tide Creek argues that if, in fact, it was negligent—its negligence was diminished by the fact that prior MSHA inspectors did not previously cite the company for failing to provide safe access to the control platform. I agree. Tide Creek’s assertion that it had not been cited in the past, was not refuted by the Secretary. While the lack of a prior citation does not relieve Tide Creek of responsibility for the violation, it somewhat lessens Tide Creek’s lack of care.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7973904	9/28/99	56.18010

The citation alleges that no individuals at the mine site were currently trained in first aid. Section 56.18010 provides in part that “[a]n individual capable of providing first aid shall be available on all shifts.”

I conclude the Secretary established the violation. The inspector testified that he asked John Petersen whether someone had been trained in first aid and that Petersen responded “yes”—but could not say who it was (Tr. 396). This testimony was not refuted by Tide Creek, and I find the conversation happened as described. I also find it reasonable to infer from the conversation that a currently trained person was not available on that shift. The facility was small. Very few persons worked at the mine. John Petersen operated the mine. Had a currently trained person been available, John Petersen surely would have known who it was.

In addition, I find that the violation was serious. When accidents happen, rapid, knowledgeable, first aid can minimize debilitating consequences and can save lives. Without the presence of a currently trained person there was a greatly reduced chance an injured miner would receive timely help. The failure to ensure the presence of such a person was far more than a technical error, it was a violation that could have cost lives.

I further find that Tide Creek was negligent. Had the company exercised the care required, a currently trained person would have been available.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7973905	9/28/99	56.5050

The citation alleges that the miner who was working at the jaw feeder was exposed to noise levels in excess of those allowed by the standard. Section 56.5050(a) sets forth permissible levels of exposure and section 56.5050(b) provides that when a permissible level is exceeded, feasible administrative or engineering controls shall be implemented by the operator.

The inspector testified that Robert Petersen was the miner who was tested for exposure to noise and that the dosimeter affixed to Petersen for an eight-hour shift measured an excessive noise level (Tr. 398). However, as Tide Creek accurately notes, evidence of exposure to an excessive noise level does not of itself establish a violation of the regulation. In *Callanan Industries, Inc.*, 5 FMSHRC 1900,1909 (November 1983), the Commission enumerated the elements the Secretary must prove to establish a violation of section 56.5050. They are:

1. Sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard;
2. Sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source;
3. Sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control;
4. Sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and
5. A reasoned demonstration that in view of elements 1- 4. . . , the costs of the control is not wholly out of proportion to the expected benefits.

The Secretary failed to meet all of the requirements of *Callanan*. The Secretary did not address whether there were engineering (or administrative) controls that could be applied to the source of the noise to achieve the required reduction and, if so, the costs and benefits of the controls. Therefore, I find the Secretary did not prove the alleged violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978137	9/29/99	50.30

The citation alleges that a copy of the quarterly employment and production report was not available at the mine for review by the inspector. Section 50.30, requires an operator to "maintain a copy of [each quarterly employment and production report] . . . at the mine office closest to the mine for five years."

The testimony focused on the company's failure to have the reports available for inspection. The inspector stated that when he requested the reports from the Petersens' daughter, Mary Ann Anderson, who told the inspector the reports were at the family's home, but she was not sure where (Tr. 410). She stated she would "have to look around the house to see if she could find [them]" (Tr. 412). The testimony was not controverted.

The standard requires the company to maintain copies of the reports at the mine office. Tide Creek asserted throughout the hearing that its effective mine office was the Petersen's nearby home. Mrs. Andersen, of whom the request was made, was acting on behalf of the company. Since she could not produce the reports upon request, they were not "available" where and when the regulation requires, and the regulation was violated.

I agree with the inspector that this was not a serious violation. The inspector described it as a "paperwork violation" (Tr. 413). I also agree that the company's negligence was low. As Mrs. Anderson told the inspector, the illness of Mrs. Petersen's mother disrupted the household and the family's management of its business, and I find that this mitigated the company's lack of care (Tr. 412).

DOCKET NO. WEST 2000-519-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978122	9/27/99	56.18002(b)

The citation alleges Tide Creek had no records of examinations of working places. Section 56.18002(a) requires each working place to be examined once each shift. Section 56.18002(b) requires the records of the on-shift examinations to be kept for one year and be made available to the inspector on request.

I conclude that the violation existed as charged. The inspector testified without contradiction that when he requested the records, he was told by John Petersen that the records were not at the workplace (Tr. 128). The standard requires the records to be produced when the inspector asks. They were not, and the standard was violated. The violation was not serious, however, in that the records later were found.

Tide Creek asserts that John Petersen is dependent upon others to handle his paperwork,

particularly his wife, who could not work from August 1999 until the late Summer of 2000. The company also asserts that Robert Petersen, not John, was the keeper of the records (Resp. Br. 57).

These arguments have no bearing on the existence of the violation, but they impact the negligence of the company. As previously noted, the request to see the records came at a time when the Petersen household was disrupted by the illness of Mrs. Petersen's mother. The Petersens were distracted and they could not devote their full attention to their business. While it is true that they then did not exhibit the care required of them, their lack of care was mitigated.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978124	9/27/99	56.14107(a)

The citation alleges that the belt conveyor's self cleaning tail pulley, which was located eight inches above ground level and between the frame of the jaw crusher, was not guarded to prevent contact.

The inspector testified that the fins on the pulley were accessible to miners working or traveling near the pulley because the fins were not more than seven feet from a travel-way or working place (Tr. 142). Tide Creek argues that there is nothing in the standard regarding the distance a moving machine part must be from a travel-way or work place and therefore the citation should be vacated. It also argues, that in any event, the tail pulley was more than seven feet from a walkway or workplace as evidenced by its exhibits (Resp. Br. 58).

I find that the violation existed as charged. Tide Creek did not challenge the inspector's testimony that a physical guard did not separate the tail pulley from the surrounding area. Nor did it challenge his assertion that the fins on the pulley could cause injury to any miner who contacted them (*See* Tr. 143-144). As I noted previously, section 56.14107(b) recognizes that moving machine parts can be guarded by distance by exempting physical guards where "exposed moving parts are at least seven feet away from walking or working surfaces." The inspector testified that the pulley was less than seven feet from the ground (Tr. 142) and that "a person could walk right up to the side of the tail pulley" (Tr. 145). He believed that because the pulley was located between the frame of the jaw crusher, access to the pulley, while possible, was not easy (*Id.*).

There is no testimony in the record controverting the inspector's contention that the physically unguarded tail pulley could be accessed by a person who walked up to it, and I find that the unguarded pulley was within seven feet of a walking surface, and that a guard was required.

There also is no testimony controverting the inspector's opinion that the location of the tail pulley meant that it was not likely to be touched by miners (Tr. 145). Therefore, I find that

although a fatality easily could have resulted if a miner was caught in the pulley, the relatively inaccessible location of the pulley meant that the chance an accident would happen was remote and the violation was not serious.

Finally, the inspector testified the relatively inaccessible location of the tail pulley mitigated Tide Creek's negligence (Tr. 147). Again, I agree and conclude that the violation was not caused by an undue lack of care but rather by the company's mistaken, but good faith belief that because of the pulley's location, physical guarding was not required.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978125	9/27/99	56.12032

The citation alleges the cover plate was missing on the 480-volt electrical termination box for the drive motor of the shaker screen. Section 56.12032, requires that "cover plates on electrical equipment and junction boxes . . . be kept in place at all times except during testing or repairs." John Petersen admitted that the plate was not in place (Tr. 330). No testing or repair of the equipment was in progress. Therefore, I conclude the company violated the standard.

Tide Creek asserts that this violation was not hazardous. It argues that because the crusher's electrical system was grounded, there was no danger that anyone would be shocked (Resp. Br. 61). I agree that the violation was not serious, but for reasons other than those advanced by the company. First, the fact that the crusher's electrical system was grounded did not necessarily diminish the chance that someone would be injured due to the violation. Tide Creek did not establish the efficacy of the grounding system. John Petersen stated at trial that the company had tested the grounding system on several occasions. However, when he was asked to produce the test reports, the most current record he could find was dated 1997. There is no way to determine from a 1997 test how safe the grounding system was in September 1999.

Moreover, the lack of a cover plate meant that a person inadvertently could contact wires inside the termination box. If the insulation on the wires was defective or if the leads were exposed, a person could have been seriously injured or worse. However, the Secretary did not establish that the insulation on the wires inside the box was faulty, nor did she offer testimony regarding otherwise exposed electrical components inside the box. Further, very few miners came near the box during the course of their work. For these reasons I find that the violation presented little chance of injury.

John Petersen explained that the cover plate was affixed to the box by a single bolt and that he was unaware the bolt had become dislodged. He also testified that the wires inside the box did not short-out when the cover plate was off, and he therefore was not alerted that the cover plate was missing (Tr. 324-325). I find, however, that the violation was the result of the

company's negligence. John Petersen knew the cover plate was attached by one bolt. Since failure of the bolt meant the plate's loss, the exercise of due care required the bolt and plate to be checked periodically. Tide Creek did not check. Rather, it apparently relied on a short circuit of the wires inside the box to signal the lack of a cover plate. This was inadequate care.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978129	9/28/99	56.14101(a)(3)

The citation alleges that the service brakes on the rear axle of a haulage truck were not functional. Half of the right rear brake cam was missing and both back brakes were disconnected. The truck was used to haul rock from the crushing plant area to the stockpile area. As has been noted, section 56.14101(a)(3) requires all of the braking systems on self-propelled mobile equipment to be maintained in functional condition.

I find the violation existed as charged. John Petersen indicated that he was aware the rear service brakes were disconnected (Tr. 176). Because the brakes were not connected, they could not function (Tr. 176). The citation states the front service brakes alone could hold the truck with a typical load, however, the standard requires all brakes to be maintained in functional condition and the fact that the front brakes were fully functional does not vitiate the violation.

This was a serious violation. John Petersen testified the rear brakes were disconnected because he was afraid mud would enter the braking mechanisms and cause the brakes to lock (Tr. 176-177). However, disabling the rear brakes meant that if the front brakes malfunctioned, then no service brakes were available to stop the truck. This seriously endangered both the driver of the truck and any miners in its path.

I conclude, as well, that Tide Creek was negligent. John Petersen knew that the brakes were disconnected (Tr. 176). As I have stated previously, if he believed compliance with the standard actually diminished safety, John Petersen should have filed a petition for its modification with the Secretary (30 U.S.C. § 811(c)).

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978132	9/28/99	56.14101(a)(2)

The citation was issued because the parking brakes on a haulage truck were not capable of holding the truck without a load on the elevated haulage road leading to the feeder. The truck was used to haul material from the rock crushing plant to the feeder. The inspector testified he tested the parking brakes of the truck when the truck was unloaded and found that the brakes would not hold the truck (Tr. 215). He also testified that he believed the truck regularly traveled

the road uphill to the feeder, although he never actually observed the loaded truck make the trip (Tr. 215).

Section 56.14101(a)(2) requires parking brakes on self-propelled mobile equipment to be able to hold the equipment with its typical load on the maximum grade it travels. I find that the violation existed as charged. The inspector's testimony that the brakes would not hold the truck when it was unloaded was not refuted. If the parking brakes would not hold the truck without a load, they surely would not hold a loaded truck. Further, the inspector's testimony that the truck traveled up the road to the feeder was not disputed. The inspector's testimony was essentially corroborated by John Petersen who confirmed at times the truck did travel up to the feeder (Tr. 353-354).⁴

The inspector was not specific about where on the road the parking brakes were tested, but it can be assumed it was on a grade since a test on level ground would have revealed nothing about the ability of the parking brakes to hold the truck. Further, since the brakes would not hold the truck on the grade where the test occurred, it logically follows that they would not hold the truck on the maximum grade the truck traveled.

The inspector was concerned that if the parking brakes were set and the truck was parked on an incline, it could roll and hit someone. He agreed, however, that the service brakes held the truck on an incline and that this diminished the gravity of the violation (Tr. 216-217). I find the violation was not serious. It was unlikely that the truck would have been parked on an incline. The most likely use of the parking brakes on an incline would have been to assist in holding the loaded truck once it stopped on the grade. Since, the service brakes alone were capable of holding the loaded truck on a grade, I agree with the inspector that an accident was unlikely to occur as a result of the violation.

The inspector believed correctly that Tide Creek was negligent. The defective brakes should have been reported, and they were not (Tr. 217). Had Tide Creek meet the standard of care required, the parking brakes would have functioned properly or the truck would have been removed from service.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978133	9/28/99	56.14101(a)

The citation was issued because of air leaks in the left front brake cam and in the air line to the right rear brake on the same truck that was the subject of the previous citation. The

⁴ I also note that although John Petersen at first asserted the truck was not in use, he later said it could have been used as recently as two or three days before the inspection.

inspector testified that he tested the air lines on the truck and found that they were leaking so that as the brakes were applied they lost some of their effectiveness (Tr. 221-222). Section 56.14101(a) requires that “[a]ll braking systems . . . on . . . [self-propelled mobile] equipment . . . be maintained in functional condition.” Tide Creek conceded that the air leaks existed, and in so doing admitted the braking system on the truck was not fully functional. I find there was a violation as charged.

The inspector explained what he feared could happen, “[I]f you were going down a hill in the truck and you continued to loose air pressure, you would loose brakes” (Tr. 222). Still, he stated that despite the leaks, there was sufficient air pressure to stop the truck (Tr. 223). This greatly reduced the possibility of an accident, and I find that the gravity of the violation was less than serious.

I further find that Tide Creek was negligent in allowing the violation to exist. Not only should the driver of the truck have noticed and reported that the brakes tended to fade (a sign of leaking air lines), but the leaking air was audibly obvious (Tr. 224).

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978136	9/28/99	56.14100(d)

The citation was issued because when the inspector asked John Petersen to see the records of defects on self-propelled mobile equipment, Petersen did not show him any (Tr. 225). Section 56.14100(d) requires uncorrected, safety-affecting defects on self-propelled mobile equipment to be reported to and recorded by the operator. The standard also requires that the records be kept at the mine or the nearest mine office and that they be made available for inspection by the inspector. The company does not dispute that Petersen did not show the inspector the records when the inspector asked. I find that the violation existed as charged.

The inspector did not believe this was a serious violation (Tr. 225). The failure to have the records available for review was unlikely to result in or to contribute to a miner’s injury. However, Tide Creek was negligent in failing to produce the records. Tide Creek stated in its brief that it has been keeping such records for years (Resp. Br. 65). If so, it should have known that their availability also was required.

DOCKET NO. WEST 2001-76-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978121	9/27/99	56.12028

The citation alleges that the company failed to conduct yearly continuity and resistance testing of grounding systems. Section 56.12028 requires such testing annually after grounding systems have been installed. It also requires records of the test be made available to an inspector. Tide Creek argues that testing was done but admits that it was not done annually (Resp. Br. 74). (The inspector testified that the system had been tested last on March 10, 1997, (Tr. 547)). Also, it does not dispute the fact that it had no records available to show the inspector. Therefore, I find that a violation of the cited standard existed.

The inspector properly determined that the violation was not serious. The Secretary did not offer any testimony to refute the company's contention that the facility never has experienced electrical continuity problems. The fact that the mine has no history of continuity malfunctions lessens the chance that the violation would result in an injury. (I note in passing that the company had undertaken at least a partial test of the grounding system in June 1999 (Tr. 547), and no problems were detected.)

With regard to the company's negligence, the inspector observed that Tide Creek had been cited previously for a similar violation (Tr. 549). Tide Creek did not disagree, and I find that it knew annual testing and record keeping were required. It's failure to comply was due to its negligence.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978134	9/28/99	56.14132(a)

The citation alleges that the horn on a front-end loader did not work when tested. The inspector testified that he asked the operator of the front-end loader to activate the horn by pushing the horn button. The operator did as requested, and the horn did not work (Tr. 552). Section 56.14132(a) requires manually operated horns on self-propelled mobile equipment to be operable. The violation existed as charged.

The violation was not serious. The loader was operating in an area where few other pieces of equipment and few other miners were present. The loader operator had unrestricted frontal visibility. He could slow, stop, or redirect the vehicle if he saw a miner or a piece of equipment come into the loader's path. That the horn was not operating was unlikely to cause or contribute to an accident.

However, the company was negligent. It was easy to determine that the horn did not work and the violation should have been discovered during the required pre-shift examination of the equipment. Had the company exercised the care required, the horn would have been repaired or the loader would have been removed from service until the horn was repaired.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
7978135	9/28/99	56.14101(a)(2)

The citation alleges the parking brakes on the same front-end loader were incapable of holding the loader without a load on the elevated haul road in front of the load out bunkers for the rock crushing plant. The inspector testified he saw a miner set the front-end loader's parking brakes on a grade. He described the grade as "a little elevated area" and he testified that the loader had been operating in the area (Tr. 559). The brakes did not hold the loader which rolled until it came to a level area, or until the operator applied the service brakes (Tr. 555-556).

As has been noted, the standard requires parking brakes to be able to hold self-propelled mobile equipment with its typical load on the maximum grade it travels. Inadequate testimony was elicited by the Secretary to support the alleged violation. There was no testimony about the maximum grade the front-end loader traveled, nor was there any testimony about whether or not the bucket was loaded. While I might have been able to infer that the parking brakes could not hold the loader on its maximum grade since they could not hold it on a slight grade, I can make no such inference about the equipment's "typical load." There was no testimony about whether the bucket contained a load, nor about what a "typical load" might be. The loader might have been carrying nothing; it might have been carrying its typical load; or, it might have been carrying more than its typical load. Since there is no way to determine from the record whether the parking brakes were "capable of holding the equipment with its typical load", I conclude that the Secretary did not prove the alleged violation.

ABILITY TO CONTINUE IN BUSINESS

The operator bears the burden of proof as to the effect of a civil penalty on its ability to continue in business. In the absence of such proof, the judge will presume that no adverse affect will occur. Tide Creek argues that paying the proposed civil penalties will have a detrimental affect on its ability to continue operating. Steven Brittle, a licenced CPA, appeared as a witness for Tide Creek (Tr. 478). He has been the company's accountant for many years.

Mr. Brittle described the company as "a struggling entity attempting to achieve success" (Tr. 478). He stated that he believes the company's continued existence is precarious, and he described the company as being in a "survival mode" (*Id.*). He testified that due to diminished sales, the company's owners continually must lend the company money to meet its payroll (Tr. 477-478). The company's income between 1994 and 1999 (the last year in which a federal income tax return was filed [⁵]) ranged from a low of \$143,788 to a high of \$278,181 (Tr. 469). Since 1999, the company has suffered an increasingly severe financial impact due to continually

⁵ The company received an extension for filing its year 2000 tax return (Tr. 469).

lower sales and to the intermittent nature of those sales (Tr. 467). As a result, the company has no steady source of income.

The company's principle current asset is its equipment, but Mr. Brittle maintained some of the equipment only has scrap value (Tr. 478). In his view, any additional costs to the company will have a "very severe" impact on the company's viability and will mean that the owners will have to put even more money of their own into the company. Mr. Brittle stated that if the owners do not continue to give the company out-of-pocket subsidies, the business, "is not going to survive (Tr. 477). However, Mr. Brittle also was of the opinion that the company might be able to pay the assessed penalties, if payments are contingent on the company first generating a positive revenue (Tr. 484).

The Secretary argues that Mr. Brittle's testimony is unreliable because it was based on documents supplied by Tide Creek and because Mr. Brittle has not visited the mine in several years. I reject these arguments. All in all, he was a persuasive and credible witness. There is nothing remarkable in the fact that Mr. Brittle used Tide Creek's documents. CPAs usually rely on financial information and documents furnished by their clients (*See* Tr. 481). Nor do I find the fact that Mr. Brittle has not been to the mine in several years to detract from the credibility of his testimony. Mr. Brittle has worked as a CPA for the company since the mid-1970's. Among other things, he has prepared the company's tax returns. Certainly, he is privy to the company's financial information and informed about its fiscal situation, the topics about which he testified.

The fiscal picture of Tide Creek that emerged from Mr. Brittle's testimony is not encouraging. He made clear that since 1999 the company's financial situation has deteriorated, a fact underscored by John Petersen's undisputed testimony that he has cashed in his life insurance policies to fund the company (Tr. 479). Based on his description of the company's fiscal situation, I accept Mr. Brittle's opinion that to become financially healthy, the company must sell more product and must do so on a regular basis—something that has yet to happen.

Therefore, I conclude Tide Creek has met its burden of proving that the civil penalties assessed herein will have a detrimental affect on its ability to continue in business. To lessen that affect, I will assess lower penalties than otherwise would be warranted. In addition, Tide Creek may pay penalties on a structured basis. Structured payments should make it easier for the company to manage the new debt the penalties represent. However, I will not implement Mr. Brittle's suggestion that the structured payments be conditioned on increased sales. Nothing in the Act warrants making payments dependent on future revenue.

SIZE

As stated at the beginning of this decision, the company is small in size.

GOOD FAITH ABATEMENT

There were four instances in which the Secretary issued orders to the company for failing to abate within the time as originally set. In one instance, Citation No. 7978127 (Docket No. WEST 2000-437-M), I have found that extenuating circumstances excused the company's lack of timely compliance. In the other three: Citation No. 7978121; Citation No. 7978134; and Citation No. 7978135 (Docket No. WEST 2001-76-M), the Secretary subsequently vacated the orders. I, therefore, conclude in all instances the company complied in good faith.

HISTORY OF PREVIOUS VIOLATIONS

At the hearing, counsel for the Secretary stated that the company had no applicable history of previous violations, and I so find (Tr. 568-569).

CIVIL PENALTY ASSESSMENTS

DOCKET NO. WEST 2000-368-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7973902	9/27/99	56.12008	\$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given fact that the proposed assessment adversely will affect the company's ability to continue in business, that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$40 is appropriate.

DOCKET NO. WEST 2000-437-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978127	1/27/00	56.14101(a)(3)	\$371

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that extenuating circumstances excused its lack of timely compliance; and that the company lacks an applicable history of previous violations, I conclude an assessment of \$70 is appropriate.

DOCKET NO. WEST 2000-446-M

<u>Citation No.</u>	<u>Date</u>	<u>30 U.S.C.§</u>	<u>Proposed Assessment</u>
7973999	1/19/00	814(b)	\$600

At the hearing the Secretary explained that this citation has been vacated (Tr. 16-17). Therefore, no penalty is assessed.

DOCKET NO. WEST 2000-519-M

<u>Citation No.</u>	<u>Date</u>	<u>30 U.S.C.§</u>	<u>Proposed Assessment</u>
7978122	9/27/99	56.18002(b)	\$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's mitigated negligence. Given these criteria, and given fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$25 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978123	9/27/99	56.14107(a)	\$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that the company lacks an applicable history of previous violations, I conclude an assessment of \$70 is appropriate for this violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978124	9/27/99	56.14107(a)	\$188

I have found the violation was not serious. I also have found that it was the result of Tide Creek's mitigated negligence. Given these criteria, and given the fact that the proposed

assessment adversely will affect the company's ability to continue in business; that the company is small, that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$25 is appropriate for this violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978125	9/27/99	56.12032	\$264

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$40 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978126	9/27/1999	56.14103(b)	\$66

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$40 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978129	9/28/99	56.14101(a)(3)	\$55

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$70 is appropriate for this violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978130	9/28/99	56.14132(b)	\$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment

adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$70 is appropriate for this violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978131	9/28/99	56.14107(a)	\$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given fact that the proposed assessment adversely will affect the company's ability to continue in business, that the company is small, that it exhibited good faith in abating the violation, and that the company lacks an applicable history of previous violations, I conclude an assessment of \$70 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978132	9/28/99	56.14101(a)(2)	\$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$40 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978133	9/28/99	56.14101(a)	\$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$40 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978136	9/28/99	56.14100(d)	\$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$40 is appropriate.

DOCKET NO. WEST 2000-561-M

<u>Citation No.</u>	<u>Date</u>	<u>30 U.S.C.§</u>	<u>Proposed Assessment</u>
7973901	9/27/99	56.11001	\$215

I have found the violation was serious. I also have found that it was the result of Tide Creek's lessened negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$60 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7973904	9/28/99	56.18010	\$162

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$70 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7973905	9/28/99	56.5050	\$215

I have found that the Secretary did not prove the violation. No civil penalty is assessed.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978137	9/29/99	50.30	\$66

I have found the violation was not serious. I also have found that it was the result of Tide Creek's mitigated negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$25 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978438	3/29/2000	56.9301	\$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$70 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978439	3/29/2000	56.9300(b)	\$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$70 is appropriate.

DOCKET NO. WEST 2001-76-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.§</u>	<u>Proposed Assessment</u>
7978121	9/27/99	56.12028	\$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment

adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$40 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7978134	9/28/99	56.14132(a)	\$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of \$40 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7978135	9/28/99	56.14101(a)(2)	\$55

I have found that the Secretary did not prove the violation. No civil penalty is assessed.

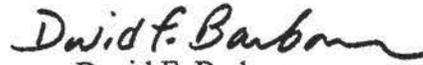
ORDER

Tide Creek's motion to dismiss Docket No. WEST 2000-446-M is **GRANTED**. Citation No. 7973905 (Docket No. WEST 2000-561-M) and Citation No. 7978135 (West 2001-76-M) are **VACATED**.

Further, Tide Creek **IS ORDERED** to pay the following penalties on the structured basis set forth below:

Docket No. WEST 2000-368-M	\$ 40
Docket No. WEST 2000-437-M	70
Docket No. WEST 2000-446-M	0
Docket No. WEST 2000-519-M	530
Docket No. WEST 2000-561-M	260
Docket No. WEST 2001-76-M	80
Total:	\$980

Tide Creek shall pay \$330 within 30 days of the day of this decision, \$325 on or before June 24, 2002, and \$325 on or before September 24, 2002.



David F. Barbour
Chief Administrative Law Judge

Distribution:

Matthew Vadnal, Esquire, Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

Agnes Petersen, Esquire, Tide Creek Rock, Inc., 33625 Tide Creek Road, Deer Island, OR 97054

/wd

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 22, 2002

MIKE FLETCHER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2001-150-DM
	:	WE MD 00-11
	:	
v.	:	
	:	Portable Crusher #1
MORRILL ASPHALT PAVING,	:	Mine I.D. 45-03357
Respondent	:	

DECISION

Appearances: Larry Larson, Esq., Lukins & Annis, Moses Lake, Washington, for Complainant;
Lewis L. Ellsworth, Esq., Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Tacoma, Washington, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Mike Fletcher against Morrill Asphalt Paving ("Morrill") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Fletcher alleges that he was laid off from his employment with Morrill, at least in part, because he complained about safety conditions at the crusher. An evidentiary hearing was held in Wenatchee, Washington. The parties presented closing argument at the hearing in lieu of post-hearing briefs. For the reasons set forth below, I find that Mr. Fletcher established that he engaged in protected activity and that his layoff was motivated at least in part by that activity.

I. SUMMARY OF THE EVIDENCE

Morrill is in the sand and gravel business. Morrill operated a portable plant used to crush rock that was moved to several locations in Washington State between 1997 and 2000. This case arose as a result of events that occurred in July 1999 through early February 2000.

Mike Fletcher first starting working for Morrill in January 1997. Prior to that time he worked for several financial institutions and for Wenatchee Sand and Gravel. He was hired to operate a mobile rock crusher. He also spent a year in Hermiston, Oregon, operating an asphalt

plant for Morrill. In July 1999, the portable crusher was at a pit near Wenatchee. Because the crusher was being set up at that time, he ran the loader and fed the plant for about a week. (Tr. 15). While the crusher was at this pit, Fletcher complained about safety conditions to Roger Harting, crusher superintendent. He told Harting that the handrails on the cone screen had not been installed exposing employees to a 14-foot drop. (Tr. 16). Fletcher testified that the screens were being changed on a daily basis exposing him and others to a falling hazard. Fletcher also called Richard Thody, the corporate safety manager, to complain about the missing handrails. Fletcher testified that Thody went to the pit and told Warren Smethers, who was in charge of maintenance for the crushing plant, that the handrails needed to be installed. Handrails were installed shortly thereafter.

In August 1999, the portable crusher was moved to a different location. During this period, Fletcher was in contact with Thody on a regular basis to talk about safety issues. (Tr. 17). Fletcher testified that Thody asked him to keep a list of safety deficiencies so Thody would be better informed about safety issues. Fletcher provided that list in September 1999. (Ex. 4). In early October 1999, the crew was told to report to the office of Dean Gill, the General Manager. He called each individual into his office to discuss safety at the crusher. Mr. Smethers was terminated from his employment and the crusher was shut down until Thody made sure that all safety deficiencies had been corrected. (Tr. 19). Smethers was subsequently rehired by Morrill.

In October 1999, the crusher was moved to Maple Valley in Kent, Washington. After this move, Mr. Fletcher was assigned to the night shift to perform maintenance. The crusher was shut down during the night shift and only maintenance was performed. In January 2000, the crushing plant had to be repositioned at the Kent site because it was in a low area that tended to accumulate water. After this relocation, Fletcher was assigned to be the plant operator during the day shift. Fletcher made a number of complaints in January to Roger Harting. When no changes occurred, Fletcher made these same complaints to Mr. Thody. His complaints were that two employees at the crushing plant, Randy Syria and Don Drinkwater, were working with the smell of alcohol on their breath. (Tr. 23). Fletcher testified that Syria told him that he drank vodka at night until he passed out and started drinking again when he woke up the next morning. Fletcher also testified that Syria apologized for his behavior. Fletcher stated that he believes that the drinking issue is related to safety because there are many dangerous moving parts around a crusher. For example, Fletcher believed that Syria could kill or injure an employee if he operated the dozer while intoxicated. Fletcher felt that, as a shift boss, he had a duty to report this behavior. He stated that other employees came to him to complain about intoxication on the job. Fletcher stated that he was present when two other employees complained about this issue to Harting. (Tr. 26-27).

On February 8, 2000, Fletcher again complained to Harting that Mr. Syria smelled of alcohol, had a surly attitude, and had been arguing with another employee. Harting merely shrugged his shoulders. Later during that same shift, Mr. Harting told Fletcher that he was laid off. (Tr. 27). Fletcher testified that he asked Harting for a reason and Harting replied that there

was no reason. (Tr. 28). When Fletcher asked again, Harting replied that the company “didn’t give Warren [Smethers] a reason when they laid him off.” *Id.*

After Fletcher left the property in his truck, he called Dean Gill. Fletcher testified that Gill told him that he didn’t know that he “had been laid off.” *Id.* Gill told Fletcher to meet with him at his office the following morning. Fletcher also called Mr. Thody. Fletcher testified that Thody was furious when he heard that he had been laid off. Apparently, Thody wondered aloud during this conversation whether Fletcher had been discriminated against for raising safety issues. (Tr. 29). Thody asked Fletcher to meet with him after his meeting with Gill the following morning.

At the meeting with Gill on the morning of February 9, Fletcher asked Gill whether Harting had told him about Fletcher’s complaints about safety and drinking on the job. Gill replied that Harting had not contacted him about any drinking issues. Fletcher testified that Gill did not tell him at this meeting that he was being laid off for economic reasons or for lack of work. *Id.*

Fletcher then met with Thody. Thody called Burt Touchberry, his boss, into his office and outlined the key events in Fletcher’s employment history. According to Fletcher, both Thody and Touchberry indicated that he may have been discriminated against. (Tr. 30). Thody asked Fletcher to make a list of the safety deficiencies that Roger Harting had tolerated since Fletcher started working for Harting. (Tr. 30; Ex. 3).

Fletcher testified that Gill called him at his home on February 10, 2000, and said “you weren’t laid off for any other reason than lack of work.” (Tr. 32). Fletcher met with Thody several more times after that. Thody recommended that Fletcher file a discrimination complaint with the State of Washington under WISHA, the Washington Industrial Safety and Health Act. Fletcher filed a WISHA complaint. (Ex. 1). On or about February 24, Thody told Fletcher that he continued to believe that Fletcher got a “raw deal,” but that he had been verbally reprimanded by his supervisor for making statements about discrimination to Fletcher.

Fletcher agrees that the crushing plant was overstaffed at the time of his layoff. (Tr. 46-47). He also does not dispute that Roger Harting was qualified and able to operate the plant. He also admits that when he raised safety issues at the pit near Wenatchee, the conditions were corrected. (Tr. 47). Except for the drinking issue raised at the Kent site, all of the safety issues were corrected. Indeed, Mr. Gill went to the site and instructed employees on safety issues. (Tr. 49). Morrill shut down the plant for several days in early October 1999 to correct the potential safety hazards that Fletcher brought up. Thody told Gill about the drinking problem at the crusher, but Harting never mentioned it. Fletcher believes that he was terminated because he went over Harting’s head to talk to Thody and Gill about his safety concerns. Fletcher believes that both Gill and Thody wanted the crusher to be operated in a safe manner.

Fletcher believes that, once Morrill determined that it needed to eliminate an employee at the Kent site, he should have been bumped down to another position because he was capable of performing all of the tasks at the crusher. Gill did not deny that Fletcher could have probably performed any job at the crusher. (Tr. 76-77). As it was, the two employees who came to work with alcohol on their breath kept their jobs while he was laid off. Both Syria and Drinkwater had less seniority than Fletcher. Drinkwater was hired by Morrill on January 10, 2000, and Syria was hired on August 23, 1999. Fletcher contends that he was laid off because he complained about safety over Harting's head.

Mr. Gill testified that he advised Fletcher on February 8 that he was being laid off because the company had to cut back. (Tr. 95). Gill testified that Fletcher was laid off because the company was losing money at the Kent site and, because they were operating only one shift, two plant operators were no longer needed. (Tr. 68). He stated that he had never terminated anyone on the basis of a lack of work until Fletcher was terminated. Gill stated that Fletcher was a good employee and admitted that he could have terminated Drinkwater or Syria instead of Fletcher.

Gill testified that he was the Morrill manager who determined that a layoff was necessary. He discussed who should be laid off with Harting. The crushing plant was operating one shift per day but there were two plant operators, Fletcher and Harting. Gill testified that he told Harting that the crusher did not need two plant operators. (Tr. 74). Harting called Gill back to tell him that Fletcher was the other plant operator. Gill testified that he responded "that's fine," meaning that Fletcher was chosen for the layoff. (Tr. 74-75). Gill testified that he did not take seniority into consideration when making this decision. (Tr. 79).

Although Gill told the Washington State Department of Labor and Industry during the WISHA investigation that Fletcher was the highest paid employee at the crushing plant, there were actually four or five employees making the same amount of money as Fletcher at the Kent project. Both Drinkwater and Syria were paid the same rate as Fletcher. When the crusher was working at projects that were not publically funded, Fletcher and Harting were paid more than the other employees. (Tr. 91). Gill testified that he chose Fletcher because Morrill did not need two plant operators at Kent. He believed that Thody was working with Syria and Drinkwater to correct any drinking problems. He was concerned about it, but believed that it no longer presented a safety hazard. Gill also testified that employees should raise safety issues and that he has never taken an adverse action against an employee who complained about safety. (Tr. 91-92). A meeting was held on the morning of February 8, 2000, to advise employees that they will be terminated if they test high for blood alcohol. (Ex. 6).

Richard Thody testified that he has a degree in loss control and started working for Morrill's parent company, Goodfellow Brothers, Inc., as the safety and health manager in March 1999. (Tr. 109). He stated that he and Fletcher had a good relationship and that Fletcher discussed safety issues with him in July 1999 and at other times after that date. Fletcher also complained to him about employees drinking on the job. (Tr. 114). Thody discussed the

drinking problem with Gill. Thody apparently was not held in high regard by Harting because Harting referred to Richard Thody as the "Safety Dick" behind his back. (Tr. 116; Ex. 3 p.2).

When Thody heard that Fletcher had been laid off, he became upset. Thody testified that he told Fletcher that he may have been discriminated against. (Tr. 118). At the hearing, Thody testified that he does not believe that Fletcher was discriminated against for making safety complaints. (Tr. 118-19). Thody now believes that his initial belief that Fletcher may have been discriminated against was "a knee-jerk reaction." (Tr. 122). He was upset that Fletcher was laid off because they worked well together on safety issues and he considered Fletcher to be his friend. (Tr. 122, 126). He was also upset because he also believed that Fletcher was very safety conscious. (Tr. 127). Thody testified that Gill would not take any retaliatory action against an employee for making safety complaints.

Gary Kneedler worked for Morrill from July 1994 to November 1999 as a crusher superintendent. (Tr. 130). Mr. Fletcher had worked under Kneedler as a plant operator. Kneedler testified that Fletcher knew how to operate the loader, the dozer, and the bobcat as well as perform all the other jobs at the crusher. Kneedler testified that Fletcher was a better employee than others because he was experienced at running all the equipment. He would have taken the experience and seniority of employees into consideration if a layoff had been required when he was the crusher superintendent. Kneedler testified that, in the crushing business, an employer will need two plant operators on some jobs but only one in others, depending on the number of operating shifts. He said that, as a general matter, "the more experienced key guys are the ones you want to keep around when you fluctuate crews back and forth." (Tr. 133). He admitted that Morrill was not required to lay off employees based on seniority, but that it was the "industry standard" to do so. (Tr. 135).

Shawn Simmons worked for Morrill from October 1998 to November 2000 as the area manager in Morrill's Hermiston, Oregon, office. He worked with Fletcher when Fletcher was the operator of the hot plant. Simmons testified that he was present at a safety meeting held in the Wenatchee Convention Center when he overheard a discussion of Mr. Fletcher's layoff. Simmons could not remember when this meeting took place but it was before Fletcher was laid off. (Tr. 143). Simmons heard Gill talk about the layoff. In Simmons' opinion, based on these conversations, the "primary reason [that Fletcher was laid off] seemed to be that he was stirring the pot, causing problems, going to the safety officer, things like that." (Tr. 140-41).

Mr. Gill testified that he has never made any derogatory remarks about Thody and that he did not say anything negative about Fletcher at the safety meeting at the convention center. (Tr. 151). Gill testified that Thody is a good safety officer because he is "real thorough." *Id.* Gill testified that Simmons may harbor animosity against Morrill because Simmons was accused by Morrill of stealing from the company. (Tr. 152). Morrill believes that he was selling crushed rock off the books and pocketing the money. (Tr. 152-53). Although Simmons quit his job in November 2000, Gill testified that Morrill was investigating Simmons' activities and that he would have been fired in any event for stealing from the company.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Mr. Fletcher

Mr. Fletcher argues that the facts demonstrate that he was a good worker and a safety-conscious employee who had worked for the company since 1997. Starting in July 1999, Fletcher made safety complaints to his supervisor and to Mr. Thody. In January 2000, Fletcher complained about employees coming to work with alcohol on their breath. One of the individuals that Fletcher complained about, Mr. Drinkwater, was hired on January 10, 2000. After Fletcher made these complaints, Morrill decided that it needed to lay him off for economic reasons. Fletcher was laid off even though other employees had less seniority. The evidence shows that Fletcher had the experience to perform all the jobs at the plant.

Fletcher argues that the company's justification for his layoff is illogical and inconsistent. First, Morrill's position in the WISHA proceedings was that Fletcher was chosen because he was the highest paid employee at the Kent site. Later, when it was revealed that Fletcher made no more money than anyone else, the company argued that it did not need two plant operators. Fletcher contends that, because he had the ability and experience to perform all the jobs at the plant, the decision to lay him off as opposed to other less experienced employees does not make any sense. Mr. Gill testified that the company is safety conscious, yet the only person laid off was Mr. Fletcher who was making safety complaints. Mr. Thody was very upset by the layoff because the company let go the only person who was keeping him informed about safety problems. Thody continued to be concerned about Fletcher's termination when the State of Washington investigated the incident. Thody's testimony at the hearing should not be given any weight. Fletcher contends that the statements of management and Morrill's justification for choosing Fletcher for layoff do not "stack up in this case." (Tr. 161). Fletcher contends that he established that he was discriminated against when chosen for layoff.

B. Morrill Asphalt

Morrill argues that its decision to lay off Mr. Fletcher was not personal but economic only. The evidence establishes that Morrill had a strong commitment to safety. Fletcher does not deny that Thody and Gill were committed to safety. Fletcher did not feel threatened by bringing written safety complaints even though he knew that management would see it. Gill came to the plant in early October 1999 and shut it down for two days so that the safety problems that Fletcher brought up could be corrected. Every safety complaint that Fletcher raised was promptly attended to. Fletcher's real argument in this case is that he was singled out because he went over Harting's head when making safety complaints to Thody and Gill. There is no evidence in the record that he was discriminated against for this reason.

A mine operator cannot "negligently discriminate" against a miner. (Tr. 163). The discrimination must be an intentional act. Throughout this case and the investigation by the State of Washington, Fletcher maintained that Mr. Gill would not have taken any action against him as

punishment for raising safety issues. Mr. Gill was the person who determined that there were too many people working at the Kent Plant and determined that two plant operators were not necessary. There is no question that Morrill was losing money at the Kent Plant. Morrill does not have a collective bargaining agreement and it does not recognize seniority as a factor when laying off employees. There was nothing improper about Morrill selecting Fletcher for layoff.

Mr. Thody considered Fletcher to be his friend. Consequently, when Thody heard that Fletcher of laid off, he was naturally very upset. Thody raised the discrimination issue because he was upset, not because he believed that Fletcher had actually been discriminated against. Fletcher's reliance on Mr. Thody's statements following his layoff is nothing more than a "house of cards." (Tr. 166). The testimony of Simmons should be given no weight. This case should be dismissed because Fletcher did not meet his burden of proof.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Did Mike Fletcher engage in protected activity?

Mr. Fletcher engaged in protected activity when he complained about safety conditions at the plant from July 1999 until he was laid off. His complaints about alcohol use by his fellow employees was safety related because he feared that they could injure him as they operated heavy equipment.

B. Was Morrill's layoff of Mike Fletcher motivated in any part by his protected activity?

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

There can be no dispute that Morrill was aware of Fletcher's safety complaints. There was also a coincidence in time between Fletcher's complaints and his layoff. Fletcher started making safety complaints in July 1999 and his complaints continued until his layoff. Simmons testified that he overheard a conversation that led him to believe that Fletcher was laid off because he was "stirring the pot, causing problems, [and] going to the safety officer." (Tr. 140-41). I do not rely on Simmons' testimony. Circumstantial evidence shows that Harting did not welcome the safety activities of Thody and Fletcher. There is also evidence that Harting, not Gill, selected Fletcher for layoff. It appears that Morrill had never previously terminated anyone from employment under circumstances similar to the layoff of Fletcher.

I find that Fletcher established a *prima facie* case of discrimination. The circumstantial evidence establishes that the choice of Fletcher for lay off was motivated at least in part by his safety activities. Morrill's decision to lay off Fletcher does not make any sense from a business context. Fletcher was a well-trained and experienced plant operator who could perform any of the myriad tasks at the crusher. He had worked for Morrill for three years in a wide range of positions from a hot plant operator, maintenance worker, plant operator, and equipment operator. There is nothing in the record to indicate that Morrill had any problems with his work habits. When the plant was first moved to Kent, Fletcher worked the evening maintenance shift because there was only one operating shift. For reasons that are not clear, when the plant was repositioned at Kent to reduce flooding around the crusher, Fletcher became the plant operator even though Harting also worked that same shift and could operate it.

I credit the testimony of Gary Kneedler that it is the industry standard for a sand and gravel operator to retain the most senior and experienced employees when a layoff is necessary. It is logical to do so because, if and when the workload increases, the operator will be able to increase output more quickly. I recognize that Morrill was not restricted by a collective bargaining agreement to use seniority when determining whom to layoff, but it strains logic to assume that experience would not be considered when a reduction in workforce is necessary. In this case, Morrill retained two employees who had alcohol abuse problems at the plant, including one who had worked for Morrill for less than a month. Under these circumstances, the logic behind Morrill's decision to lay off Fletcher is difficult to understand. As discussed below, the evidence establishes that Harting played a major role in the decision to lay off Fletcher.

As the Commission has stated, motivation is subjective and direct evidence of motivation is rarely encountered. There is sufficient evidence in the record to establish that Morrill was motivated, at least in part, by Fletcher's safety work to establish a *prima facie* case of discrimination. Some of the evidence I relied upon in reaching this conclusion is discussed in more detail below.

C. Did Morrill establish that its layoff of Mike Fletcher (1) was not motivated in any part by Fletcher's protected activity or (2) that it would have occurred even if Fletcher had not made any safety complaints to Harting, Thody, and Gill?

Morrill contends that the layoff was totally based on economic considerations. Morrill established, and Fletcher does not dispute, that a layoff at the crusher was justified. Morrill did not make the decision that a layoff was necessary as a pretext to terminate Fletcher. The issue is whether the decision to choose Fletcher for layoff was motivated by his protected activities.

Morrill posited a number of different reasons for choosing Fletcher for layoff. When Fletcher challenged his layoff in the WISHA proceeding, Morrill contended that Fletcher was chosen because he was the highest paid employee at the crusher besides Mr. Harting. It is clear that Mr. Fletcher's wages were no greater than Drinkwater's and Syria's wages at the Kent project. In the present proceeding, Morrill argued that Fletcher was chosen because two plant operators were not required at Kent. Morrill did not establish that Fletcher was chosen for that reason alone.

Morrill also relies on the fact that Fletcher did not believe that Gill would lay him off because he complained about safety. Fletcher had high regard for Gill's commitment to safety because he had responded to his earlier complaints. Morrill argues that Fletcher's confidence in Gill is an admission that bars this action. It contends that because Gill made the final decision to lay off Fletcher, this case must be dismissed. I reject Morrill's argument. First, Fletcher's position is that Harting was the one who wanted to see him terminated from his employment and that it was Harting, not Gill, who first suggested that Fletcher be chosen for layoff. Fletcher believes that if he had not been making safety complaints, Harting would have not have suggested him for layoff and that Gill would have accepted Harting's recommendation. In

addition, the complaint in this case is against Morrill not Gill so the fact that Fletcher believes that Gill would not lay him off for making safety complaints does not bar this action or establish that Morrill was not motivated in some part by Fletcher's safety complaints.

Discrimination cases typically arise in the context of a termination for cause. In such instance, if a mine operator cannot establish that the protected activity played no part in its decision to terminate the complainant, it may nevertheless defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. Because this case involves a layoff, the test is not a perfect fit. I must analyze whether Morrill would have laid Fletcher off even if he had not engaged in protected activity.

The Commission has cautioned its administrative law judges that the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted). Nevertheless, the judge must carefully analyze the reasons given by the employer for the adverse action to determine whether such reasons are simply a pretext. In *Chacon*, the Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business practice or on whether a particular adverse action was "just or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather the narrow statutory question is whether the

reason was enough to have legitimately moved that operator to have disciplined the miner.

Chacon, at 3 FMSHRC 2516-17 (citations omitted). The Commission further explained its analysis as follows:

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

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

As stated above, Morrill’s evidence that cutbacks were necessary is credible. It is also true that two plant operators were not necessary at the Kent site because the crusher was operating only one shift per day. The question is whether Morrill used the layoff as a cover to terminate Fletcher.

Morrill argues that a mine operator cannot “negligently discriminate” against a miner. I agree that the discrimination must be intentional. The following factors are in Fletcher’s favor: (1) the proximity in time between his safety complaints and the adverse action; (2) Morrill’s knowledge of his protected activity; (3) Morrill provided inconsistent reasons for choosing Fletcher for layoff at different times; (4) Morrill was aware that Fletcher had worked in many different positions for Morrill including on the maintenance shift at the Kent site; (5) Fletcher was paid the same hourly wage at the Kent site as other employees including Syria and Drinkwater; (6) Harting referred to Thody in disparaging terms, (7) Harting did not appear to welcome and was unresponsive to Fletcher’s safety complaints, and (8) Fletcher had a good work record. Also favoring Fletcher is Mr. Thody’s initial reaction to his layoff. Thody was well aware of Fletcher’s work history and safety activities and he sincerely believed that he had been discriminated against. Fletcher was the only Morrill employee making safety complaints.

Of these factors, I find it highly significant that Mr. Gill offered different explanations for the layoff of Fletcher at different times. Because his reasons are inconsistent, I question the credibility of his testimony. Mr. Gill told the Washington State Department of Labor and Industry (DLI) investigator, on May 18, 2000, that Mr. Harting made the decision to lay off Fletcher. (Gill Interview at 5 attached to Fletcher’s Response to Morrill’s Motion for Summary

Decision; Tr. 98-99). Gill told the DLI investigator that when he asked Harting how many people were working at the Kent crusher, Harting replied that eight people were working there. *Id.* Gill stated that he told Harting that only six people should be on that job. He further stated that Harting called him back and asked if it was “okay to lay off Mike.” Gill told the DLI investigator that he responded to Harting as follows:

[W]hoever you want to lay off is fine with me. I mean, that’s, you’re the guy that’s running the crusher. As long as . . . it’s not jeopardizing your production ability, you know, you make the choice.

Id. Gill also told the DLI investigator that Fletcher was the highest paid employee on the job except Roger Harting. *Id.* at 6.

During his deposition taken in this proceeding on July 17, 2001, Gill stated that, although Harting notified Fletcher that he was being laid off, “Roger and I” made the decision to choose Fletcher for layoff. (Gill Dep. at 28 attached to Fletcher’s Response to Morrill’s Motion for Summary Decision; Tr. 102). Gill further testified at the deposition, as follows:

I remember telling [Harting]: We don’t need two operators. What do we need two crusher operators for. We don’t. Well, lets get rid of one of the crusher operators. These other guys are grunts that do specific things. Mike was basically the guy who just sat around and pushed buttons on a button house, get rid of Mike.

(Gill Dep. at 34). At the hearing, Gill testified that he told Harting to lay off the other crusher operator and, when he was told that it was Fletcher, he replied “that’s fine.” (Tr. 74-75). Harting did not testify at the hearing. Gill’s testimony in the WISHA proceeding, taken only a few months after the layoff, was that Harting chose Fletcher for layoff. That testimony supports Fletcher’s position in this case. I find that Fletcher’s version of the events, as supported by Gill’s DLI interview, is more credible.

Morrill did not rebut Fletcher’s *prima facie* case. I find that the testimony of Fletcher is more credible than the testimony of Gill or Thody, for the reasons discussed above. Gill’s testimony has been inconsistent and Thody’s change of heart is not convincing. According to the declaration of DLI investigator Britt Scott, Thody told Scott during a telephone interview in March 2000, that Fletcher’s layoff “would make [his] job more difficult because now other employees are going to be afraid to speak up or report any safety and health problems or concerns.” (Ex. 11 at 2). The anti-discrimination provisions of the Mine Act were enacted specifically to prevent these types of fears. During the seven months prior to his layoff, Fletcher sought Thody’s help in correcting safety deficiencies because Fletcher reasonably believed that Harting did not welcome and was unresponsive to his safety concerns. I conclude that the justifications presented by Morrill for choosing Fletcher for layoff are “so weak, so implausible,

or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.” *Chacon*, at 3 FMSHRC 2516. Morrill used the necessity of the layoff to select Fletcher because he had been making safety complaints to Thody. In conclusion, I find that Fletcher established a *prima facie* case of discrimination and that Morrill did not rebut his case by showing that it did not lay off Fletcher for his protected activity or that it would have laid Fletcher off even if he had not engaged in protected activity.

It is my understanding that Fletcher is seeking (1) back pay from the date of his layoff through November 14, 2000; (2) retirement pay for the same period of time; and (3) health care benefits for this same period of time. (Tr. 33-46). He worked for other employers during part of this period. The crusher was shut down on November 14, 2000, and the crusher employees were laid off. Morrill disputes the award sought by Fletcher.

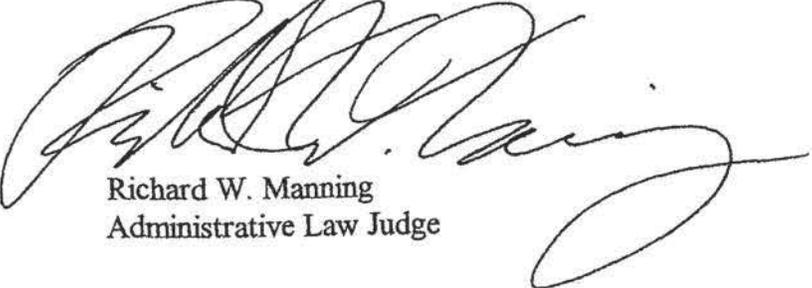
IV. ORDER

The parties are **ORDERED TO CONFER** before **March 15, 2002**, in an attempt to reach agreement on the specific relief to be awarded. An agreement as to the scope and amount of the relief will not preclude either party from appealing this decision. If an agreement is reached, it shall be submitted to me on or before **March 27, 2002**. The relief may be a lump sum payment.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions on the disputed issues, with supporting arguments, case citations, and citations to the record, on or before **March 28, 2002**. Each party shall submit specific proposed dollar amounts for each category of relief.¹ If either party requests a hearing on remedial issues, such request shall identify the specific issue(s) on which a hearing is deemed necessary and provide a proffer of the evidence intended to be introduced. The other party shall submit a similar proffer within five days. If I determine that a hearing is necessary, it will be scheduled expeditiously. In accordance with 29 C.F.R. § 2700.44(b), I am submitting copies of this decision to the Secretary of Labor so that she may propose a civil penalty for the violation of section 105(c) of the Mine Act as set forth in that rule.

¹ The proper method of calculating interest on back pay is set forth in *Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).

I retain jurisdiction over this case until I issue a specific award to Mr. Fletcher. Consequently, this decision will not become a final appealable decision until I issue an order awarding monetary damages.



Richard W. Manning
Administrative Law Judge

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RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 1, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-363-M
Petitioner,	:	A. C. No. 41-00009-05552
	:	
v.	:	Docket No. CENT 2001-364-M
	:	A. C. No. 41-00009-05553
CACTUS CANYON QUARRIES	:	
OF TEXAS, INC.,	:	
Respondent.	:	Mine: Fairland Plant & Quarry

**ORDER DENYING MOTION TO CERTIFY
INTERLOCUTORY REVIEW**

This case is now before me on Respondent's Motion to Certify a Ruling for Interlocutory Review by the Commission under Rule 76. The issues Respondent seeks to have the Commission review arise out of my decision to permit the Secretary to file these Petitions after the lapse of the 45 day period following notice of contest provided in Rule 28(a). My Order granting leave to file beyond the 45 day period was dated December 12, 2001. Respondent filed a motion to reconsider by Order and that motion was denied on December 28, 2001. Respondent filed motions addressed both to me and to the Commission seeking interlocutory review of my decision to permit the late filing of these Petitions. Counsel for the Secretary has now filed (January 25, 2002) a response to these motions for interlocutory review.

Analysis

Under Rule 76, a Motion for Certification of Interlocutory Review poses two questions for the hearing Administrative Law Judge; (1) does the ruling sought to be reviewed involve a controlling question of law, and (2) will immediate review materially advance the final disposition of the proceeding. For reasons discussed at greater length below, my answer to both questions is negative.

In a pedestrian sense, any issue that has the potential to end a controversy can be said to be a "controlling" issue. In that sense, the Respondent appears to argue that the issue of timing of the filing of the Petition is a controlling issue which ought to be resolved in it's favor before going on to the merits of the various citations of safety violations contained in the Petitions. What the Respondent fails to note in Rule 76 is the requirement that the issue be an issue of law, i.e. a question of interpretation of the law in the facts of the case. In this instance, no question of law is

presented. It is clear that an Administrative Law Judge has great factual discretion in determining whether to grant leave to file a Petition beyond the period established by the Rules of the Commission. While there are cases and opinions on the exercise of that discretion, it remains a factual rather than a legal issue and thus is not appropriate for interlocutory review. The point, if it has merit in the eyes of a subsequently reviewing body, has been preserved for any necessary subsequent appeal.

Further, it is my opinion that interlocutory review of this question would not materially advance the final disposition of this proceeding. Interlocutory review would, on the contrary, greatly delay the final disposition of this proceeding. Counsel for the Secretary has contributed a much more detailed account of the reasons for the small delays experienced in this case. While that detail was not necessary to convince me that adequate reasons for the delay existed, they make it clear to me that the probability of dismissal for delay under Rule 28 is so small as to be nonexistent. Affording the Respondent an interlocutory review at this time would serve no useful function.

I have pending before me four Petitions for Assessment of a Civil Penalty against Cactus Canyon Quarries, i.e. these two and two others. It is my intention, as soon as the issue of interlocutory review is resolved by the Commission, to conduct a prehearing conference in Austin, Texas, on all of these cases then pending before me in order to expedite a consolidated hearing on the merits. Further delays will be reduced to a bare minimum.

Therefore, it is

ORDERED that the Motion for Interlocutory Review is denied.


Irwin Schroeder
Administrative Law Judge
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February 6, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2002-21
Petitioner	:	A. C. No. 46-01968-04383
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Mine: Blacksville No. 2

ORDER ACCEPTING LATE FILING
ORDER TO RESPONDENT TO ANSWER

Before: Judge Barbour

On January 28, 2002, the Commission received the Secretary of Labor's Motion For Leave to File Out of Time, in the above captioned case. The Secretary failed to timely file her penalty petition. In support of her motion, the Secretary asserts that the Solicitor's Office received the present case, Docket No. WEVA 2002-21, on January 18, 2002 along with another case, Docket No. WEVA 2002-20. Mot. at 1. When Docket No. WEVA 2002-20 was transferred to the Mine Safety and Health Administration's ("MSHA") District Three Office to be handled by a CLR, the documentation case was inadvertently transferred along with another case. *Id.* The assigned counsel, the Secretary further proffers, realized what happened on January 24, 2002, and instructed the MSHA office to return the documentation via overnight mail. *Id.* at 1-2. In addition, the Secretary states that the case was further delayed because MSHA did not receive the mail for an extended period-of-time due to the recent anthrax contamination in the U.S. Postal Service, and, thus, the processing of this case by the Office of Assessments was delayed. *Id.* at 2. The Respondent does not object to this motion. *Id.*

According to the date stamped on the notice of contest, MSHA received the operator's contest on November 29, 2002. Therefore, the Secretary should have filed her penalty petition on or before January 14, 2002. The Secretary's Certificate of Service shows that the penalty petition was filed on January 28, 2002, 14 days after the due date.

Section 105(d) of the Mine Act states in pertinent part: “[i]f, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of penalty issued under subsection (a) or (b) of this section . . . , the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing”. Further, 29 C.F.R. § 2700.28(a) states that, “within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty”. Moreover, the Commission has stated that “Rule [28] implements the meaning of ‘immediately’ in section 105(d)”. *Salt Lake Co. Road Dept.*, 3 FMSHRC 1714, 1715 (July 1981). Thus, it is apparent that the purpose of Rule 28 is to effectuate swift enforcement. *Id.*

While the Secretary should adhere to the 45-day time limit, the Commission has made clear that neither the term “immediately” nor the time limit should be construed as a “procedural strait [jacket]”. *Id.* at 1716. The Commission has further stated that the Secretary may request permission for late filing if the request is (1) based upon adequate cause, and (2) the operator has an opportunity to object to the late filing on the grounds of prejudice.¹ *Id.*

There are various situations from which adequate cause may arise. Clerical mishaps have been considered adequate cause for late filings. A Solicitor has been permitted to file a penalty petition out of time because the file for the case had been inadvertently misplaced. *Jerry Hudgeons*, 22 FMSHRC 272, 274 (Feb. 2000). The Commission has held that a rise in caseload coupled with a lack of personnel support has been considered adequate cause. 3 FMSHRC 1714; *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). A late-filed penalty petition has also been accepted where the delay was due to the adoption by MSHA of a new system for handling mine safety cases. *Roberts Brothers Coal Co.*, 17 FMSHRC 1103 (June 1995). In addition, a government shutdown has been considered adequate for a late filing. *Roger Christiansen*, 18 FMSHRC 1693 (Sept. 1996).

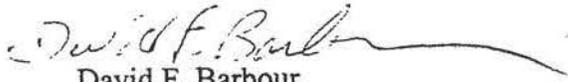
Adequate cause is based upon the reasons offered and the extent of the delay. 22 FMSHRC at 273. I conclude that the clerical error and the unforeseen anthrax contamination in the postal service constitute adequate cause for filing the penalty petition 14 days out of time.

¹In footnote one of the Secretary’s motion, the Secretary disagrees with the Commission’s position that the Secretary must establish adequate cause apart from any consideration of whether the operator is prejudiced by the delay. Commission decisions are binding precedent in Mine Safety cases, however, and the Commission has clearly stated that “the Secretary must establish adequate cause for the delay in filing, *apart from any consideration of whether the operator was prejudiced by the delay.*” *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089 (Oct. 1993), *aff’d*, 57 F.3rd 982 (10th Cir. 1995)(emphasis added). Therefore, as binding precedent, Commission Judges must make separate determinations for adequate cause and prejudice to the operator before they accept late filings.

In addition, as the Respondent has not alleged any prejudice from the delay, I conclude that the short delay is not prejudicial.

In light of the foregoing, it is **ORDERED** that the Secretary's late filed penalty petition is **ACCEPTED**.

It is further **ORDERED** that the Respondent file an answer to the penalty petition within 30 days of the date of this order.


David F. Barbour
Chief Administrative Law Judge

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/wd

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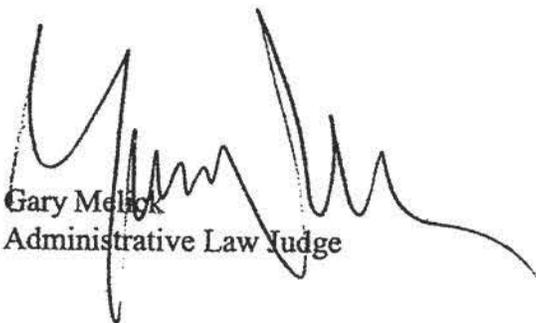
February 14, 2002

PRONGHORN DRILLING COMPANY,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
v.	:	DOCKET NO. EAJ 2001-4
	:	
SECRETARY OF LABOR,	:	Formerly WEST 2000-537-M / 538-M
MINE SAFETY AND HEALTH	:	A. C. Nos. 48-00837-05501 N5Y
ADMINISTRATION (MSHA),	:	48-00837-05502 N5Y
Respondent:	:	
	:	Smith Ranch Project

AMENDMENT TO DECISION

Pursuant to Commission Rule 69(c), 29 C.F.R. § 2700.69(c), paragraph 2 page 3 of the decision in this case issued January 15, 2002, is hereby corrected to read as follows:

The Secretary nevertheless argues that Rio Algom’s processing of this mineral, which has been extracted in liquid form without workers underground, is covered under Section 3(h)(1)(C) of the Act as “the milling of such minerals.” “Coal or other mine” is there defined to also include “. . . structures, facilities, equipment, machines, tools, or other property, . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, *or used in, or to be used in, the milling of such minerals . . .*” (*emphasis added*).



Gary Mellick
Administrative Law Judge

Distribution: (By Certified Mail)

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