

## MARCH AND APRIL 2008

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**MARCH AND APRIL 2008**

There were no cases in which REVIEW was either granted or denied.



## **COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 4, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2008-123-M
	:	A.C. No. 14-00162-122958 A
	:	
v.	:	
	:	
THOMAS TORRANCE, employed by	:	
BUZZI UNICEM, USA	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On December 4, 2007, the Commission received from Thomas Torrance (“Torrance”) a motion by counsel seeking to reopen a penalty assessment against Torrance under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

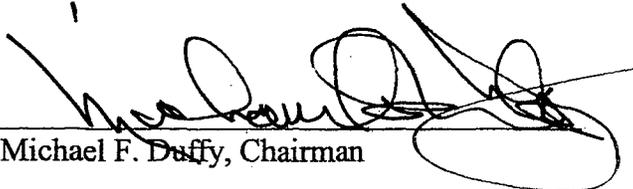
Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary,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

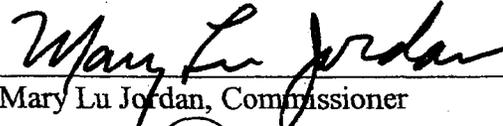
On July 23, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Torrance, alleging that he was personally liable under section 110(c) of the Mine Act for an order issued to his employer, Buzzi Unicem, USA. In his motion and accompanying affidavit, Torrance asserts that he mailed the form contesting the penalty on August 18, 2007. Nevertheless, Torrance received a delinquency notice from MSHA in early November 2007, and according to Torrance, MSHA states that it never received the notice of contest form. Torrance maintains that the assessment never became a final order, but that if it is deemed to have become one, the proceeding should be reopened so that

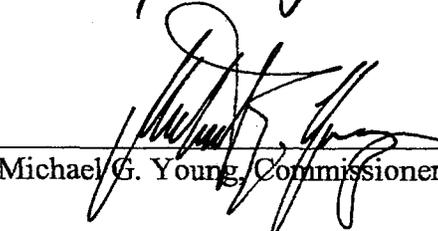
Torrance can contest the penalty and underlying citation. The Secretary does not oppose reopening.

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

Having reviewed Torrance’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Torrance failed to timely contest the penalty proposal and, if so, whether good cause exists for granting relief from the final order. If Torrance timely contested the penalty, or if it is determined that he did not but that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

  
Michael F. Duffy, Chairman

  
Mary Lu Jordan, Commissioner

  
Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 4, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2008-256
	:	A.C. No. 15-18241-126999
v.	:	
	:	
CLOVERLICK COAL COMPANY LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On December 6, 2007, the Commission received a letter requesting that the Commission reopen a penalty assessment issued to Cloverlick Coal Company LLC (“Cloverlick”) that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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

On September 12, 2007, the Department of Labor’s Mine Safety and Health Administration issued Assessment No. 000126999, which proposed penalties for 34 citations that had previously been issued to Cloverlick. The operator states that it did not receive the assessment form until October 30, 2007. A handwritten note on the copy of the assessment attached to Cloverlick’s letter appears to suggest that the operator returned the form on or about

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<sup>1</sup> The letter also requested reopening of an assessment issued to an affiliated company, Panther Mining LLC. That request is the subject of a separate order issued today in Docket No. KENT 2008-257.

November 2, indicating its desire to contest 11 of the proposed penalties. The Secretary states that she does not oppose Cloverlick's request to reopen.

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

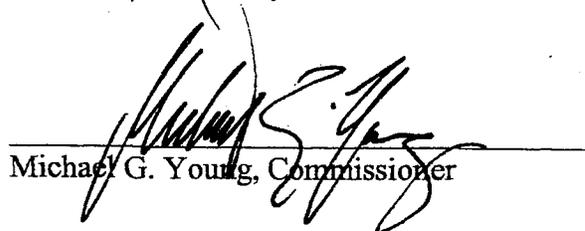
Having reviewed Cloverlick's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Cloverlick's contest was timely and, if it was not timely, whether good cause exists for granting relief from the final order. If Cloverlick's contest was timely, or if it is determined that it was not but that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

April 4, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2008-257
	:	A.C. No. 15-18198-127066
v.	:	
	:	
PANTHER MINING LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On December 6, 2007, the Commission received a letter requesting that the Commission reopen a penalty assessment issued to Panther Mining LLC (“Panther”) that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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

On September 12, 2007, the Department of Labor’s Mine Safety and Health Administration issued Assessment No. 000127066, which proposed penalties for 80 citations that had previously been issued to Panther. The operator states that it did not receive the assessment form until October 23, 2007. In response, the Secretary states that she does not oppose Panther’s request to reopen. She also forwarded to the Commission a copy of the assessment she received from Panther indicating the operator’s desire to contest 35 of the proposed penalties, and which

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<sup>1</sup> The letter also requested reopening of an assessment issued to an affiliated company, Cloverlick Coal Company LLC. That request is the subject of a separate order issued today in Docket No. KENT 2008-256.

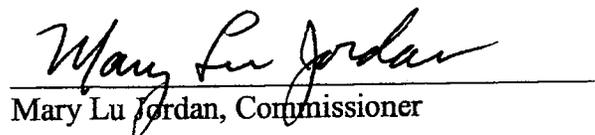
includes a handwritten note that appears to suggest that the operator returned the form on or about October 29.

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

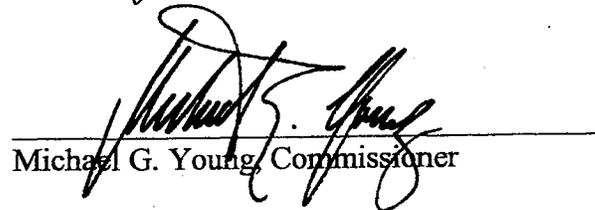
Having reviewed Panther’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Panther’s contest was timely and, if it was not timely, whether good cause exists for granting relief from the final order. If Panther’s contest was timely, or if it is determined that it was not but that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 4, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2008-60-M
	:	A.C. No. 21-00071-128120
v.	:	
	:	
PEDERSON BROTHERS, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

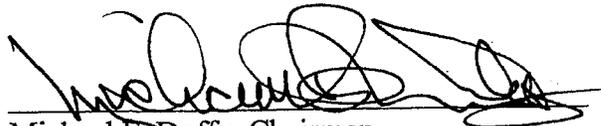
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On November 20, 2007, the Commission received from Pederson Brothers, Inc. (“Pederson”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On December 5, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation to Pederson. On October 3, 2007, as a result of the citation, MSHA issued a proposed assessment of \$838. Pederson states that the proposed assessment was forwarded to its counsel, who was traveling at the time the assessment was received at her office. Pederson further states that counsel’s office staff, through clerical error, placed the proposed assessment in the wrong file and that counsel did not discover the error until November 14, 2007. Pederson states that it had always intended to contest the citation and penalty. The Secretary does not oppose the request to reopen the proposed assessment.

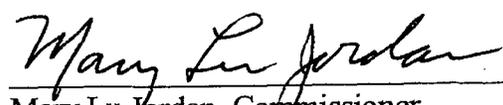
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

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



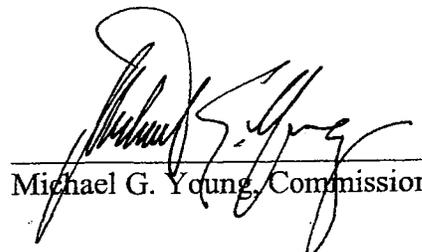
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

April 4, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2008-61-M
	:	A.C. No. 21-00071-123814
v.	:	
	:	
PEDERSON BROTHERS, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On November 20, 2007, the Commission received from Pederson Brothers, Inc. (“Pederson”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

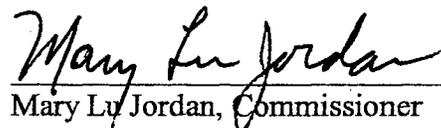
On December 5, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued six citations to Pederson. In its motion, Pederson states that, on April 4, 2007, it filed a change in legal identity with MSHA that included a change in the company’s legal address from one state to another. Sometime in August 2007, MSHA issued proposed penalties in connection with the citations but mistakenly mailed them by certified mail to Pederson’s old address. Pederson further states in its motion that there was no one at the old address who could sign for the mail and forward it to the new address. On November 1, 2007, when MSHA sent Pederson a letter by first class mail, demanding payment in full for the proposed penalties, that letter was forwarded to Pederson’s new address. Pederson states that it always had intended to

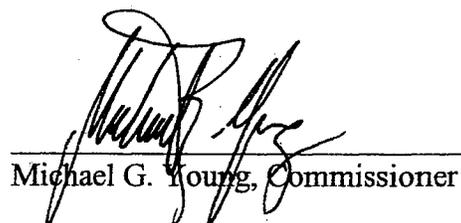
contest the citations and penalties. The Secretary does not oppose the request to reopen the proposed assessment.

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

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

  
Michael F. Duffy, Chairman

  
Mary Lu Jordan, Commissioner

  
Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 4, 2008

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. PENN 2008-98-M  
 : A.C. No. 36-00165-125280  
v. :  
 :  
CEMEX, INC. :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On November 30, 2007, the Commission received from Cemex, Inc. (“Cemex”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In June 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued citations to Cemex. On August 31, 2007, Cemex received a proposed assessment as a result of the citations that previously had been issued. Cemex states that the proposed assessment was addressed to its plant manager, who forwarded the assessment to its safety director. Cemex further states that its safety director was out of the office on travel during most of August, September, and October and that he was unaware of the assessment until sometime in October 2007. Cemex’s safety director then sent a request for a hearing on the

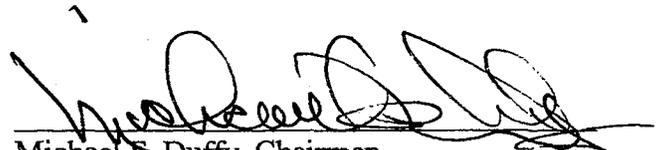
proposed penalties, which MSHA denied because the request was untimely. The Secretary states that she does not oppose Cemex's request to reopen the proposed penalty assessment.<sup>1</sup>

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

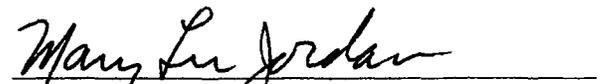
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<sup>1</sup> In the letter in which she states that she does not oppose the reopening of the penalty assessment, the Secretary requests that Cemex clarify which of the proposed penalties and associated citations are to be reopened because Cemex checked only one penalty on the assessment form but, in addition, also checked a box on the form indicating that it wanted to contest all violations.

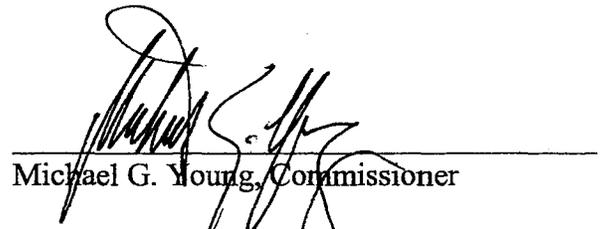
Having reviewed Cemex's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Cemex's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 4, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2008-132
ADMINISTRATION (MSHA)	:	A.C. No. 36-08299-130703
	:	
v.	:	Docket No. PENN 2008-142
	:	A.C. No. 36-08299-123747
LITTLE BUCK COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On December 28, 2007, the Commission received from Little Buck Coal Company (“Little Buck”) a motion made by counsel to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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

On May 23, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued six citations and orders to Little Buck. The operator subsequently filed timely contests of each citation and order, and those contests are pending in Docket Nos. PENN 2007-267-R through PENN 2007-272-R. MSHA later issued Proposed Assessment No. 000123747, which proposed a penalty for one of the citations, and Proposed Assessment No. 000130703, which proposed penalties for the other five citations and orders.

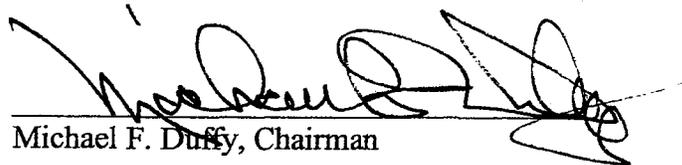
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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers PENN 2008-132 and PENN 2008-142, both captioned *Little Buck Coal Co.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

Little Buck states that it believed it had forwarded the proposed assessments to the outside counsel representing it in the related contest proceedings. When that counsel learned from opposing counsel in the contest proceedings that neither of the proposed assessments had been contested within the applicable 30-day periods, she alerted Little Buck of its failure to forward the assessments. The Secretary states that she does not oppose Little Buck's request to reopen the proposed penalty assessments.

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

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



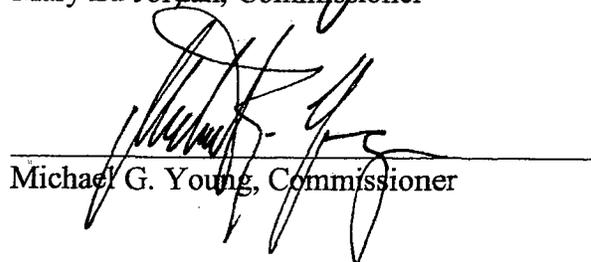
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 4, 2008

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. WEST 2008-257  
 : A.C. No. 05-03836-123538  
v. :  
 :  
TWENTYMILE COAL COMPANY :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

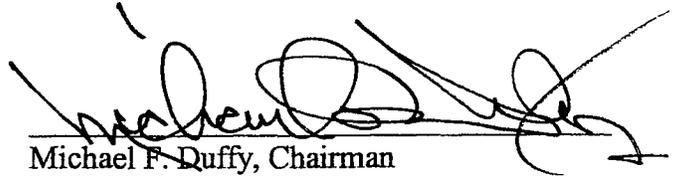
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On December 10, 2007, the Commission received from Twentymile Coal Company ("Twentymile") a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On July 31, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000123538 to Twentymile, proposing penalties for 33 citations and orders that previously had been issued to the company's Foidel Creek Mine. Twentymile states that the mine promptly processed and forwarded the assessment to Twentymile's corporate office for payment, but that due to a processing error, the 26 penalties that Twentymile was not contesting were not paid until October 2007. Twentymile requests reopening so that it can contest the other seven penalties. The Secretary states that she does not oppose Twentymile's request to reopen.

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

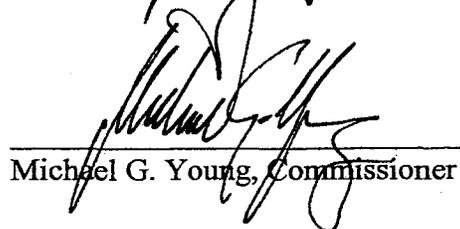
While Twentymile’s request for relief addresses the mistake that led to the late payment of the uncontested penalties, it does not explain the company’s separate failure to return the assessment form to MSHA in order to contest the seven penalties that it states it intended to contest. Consequently, we deny Twentymile’s request without prejudice. See *Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006).



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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April 4, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-288
	:	A.C. No. 46-05086-124355
v.	:	
	:	
BANDMILL COAL CORPORATION	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

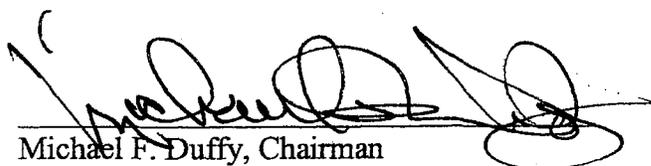
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On December 7, 2007, the Commission received from Bandmill Coal Corporation (“Bandmill”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

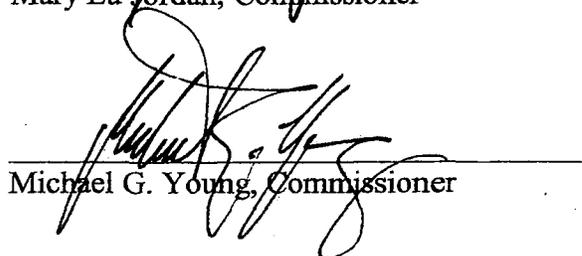
On August 8, 2007, the Department of Labor’s Mine Safety and Health Administration issued Proposed Assessment No. 000124355 to Bandmill, proposing penalties for a citation and three orders that previously had been issued to the company. Bandmill’s safety director states that he meant to forward the assessment to Bandmill’s outside counsel handling the pending contests of the three orders so that the penalties for the three orders could also be contested. He further states that instead he mistakenly included the assessment with two other assessments issued to an affiliated company which he had telecopied to different outside counsel representing the affiliate. Outside counsel for the affiliate states that he assumed that counsel for Bandmill also received the forwarded assessment meant for that firm, but the firm did not. The Secretary states that she does not oppose Bandmill’s request to reopen the proposed penalty assessment.

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

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

  
Michael F. Duffy, Chairman

  
Mary Lu Jordan, Commissioner

  
Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 9, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-311-M
	:	A.C. No. 45-00805-130676
v.	:	
	:	
LAFARGE NORTH AMERICA, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 7, 2008, the Commission received from Lafarge North America, Inc. (“Lafarge”) a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

Over a period of several days in September 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued eleven citations to Lafarge. On November 1, 2007, MSHA issued a proposed penalty assessment for the citations. Lafarge states that it contested the penalties on December 12, 2007, and believed it had timely filed the contest. However, it subsequently received correspondence from MSHA stating that the proposed penalty had become a final order on December 8, 2007. Lafarge adds that, due to an internal mistake and confusion as to the date of receipt of the proposed assessment form, the form was not processed in a timely manner. The Secretary states that she does not oppose Lafarge’s request for relief.

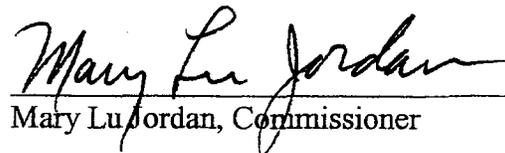
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

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



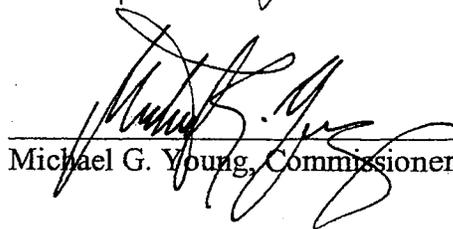
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

April 9, 2008

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. WEST 2008-312-M  
 : A.C. No. 04-01924-128052  
 :  
v. :  
 :  
CALMAT COMPANY, d/b/a :  
VULCAN MATERIALS COMPANY, :  
WESTERN DIVISION :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 7, 2008, the Commission received from Calmat Company, d/b/a/ Vulcan Materials Company, Western Division (“Vulcan”) a letter from counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

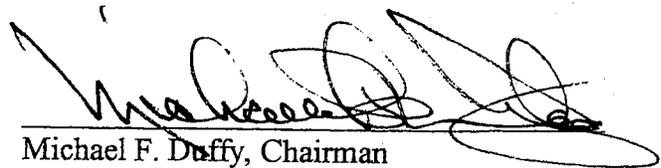
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On October 3, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment, A.C. No. 000128052, to Vulcan for an order and a citation. Vulcan states that it inadvertently sent the form contesting the penalty assessment to MSHA’s local Western District office in Vacaville, California, instead of to the MSHA office located in Arlington, Virginia. Vulcan attached the return receipt allegedly indicating that the

notice of contest was received by MSHA at its office in Vacaville. The Secretary states that she does not oppose Vulcan's request to reopen the penalty assessment.

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

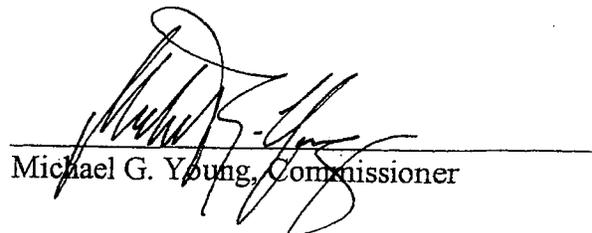
Having reviewed Vulcan's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Vulcan's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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April 9, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-313-M
	:	A.C. No. 45-03415-124697
v.	:	
	:	
INTERWEST CONSTRUCTION &	:	
DEVELOPMENT, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 9, 2008, the Commission received from Interwest Construction & Development, Inc. (“Interwest”) a petition (which the Commission shall treat as a motion) to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

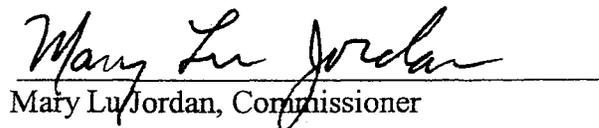
On August 9, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Interwest the proposed penalty assessment at issue. The company asserts that it sent the form to MSHA on or about August 20, 2007, indicating that it wished to contest the proposed penalties. However, it subsequently learned from MSHA that the agency did not receive Interwest’s contest and that Interwest was delinquent in its payment of the penalties listed in the proposed assessment. The Secretary of Labor states that she does not oppose Interwest’s request for relief.

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

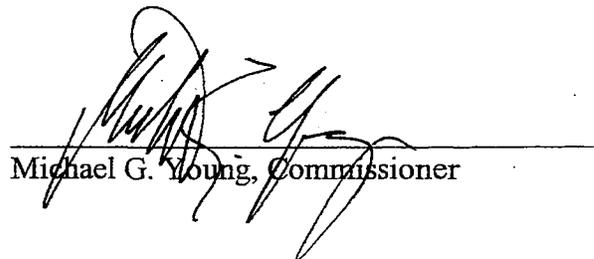
Having reviewed Interwest’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Interwest’s apparent failure to timely contest the penalty proposal and whether relief from the final order should be granted.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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 10, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2008-278-M
v.	:	A.C. No. 01-03195-128840
	:	
QUALITY COAL COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

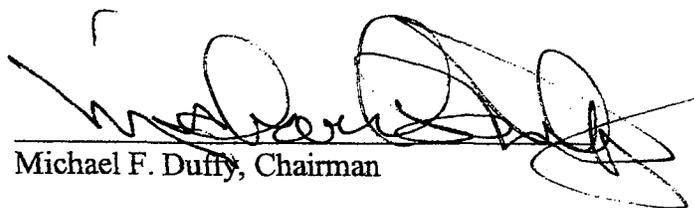
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 28, 2008, the Commission received from Quality Coal Company, Inc. (“Quality”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 11, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment, No. 000128840, to Quality. In its request, Quality states that it subsequently received a second proposed penalty assessment, No. 000128844. Quality explains that its mining foreman, who received the penalty proposals, erroneously believed that Quality could contest both proposed penalty assessments within 30 days of the second assessment. Quality submits that the second proposed penalty assessment was timely contested and is the subject of Docket No. SE 2008-131. The operator further states that Proposed Assessment No. 000128840 had been routed incorrectly among its personnel. The Secretary states that she does not oppose Quality’s request for relief.

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

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



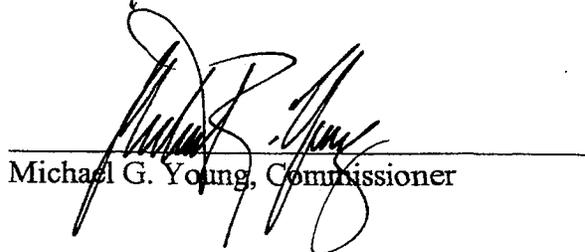
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 10, 2008

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
 :  
v. : Docket No. VA 2008-81-M  
 : A.C. No. 44-02829-119439  
U.S. SILICA COMPANY :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 18, 2008, the Commission received a letter from U.S. Silica Company (“U.S. Silica”) requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On June 5, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment, A.C. No. 000119439, to U.S. Silica. U.S. Silica states that it mailed its contest of the proposed penalty assessment to MSHA, but that it appears that the contest was never received. The Secretary responds that she has no record that the penalty contest form was received by MSHA’s Civil Penalty Compliance Office, but that she does not oppose U.S. Silica’s request to reopen the penalty assessment.

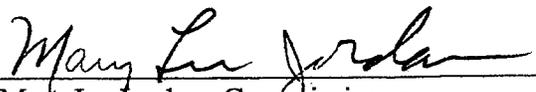
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

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



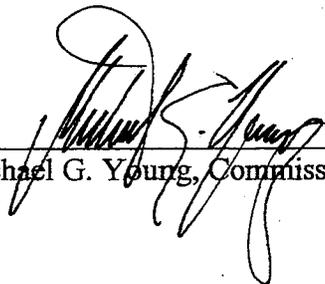
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 10, 2008

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. VA 2008-89-M  
 : A.C. No. 44-00061-129587  
 :  
LE SUEUR-RICHMOND SLATE CORP. :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 29, 2008, the Commission received from Le Sueur-Richmond Slate Corp. (“Le Sueur”) a letter by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

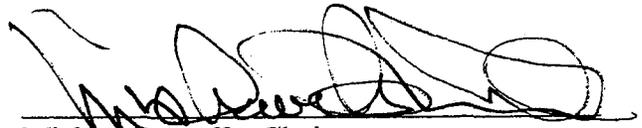
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On October 18, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment No. 000129587 to Le Sueur. Le Sueur states that, after the proposed assessment was delivered, the employee who signed for the delivery became ill, her work load decreased, and the proposed assessment was never presented to the operator’s officers. The Secretary states that she does not oppose Le Sueur’s request to reopen.

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

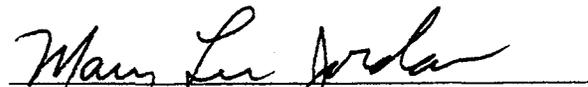
which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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



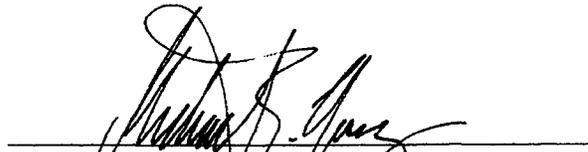
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

April 10, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2008-350-M
v.	:	A.C. No. 45-03175-127980
	:	
IRON MOUNTAIN QUARRY, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 23, 2008, the Commission received from Iron Mountain Quarry, LLC (“Iron Mountain”) a letter by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

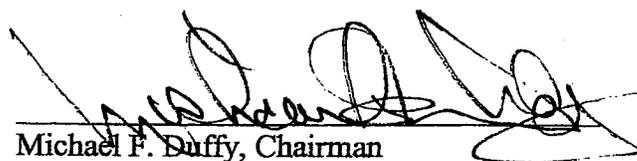
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On October 30, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued proposed penalty assessment No. 000130280 to Iron Mountain proposing civil penalties for six citations that had been issued to Iron Mountain on August 23, 2007. Iron Mountain asserts that it timely contested those proposed penalties. The operator states that it subsequently received a notice from MSHA stating that Iron Mountain was delinquent in paying the civil penalty associated with proposed penalty assessment No. 000127980. The operator states that, upon further investigation, it discovered that Penalty Assessment No. 000127980 set forth a proposed civil penalty for Citation No. 7981307, also issued on August 23, 2007. It submits that it intended to contest Citation No. 7981307 but that it has no record of having received Proposed Assessment No. 000127980. Iron Mountain explains that if it had, in fact, received the proposed penalty assessment, its failure to contest the penalty associated with

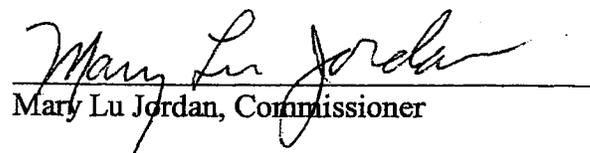
Citation No. 7981307 was due to a mistake. The Secretary states that she does not oppose Iron Mountain's request to reopen. For clarity, the Secretary attached a copy of Proposed Assessment No. 000127980 (dated October 2, 2007), and a tracking report showing delivery.

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

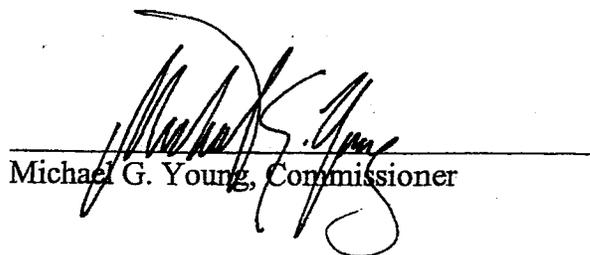
Having reviewed Iron Mountain's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Iron Mountain's failure to timely contest the penalty proposal and whether relief from the final order should be granted.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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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April 21, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2008-268
	:	A.C. No. 11-00877-131860
v.	:	
	:	
WABASH MINE HOLDING COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On March 14, 2008, the Commission received from Wabash Mine Holding Company (“Wabash”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 15, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Wabash proposed penalties for three citations. According to Wabash, it had previously filed contests to challenge the underlying citations. Wabash further states that a new employee in the office of its safety director did not understand that the proposed penalties had to be contested separately from the citations. Therefore, Wabash states that the

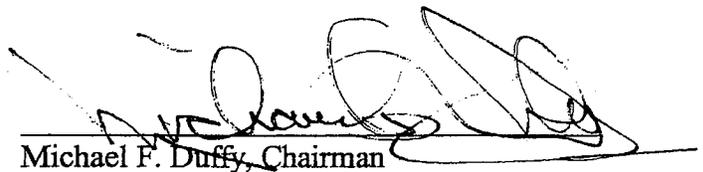
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<sup>1</sup> Commissioner Robert Cohen assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

employee believed that the penalties had been contested. The Secretary states that she does not oppose Wabash's motion to reopen the assessment.

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

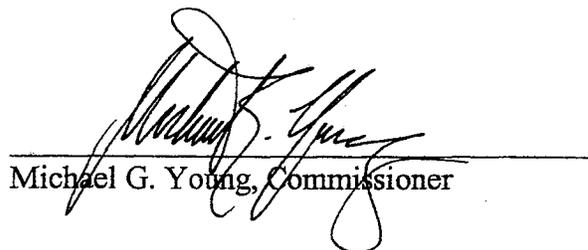
Having reviewed Wabash's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Wabash's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

April 21, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2008-505
v.	:	A.C. No. 46-08787-131617
	:	
ALEX ENERGY, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On February 4, 2008, the Commission received from Alex Energy, Inc. (“Alex Energy”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 13, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000131617 to Alex Energy, proposing penalties for 17 citations that had been issued to the company during August 2007. According to Alex Energy’s former safety director, J.J. Meadows, upon receipt of the assessment he placed a check mark in the box next to each of seven of the citations to indicate his

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<sup>1</sup> Commissioner Robert Cohen assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

recommendation to Alex Energy's attorneys that the penalties for those citations be contested. Meadows states that he then made arrangements for Alex Energy to pay the other ten proposed penalties to MSHA. Meadows never followed through with consulting counsel on the seven proposed penalties he wished to contest, however, nor did he realize that Alex Energy had failed to contest the citations until January 2008. The Secretary states that she does not oppose Alex Energy's request to reopen the penalty assessment as to the seven proposed penalties.

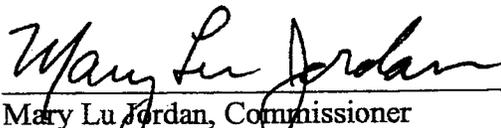
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

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



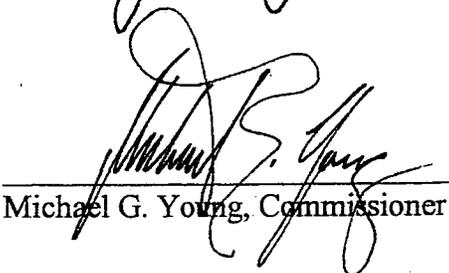
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 25, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2008-661
ADMINISTRATION (MSHA)	:	A.C. No. 15-18850-135605
	:	
v.	:	Docket No. KENT 2008-662
	:	A.C. No. 15-18850-135609
ICG HAZARD, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”).<sup>2</sup> On March 6, 2008, the Commission received from ICG Hazard, LLC (“ICG”) motions by counsel seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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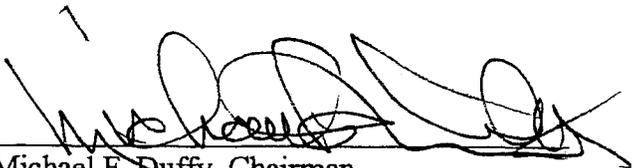
<sup>1</sup> Commissioner Robert Cohen assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

<sup>2</sup> Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. KENT 2008-661 and KENT 2008-662, as both dockets involve similar procedural issues and similar factual backgrounds.

On January 17, 2008, ICG received two proposed assessments issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). According to ICG, following receipt of the assessments, it forwarded them to the Director of Safety and Health for ICG's parent company, who reviewed the assessments. ICG states that he determined to contest certain penalties in both assessments. However, ICG states that clerical personnel in the director's office, through a misunderstanding, did not return assessment forms to MSHA indicating that the assessments would be contested. The Secretary states that she does not oppose the reopening of the assessments.

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

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



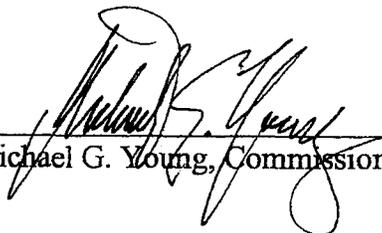
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 25, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2008-279-M
	:	A.C. No. 31-02188-130246
v.	:	
	:	
CURRITUCK SAND, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On February 4, 2008, the Commission received from Currituck Sand, Inc. (“Currituck”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 30, 2007, the Department of Labor’s Mine Safety and Health Administration issued Proposed Assessment No. 000130246 to Currituck, proposing penalties for four citations that had been issued to the company on September 12, 2007. Currituck’s Pit Manager, whose responsibilities at the mine include safety matters, states that the company had contested the citations and that he believed that the operator’s counsel would be filing the notice of contest

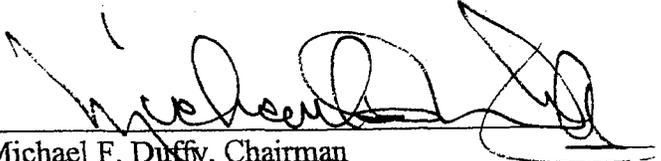
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<sup>1</sup> Commissioner Robert Cohen assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

with respect to the penalties. However, counsel states that she believed that Currituck had already filed the penalty contest form, so consequently the form was never filed. The Secretary states that she does not oppose Currituck's request to reopen the proposed penalty assessment.

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

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



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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

April 30, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2008-494
	:	A.C. No. 15-05375-130003
v.	:	
	:	
CW ELECTRIC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On February 6, 2008, the Commission received from counsel for CW Electric a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 25, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 00013003 to CW Electric, proposing penalties for two citations that had been issued to the contractor on June 27, 2007. The company states, without further explanation, that, while it intended to contest the assessment, it neither filed a notice of contest nor paid the penalties because it believed MSHA would reissue the assessment

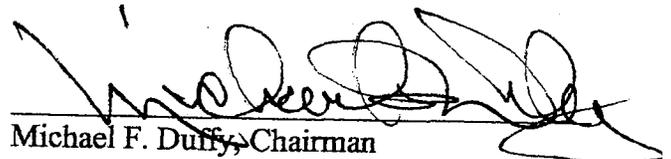
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<sup>1</sup> Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

to a different named entity. The Secretary states that she does not oppose CW Electric's request to reopen the penalty assessment.

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

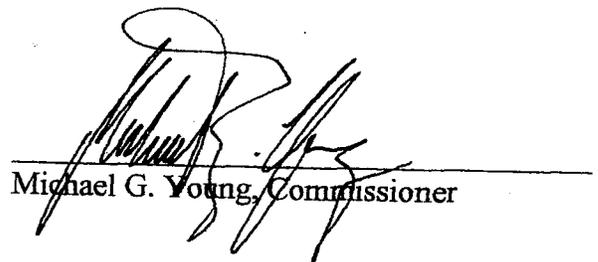
Having reviewed CW Electric's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for CW Electric's failure to timely contest the penalty proposal and whether relief from the final order should be granted. The judge should require CW Electric to explain the basis for its belief that MSHA would reissue the assessment to a different named entity. After that, if it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

April 30, 2008

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

v.

ROAD FORK DEVELOPMENT  
COMPANY, INC.

Docket No. KENT 2008-512

A.C. No. 15-09830-132554

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 11, 2008, the Commission received from Road Fork Development Company Inc. ("Road Fork") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 27, 2007, the Department of Labor's Mine Safety and Health Administration issued a proposed assessment to Road Fork for 12 citations that had been

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<sup>1</sup> Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

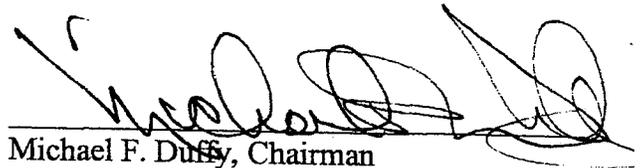
previously issued to the operator. Road Fork states that, following receipt of the assessment, it faxed the proposed assessment to the law firm which represented it in proceedings before the Commission. The paralegal at the law firm who is responsible for receiving and processing documents attempted to scan the assessment form and send it by electronic mail to the attorneys who were primarily responsible for handling Road Fork matters. However, because of unspecified technical problems, the attorneys never received the email, and no contest of the penalty assessment was filed. Road Fork learned of the error when it received an invoice from MSHA specifying unpaid assessments. The Secretary states that she does not oppose the reopening of the assessment.<sup>2</sup>

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

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<sup>2</sup> This is the first of three proceedings involving the same law firm where a breakdown in office procedures has been cited as the reason for contests not being filed. Orders are also being issued today in the other two proceedings, *Clean Energy Mining Co.*, Docket No. KENT 2008-538, and *Long Fork Coal Co.*, Docket No. KENT 2008-633. In her letter in response to the motion filed in *Long Fork*, the Secretary urges that counsel take steps to ensure that such breakdowns do not continue and that penalty assessments are timely contested. We agree with this recommendation.

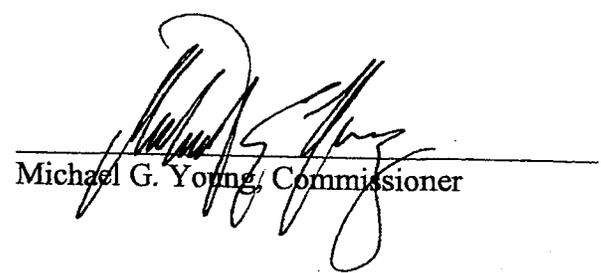
Having reviewed Road Fork's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Road Fork's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 30, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-538
v.	:	A.C. No. 15-10753-119562
	:	
CLEAN ENERGY MINING COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On February 12, 2008, the Commission received from Clean Energy Mining Company (“Clean Energy”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On June 6, 2007, the Department of Labor’s Mine Safety and Health Administration issued a proposed assessment to Clean Energy for 30 citations that had been previously issued to the operator. Clean Energy states that, following receipt of the assessment, it faxed the proposed

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<sup>1</sup> Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

assessment to one office of the law firm which represented it in proceedings before the Commission. That office was to fax the assessment to another office of the law firm which was responsible for submitting the contest form. According to Clean Energy, the second office never received the fax in this instance, however, so the operator did not contest 18 of the proposed penalties that it states it intended to contest, and instead paid only 12 of the penalties. The Secretary states that she does not oppose the reopening of the assessment as to those 18 penalties.<sup>2</sup> In her response in this proceeding, the Secretary also notes that she notified Clean Energy by letter dated September 6, 2007, that it was delinquent in paying the assessment at issue here.

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

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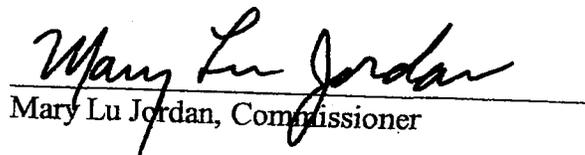
<sup>2</sup> This is the second of three proceedings involving the same law firm where a breakdown in office procedures has been cited as the reason for contests not being filed. Orders are also being issued today in the other two proceedings, *Road Fork Development Co.*, Docket No. KENT 2008-512, and *Long Fork Coal Co.*, Docket No. KENT 2008-633. In her letter in response to the motion filed in *Long Fork*, the Secretary urges that counsel take steps to ensure that such breakdowns do not continue and that penalty assessments are timely contested. We agree with this recommendation.

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



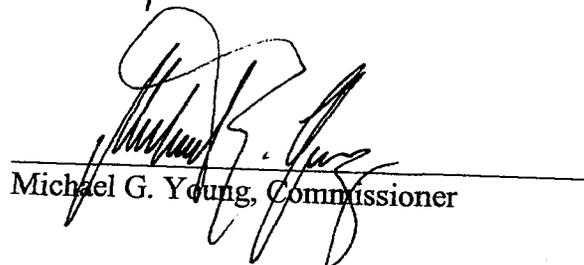
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 30, 2008

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. KENT 2008-633  
: A.C. No. 15-05375-132553  
v. :  
: :  
LONG FORK COAL COMPANY :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On March 4, 2008, the Commission received from Long Fork Coal Company (“Long Fork”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 27, 2007, the Department of Labor’s Mine Safety and Health Administration issued a proposed assessment to Long Fork for three citations that had been previously issued to the operator. Long Fork states that, following receipt of the assessment, it

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<sup>1</sup> Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

faxed the proposed assessment to the law firm which represented it in proceedings before the Commission. The paralegal at the law firm who is responsible for receiving and processing documents attempted to scan the assessment form and send it by electronic mail to the attorneys who were primarily responsible for handling Long Fork matters. However, because of unspecified technical problems, the attorneys never received the email, and no contest of the penalty assessment was filed. Long Fork learned of the error when it received an invoice from MSHA specifying unpaid assessments. The Secretary states that she does not oppose the reopening of the assessment.<sup>2</sup>

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

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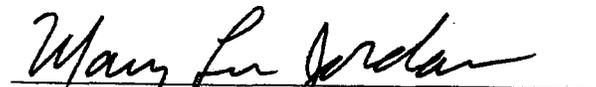
<sup>2</sup> In the letter in which the Secretary stated that she does not oppose Long Fork’s Motion to Reopen, she also noted that this is the third proceeding involving the same law firm where a breakdown in office procedures has been cited as the reason for contests not being filed. Orders are also being issued today in the other two proceedings, *Road Fork Development Co.*, Docket No. KENT 2008-512 and *Clean Energy Mining Co.*, Docket No. KENT 2008-538. The Secretary urges that counsel take steps to ensure that such breakdowns do not continue and that penalty assessments are timely contested. We agree with this recommendation.

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



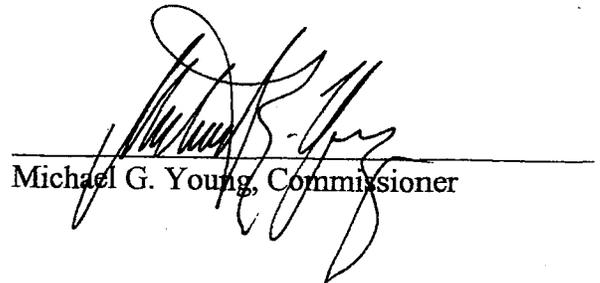
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 30, 2008

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEVA 2008-600  
 : A.C. No. 46-01318-132649  
 :  
CONSOLIDATION COAL COMPANY :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On February 28, 2008, the Commission received from Consolidation Coal Company (“Consol”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 27, 2007, the Department of Labor’s Mine Safety and Health Administration issued Proposed Assessment No. 000132649 to Consol, proposing penalties for 87 citations and orders that had been issued to the company’s Robinson Run No. 95 Mine during 2007. According to Consol, the proposed assessment was received by the mine’s superintendent,

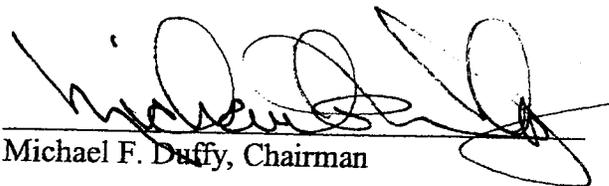
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<sup>1</sup> Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

and the company intended to contest 24 of the proposed penalties. Consol states, however, that due to the assessment form being misplaced during a move to new offices at a new portal of the mine, the operator never filed the contest form. The Secretary states that she does not oppose Consol's request to reopen the penalty assessment as to the 24 proposed penalties.

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

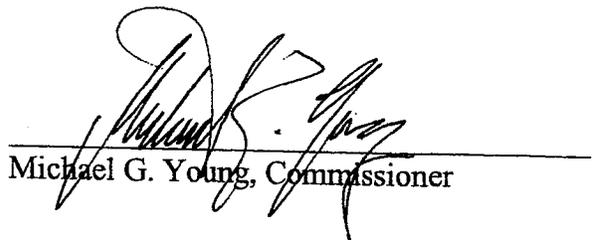
Having reviewed Consol's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Consol's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
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**ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 7, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2006-524-M
Petitioner	:	A.C. No. 04-01787-090994
	:	
v.	:	
	:	Gordon Sand Company
GORDON SAND COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: John D. Perez, Conference & Litigation Representative, Mine Safety & Health Administration, Vacaville, California, for Petitioner.

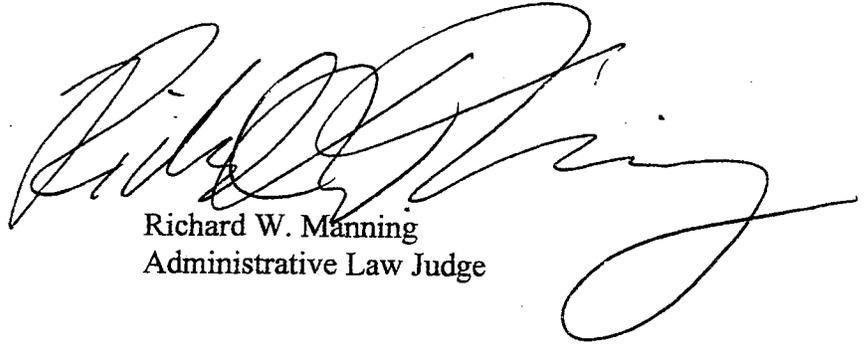
Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Gordon Sand Company, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). Gordon Sand Company operates a construction sand and gravel operation in Santa Barbara County, California. It contested three citations issued by the Secretary. An evidentiary hearing was held in Oakland, California.

The Secretary’s representative appeared at the scheduled hearing along with his witness but nobody from Gordon Sand Company was present. I called George Gordon III, the chief executive officer of the company, at his office in Hayward, California, and was advised that he was not in the office at that time. About ten minutes later, he called me back and advised me that he had forgotten about the hearing. I advised him that I would be holding the company in default.

Prior to the hearing, the Secretary agreed to vacate Citation Nos. 6390416 and 6390417. (Secretary’s Response to Prehearing Order). As a consequence, the scheduled hearing only concerned Citation No. 6390415, which alleges a violation of 30 C.F.R. § 56.14107(a). I hereby find Gordon Sand Company in **DEFAULT** with respect to that citation. Citation No. 6390415 is affirmed in all respects as is the Secretary’s proposed penalty for the citation. (Tr. 4).

For the reasons set forth above, Citation No. 6390415 is **AFFIRMED**, and Gordon Sand Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$177.00 within 30 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

Distribution:

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George E. Gordon III, Gordon Sand Company, 28310 Industrial Blvd., Suite F, Hayward, CA  
94545 (Certified Mail)

RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 25, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-132
Petitioner	:	A. C. No. 46-01437-99999-01
v.	:	
	:	
MCELROY COAL COMPANY,	:	McElroy Mine
Respondent	:	

**DECISION**

Appearances: Judson H.P. Dean, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, Pennsylvania,  
for the Petitioner;  
R. Henry Moore, Esq., Jackson Kelly PLLC,  
Pittsburgh, Pennsylvania, for the Respondent;

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 820(a), by the Secretary of Labor against the respondent, McElroy Coal Company ("McElroy"). The petition seeks to impose a total civil penalty of \$27,348.00 for 20 alleged violations of mandatory safety standards contained in 30 C.F.R. Parts 70 and 75 of the Secretary's regulations governing underground coal mines.

This matter was heard on October 16, 2007, in Fairmont, West Virginia. The parties' post-hearing briefs and replies are of record. At trial, the parties advised that they had reached a settlement agreement with respect to all but one of the cited violations that are the subject of this proceeding. The record was left open for the parties to submit the terms of their agreement in writing. The parties' Motion for Approval of Partial Settlement with respect to 19 citations and orders was filed on March 3, 2008. McElroy has agreed to pay a total civil penalty of \$12,576.50 for the 19 settled citations and orders rather than the \$20,748.00 civil penalty initially proposed by the Secretary.<sup>1</sup> The parties' settlement agreement is discussed below and approved herein.

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<sup>1</sup> The proposed \$12,576.50 settlement is based on the Corrected Motion to Approve Partial Settlement filed by the Secretary on March 6, 2008.

The only order adjudicated is 104(d)(2) Order No. 7149765 for which the Secretary proposes a \$6,600.00 civil penalty. As 104(d)(2) Order No. 7149765 as well as the Secretary's proposed civil penalty shall be affirmed, a total civil penalty of \$19,176.50 shall be assessed for the 20 cited violative conditions.

### **I. Statement of the Case**

At issue is the proposed \$6,600.00 civil penalty for 104(d)(2) Order No. 7149765 issued on January 11, 2006, for an alleged significant and substantial ("S&S") violation of the Secretary's mandatory safety standard in 30 C.F.R. § 75.400.<sup>2</sup> This mandatory safety regulation requires that coal dust and other combustible material must be cleaned up in a timely manner rather than being permitted to accumulate in active workings. The order was issued after extensive coal dust accumulations were observed along an active longwall belt. The condition was attributed to McElroy's unwarrantable failure because the accumulations were recorded during preshift and onshift examinations for 18 consecutive shifts (five days) without any meaningful remedial action.

McElroy has stipulated to the fact of the section 75.400 violation. (Joint Stip. 7). However, McElroy disputes both the S&S characterization of the violation,<sup>3</sup> and that the violation was unwarrantable.<sup>4</sup> Although the parties' disagreement on the exact measurements of the accumulations is a matter of degree, the evidence reflects that they were widespread and significant in depth. McElroy's contest of the S&S and unwarrantable issues primarily is based on its assertion that the cited accumulations were not in contact with any potential ignition source (not contacting rollers), and, therefore, the accumulations were not serious in gravity, or in need of expeditious removal.

With respect to the issue of S&S, it is well settled that the seriousness of violations should be evaluated in the context of continued mining operations assuming that the cited condition will remain unabated. *See, e.g., Mid-Continent Resources*, 16 FMSHRC 1218, 1221 (June 1994) (citing *U.S. Steel Mining Co., Inc.*, 7 FMSHRC at 1125, 1130 (Aug. 1985)). For the reasons discussed below, given the migrating nature of coal accumulations, the propagation

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<sup>2</sup> McElroy concedes that 104(d)(2) Order No. 7124999 issued on October 26, 2005, is the predicate order for 104(d)(2) Order No. 7149765 issued on January 11, 2006, as an intervening "clean" inspection had not occurred. (Joint Stip. 8).

<sup>3</sup> Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

<sup>4</sup> A violation of a mandatory safety standard is unwarrantable when the actions of the mine operator that resulted in the violation constitute more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987).

hazard they present, and the ever-present potential ignition source caused by worn rollers, the Secretary's S&S designation, and her contention that the violation is attributable to an unwarrantable failure, shall be affirmed. Consequently, McElroy has failed to demonstrate an adequate basis for disturbing the Secretary's proposed \$6,600.00 penalty.

## **II. Findings of Fact**

This matter concerns coal accumulations that were observed along the conveyor belt for the three-Left, five-South longwall section during a January 11, 2006, inspection at the McElroy Mine. At that time, the longwall's production was approximately 10,000 tons of coal per shift. (Tr. 386). Extracted coal is transported from the three-Left, five-South longwall face on a longwall belt that carries coal from the face to the main belt at the mouth of the section. (Tr. 84). The longwall belt comprises approximately 5,000 feet of the approximate 22 miles of conveyor belt that is operating at the mine. (Tr. 84-5, 151). The crosscuts along the belt entry are approximately 16 feet wide. (Tr. 98). The crosscuts are separated by large and small blocks of coal. The large blocks of coal are 275 feet long. The smaller blocks of coal are approximately 137½ feet long. (Tr. 103; Gov. Ex. 5A). On January 11, 2006, the longwall face was located inby the 36 crosscut. (Gov. Ex. 5A).

The longwall belt, which is 54 inches wide, is supported by a metal structure that is four feet high. (Tr. 84, 397). The entire structure, including the side rails, is approximately 72 inches wide. (Tr. 397). The belt and side rails are supported above the ground by metal stands, which are located about 10 feet apart. (Tr. 90). There are sets of top rollers and bottom or "idler" rollers in each cradle. (Tr. 84). The bottom rollers are approximately 12 to 14 inches above the ground and are attached to the belt stands. (Tr. 90, 129-30). The drive is located near the outby end of the belt. (Tr. 90; Gov. Ex. 5). Along the belt near the drive, there is a "box check" and a separate regulator used to regulate air in the belt entry. (Tr. 88).

Mine Safety and Health Administration ("MSHA") Inspector Jason Rinehart arrived at the McElroy Mine at approximately 7:15 a.m. on January 11, 2006. Prior to going underground, Rinehart reviewed the preshift and onshift book for the three-Left, five-South longwall section. (Tr. 27). Rinehart noted repeated examination book entries describing the locations of numerous accumulations in the belt entry that required cleaning during the period beginning with the preshift examination that was completed at 7:00 a.m. for the day shift on January 5, 2006, through the preshift examination that was completed at 7:00 a.m. for the current January 11, 2006, day shift. The exact dimensions with respect to length and depth of the accumulations were not entered by the preshift or onshift examiners. (Gov. Ex. 3). Specifically, the relevant McElroy examination book notations reflect:

Accumulations between the 38 and 31 blocks were reported for 18 consecutive shifts (5 days) (accumulations between the 38 and 35 blocks apparently were only reported from January 5 through January 9, 2006, because the longwall face had

retreated from the 38 block to the 35 block during this time). (Tr 33-64, 68-70; *see* Gov. Ex. 3, at 1, 35).

Accumulations between the 17 and 22 blocks were reported for 18 consecutive shifts (5 days) from 7:00 a.m. on January 5, 2006, until the preshift examination at 7:00 a.m. on January 11, 2006. (Tr 33-64, 68-70; *see* Gov. Ex. 3, at 1, 35).

Accumulations between the 9 and 11 blocks were reported for 18 consecutive shifts (5 days) from 7:00 a.m. on January 5, 2006, until the preshift examination at 7:00 a.m. on January 11, 2006. (Tr. 33-64, 73; *see* Gov. Ex. 3, at 1, 35).

Accumulations at the "ALC" ("Belt A/L" or "A/L") were reported for 18 consecutive shifts (5 days) from 7:00 a.m. on January 5, 2006, until the preshift examination at 7:00 a.m. on January 11, 2006. (Tr. 33-64; *see* Gov. Ex. 3, at 1, 35).

Accumulations between the 5 block and the airlock were reported for 15 consecutive shifts (4 days) from 3:00 p.m. on January 6, 2006, until the preshift examination at 7:00 a.m. on January 11, 2006. (Tr. 33-64, 72; *see* Gov. Ex. 3, at 9, 35)

After reviewing the findings of the preshift and onshift examiners, Rinehart went to the three-Left, five-South section to compare the condition of the belt entry to the notations in the examination book. Rinehart was accompanied by McElroy's safety representative Charles Bradley Racer and miners' representative Tom Stern. (Tr. 74). Racer accompanied Rinehart for the entire belt inspection. (Tr. 168). Although Rinehart believed that the belt was running at the time of inspection, Racer testified the belt was shut down to perform the routine maintenance that is required at the beginning of each shift, such as checking pressures on the sheer spray arms and drums. (Tr. 92, 319-21).

Rinehart took measurements of the accumulations along the beltline and announced the results of his measurements to Racer and Stern. They did not express any disagreement with Rinehart's measurements at that time. (Tr. 118-119). Rinehart stated the accumulations consisted of black float coal dust that he described as dry, fine, and powdery. The accumulations had not been rock dusted. (Tr. 122-23). Rinehart testified that the accumulations were obvious to anyone walking along the conveyor belt, and, that no one was cleaning the accumulations at the time of his inspection. (Tr. 123-24).

Bottom rollers are located approximately 12 to 14 inches above the mine floor. (Tr. 129-30). Rinehart noted that there were two bottom rollers in contact with accumulations that were 14 inches in depth between the 10 and 11 blocks, and that there was one roller in contact with accumulations that were 14 inches in depth between the 9 and 10 blocks. (Tr. 128-29; Gov. Ex. 5A). Although bearings in rollers can wear over time, causing friction-related heat, Rinehart did not detect any heat from the three bottom rollers in proximity to the coal dust accumulations. (Tr. 130-31).

Rinehart also determined that 12 top rollers located between the 9 to 13 blocks had recently been replaced during the afternoon shift on January 6, 2006.<sup>5</sup> (Tr. 55-57, Gov. Ex. 3 at 12). In addition, Rinehart observed two frozen top rollers<sup>6</sup> between the 26 and 28 blocks, a bad top roller between the 13 and 14 blocks, and a bad bottom roller between the 12 and 13 blocks.<sup>7</sup> (Tr. 107, 129, 133-34). Finally, Rinehart observed that the conveyor belt was cutting into the stands in the vicinity of the No. 18 crosscut (No. 18 block). (Tr. 124; Gov. Ex. 5A).

As a result of his review of the examination book and his observations of the conditions in the belt entry, Rinehart issued 104(d)(2) Order No. 7149765 at 9:13 a.m. on January 11, 2006, citing a violation of the mandatory standard in section 75.400. As previously noted, this safety standard requires combustible materials such as coal dust, float coal dust and loose coal to be cleaned up to prevent their accumulation in active workings. Order No. 7149765 states:

An accumulation of loose coal, coal fines, and float coal dust exists on the 3-Left, 5-South longwall belt at the following locations: No. 34-33 block loose coal and coal fines up to 8 inches deep at various locations; No. 33-32 block loose coal up to 5 inches deep at various locations; No. 32-31 block loose coal up to 11 inches deep at various locations; No. 30-29 block loose coal up to 7 inches at various locations; No. 29-28 block loose coal up to 7 inches deep at various locations; No. 28-27 block loose coal up to 9 inches deep at various locations; No. 26-25 block loose coal 14 feet long 37 inches wide and up to 16 inches deep on both sides of the belt; No. 9-11 block loose coal 64 inches wide in places and up to 14 inches deep. There were two rollers in contact with the accumulations between 10-11 block and one roller in contact with accumulations between 9-10 block. Also, there were dry coal fines and float coal dust extending between No. 5 block and

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<sup>5</sup> It is undisputed that top rollers were replaced on January 6, 2006. References in the transcript that the top rollers were replaced on January 6, 2005, are erroneous. (Tr. 55-57). The error occurred because the examination book entry "Replaced 12 Tops 9-13 Brk" erroneously reflects the examination occurred on January 6, 2005, instead of January 6, 2006, as the examiner apparently forgot to record the arrival of the new year. (Gov. Ex. 3 at 12).

<sup>6</sup> A "frozen" roller is one that does not spin. (Tr.133).

<sup>7</sup> A "bad" roller is one that has bearings that are beginning to fail. (Tr. 133).

the box check. The float coal dust extended in the belt regulator. 0.45% methane was detected on this belt. The following conditions were listed in the preshift examination books for 18 shifts with no corrective action taken: Airlock to 5 wall needs cleaned [sic], 17-22 and 31-35 block needs cleaned [sic] and 9-11 block spillage.

(Gov. Ex. 1). Although inadvertently not cited in Order No. 7149765, Rinehart noted accumulations at the 19 to 20 block that were 30 feet long and 6 to 8 inches in depth. (Tr. 65; Gov. Ex. 2).<sup>8</sup>

Rinehart designated the violation as S&S because the frozen top roller, bad bottom roller, belt contact with the metal stand, and a potential bearing failure in the rollers contacting the coal dust, were all potential sources of heat that could ignite the combustible coal accumulations. (Tr. 131-36). Rinehart was also concerned with the propagation hazard of float coal dust that could be suspended in air, providing additional fuel in the event of an explosion. (Tr. 137).

Rinehart attributed the accumulations to an unwarrantable failure because the hazardous accumulations were extensive and obvious. Moreover, the accumulations were permitted to exist for five days despite being repeatedly noted by examiners as a condition needing corrective action. (Tr. 146-47).

The 104(d)(2) Order No. 7149765 was terminated at 2:15 p.m. on January 11, 2006, five hours after it was issued. It took at least ten miners several hours to remove the cited accumulations. (Tr. 140-41, 252-53; Resp. Reply Br. at 3).

Ryan Carmen is currently employed by MSHA as an inspector-in-training. In January 2006, Carmen was employed as a foreman at the McElroy Mine. At that time, Carmen was the foreman for the three-Left, five-South longwall section. (Tr. 203-04, 211-12). Carmen testified that the accumulations noted in the examination book from January 5 to January 11, 2006, between the 31 to 38 blocks, the 17 to 22 blocks and the 9 to 11 blocks were the same accumulations cited by Rinehart in Order No. 7149765. (Tr. 231-32). In fact, Carmen personally entered several of the notations concerning the cited accumulations in the examination book. (Tr. 210-15). Carmen stated that conditions requiring corrective action were not always immediately addressed at the McElroy Mine due to other priorities and personnel shortages. (Tr. 245-46). In this regard, Carmen testified that from January 5, 2006, until Rinehart's January 11, 2006, inspection, McElroy did not assign any miners to clean the accumulations noted by the preshift examiners. (Tr. 246-47).

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<sup>8</sup> The testimony concerning Rinehart's observations of the accumulations between blocks 19 and 20 was allowed as relevant evidence concerning whether the accumulations observed by Rinehart were the accumulations noted by examiners from January 5 through January 11, 2006. However, any attempt by the Secretary to modify the citation to include the accumulations between blocks 19 and 20 was denied. (Tr. 66).

Rinehart testified that there was an 8 inch hole in the middle of the conveyor belt. (Tr. 171-72; Gov. Ex. 2). As the conveyor belt traveled, the hole was a source of spillage anywhere along a significant length of the three-Left, five-South beltline. (Tr. 172). Racer corroborated Rinehart's testimony concerning the hole in the middle of the belt. Racer estimated the size of the hole was approximately 12 inches by 6 inches. (Tr. 335). Racer speculated about the path of the spillage after it passed through the hole in the belt. Racer opined:

Oh, if there's a hole in the belt as its moving, the coal's going to fall through that hole. And as it falls through that hole, its going to hit the bottom belt, which is traveling in the opposite direction and kick it, or kick it around, or have it hit a stand and come off on the side of the belt.

(Tr. 335).

Timothy T. Underwood, McElroy's Assistant Superintendent, similarly opined that most of the cited accumulations came from the hole in the belt, stating that "it doesn't take very long . . . to get an accumulation on the beltline with a hole in it." (Tr. 375, 396).

After the 104(d) order was issued, Underwood asked Rinehart what action was necessary to restart the conveyor. Underwood stated that Rinehart responded that the accumulations had to be cleaned before the order could be terminated. Underwood testified that Rinehart did not tell him that any of the accumulations were contacting rollers. (Tr. 367-68).

Although Racer and Underwood admit the hole in the belt provided the means for coal dust to accumulate quickly, McElroy disputes the extent and depth of the accumulations. Racer testified that the accumulations were no more than twelve inches deep, and that twelve inch depths only existed near the stands supporting the belt structure. Specifically, Racer testified the most extensive areas where there was spillage from stand to stand was between the 9 to 11 blocks, the 25 to 26 blocks and the 31 to 34 blocks. Furthermore, Racer conceded the accumulations were as much as twelve inches in depth between the 9 to 11 blocks and between the 25 to 26 blocks. (Tr. 327).

Contrary to Rinehart's testimony that accumulations were situated under the belt in proximity to several bottom rollers, Racer stated the accumulations were in narrow bands, no more than six inches in width, that were located at the side of the belt, between the waterline and belt structure. (Tr. 332-34). In this regard, Racer denies that Rinehart showed him any rollers that were contacting coal. (Tr. 324-25). When asked whether Rinehart pointed out any bad rollers, or, whether he observed any bad rollers while he accompanied Rinehart during his inspection, Racer answered, "Not that I recall." (Tr. 325). Similarly, Underwood testified that Rinehart did not tell him that rollers were contacting coal when Rinehart described what he observed during his inspection. (Tr. 367-68).

### **III. Further Findings and Conclusions**

McElroy has stipulated that it violated section 75.400 in that the cited coal dust accumulations were permitted to accumulate in active workings rather than being cleaned up in a timely manner. (Joint Stip. 7). However, McElroy disputes the S&S designation and the Secretary's claim that the accumulations were attributable to its unwarrantable failure.

As a threshold matter, it is significant to note that S&S and unwarrantable issues are mutually independent. Although the degree of danger posed by a violation is a relevant consideration in determining whether an unwarrantable failure has occurred, a violation does not have to be S&S to support an unwarrantable failure. *Youghiogeny & Ohio Coal Company*, 10 FMSHRC 603, 609 (May 1988) (an S&S finding is not a prerequisite for issuance of a 104(d)(1) order).

#### **a. Significant and Substantial Issue**

As a general proposition, a violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC at 1129, the Commission explained its *Mathies* criteria as follows:

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

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

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Viewing the evidence in a light most favorable to McElroy, Racer's description of the subject accumulations, from stand to stand between several blocks, as much as 12 inches in depth, clearly supports the Secretary's assertion that the accumulations were extensive. However, the thrust of McElroy's opposition to the S&S designation appears to be its assertion that the cited accumulations were alongside the beltline rather than under the belt in proximity to bottom rollers.

Assuming, *arguendo*, that the accumulations were not contacting any rollers, coal dust accumulations, including float dust and coal fines, are migratory by nature. Thus, there is little evidentiary significance to McElroy's claim that, at the time of Rinehart's inspection, the prohibited combustible accumulations were located alongside the belt next to the rollers rather than under the belt in contact with bottom rollers. I am unaware of any Commission precedent that establishes contact with belt rollers as a prerequisite to an S&S determination for proscribed accumulations in a belt entry. Moreover, such a conclusion would ignore the significant propagation hazard posed by the extensive accumulations that are present in this case.<sup>9</sup>

Turning to a more traditional discussion of the S&S issue, with regard to the first element of *Mathies* -- violation of a mandatory standard -- McElroy has stipulated that the accumulations cited in 104(d)(2) Order No. 7149765 constitute impermissible combustible accumulations prohibited by section 75.400. (Joint Stip. 7).

With respect to the second element of *Mathies*, i.e., a discrete safety hazard contributed to by the violation, longstanding Commission precedent has recognized that combustible accumulations create significant explosion and propagation hazards. *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979) (ignitions and explosions are major causes of death and injury to miners); *Utah Power & Light Co.*, 12 FMSHRC 965, 970 (May 1990) (recognizing

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<sup>9</sup> "Propagation" occurs when coal dust provides the fuel that transmits "the flame of an explosion . . . over considerable areas of a mine in such manner as might result in loss of life of workers in a mine." See Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 429 (2nd ed. 1997).

Congressional concern regarding loose coal propagation and explosion hazards); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997) (combustible accumulations are hazardous because, when placed in suspension, they will propagate an explosion). As coal dust is combustible, if combustion were to occur, i.e., fire or explosion, there obviously is a reasonable likelihood that miners will be exposed to serious injury or death. Thus, the fourth element of *Mathies* is also satisfied -- a reasonable likelihood of serious injury if the hazard posed by the violation results in a fire or contributes to an explosion.

The remaining element of *Mathies* requires the Secretary to demonstrate that it is reasonably likely that the combustible accumulations violation will result in an event -- a fire or explosion -- that is reasonably likely to result in serious or fatal injury. Thus, it is the likelihood of a fire or explosion that is the dispositive question in resolving the S&S issue.

Although I have concluded that contact with conveyor rollers is not necessary to support an S&S designation, on balance, the evidence supports Rinehart's testimony that two bottom rollers were contacting accumulations between the 10 and 11 blocks, and that one roller was contacting accumulations between the 9 and 10 blocks. Rinehart's recollection is supported by his contemporaneous field notes. (Gov. Ex. 2, at 5). In addition, Rinehart's testimony, also supported by his notes, that there was a bad bottom roller between the 12 and 13 blocks, has not adequately been rebutted. *Id.* I reach this conclusion because Racer's testimony that he did not recall whether Rinehart pointed out any bad rollers, or, whether he observed any bad rollers when he accompanied Rinehart, is unconvincing. (Tr. 325). Underwood's testimony that Rinehart did not tell him that accumulations were contacting bottom rollers when they discussed abatement of the 104(d) order is entitled to little weight, as Underwood, unlike Racer, lacked personal knowledge of the cited conditions because he was not present during the inspection.

In the final analysis, it is undisputed that rollers are a potential ignition source by virtue of friction caused by the deterioration of their bearings. In fact, McElroy had replaced numerous top rollers several days before Rinehart's inspection. Moreover, Rinehart's observation of the conveyor belt cutting into the stands in the vicinity of the 18 block is evidence of an additional potential ignition source. (Gov. Ex. 2 at 4).

When viewed in the context of continuing mining operations, there are sufficient potential sources of ignition from malfunctioning rollers and belt contact with the metal frame that are in proximity to combustible accumulations to warrant the conclusion that a fire or explosion is reasonably likely to satisfy the third element of *Mathies*. This conclusion is further supported by the propagation hazard posed by this combustible material that can easily be put in suspension by moving belts and rollers. See *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988) (finding that combustible fuel, capable of suspension, in the presence of ignition sources constitutes a "confluence of factors" necessary to support an S&S violation).

Notwithstanding the ignition hazard posed by rollers, McElroy attempts to diminish the fire and explosion threat by relying on its carbon monoxide (“CO”) monitoring system. Carbon monoxide is a by-product of combustion. CO sensors are designed to detect carbon monoxide at very low levels before flames are present. In so doing, McElroy relies on an early detection system to warn miners, and to allow it to quickly extinguish fires, to support its assertion that a significant fire or explosion is not reasonably likely.

McElroy’s reliance on its early detection system must be rejected. As a general proposition, detection systems, such as methane monitors, do not diminish the seriousness of the violation of other mandatory safety standards, such as the failure to ensure that electric face equipment is permissible. 30 C.F.R. § 75.500. In fact, in *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995), the Court, in addressing the S&S issue, rejected the mine operator’s reliance on fire suppression equipment, such as CO monitors and water sprays, to mitigate an accumulation hazard. The Court stated the presence of such safety measures “does not mean that fires do not pose a serious safety risk to miners.” *Id.* The Court further noted the operator’s position “defies common sense” because such “precautions are presumably in place . . . precisely because of the significant dangers associated with coal mine fires.” *Id.*; see also *AMAX Coal Company*, 19 FMSHRC 846, 850 (May 1997) (holding that the presence of fire detection equipment and fire fighting equipment does not negate the serious safety risk posed by fires).

Finally, McElroy relies on an MSHA report concerning underground belt entry fires to support its contention that serious injury is not a likely consequence of a belt fire.<sup>10</sup> MSHA, *Reducing Belt Entry Fires in Underground Coal Mines*, (2007) (Resp. Ex. 53). Specifically, the report notes that there have been no fatalities or reportable lost time injuries as a result of the 63 reportable belt entry fires that occurred in the 25 year period from 1980 to 2005. (*Id.* at 6).

While this MSHA report concluded there had been no reportable lost time injuries as a result of belt fires through 2005, it cannot be seriously contended that the report supports the proposition that serious injury or death is not a reasonably likely result of a fire in an underground mine. In fact, the Aracoma ROI tragically dispels any such notion. The Aracoma disaster involved a longwall belt fire that caused the death of two miners. The fire started as a

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<sup>10</sup> This “belt entry fire report” was not provided by the respondent to the Secretary’s counsel prior to the hearing. Nor did the respondent proffer any testimony concerning the report’s contents. The record was left open to provide the Secretary an opportunity to respond to the report, and to take additional testimony if necessary. In response to MSHA’s “belt entry fire report,” on November 19, 2007, the Secretary filed the MSHA Report of Investigation of a January 19, 2006, fatal underground coal mine fire at the Aracoma Alma Mine #1. MSHA, *Report of Investigation of the January 19, 2006, Fatal Underground Coal Mine Fire at the Aracoma Alma Mine #1* (2007) (“Aracoma ROI”). The record with respect to the MSHA reports was closed after the parties elected to address the MSHA reports in their briefs rather than provide additional testimony or documentation.

result of frictional heating caused by the misalignment of the longwall belt and the belt of the headgate take-up storage unit. (Aracoma ROI at 2). The fire ignited accumulations which increased the intensity and extent of the mine fire. *Id.*

McElroy asserts that the Secretary's reliance on the Aracoma fire is misplaced because, in Aracoma, the belt fire originated at the headgate take-up drive rather than at a belt entry conveyor. (Resp. Br. at 14). The original situs of a fire is little solace to a burn victim. Rather, the risk of injury or death is determined by the intensity of a fire or explosion -- not the location of the initial ignition. McElroy has proffered a distinction without a difference that must be rejected.

In addition, McElroy seeks to distance itself from the Aracoma fire because the fatalities were attributable "to a host of conditions" including noncompliance with ventilation requirements and inadequate escapeways. (*Id.* at 14-15). This distinction is also unavailing. The exercise of precaution, or the lack thereof, does not affect the S&S nature of a violation. *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (an S&S violation continues to exist "regardless of whether caution is exercised").

Finally, the Aracoma disaster notwithstanding, the Commission previously has rejected the identical argument that a section 75.400 violation due to accumulations in belt entries is not S&S because very few belt fires have resulted in injuries. *AMAX Coal Company*, 19 FMSHRC at 849. The Commission determined that the fact that injuries have been avoided in the past in connection with a particular violation is fortuitous, and it is not determinative of an S&S finding. *Id.* (citations omitted).

In sum, it is reasonably likely that the continued presence of this uncorrected combustible material violation in proximity to potential ignition sources during continuing mining operations will result in, or contribute to, a fire or explosion event that will cause serious or fatal injuries. Consequently, the evidence reflects this violation of section 75.400 is properly designated as significant and substantial in nature.

#### b. Unwarrantable Failure Issue

The elements of unwarrantable conduct are well settled. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining*, 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 135-36 (approving the Commission's unwarrantable failure test).

The Commission examines various factors in determining whether a violation is unwarrantable, including the magnitude of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC at 11-12, 17; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

Here, McElroy permitted combustible material to accumulate over a considerable period of time. The Commission, as well as Congress, has recognized that accumulations of combustible materials constitute hazardous conditions, as any combustible material when placed in suspension will enter into and propagate an explosion. *Enlow Fork*, 19 FMSHRC at 14, citing S. Rep. No. 411, 91st Cong., 1st Sess. 65 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975).

As previously discussed, the accumulations were numerous and extensive in size and depth. As an example of one of the many accumulations cited in 104(d)(2) Order No. 7149765, accumulations that were located on both sides of the belt between the 25 and 26 blocks were cited that were 14 feet long, 37 inches wide, and up to 16 inches in depth. These accumulations alone are of significant magnitude to warrant a finding that they were extensive. In this regard, even McElroy concedes portions of the cited accumulations were as much as 12 inches deep. Finally, Carmen recalled it took as many as 20 miners four hours to remove the cited accumulations. (Tr. 252-53). Even McElroy acknowledges the cleanup took approximately ten miners three hours, from after 10:00 a.m. until 1:20 p.m., to complete. (Resp. Reply Br. at 3). Consequently, the evidence clearly reflects the cited accumulations were extensive.

That the cited accumulations were readily apparent is evidenced by the repeated entries by preshift and onshift examiners calling for corrective cleanup action during a five day period encompassing 18 shifts beginning on January 5, 2006. The preshift examination "is of fundamental importance in assuring a safe working environment underground." *Enlow Fork*, 19 FMSHRC at 15 (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)). Thus, a mine operator is required to perform preshift examinations to identify hazardous conditions. *Enlow Fork*, 19 FMSHRC at 14 (citing 30 C.F.R. § 75.360(b)). Yet, Carmen testified the preshift examiners' repeated requests for corrective action went unheeded. (Tr. 246-47).

McElroy suggests there is insufficient evidence that the accumulations recorded over these 18 shifts are the same accumulations observed by Rinehart on January 11, 2006, because, although the examination book entries describe the accumulations by location, they do not contain the dimensions of the accumulations. The Commission has held that the fact that a violative condition was not noted in a preshift examination is not evidence that the violation did not exist, or that it was of short duration. *Peabody*, 14 FMSHRC at 1262. Rather, the fact that an examiner failed to record an accumulation does not bar an unwarrantable failure finding. *Id.* So too, McElroy's inadequate description of the accumulations in its examination book does not give rise to a claim that there is insufficient evidence that the accumulations observed by Rinehart, at the identical locations noted during preshift examinations, are the same accumulations recorded by the examiners.

With respect to whether McElroy's conduct was so egregious as to be unwarrantable, it is important to consider the underlying facts surrounding the violation. The accumulations existed for as long as 18 shifts. McElroy has conceded that a hole in the belt was a significant, if not primary, source of the violative accumulations. (Tr. 375). Consequently, it is reasonable to conclude that the hole in the belt also existed for at least 18 shifts. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (reasonable inferences are permissible if there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred).

It is axiomatic that "[t]he risk to be perceived defines the duty to be owed." *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (1928). A hole in the middle of a conveyor belt defeats the purpose. As Underwood admitted, "it doesn't take very long . . . to get an accumulation on the beltline with a hole in it." (Tr. 375). Given the repeated notations of significant accumulations along the beltline, McElroy knew, or should have known, of the hole's existence. Yet it continued to convey coal on the belt despite this source of significant combustible accumulations.<sup>11</sup> Thus, the fact that the accumulations were caused by a hole in the conveyor belt is an aggravating circumstance. Consequently, McElroy's continued operation of the defective belt constitutes more than ordinary negligence.

In sum, the evidence unequivocally establishes the cited accumulations are attributable to at least a high degree of negligence. The Court has concluded that extensive accumulations that were present at least *one shift* and not removed after *one preshift examination* provided an adequate basis to establish an unwarrantable failure. *Buck Creek*, 52 F.3d at 136. Here, McElroy's nonfeasance was far greater than the unwarrantable conduct in *Buck Creek*. The obvious and extensive accumulations were of five days duration, and known to McElroy, as

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<sup>11</sup> I am cognizant that the 6 by 12 inch hole in the belt described by Racer must be viewed in the context of the approximate 5,000 feet length of the longwall belt. (Tr. 335). However, the documented extensive accumulations during a period of 18 shifts should have heightened McElroy's awareness of a potential defect in the beltline as a source of the accumulations. The hole should have been discovered when the belt was de-energized during routine belt maintenance performed at the beginning of each shift. (Tr. 319-21).

shown by the repeated entries in its preshift examination book. The accumulations were dangerous, as they posed a serious fire or explosion hazard. *Enlow Fork*, 19 FMSHRC at 14; see also *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117,1121 (Aug. 1985) (discussing the combustibility of coal, and noting that “ignitions and explosions are major causes of death and injury to miners”). McElroy was on notice that greater cleanup efforts were required by virtue of the fact that it had been cited for 245 section 75.400 violations during the two year period preceding the issuance of the subject 104(d)(2) order. (Tr. 148-49). Finally, McElroy made no effort to remedy the violative accumulations prior to Rinehart’s inspection. See *San Juan Coal Co.*, 29 FMSHRC 125, 134-35 (Mar. 2007) (noting that “an operator’s failure to clean up accumulations at the time of inspection . . . may support an unwarrantable failure finding”). In short, all of the necessary elements are present to support the conclusion that the cited accumulations are attributable to McElroy’s unwarrantable failure.

### c. Civil Penalty

The statutory civil penalty criteria are set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). In determining the appropriate civil penalty to be assessed, section 110(i) provides, in pertinent part:

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

McElroy is a large mine operator that is subject to the jurisdiction of the Mine Act. The proposed penalty will not affect McElroy’s ongoing business operations and McElroy promptly abated the cited violation after the subject 104(d) withdrawal order was issued. While the history of 245 section 75.400 violations in the two year period preceding this violation should be viewed in the context of the 22 miles of beltline in the McElroy Mine, such a history cannot be viewed as a mitigating factor.

With respect to negligence, I have given McElroy the benefit of the doubt that its failure to address the corrective action repeatedly requested by its preshift examiners evidenced only a high degree of negligence, rather than a reckless or conscious disregard. I reach this conclusion because of the absence of defective rollers in close proximity to the cited coal accumulations. Finally, as previously discussed, extensive combustible accumulations along a beltline is a violation that is serious in gravity. Consequently, there is no basis for disturbing the civil penalty initially proposed by the Secretary. Accordingly, consistent with the statutory penalty criteria, a civil penalty of \$6,600.00 shall be assessed for 104(d)(2) Order No. 7149765.

d. Settlement Terms

As noted, the Secretary has filed a motion to approve a settlement agreement with respect to the 19 remaining citations and orders in this proceeding. A reduction in civil penalty for these 19 cited violations, from \$20,748.00 to \$12,576.50, is proposed. The settlement terms include deleting the S&S designation from Citation Nos. 7135325, 7135329, 7135696, 7135331, 7135697, 7135703 and 7135706, and vacating Citation Nos. 7135695 and 7148008. The parties also have agreed to modify Citation No. 7135959 by deleting the S&S designation, and by amending the citation to reflect that the violated mandatory standard was 30 C.F.R. § 75. 517 rather than 30 C.F.R. § 75. 604(b).

I have considered the representations and documentation submitted in support of the Secretary's motion and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the parties' settlement terms shall be approved.

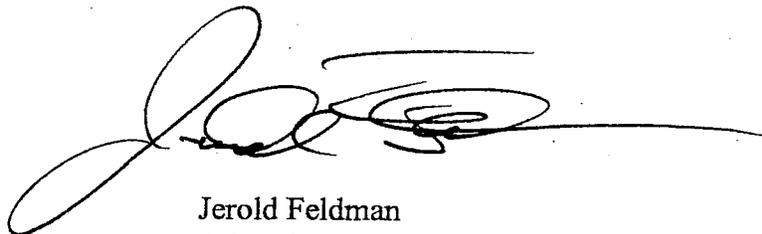
**ORDER**

Consistent with this Decision, **IT IS ORDERED** that 104(d)(2) Order No. 7149765 **IS AFFIRMED**.

**IT IS FURTHER ORDERED** that McElroy Coal Company shall pay a civil penalty of \$6,600.00 in satisfaction of 104(d)(2) Order No. 7149765.

Consistent with the parties' settlement terms, **IT IS FURTHER ORDERED** that McElroy Coal Company shall pay a civil penalty of \$12,576.50 for the remaining 19 citations and orders in issue in this proceeding.

Consistent with this decision and the parties' settlement terms, **IT IS ORDERED** that McElroy Coal Company shall, within 30 days of the date of this decision, pay a total civil penalty of \$19,176.50 in satisfaction of the 20 citations and orders that are the subject of this matter. Upon receipt of timely payment, the civil penalty proceeding in WEVA 2007-132 **IS DISMISSED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal flourish extending to the right.

Jerold Feldman  
Administrative Law Judge

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/rs

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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April 7, 2008

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

v.

NELSON QUARRIES, INC.,  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2006-178-M  
A.C. No. 14-01477-87956

Docket No. CENT 2006-202-M  
A.C. No. 14-01477-80283

Plant 1

Docket No. CENT 2006-203-M  
A.C. No. 14-01478-77337

Docket No. CENT 2006-204-M  
A.C. No. 14-01478-82614

Docket No. CENT 2006-228-M  
A.C. No. 14-01478-87955

Plant 2

Docket No. CENT 2006-207-M  
A.C. No. 14-01277-74668

Docket No. CENT 2006-208-M  
A.C. No. 14-01277-82615

Docket No. CENT 2006-229-M  
A.C. No. 14-01277-87965

Docket No. CENT 2006-231-M  
A.C. No. 14-01277-93224

Plant 3

Docket No. CENT 2006-151-M  
A.C. No. 14-01597-85132

Docket No. CENT 2006-206-M  
A.C. No. 14-10597-80316

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 : Docket No. CENT 2006-230-M  
 : A.C. No. 14-01597-90759  
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 : Docket No. CENT 2006-233-M  
 : A.C. No. 14-01597-93238  
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 : Docket No. CENT 2006-237-M  
 : A.C. No. 14-01597-77364-02  
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 : Plant 4  
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 : Docket No. CENT 2006-200-M  
 : A.C. No. 14-01635-74774  
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 : Docket No. CENT 2006-201-M  
 : A.C. No. 14-01635-80401  
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 : Plant 5

**DECISION**

**Appearances:** Jennifer Casey, Esq, and Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Ronald Pennington, Conference & Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;  
 Paul M. Nelson, Nelson Quarries Inc., Gas, Kansas, for Respondent.

**Before:** Judge Manning

These cases are before me on 16 petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Nelson Quarries, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve 100 citations and orders issued by MSHA under sections 104(a) and 104(d)(1) of the Mine Act at five plants operated by Nelson Quarries. The parties presented testimony and documentary evidence at the hearing held in Topeka, Kansas, and filed post-hearing briefs on a few of the citations.

At all pertinent times, Nelson Quarries operated five quarries in Allen and Crawford Counties, Kansas. The quarries mine limestone and then crush and screen the material for sale. The operations are portable. Three of these facilities operate intermittently and the other two operate full-time. The oldest quarry has been operating since 1985 and the newest quarry was opened in 2004. Most of the citations at issue in these cases were issued after a hazard complaint

was filed by a former employee of Nelson Quarries. The complaint listed 14 alleged hazards. Some of the hazards complained of were general, such as the ones that stated “Nelson Quarries’ properties are unsafe to everyone who works in them” and “electricity is bad [at] all plants.” (Tr. 35-36; Exs. G-1, G-11). Others were more specific, such as one that stated that “explosives are left unguarded and hid around the plant to save time and money.” *Id.* This complaint was with respect to Plant 4. As a result of this complaint, inspectors from MSHA’s Topeka, Kansas, office conducted a comprehensive inspection of all five quarries. Because MSHA’s Topeka office did not have an electrical inspector, an electrical inspector was brought in from Salt Lake City, Utah, to inspect the electrical systems at all five plants. (Tr. 138). MSHA determined that about half of the hazards complained of had some validity. Nelson Quarries received more citations during these inspections than it had ever received. All of the citations discussed below were issued under section 104(a) of the Mine Act unless otherwise noted.

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Discussion of General Issues Raised by Nelson Quarries

Nelson Quarries raised a number of general issues that are applicable to all or most of the citations at issue. First, it argues that the Secretary failed to demonstrate that accidents could result from many of the cited conditions. For example, it contends that an injury could only result from an employee’s intentional misconduct in many of the conditions cited under the Secretary’s guarding standard. It maintains that the Secretary failed to establish any likelihood of an injury to employees as a result of the cited conditions.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10<sup>th</sup> Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

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

*Allied Products, Inc.*, 666 F.2d 890, 892-93 (5<sup>th</sup> Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great. The risk of injury and the appropriate penalty for each citation is discussed below.

The Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a “reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.” *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee’s clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by an unguarded tail pulley at Nelson Quarries’ operations is not a defense because there is a history of such injuries at plants throughout the United States. “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . .” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). For example, fatal accidents have occurred at small operations as a result of inadequately guarded tail pulleys. *See Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000) (ALJ).

Nelson Quarries also contends that many of the conditions cited by the MSHA inspectors existed during previous MSHA inspections. It states that MSHA did not issue citations for these conditions until the present inspections when the company came under tougher scrutiny, especially with respect to the guarding citations that were issued. Thus, it contends that it did not receive fair notice of MSHA’s new interpretation of the safety standard.

The Secretary must provide fair notice of the requirements of broadly written safety standards. Such standards are “simple and brief in order to be broadly adaptable to myriad circumstances.” *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In “order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be ‘so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application’ ” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.”

*Id.* (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. “The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated.” *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5<sup>th</sup> Cir. 1976). I discuss the application of this “fair notice” issue to particular citations in more detail below.

Finally, Nelson Quarries contends that the individual at each quarry who functioned as a lead man was not an agent of the company despite the fact that at the time of the subject inspections each of these individuals had the title “foreman.” It maintains that these employees were rank and file miners who were only given a few ministerial functions.

As a general matter, a mine operator can be held liable for the acts of its agents. An agent is defined at section 3(e) of the Mine Act as “any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of miners in a . . . mine.” The Commission has held that the negligence of an agent of a mine operator must be considered when determining the operator’s negligence in assessing a civil penalty under section 110(i) of the Mine Act and when evaluating an unwarrantable failure allegation. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991).

When deciding whether a miner is an agent of an operator, the Commission has focused on the miner’s function and not his job title. It has examined whether the miner’s function involved responsibilities normally delegated to management personnel and whether his responsibilities were crucial to the mine’s operation. It has also considered whether the miner exercised managerial responsibilities at the time of his negligent conduct.

*Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000) (citations omitted). The conduct of a rank-and-file miner, “may *not*, absent agency, be imputed to the operator.” *Whayne Supply Co.*, 19 FMSHRC 447, 454 (Mar. 1997) (emphasis in original). I discuss the application of these agency issues to particular citations in more detail below.

#### **B. CENT 2006-151-M, Plant 4.**

1. On November 15, 2005, Inspector Dustan Crelly issued Citation No. 6291250 under section 104(d)(1) of the Mine Act alleging a violation of section 56.6130(a). (Ex. G-13). The citation alleges that two partial rolls of primer (shock tube) were stored in the parts trailer. The citation states that the “rolls of explosive material were under the shelves” in the trailer. The citation also states that Foreman Gene Andres told the inspector that this material had been in the trailer since at least June 2005. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was significant and substantial (“S&S”) and that the negligence was high. The safety standard provides that

“[d]etonators and explosives shall be kept in magazines.” The Secretary proposes a penalty of \$1,000.00 for this citation.

Inspector Crelly testified that the legal identity report for Plant 4 lists Gene Andres as the foreman. (Tr. 185; Ex. G-10). Mr. Andres also confirmed this fact during the inspection. (Tr. 189-90). Inspector Crelly was looking for improperly stored explosives because of the allegations in the hazard complaint. (Tr. 190). Shock tube is a low explosive that is used as the lead line to detonate high explosives. (Tr. 191). The shock tube was an explosive and it was not stored in a magazine. The inspector testified that Mr. Andres told him that he knew that the shock tube was being stored in the parts trailer. (Tr. 194, 216). Inspector Crelly determined that the citation was S&S because shock tube is classified as an explosive, it was not stored in an isolated area, and there were cigarette butts in and around the trailer. (Tr. 198-99). The shock tube was not in the original manufacturer’s packaging or any other container. As a consequence, it could be contaminated by grit and sand, which would render it more sensitive to detonation. (Tr. 200). If something were to fall off a shelf and strike the shock tube, it could easily detonate. Miners enter the trailer every day.

Inspector Crelly determined that the violation was the result of the operator’s unwarrantable failure to comply with the safety standard. He based this determination on the fact that Foreman Andres knew that the shock tube was present and he did not take any action to remove it from the parts trailer. (Tr. 202). The shock tube was in plain view. The condition was abated when the shock tube was moved to the magazine. (Tr. 203).

Thomas E. Lobb, a physical scientist with MSHA in Triadelphia, West Virginia, testified on behalf of the Secretary by telephone. He conducts investigations into accidents that involves explosives. (Tr. 222; Ex. G-14). He also provides training in blasting safety and provides technical assistance to industry. He testified that shock tube is an explosive material, but its strength is limited so that it is relatively safe to anyone standing more than 25 meters away. (Tr. 225- 38; Ex. G-14b). He testified that this product presents a fire hazard. In addition, improper storage or mishandling can cause misfires when the shock tube is used. (Tr. 239-41). Misfires are one of the top five causes of blasting accidents. *Id.*

Jon Bruner, who is in charge of product management for Dyno-Nobel, Inc., testified on behalf of Nelson Quarries by telephone. He does not have a technical or scientific background. (Tr. 257). He testified that shock tube is not a high explosive. (Tr. 246-49). If the shock tube were ignited, it could cause burning injuries if it were in your hand, but it would not explode and it would not cause a fatal injury. (Tr. 251). He stated that if a spool of shock tube were accidentally shot, an injury would be unlikely. (Tr. 253). He admitted that shock tube is a low explosive and must be stored in a magazine under MSHA’s regulations. (Tr. 256-57). He also admitted that the presence of dirt, sand, and grit could make the shock tube more sensitive to detonation. (Tr. 264).

Patrick Clift, a foreman at Plant 4 for Nelson Quarries, testified that he was not aware that the shock tube was in the parts trailer. He stated that he was the only foreman at plant 4. (Tr. 274, 276). When he was interviewed by MSHA on February 2, 2006, he stated that Gene Andres was also a plant foreman. (Tr. 280-81; Ex. G-137h, p. 4). The mine's legal identity report lists Mr. Andres as the foreman and the person in charge of safety. (Tr. 281-83). Nelson Quarries has now given Mr. Andres the title of "lead man." (Tr. 284).

Gene Andres testified that he was not really a foreman at the time of the MSHA inspection, but he was the person in charge at Plant 4. (Tr. 293). He was not a foreman because he did not have the power to hire and fire employees or to discipline them. (Tr. 294). He can always call the foreman when important decisions need to be made. He testified that the parts trailer was not lighted. He was not aware that the shock tube was present until the inspector found it. (Tr. 295). Although he performs the daily workplace examinations, he does not walk all the way to the back of the trailer. He just makes sure that there is a clear walkway to the back of the trailer. He made sure that there was access to the back of the trailer, but he did not notice the shock tube when he performed his examination that Monday. (Tr. 309-10). He denies that he admitted to Inspector Crelly that he knew that the shock tube was in the trailer. He said that after June 2005, Buckley Powder Company did all of the blasting at the mine and that, therefore, the shock tube must have been present since that date. (Tr. 296).

During his interview with an MSHA inspector in February 2006, Andres referred to himself as the "plant foreman," he said that he "direct[ed] the work force," and he had the authority to tell "the workers what to do." (Tr. 307; Ex. G-137g, p. 2). He also stated that although he did not have the authority to hire or fire anyone or to discipline anyone, he could "recommend that they be disciplined or maybe talk to them if they do something wrong." *Id.* In this same interview with MSHA, Andres further stated that he does not inspect the parts trailer "because no one works in the parts trailer." (Tr. 310; Ex. G-137g, p. 4).

In its brief, Nelson Quarries makes two arguments. First, it argues that the inspector was confused about the nature of the material in the parts trailer. Shock tubing, by itself, cannot set off explosives because it is not strong enough. It contains 15 milligrams of HMX/aluminum powder per meter. Any combustion would have been contained within the plastic tubing. Without a detonator present, the shock tube did not pose a hazard to miners. The accidents cited by MSHA occurred after the shock tubing had been inserted into a detonator. Second, Nelson Quarries argues that Gene Andres was not its agent but was simply a lead man. The only foremen were Mike Peres and Patrick Clift and only their actions can be imputed to Nelson Quarries. It relies on the Commission's decision in *Martin Marietta Aggregates* and on the unpublished decision of the 9<sup>th</sup> Circuit in *Original Sixteen to One Mine, Inc. v. FMSHRC*, 175 Fed. Appx. 825, 2006 WL 897570.

I find that the shock tube is an explosive as that term is used in the safety standard. Thomas Lobb testified that shock cord is classified as an explosive and is required to be stored in a magazine. (Tr. 225-37; Ex. G-14b). While it is not likely that the shock tube would create a

serious explosion hazard, it could help propagate a fire. In addition, he testified that shock tube can misfire when handled or stored improperly. I credit the testimony of Mr. Lobb. As a consequence, the Secretary established a violation because the shock tube was not stored in a magazine.

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

The Secretary established a violation and that a discrete safety hazard was created. I also find that it was reasonably likely that the hazard contributed to would result in an injury assuming continued mining operations. Smoking was not prohibited in the area, cigarette butts were found in and around the trailer, and the shock tube would vigorously burn in the event of a fire. (Tr. 199). Anyone in the trailer was exposed to the hazard. In addition, if the shock tube were used, it could misfire because it had not been properly stored. Any injury would be of a reasonably serious nature. I find that the Secretary established that the violation was S&S.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. A number of factors are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator’s knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

It is clear that the shock tube had been in the parts trailer for some time. Inspector Crelly testified that Mr. Andres told him that he knew it was there. (Tr. 194, 216). The inspector wrote

the following in his citation notes: “Gene Andres, foreman, stated that he knew this explosive material should not have been stored in this parts trailer and it had been since at least 6/2005” (Ex. G-13b). The shock tube was in plain view and the inspector saw it upon entering the trailer. Andres testified that he did not know that the shock tube was present and that, when he conducted his daily examinations, he did not walk to the back of the trailer where the shock tube was stored. He admitted that it is likely that the shock tube had been in the parts trailer since June because that is when Nelson Quarries stopped performing its own blasting.

I find that the Secretary established that the violation was the result of the operator’s unwarrantable failure. Inspector Crelly testified that the condition was obvious and that he observed the shock tube when he entered the trailer. The record also establishes that the condition had existed for some time. I credit Crelly’s testimony and inspection notes on this issue and find that Andres was aware that it was present.

I find that Mr. Andres was an agent of Nelson Quarries in this instance. Andres accompanied MSHA inspectors during inspections as the company’s representative and he acted in that capacity during the instant inspection. (Tr. 188). When Inspector Crelly started his inspection, Mr. Andres told him that he was the foreman. Andres was listed as a foreman and as a person in charge of health and safety in MSHA’s legal identity report. (Tr. 185; Ex. G-4). Andres was responsible for conducting the daily workplace examinations at the plant. The Commission has held that a miner is the agent of a mine operator when carrying out the required examinations entrusted to him by the operator. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,194 (February 1991). Andres was compensated at a higher rate of pay than other employees. When interviewed on February 1, 2006, by an MSHA special investigator, Andres stated that he was a foreman and that he had the authority to direct the workforce, assign tasks, shut down equipment for safety conditions, and recommend that an employee be disciplined or terminated. (Tr. Ex. G-137g). Peres and Clift travel from plant to plant with the result that Andres was in charge of Plant 4 when neither Peres nor Clift was around. Although Andres could not hire or terminate an employee, he made recommendations to Peres and Clift. I find that Mr. Andres sufficiently meets the Commission’s multi-factor test for the imputation of an agent’s negligence to a mine operator for purposes of penalty assessments and unwarrantable failure findings as set forth in *Martin Marietta Aggregates*, 22 FMSHRC 633, 636-40 (May 2000). The fact that only Nelson family members could make the ultimate decision on disciplinary issues does not negate the fact that other individuals, including Andres, were given responsibilities that are normally delegated to management personnel. (Tr. 274).<sup>1</sup>

I also find that the court’s decision in *Original Sixteen to One* does not support the position of Nelson Quarries. That case was factually driven and the court specifically determined that there was “no evidence in the record that [the lead man’s] function ‘involved responsibilities normally delegated to management personnel,’ or that he ‘exercised managerial responsibilities at the time of his negligent conduct.’” (quoting *Martin Marietta Aggregates*). The court found

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<sup>1</sup> Both Peres and Clift are related to the Nelson family by marriage.

that the lead man's authority to assign tasks to the other miners with whom he was working that day is not by itself sufficient to support a finding that he is an agent. It is clear to me that Andres had more authority at the plant than the lead man at the Sixteen to One Mine.

For the reasons set forth above, the citation is affirmed as written. I find that the Secretary's proposed penalty of \$1,000.00 is appropriate taking into consideration the penalty criteria set forth in section 110(i) of the Mine Act.

2. On November 16, 2005, Inspector Crelly issued Order No. 6291251 under section 104(d)(1) of the Mine Act alleging a violation of section 56.6300(b). (Ex. G-15). The citation alleges that the crusher operator shot oversized material out of the hopper at the crusher and he was neither trained nor experienced with the handling and use of explosive material. The citation states that Mr. Andres told the inspector that the "hopper has to be shot whenever an oversized rock is sent to the crusher and the crusher operator is not qualified to handle explosives and he was aware of this." (Ex. G-15). Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was high. The safety standard provides that "[t]rainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material." The Secretary proposes a penalty of \$1,300.00 for this order of withdrawal.

The inspector testified that the crusher operator, who was not trained or experienced in the use of explosives, was shooting material out of the hopper without a trained miner being present. (Tr. 204, 208). Inspector Crelly testified that when he went into the crusher shack he saw a stick of high explosive (Boostrite) sitting in the shack. When he asked why it was there, the crusher operator told him that he shot oversized rock in the hopper the previous Monday and, because he did not use all of the explosive material he had removed from the magazine, he put it in the crusher shack. (Tr. 204-05, 207; Ex. G-74c). It was in a tray next to what the inspector called "shotgun primers." (Tr. 206). Shotgun primers are initiation devices used to set off a high explosive. *Id.* Thus, the inspector testified that he observed a high explosive stored next to detonators in the crusher shack. (Tr. 207). The crusher operator had been smoking in the crusher shack. (Tr. 209-10).

Inspector Crelly determined that the violation was S&S because if the cited practice continued it was reasonably likely that someone would be seriously injured or killed. (Tr. 212-13). The inspector saw the crusher operator smoking in the crusher shack. Inspector Crelly determined that the violation was caused by the operator's unwarrantable failure to comply with the standard because the violation was obvious and it appeared to be a standard practice at the mine. (Tr. 214-15). The inspector admitted that the crusher operator had been told by management not to smoke in or around the crusher shack. (Tr. 219).

Mr. Clift testified that the crusher operator was Travis Tomlinson and Tomlinson had been trained to handle and use explosives. (Tr. 275). He testified that other Nelson Quarries

employees had shown Tomlinson how to shoot out crushers at other plants owned by the company and that Tomlinson had helped other more experienced miners perform that task before he did so on his own. He further testified that an untrained employee can seriously damage the crusher if he improperly uses explosives. (Tr. 276). The order was terminated after Mr. Andres instructed employees that he was the only experienced and trained person who was authorized to use explosives, and he took possession of the keys to the magazine. (Tr. 288; Ex. G-15).

Gene Andres denied that he ever told Inspector Crelly that the crusher operator was not qualified to handle and use explosives. (Tr. 296-97). He merely told Crelly that he had not personally trained Tomlinson. An untrained person could seriously damage the equipment if he shoot explosives inside the crusher. (Tr. 298). He testified that he previously observed Tomlinson shoot a rock in the crusher but he could not remember when that was. (Tr. 300, 317). He also stated that he was at the plant when Tomlinson shot the rock in the crusher in November 2005 and that he observed him doing so. Andres testified that he did not notice that Tomlinson stored the second stick of Boostrite in the crusher shack or that shotshell primers were being stored there as well. (Tr. 300-01). Andres also said that he did not know where Tomlinson got the cap for the blast that day.

In his interview with an MSHA inspector in February 2006, Andres said "I normally go with the crusher operator to shoot, but I didn't know that [Tomlinson] was shooting that day and he forgot to take the explosives back and left a stick of Boostrite in the crusher booth the day before the MSHA inspection." (Tr. 305-06; Ex. G-137g, p. 5). He further stated that when he saw the Boostrite during the MSHA inspection, "I liked to have had a heart attack when I saw the explosives in there . . . I didn't know that he was shooting that Monday." *Id.*

In its brief, Nelson Quarries argues that Inspector Crelly did not listen to the answer of Andres when he asked if Tomlinson was trained in the use of explosives. Andres merely stated that he had not trained him. The record establishes that Tomlinson came to Plant 4 already trained by company employees at another plant. The record also shows that an untrained miner could injure himself and seriously damage or destroy a very expensive primary crusher. Nelson Quarries argues that it would never take such a risk. Indeed, when Crelly asked Tomlinson if he knew that he should not be smoking around explosive materials, he answered in the affirmative by stating he had been taught that smoking was prohibited during his training. (Ex. G-12 p. 19). Mr. Clift testified that Tomlinson had been trained by two company blasters and that the company does not allow untrained miners to use explosives. Clift also testified that the method of abatement was actually chosen by the inspector and the company agreed to the abatement to finish the inspection. To abate, the company agreed that Andres will be the experienced and trained miner who can handle explosives. Nelson Quarries and Mr. Andres felt intimidated by MSHA because the agency had multiple inspectors at the plant and at the other plants during the same period of time. They felt that they were under the gun and ask that the order be vacated.

In her brief, the Secretary argues that the record does not support the company's arguments. The record demonstrates that Andres "was neither intimidated nor confused when he

told Inspector Crelly that Travis Tomlinson had not received training in the handling and use of explosive materials.” (S. Br. 7). The Secretary argues that Andres testimony should not be credited because he said contradictory things during the investigation and at the hearing. At the hearing, Andres testified that he watched Tomlinson shoot out the hopper for the crusher. (Tr. 300-01). Mr. Andres previously told MSHA’s special investigator that he was running a loader that day and was not aware that Tomlinson was shooting the crusher. (Tr. 304-06; Ex. G-137g, p. 5). The Secretary states that the inspector recorded his conversation with Andres in his field notes and that Andres signed these notes. (Tr. 195-96, 313; Ex. G-12 p. 11). In addition, Tomlinson told Inspector Crelly that he was “uncomfortable” handling explosives. (Tr. 207-08). Finally, the Secretary argues that the fact that Tomlinson stored boostrite in the crusher shack next to the shotgun primers and that he smoked in the area demonstrates that he had not been properly trained in the handling of explosives.

The resolution of this order depends almost entirely on credibility determinations. I credit the testimony of Inspector Crelly and the exhibits presented by the Secretary. The company’s evidence was both conflicting and unpersuasive. First, although I have no doubt that Nelson Quarries did not want inexperienced persons handling and shooting explosives, the preponderance of the evidence establishes that Tomlinson was neither sufficiently trained nor experienced to be shooting the hopper of the crusher without direct supervision. I find that Mr. Andres was operating a loader at the time Tomlinson shot the hopper for the crusher. Mr. Clift testified that he talked to Russ and James Caudill and Chris Eagle and they told him that they trained Tomlinson on the use of explosives at another plant. (Tr. 275). Specifically, he stated that Tomlinson “helped Chris Eagle shoot out a crusher, I believe, its been a long time ago when we worked at Gas [Kansas], I believe I saw him help Chris Eagle at one point, but that was a long time ago, so [testimony interrupted]” *Id.* This testimony is so weak that I cannot give it much weight. No credible evidence was presented by the company to show that Tomlinson had actually been trained or was sufficiently experienced. Consequently, I find that the Secretary established a violation. Mr. Tomlinson, who was not sufficiently trained or experienced, shot a rock in the hopper when he was not in the immediate presence of someone trained and experienced in the handling and use of explosive material.

It is clear that the violation was S&S because it was reasonably likely that the hazard contributed to by the violation would result in death or serious injury assuming continued mining operations. Inexperienced and untrained miners pose a hazard to themselves when handling explosives.

Inspector Crelly determined that this violation was obvious by talking to Messrs. Andres and Tomlinson. It appeared to Crelly that the company did not have in place appropriate procedures for the handling and use of explosives. Tomlinson did not return the unused Boostrite to the magazine but stored it in the crusher shack. Mr. Andres left blasting caps in his truck so that anyone could get them. There was little or no security for explosives at the plant, shock tube was stored in a parts trailer, and Tomlinson smoked around explosives. The inspector testified that “the way they handled the explosives or stored the explosives showed me that they

did not have respect for it.” (Tr. 215). I find that a preponderance of the evidence supports the Secretary’s determination that the violation was the result of the company’s unwarrantable failure to comply with the safety standard. The violation was obvious and it appears that there was little to no supervision of the use and storage of explosives at the site. Tomlinson apparently was uncomfortable handling and using explosives yet he was permitted to shoot the crusher. No effort had been made to properly train Tomlinson. Nothing in the record suggests that this was an isolated or unusual event. The operator’s attitude toward the storage and use of explosive material was rather casual given the serious hazard that was posed. I find that Nelson Quarries was rather indifferent toward the hazard and that their conduct exhibited a serious lack of reasonable care. A penalty of \$1,500.00 is appropriate for this violation.

**C. CENT 2006-178-M, Plant 1.**

1. On November 16, 2005, Inspector Chrystal Dye issued Citation No. 6291644 alleging a violation of section 56.20003, as modified. (Ex. G-3). The citation alleges that there was about four inches of material on the walkway of the Cedar Rapid screen #620 and that material covered an area that was about four by six feet. Inspector Dye determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that “[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.” The Secretary proposes a penalty of \$614.00 for this citation.

Inspector Dye testified that the cited area is both a passageway and a potential workplace when maintenance is being performed. (Tr. 46; Ex. G-3). The material was up to the height of the four inch toe boards. (Tr. 47). The walkway is rarely used, but there was a fixed ladder used for access to the area. (Tr. 48, 83). It was most likely used for maintenance and repair. The area was 10 to 12 feet above the ground and the accumulated material created a tripping and stumbling hazard. There was a substantial railing along the walkway. (Tr. 83). Inspector Dye estimated that it would take at least one day of production for this amount of material to accumulate. (Tr. 50). Kenneth Nelson, the president of Nelson Quarries, testified that the only time anyone would be up on the walkway would be to change screens about once every two months when the screen is operating. (Tr. 97-99). Because material often falls off the screen, onto the walkway, miners clean the area when they need to access the walkway. *Id.*

I find that the Secretary did not establish a violation. It is clear that the cited area was a workplace or a passageway. The key factor here is that miners travel to the cited walkway for the screen only when the screen is changed. I credit Mr. Nelson’s testimony in this regard. The screen is changed about once every two months assuming that the Cedar Rapids screen is being used on a continuous basis. The plant operates intermittently. Under the Secretary’s interpretation of the safety standard, miners would have to regularly travel to the walkway for the sole purpose of cleaning it even though miners would not be working or walking on the walkway for days or weeks. If it only takes a day or two for material to accumulate, miners would be required to clean the walkway repeatedly even though it was not being used. This repeated

cleaning would needlessly expose miners to the very slipping and tripping hazards that the safety standard was designed to prevent. There has been no showing that miners have ever walked or worked on the cited walkway without first cleaning it off. This citation is vacated.

2. On November 16, 2005, Inspector Dye issued Citation No. 6291646 alleging a violation of section 56.18012. (Ex. G-4). The citation alleges that there were no emergency phone numbers posted at the mine. Inspector Dye determined that an injury was unlikely and that any injury would not result in any lost work days. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that “[e]mergency phone numbers shall be posted at appropriate telephones.” The Secretary proposes a penalty of \$614.00 for this citation.

MSHA requires that phone numbers for the fire department, hospitals, poison control, and the like be posted at every mine. (Tr. 53-54). These numbers are typically posted at the scale house at small surface mines. Inspector Dye stated that this requirement is not obviated by the use of cell phones. Programming a cell phone with these numbers is not sufficient. (Tr. 55). A person who may need to make an emergency call, such as truck drivers for customers, may not have access to the programmed cell phone. No telephone had been installed at the scale house. (Tr. 85, 93). Foremen keep cell phones in their pickup trucks. (Tr. 117). The county has “911 Service” so a miner or a truck driver can call 911 to obtain emergency assistance. (Tr. 94). Sometimes customers are at the site loading material into trucks when employees of Nelson Quarries are not present. (Tr. 117-18).

I find that the Secretary established a violation. The gravity is obviated by the prevalence of cell phones and the fact that the county has 911 service. A penalty of \$40.00 is appropriate.

3. On November 16, 2005, Inspector Dye issued Citation No. 6291647 alleging a violation of section 109(a) of the Mine Act. (Ex. G-5). The citation alleges that there was no bulletin board at the mine for posting documents required by law to be posted. Inspector Dye determined that an injury was unlikely and that any injury would not result in any lost work days. She determined that the violation was not S&S and that the negligence was moderate. The Mine Act provides that there “shall be a bulletin board at . . . a conspicuous place near an entrance of [the] mine” for use in posting “orders, citations, notices and decisions required by law or regulation to be posted. . . .” The Secretary proposes a penalty of \$203.00 for this citation. Dye testified that most small mines do not have an office so they place a bulletin board at the scale house. (Tr. 56). This plant did not have a bulletin board anywhere on the site. Kenneth Nelson testified that the company keeps employees informed of their rights. (Tr. 97).

I find that the Secretary established a violation. The requirement for a bulletin board is set forth in the Mine Act itself. A penalty of \$60.00 is appropriate.

4. On November 16, 2005, Inspector Dye issued Citation No. 6291645 alleging a violation of section 56.14107(a). (Ex. G-6). The citation alleges that the head pulley for belt 712

was not guarded to prevent persons from becoming entangled in moving machine parts. The citation states that the head pulley was 4½ feet above the ground. Inspector Dye determined that an injury was unlikely but that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, and takeup pulleys, flywheels, coupling, shafts fan blades; and similar moving parts that can cause injury.” The Secretary proposes a penalty of \$614.00 for this citation.

Inspector Dye testified that the violation was obvious. (Tr. 73-74). She said that someone could come into contact with the head pulley while cleaning under it or while walking in the area. Employees shovel out accumulations because they do not have Bobcat or other scoop at the quarry. (Tr. 76). She stated that it would be easy for a miner’s clothing to become entangled in the pulley.

Kenneth L. Nelson testified that he had only been issued three citations alleging inadequate guards on moving machine parts at all the company’s plants since 2003. (Tr. 94). The company has up to 100 guards at each plant. Nelson testified that the MSHA inspectors were “a lot more aggressive” during the inspections at issue in these cases. (Tr. 95). He believed that MSHA was “judging us differently on our guards than they ever have in the past.” *Id.* Nelson objected to the fact that MSHA changed its guarding requirements but then inspected all of its plants at the same time so that it could not meet these new requirements before citations were issued. He said that he believes that MSHA previously inspected the head pulley in the same condition without issuing a citation. (Tr. 100-01). These inspections occurred when the unit was at a different location. (Tr. 107). The sides of the pulley, which protect the pinch points, have always been guarded. *Id.*

In addition, Nelson testified that there is another conveyor right in front of the cited conveyor that is directly in front of the cited head pulley and that this conveyor restricts access to the cited area. (Tr. 100; Ex. R-178). Although he did not measure the height of the head pulley, he estimates that it was over six feet above the ground. (Tr. 111).

The Commission addressed the issue of reasonable notice with respect to the Secretary’s guarding standard in *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001). The Secretary has been enforcing this standard for about 23 years. In *Good Construction*, the mine operator contended that it did not have adequate notice of the requirements of 30 C.F.R. § 56.14107(a) because the language of the safety standard “does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years.” *Good Construction* at 1002. The moving machine parts were guarded in that case, but the MSHA inspector determined that the guarding was insufficient.

The Commission's decision was split on the issue of how that particular case should be handled. Nevertheless, when put in the context of previous Commission decisions, I believe that the holding is essentially the same in both opinions with respect to how this issue should be analyzed in future cases, as summarized in the opinion of Commissioners Jordan and Beatty.

In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the operator's employees as to whether the practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

23 FMSHRC 1005 (citations and footnote omitted).

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

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

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

Under the final rule, the standard applies where the moving machine parts can be contacted and cause injury. Some commenters believed that guards should provide protection against inadvertent, careless, or accidental contact but not against deliberate or purposeful actions. They consider guards which totally enclose moving parts as counter-productive to other safety considerations such as proper work procedures, training, and general attention to hazardous conditions

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

The Secretary’s Program Policy Manual (“PPM”) provides additional information to the public about the Secretary’s interpretation of safety standards. The PPM provides, in part, as follows:

All moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection. The use of chains to rail off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard.

(Ex. G-6d; IV MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 56/57.14107 (2000) (“PPM”). Although the PPM is not binding on the Secretary, it does provide the mining community with notice of MSHA’s interpretation of her safety standards.

Finally, the Secretary published *MSHA’s Guide to Equipment Guarding*. (Ex. G-6c). Although this booklet is again not binding on the Secretary, it includes text and illustrative drawings to show what the agency considers to be adequate guarding under the safety standard.

At the hearing, I ruled that the Nelson Quarries had adequate notice of the requirements of the standard because the violation was patently obvious. (Tr. 121, 790-92). Quite simply, a reasonably prudent person would recognize that the existing guarding did not protect persons from coming into contact with hazardous moving machine parts. A miner could approach the head pulley from the side and come in contact with moving parts that could injure a miner. Although Nelson Quarries correctly stated that material on this belt dumps onto another belt, there were accumulations in the area under the belt which would require shoveling from time to time. (Ex. R-178b).<sup>2</sup> Access was limited from the front but not from the side. I credit the testimony of Inspector Dye as to the accessibility of moving machine parts.

This plant is moved from location to location as the need arises. Although the plant is set up in the same basic configuration at each location, access to moving machine parts may be more limited at some locations and other MSHA inspectors may have overlooked the condition as a

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<sup>2</sup> This photograph was taken after the condition had been abated.

result. The interpretive material issued by MSHA, including its guide to equipment guarding, makes clear that the guards present at the time of the inspection were inadequate to protect miners. Nelson Quarries did not sustain its burden of showing that the lack of previous citations led it to believe that additional guarding was not required. I find that the Secretary provided adequate notice to the mining community that the guard provided at the head pulley was inadequate to meet the requirements of the standard.<sup>3</sup>

For these reasons, I affirm this citation as a non-S&S citation with moderate negligence. A penalty of \$100.00 is appropriate.

5. On November 21, 2005, Inspector Thomas Barrington, an electrical inspector from Salt Lake City, issued Citation No. 6317464 alleging a violation of section 56.12025. (Ex. G-8). The citation alleges that the grounding system on the 527 conveyor was not being maintained in that a ground resistance test measured 200 ohms to ground. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that “[a]ll metal enclosing or encasing electrical circuits shall be grounded . . . .” The Secretary proposes a penalty of \$963.00 for this citation.

Inspector Barrington testified that the grounding system on the conveyor was not effective because the resistance in the grounding circuit was too high to effectively open the circuit protective device. (Tr. 143). He used an analog volt/ohm meter to test the grounding system. There was a grounding wire present. When he tested the system, he stayed in the motor control center (MCC) with the meter and a lead was taken by a Nelson Quarries employee or another inspector to each motor at the plant. (Tr. 165-6). He tested the system several times to make sure that his readings were accurate. (Tr. 157). A grounding system must provide a continuous grounding medium back to the source and it must have low impedance. (Tr. 144). The phase-to-phase voltage on the conveyor was 480 volts while phase-to-ground was 277 volts. Any miner working in around the plant was exposed to the hazard and he could receive burns or could be electrocuted. (Tr. 155). The inspector determined that an injury is reasonably likely because the components at the plant are made of metal and the resistance is high. (Tr. 155, 158).

Kenneth Nelson testified that it has performed the resistance and continuity test annually and whenever equipment is moved as required by MSHA. (Tr. 173). If the resistance is higher

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<sup>3</sup> I vacated a guarding citation for lack of notice in my decision in *Higman Sand & Gravel*, 24 FMSHRC 87 (Jan. 2002), for a number of reasons that do not apply here. First, the plant at issue in that case was not moved around. Second, the guard that was present was quite substantial and the cited opening in the guard was quite small. In addition, cleanup was not performed with shovels in that instance. MSHA had previously cited the same pulley because the guard had been removed but the inspector accepted the guard as adequate when it was replaced to abate that citation.

than expected, it can usually be corrected by cleaning corrosion from around the area where the grounding wire is attached to the equipment.

I find that the Secretary established an S&S violation of the safety standard. I credit the inspector's testimony that he correctly tested the grounding system. Although corrosion may have created the problem, the hazard was still present and serious. It was reasonably likely that someone would be injured or electrocuted if the condition were not corrected. A penalty of \$500.00 is appropriate taking into consideration the penalty criteria.

6. On November 21, 2005, Inspector Barrington issued Citation No. 6317465 alleging a violation of section 56.12025. (Ex. G-9). The citation alleges that the grounding system on the 614 conveyor was not being maintained in that a ground resistance test measured 2.5 ohms to ground. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of \$614.00 for this citation.

As with the previous citation, Inspector Barrington testified that the grounding system on the conveyor was not effective because the resistance in the grounding circuit was too high to effectively open the circuit protective device. (Tr. 159-60). He used an analog volt/ohm meter to test the grounding system. There was a grounding wire present. He tested the system several times to make sure that his readings were accurate. Because of the level of impedance on the grounding wire, the circuit breaker would not immediately trip. (Tr. 161). It would take several seconds before the breaker would trip. (Tr. 169). The metal components of the conveyor would become energized in the event of a fault and expose miners to an electrocution hazard. He testified that such an event was reasonably likely.

My findings with respect to this citation are the same as with Citation No. 6317464. A penalty of \$500.00 is appropriate.

7. Prior to the hearing, the Secretary agreed to vacate Citation Nos. 6291635, 6291637, 6291642, and 6291648.

**D. CENT 2006-200-M, Plant 5.**

1. On October 26, 2005, Inspector Dye issued Citation No. 6291576 alleging a violation of section 56.14107(a). (Ex. G-16). The citation alleges that there was inadequate guarding on the smooth head pulley on the #226 conveyor. The top of the belt was about 6 feet above the ground. The bottom of the pulley was adequately guarded, but the top was not. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Dye testified that although an unguarded smooth pulley is not as dangerous as an unguarded self-cleaning pulley, it still presents a hazard. (Tr. 324). There was a gap in the guarding for this pulley “where someone could reach in and make contact with the smooth head pulley.” (Tr. 325, 430). She measured the distance to the open area as six feet off the ground. (Tr. 327, 432). She believes that it was possible for someone cleaning up accumulations to get the shovel handle or their shirt caught in the pulley if it were operating. Plant 5 had been in operation since December 2004. There were between 40 and 60 machine guards at this plant. (Tr. 323). The plant is cleaned up after it is shut down. (Tr. 432).

Michael Peres, a superintendent and safety director for Nelson Quarries, testified that the opening cited by Inspector Dye was about three inches wide and that the pulley was recessed about six inches. (Tr. 475-76). The pinch point for the pulley was further away from the opening. Mr. Peres has worked for Nelson Quarries for about 15 years and he has held about every position at the quarries. (Tr. 498).

It is significant that the cited opening was about six feet above the ground. Nevertheless, the opening was large enough to pose a hazard. The pulley was recessed about six inches. Accumulations at the plant are generally cleaned up after it is shut down. I find that the Secretary established a violation but that the negligence was low. A penalty of \$50.00 is appropriate. (Tr. 794).

2. On October 26, 2005, Inspector Dye issued Citation No. 6291584 alleging a violation of section 56.14107(a). (Ex. G-17). The citation alleges that the tail pulley on the Thor radial stacker was not adequately guarded. The citation states that the tail pulley was guarded on the sides but not on the bottom. The pulley was a little under six feet above the ground. Grease fittings were within six inches of the pulley. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Dye testified that the smooth pulley was not guarded on the bottom. (Tr. 331). An employee could get under the pulley during cleanup operations or while greasing and his clothing could become entangled in the pulley. (Tr. 334). She does not know whether employees grease fittings around the pulley while the plant is operating. (Tr. 435-36).

Mr. Peres testified that a miner would have to climb up on a concrete structure to be under the cited pulley. (Tr. 478; Ex. R-200k). Grease hoses were hanging down. The pulley was recessed within the structure of the radial stacker. (Tr. 480; Ex. R-200k).

Although the possibility of an accident is low, there were exposed moving machine parts that posed a hazard to miners. I find that the Secretary established a violation but that the operator’s negligence was low. A penalty of \$50.00 is appropriate. (Tr. 795).

3. On October 26, 2005, Inspector Dye issued Citation No. 6291592 alleging a violation of section 56.14107(a). (Ex. G-18). The citation alleges that there was no guard on the alternator belt and pulley on the Dresser Haul truck No. 1008. The cited area is only accessed for maintenance or to check fluid levels. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Dye testified that the fan blades were guarded but that the belts and pulleys were not guarded. Miners may come in contact with the moving machine parts while checking fluid levels and performing maintenance. (Tr. 339-40). She stated that some fluids need to be checked while the engine is running. Often trucks are running when the operator conducts his pre-shift examination. At least two other citations had been previously issued to Nelson Quarries for failure to guard moving machine parts for a motor on a haul truck. (Tr. 342-43; Ex. G-18d). MSHA's guarding manual covers the guarding of belts and pulleys in engine compartments on mobile equipment. (Tr. 345; Ex. G-6c, p. 25). Dye testified that hands and fingers could be severely injured as a result of this violation. (Tr. 347-48). She does not know whether employees check fluid levels while the truck is running, but there would be nothing to stop anyone from doing so. (Tr. 437). The belts and pulleys are recessed within the frame. The guards installed at the factory for the radiator fan were in place.

Mr. Peres testified that fluid levels are checked with the engine off. (Tr. 481). Checking fluid levels while the engine is running will give inaccurate readings. In addition, oil cannot be added to the engine while it is running. The cited pulleys and belts were recessed in the engine compartment. (Tr. 482).

Although the cited belt and pulley were recessed, they were required to be guarded under the safety standard. The chance of injury is not great, but the guarding standard is designed to prevent accidental injury. As stated above, the standard takes into account ordinary human carelessness. The violation was not serious. The citation is affirmed and a penalty of \$60.00 is appropriate. (Tr. 797).

4. On October 26, 2005, Inspector Dye issued Citation No. 6291593 alleging a violation of section 56.14107(a). (Ex. G-19). The citation alleges that there were no guards on the alternator or the fuel injector drive pulley on the Euclid haul truck No. 1017. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation. Inspector Dye testified that the conditions cited in this citation were quite similar to those in the previous citation. (Tr. 348-52). Mr. Peres testified that fluids are neither checked nor added while the engine is running. (Tr. 483-84).

The cited pulleys were required to be guarded under the standard. As in the previous citation, the chance of an injury is not great but the standard was put into place to prevent

accidental injuries. The violation was not serious. A penalty of \$60.00 is appropriate. (Tr. 797).

5. On October 26, 2005, Inspector Dye issued Citation No. 6291569 alleging a violation of section 56.14112(b). (Ex. G-20). The citation alleges that the guard for the tail pulley on the impactor belt was not secured on one side. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides “guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.” The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that vibration can cause a guard to become loose and fall from place. (Tr. 353). Because the guard was loose, there was an opening and, if someone were to trip and fall in the area, he could become entangled in the moving machine parts. (Tr. 354-59) No miners were testing or making adjustments to the machinery. (Tr. 358-59). The area of concern to the inspector was the area around the wire mesh. (Tr. 444).

Peres testified that the pulley was guarded by a piece of solid metal that surrounded it. (Tr. 485; Ex. G-20c). That guard was provided by the manufacturer. The guard cited by the inspector was added by Nelson Quarries as an enhancement. *Id.* The mesh guard was added by Nelson Quarries because “we didn’t feel like the factory guard was adequate.” (Tr. 516). The part cited by MSHA, however, did not need additional guarding. The only reason the mesh was there was because the person who installed it neglected to cut it off. (Tr. 518).

As I stated at the hearing, I find that the Secretary did not establish a violation. (Tr. 797-98). The solid metal guard covered the moving machine parts. I credit the testimony of Peres on this citation that the expanded metal guard was attached to protect other areas and it simply overlapped the solid metal guard. The cited guard was not loose. Consequently, I vacate this citation.

6. On October 26, 2005, Inspector Dye issued Citation No. 6291578 alleging a violation of section 56.14112(b). (Ex. G-21). The citation alleges that the guard on the self-cleaning tail pulley for conveyor No. 534 was hanging down in the area of the rollers, that the top and end guards were damaged, that the drive belt guard was missing on the top and back, and that the lower guard was not securely in place. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that there were a number of conditions on the conveyor that concerned her. The guard on the side had come loose at the top and had fallen down. (Tr. 361; Ex. G-21c). This exposed several rollers under the belt. In addition, the openings in the top guard were too large to be effective. (Tr. 363, Ex. G-21d). The openings were about two to three

inches wide. (Tr. 446). The drive guard belt was also missing. (Ex. G-21e). This area is not very high off the ground. (Tr. 364). She testified that no testing or repairs were being conducted at the time of the inspection. (Tr. 366). She was concerned that miners could get their fingers or hands entangled in the moving machine parts. She admitted that the tail pulley itself was adequately guarded. (Tr. 444). She also stated that the "troughing rollers" shown on Ex. G-21c are exempted under the guarding standard. (Tr. 446).

Peres believes that the guard that was loose was still protecting the tail pulley. (Tr. 487; Ex. G-21c). The only exposed moving machine parts are the troughing rollers, which are not required to be guarded. He also testified that the pulley was about ten inches from the guard at the top. As a consequence, he does not believe that anyone could get caught in the pulley. (Tr. 488; Ex. G-21d). Finally, the drive belt was normally about six to seven feet above the ground. (Tr. 489). The inspector was able to reach the area because she was standing on top of accumulations.

For the reasons set forth at the hearing, I affirm this citation. (Tr. 798-800). I find that the conditions cited by Inspector Dye violated the safety standard. The area was accessible. Although she had to stand on accumulations to see the drive belt, miners would be able to do so too. A penalty of \$60.00 is appropriate.

7. On October 26, 2005, Inspector Dye issued Citation No. 6291579 alleging a violation of section 56.14112(b). (Ex. G-22). The citation alleges that the guarding material on the tail pulley for conveyor No. 516 was not secured at the bottom and that this condition could allow miners to come into contact with moving machine parts on the belt. The inspector determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that there was a gap in the belting material that was being used as a guard. (Tr. 367; Ex. G-22c). The gap was present because the belting was not securely in place. (Tr. 368). As a consequence, Inspector Dye believed that someone could come into contact with the moving machine parts. (Tr. 370). The inspector could not remember how far back into the frame the tail pulley was recessed. (Tr. 450). Peres testified that the pulley was recessed inside the frame of the conveyor about six to eight inches. (Tr. 490).

As I stated at the hearing, the Secretary established a violation because the gap presented a hazard to employees as illustrated in the photograph. (Tr. 800; Ex. G-22c). Because the pulley was recessed, the chance of an injury was not very great. A penalty of \$60.00 is appropriate.

8. On October 26, 2005, Inspector Dye issued Citation No. 6291572 alleging a violation of section 56.12004. (Ex. G-23). The citation alleges that the 480 volt overhead power cable for the 547 belt had four separate areas where damage had been done to the outer jacket, exposing the inner wires to mechanical damage. The cable was about 12 feet in the air and the inspector

believes the copper wire was showing in one location. The inspector determined that an injury was unlikely but that any injury could result in a fatal accident. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that “electrical conductors exposed to mechanical damage shall be protected.” The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Dye testified that the outer jacket on the cable was damaged. (Tr. 386; Ex. G-23c & 23d). The plant was shut down so that cited conditions could be corrected as they were cited, but the plant had been running the previous day. (Tr. 389). She believes that copper wire was showing and she testified that employees of Nelson Quarries agreed with her. (Tr. 390, 454). The hazard created was that if a short developed as a result of this damage, anyone touching the metal frame of the conveyor could receive a fatal electric shock. (Tr. 391). Peres testified that he offered to take the cable down so that Inspector Dye could examine it more closely, but she said she could tell that bare wires were exposed. (Tr. 491). He stated that when he took the cable down to repair it, none of the copper wires were exposed.

I reject the idea that the inspector could positively determine that copper wire was exposed in a small area of the suspended cable while she was standing on the ground. Nevertheless, the standard requires that electrical conductors exposed to mechanical damage be protected. Because the outer jacket protecting the electrical conductors had been damaged, the cable was required to be repaired. There was a potential for a short in the circuit because the damaged outer jacket would allow rain and snow to enter the cable. A penalty of \$60.00 is appropriate.

9. On October 26, 2005, Inspector Dye issued Citation No. 6291573 alleging a violation of section 47.41(a). (Ex. G-24). The citation alleges that the large diesel storage tank was not labeled for its contents so that employees would know what the tank contained. The inspector determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that a mine “operator must ensure that each container of a hazardous chemical has a label . . . with the appropriate information.” The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Dye testified that a container is any “bag, barrel, bottle . . . storage tank, or the like.” (Tr. 392). She said that fuel tanks are included in this definition unless the tank is on mobile equipment. The cited tank was next to the parts trailer and it held about 7,500 to 8,000 gallons. (Tr. 394). The tank supplied fuel to the plant. Diesel fuel is a hazardous chemical because it can have adversely affect a person’s health. The MSDS for diesel fuel states that it is hazardous. (Tr. 397-98 ; Ex. G-24c). She believes that the health hazards could lead to “long-term damage.” *Id.*

The Secretary established a non-S&S violation. This standard is important so that anyone on the property will know what is stored there without have to think about it. This provision is

especially important for emergency responders who have never been to the plant. (Tr. 801-02). The cited standard has only been applied to small quarries relatively recently so I have reduced the negligence. I find that A penalty of \$40.00 is appropriate.

10. On October 26, 2005, Inspector Dye issued Citation No. 6291580 alleging a violation of section 56.4501. (Ex. G-25). The citation alleges that there was no valve on the bottom of the 500 gallon diesel fuel tank on the Spokane crusher to stop the flow of fuel at the source. The inspector determined that an injury was unlikely but that it could lead to a fatal accident. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that “fuel lines shall be equipped with valves capable of stopping the flow of fuel at the source. . . .” The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Dye testified that Nelson Quarries should have installed a valve to control the flow of fuel. (Tr. 399). There was no valve on the cited fuel line. The purpose of the standard is to allow the operator to shut off the tank if a leak develops. If the fuel keeps flowing, a fire hazard is presented which can result in a fatal accident. (Tr. 401-02). There was no berm around the tank to contain any leaking diesel fuel.

I find that the Secretary established a violation. It is clear that there was no valve present. A penalty of \$60.00 is appropriate.

11. On October 26, 2005, Inspector Dye issued Citation No. 6291587 alleging a violation of section 56.6101(a). (Ex. G-26). The citation alleges that the area to the north and east of the cap storage magazine had dry grass and brush within nine feet of the magazine. The inspector determined that an injury was unlikely but that the violation could contribute to a fatal accident. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that “areas surrounding storage facilities for explosive materials shall be clear of rubbish, brush, [and] dry grass . . . for 25 feet in all directions . . . .” The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that the cap magazine qualifies as “storage facility for explosive materials.” (Tr. 403). The brush and grass was within nine feet of the magazine. (Tr. 404-05; Ex. G-26c, 26d & 26e). If a fire were to start in the brush or grass, the flames could get into the magazine through the air vents and cause an explosion. (Tr. 406). Peres testified that most of the growth cited by Inspector Dye was green, but he does not deny that dry grass was present. (Tr. 493, 522; Ex. G-26).

This citation is affirmed as written. Although some of the brush was green, it is beyond dispute that brush and dry grass was present within 25 feet of the magazine. A penalty of \$60.00 is appropriate.

12. On October 26, 2005, Inspector Dye issued Citation No. 6291588 alleging a violation of section 56.4101. (Ex. G-27). The citation alleges that the storage area for explosive materials

did not have a sign warning against smoking or open flames. There was a sign identifying it as an explosive storage area. The inspector determined that an injury was unlikely but that any injury could be fatal. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that an explosion hazard existed around the storage area. (Tr. 407). There were two magazines, one for explosives and the other for ANFO (Ammonium Nitrate/Fuel Oil). She was concerned about a fire starting and entering the magazines. (Tr. 408). Kenneth Nelson testified that there used to be no smoking/open flames signs on magazines but that the Kansas State Fire Marshall ordered the signs removed in 1994 to be replaced with a sign with black letters on a white background that said, "Explosives. Keep Off." (Tr. 527). He stated that MSHA has inspected these magazines numerous times since then without issuing citations. He admitted that he may have been able to post both signs. (Tr. 528-29). Some of Nelson's employees smoke while at work.

The safety standard is clear on its face. Although the plant must comply with state regulations, it could also have included a no smoking sign. Because of the actions of the Fire Marshall and the fact that previous MSHA inspections had not identified the violation, I reduce the negligence to low. A penalty of \$40.00 is appropriate.

13. On October 26, 2005, Inspector Dye issued Citation No. 6291590 alleging a violation of section 56.14100(b). (Ex. G-28). The citation alleges that there were a number of defects affecting safety on Dresser haul truck No. 1008. The tether strap for the operator's door was missing. The inner door handle was missing. The glass on the door would not stay up exposing the operator to dust and noise. One of the tether straps for the operator's seat was broken off. The tail lights did not work. The inspector determined that an injury was reasonably likely and that any injury could be fatal. She determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary proposes a penalty of \$135.00 for this citation.

Inspector Dye testified that the door tether keeps the door from opening all the way. Because there is no handrail on the walkway, the door is tethered to help keep the operator from falling when getting out of the haul truck. (Tr. 410). The truck is used to haul material from the pit to the plant. The tether straps are a safety feature because they keep the door from opening beyond the point where it should be opened. (Tr. 411-12, 460). The tether strap for the seat helps keeps the seat inside the cab of the truck. The haul truck sometimes travels over rough terrain and the seat tether helps keep the seat in place. Inspector Dye believes that the inside door handle is an important safety feature because the operator may need to exit the truck quickly in an emergency. (Tr. 415-16). She was also concerned that the truck operator was being constantly exposed to noise and dust because the door window would not stay up. She admitted

that MSHA's standards do not require that windows be installed on trucks. (Tr. 462-64). She also said that tail lights are important so that any vehicles behind the haul truck would know where it is and where it is going. It is often windy and dusty in Kansas, which obscures the vision of equipment operators. (Tr. 413-14). Although Inspector Dye admitted that she did not know exactly how long these conditions existed on the truck, it was apparent that the conditions had existed for some time. (Tr. 418-19).

Inspector Dye testified that, given the number of defective conditions on the truck, it was reasonably likely that the violation would contribute to a fatal injury. (Tr. 419). The truck operator could fall from the cab, he could be trapped inside the cab in the event of an accident, and he could be thrown around inside the cab in the event another vehicle collided with the truck. For this reason, she determined that the violation was S&S.

Mr. Peres testified that the leather strap for the door on the haul truck is not a safety item. (Tr. 494). It is there to keep the door from slamming back against the side of the cab and the bed. The company had ordered a new handle for the door but it had not yet arrived. He did not explain this to the MSHA inspector. (Tr. 521).

For the reasons set forth in Inspector Dye's testimony, I affirm this citation. Taken together, the safety defects cited by the inspector created a significant hazard to the truck operator. I credit the inspector's conclusion that these defects were not corrected in a timely manner. I also find that the violation was S&S because it was reasonably likely that the hazard contributed to by the violation would result in a serious injury. A penalty of \$135.00 is appropriate.

14. On October 26, 2005, Inspector Dye issued Citation No. 6291594 alleging a violation of section 56.14100(b). (Ex. G-29). The citation alleges that there was only one operable backup light and no operating tail lights on the Euclid haul truck No. 1017. The inspector determined that an injury was unlikely but that any injury could be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that tail lights are necessary in dusty environments and in the dark so that the truck can be seen from behind. (Tr. 423-24). In addition, when the back up light comes on, anyone behind the truck will know that the truck will be backing up. The truck backs up when it dumps at the crusher.

I find that inadequate backup lights and tail lights are defects that affect safety. I also find that these defects were not corrected in a timely manner. A penalty of \$60.00 is appropriate.

15. On October 26, 2005, Inspector Dye issued Citation No. 6291591 alleging a violation of section 56.14132(a). (Ex. G-30). The citation alleges that the backup alarm on the Dresser haul truck No. 1008 was not working. The truck is regularly used to haul material from the pit to

the crusher. The inspector determined that an injury was reasonably likely and that any injury could be fatal. She determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety device shall be maintained in a functional condition." The Secretary proposes a penalty of \$135.00 for this citation.

The inspector testified that a backup alarm is considered to be an audible warning device as that term is used in the safety standard. (Tr. 425). A backup alarm lets people in the area know that the vehicle will be backing up. Nelson Quarries did not offer any explanation for this condition. She believes that it was reasonably likely that someone would be fatally injured if the cited condition were not corrected. (Tr. 427-28).

Peres testified that pedestrians are never on the ground while haul trucks are operating. (Tr. 495-96). In addition, over-the-road trucks are never in the area where the haul truck operates. Only one haul truck is operating at any given time.

It is clear that a backup alarm is a safety device and that it was not maintained in a functional condition. Many people have been killed or injured at mines because of faulty backup alarms. Because there are no pedestrians at this mine while haul trucks are operating, I find that the violation was not S&S. A penalty of \$60.00 is appropriate.

16. Prior to the hearing, the Secretary agreed to vacate Citation No. 6291581 and Nelson Quarries agreed to withdraw its contest of Citation Nos. 6291574, 6291582, and 6291585.

**E. CENT 2006-201-M, Plant 5.**

1. On October 26, 2005, Inspector Dye issued Citation No. 6291583 alleging a violation of section 56.14107(a). (Ex. G-31). The citation alleges that the head pulley on the No. 546 conveyor was not adequately guarded. The head pulley was guarded on the side but not on the front. The inspector determined that an injury was reasonably likely and that any injury was likely to be permanently disabling. She determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of \$72.00 for this citation.

Inspector Dye testified that there is a platform that the operator uses for taking grab samples of the material coming off the belt. (Tr. 532). Employees reach over the railing with a bucket or some other vessel to take a sample of the product. She believes that someone could be severely injured if their clothing got caught in the moving pulley as he was trying to get a product sample. (Tr. 534). Inspector Dye designated the citation as S&S because she believes that a serious injury is reasonably likely assuming continued normal mining operations. (Tr. 535-36). The head pulley was partially guarded. (Tr. 568-69). She admitted that if the guard were extended, the mine operator would not be able to obtain grab samples at that location. (Tr. 570-71).

Mr. Peres testified that the existing guard extended an inch or two in front of the head pulley. (Tr. 588). The existing mesh guard was about the height of a person's arm pit. The pinch point was behind the mesh guard. A grab sample was taken about once a week. (Tr. 589).

I affirmed this citation at the hearing. (Tr. 802-04). I held that the condition created a hazard because grab samples were taken at this location. A person's jacket or clothing could easily become entangled in the moving machine parts. A penalty of \$70.00 is appropriate.

2. On October 26, 2005, Inspector Dye issued Citation No. 6291586 alleging a violation of section 56.9300(a). (Ex. G-32). The citation alleges that the approaches to the elevated scale were not bermed to prevent over-travel of mobile equipment. The inspector determined that an injury was unlikely but that any injury was likely to be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Dye stated that the scale was used to weigh trucks entering and leaving the property. (Tr. 537). The cited roadway is mostly used by over-the-road trucks. She testified that the west approach was 25 feet long and had a drop-off of three feet on both sides. (Tr. 539). The east approach had a drop-off of three and a half feet on the south and about six to seven feet on the north. (Tr. 539, 575). There were no berms or guardrails present. (Tr. 540). She was concerned that if a truck were to go over the edge, its load could shift and the vehicle could turn over. (Tr. 542).

Peres testified that the drop-offs on both sides of the road through the scale were sloped. (Tr. 590). He further disagreed with the inspector and said that the drop-off was not six or seven feet on one side. (Tr. 592). The slope along the side of the road was not steep enough to cause a truck to overturn if it went off the road. (Tr. 594). Truck drivers are instructed to not exceed five miles per hour over the scale because the scale can be damaged by higher speeds. (Tr. 593-94).

I find that the Secretary established a violation. I credit the testimony of Inspector Dye. I find that the violation was not serious and the operator's negligence was low because the hazard was not obvious and drivers proceed over the scale house at a low rate of speed. A penalty of \$40.00 is appropriate.

3. On October 26, 2005, Inspector Dye issued Citation No. 6291589 alleging a violation of section 56.14101(a)(2). (Ex. G-33). The citation alleges that the park brake on the Dresser haul truck No. 1008 would not hold the truck when it was tested on a slight downgrade. The inspector determined that an injury was unlikely but that any injury was likely to be fatal. She determined that the violation was not S&S and that the negligence was low. The safety standard

provides, in part, that “parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.” The Secretary proposes a penalty of \$60.00.

Inspector Dye testified that the truck was equipped with a parking brake. (Tr. 546). The parking brake worked when the key for the haul truck was in the on position but the parking brake would not work if the key was in the off position. (Tr. 547). This condition violated the safety standard because fatal accidents have occurred because of defective parking brakes. (Tr. 552). The truck cannot be operated without the key. (Tr. 578).

Mr. Peres testified that when the driver does his preshift examination of the truck, it is parked against an embankment so it cannot roll. (Tr. 595). The park brake cannot be checked without moving the vehicle, so the truck is running when the check is performed.

I find that the Secretary established a violation but that the operator’s negligence was low. When the truck driver performed the preshift examination of the parking brake, the truck was running. As a consequence, it appeared that the parking brake was properly functioning. A penalty of \$40.00 is appropriate.

4. On October 26, 2005, Inspector Dye issued Citation No. 6291595 under section 104(d)(1) of the Mine Act alleging a violation of section 56.14101(a)(2). (Ex. G-34). The citation alleges that the park brake on the Euclid haul truck No. 1017 did not hold the truck when it was tested on a slight grade. The citation states that pre-shift reports establish that the park brake had not been working since September 29, 2005, and that the foreman knew of this defect. The inspector determined that an injury was reasonably likely and that any injury was likely to be fatal. She determined that the violation was S&S and that the negligence was high. The Secretary proposes a penalty of \$625.00 for this citation.

Inspector Dye testified that the preshift checklist filled out by the truck operator shows that the park brake had not been working since late September. (Tr. 554-55). Three different truck operators reported the problem on the preshift checklist. The foreman, Ronnie Head, told the inspector that he knew that the park brake was not working and that he had called the mechanic to repair the brake. Apparently, the mechanic told him that the park brake did not need to work. (Tr. 555, 557). Mr. Head told the inspector that he advised Mr. Peres of this problem. (Tr. 557-58). Peres told the inspector that he did not know that the park brake was not working properly. (Tr. 558). This truck was used while the park brake was inoperative and it was not taken out of service. (Tr. 561). It was possible that the truck was idle for long periods of time. (Tr. 582). The service brakes were working.

The inspector designated the citation as S&S because the company had been using the truck in a defective condition for almost a month. (Tr. 562). The truck has to travel over grades of up to nine to twelve percent. She tested the brake with the bed empty, but it often travels with a load of rock. With other trucks around, it would be impossible to hold the truck on a steep grade. She believed that it was reasonably likely that the violation would contribute to an injury

of a reasonably serious nature. In addition, she noted that there had been an accident at another plant of Nelson Quarries in 2005 in which the equipment operator lost control of his vehicle and his service brakes were not operating.

Mr. Peres testified that this truck was used on an intermittent basis. (Tr. 599). Mr. Head told him, after this inspection, that he had called a mechanic to fix the problem after it was noted. (Tr. 600). He stated that he talks to the foremen at the plant about any preshift problems, but he does not usually examine the records that are kept in the trucks. (Tr. 603). He further testified that he first learned that the park brake was not working moments before MSHA arrived to perform its inspection. (Tr. 610). Mr. Head had known about this problem for about 30 days. Peres stated that he immediately tagged the truck out of service.

In its brief, Nelson Quarries argues that this citation should not have been issued under section 104(d)(1). The inspector issued the unwarrantable failure citation based on statements of Mr. Head, who was a lead man at the plant. Mr. Head was not an agent of Nelson Quarries because he was paid on an hourly basis and he did not have management authority. He was “able to contact” Mr. Peres “any time anything came up” that “needed management input.” (N.Q. Br. 12). He did not have the authority to hire, fire, discipline, or assign equipment to miners.” *Id.* Mr. Head did not follow company procedures when he failed to notify Peres that the park brake did not work. Nelson Quarries seeks to have this citation modified to a non-S&S, low negligence section 104(a) citation.

In response, the Secretary contends that it is not disputed that the park brake was not functioning and that this condition had been consistently reported on prior pre-shift reports. She notes that the company acknowledges that Mr. Head had the responsibility to report the defect to appropriate officials. It is undisputed that Mr. Head was responsible for conducting workplace examinations at Plant 5. Dye testified that Mr. Head directed the workforce while she was at the plant for the inspection and that he ordered employees to correct conditions that had been cited during the inspection. Dye also testified that Mr. Head told her that he had received supervisory training from the company under Part 46 of the Secretary’s regulations. (Tr. 560-61). As stated above, the Secretary also noted that all of the forms submitted by the company to MSHA indicated that Mr. Head was the foreman in charge of the plant. The Secretary also argues that Mr. Peres had knowledge that the park brake was not working well before the inspection.

I find that the violation was S&S. The condition had existed for almost a month and it was reasonably likely that the hazard contributed to by the violation would lead to a serious accident. I credit the testimony of Inspector Dye in this regard.

I also find that the violation was the result of the operator’s unwarrantable failure to comply with the standard. As with Mr. Andres in Citation No. 6291250, discussed above, I find that Mr. Head functioned as an agent of Nelson Quarries for the purposes of the Mine Act. He presented himself to Inspector Dye as the company’s representative and the company had given him the title “foreman.” He conducted the workplace examinations and he had the authority to

direct the workforce at the plant. The only management function he did not possess was the ability to hire, fire, and discipline employees but he made recommendations as the need arose. Although Mr. Head reported to Mr. Peres, it is clear that Mr. Head was the onsite manager when Mr. Peres was not at the plant. As with Mr. Andres, he had the authority to assign job duties, direct the use of equipment, represent the company during safety and health inspections, and direct the abatement of citations. He was aware that the park brake on the truck did not work and he permitted its continued operation. He made several attempts to get the company's mechanic to come to the plant to fix the brakes without success. Inspector Dye testified that Mr. Head told her that he advised Mr. Peres that the park brake was not working. (Tr. 557).

The violative condition existed for over a month, at least one of the operator's agents knew of the condition, and the condition posed a significant risk to employees. A penalty of \$625.00 is appropriate for this citation.

**F. CENT 2006-202-M, Plant 1.**

1. On November 16, 2005, Inspector Dye issued Citation No. 6291636 alleging a violation of section 47.41(a). (Ex. G-35). The citation alleges that the diesel tank by the oil storage trailer was not labeled for its contents to ensure that everyone knew what chemical was present. Inspector Dye determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$375.00 for this citation.

Inspector Dye testified that when she arrived at Plant 1, the gate was locked. (Tr. 615). The plant had not produced for a few months. After a mechanic arrived and unlocked the gate, she conducted her inspection. She testified that the cited diesel tank was large. (Ex. 35c). There was diesel spillage on the ground near the nozzle. (Tr. 617). The words "Flammable No Smoking" was written on the tank in large letters. All employees knew that the tank was for the storage of diesel fuel. (Tr. 630).

Mr. Peres testified that Plant No. 1 was not operating at the time the citation was issued. (Tr. 640). The pit was full of water and there were only a few pieces of mobile equipment present. There were no haul trucks present to haul material to the crusher.

For the reasons set forth above with respect to Citation No. 6291573, I affirm the citation. Although the plant was not operating at this time, the company had not notified MSHA that the plant was closed. I am reducing the negligence to low because the plant was not operating and this relatively new safety standard was only now being applied to the company's quarries. A penalty of \$40.00 is appropriate.

2. On November 16, 2005, Inspector Dye issued Citation No. 6291639 alleging a violation of section 47.41(a). (Ex. G-36). The citation alleges that the diesel tank inside the

electrical trailer was not labeled for its contents to ensure that everyone knew what chemical was present. Inspector Dye determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$375.00 for this citation.

Inspector Dye testified that the tank supplied fuel to the generator. (Tr. 621). She had previously observed at least one diesel tank at a Nelson Quarries plant that was properly labeled. (Tr. 622-23). She did not check to see if there was any fuel in the tank. (Tr. 632). Employees knew that the tank was for the storage of diesel fuel. (Tr. 633). Peres testified that the tank was empty and it was not plumbed in. (Tr. 642, 652). The 1,000 gallon diesel tank for the generator was outside. (Tr. 643).

If the tank was empty and not plumbed in, it need not be labeled for its contents. Given that the inspector did not check to see if there was fuel in the tank, I credit the testimony of Mr. Peres and vacate this citation.

3. On November 16, 2005, Inspector Dye issued Citation No. 6291638 alleging a violation of section 56.4104(b). (Ex. G-37). The citation alleges that a five gallon bucket containing used oil and rags was sitting inside the oil storage trailer. Inspector Dye determined that an injury was unlikely but that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that “waste or rags containing flammable or combustible material that could create a fire hazard shall be placed in covered metal containers or other equivalent containers with flame containment characteristics.” The Secretary proposes a penalty of \$614.00 for this citation.

Inspector Dye testified that she saw the oil and rags in an ordinary plastic bucket. (Tr. 625). If there were an ignition source, a fire could be started. She did not observe any ignition sources. A fire extinguisher was in the area.

I find that the Secretary established a violation. Because the violation was not serious, a penalty of \$60.00 is appropriate.

4. On November 16, 2005, Inspector Dye issued Citation No. 6291641 alleging a violation of section 56.14107(a). (Ex. G-38). The citation alleges that the alternator and fan v-belts were not guarded on the generator in the electrical trailer. Inspector Dye determined that an injury was unlikely but that any injury would likely be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$375.00 for this citation.

The inspector testified that the cited belts were not guarded. (Tr. 628; Ex. G-38c). The fan blades were properly guarded. Someone might be in the area to check any fluids or to check the belts. The area is narrow. If someone were to slip, he could get his hand caught in the

moving machine parts. (Tr. 629). The dipstick was not near the unguarded v-belts. Peres testified that it would be very difficult to come into contact with the cited belts. (Tr. 644). The generator is controlled from a computer panel at the back of the trailer. He believes that the belts were guarded by location.

At the hearing, I upheld the citation because the cited area was not guarded. (Tr. 804-05). The belts for the fan were required to be guarded. Because the violation was not S&S, a penalty of \$60.00 is appropriate.

5. Prior to the hearing, the Secretary agreed to vacate Citation No. 6291640.

**G. CENT 2006-203-M, Plant 2.**

1. On October 5, 2005, Inspector James W. Timmons issued Citation No. 6321288 under section 104(d)(1) of the Mine Act alleging a violation of section 56.14100(c). (Ex. G-42). The citation alleges that on September 23, 2005, foreman J. Benedict instructed T. Larson to move a lime pile with the IH 530 front-end loader. The service brakes on the loader were not functional and when the engine failed the loader rolled down a ramp, hit the guard rail at the creek crossing and dropped about six feet on its side into the creek. The citation alleges that Mr. Benedict knew that the brakes were not working and that Mr. Clift had told him to take the loader out of service. The inspector determined that an injury was highly likely and that any injury was likely to be fatal. He determined that the violation was S&S and that the negligence was high. The safety standard provides that "when defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area . . . or [tagged out]." The Secretary proposes a penalty of \$1,500.00 for this citation.

Inspector Timmons testified that he inspected Plant 2 because of a hazard complaint that was filed with MSHA. (Tr. 660; Ex. G-39). The hazard complaint stated that there had been a loader accident at the mine on September 23. Kenneth Nelson handed the inspector its accident investigation report after he showed him the hazard complaint. (Ex. G-40). This accident report listed Jeff Benedict as the foreman. Apparently, Mr. Larson raised the loader's bucket into the air while he was on the ramp, the motor failed, and the loader ran down the ramp, over the guardrail, and into a dry creek bed because the service brakes were not working. Larson was taken to the hospital and was diagnosed with severe bruises. (Tr. 665). The company's accident report states that Benedict ordered Larson to operate the loader. As stated above, the mine superintendent had ordered Benedict to take this loader out of service prior to the accident. Richard Andres, a company mechanic, told Inspector Timmons that there was no brake fluid in the brake fluid reservoir, the main air tank was full of water, and there was an air leak in the compressor. (Tr. 669). Larson had worked as a haul truck driver at the quarry for about 30 days. (Tr. 676).

For the reasons set forth above, Inspector Timmons testified that the violation was S&S. (Tr. 676-78). He designated the violation as an unwarrantable failure because the company knew that the brakes were defective and, through Mr. Benedict, allowed it to be operated by an inexperienced loader operator. (Tr. 678-80). Mr. Benedict told Inspector Timmons that he was the foreman at the plant. (Tr. 721).

Kenneth Nelson testified that he prepared the company's accident report. (Tr. 825; Ex. G-40). Jeff Benedict had given Larson some informal training on the loader prior to the accident. (Tr. 828). Foreman Patrick Clift testified that he was not aware that Lawson was going to operate the loader on the day of the accident. (Tr. 839). Jeff Benedict, in the presence of Clift, asked the mechanic, Jason Schmidt, if he had time to look at the loader because the brakes on the loader were not working properly. Schmidt had to work on some equipment at another plant so Clift told Benedict not to use the loader. (Tr. 840-41, 872-74). When Clift heard about the accident he was surprised Larson had been operating the loader because he had told Benedict not to use it. Clift had not given Benedict authority to assign Larson to the loader. (Tr. 842). Larson had not been task trained on the loader. (Tr. 876). Clift testified that he was the foreman of Plants 2 and 4 at the time of the accident. He is always available to employees at the plants on the company's cell phone, which he carries at all times.

Nelson Quarries argues that Mr. Benedict did not meet the Commission's multi-factor test used to determine whether someone is an agent of a mine operator. Its arguments are similar to the arguments it made concerning Messrs. Andres and Head. Benedict was an hourly employee who could not hire, fire, discipline or assign equipment to employees. Mr. Nelson states that he was not well versed on the legal implications of using the term foreman for a person who functions as a lead man. In addition, Mr. Clift testified that he specifically instructed Benedict to remove the loader from service and keep it parked until the brakes could be repaired by the mechanic. Thus, Nelson Quarries complied with the regulation but the lead man, acting on his own, ignored the instructions of his supervisor and placed the loader into service. As a consequence, Mr. Benedict is responsible for the accident, not the company. The company did all that it could to prevent the accident. It asks that the citation be modified to a section 104(a) citation with low negligence.

The Secretary makes the same arguments that she did with respect to the previous unwarrantable failure citations. She notes that Mr. Benedict represented himself as a representative of management during the inspection and no person in a more senior position with Nelson Quarries disputed Benedict's authority with MSHA inspectors. Indeed, the company had previously designated Benedict as the person in charge on the legal identity form it filed with MSHA. In the accident report drafted by Kenneth Nelson, Mr. Benedict is identified as the foreman who "had [Larson] run the loader to move the lime pile on the north side of the plant to the stockpile." (Ex. G-40). Regardless of the title used for Mr. Benedict, it is clear that he told Larson to operate the loader that day, which indicates that Benedict had the authority to direct the workforce.

I find that Benedict was the agent of Nelson Quarries when he directed Larson to operate the front-end loader on the day of the accident. Benedict had been delegated authority to direct the workforce. There is no dispute that the safety standard was violated. I find that the Secretary established that the violation was S&S. Unwarrantable failure is characterized by "intentional misconduct," "reckless disregard," "indifference," or "a serious lack of reasonable care." Although Benedict functioned as the company's agent, it is clear that Benedict's supervisor told him not to use the loader. I credit the testimony of Mr. Clift that he was with company mechanic Schmidt, who was at the quarry to work on another piece of equipment the day before the accident, when Benedict came up to tell them that he had "parked the loader because the brakes had not been working." (Tr. 840, 873-74). Because Schmidt did not have time to work on the loader at that time, Clift instructed Benedict not to use the loader until Schmidt had a chance to work on it. Clift was an agent of Nelson Quarries too, of course. Nevertheless, Nelson Quarries, acting through Mr. Benedict, directed Larson to operate the subject loader. This action demonstrated a serious lack of reasonable care. As a consequence, I find that the Secretary established that the violation was a result of the company's unwarrantable failure to comply with the safety standard.

Given that the company's agent disregarded the instruction of his supervisor, I find that its negligence was not as high as it would have otherwise been. Benedict was disciplined for ordering Larson to operate the loader. (Tr. 860). A penalty of \$800.00 is appropriate.

2. On February 24, 2005, Inspector Timmons issued Citation No. 6290517 alleging a violation of section 56.14109. (Ex. G-43). The citation alleges that there was no guard along the impact belt and that the belt rollers were exposed next to the stairs to the crusher cab. Inspector Timmons determined that an injury was reasonably likely and that any injury would likely be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that unguarded conveyors next to travelways shall be equipped with a stop cord or with railings that are positioned to prevent persons from falling against the conveyor. The Secretary proposes a penalty of \$177.00 for this citation.

Inspector Timmons testified that stairs leading to the cab for the crusher were right next to the conveyor. The railing on the stairs only guarded part of the conveyor. (Tr. 682-86). A railing must be positioned to prevent a person from falling onto or against the conveyor. (Tr. 723). There was no stop cord present and there was nothing present to prevent accidental contact with the conveyor. He determined that the violation was S&S because the crusher operator or anyone else entering or exiting the cab for the crusher was exposed to the hazard. If anyone were to trip or stumble and fall into the conveyor structure, they would be seriously injured. (Tr. 687-88).

Mr. Clift testified that the stairway into the crusher cab had been in the same location from the beginning. The same configuration is used whenever the plant is moved to a new location. (Tr. 845). The plant has been inspected by MSHA many times and the condition cited by Inspector Timmons had never been cited in the past.

Section 56.14109 contains two requirements which must be satisfied before the standard applies. The belt must be next to a "travelway" and the belt must be "unguarded." A travelway is defined in 56.14000 as a "passage, walk, or way regularly used or designated for persons to go from one place to another." The stairway to the crusher cab was immediately adjacent to the belt. The handrails for these stairs acted as a railing when a miner was on the stairs. In approaching this stairway, a miner would need to momentarily walk alongside a small portion of the impact belt to reach the first step. (Ex. G-43d). As a consequence, I find that the belt was next to the travelway at that location. In this instance, it was clear that the impact belt was unguarded at the bottom of the stairway to the crusher cab. (*Compare, Nolichecky Sand Company, Inc.*, 22 FMSHRC 1057 (Sept. 2000)). The belt was at a level that posed a hazard to miners. There was no rail or stop cord for the belt. There were rocks and tripping hazards in the area. There was nothing to keep miners from falling into the moving belt.

I find that the Secretary established an S&S violation of the safety standard. Miners walk up into the crusher cab on a regular basis while the belt is running. The tripping and stumbling hazards were obvious. A miner's arm or clothing could become entangled in the belt rollers and pull the miner into the pinch point. (*See, for example, Asphalt Paving*, 27 FMSHRC 123 (Feb. 2005) (ALJ)). It is reasonably likely that this violation would contribute to an injury of a reasonably serious nature.

Nelson Quarries argues that the citation should be vacated because the plant has been inspected by MSHA many times and the condition cited by Inspector Timmons had never been cited in the past. I reject this argument. The standard is clear on its face as it applies to the facts in this case. The cited conveyor belt was not guarded where it was next to a travelway. As a consequence it was required to be equipped with a stop cord or railings. As a consequence, the reasonable prudent test does not apply. In addition, the Secretary has published notices informing the regulated community of its interpretation of the standard. In its *Guide to Equipment Guarding*, MSHA advised the mining community that conveyors located at the level of a miner's torso must be provided with a guard or stop cord. (Tr. 683; Ex. G-6c, pp. 12-13). The fact that the condition had never been cited does not change that fact. A penalty of \$100.00 is appropriate for this violation.

3. On February 24, 2005, Inspector Timmons issued Citation No. 6290516 alleging a violation of section 56.14107(a). (Ex. G-44). The citation alleges that there was no guard on the back side of the V-belt and pulley for the surge hopper. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Timmons testified that the exposed opening was about five feet above the ground. (Tr. 688-92). Although the surge hopper was not in operation at the time of the inspection it had been operating earlier in the week and would always be operating when the

crusher was in use. The "oil filling spout or plug" was near the unguarded area. (Tr. 691). He determined that the violation was not S&S.

Clift testified that the cited area has never been guarded by the company and has never been cited. (Tr. 846). It has been in this condition for many years. There are no grease fittings near the moving parts. (Tr. 848). The oil plug mentioned by the inspector cannot be opened while the equipment is operating because oil would fly out all over the miner who opened it. *Id.*

I find that the Secretary established a violation. The unguarded opening presents an obvious hazard. I take into consideration the fact that the area had never been cited when considering the negligence criterion. Although MSHA may have never cited this particular V-belt and pulley, the agency has consistently required such belts and pulleys to be guarded. It clearly fits within the scope of the safety standard. I find that the operator's negligence and the gravity to be low. A penalty of \$40.00 is appropriate.

4. On February 24, 2005, Inspector Timmons issued Citation No. 6290520 alleging a violation of section 56.14132(a). (Ex. G-45). The citation alleges that the manually operated horn on the Caterpillar haul truck was not working. Inspector Timmons determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Timmons testified that the cited truck would be used when the plant was in operation. (Tr. 693). The horn would be needed to give a warning. The truck would be used to haul material from the pit to the plant. (Tr. 695). The plant was not operating at the time of the inspection because it was being set up. (Tr. 728-29). At the time of the inspection, only part of the plant was operating. Clift testified that he truck was only used occasionally. (Tr. 850).

The Secretary established a violation. The gravity was low because the truck was only used occasionally and the negligence was low because the plant was being set up in a new location. A penalty of \$40.00 is appropriate.

5. On February 24, 2005, Inspector Timmons issued Citation No. 6290521 alleging a violation of section 56.14100(b). (Ex. G-46). The citation alleges that the outriggers on the Drott-2500 crane were not maintained in a proper condition in that the electrical system in the cab was not functional. A person must crawl under the crane when it is running to manually push the valves that operate the outriggers. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Timmons testified that the outriggers could not be extended from the cab of the crane. (Tr. 697). The crane had last been used two days before the citation was written. The

outriggers must be extended before the crane can be used. Going under the crane to extend the outriggers while the crane is turned on creates a hazard in the event the crane were to roll. (Tr. 699-703, 739). The inspector did not see any wheel chocks in the area. He considered the cited condition to be a defect that affected safety and it was not corrected in a timely manner. The parking brakes and service brakes on the crane were working. (Tr. 732).

Clift testified that the crane was not used very frequently. It was used for heavy work, such as setting a secondary crusher. (Tr. 851). The operator was instructed to never leave the cab of the crane while the outriggers were being extended. Two men would be on the ground, one under the crane to operate the hydraulics and another at the corner, in plain view of the operator in the cab, to direct the work. Clift said that he was always present when the crane was used. (Tr. 853).

The Secretary established a violation. The operator was aware of this safety defect. The fact that the operator used other methods to ensure the safety of miners mitigates the gravity to a certain degree. A penalty of \$60.00 is appropriate.

6. On February 24, 2005, Inspector Timmons issued Citation No. 6290522 alleging a violation of section 56.14132(a). (Ex. G-47). The citation alleges that backup alarm on the Michigan L-320 front-end loader was not working. Inspector Timmons determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Timmons testified that the loader was equipped with a backup alarm but it was not working. (Tr. 705-07). When he asked an employee to back up the loader, the alarm did not work. The loader was used on a regular basis at the plant to load haul trucks at the pit and also to load customers' trucks. The loader had an obstructed view to the rear.

Clift testified that this loader is never used to load customer trucks because it is too big. (Tr. 854). In addition, the loader is rarely used and is subjected to a pre-shift examination before it is used. Another similar loader was used more frequently. (Tr. 855).

This loader was parked and ready for use. It would have been subjected to a pre-shift examination before it was used. I credit Mr. Clift's testimony that it was never used to load customer trucks and that it is not used as often as the other loader. The backup alarm was not maintained in a functional condition. I find that the Secretary established a violation but that the gravity and negligence was low. A penalty of \$40.00 is appropriate.

7. On February 24, 2005, Inspector Timmons issued Citation No. 6290523 alleging a violation of section 56.14100(b). (Ex. G-48). The citation alleges that the windshield wipers on the Michigan L320 front-end loader were not working. Inspector Timmons determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He

determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Timmons testified that the wipers were not working on the loader. (Tr. 708-11). He considers wipers to be safety equipment because in inclement weather and dusty conditions, wipers improve the visibility for the equipment operator. The condition was not corrected in a timely manner because the loader had been used with inoperable wipers. The operator's visibility would especially be impaired in fog, rain, and snow. This is the same loader cited above. Clift's testimony with respect to this citation is the same. The loader had been parked for month. (Tr. 856).

I affirm this citation but find that the gravity and negligence was low. A penalty of \$40.00 is appropriate.

8. On February 24, 2005, Inspector Timmons issued Citation No. 6290524 alleging a violation of section 56.6132(a)(4). (Ex. G-49). The citation alleges that the lid of the high explosives magazine had exposed steel on the inside because the wood liner was missing. High explosives were in the magazine. Inspector Timmons determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that magazines shall be "made of non-sparking material on the inside." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Timmons testified that the wood liner had been removed and was sitting off to the side. (Tr. 711-15). The liner was dirty and dusty, which led the inspector to conclude that the violative condition had existed for at least a few days. He found about eight sticks of Torpex, which is a high explosive, in the magazine.

Mr. Clift testified that the magazine was for the storage of detonators, not high explosives. (Tr. 856-57). At the time the citation was issued, an independent contractor was performing blasting work at the plant.

I affirm the citation and find that a penalty of \$60.00 is appropriate.

9. On October 5, 2005, Inspector Timmons issued Citation No. 6321289 alleging a violation of section 56.14100(b). (Ex. G-50). The citation alleges that the headlights on the Komatsu 210-M haul truck were not working. The truck was in use hauling rock. Inspector Timmons determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Timmons testified that the truck is used to transport rock at the plant. (Tr. 716-19). Headlights affect safety because the plant operates when it is still dark. Clift testified that,

although the company fixes broken headlights, he does not consider a broken light to be a “safety defect.” (Tr. 859).

I find that broken lights are a defect that affects safety. The citation is affirmed and a penalty of \$60.00 is appropriate.

10. On November 22, 2005, Inspector Dye issued Citation No. 6291667 alleging a violation of section 46.7(a). (Ex. G-51). The citation alleges that Travis Larson was not given adequate task training on the International Huff payloader (front-end loader) in which he had no previous work experience. Inspector Dye determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that task training must be provided to any miner who is assigned to a new task in which he has no previous work experience. The Secretary proposes a penalty of \$165.00 for this citation.

Inspector Dye was at the plant to determine if Mr. Larson had been adequately trained to operate the front-end loader at the time of his accident, as discussed above. (Tr. 744). Larson had been hired by Nelson Quarries as a haul truck driver. He had not held any other positions at the plant. (Tr. 745). The controls for a truck and payloader are different and the operator performs a different type of work on each. (Tr. 747). When Inspector Dye interviewed management and hourly employees at the plant, nobody suggested that Larson had been task-trained on the loader. (Tr. 749). Larson’s new miner training record shows that he was trained for haul truck operations. (Tr. 753-54; Ex. G-51d, p. 1). A letter dated December 7, 2005 from Patrick Clift to Inspector Dye also states that Larson had not been task trained to operate a loader. (Tr. 750-51, 762-63 ; Ex. G-51c). Inspector Dye believed that it was reasonably likely that a serious injury would result because Larson had not been trained to operate the loader before he used it.

Clift testified that Mr. Benedict did not have the authority to assign Larson to operate the loader. Benedict was disciplined for ordering Larson to operate the loader. (Tr. 860). I affirm this citation. I have already determined that Mr. Benedict was the agent of Nelson Quarries when he ordered Mr. Larson to operate the loader. It is clear that Larson had not been task- trained. There is no evidence that Larson had ever operated a loader before. The violation is S&S because it was reasonably likely that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature. Because Benedict ordered Larson to operate the loader against the instructions of his supervisor, I find that the negligence should be reduced. A penalty of \$100.00 is appropriate.

11. On November 15, 2005, Inspector Barrington issued Citation No. 6317446 alleging a violation of section 56.12040. (Ex. G-52). The citation alleges that operating controls in the distribution boxes in the motor control center were installed in such a way that they could not be operated without the danger of contact with energized conductors and terminals. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be

fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that operating controls be installed so that they can be operated without the danger of contact with energized conductors. The Secretary proposes a penalty of \$165.00 for this citation.

Inspector Barrington testified that the electrical system was not energized at the time of his inspection. The electrical system was 480-volt phase-to-phase applied with 277-volt phase-to-ground that was furnished by a diesel generator. (Tr. 765). When the distribution box was opened, the circuit breakers and other components of the electrical circuits were fully exposed. (Tr. 766-72; Exs. G-52c through Ex. G-52i). The violation presented a significant burn, shock, and electrocution hazard to anyone who entered the motor control center. The crusher is operated from a stop-start button at a different location. (Tr. 815). All of the electrical controls were inside cabinets, which were all closed at the time of the inspection. Management advised Inspector Barrington that power to the motor control trailer is cut off before any work is performed in the trailer. (Tr. 816).

Mr. Clift testified that all of the electrical components were inside of cabinets in the motor control room. This control room is off limits to employees and they are trained not to enter the area. (Tr. 860). The control room is usually kept locked, but it was not locked on the day of the inspection because the generator had not been started. (Tr. 889). The motor control room has been in use for about 15 years in the same condition and it has never been cited by MSHA. Indeed, another inspector required the company to improve the grounding system, so he was aware of the condition of the electrical cabinets. The crusher is not operated from this control room. (Tr. 862). The plant is shut down and locked out whenever any work is performed in the control room.

It is important to understand that Nelson Quarries' facilities had never been inspected by an MSHA electrical inspector because the Topeka, Kansas, office is not staffed with an electrical inspector. The hazard complaint filed with MSHA alleged that the "electricity is bad on all plants." (Ex. G-11). As a consequence, MSHA brought in a electrical inspector from its Salt Lake City office to inspect all the plants for compliance with the Secretary's electrical standards. This citation is one of many that Inspector Barrington issued. The photographs he took show that when the doors to the electrical cabinets were opened, all of the electrical components were exposed. (Exs. G-52c - 52i). Typically, electrical components are protected from accidental contact within the cabinet.

I find that the Secretary established a violation. Anyone who opened the cabinets faced a risk of an electric shock hazard. The wires and terminals for the circuit breakers were totally exposed. Circuit breakers are operating controls. The fact that the company had never been cited for this condition simply reflects that fact that its plants had never been subject to an electrical inspection.

I find that the Secretary did not establish that the violation was S&S. The crusher is not operated from this trailer as the start-stop button is at a different location. The trailer is kept locked when the plant is operating and only authorized persons may enter the trailer. The plant is shut down and locked out whenever any work is performed in the control room. A penalty of \$100.00 is appropriate.

12. On November 15, 2005, Inspector Barrington issued Citation No. 6317432 alleging a violation of section 56.14107(a). (Ex. G-53). The citation alleges that the alternator and drive belt on the Caterpillar 769C haul truck were not guarded to prevent contact. Inspector Barrington determined that an injury was unlikely and that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Barrington testified that the violation was on the left side of the engine compartment on the truck near the cooling fan. If anyone were to check the area looking for oil leaks or air leaks on the compressor when the engine was running could become entangled in the moving parts. (Tr. 778). The cited pulleys were near the middle of the engine. (Tr. 818).

The truck is serviced at the front from the top. (Tr. 864). Clift testified that the truck has been previously inspected by MSHA. Michael Peres testified that on previous inspections, one MSHA inspector (Dustin Crelly) told him that recessed alternator belts need not be guarded on trucks where the fluids are checked from the top as miners were not exposed to the hazard. (Tr. 891). Truck engines are too loud to hang around them when they are running unless you have a specific reason to be there. (Tr. 894). Inspector Crelly denied making such statements. (Tr. 920).

I find that the Secretary established a violation. Alternator and drive belts on haul trucks are required to be guarded. I agree with Peres that the violation was not very serious because the chance of accidental contact was not very great. I credit Inspector Crelly's testimony that he never advised the company that recessed belts are not required to be guarded. A penalty of \$60.00 is appropriate.

13. On November 16, 2005, Inspector Barrington issued Citation No. 6317440 alleging a violation of section 56.11002. (Ex. G-54). The citation alleges that safe access was not provided to the fuel check port on the 7200 gallon fuel tank. Inspector Barrington determined that an injury was unlikely and that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides "crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Barrington testified that there were stairs to the top of the horizontal tank but that a miner would have to walk along the top of the tank to check the fuel level. (Tr. 807-10;

Exs. G-54c and 54d). There were no handrails along the top of the tank, which was a rounded surface. A miner went to the top of the tank monthly to check the fuel level. It was ten feet to the ground from the top of the fuel tank.

I find that the Secretary established a violation. The Secretary has not defined the term "walkway." Nevertheless, it can be defined as a "passage for walking." See, *Summit, Inc.*, 13 FMSHRC 1511, 1517 (Sept. 1991) (ALJ). It was not disputed that a miner walks on top of the fuel tank once a month to check the fuel level. The top of a fuel tank has been construed as a "walkway" under similar circumstances. *Thor Mining Co.*, 2 FMSHRC 1592, 1598 (June 1980) (ALJ). Handrails were not provided. A penalty of \$60.00 is appropriate.

14. On November 16, 2005, Inspector Barrington issued Citation No. 6317442 alleging a violation of section 56.11002. (Ex. G-55). The citation alleges that the handrails on the stairway leading up into the generator trailer were not being properly maintained. Inspector Barrington determined that an injury was unlikely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Barrington testified that once per shift someone would enter the generator trailer to start the generator. Barrington testified that he was with MSHA Inspector Tedesco during this inspection. When Tedesco walked up the cited stairway the handrail came apart in his hand and he stumbled off the stairs. (Tr. 812-13, 819). The coupler holding the metal parts together had pieces missing. Mr. Clift testified that the condition was not obvious because the pieces were still together.

This citation is affirmed. I find that the negligence should be reduced because the defect was hidden. A penalty of \$40.00 is appropriate.

15. Prior to the hearing, the Secretary agreed to vacate Citation Nos. 6317429, 4317430, 6317436, 6317437, and 6317438. Nelson Quarries agreed to withdraw its contest of Citation No. 6317441.

#### **H. CENT 2006-204-M, Plant 2.**

1. On February 24, 2005, Inspector Timmons issued Citation No. 6290519 alleging a violation of section 56.14101(a)(3). (Ex. G-56). The citation alleges that the park brake on the Dresser Haul pack truck was not maintained in working condition. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that braking systems installed on equipment shall be maintained in functional condition. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Timmons testified that the truck rolled when he had a miner test the park brake. (Tr. 904). The truck was empty. The truck had been used on the previous day and the driver told the inspector that the park brake had been working. The service brakes were working on this truck. (Tr. 907). Michael Peres testified that, because the park brake had worked the day before, it must have become inoperable the morning of the inspection. (Tr. 1023).

There is no dispute that the park brake was not working when tested. It is apparent, however, that the brake had been functioning the previous day and it is likely that it became inoperable during the shift. The operator's negligence is quite low. *See, Higman Sand & Gravel*, 25 FMSHRC 175, 181 (April 2003) (ALJ). A penalty of \$10.00 is appropriate.

2. Prior to the hearing, the Secretary agreed to vacate Citation Nos. 6317431 and 6317433.

**I. CENT 2006-206-M, Plant 4.**

1. On November 15, 2005, Inspector Crelly issued Citation No. 6291248 alleging a violation of section 56.6130(a). (Ex. G-74). The citation alleges that there was a stick of Boostrite stored on the shelf in the crusher shack, which is occupied by the crusher operator about ten hours a day. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of \$247.00 for this citation.

Inspector Crelly testified that Travis Tomlinson, the crusher operator, stored the explosive material in the crusher shack. (Tr. 951). Shotshell primers were on the same shelf. *Id.* Shotshell primers are a type of detonator that initiates a blasting cap to detonate explosives. Primers should never be stored with explosives. Inspector Crelly observed Tomlinson smoking in the area. Crelly concluded that if these conditions were to continue it was reasonably likely that a fatal accident would occur. (Tr. 953-54). The crusher shack was about five feet wide and six feet long. No shock tube was in the crusher shack. (Tr. 1017).

Peres testified that the shotshell primers are not detonators. (Tr. 1045). He said that a blasting cap or other detonator would be required to shoot off the Boostrite. Shot shells are not required to be stored in an explosives magazine. People store them in their homes. (Tr. 1073). At the quarry, shot shells are sometimes put in the dynamite magazine.

The inspector cited the company for having the Boostrite stored in the crusher shack. Although the presence of the Shotshell primers may have added to the danger, it was the presence of the explosive material that created the safety hazard. In addition, the manufacturer of shotshell primers warns that they are subject to mass detonation and that they are sensitive to "impact, friction, heat, flame, static electricity and mishandling abuses." (Ex. G-140 p. 4. The manufacturer also advises that smoking should not be permitted around primers. *Id.* I find that the Secretary established a violation because the Boostrite was not stored in a magazine. The

violation was S&S and serious. I find that a violation of \$500.00 is appropriate for this violation because of the serious nature of the cited condition.

2. On November 17, 2005, Inspector Barrington issued Citation No. 6317458 alleging a violation of section 56.12001. (Ex. G-75). The citation alleges that the power cords attached to the load side of the Cutler Hammer line starter were not properly protected against excessive overload by the heater coils. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity. The Secretary proposes a penalty of \$247.00 for this citation.

Inspector Barrington testified that the three heater coils were not of the type specified by the manufacturer. (Tr. 1086-88). The amperage on the coils was oversized for the conditions. If there were to be an overload in a circuit, there would be a potential for arcing at the overload relay. The components could melt due to the high temperatures. Miners working at the plant were exposed to the hazard. The circuit would not open quickly enough to prevent the current from traveling to other areas in the plant along metal components. (Tr. 1090, 1097-98, 1104-05). Fuses and circuit breakers are designed for overcurrent conditions and thermal protection devices are for overload. (Tr. 1100).

I affirm this citation in all respects. A penalty of \$250.00 is appropriate.

3. On November 16, 2005, Inspector Barrington issued Citation No. 6317453 alleging a violation of section 56.12001. (Ex. G-76). The citation alleges that the phase wires between the 90 amp breaker and the Siemens line starter was not of the proper size and current carrying capacity. The citation further states that the No. 1 phase had "two wires in between the terminals of the breaker to the line starter estimated to be number 12 AWG." Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

During his inspection, the inspector noticed that the phase conductors between the breaker and a line starter were not all of the same size. The subject line starter is in the motor control center. It is 480 volts phase-to-phase and 277 volts phase-to-ground. (Tr. 1091). All of the wires should have been 6 AWG under the National Electrical Code and other reference materials. (Tr. 1094-97; Ex. G-75d). At the hearing, he testified that the two wires that were of concern to him appeared to be about a size 10 and together they did not match up to the "same value in wiring as the size 6 would have." (Tr. 1092). If there were a short circuit or a ground fault, it would bypass the overload protection in the line starter would likely burn up two wires before the breaker tripped. Ken Nelson testified that the company never buys AWG Gage No. 12 wire. (Tr. 1111). The inspector assumed that the mine was using that size wire and based his citation on that assumption.

In the citation, the inspector stated that the cited wiring appeared to be size 12, but at the hearing he referenced size 10. The company contends that it does not purchase size 12, but it admitted that it buys No. 10 wire. (Tr. 1111). The inspector calculated that the cited wires were too small to provide adequate protection and that AWG 6 wire would have been appropriate.<sup>4</sup> (Tr. 1094-99). I credit Inspector Barrington's testimony because of his electrical expertise. I affirm the citation and the proposed penalty of \$60.00.

4. Prior to the hearing, Nelson Quarries agreed to withdraw its contest of Citation No. 6291249.

**J. CENT 2006-207-M, Plant 3.**

1. On June 28, 2005, Inspector Timmons issued Citation No. 6290611 alleging a violation of section 56.14132(a). (Ex. G-77). The citation alleges that the horn on the Caterpillar haul truck No. 36 was not maintained in working condition. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6290520. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard with low negligence. A penalty of \$40.00 is appropriate.

2. On June 28, 2005, Inspector Timmons issued Citation No. 6290612 alleging a violation of section 56.14132(a). (Ex. G-78). The citation alleges that the horn on the Volvo 330-D front-end loader was not maintained in working condition. The loader was in use at the time of the inspection. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6290520. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. A penalty of \$60.00 is appropriate.

3. Prior to the hearing, Nelson Quarries withdrew its contest of Citation No. 6290614 and it agreed to pay the proposed penalty for Citation No. 6290615 at the hearing. (Tr. 1145).

**K. CENT 2006-208-M, Plant 3.**

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<sup>4</sup> The smaller the AWG number, the larger the wire.

1. On June 28, 2005, Inspector Timmons issued Citation No. 6290622 alleging a violation of section 56.5001(a)/5005. (Ex. G-80). The citation alleges that Caterpillar haul truck operator J. Hillbrand was exposed to a shift-weighted average of 1.40 mg/m<sup>3</sup> of respirable silica bearing dust. This reading exceeded the Threshold Limit Value of 1.25 mg/m<sup>3</sup> times the error factor. Respiratory protection was not being used and a respiratory protection program was not in place. Inspector Timmons determined that an injury was reasonably likely and that any injury would likely be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The health standard provides, in part, that "exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists. . . ." Section 56.5005 provides, in part, that when "engineering control measures have not been developed or when necessary by the nature of the work involved . . . , employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment." The Secretary proposes a penalty of \$749.00 for this citation.

Inspector Timmons testified that a silica dust survey had not been conducted at the plant for at least five years. (Tr. 1115). He sampled five miners. He used his normal sampling protocol. The samples were analyzed at MSHA's laboratory using its normal testing protocol. The results showed that Mr. Hillbrand was overexposed (Tr. 1130-31; Ex. G-80d). The company violated both safety standards because the test results showed that Hillbrand was overexposed and there were no administrative or engineering controls in place to deal with situations where miners were overexposed. (Tr. 1133-34). The truck that Hillbrand was driving did not have air-conditioning and the windows were down. Nelson Quarries had not conducted their own dust sampling at the quarry. He designated the citation as S&S because whenever there is an overexposure of silica-bearing dust and the employee is not subject to any administrative or engineering controls, such as wearing a fit-tested respirator, it is reasonably likely that the employee will develop a respirable illness of a reasonably serious nature. Inspector Timmons also testified that it was his understanding that Hillbrand was in the development area hauling dirt from the top of the highwall. (Tr. 1138). He was driving in dirty dusty areas.

Ken Nelson testified that he had no knowledge that anyone working at his quarries were overexposed to silica-bearing dust. (Tr. 1142). Dust sampling had never been performed at the plant. When this citation was issued, he took the truck out of service until air-conditioning was installed. Air-conditioning was installed in other trucks as well. He also immediately assigned Mr. Hillbrand to work in areas that, based on MSHA testing, were not as dusty.

MSHA is permitted to issue citations based on a single-shift silica dust survey. I reach this conclusion based on the Commission's decision in *Asarco, Inc.*, 17 FMSHRC 1 (1995), and former Commission Administrative Law Judge Maurer's subsequent analysis in *Asarco, Inc.*, 19 FMSHRC 1097, 1130-1136 (1997). Based on the evidence presented, Judge Maurer concluded that "MSHA's use of single-shift sampling is a reasonable means of ascertaining, to the requisite degree of accuracy, whether the enforcement concentration level standard in section 57.5001(a)

has been exceeded." *Id.* at 1136. See *Excel Mining, LLC.*, 22 FMSHRC 318, 319-20 (Mar. 2000) ("We have held that the legal basis for rejecting the use of single-shift sampling in coal mines does not apply to metal/non-metal mines."). See also *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1 (DC Cir. 2003).

I find that the Secretary established a violation. It is important to note that the company had not been doing its own silica-dust sampling. Nelson Quarries was not using any administrative or engineering controls to protect the truck driver from the dust.

The violation contributed to a discrete health hazard. I also find that the evidence establishes that there was a reasonable likelihood that the hazard contributed to by the violation would result in an illness of a reasonably serious nature. As stated above, Hillbrand was overexposed to silica dust. The roadways were not being watered, the windows on the truck were down, Hillbrand was not wearing a respirator, and administrative controls were not being used. Nelson Quarries did not have in place a program for monitoring the exposure to silica dust so it had no way of knowing whether anyone was being overexposed. Taking into consideration continuing mining operations, I find that the violation was S&S and serious. A penalty of \$750.00 is appropriate.

2. On November 2, 2005, Inspector Dye issued Citation No. 6291604 alleging a violation of section 56.14107(a). (Ex. G-81). The citation alleges that the alternator belt on the Caterpillar 96B loader was not guarded to prevent persons from becoming entangled in the moving machine parts. Inspector Dye determined that an injury was unlikely and that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6317432. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. Alternator belts on loaders are required to be guarded, but the violation was not serious because the chance of accidental contact was not very great. A penalty of \$60.00 is appropriate.

3. On November 2, 2005, Inspector Dye issued Citation No. 6291611 alleging a violation of section 56.12006. (Ex. G-82). The citation alleges that the motor control center "controlling 35 motors from 14 distribution boxes in the electrical trailer was not provided with separate disconnecting devices for each branch circuit." Inspector Dye determined that an injury was unlikely and that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6317445. Based on that evidence, set forth below, I find that the Secretary established a non-S&S violation of the safety standard. As stated below, it is

clear from the regulation that each branch circuit is required to have its own disconnecting device. Circuit breakers or plugs are typically used as disconnecting devices. A penalty of \$60.00 is appropriate.

**L. CENT 2006-228-M, Plant 2.**

1. On November 15, 2005, Inspector Barrington issued Citation No. 6317444 alleging a violation of section 56.12001. (Ex. G-104). The citation alleges that the 10/4 AWG, SO-type power cord was not properly protected against overload by the Square D circuit breaker. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of \$247.00 for this citation.

Inspector Barrington testified the No. 10 AWG wire of a four conductor cable coming off the bottom of a 70-amp breaker did not meet the requirements of the safety standard. (Tr. 1148). The circuit was 480 volts phase-to-phase and 227 volts phase-to-ground. The power was not on. The wire was rated for 30 amps but the breaker was rated for 70 amps. Thus, there was insufficient overload protection on the circuit. A 70-amp breaker is not of the correct type and capacity for a No. 10 wire. The wiring would overheat and fault out before the breaker would trip. (Tr. 1152). The fault would likely travel through metal components of the equipment at the quarry. (Tr. 1152-53). The installation did not meet the requirements of the National Electrical Code. (Tr. 1228-30).

I find that the Secretary established a violation and that the violation was S&S. The circuit was not adequately protected. It was reasonably likely that the hazard contributed to by the violation would result in a serious injury given continued mining operations. A penalty of \$250.00 is appropriate.

2. On November 15, 2005, Inspector Barrington issued Citation No. 6317445 alleging a violation of section 56.12006. (Ex. G-105). The citation alleges that the distribution box mounted in the motor control center for the screening and crushing plant was not provided with a disconnecting device for each branch circuit. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that distribution boxes be provided with a disconnecting device for each branch circuit and that the disconnecting devices be designed so that it can be determined by visual observation whether the circuit is energized. The Secretary proposes a penalty of \$247.00 for this citation.

Inspector Barrington testified that there were two circuits coming off the distribution box from one breaker. (Tr. 1184-86, Ex. G-105c). He stated that the violation was obvious. The standard required that each circuit be isolated with its own disconnecting device. There were separate thermal protection devices for each circuit, each with its own starting buttons. (Tr. 1231). Miners were exposed to the hazard because the circuits could not be isolated.

Mr. Peres testified that the National Electrical Code allowed the configuration of circuits that were present at the quarry. (Tr. 1256). The two pieces of equipment (the cone return and the 521 conveyor) could be run independently and they each had their own start button.

It is clear from the regulation that each branch circuit is required to have its own disconnecting device. Circuit breakers or plugs are typically used as disconnecting devices. The circuit breaker in question controlled two branch circuits. (See, PPM Part 56/57.12006). The fact that the piece of equipment on each circuit had their own stop/start button does not obviate this requirement. Each circuit must have its own visible disconnecting device. This violation was obvious. (Ex. G-105c). I find that the Secretary established a violation. I also credit Inspector Barrington's testimony concerning the hazards created by this violation and I find that the violation was S&S. A penalty of \$250.00 is appropriate.

3. On November 15, 2005, Inspector Barrington issued Citation No. 6317443 alleging a violation of section 56.12018. (Ex. G-106). The citation alleges that the principal power switches were not all labeled to show which units they controlled. Inspector Barrington determined that an injury was not reasonably likely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard required that principal power switches be labeled to show which units they control unless identification can be made readily by location. The Secretary proposes a penalty of \$60.00 for this citation.

Barrington testified that the company had numbers posted on the covers for the distribution boxes but they did not all match up with what was in the field. (Tr. 1190, 1236, 1251). The labels were not on or near the breakers but were on the outside of the doors for the distribution boxes. It would have been easy to open the incorrect breaker when attempting to perform repairs on a piece of electrical equipment. Proper identification is especially important in an emergency situation. (Tr. 1192, 1196). Mr. Peres testified that the labels on the outside of the panels are kept up to date. (Tr. 1258).

I credit the testimony of Inspector Barrington. The citation is affirmed and a penalty of \$60.00 is assessed.

4. On November 15, 2005, Inspector Barrington issued Citation No. 6317447 alleging a violation of section 56.12008. (Ex. G-107). The citation alleges that the cable for the 503 short belt was pulled from the electrical enclosure through the entrance gland exposing the phase and ground conductors. Inspector Barrington determined that an injury was not reasonably likely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that cables shall enter metal frames of electrical components only through proper fittings. The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that the cables for one of the conveyors had pulled through the bushing and was hanging by the phase conductors. (Tr. 1196-98; Ex. G-107c). The outer jacket had pulled out of the fitting. The inspector did not know how long the condition existed. (Tr. 1240). The insulation around the conductors had not yet been damaged.

This citation is affirmed as a non-S&S violation. A penalty of \$60.00 is appropriate.

5. On November 16, 2005, Inspector Barrington issued Citation No. 6317450 alleging a violation of section 56.12008. (Ex. G-108). The citation alleges that the three wires entering the top of the power bus box were not adequately insulated. Inspector Barrington determined that an injury was not reasonably likely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that the metal openings were bushed but the wires entering the box through the bushings did not have outer jackets. (Tr. 1202; Ex. G-108d). The jacket had been stripped back so that the wires could fit through the openings. Because the bushings were not insulated, but were metal, the installation did not meet the requirements of the standard. The insulation on the wires had not been damaged. Mr. Peres testified that the mine wraps electrical tape around the wires where they pass through the bushing to provide the required insulation. (Tr. 1260).

Electrical tape is no substitute for an adequate bushing and there is no proof that electrical tape was present in this installation. The Secretary established a violation and the proposed penalty of \$60.00 is appropriate.

6. On November 16, 2005, Inspector Barrington issued Citation No. 6317449 alleging a violation of section 56.12025. (Ex. G-102). The citation alleges that the grounding system on the IC bin conveyor was not maintained as required. When tested, the grounding system measured 75 ohms to ground. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of \$247.00 for this citation.

Inspector Barrington testified that when he tested the ground for the conveyor using a Triplet analog meter, he determined that the resistance in the grounding wire was sufficiently high that it would not trip the breakers it was serving. (Tr. 1208, 1210). He used his standard procedure when testing the grounding system. (Tr. 1246-48). Richard Tedesco helped him perform the test. (Tr. 1234). The impedance was too high given the size of the grounding wire to carry the current back to the breaker. The company's testing records did not indicate that there was any problem with the grounding system. (Tr. 1232). The violation was S&S because the likelihood of someone getting injured was high. (Tr. 1216).

Mr. Peres testified that he performs the annual continuity and earth ground tests at all five plants. (Tr. 1261). When a ground wire shows resistance, it is usually because of dirt or corrosion at a connection point. Testing the ground wire can be tricky and he sometimes gets false readings. When he gets a better connection with the meter, the ground wire has always passed the annual test. If the test is performed by someone who lacks experience, a false reading can easily be obtained. (Tr. 1263). He is not aware of any problems that Inspector Barrington had when he checked the grounding systems at the plant. (Tr. 1169). A reading of 73 ohms, if the test were performed correctly, would show a problem with the grounding wire.

I find that the Secretary established an S&S violation of the safety standard. I credit the inspector's testimony that he correctly tested the grounding system. Although corrosion may have created the problem, the hazard was still present and serious. It was reasonably likely that someone would be injured or electrocuted if the condition were not corrected. A penalty of \$250.00 is appropriate taking into consideration the penalty criteria.

7. On November 16, 2005, Inspector Barrington issued Citation No. 6317448 alleging a violation of section 56.12025. (Ex. G-103). The citation alleges that the grounding system on the El Jay screen conveyor was not maintained as required. When tested, the grounding system measured 9 ohms to ground. Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The circumstances that led Inspector Barrington to issue this citation were similar to those in the previous citation. (Tr. 1222-23). For the same reasons, I affirm the citation and assess a penalty of \$60.00.

8. The Secretary agreed to vacate Citation No. 6317428.

**M. CENT 2006-229-M, Plants 1 and 3.**

1. On November 21, 2005, Inspector Barrington issued Citation No. 6317462 alleging a violation of section 56.12008. (Ex. G-109). The citation alleges that the cables entering the bottom metal frame of the motor control enclosure were not provided with proper fittings. There were 16 cables entering the enclosure and 4 of them were not properly bushed. Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Barrington testified that four of the 480-volt cables were not properly bushed. (Tr. 1303). The motor control center was subject to vibration because it was in the same trailer as the generator. The sharp edges of the box could have cut into the cables and the cables could otherwise loosen. (Tr. 1306). Mr. Peres testified that this citation was actually issued at Plant 1, as was Citation No. 6317463.

I affirm this citation based on Inspector Barrington's testimony. A penalty of \$60.00 is appropriate.

2. On November 21, 2005, Inspector Barrington issued Citation No. 6317463 alleging a violation of section 56.12032. (Ex. G-110). The citation alleges that the inspection plates on the 110 volt breaker were not secured as required. Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that inspection and cover plates on electrical equipment and junction boxes shall be kept in place except for testing or repairs. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Barrington testified that as he was inspecting the area he bumped the breaker box and the cover fell off. (Tr. 1311). Mr. Peres testified that the plant had not been in operation for three months. (Tr. 1368).

I find that the Secretary established a violation. The violation was not serious and the company's negligence was low. A penalty of \$40.00 is appropriate.

3. On November 2, 2005, Inspector Dye issued Citation No. 6291597 alleging a violation of section 56.9315. (Ex. G-111). The citation alleges that there was visible dust coming from the plant, exposing persons to low visibility hazards. Inspector Dye determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. She determined that the violation was S&S and that the negligence was moderate. The safety standard provides that dust must be controlled at muck piles, material transfer piles, crushers and on haulage roads where hazards to persons could be created by impaired visibility. The Secretary proposes a penalty of \$165.00 for this citation.

Inspector Dye testified that as she was driving down the county road, she could see dust coming off the plant. (Tr. 1278). The plant was "engulfed in dust." (Exs. G-111c and 111d). The wind was blowing 25 miles per hour that day. The company did not have a water truck at the plant and water sprays were not installed at the crusher or along the conveyors. The haulage trucks did not have their headlights on. The company shut down the plant soon after the MSHA inspectors arrived and the dusty conditions abated. Mine operators that use dust control measures are able to greatly reduce the amount of dust produced in windy conditions. (Tr. 1185). The inspector believes that the dusty conditions created visibility hazards as well as a potential health hazard to employees. She determined that the violation was S&S because it was reasonably likely that trucks operating at the plant would be involved in an accident. The company submitted and implemented a dust control plan to abate the citation.

Mr. Peres testified that the plant was shut down soon after the inspectors arrived because the wind had picked up. (Tr. 1361). He had previously called Mr. Nelson to ask him about the weather forecast and to tell him that the plant may need to shut down. Peres said that he did not

know that MSHA was onsite when he made the decision to shut down the plant. He understands that the wind had picked up to a sustained speed of 35 mph with gusts even higher. It was not as windy earlier in the day and there were no visibility problems. (Tr. 1363). The plant is frequently shut down when it gets too windy. Peres said that the roadways are normally kept wet by using haul trucks and loaders to spread water along the roads.

I credit the testimony of Mr. Peres and I vacate this citation. He testified that he shuts down a plant if it becomes too windy and dusty.

**N. CENT 2006-230-M, Plant 4.**

1. On November 16, 2005, Inspector Crelly issued Citation No. 6291253 alleging a violation of section 56.3200. (Ex. G-112). The citation alleges that the faces in the pit had not been scaled. The faces were about 30 to 35 feet high on the north side and 40 feet high on the south side. There was loose and unconsolidated material on both sides of the pit. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. The citation was subsequently amended to show that an accident was unlikely and that the violation was not S&S. The negligence was moderate. The standard provides that ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the area. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Crelly testified that he observed loose, unconsolidated material on the pit faces. The pit was about 75 yards wide. (Tr. 956, 360; Ex. G-112d). He observed tire tracks eight feet from the edge of the face. The area at the base of the face had been cleaned up. (Tr. 959). If any of the loose material were to fall, it could strike someone under highwall. There was a sump pump in the area. Foreman Gene Andres told the inspector that the company does not have any equipment that can scale the highwall. Inspector Crelly believed it was too dangerous to get too close to the face to take any measurements. (Tr. 1001).

Mr. Peres testified that other MSHA inspectors had advised the company that the higher the face the further back from the face miners are prohibited from entering. (Tr. 1048-49). He called it the 25 percent rule because you must stay back a quarter of the distance of the height. Peres estimated that loose rock around the base of the face protruded out about 12 feet. (Tr. 1075). He further testified that there were no loose rocks along the face in the areas where rocks at the base had been removed with a loader. Nelson Quarries admitted during discovery that there was loose and unconsolidated material on the north side of the pit and that no scaling had been performed. (Tr. 1078-79; Ex. G-138). Scaling is not required if access to the area below the face is limited or blocked. (Tr. 1081).

Mr. Andres testified that the loader tracks that the inspector observed were at least 13 feet away from the toe of the highwall. (Tr. 1162). The water pump was at least 40 feet from the highwall. Andres also testified that there was a trackhoe that was large enough to reach 30 feet up the wall but that the mine does not rely on scaling. Scaling would put the operator of the

equipment in the zone of danger from falling rock. (Tr. 1170). Instead, barriers or berms are used to keep people away. (Tr. 1167, 1172). The company leaves some of the rock at the face to be removed during the next cycle.

I agree with Nelson Quarries that the safety standard does not require scaling. The standard requires that ground conditions that create a hazard to persons be taken down before work is performed in the affected area. During discovery, Nelson Quarries admitted that there was "loose and unconsolidated material on the north face of" its pit. (Ex. G-138). The issue is whether the loose, unconsolidated material presented a hazard to persons. The company contends that rock at the base of the highwall blocked entry to anyone below this loose material. The MSHA's photographs are consistent with the testimony of Andres and Peres. I credit the testimony of Andres and Peres with respect to this citation. Rock at the base of the highwall provided a sufficient barrier and the loose material did not pose a hazard to the workers at the time of the inspection. Under the PPM, a mine operator is permitted to use piles of muck or large boulders to keep miners out from under highwalls. As a consequence, I vacate this citation. It bears noting that Nelson Quarries must ensure that there are berms or sufficient rock under any loose or unconsolidated material on the highwall to keep miners out of the zone of danger. It must comply with the requirements of sections 56.3130, 56.3131, and 56.3200 at all times. Scaling must be performed if miners must work or travel under unconsolidated material on highwalls.

2. On November 16, 2005, Inspector Crelly issued Citation No. 6291257 alleging a violation of section 56.14100(b). (Ex. G-113). The citation alleges that the bottom step on the Caterpillar 988F front end loader was missing. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be permanently disabling. The citation was later modified to show that an accident was unlikely and that the citation was not S&S. The negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Crelly testified that the bottom step was missing. (Tr. 966). The existing bottom step was 37 inches above the ground. The loader operator could slip and fall either ascending or descending the steps. The condition had existed for some time and the loader is used on a regular basis. Mr. Andres estimated that, with the missing step, the bottom step was about 31 or 32 inches from the ground. (Tr. 1164).

I find that the missing ladder rung did not present a safety hazard. Anyone entering the loader could use the handrails for support. The chance of an injury is remote at best. This citation is vacated.

3. On November 16, 2005, Inspector Crelly issued Citation No. 6291259 alleging a violation of section 56.11001. (Ex. G-114). The citation alleges that safe access was not provided to the walkway on the 615 screen. A wire stand was being used to climb up to the walkway and over the handrail. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. The citation was later modified to show that an

accident was unlikely and that the citation was not S&S. The negligence was moderate. The safety standard provides that safe access must be provided to all working places. The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that the company was using a metal stand, which was not intended to be used as a ladder, to climb up onto the 615 screen. (Tr. 970; Ex. G-114c). Employees had to climb over the handrail once they were at the top, which was about ten feet above the ground. He estimated that employees accessed the walkway a few times a week. The walkway is a working place because miners must stand on the walkway while performing maintenance and inspecting the screen. Mr. Andres told the inspector that employees got to the walkway via the metal stand, but the inspector did not see anyone using this metal stand. (Tr. 973, 1004).

Peres testified that there was a ladder for employees to use to gain access to the screen. This ladder is shown in exhibit G-130c. (Tr. 1050-51). There are also other portable ladders on the property that are used to go up on the screen. He was not aware that anyone used the wire stand to get up onto the screen. Mr. Andres testified that there were ladders available to access the screen. (Tr. 116).

The ladder referred to by Mr. Peres was tied to the frame of the screen and would not be easy to move. Although there may have been other ladders available, I credit Inspector Crelly's testimony that Mr. Andres told him employees use the wire stand. As stated above, I find that Mr. Andres was an agent of the operator. He had knowledge that miners were using the wire stand to get onto the screen. The citation is affirmed and a penalty of \$60.00 is assessed.

**O. CENT 2006-231-M, Plant 3.**

On November 21, 2005, Inspector Barrington issued Citation No. 6317461 alleging a violation of section 56.12040. (Ex. G-115). The citation alleges, in part, that the operating controls inside the motor distribution box were installed so that they could not be operated without danger of contact with energized conductors and related terminals. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6317446. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. The wires and terminals for the circuit breakers were totally exposed. Circuit breakers are operating controls. The fact that the company had never been cited for this condition simply reflects that fact that its plants had never been subject to an electrical inspection. The violation was not S&S because the plant is shut down and locked out whenever any work is performed. A penalty of \$60.00 is appropriate.

**P. CENT 2006-233-M, Plant 4.**

1. On November 17, 2005, Inspector Barrington issued Citation No. 6317455 alleging a violation of section 56.12025. (Ex. G-116). The citation alleges that the grounding system on the 540 conveyor was not properly maintained. The grounding system measured 2.5 ohms to ground. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Barrington testified that one of the company's employees helped with the testing. (Tr. 1315). His testimony with respect to this citation was the same as with other citations alleging a problem with a grounding system. It would take the breaker seconds or maybe minutes to trip in these circumstances. (Tr. 1344). Someone would have to be touching the metal framework of the equipment for an injury to occur. The previous testimony of Mr. Peres also applies to this citation. He testified that it would only take about a half a second for the breaker to trip with a resistance of only 2.5 ohms. (Tr. 1371).

For the reasons discussed above with respect to the other grounding citations issued under section 56.12025, this citation is affirmed. A penalty of \$60.00 is assessed.

2. On November 17, 2005, Inspector Barrington issued Citation No. 6317457 alleging a violation of section 56.12025. (Ex. G-117). The citation alleges that the grounding system on the 509 conveyor was not properly maintained. The grounding system measured 1.5 ohms to ground. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Barrington's testimony with respect to this citation was the same as with other citations alleging a problem with a grounding system. (Tr. 1317, 1345-46). As a general matter corrosion often causes grounding systems to fail the continuity test. Mr. Peres testified that he performs the annual continuity and earth ground tests. (Tr. 1368). He also retests the grounding systems anytime the plant is moved, a motor is replaced, or any equipment is moved. A reading of 2.5 ohms is a very low resistance to ground. The condition was corrected by cleaning the terminals to remove corrosion. (Tr. 1370).

For the reasons discussed above with respect to the other grounding citations issued under section 56.12025, this citation is affirmed. A penalty of \$60.00 is assessed.

3. On November 16, 2005, Inspector Barrington issued Citation No. 6317452 alleging a violation of section 56.12002. (Ex. G-118). The citation alleges that the control breakers mounted in the distribution boxes in the motor control center were not properly installed in that vibration from the generator had backed the mounting screws out, making it difficult to reset the breaker. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The safety standard provides, in part, that

switches and controls for electric circuits shall be properly installed. The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that the condition was obvious. (Tr. 1322-23; Ex. G-118c). The breaker assembly was secured by only one screw so it would move if anyone were required to reset the breaker. A miner would have to hold it with one hand while resetting the switch, which would expose the miner to an electric shock hazard. (Tr. 1325-26). Miners do not use the breakers to turn the equipment on and off. (Tr. 1349). He does not know how often the breaker must be reset.

Mr. Peres testified that access to the motor control centers at the plants of Nelson Quarries is restricted. Padlocks are often placed on the doors when a plant is in operation. (Tr. 1371). The only people allowed in the motor control trailer when the plant is operating are the leadman and himself. Repairs are performed when the generator is shut down. Breakers rarely kick off.

I find that the Secretary established a violation. The gravity was low because the breakers are infrequently used and access to the trailer was limited. I find that a penalty of \$40.00 is appropriate.

4. On November 21, 2005, Inspector Barrington issued Citation No. 6317454 alleging a violation of section 56.12040. (Ex. G-119). The citation alleges, in part, that the operating controls inside the distribution boxes in the motor control room were installed so that they could not be operated without danger of contact with energized conductors and related terminals. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6317446. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. The wires and terminals for the circuit breakers were totally exposed. Circuit breakers are operating controls. The fact that the company had never been cited for this condition simply reflects that fact that its plants had never been subject to an electrical inspection. A penalty of \$60.00 is appropriate.

**Q. CENT 2006-237-M, Plant 4.**

1. On November 16, 2005, Inspector Crelly issued Citation No. 6291254 alleging a violation of section 56.3130. (Ex. G-129). The citation alleges that the mining methods used in the pit were not compatible with the type and size of the equipment used. The face was about 30 to 35 feet high on the north side of the pit and about 40 high on the south side. None of the equipment at the mine could reach more than 25 feet up the face. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in

part, that mining methods shall be used that will maintain wall, bank, and slope stability in places where people work or travel. The Secretary proposes a penalty of \$247.00 for this citation.

Inspector Crelly testified that Mr. Andres told him that the company did not have any equipment that could be used to scale the rock face. (Tr. 974). There were no benches along the highwall. The inspector said that, to comply with the standard, the company must bench the area or barricade the area around the foot of the highwall so that any falling rock would not hit anyone. (Tr. 975). The company could also scale the face, but they did not have any equipment that could be used for such purposes. Instead, the company drilled and then shot the area. The inspector admitted that scaling is not mandatory. (Tr.1007-08). He designated this citation as S&S because miners are in the pit every day operating the loader and other equipment. These miners are frequently within a few feet of the face. Although pedestrians were not common, someone could be out of a vehicle checking the water pump.

Mr. Peres testified that there was a Hitachi trackhoe that can reach up to 40 feet to scale a face. (Tr. 1054-55). A rammer can be attached to use for scaling. The quarry also keeps men and machinery back from the toe of the face. The company's evidence with respect to this citation is the same as it was for the related citation (No. 6291253) alleging a violation of section 56.3200.

I vacate this citation for the same reasons I vacated Citation No. 6291253. I find that the Secretary did not establish that miners worked or traveled under unstable highwalls. I note, however, that the company must either scale down loose and unconsolidated material or it must ensure that berms or rock are present to keep miners out of the zone of danger.

2. On November 16, 2005, Inspector Crelly issued Citation No. 6291260 alleging a violation of section 56.11003. (Ex. G-130). The citation alleges that the ladder on the southwest side of the 615 screen was not maintained in safe condition. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that ladders shall be of substantial construction and maintained in good condition. The Secretary proposes a penalty of \$247.00 for this citation.

The inspector testified that the ladder was about eight feet tall and had holes in the rail that were about two by two inches. The ladder is used to access the second layer of screens. (Tr. 979). The hole is where a rung used to be. The ladder was of substantial construction but it was not maintained in good condition because it was bent and it had a hole in it. Inspector Crelly testified that if the ladder continued to be used, it was reasonably likely that someone would suffer a serious or fatal injury. (Tr. 981). The ladder was tied off in place. (Tr. 982, 1015).

Peres testified that the ladder was strong enough to hold a man. (Tr. 1056-57). The holes in the sides of the ladder were above the last rung used by miners so the holes were not subjected to the weight of miners using the ladder. Andres agreed with Peres. (Tr. 1182).

I find that the citation should be vacated. The holes were where a rung used to be and they were not as large as the inspector believed. The holes were above any area where miners would put their weight. (Ex. G-130c). The ladder was of substantial construction and was in good enough condition for its intended use. It was secured in place and it did not present a safety hazard.

3. On November 16, 2005, Inspector Crelly issued Citation No. 6291266 alleging a violation of section 56.11001. (Ex. G-131). The citation alleges that safe access was not provided to the south side of the main generator trailer in that a piece of sheet metal that was 21 inches wide was being used as a walkway into the trailer that was about 4 feet above the ground. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of \$203.00 for this citation.

The inspector testified that the sheet metal was a quarter of an inch thick, about 21 inches wide, and six feet long. (Tr. 983; Ex. G-131c). This piece of metal was not designed for this purpose and it did not provide safe access. He testified that he did not know why people would be entering the trailer at this location because there was another door provided. That door had stairs with handrails. He saw Mr. Andres use the cited entrance. He believes that the violation was S&S because someone could stumble and fall while walking on the sheet metal. The cited door was the back door to the trailer near the radiator of the generator.

Peres testified that the entrance to the generator trailer is on the side. That entrance has a stairway with handrails. The piece of metal cited by the inspector was there because two employees at the quarry had a pet cat at the mine site. (Tr. 1061-62). The cat slept near the generator because it was warm. These employees put the sheet metal by the generator to make it easier for the cat to get into the trailer. He never saw anybody using this "catwalk." (Tr. 1080). Mr. Andres denied that he ever walked or stepped on the sheet metal. (Tr. 1168). It was very muddy the day of the inspection with the result that mud would have been on the sheet metal if anyone had walked on it.

I credit the witnesses of Nelson Quarries on this citation. The photograph shows that the piece of sheet metal was not a means of access for miners to enter the trailer. (Ex. G-131c). The company provided safe access via the stairs. I vacate this citation.

4. On November 17, 2005, Inspector Barrington issued Citation No. 6317459 alleging a violation of section 56.12025. (Ex. G-132). The citation alleges that the grounding system on the 509 conveyor was not properly maintained. The grounding circuit was open when tested with an ohmmeter. Inspector Barrington determined that an injury was reasonably likely and that any injury would be fatal. The citation was designated as S&S and the negligence was moderate. The Secretary proposes a penalty of \$247.00 for this citation.

The inspector testified that the grounding circuit was open (disconnected) so that there was no ground at all. (Tr. 1319). He determined that the violation was S&S because it was reasonably likely that someone would be seriously injured in the event of a fault in the 480 volt system.

For the reasons discussed above with respect to the other grounding citations issued under section 56.12025, this citation is affirmed. A penalty of \$250.00 is appropriate.

5. On November 17, 2005, Inspector Barrington issued Citation No. 6317460 alleging a violation of section 56.12004. (Ex. G-133). The citation alleges that the insulation on the feeder cable to the 30 amp Westinghouse breaker and Cutler Hammer line starter was damaged from excessive heat. The copper conductor was exposed in places. Inspector Barrington determined that an injury was unlikely but that any injury would be fatal. The citation was designated as non-S&S and the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Barrington testified that it appeared that the insulation had been damaged by excessive heat. (Tr. 1329; Ex. G-133e). Mr. Peres believes that the insulation was chipped when the wire was moved at some point. (Tr. 1375).

I affirm the citation. Copper wire was visible whether the insulation was damaged by heat or it was chipped off. A penalty of \$60.00 is appropriate.

6. On November 17, 2005, Inspector Barrington issued Citation No. 6317456 alleging a violation of section 56.12008. (Ex. G-134). The citation alleges that the feeder cable for the No. 14 distribution box entered through a compression bushing that was not properly maintained. The gland locking nut had vibrated loose and was hanging from the leads. Inspector Barrington determined that an injury was unlikely but that any injury would be fatal. The citation was designated as non-S&S and the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

The inspector testified that the locking nut was hanging loose. (Tr. 1333-35; Ex. G-134c). The bushing was metal and he was concerned that vibration could wear down the insulation on the conductors without the nut in place. Peres testified that the bushing provided protection without the lock nut in place. (Tr. 1376).

The locking nut helps keep the cables in place and prevents vibration from damaging the insulation on the conductors. There is no indication that the insulation had been damaged. I find that the Secretary established a violation, but it was not serious. A penalty of \$40.00 is appropriate.

7. On November 17, 2005, Inspector Barrington issued Citation No. 6317451 alleging a violation of section 56.14100(b). (Ex. G-135). The citation alleges that the housing on the

Cummins generator was not maintained in good condition. The top of the housing had an open exit gland that exposed the windings in the generator to moisture and dust. Inspector Barrington determined that an injury was unlikely but that any injury would be fatal. The citation was designated as non-S&S and the negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Barrington testified that because of the dusty conditions, dirt, dust and moisture could enter the opening in the housing. The internal windings could be affected creating a safety hazard. The dust and dirt could cause the generator to get too hot. He considered the cited condition to be a defect affecting safety. (Tr. 1336-39, 1341; Ex. G-135d). The generator was not operating at the time of his inspection. Mr. Peres testified that when the generator is operating, air is forced out of the hole by the cooling fan so any dust present would be blown out. (Tr. 1377).

The standard requires that any defects that affect safety be corrected in a timely manner to prevent the creation of a hazard to persons. I find that the Secretary did not establish that the opening was a defect that affected safety. The generator was in a trailer and there was no proof that dust and dirt would enter the hole or damage the windings in any way. This citation is vacated.

8. On November 17, 2005, Inspector Barrington issued Citation No. 6317456 alleging a violation of section 56.12025. (Ex. G-132). The citation alleges that the grounding system on the 207 bin conveyor was not maintained as required. When tested, the grounding system was open. Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of \$247.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation Nos. 6317464 and 6317465. I find that the Secretary established an S&S violation of the safety standard. I credit the inspector's testimony that he correctly tested the grounding systems during his inspections. Although corrosion may have created the problem, the hazard was still present and serious. It was reasonably likely that someone would be injured or electrocuted if the condition were not corrected. A penalty of \$250.00 is appropriate.

## **II. APPROPRIATE CIVIL PENALTIES**

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Plant 1 had a history of 12 paid violations in the two years prior to November 16, 2005, Plant 2 had a history of 5 paid violations in the two years prior to October 5, 2005, Plant 3 had a history of 6 paid violations in the two years prior to June 28, 2005, Plant 4 had a history of 21 paid violations in the two years prior to November 16, 2005, and Plant 5 had a history of 5 paid violations in the two years prior to October 26, 2005. (Ex. G-136). Most of

these previous violations were non-S&S. Nelson Quarries is a rather small operator and its quarries are small. All of the violations were abated in good faith, except as noted. Nelson Quarries did not establish that the penalties assessed will have an adverse effect on its ability to continue in business. My gravity and negligence findings are set forth above. If I did not discuss gravity or negligence with respect to a citation, then the inspector's determinations are affirmed. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

### III. ORDER

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

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
CENT 2006-151-M, Plant 4		
6291250	56.6130(a)	\$1,000.00
6291251	56.6300(b)	1,500.00
CENT 2006-178 -M, Plant 1		
6291635	56.14112(b)	Vacated
6291637	56.14100(a)	Vacated
6291642	56.11002	Vacated
6291644	56.20003(a)	Vacated
6291645	56.14107(a)	100.00
6291646	56.18012	50.00
6291647	§109(a) of Act	60.00
6291648	56.11002	Vacated
6317464	56.12025	500.00
6317465	56.12025	500.00
CENT 2006-200-M, Plant 5		
6291590	56.14100(b)	135.00
6291591	56.14132(a)	60.00
6291569	56.14112(b)	Vacated
6291572	56.12004	60.00
6291573	47.41(a)	40.00
6291574	56.12004	60.00

6291576	56.14107(a)	50.00
6291578	56.14112(b)	60.00
6291579	56.14112(b)	60.00
6291580	56.4501	60.00
6291581	56.14107(a)	Vacated
6291582	56.12004	60.00
6291584	56.14107(a)	50.00
6291585	56.20003(a)	60.00
6291587	56.6101(a)	60.00
6291588	56.4101	40.00
6291592	56.14107(a)	60.00
6291593	56.14112(b)	60.00
6291594	56.14100(b)	60.00

CENT 2006-201-M, Plant 5

6291595	56.14101(a)(2)	625.00
6291583	56.14107(a)	70.00
6291589	56.14101(a)(2)	40.00
6291586	56.9300(a)	40.00

CENT 2006-202-M, Plant 1

6291636	47.41(a)	40.00
6291638	56.4104(b)	60.00
6291639	47.41(a)	Vacated
6291640	56.4101	Vacated
6291641	56.14107(a)	60.00

CENT 2006-203-M, Plant 2

6321288	56.14100(c)	800.00
6290517	56.14109	100.00
6317446	56.12040	100.00
6291667	47.7(a)	100.00
6290516	56.14107(a)	40.00
6290520	56.14132(a)	40.00
6290521	56.14100(b)	60.00
6290522	56.14132(a)	40.00
6290523	56.14100(b)	40.00
6290524	56.6132(a)(4)	60.00

6321289	56.14100(b)	60.00
6317429	56.6132(b)	Vacated
6317430	56.6132(a)(6)	Vacated
6317432	56.14107(a)	60.00
6317436	56.14112(a)(1)	Vacated
6317437	56.14107(a)	Vacated
6317438	56.14112(a)(1)	Vacated
6317440	56.11002	60.00
6317441	56.4130(b)	60.00
6317442	56.11002	40.00

CENT 2006-204-M, Plant 2

6290519	56.14101(a)(3)	10.00
6317431	56.14107(a)	Vacated
6317433	56.14107(a)	Vacated

CENT 2006-206-M, Plant 4

6291248	56.6130(a)	500.00
6317458	56.12001	250.00
6291249	56.6132(a)(6)	60.00
6317453	56.12001	60.00

CENT 2006-207-M, Plant 3

6290611	56.14132(a)	40.00
6290612	56.14132(a)	60.00
6290614	56.6202(b)(1)	60.00
6290615	56.14100(c)	60.00

CENT 2006-208-M, Plant 3

6290622	56.5001(a)/.5005	750.00
6291604	56.14107(a)	60.00
6291611	56.12006	60.00

CENT 2006-228-M, Plant 2

6317444	56.12001	250.00
6317445	56.12006	250.00
6317448	56.12025	60.00
6317449	56.12025	250.00

6317428	56.6132(a)(3)	Vacated
6317443	56.12018	60.00
6317447	56.12008	60.00
6317450	56.12008	60.00

CENT 2006-229-M, Plant1 and 3

6291597	56.9315	Vacated
6317462	56.12008	60.00
6317463	56.12032	40.00

CENT 2006-230-M, Plant 4

6291253	56.3200	Vacated
6291257	56.14100(b)	Vacated
6291259	56.11001	60.00

CENT 2006-231-M, Plant 3

6317461	56.12040	60.00
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CENT 2006-233-M, Plant 4

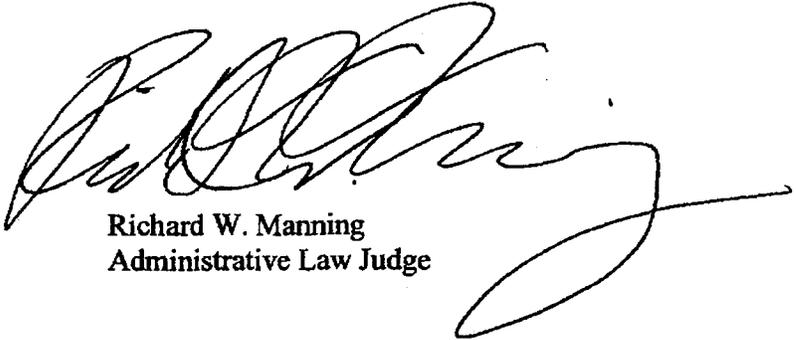
6317452	56.12002	40.00
6317454	56.12040	60.00
6317455	56.12025	60.00
6317457	56.12025	60.00

CENT 2006-237-M, Plant 4

6291254	56.3130	Vacated
6291260	56.11003	Vacated
6291266	56.11001	Vacated
6317459	56.12025	250.00
6317451	56.14100(b)	Vacated
6317456	56.12008	40.00
6317460	56.12004	60.00

TOTAL PENALTY		\$11,090.00
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Accordingly, the citations contested in these cases are **AFFIRMED, MODIFIED, or VACATED** as set forth above and Nelson Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$11,090.00 within 40 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

Distribution:

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Kenneth L. Nelson, President, Nelson Quarries, Inc., P.O. Box 100, Gas, KS 66742-0100 (Certified Mail)

RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

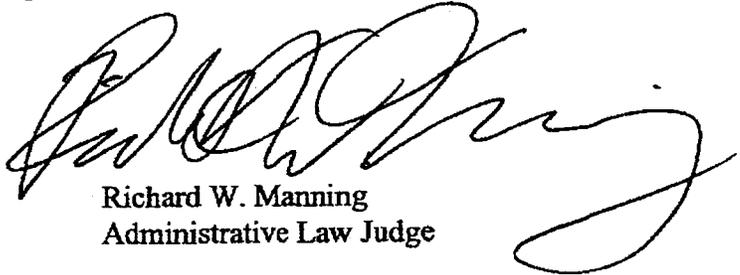
May 1, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-237-M
Petitioner	:	A.C. No. 14-01597-77364-02
	:	
v.	:	
	:	Plant 4
NELSON QUARRIES, INC.,	:	
Respondent	:	

**ORDER CORRECTING DECISION**

Before: Judge Manning

I issued my decision in this docket, along with 15 other dockets, on April 7, 2008. In this order I am correcting two clerical errors that appear in the decision. First, in numbered paragraph 4 on page 60, the decision should be changed to reflect that Citation No. 6317459 involved the grounding system on the 207 bin conveyor rather than the 509 conveyor. Second, numbered paragraph 8 on page 62 and the paragraph that follows it are both in error and are hereby deleted from the decision.



Richard W. Manning  
Administrative Law Judge

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Paul M. Nelson, P.O. Box 334, Jasper, MO 64755

Kenneth L. Nelson, President, Nelson Quarries, Inc., P.O. Box 100, Gas, KS 66742-0100

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

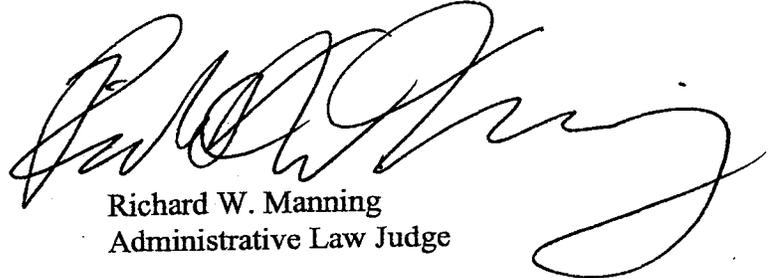
May 5, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-178-M
Petitioner	:	A.C. No. 14-01477-87956
	:	
v.	:	
	:	Plant 1
NELSON QUARRIES, INC.,	:	
Respondent	:	

**ORDER CORRECTING DECISION**

Before: Judge Manning

I issued my decision in this docket, along with 15 other dockets, on April 7, 2008. In this order I am correcting an error that appeared in the decision. In the discussion of Citation No. 6317465 on page 19 of the decision, I described the citation as being of a significant and substantial nature ("S&S"). In fact, prior to the hearing, the Secretary changed the designation to non-S&S and reduced the proposed penalty to \$60.00. I hereby correct my decision to affirm the citation as modified by the Secretary and I assess a penalty of \$60.00. As a consequence, the total penalty for this docket is reduced to \$770.00 and the total penalty for all 16 dockets is reduced to \$10,650.00.



Richard W. Manning  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 30, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-184-M
Petitioner	:	A.C. No. 13-02285-90174
	:	
v.	:	Docket No. CENT 2007-039-M
	:	A.C. No. 13-02285-97606
	:	
	:	Docket No. CENT 2007-067-M
	:	A.C. No. 13-02285-102681
	:	
JEPPESEN GRAVEL,	:	Docket No. CENT 2007-091-M
Respondent	:	A.C. No. 13-02285-104903
	:	
	:	Jeppesen Pits

**DECISION**

Appearances: Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;  
Jay A. Jeppesen, Owner, Jeppesen Gravel, Sibley, Iowa, for Respondent.

Before: Judge Manning

These cases are before me on three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Jeppesen Gravel pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve 16 citations issued by MSHA under section 104(a) of the Mine Act at the pit operated by Jeppesen Gravel. The parties presented testimony and documentary evidence at the hearing held in Sioux City, Iowa.

**I. BACKGROUND**

Jay Jeppesen owns a large piece of property in Osceola County, Iowa, along the border with Minnesota. His home is on this property and he runs several businesses from this property. One of these businesses is Jeppesen Gravel, which he operates as the sole proprietor. The only employee of Jeppesen Gravel is his son, Alan. Jeppesen and his son do all of the physical work for Jeppesen Gravel. He has several areas on his property in which he digs. Sometimes he digs material and runs it through his plant to produce gravel for sale. He also produces gravel that is

not processed in any way for use as ballast under concrete. Rock that is of a uniform size is not as important in this work. Jeppesen also digs up material used for fill. He calls these areas his "borrow pits." He digs out material from the earth and he transports it in the same condition to be used as fill. This material is often used in one of his other businesses.

Jeppesen testified that his gravel pit is quite small and is operated as needed. He also does demolition work, hauls "black dirt," does grading work, snow plowing, and other similar jobs. Jeppesen also testified that most of the material that is dug from the ground on his property is not run through the plant, but is used as part of his demolition and building site work. (Tr. 144). For example, he uses the material from his borrow pit to fill in the basement of a structure he has removed.

Jeppesen stated that gravel was mined by his father on this property since the early 1960s and he took over this business years later. (Tr. 133). He has been in the gravel business for 30 years. He testified that he had never been inspected by MSHA and had never heard of MSHA prior to the first time that MSHA Inspector William Owen first came to his operation in 2004. (Tr. 125, 133). Jeppesen testified that when the MSHA inspectors told him he had to stop working until they completed their inspection, he did not believe them and he did not know who they were. Over time, he had to educate himself on MSHA requirements and this required "a lot of change in attitude" on his part. (Tr. 126).

MSHA and Jeppesen Gravel have had a rocky relationship since that first inspection in October 2003. A detailed account of this relationship is set forth below because several of the citations were issued for harassing MSHA inspectors and impeding MSHA inspections.

William Owen, the supervisory inspector in MSHA's Fort Dodge, Iowa, office, testified that MSHA first became aware of Jeppesen's operation in October 2003 when another gravel operator in the area asked an MSHA inspector if MSHA was aware of Jeppesen's pit. (Tr. 13). Belinda Parsons, MSHA's field service person, contacted Jay Jeppesen to set up an appointment to meet with him so that a legal identity form could be filled out, training plans could be established, and "the basics" could be started. (Tr. 14). When Ms. Parsons traveled to the pit at the appointed time, nobody was there and she could not find Mr. Jeppesen. She left some written material for him. The following day, Ms. Parsons called the pit and talked to Mrs. Jeppesen to reschedule their appointment. Mrs. Jeppesen stated that Jeppesen Gravel was not interested in rescheduling the appointment and that "they didn't have any need to deal with MSHA." (Tr. 15).

The following spring, Inspector Jim Hines traveled to the Jeppesen pit to talk to Mr. Jeppesen. Mr. Jeppesen was operating a loader when Inspector Hines arrived. Inspector Hines told Mr. Jeppesen that he was there to get the legal identity form filled out, to start getting him "in line with the requirements," and that MSHA would conduct a compliance assistance visit ("CAV"). (Tr. 16). At this point, Mr. Jeppesen became upset and told Hines that he was not interested and that he did not want to do any of these things. Inspector Hines then left the area.

In May 2004, Inspector Owen visited the Jeppesen pit with Inspector Jeffrey Bagwell. The property is quite large and they did not see anyone there when they first arrived. When the inspectors saw a truck traveling down a road in another area on the property, they got in their vehicle and drove to where the truck had stopped. Mr. Jeppesen got out of the truck and Inspector Owen introduced himself and told Jeppesen why he was there. Mr. Jeppesen questioned Inspector Owen's right to be there. Jeppesen explained that he did not have any employees and that he was exempt. Inspector Owens told Jeppesen that he was not exempt from the requirements of the Mine Act and proceeded to explain that he needed to fill out a legal identity report and that MSHA would perform a CAV. Inspector Owens testified that Mr. Jeppesen became angry and asked the inspectors to leave. When Inspector Owen asked Mr. Jeppesen if he was denying MSHA entry to the mine, Jeppesen replied "yes." (Tr. 21). The inspectors then explained that it would not be in Jeppesen's best interest to deny MSHA entry to the mine because MSHA was not going to go away. Mr. Jeppesen "became more upset" and told the inspectors "to leave him alone and get off the property." *Id.* The inspectors then left the mine.

Inspector Owen wrote up a denial of entry order and then reentered the mine to talk to Mr. Jeppesen again to see if he would reconsider. Owen explained that he had the authority to issue a withdrawal order that would shut down his operation. Mr. Jeppesen became angry again and told the inspectors to get off his property. After talking to the MSHA District Office, he waited for Mr. Jeppesen's truck on the public road at the entrance to the pit. He attempted to serve Jeppesen with the denial of entry order. Mr. Jeppesen stopped his truck, but refused to take the papers the inspector wanted to hand him. These papers included the order, a legal identity report to be filled out, and other material. This paperwork was mailed to the pit the next day, but the material came back as "denied." MSHA tried to mail this material a second time but Jeppesen Gravel again refused to accept it.

The Department of Labor's Office of the Solicitor contacted Jeppesen Gravel to get consent to inspect the mine. When the Solicitor's office was not successful, counsel filed an application for a consent judgment with the United States District Court for the Northern District of Iowa. Counsel was apparently successful in getting Mr. Jeppesen to sign the consent judgment. (Ex. G-3).

On June 28, 2005, Inspector Owen returned to the property with Inspector Tony Runyon to conduct a CAV. Mr. Jeppesen was operating a front-end loader and had just dumped material into the feeder. The diesel generator was powering the plant, which was operating at that time. Mr. Jeppesen was the only person at the plant. When the inspector told Mr. Jeppesen that he was there to conduct an inspection, he became angry. He shut down the loader and the plant. Owen reminded Jeppesen that the parties had entered into a consent judgment that had been filed with the U.S. District Court wherein Jeppesen agreed to allow MSHA to inspect the pit. (Tr. 24; Ex. G-3). Inspector Owens testified that Jeppesen got into his truck and just said, "inspect." (Tr. 25). Inspector Owen terminated the previous denial of access order of withdrawal and told Jeppesen that he needed someone to operate the mobile equipment. Mr. Jeppesen did not say

much during the inspection and, according to Inspector Owen, he was not cooperative. He would not operate the mobile equipment so that the brakes could be checked. Instead, Mr. Jeppesen left the mine site and the inspectors walked around and conducted an inspection as best they could. The inspector issued ten CAV notices of violation.

The following day, when Jeppesen did not show up at the plant area, Inspector Owen called his house. Mrs. Jeppesen answered the phone and told him that he had left for the day. The inspector asked her to tell Mr. Jeppesen to call him so that they could complete the CAV inspection. Mr. Jeppesen never returned his call. The inspectors went to the repair shop/garage (the "shop"), the lights were on and there was a radio playing but they could not find anyone.

On the third day, when Inspector Owen called Mr. Jeppesen, his wife told him that he had left for the day. The inspector told Mrs. Jeppesen that he needed to complete the inspection. Later that day, Mrs. Jeppesen called Inspector Owen to tell him that Mr. Jeppesen would not be available that day. After looking around some more, the inspectors left the property. The CAV notices as well as other materials were sent to Mr. Jeppesen via Federal Express. (Tr. 27-28).

In September 20, 2005, Inspectors Owen and Ellis traveled to the Jeppesen Pit to conduct a regular inspection. When they arrived, it was obvious that the plant had been in operation because there were changes in equipment and the setup of the plant and there were changes in the stockpile products. The inspectors documented what they saw in a series of photographs. (Tr. 29; Ex. G-1). They used the photographs to document hazardous conditions. Owen testified that none of these conditions would require a great deal of money to repair or fix. (Tr. 31). Shortly after the inspectors arrived, two dump trucks pulled in bearing the name "Jeppesen Gravel." When Mr. Jeppesen got out of one of the trucks, Inspector Owen told him that they were there to conduct a regular inspection. Mr. Jeppesen replied, "We're not working today." (Tr. 32). In response, Inspector Owen asked Jeppesen if he would mind walking around the plant with him. Jeppesen declined the offer and both trucks left the property. The two inspectors completed as much of the inspection as they could without anyone present to operate mobile equipment.

The following day, Inspector Owen returned to the mine and called Mr. Jeppesen at home. His wife told the inspector that he had left for the day. The inspector called Jeppesen's cell phone and told him that MSHA needed to complete the inspection by having someone there to operate mobile equipment. The lights were on in the shop, a radio was playing, and the door was open, but nobody was present.

On September 22, 2005, Inspector Owen returned to the mine. He again asked Mrs. Jeppesen to have Mr. Jeppesen call him. When Owen went to the plant, a loader was loading trucks at the stockpiles and Mr. Jeppesen was in a backhoe. Jeppesen got out of the backhoe, walked to his truck, and proceeded to drive away. Before Jeppesen left, the inspector had a brief conversation with him asking whether he would accept the paperwork and also walk around the plant with him. Mr. Jeppesen refused. The inspector left the citations and other paperwork at the plant. Another copy of these documents was mailed to the mine. Included with these documents

was a letter from Gregory Tronson of the Secretary's Office of the Solicitor warning Jeppesen Gravel that if it fails to cooperate with MSHA inspectors, the Department of Labor will file suit to enforce the consent judgment. (Ex. G-3).

On October 19, 2005, Inspectors Owen and Runyon returned to the pit to terminate citations and conduct a follow-up inspection. (Tr. 43). There was nobody at the site when the inspectors arrived but the conditions had changed since their September inspection. It was obvious to the inspectors that the plant had been operated since their previous inspection. The engine on the loader was warm. (Tr. 46). They took photographs of the plant. (Tr. 44; Ex. G-14). They also looked at the hazardous conditions that they had previously cited and wrote up section 104(b) orders for conditions that had not been abated. Next, they drove to the shop and saw Mr. Jeppesen leaving the area in a pickup truck.

Inspector Owen traveled to the pit again on January 12, 2006. Accompanying him was Assistant United States Attorney Martha Fagg. They had made an appointment with Mr. Jeppesen to meet on that day. Ms. Fagg was present to see if she could help resolve the difficulties that had arisen between MSHA and Jeppesen Gravel. Owen testified that she wanted "to let [the Jeppesens] know what some of their options were to get into compliance and move the whole procedure in a positive manner." (Tr. 71). MSHA had not been able to complete its inspection of Jeppesen Gravel because, for example, it had not allowed inspectors to test the braking systems on mobile equipment and to review its records on training, workplace examinations, and electrical grounding. A United States Marshal and a county deputy were also present. They caught up with Mr. Jeppesen at the pit. Ms. Fagg talked to Jeppesen and described some of his options. For example, she explained the process for contesting citations. She also stated that MSHA had estimated that it would cost Jeppesen about \$1,500 to correct the conditions that had been cited by MSHA during the previous inspection. Jeppesen said that he did not have \$1,500. When Mr. Jeppesen questioned whether it would cost him \$1,500 every time MSHA inspected his facility, the meeting became more confrontational. Inspector Owen reviewed MSHA's small mines booklet to show Jeppesen the steps necessary to come into compliance. When Owen asked about looking at Jeppesen's records, Mr. Jeppesen replied that he did not have any records that were ready for review. (Tr. 75). He also refused to walk around the mine so that Inspector Owen could show him the conditions that needed correction. When Mr. Jeppesen made it clear that he was not interested in talking about safety issues any further, the inspection party left the mine.

The next day, Mr. Jeppesen called Ms. Fagg and asked for copies of citations that he had refused to take during the earlier inspections. Inspector Owen responded to this request and included a cover letter in which he summarized some of the steps that Jeppesen needed to take to come into compliance with MSHA regulations and standards. (Tr. 77; Ex. G-68).

On June 6, 2006, Inspector Jeffrey Bagwell inspected the Jeppesen property along with Assistant District Manager Herald Holeman. They were there to conduct a CAV and to follow up on previously issued citations. The district had agreed that MSHA would conduct another

CAV and this visit had been previously scheduled with Mr. Jeppesen. (Tr. 83). Although there was no one around when he first arrived, Mr. Jeppesen, his wife and his adult daughter, Katie Jeppesen, arrived soon thereafter. As he began his CAV inspection, he encountered an unguarded tail pulley. Bagwell explained to Katie Jeppesen how fatal accidents can occur as a result of unguarded tail pulleys. Mr. Jeppesen came up and accused the inspector of trying to scare his daughter. Mr. Holeman intervened and tried to explain that Bagwell was not trying to scare anyone but was trying to educate everyone. Mr. Jeppesen became verbally aggressive with Mr. Holeman, walked up to him and touched him. (Tr. 84). Holeman told Jeppesen that his behavior could be considered as "trying to intimidate and harass a federal mine inspector." (Tr. 84, 91-92). When Mr. Jeppesen continued to yell at him, Inspector Bagwell was instructed to issue a section 103 citation for intimidating a federal mine inspector, which he did. (Tr. 85; Ex. G-70). Inspectors Bagwell and Holeman were set to leave the mine when Jeppesen calmed down and said that he would allow the inspection to continue. Mr. Jeppesen accompanied the inspectors on the inspection and was cooperative with them.

At one point during this inspection, Bagwell went to his vehicle to get an electrical book. Holeman used this opportunity to write down some notes on the day's activities. Katie Jeppesen approached him and demanded to know what he was writing down. When he would not reveal his exact words, Mr. Jeppesen ordered Holeman to go to his vehicle. Holeman explained that he was there to help Inspector Bagwell with his CAV inspection. (Tr. 93-94). Inspectors Bagwell and Holeman decided that, since Bagwell seemed to have a better relationship with Mr. Jeppesen, Inspector Bagwell would continue the CAV inspection and Holeman would remain in his vehicle and observe the inspection.

On July 19, 2006, Inspector Jeffrey Hornbeck traveled to the pit with Inspector Owen. He was there to conduct a regular inspection and to terminate any outstanding citations. The inspectors saw Jay Jeppesen's son, Alan Jeppesen, in the pit area. Because Alan Jeppesen was getting ready to operate a loader, the inspector asked him to check the brakes, the backup alarm, and the horn. (Tr. 99). Alan refused, got off the loader without setting the parking brake, and left the area. Inspector Hornbeck took photographs and conducted his inspection. Later during this inspection, Jay Jeppesen arrived and ordered both inspectors off his property. (Tr. 108). When Inspector Owen explained that they were there to conduct a regular inspection, Jeppesen seemed very upset and did not talk. Because they wanted to avoid any altercations, the inspectors left the property. Inspector Hornbeck issued a section 104(a) citation alleging a violation of section 103(a) of the Mine Act for refusing to allow the inspection to continue. (Tr. 109; Ex. G-79).

On August 24, 2006, Inspector Jeffrey Schaaf accompanied Inspector Owen on a compliance follow-up visit to Jeppesen Gravel. They were accompanied by an Osceola County Deputy. There was nobody at the mine but it appeared that mining activity had recently occurred. The inspector took photographs of the mine site. (Tr. 115-16; Ex. G-82). The inspector issued some section 104(b) orders of withdrawal. When Jay Jeppesen arrived, he was upset that Inspector Owen was present. Inspector Schaaf asked to inspect the mobile equipment,

but Jeppesen refused to operate the equipment. The inspectors explained why they were there and that the loader needed to be operated to check the brakes, horn, and backup alarm. When Jeppesen continued to refuse to operate the loader and told Inspector Owen to leave the property, Inspector Schaaf issued a section 104(b) order for the operator's refusal to comply with the denial of entry citation. (Tr. 121; Ex. G-88).

Mr. Jeppesen did not seriously dispute these events, although he seemed to believe that many of the disputes were instigated by MSHA's aggressive actions. He testified that, as of the date of the hearing, Jeppesen Gravel is "virtually in compliance." *Id.* He had to remove mobile equipment that was not in compliance with MSHA requirements and rent newer equipment. He testified that he has spent about \$8,000 to get into compliance and most of that is on his personal credit card. Jeppesen testified that Mike Jackley from MSHA's small mines office was immensely helpful. Jeppesen testified that he completely "redid" his operation in the spring of 2006 to come into compliance MSHA's regulations.

## **II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In 1979, MSHA entered into an interagency agreement with the Department of Labor's Occupational Safety and Health Administration ("OSHA") to provide some guidance to the regulated community on the jurisdiction of these two agencies ("Interagency Agreement"). (<http://www.msha.gov/regs/1979mshaoshammu.htm>). In section B(7) of the Interagency Agreement, the following definition is provided:

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

MSHA has determined that some of areas on Jeppesen's property are actually borrow pits that are not subject to MSHA jurisdiction. These borrow pits are separate from the pits used to mine sand and gravel. Pits used to mine gravel, whether the material is treated at the plant or not, are subject to MSHA jurisdiction.

At the hearing, Mr. Jeppesen presented several of his federal tax returns to show that he is virtually broke. These returns show that his adjusted gross income was \$11,347 in 2006, was \$30,256 in 2005, and was \$7,995 in 2004. (Tr. 140). His Schedule C for 2006 shows a profit of \$9,100 on his business. (Tr. 141). His Schedule C for 2005 shows a profit of \$29,800. His Schedule C for 2003 shows a net loss of \$28,500. (Tr. 142). He also introduced a letter from his bank showing that he has about \$254,000 in outstanding loans from the bank. (Ex. R-1).

#### **A. Citations Issued.**

Jeppesen Gravel was issued 16 citations between September 2005 and July 2006, as follows:

1. On September 20, 2005, Inspector Owen issued Citation No. 6154828 alleging a violation of section 56.14130(a)(3). (Exs. G-4, G-6). The citation alleges that a Caterpillar 966C front-end loader, which was manufactured in 1970, was not provided with a roll-over protective structure ("ROPS"). It also had a seatbelt that was not properly installed and maintained. Inspector Owen determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that the negligence was moderate. The inspector determined that the violation was serious because the loader travels on the feed ramp and on rock stockpiles and is therefore subject to a rollover hazard. (Tr. 39). The safety standard provides that ROPS and seatbelts shall be installed on wheel loaders. The safety standard also requires that seatbelts be maintained in a functional condition and replaced when necessary to assure proper performance. The Secretary proposes a penalty of \$124.00 for this citation.

2. On September 20, 2005, Inspector Owen issued Citation No. 6154829 alleging a violation of section 56.9301. (Exs. G-7, G-9). The citation alleges that adequate berms were not provided on the sides of the ramp on the oversize rock pile, which is used by the front-end loader. The ramp was about 6 feet high, 35 feet long, and 12 feet wide. The berm was 16 inches high on the east side and 4 inches high on the west side. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector observed loader tracks near the edge of the ramp on the pile. (Tr. 41). The safety standard provides that berms or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning. The Secretary proposes a penalty of \$60.00 for this citation.

3. On September 20, 2005, Inspector Owen issued Citation No. 6154830 alleging a violation of section 56.12018. (Exs. G-10, G-12). The citation alleges that the individual circuit breakers on the free standing control panel were not labeled to show which circuit they controlled. In the event of an emergency, persons may not be able to determine which circuit to disconnect. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that, although Mr. Jeppesen

is likely to be aware what each switch controls, others may not. (Tr. 42). The safety standard provides that principal power switches shall be labeled to show which units they control. When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154840 under section 104(b) of the Mine Act. (Ex. G-15). The Secretary proposes a penalty of \$237.00 for this citation.

4. On September 20, 2005, Inspector Owen issued Citation No. 6154831 alleging a violation of section 56.14130(c). (Exs. G-18, G-20). The citation alleges that the Caterpillar 936E front-end loader was not provided with a ROPS approval label. The loader was parked in the plant area but the tire tracks indicated that it had recently been used. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the ROPS on the cab of the loader appeared to fit but, without the label, he could not be certain. (Tr. 41). The safety standard provides that all ROPS must have a permanent label designating the make and model number of the equipment for which the ROPS is designed. The Secretary proposes a penalty of \$60.00 for this citation.

5. On September 20, 2005, Inspector Owen issued Citation No. 6154832 alleging a violation of section 56.14107(a). (Exs. G-21, G-23). The citation alleges that the self-cleaning tail pulley on the dozer trap feeder conveyor was not guarded. The condition was in an area that is not normally traveled during plant operations, but the pulley was totally exposed. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that, although contact with the tail pulley was not likely, the pulley was so open that someone could be drawn into it upon accidental contact. (Tr. 50). The safety standard provides that moving machine parts shall be guarded to protect people from contacting drive, head, tail, and takeup pulleys and other similar moving parts that can cause injury. When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154841 under section 104(b) of the Mine Act. (Ex. G-24). The Secretary proposes a penalty of \$271.00 for this citation.

6. On September 20, 2005, Inspector Owen issued Citation No. 6154833 alleging a violation of section 56.12008. (Exs. G-26, G-28). The citation alleges that bushings were not provided where the power cord for the feeder conveyor motor exited the disconnect box on the conveyor framework and at the motor junction box. This same condition existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the outer jacket on the cable did not appear to be damaged but that the vibration of the machinery could damage the cable creating an electric shock hazard. (Tr. 52). The safety standard provides that power wires and cable shall enter metal frames of motors, splice boxes, and electrical components only through proper fittings and bushings. When Inspector Owen returned on October 19, 2005, he discovered that

no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154842 under section 104(b) of the Mine Act. (Ex. G-29). The Secretary proposes a penalty of \$291.00 for this citation.

7. On September 20, 2005, Inspector Owen issued Citation No. 6154834 alleging a violation of section 56.14107(a). (Exs. G-32, G-34). The citation alleges that the tail pulley on the rock discharge conveyor for the screen plant was not guarded. The tail pulley was located at the top of a ladder providing access to the walkway for the screen plant. The tail pulley was about two feet above the walkway but the conveyor framework partially blocked access. This same condition existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that, although contact with the tail pulley was not likely because it was behind structural steel, if someone were to come into contact with the moving parts he could be severely injured. (Tr. 56). When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154843 under section 104(b) of the Mine Act. (Ex. G-35). The Secretary proposes a penalty of \$237.00 for this citation.

8. On September 20, 2005, Inspector Owen issued Citation No. 6154835 alleging a violation of section 56.14107(a). (Exs. G-38, G-40). The citation alleges that the tail pulley on the sand discharge conveyor for the screen plant was not guarded. The tail pulley was about two feet above the ground and was partially guarded by location. This same condition existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the tail pulley was partially guarded due to the fact that it was located "within the confines of the machinery." (Tr. 57-58). When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154844 under section 104(b) of the Mine Act. (Ex. G-41). The Secretary proposes a penalty of \$237.00 for this citation.

9. On September 20, 2005, Inspector Owen issued Citation No. 6154836 alleging a violation of section 56.14107(a). (Exs. G-43, G-45). The citation alleges that the self-cleaning tail pulley on the portable conveyor feeding sand to the screening plant was not completely guarded. The sides and top were well guarded but the pulley was fully exposed from the rear. The opening was about 40 inches wide and 20 inches high and the pulley was recessed about 4 inches. This same condition existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the exposed tail pulley was about 30 inches above the ground, but that the area is not normally traveled while the plant is operating. (Tr. 60). Because the opening was large, someone could be pulled into the pulley if contact were made. When Inspector Owen

returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154844 under section 104(b) of the Mine Act. (Ex. G-46). The Secretary proposes a penalty of \$291.00 for this citation.

10. On September 20, 2005, Inspector Owen issued Citation No. 6154837 alleging a violation of section 56.12008. (Exs. G-49, G-51). The citation alleges that bushings were not provided where the power cord for the rock discharge conveyor exited the disconnect box and at the junction box on the support leg of the screening plant. There were also 2 inches of inner conductors exposed on the power cord at the junction box on the support leg of the screening plant and there were 14 inches of exposed inner conductors on the power cords at the fused disconnect box. These same conditions existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the copper conductors were not exposed at any location but that there was no mechanical protection where the outer jacket had been stripped away. (Tr. 62-63). When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154846 under section 104(b) of the Mine Act. (Ex. G-52). The Secretary proposes a penalty of \$291.00 for this citation.

11. On September 20, 2005, Inspector Owen issued Citation No. 6154838 alleging a violation of section 56.12032. (Exs. G-55, G-57). The citation alleges that there was an opening in the plug-in panel at the rear of the portable generator exposing a person to the hazard of contacting the bus bars inside the panel. The opening was four inches in diameter and the bus bars were two inches behind the opening. The opening was below the generator controls. Inspector Owen determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that inspection and cover plates on electrical equipment shall be kept in place at all times except during testing and repairs. The inspector testified that the controls to start the generator motor were on another side, but the controls to turn on the power were above the cited opening. (Tr. 65-66). The bus bars were just inside the opening. He believed that a serious injury was reasonably likely. When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154847 under section 104(b) of the Mine Act. (Ex. G-58). The Secretary proposes a penalty of \$354.00 for this citation.

12. On September 20, 2005, Inspector Owen issued Citation No. 6154839 alleging a violation of section 56.4101. (Exs. G-61, G-63). The citation alleges that warning signs were not provided on the large fuel tank on the portable generator to prohibit smoking or the use of open flames. Inspector Owen determined that an injury was unlikely and that any injury would not result in lost work days. He determined that the violation was not S&S and that the negligence was low. The safety standard provides that readily visible signs prohibiting smoking and open flames must be posted where a fire or explosion hazard exists. The inspector testified that, because it would be rather obvious to anyone that the tank contained diesel fuel and the tank

was not leaking, an injury was not likely. (Tr. 68). When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154848 under section 104(b) of the Mine Act. (Ex. G-64). The Secretary proposes a penalty of \$94.00 for this citation.

13. On June 6, 2006, Inspector Bagwell issued Citation No. 6181361 alleging a violation of section 103(a) of the Mine Act. (Ex. G-70). The citation alleges that the mine operator harassed and tried to intimidate a federal mine inspector while he was trying to conduct a compliance follow-up inspection. The mine operator “engaged in screaming and provoking comments.” Inspector Bagwell determined that an injury was not likely and the violation would not result in any lost workdays. He determined that the violation was not S&S and that the negligence was high. Section 103(a) of the Mine Act provides that authorized representatives of the Secretary of Labor shall make frequent inspections of mines to determine whether there is compliance with health and safety standards. This section further provides that in fulfilling this responsibility under the Mine Act, the authorized representatives of the Secretary “shall have a right of entry to, upon, or through any . . . mine.” The inspector testified that, after he started the inspection, Jay Jeppesen started yelling at Assistant District Manager Holeman and then got in very close to him. (Tr. 84). He issued this citation based on Mr. Jeppesen’s behavior. Holeman testified that Jeppesen refused to shake his hand when he arrived. Later, Mr. Jeppesen started yelling at him and made physical contact with him. (Tr. 91). After Holeman warned Jeppesen that he could be issued a citation for harassing and intimidating a federal inspector, Jeppesen continued to scream at him. Holeman remained in his vehicle during the remainder of the inspection. The Secretary proposes a penalty of \$275.00 for this citation.

14. On July 19, 2006, Inspector Hornbeck issued Citation No. 6182485 alleging a violation of section 56.14130(h). (Exs. G-74, G-76). The citation alleges that the seat belt for the Caterpillar 966C front-end loader was not in functional condition. The female latch was rusted closed and the seatbelt could not be latched or unlatched. In addition, the straps for the seatbelt were attached to the seat itself and not to the mounting point on the loader. Inspector Hornbeck determined that an injury was reasonably likely and any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that the negligence was high. The safety standard sets forth the requirements for seatbelt construction. The inspector testified that the seatbelt straps were not tethered to the frame of the loader and the belt buckle would not work. (Tr. 103). Before he arrived to inspect Jeppesen Gravel, he reviewed MSHA’s file on Jeppesen Gravel in his office. He discovered that Citation No. 6154828 issued by Inspector Owen on September 20, 2005, for failing to have an operable seatbelt on this loader was terminated when Jeppesen removed the loader from mine property for use at its borrow pit. (Tr. 104; Ex. G-72). As a consequence, he determined that Jeppesen’s negligence was high because Mr. Jeppesen was told that he could not bring the loader back to the mine until the seatbelt was fixed. (Tr. 104-05). The Secretary proposes a penalty of \$1,800.00 for this citation.

15. On July 19, 2006, Inspector Hornbeck issued Citation No. 6182486 alleging a violation of section 56.14130(a). (Exs. G-76, G-77). The citation alleges that there was no

ROPS on the Caterpillar 966C front-end loader and that the loader had been previously cited for this condition. The loader was being used to load delivery trucks from product stockpiles. Inspector Hornbeck determined that an injury was reasonably likely and any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that the negligence was high. The inspector testified that the violation was very serious. (Tr. 106). As with the previous citation, this condition was cited previously and was terminated when the loader was removed to the borrow pit. As a consequence, he determined that Jeppesen's negligence was high because Mr. Jeppesen was told that he could not bring the loader back to the mine until a ROPS was installed. (Tr. 104-05). The Secretary proposes a penalty of \$1,800.00 for this citation.

16. On July 19, 2006, Inspector Hornbeck issued Citation No. 6182487 alleging a violation of section 103(a) of the Mine Act. (Ex. G-79). The citation alleges that the mine operator refused to allow an authorized representative to inspect his mine. Inspector Owen was with Inspector Hornbeck during the inspection. Mr. Jeppesen approached the MSHA inspectors in a pickup truck "driving erratically sliding to a stop exiting the vehicle shouting, "Bill Owen, you can't be here this is my property and I told you can't be here and get off my property." When Inspector Owen tried to tell Jay Jeppesen that he was denying entry to an authorized representative of the Secretary of Labor, Jeppesen told him to leave and not come back. Inspector Hornbeck determined that an injury was not likely and the violation would not result in any lost workdays. He determined that the violation was not S&S and that Jeppesen demonstrated reckless disregard. The inspector testified that he was concerned that there could be an altercation, given Mr. Jeppesen's angry demeanor. (Tr. 108). Inspectors Owens and Hornbeck left the property after the citation was written. The Secretary proposes a penalty of \$1,000.00 for this citation.

## **B. Discussion and Analysis**

Jeppesen Gravel did not introduce evidence to contradict the evidence presented by the Secretary other than to state that the crushing plant was not operating at the time of several MSHA inspections. (Tr. 123). Instead, it argues that it does not have any money to pay the proposed penalties. Jeppesen states that the MSHA inspectors have been uncooperative. The inspectors conduct CAV inspections, which should not involve any penalties, but when they returned, citations and penalties were issued. In his opening statement, Mr. Jeppesen stated that "from the very beginning, I have explained that getting into compliance is going to be a grave hardship for my family." (Tr. 6). MSHA is "making me choose between having a guard on an implement that only I can get caught in or not having good enough tires for my family to ride in." *Id.* He stated that if he had the money, he would gladly fix everything to MSHA's standards.

I find that Jeppesen Gravel is a very small, seasonal sole proprietorship. The information submitted to MSHA by Jeppesen Gravel indicates that Jeppesen operated the pit and plant about 16 hours in 2006. Although that figure is likely too low, there is no doubt that Jeppesen is an

extremely small operation. Mr. Jeppesen does not have many assets and he has little money to pay penalties.

Apparently, his pit was not known to MSHA until about 2003. Although the property is in Iowa, the main access road to the mine is along the Minnesota state line. Jay Jeppesen was hostile to MSHA from the beginning. I believe that he was being honest when he testified that he did not know who the inspectors were or what they were doing on his property the first few times they were there. Nevertheless, MSHA inspectors gave him plenty of opportunities to learn more about MSHA and its legal authority by September 2005, when the first citations at issue in these cases were issued. Moreover, when Inspector Owen arrived in January 2006 along with an Assistant United States Attorney and a United States Marshal, Mr. Jeppesen should have recognized that he could no longer refuse to cooperate with MSHA inspectors. Despite this warning, he continued to harass MSHA inspectors and impeded their lawful inspections. In addition, Mr. Jeppesen failed to take advantage of the CAV inspections because he did not make any effort to correct the deficiencies. As a consequence, citations were later issued for many of these same conditions. Moreover, he did not correct many of the hazardous conditions cited by MSHA until section 104(b) orders were issued. Finally, although Jeppesen abated Citation No. 6154828, which involved a ROPS and seatbelt violation, by removing his Caterpillar 966C loader to his borrow pit, he later brought the loader back for use in the gravel pit without correcting the deficiencies. Mr. Jeppesen was his own worst enemy during these inspections.

Nothing in the record suggests that the MSHA inspectors were overbearing, hostile, or overly aggressive. Indeed, it appears that they bent over backwards to try to inform Mr. Jeppesen about the requirements of the Mine Act and help him come into compliance. MSHA does not have the legal authority to exempt Jeppesen Gravel from the requirements of the Mine Act, so its inspectors had to take steps to get Jeppesen into compliance with the safety standards. It appears that only Mr. Jeppesen himself was put in danger as a result of the cited conditions, although his son was also apparently affected in some instances.

Mr. Jeppesen must understand that the Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10<sup>th</sup> Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

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

*Allied Products, Inc.*, 666 F.2d 890, 892-93 (5<sup>th</sup> Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in

assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great.

The Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a “reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.” *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee’s clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by an unguarded tail pulley at Jeppesen Gravel’s operation is not a defense because there is a history of such injuries at plants throughout the United States. “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . .” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). For example, fatal accidents have occurred at small operations as a result of inadequately guarded tail pulleys. See *Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000) (ALJ).

I find that the Secretary established that Jeppesen Gravel violated the safety standards and section 103(a) of the Mine Act as alleged in the 16 citations at issue. I also uphold the S&S determinations of the inspectors. A violation is classified as S&S “if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). Citation Nos. 6154828, 6182485, and 6182486 were S&S and serious violations of the cited safety standards. The other citations were neither S&S nor serious. I am mindful of the fact that, in many instances, the only individual at risk from the hazards cited was Mr. Jeppesen himself.

I am reducing the negligence of Jeppesen Gravel on those citations that were issued on September 20, 2005, where the company timely abated the condition. Thus, the negligence for Citation Nos. 6154828, 6154829, and 6154831 is reduced to “low” to reflect the fact that this

was Jeppesen's first MSHA inspection. The inspectors' negligence findings with respect to the other citations are affirmed.

The Commission has held that, when considering the ability to continue in business criterion in a case involving a sole proprietor, a judge must make findings regarding the effect of a penalty on the individual's ability to meet his financial obligations. *Unique Electric*, 20 FMSHRC 1119, 1122-23 (Oct. 1998). In this case, I find that the evidence establishes that the penalties proposed by the Secretary will significantly affect Jay Jeppesen's ability to meet his financial obligations. (*See, for example*, Tr. 139-43). I have taken this criterion into consideration in assessing the penalties in these cases.

### III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that one citation was issued prior to the citations at issue in these cases. As discussed above, Jeppesen Gravel is an extremely small mine operator. Only a few of the citations at issue in these cases were abated in good faith. As discussed above, Jeppesen Gravel demonstrated that the proposed penalties will affect its ability to continue in the sand and gravel business. My gravity and negligence findings are set forth above. Jay Jeppesen must understand that he should not expect to see such large reductions in penalties in future cases. I gave him the benefit of the doubt with respect to the negligence criterion because his experience with MSHA was limited. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

### IV. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
CENT 2006-184-M		
6154830	56.12018	\$50.00
6154832	56.14107(a)	50.00
6154833	56.12008	55.00
6154834	56.14107(a)	50.00
6154835	56.14107(a)	50.00
6154836	56.14107(a)	55.00
6154837	56.12008	55.00
6154838	56.12032	60.00
6154839	56.4101	5.00

CENT 2007-039-M

6154828	56.14130(a)(3)	50.00
6154829	56.9301	1.00
6154831	56.14130(c)	1.00

CENT 2007-067-M

6181361	103(a) Mine Act	100.00
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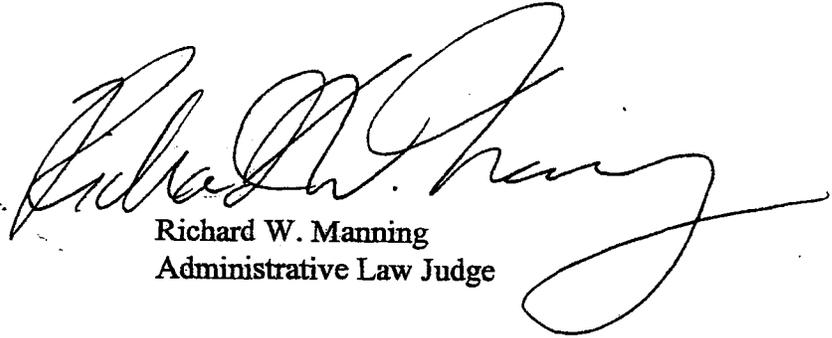
CENT 2007-067-M

6182485	56.14130(h)	200.00
6182486	56.14130(a)	200.00
6182487	103 (a) of Mine Act	500.00

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TOTAL PENALTY \$1,482.00

For the reasons set forth above, the citations and orders are **AFFIRMED** or **MODIFIED**, as set forth above. Jay Jeppesen, doing business as Jeppesen Gravel, is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,482.00 within 40 days of the date of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.



Richard W. Manning  
Administrative Law Judge

Distribution:

Gregory Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Certified Mail)

Jay A. Jeppesen, 719 Eighth Street, Sibley, IA 51249 (Certified Mail)

RWM

**ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 31, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-148-M
Petitioner	:	A.C. No. 40-03268-80642
	:	
v.	:	Docket No. SE 2006-163-M
	:	A.C. No. 40-03268-82949
SCP INVESTMENTS, LLC,	:	
Respondent	:	Old County Quarry

**ORDER TO SHOW CAUSE**

These matters concern 12 citations that were issued as a result of an inspection of the Old County Quarry conducted by Mine Safety and Health Inspector (MSHA) Jeffrey Phillips on December 14, 2005. The cited violations have been corrected and the subject citations have been terminated.

The Old County Quarry is a rock crushing facility operated by SCP Investments, LLC (“SCP”). Pat Stone is the managing partner of SCP. According to Stone, the mine commenced operations in September 2005. Section 109(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“Mine Act”) requires a mine operator to file with the Secretary of Labor (“the Secretary”) the name and address of the mine, as well as the name and address of the person who controls the mine. 30 U.S.C. § 819(d). Consistent with the statutory provisions of section 109(d), Part 41 of the Secretary’s regulations requires mine operators to file a Legal Identity Report Form within 30 days of the opening of a new mine. 30 C.F.R. §§ 41.10, 41.11(a).

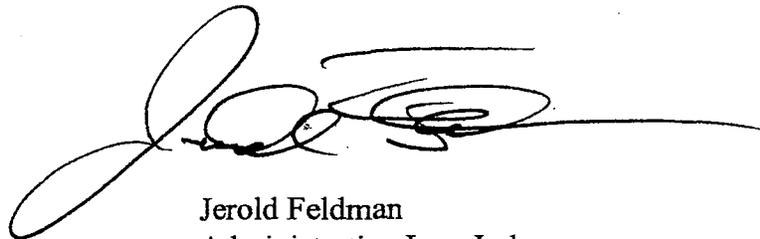
At the time of Phillips’ inspection, SCP had not filed the required Legal Identity Report Form registering the facility as an active mine. Consequently, on December 14, 2005, Phillips ordered Stone to leave the mine property rather than allow Stone to accompany him during the mine inspection, reportedly because it was too dangerous given Stone’s lack of Part 46 miner training. 30 C.F.R. Part 46. Stone, on behalf of SCP, objects to not being allowed to remain on mine property during the inspection.

Section 103(f) of the Mine Act provides, in pertinent part, “[s]ubject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany” an MSHA inspector during an inspection. 30 U.S.C. § 813(f). Thus, the right to accompany an inspector during an inspection is an important right that may only be curtailed by the Secretary’s regulations. *Consolidation Coal Co.*, 16 FMSHRC 713, 718 (Apr. 1994). Therefore, in extraordinary circumstances, the Secretary may preclude walkaround rights of miners’ representatives “where necessary to protect the safety of miners.” *Id.* at 719.

The Commission has rejected the failure to comply with MSHA filing requirements as a basis for denying section 103(f) “walkaround rights.” *Emery Mining Corporation*, 10 FMSHRC 276, 277 (Mar. 1988) (failure of a nonemployee miners’ representative to file identifying information required by 30 C.F.R. Part 40 does not permit an operator to refuse the representative entry to its mine for purposes of exercising section 103(f) walkaround rights). The Commission has also rejected the denial of walkaround rights based on an operator’s good faith reasonable belief that the area to be inspected was too dangerous to be entered. *Consolidation Coal*, 16 FMSHRC at 718-19.

In view of the above, **IT IS ORDERED** that the Secretary **SHOW CAUSE, in writing**, why the subject citations should not be vacated because MSHA’s mine inspection violated the provisions of section 103(f) of the Mine Act. Specifically, the Secretary should identify any regulation that identifies the circumstances that warrant the denial of a mine operator’s right to accompany an inspector. In addition, the Secretary should provide any Interpretive Bulletin or Memorandum addressing her implementation of the walkaround rights in section 103(f). The Secretary also should specify, by specific reference to her regulations, the requisite training that must be completed by a miners’ representative, or a mine operator, before he is allowed to be present during an inspection. Finally, the Secretary should identify, with specificity, the hazards that Stone would have been exposed to if he had accompanied Phillips on December 14, 2005, during this surface mine inspection. The Secretary may provide any additional information deemed appropriate.

**IT IS FURTHER ORDERED** that the Secretary’s response shall be filed within 21 days of this Order. If SCP Investments, LLC, wishes to respond to the Secretary, it should do so **within 14 days of receipt** of the Secretary’s response to this Order.

A handwritten signature in black ink, appearing to read "Jerold Feldman", with a long horizontal line extending to the right.

Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

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Pat Stone, SCP Investments, LLC, P.O. Box 82, Crab Orchard, TN 37723

/rps

30 FMSHRC 344