

APRIL 2001

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APRIL 2001

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

Secretary of Labor, MSHA v. Lodestar Energy, Inc., Docket No. KENT 2000-79.
(Judge Hodgdon, February 27, 2001)

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

Secretary of Labor, MSHA v. Cactus Canyon Quarries of Texas, Inc., Docket No.
CENT 2000-118-M. (Judge Zielinski, March 9, 2001)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 17, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 2001-124-M
	:	A.C. No. 24-01893-05510
MISSOULA COUNTY ROAD	:	
DEPARTMENT	:	

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On December 18, 2000, the Commission received from Missoula County Road Department (“Missoula County”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Missoula County.

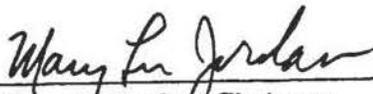
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

In a letter submitted by Missoula County’s Director of Public Works, Gregory Robertson, Missoula County contends that on August 29, 2000, it received a proposed assessment from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) for a violation that was

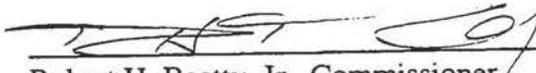
issued before Mr. Robertson began working at Missoula County. Mot. at 1. Missoula County claims that on August 30, it sent a letter contesting the proposed assessment. *Id.* It alleges that, on December 4, it received a notice of “fine and late fee” from MSHA dated November 8. *Id.* Robertson claims that he called MSHA and spoke with Tammy Nelson, who informed him that the contest letter had not been received and instructed him to send a copy of the letter by facsimile. *Id.* Missoula County contends that, on December 12, it received a letter from MSHA stating that its contest letter was received too late and could not be considered. *Id.* Missoula County requests that the Commission grant its request for relief and reopen the matter so that it may proceed to a hearing on the merits. *Id.* at 2. Attached to its request is a copy of the August 30 letter allegedly sent by Missoula County to MSHA. Attach.

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

On the basis of the present record, we are unable to evaluate the merits of Missoula County's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Ahern & Assocs., Inc.*, 23 FMSHRC 121, 122-23 (Feb. 2001) (remanding to a judge where movant claimed that it timely filed hearing request, which MSHA never received); *BR&D Enters.*, 22 FMSHRC 479, 480-81 (Apr. 2000) (remanding to a judge where operator alleged that it timely submitted hearing request by certified mail but never received receipt, and MSHA did not receive request). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



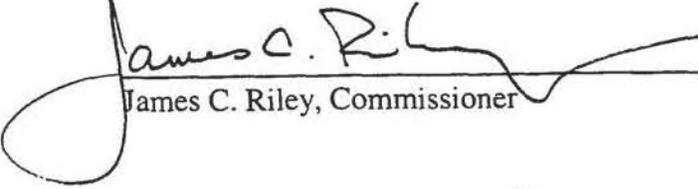
Mary Lu Jordan, Chairman



Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

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


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 17, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2001-182-M
	:	A.C. No. 04-04075-05588
v.	:	
	:	Docket No. WEST 2001-183-M
KAISER CEMENT CORPORATION	:	A.C. No. 04-04075-05590

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, 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. (1994) (“Mine Act”). On January 23, 2001, the Commission received from Kaiser Cement Corporation (“Kaiser”) a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose Kaiser’s motion for relief.

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

In its request, Kaiser, which is represented by counsel, asserts that it mishandled and inadvertently paid two proposed penalty assessments associated with citations that it had previously contested. Mot. at 1-3. Specifically, Kaiser submits that on March 16-18, 1999, it received the underlying citations from the Department of Labor’s Mine Safety and Health Administration (“MSHA”), and on April 15, 1999, it filed Notice of Contests for each citation. *Id.* at 1. Kaiser contends that its contests were docketed and assigned to Administrative Law Judge

Richard W. Manning, who granted the Secretary's request to stay proceedings pending the issuance of the associated proposed penalties. *Id.* at 1-2. It asserts that in July 1999, its Safety Director Danny Lowe, who had handled the citations, left Kaiser, and that its Purchasing Director, Jack Hewton, temporarily assumed the responsibilities of Safety Director. *Id.* at 2. Subsequently, on January 24 and April 3, 2000, Kaiser contends that Hewton received the proposed penalty assessments for the underlying citations and, unaware that Kaiser had previously contested the underlying citations, initiated payment. *Id.* at 2-3. Kaiser asserts that payment of the proposed assessments and failure to submit the green cards were the result of an administrative mistake and miscommunication during a transition period in its safety department, amounting to inadvertence or a genuine mistake, and that it intended to continue to contest the citations and penalties. *Id.* at 3-4. It also argues that genuine issues exist regarding the merits of the civil penalties and underlying citations, and requests that the Commission grant its request for relief. *Id.* Attached to its request is the affidavit of Jack Hewton which supports Kaiser's allegations. Attach.

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

The record indicates that Kaiser intended to contest the proposed penalty assessments, but that it failed to do so in a timely manner due to internal mismanagement. The declaration attached to Kaiser's request appears to be sufficiently reliable and supports Kaiser's allegations. In the circumstances presented here, we will treat Kaiser's late filing of a hearing request as resulting from inadvertence or mistake.¹ *See Martin Marietta Aggregates*, 22 FMSHRC 1178, 1179-80 (Oct. 2000) (granting motion to reopen where operator's inadvertent payment of the proposed assessment was due to processing error by its accounts payable department and operator attached notarized statement supporting its allegations); *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999) (granting the motion to reopen where the employee responsible for handling penalties was out of the country and mishandling of the proposed assessments resulted in mistaken payment); *Cyprus Emerald-Res. Corp.*, 21 FMSHRC 592, 593-94 (June 1999) (granting motion to reopen

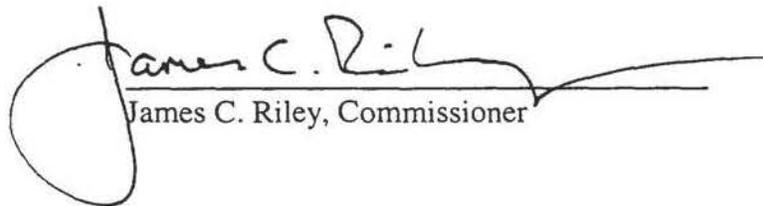
¹ In any case, Commissioners Riley and Verheggen would grant Kaiser's request for relief on the basis that it is not opposed by the Secretary, and because no other circumstances exist that would render such a grant problematic.

where operator supported its allegation that it mistakenly paid proposed penalty assessment with an affidavit).

Accordingly, in the interest of justice, we grant Kaiser's request for relief, reopen these penalty assessments that became final orders, and remand to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



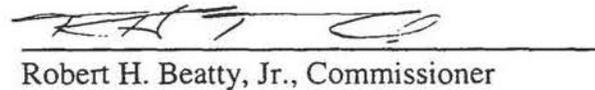
Mary Lu Jordan, Chairman



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 17, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2001-89-M
	:	A.C. No. 32-00740-05510
CLOSE CONSTRUCTION COMPANY, INC.	:	

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On January 25, 2001, the Commission received from Close Construction Company (“Close”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Close.

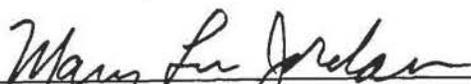
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

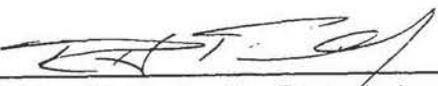
In a letter submitted by the president of Close Construction, Greg Close, Close contends that it previously sent a letter to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) contesting the proposed penalty assessment it currently seeks to reopen, but that the letter contained a typing error. Mot. Close asserts that, as a result of this error, it had indicated an incorrect assessment control number for the proposed assessment that it intended to contest, and

that the correct number is 32-00740-05510. *Id.* It explains that it did not realize its error until it received a notice from MSHA stating that Close had failed to pay the penalty. *Id.* Close requests that the Commission grant its request for relief and reopen the proceeding. *Id.*

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

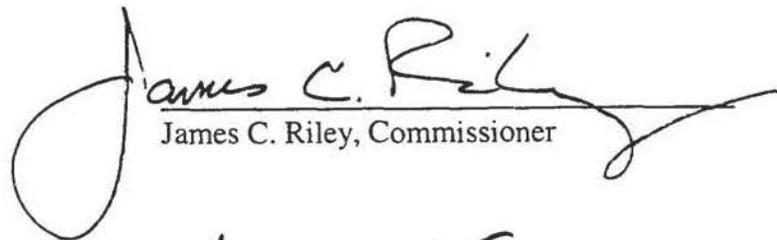
On the basis of the present record, we are unable to evaluate the merits of Close’s position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Drummond Co.*, 17 FMSHRC 883, 883-84 (June 1995) (remanding to a judge where operator mistakenly circled citations it did not wish to contest, rather than circling the citations it sought to contest). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

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



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner

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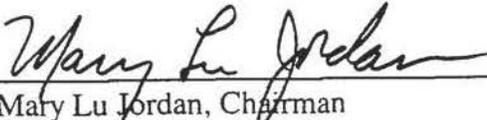
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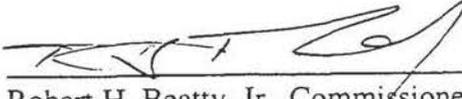
request for relief and reopen the proceeding. *Id.* Attached to its request is a copy of the proposed assessment with the notations “Protested 11-7-00” and “Lynn Johnson 2-5-00.”

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

On the basis of the present record, we are unable to evaluate the merits of H & D’s position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. See *Original Sixteen to One Mine, Inc.*, 23 FMSHRC 149, 149-50 (Feb. 2001) (remanding to a judge where operator alleged that it sent a hearing request to MSHA, but MSHA did not receive the request); *Ahern & Assocs., Inc.*, 23 FMSHRC 121, 121-22 (Feb. 2001) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.



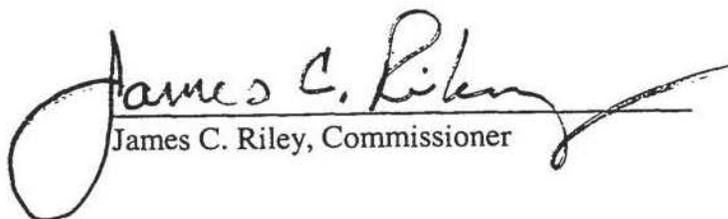
Mary Lu Jordan, Chairman



Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

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


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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April 20, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of DEWAYNE YORK	:	
	:	
v.	:	Docket No. KENT 2000-255-D
	:	
BR&D ENTERPRISES, INC.	:	

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

ORDER

BY THE COMMISSION:

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c)(2) (1994). On August 29, 2000, Commission Administrative Law Judge Michael E. Zielinski ordered the temporary reinstatement of Dewayne York. 22 FMSHRC 1013, 1019 (Aug. 200) (ALJ). The matter comes before the Commission on a motion made by the Secretary of Labor under Commission Procedural Rule 1(b) and Rule 60(b) of the Federal Rules of Civil Procedure asking the Commission to reopen the proceedings and remand the case to the judge to allow him to review and rule on an agreement among the parties to economically reinstate York. For the reasons that follow, we find that the judge has sole jurisdiction over this case, and accordingly, we dismiss the Secretary's motion for lack of jurisdiction.

On May 26, 2000, Dewayne York filed a discrimination complaint with the Department of Labor's Mine Safety & Health Administration ("MSHA"). After a preliminary investigation of York's complaint, on August 4, 2000, the Secretary applied to the Commission for York's temporary reinstatement. A hearing on the Secretary's application was held, and on August 29, 2000, the judge ordered York's temporary reinstatement. 22 FMSHRC at 1019. The judge's order was not appealed. *See* 29 C.F.R. § 2700.45(f) (expedited procedures for appealing to the Commission an order in a temporary reinstatement proceeding).

The parties subsequently agreed that York should be “economically reinstated rather than being placed back to work.” Mot. Attach. C (Agreed Order on Economic Reinstatement Oct. 11, 2000). It appears that York’s economic reinstatement has already been implemented. The parties’ Agreed Order states that York’s economic reinstatement “began on August 31, 2000,” and includes York “receiv[ing] the same amount of pay, including overtime pay . . . [and] any and all benefits which he would receive” if he were working, including health insurance. *Id.* The parties requested that the judge enter an order modifying his temporary reinstatement order to bring it into accord with the parties’ agreement on economic reinstatement. *Id.*

In a December 21, 2000 letter to the parties, Judge Zielinski declined to amend his temporary reinstatement order. Mot. Attach. D. The judge stated:

[T]he Agreed Order raises a serious question of jurisdiction. Commission Procedural Rule 69(b) provides that a judge’s jurisdiction terminates upon issuance of a decision. . . . While the rules contemplate some continuing jurisdiction over an order of temporary reinstatement (*see*, Rule 45(f)), I have concluded that the more likely construction is that an ALJ does not have jurisdiction to amend an order of temporary reinstatement and that a motion seeking such relief would have to be directed to the Commission.

Id. The judge advised the parties they could “(1) resubmit the order to him as a motion if they wished him to make a formal ruling on the matter, (2) submit a motion to the Commission, or (3) simply retain the order for their files.” *Id.*

The Secretary then filed the instant motion. The motion is made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure under which the Secretary notes “the Commission has reopened proceedings on a number of occasions to allow the parties an opportunity to submit settlement agreements after a decision has become final.” Mot. at 3 (citations omitted). The Secretary states that “[f]or purposes of this motion, [she] assumes that the judge was correct in concluding that a judge does not have jurisdiction to amend an order of temporary reinstatement once he has issued it.” *Id.* at 2 n.1.

The Secretary’s motion presents the issue of whether a judge’s order reinstating a miner who has filed a discrimination complaint under section 105(c)(2) of the Mine Act becomes a “final” decision when the period to take an appeal under Commission Procedural Rule 45(f)

expires.¹ The answer to this question will determine whether jurisdiction over a request to amend the order properly lies with the judge or with the Commission.

When a judge orders the temporary reinstatement of a miner under section 105(c)(2) of the Mine Act,² the employment status of the miner remains temporary until the complaint on which his or her reinstatement is based is resolved, i.e., “pending final order on the complaint.” 30 U.S.C. § 815(c)(2). Temporary reinstatement precedes the filing with the Commission of a formal discrimination complaint by the Secretary. It is based on a finding that the miner’s complaint to MSHA is not frivolous, a more lenient standard than the one applied in a subsequent case on the merits of the discrimination claim. Usually, temporary reinstatement precedes a full investigation of the miner’s complaint by MSHA. This leaves open the possibility that MSHA could determine, upon further investigation, that the circumstances surrounding the temporarily reinstated miner’s complaint do not constitute a violation of section 105(c)(1).

If this occurs, the miner’s temporary job status under section 105(c)(2) terminates. Commission Procedural Rule 45(g) sets forth the procedure for formalizing this termination:

If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C.

¹ Rule 45(f) provides, in part: “Review by the Commission of a Judge’s written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition . . . within 5 days following receipt of the Judge’s written order.” 29 C.F.R. § 2700.45(f).

² Section 105(c)(2) provides in relevant part:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary’s receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

30 U.S.C. § 815(c)(2).

§ 815(c)(1), have not been violated, the *judge* shall be so notified and *shall enter an order dissolving the order of reinstatement*.

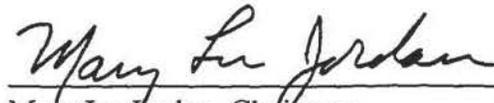
29 C.F.R. § 2700.45(g) (emphasis added).

From the explicit requirement in the Procedural Rules that a judge dissolve an order of reinstatement under the foregoing circumstances, it follows that the judge retains jurisdiction over the temporary reinstatement docket during the investigation of the miner's complaint. Nor is there any indication in the Rules that a judge surrenders any such jurisdiction after the Secretary files a complaint with the Commission on behalf of a miner. Thus, when a discrimination complaint is filed with the Commission, it is solely within the judge's discretion to entertain any motions made to amend, modify, enforce, or otherwise address his underlying order of temporary reinstatement.

Further, Rule 45 contemplates Commission jurisdiction over temporary reinstatement dockets only in very narrow circumstances. Under Rule 45(f), we may review a judge's order in a temporary reinstatement proceeding. This limited review is normally the only jurisdiction the Commission may exercise in a temporary reinstatement proceeding. 30 U.S.C. § 815(c)(2). There having been no appeal under Rule 45(f) in this case, we find that the judge has sole jurisdiction over the case "pending final order on the complaint," and that we thus have no jurisdiction to entertain the motion made by the Secretary.³

³ Because of our holding that the judge retains jurisdiction in this matter, the Secretary's request for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure is, in effect, moot. There is no need to "reopen the proceedings in this case," Mot. at 3, because they have not yet been terminated, and are still before the judge.

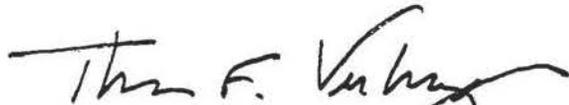
Accordingly, we dismiss the Secretary's motion for lack of jurisdiction. We suggest that the parties may resubmit their agreement to the judge for further action as they deem appropriate.



Mary Lu Jordan, Chairman



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2001

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 98-37
 :
 :
CONSOLIDATION COAL COMPANY :

BEFORE: Jordan, Chairman; Riley and Verheggen, Commissioners¹

DECISION

BY: Riley and Verheggen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 801 et seq. (1994). At issue is Commission Administrative Law Judge Jerold Feldman’s decision dismissing a citation issued on August 5, 1997 by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against Consolidation Coal Company (“Consol”) in connection with visible dust generated during roof bolting at Consol’s Blacksville No. 2 Mine, allegedly in violation of 30 C.F.R. § 72.630(d).² 22 FMSHRC 121 (Jan. 2000) (ALJ). The Commission granted the Secretary’s petition for

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

² Section 72.630(d) states:

Ventilation control. To adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other miners in the area.

30 C.F.R. § 72.630(d).

discretionary review challenging the judge's decision. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Consol operates the Blacksville No. 2 mine, an underground coal mine in Monongalia County, West Virginia. 22 FMSHRC at 123; S. Ex. 11. At the time MSHA issued the citation at issue in these proceedings, Consol used scroll auger drills on its roof bolting machines at the mine. 22 FMSHRC at 123. A scroll auger drill has a spiral design that, as the drill penetrates the roof, allows particles of rock that are displaced by the drill to run out of the hole along the drill's spirals, rather than plugging up the hole. *Id.*; Tr. 90. The roof bolting machine, or "roof bolter," was located towards the front of the continuous mining machine. *See* S. Exs. 2, 3. Individual miners stationed on either side of the continuous mining machine operated the roof bolter. Tr. 105, 110.

The ventilation control systems used with the scroll auger roof bolters were designed to divert the dust generated by roof drilling into the end of a slider tube that was the last extension segment of the ventilation tubing. 22 FMSHRC at 125. As the face in the section was advanced, the slider tube was periodically extended so that it remained 10 feet from the face. *Id.* The ventilation was directed to divert the drill dust away from the faces of the miners operating the roof bolters. *Id.*

Before the citation at issue in this proceeding was issued, MSHA subjected Consol's drill dust control measures for scroll auger roof bolters to some scrutiny. *See id.* at 121. On December 5, 1996, after receiving a complaint pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 813(g),³ MSHA issued a citation charging Consol with a violation of section 72.630(d) based on an inspector's observations of visible drill dust around the position of the return side roof bolter in the 9-S section of the Blacksville No. 2 Mine. 22 FMSHRC at 124. Consol abated this citation by wrapping a ventilation tube joint to keep air from escaping. *Id.* Sometime later, in early 1997, Consol replaced the 45 horsepower fans in its ventilation control system with 75

³ Section 103(g) provides, in pertinent part:

Whenever a representative of the miners or a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger

30 U.S.C. § 813(g)(1).

horsepower fans, which at that time was the largest fan used for dust ventilation control purposes. *Id.*

On April 8, 1997, Consol's corporate dust control coordinator Craig Yanak and other Consol officials met with MSHA officials, including MSHA Inspector William Ponceroff, to discuss dust control. *Id.* During this meeting, the MSHA officials expressed concern over Consol's use of scroll augers. *Id.* Yanak testified that he heard Ponceroff state "that his next venture was going to be to rid Blacksville Two of the . . . scroll augers by whatever means it was necessary for him to do so." Tr. 1042.⁴ Later that month, on April 30, MSHA issued a citation on the 9-S section of Blacksville No. 2 for a violation of the respirable dust standard, 30 C.F.R. § 70.100(a). 22 FMSHRC at 124. Sampling had revealed a respirable dust concentration of 2.98 milligrams per cubic meter of air ("mg/m³"). *Id.* MSHA abated the citation on June 17, 1997 after abatement respirable dust samples revealed dust levels below the 2.0 mg/m³ standard. *Id.*

On June 4, 1997, Ponceroff issued a citation on the 9-S section of Blacksville No. 2 alleging a violation of section 72.630(d) based on his observations of drill dust around the return side roof bolter, occupation code 048. *Id.* at 125; S. Ex. 6. Consol abated the citation by installing belting around the frame of the miner and at the drill head in order to divert dust away from the drill operator. 22 FMSHRC at 125. The judge noted, however, that "Ponceroff's observations of excessive dust due to inadequate ventilation control *were not confirmed* by MSHA's respirable dust sample results taken on the 048 occupation during the period June 4 through June 6, 1997, to abate [the citation] issued on April 30, 1997." *Id.* (emphasis in original). The average of these abatement samples was 1.4 mg/m³. *Id.*

On June 5, 1997, Consol dust control coordinator Yanak went to the 9-S section to take spot respirable dust concentration readings with a real time aerosol monitor (RAM). *Id.* Because RAM readings can not distinguish between dust particles and other particles, RAM readings tend to be higher than dust samples taken with cassettes. *Id.* The RAM readings indicated respirable dust readings of between 0.1 and 0.2 mg/m³, well below permissible limits. *Id.*

On August 5, 1997, "[i]n response to continuing complaints from union representatives about the miners' exposure to drill dust," Ponceroff returned to the 9-S section during the midnight shift. *Id.* Ponceroff observed what he considered to be excessive dust around the return side roof bolter, and concluded that "the dust was in the roof bolters' breathing zones." *Id.* At this time, the continuous miner had advanced deep into the mining cycle, with the ventilation exhaust tubing extending approximately 188 feet from where the exhaust fan was located. *Id.* at 126. Both miners operating the roof bolters testified that they believed they were exposed to excessive dust. *Id.* Randy Murray, a union safety committeeman who accompanied Ponceroff

⁴ Roy Pride, the Blacksville No. 2 Mine general superintendent, testified "Ponceroff had made . . . statements that he was going to get the drill steels out of Blacksville Number 2 mine and that he was going to keep seeing visible dust until he got the spiral drill steels out of [the mine]." Tr. 861, 973-74.

(*id.* at 125), testified that, although the section ventilation was adequate, he believed that it “was not carrying the dust away adequately from the miners.” *Id.* at 126. Murray testified that Consol could not control the dust “by ventilation . . . we would still be getting dust no matter what they did [with ventilation].” Tr. 209-10.

As a result of his August 5 inspection, Ponceroff issued Citation No. 4540528, which he designated significant and substantial,⁵ alleging a violation of section 72.630(d) for ineffective dust control measures. 22 FMSHRC at 127. The citation stated in part: “Dust resulting from drilling rock was observed in the 9-S section exposing the return and intake roof bolters to inhalation hazards from dust.” S. Ex. 5.

Following the issuance of the citation, Consol added a section of tubing to extend the main ventilation tubing further in by the roof bolters. 22 FMSHRC at 127. Consol also repaired the belt that had been placed around the frame of the continuous miner to keep dust from traveling from the intake side underneath the miner to the return side. *Id.* In addition, Consol installed external water sprays to keep the dust down. *Id.* During the day shift on August 5, Ponceroff returned to the 9-S section and determined that these remedial measures had not succeeded in correcting the dust problems he observed the night before. *Id.* at 128. He extended the abatement period for the citation until August 12, 1997, to allow MSHA technical support personnel to visit the mine and evaluate the problem. *Id.*

An MSHA technical support team visited the 9-S section on August 12 and 19. *Id.* Following the August 12 visit, Consol replaced the continuous miner with a continuous satellite miner. *Id.* Compared to the continuous miner Consol previously used, the controls for the roof bolter on the satellite miner are located farther back from the drill hole, and the design of the satellite miner’s frame resulted in less dust being drawn under and dispersed upward. *Id.* By the time the technical support team visited the mine again on August 19, the satellite miner was operating only 50 feet from the exhaust fan. *Id.* Although the team found no problems with dust control on the section, it recommended that Consol replace its 18-inch oval ventilation tubing with more efficient round ventilation tubing with internal seals. *Id.* At this time, Ponceroff terminated Citation No. 4540528. 22 FMSHRC at 128. Sometime later, MSHA and Consol informally agreed that over the next 18 months, the company would retrofit its continuous miners with hollow steel drills and dust collection systems when the miners were brought to the surface for maintenance and repair. *Id.*

Consol contested the penalty MSHA proposed for Citation No. 4540528 and a hearing was held. *Id.* at 121-22. First, the judge found that while section 72.630 allows three methods of

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

controlling drill dust,⁶ whichever method is used must be effective — even if not the most efficient. *Id.* at 122. He went on to find that “the goal of dust control is divert lighter respirable dust particles away from miners even though visible dust may continue to exist.” *Id.* at 129. Noting that “[r]espirable dust is comprised of extremely small particles that are not visible in the atmosphere” (*id.*), the judge concluded:

[O]bservation of a dust cloud by an MSHA inspector, particularly at the site of a dust producing rock drilling activity, is not, *alone*, evidence of ineffective dust control measures. Rather, ineffective dust control measures must be evidenced by an operator’s identifiable failure to follow the MSHA approved ventilation and dust control plan, or, an identifiable defect in the dust control equipment.

Id. at 122-23 (emphasis in original); *see also id.* at 130 (“The notion that visible dust observed in a cap light during the drilling process in an underground mine, alone, should provide a generic basis for allegations of violative conduct must be rejected.”).

The judge then stated, however, that “[s]ubjective visible observations that serve as the sole basis for alleging a [section] 72.360 violation are not always reliable,” and proceeded to evaluate the reliability of Ponceroff’s testimony. *Id.* at 130. The judge first noted Ponceroff’s observations of visible dust that led him to issue a citation on April 30, 1997 similar to the one at issue here, observations which MSHA samples of the mine atmosphere did not confirm. *Id.* The judge then stated that “the significance of visible observations of drill dust is particularly suspect in this case, where pressure was brought to bear on MSHA inspectors to force [Consol] officials into replacing the ventilation controls with dust collection systems.” *Id.* In light of these considerations, the judge discredited Ponceroff’s observations and concluded that they, alone, did not establish a violation. *Id.* The judge also discredited the observations of the miners who testified regarding visible dust, noting that their “descriptions must be viewed in the context of the [their] general dissatisfaction with ventilation as a means of controlling drill dust, and their desire for state-of-the-art dust collection.” *Id.*

The judge then found that MSHA did not identify any “missing, defective or otherwise ineffective means of dust control” employed by Consol, this based on his finding that none of the modifications implemented by Consol to abate the violation lessened the level of dust exposure. *Id.* at 130-31. He also noted that the Secretary’s vacating the S&S designation on the citation was inconsistent with her assertion that the miners were not adequately protected from drill dust exposure. *Id.* at 132. The judge concluded that “the Secretary has failed to demonstrate, by a

⁶ 30 C.F.R. § 72.630(a) provides: “Dust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method approved by the Secretary that is as effective in controlling dust.”

preponderance of the evidence, that [Consol's] ventilation control configuration was defective, or that it otherwise failed to adequately control dust from rock drilling on August 5, 1997," and he accordingly dismissed Citation No. 4540528. *Id.*

II.

Disposition

The Secretary argues "the judge erred by failing to accept her interpretation of section 72.630(d) as requiring that ventilation systems used to control drill dust be effective and readily disperse and carry away the dust from the drill operator and other miners in the area even when the operator is following its ventilation and [dust] control plan and the ventilation controls are not effective." PDR at 12. The Secretary goes on to assert that, based on the testimony of her witnesses, Consol's dust control system violated section 72.630(d) because it was visually ineffective. *Id.* at 13-16. She also disputes the judge's reliance in discrediting Ponceroff on the April citation for a violation of section 72.630(d) where contemporaneous samples revealed acceptable levels of respirable dust in the area. *Id.* at 17. Section 72.630(d), the Secretary asserts, requires that all drill dust be controlled, not just respirable dust. *Id.* Pointing to the preamble to the final rule, she also argues that section 72.630(d) was promulgated because enforcement based solely on a permissible exposure limit (i.e., 2.0 mg/m³ of respirable dust) would not adequately protect miners from drill dust, where extremely high exposure can occur in a very short time. *Id.* at 17-18 (citing 59 Fed. Reg. at 8318). The Secretary challenges the judge's reliance on the S&S designation on the citation being vacated as a grounds for dismissing the citation. *Id.* at 18-19. Finally, the Secretary argues that the judge's finding that Consol's ventilation controls were not defective is not supported by substantial evidence. *Id.* at 19-20.

Consol argues that the Commission should not consider the Secretary's deference argument because she did not raise it before the judge. Consol Br. at 11. Moreover, Consol argues, section 72.630(d) "is, by the Secretary's own admission, clear and unambiguous," and that, therefore, it is not open to interpretation by the Secretary. *Id.* Consol further argues to prove a violation of section 72.630(d), the Secretary must demonstrate that the drill dust controls in the approved dust control plan are not functioning properly. *Id.* at 12-13. Consol goes on to assert that substantial evidence supports the judge's finding that its ventilation controls were not defective. *Id.* at 13-15. Finally, Consol argues that the judge properly rejected evidence of a violation based solely on "subjective visual observations," and the judge's rejection on credibility grounds of the testimony of Inspector Ponceroff and the miners should not be disturbed. *Id.* at 15-16.

The regulation at issue in this case is clear and unambiguous. It requires that when ventilation is used to control dust generated by drilling rock, "the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other miners in the area." 30 C.F.R. § 72.630(d). In fact, both the Secretary and the judge agree that section

72.630(d) requires operators to control drill dust, and that any such control must be effective. 22 FMSHRC at 122; PDR at 12.

What is also clear from the preamble to the final rulemaking promulgating section 72.630(d) is that the standard is intended to prevent exposure to respirable dust. 59 Fed. Reg. at 8322 (“All drillers and other miners must be protected from the inhalation hazard of respirable drill dust.”). As explained in the preamble, however, the standard does not condition compliance upon meeting a permissible exposure limit measured exclusively through sampling. *Id.* at 8318, 8323. Instead, MSHA announced that it will look at a number of factors to test an operator’s compliance with the standard, including:

- determining whether “a dust control is missing, defective, or obviously visually ineffective,” *id.* at 8325;
- “reviewing manufacturer’s specifications or other pertinent data relative to the design and operation of the dust control” in situations “where it is not obvious that a control is effective,” *id.*;
- measuring “air quantity or other measures set forth in a mine’s ventilation and methane and dust control plan,” *id.*; and
- “if practical, collecting samples to evaluate [the] effectiveness” of dust controls, *id.* at 8324.

We thus disagree with the judge’s statement that “observation of a dust cloud by an MSHA inspector, particularly at the site of a dust producing rock drilling activity, is not, *alone*, evidence of ineffective dust control measures.” 22 FMSHRC at 122 (emphasis in original). We can envision circumstances in which compliance can be determined solely on the basis of an inspector’s observations of a dust cloud, and the preamble clearly contemplates such cases when it refers to dust controls that are “obviously visually ineffective.” 59 Fed. Reg. at 8325. The judge, however, did not base his decision on his erroneous reading of section 72.360. Instead, he evaluated the testimony of Ponceroff and the miners and rendered a finding on its reliability. Since he took this extra step, we find his initial error harmless.

This testimony served as the basis on which the Secretary alleged that Consol violated section 72.630(d). The Secretary frames her initial argument as turning on regulatory interpretation, but she in fact bases her assertion that Consol violated section 72.630(d) on the testimony of Ponceroff and the miners operating the roof bolters that “the drill dust was not being readily dispersed.” PDR at 13-14. Indeed, this case does not turn on regulatory interpretation at all, but instead on the factual underpinnings of the Secretary’s case.

The judge concluded that neither the testimony of Ponceroff nor the miners was credible.⁷ The Commission must exercise a great degree of deference when considering a judge's credibility determinations. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). The Commission has noted that "the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions." *Id.* at 1881 n.80. The sorts of exceptional circumstances that would warrant overturning a judge's credibility findings are where such findings are self-contradictory, based on irrational criteria, or contradict the evidence. *Id.* As the Eleventh Circuit has explained, "[s]ince the ALJ has an opportunity to hear the testimony and view the witnesses he is ordinarily in the best position to make a credibility determination." *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984). In light of this, the *Ona* court concluded that "as a general rule courts are bound by the credibility choices of the ALJ, even if they 'might have made different findings had the matter been before [them] . . . de novo.'" *Id.* at 719 (quoting *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1329 (5th Cir. 1978)); *cf. Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) ("Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided."). *See also Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (February 1984) (when judge's finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff'd*, 766 F.2d 469 (11th Cir. 1985).

Here, no grounds exist upon which we would overturn the judge's findings on the credibility of Ponceroff and the miners. To the contrary, his findings are supported by substantial evidence.⁸ Particularly relevant is the judge's view of this case "in the context of the roof

⁷ The dissent argues that the "judge never explicitly stated whether . . . he found [Ponceroff] credible," and is "particularly reluctant" to conclude that the judge discredited the testimony of the miner witnesses "due to the dissatisfaction they had expressed with the existing dust control procedures at the mine." Slip op. at 11, 12. The dissent would remand this case to allow the judge to "make explicit credibility determinations." Slip op. at 13. We do not agree. Here, the judge made findings adequate to support his decision, and sufficiently explained his reasoning. Although he never explicitly states that he discredited the testimony of Ponceroff and the miners, he came as close as a judge can get to discrediting testimony without explicitly saying so, and we certainly find he implicitly discredited the testimony. Insofar as the judge's credibility findings here are implicit, we have found implied credibility determinations where judges have said far less. *See Fort Scott Fertilizer—Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (recognizing implicit credibility finding of judge); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 261, 265, 267 (Feb. 1997) (same).

⁸ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable

bolter's general dissatisfaction with ventilation as a means of controlling dust" (22 FMSHRC at 130), as well as MSHA's apparent efforts to advance this agenda of the miners, as when Ponceroff announced "that his next venture was going to be to rid Blacksville Two of the . . . scroll augers by whatever means it was necessary for him to do so." Tr. 1042. We find any such statement as this directed at Consol officials inappropriate insofar as the ventilation system used by Consol to control drill dust complied with section 72.630(d), as confirmed by the MSHA technical support team that visited the 9-S section on August 12 and 19, 1997 and found no problems with the system. 22 FMSHRC at 128.

We find unpersuasive the Secretary's argument that the judge, in discrediting Ponceroff, should not have relied on respirable dust samples that were at odds with the inspector's issuance of a citation in April 1997 for a violation of section 72.630(d) based on his visual observations of dust. PDR at 17; S. Br. at 19-21. The Secretary argues that "to establish a violation of Section 72.630(d), [she] need not show that the [permissible exposure limit] was exceeded." S. Br. at 19. She also points to language in the preamble which states that "the final rule is a work practice standard that *does not require sampling*." *Id.* at 20 (quoting 59 Fed. Reg. at 8322 (Secretary's emphasis)). Clearly, the preamble explicitly and for good reason does not condition compliance with section 72.360(d) upon sampling. But this is not to say that the preamble precludes the use of sampling to evaluate the effectiveness of drill dust controls. To the contrary, it explicitly contemplates the use of such sampling. 59 Fed. Reg. at 8325 ("In those cases where it is not obvious that a control is effective, MSHA inspectors will continue to have the option . . . of sampling to determine its effectiveness."). Under MSHA's own rule, sampling is thus relevant in evaluating the effectiveness of a drill dust control.

Here, though, the point is even narrower. Here, the respirable dust sampling used to discredit Ponceroff was not used to establish a violation of section 72.360(d). Instead, the samples were taken to determine whether Consol had successfully abated a violation of section 70.100(a) — samples taken in the same area and at the same general time that Ponceroff claimed to have observed a violation of section 72.360(d). We find the samples relevant to the reliability of Ponceroff's ability to visually evaluate Consol's drill dust controls, and that the judge properly considered them.⁹

The judge also reached the issue of whether MSHA "identified a missing, defective or otherwise ineffective means of dust control." 22 FMSHRC at 130. He concluded that MSHA

mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Under the substantial evidence test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

⁹ We also note that Ponceroff's observations were also undercut by the RAM readings taken by Yanak. 22 FMSHRC at 125.

made no such showing. *Id.* at 131. Given that the Secretary's assignment of error on this point rests upon further testimony of Ponceroff and miners with respect to dust conditions in the 9-S section (S. Br. at 20), and that we have already affirmed the judge's discrediting of this testimony, the Secretary's argument is unavailing.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision dismissing Citation No. 4540528.


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

Chairman Jordan, dissenting:

I agree with my colleagues that the judge erred in holding that compliance with 30 § 72.630(d) can never be determined solely on the basis of an inspector's observations of dust. Slip op. at 7. However, I disagree with their conclusion that because the judge evaluated the credibility of the inspector's testimony as to the extent of dust observed, his application of the wrong legal standard amounts to harmless error. *Id.* I believe remand is necessary to permit the judge to discuss the evidence in the record corroborating or refuting the inspector's statements, and to clarify the judge's views regarding the inspector's credibility.

On August 5, 1997, Inspector Ponceroff conducted an inspection of the Blacksville Mine during the midnight shift. 22 FMSHRC 121, 125 (Jan. 2000) (ALJ). The inspector observed drill dust "engulfing" two roof bolter operators, and issued a citation for a violation of 30 C.F.R. § 72.630(d), which requires that dust from drilling rock be readily dispersed and carried away from the drill operator and other miners. 22 FMSHRC at 125-127.

The testimony of the inspector was the centerpiece of the Secretary's case alleging the presence of visible dust near the miners. Unfortunately, and likely due to the judge's erroneous determination that an inspector's observations of dust "alone" does not provide a basis for establishing the violation, *Id.* at 130, the judge's analysis of the inspector's testimony is somewhat opaque. The judge never explicitly stated whether or not he found him credible. *Id.* Referring to evidence that MSHA and the miners wanted the operator to implement a different dust collection system, the judge noted only that the inspector's "observations and conclusions must be viewed in context." *Id.* I am reluctant to equate this comment with a credibility determination, particularly when the judge does not mention or offers only a passing reference to the evidence tending to corroborate the inspector's testimony.

For example, the inspector's observations regarding the extent of dust present are supported by contemporaneous notes, Gov. Ex. 1 at 8, which even Consol characterizes as "meticulous." Consol Post-Hearing Br. at 6. In addition, the inspector's testimony that the drill dust surrounded the roof bolters was confirmed by seven miner witnesses.¹⁰ After

¹⁰ The two miners who were roof bolting when the inspector issued the citation under review described their working conditions as follows:

"I always got dust from my bolter and the opposite bolter. It would come under the machine and come up in my face [Y]ou were exposed to the dust all the time . . . It was on my teeth when I come [sic] out of the mine. . . . I ate a lot of dust." Tr. 401, 409-411.

"[The dust] came down and just swirled all around . . . [a]ll around you personally, yourself, the person that was drilling in that area." Tr. 457.

The miner who accompanied the inspector offered the following description:

acknowledging their “vivid descriptions of dust exposure,” 22 FMSHRC at 130, the judge noted the miners’ “dissatisfaction with ventilation as a means of controlling dust.” *Id.* I believe my colleagues read too much into this statement when they conclude that the judge discredited every miner who testified. Slip op. at 8. Moreover, I think we should be particularly cautious in ascribing credibility determinations to the judge in this case because his erroneous legal standard rendered the inspector’s testimony about visible dust irrelevant to the judge’s determination of whether a violation of section 72.630(d) occurred.

Affirming the present decision requires us to adopt a credibility determination from judicial comments that would suggest the judge viewed the roof bolters as a collective body whose veracity regarding visible dust was inherently suspect, due to the dissatisfaction they had expressed with the existing dust control procedures at the mine. 22 FMSHRC at 130. I am particularly reluctant to follow this course of action given the fact the record contains comments by the judge which would indicate a different view of the miners’ testimony. At one point the judge stated, “I think I’ve said numerous times, I thought that the testimony of the miners is very compelling [as] to the dust exposure that they had.” Tr. 829. At the end of the trial, the judge announced, “the testimony by the roof bolters was compelling.” Tr. 1315 .

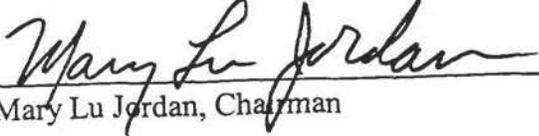
“[The] auger-type drill . . . allowed dust to come straight down and suspend in and around the bolters . . . [a]round their body. On their face, their arms, their legs.” Tr. 205, 208.

When the inspector returned to the area during the next day shift, he concluded that conditions had not improved. 22 FMSHRC at 128. The roof bolters on duty during that shift provided the following description of their environment:

“[Dust] was mostly just right around my head and down around my body. . . . The dust was coming from the hole that I drilled and dropped straight down and then I blew them up you know, coming up around my body [M]y dust and Kenny’s dust on the other side would come my way because I had ventilation up there and that could suck his dust across to me.” Tr. 531.

“Everybody inhaled the drill dust when they drilled augers. There’s no way to get out of it [W]e always ate dust while we was in the mine, sir, bolting.” Tr. 470, 475.

Consequently, I believe this case should be remanded so the judge can properly analyze the comprehensive testimony, conduct a separate, careful analysis of the testimony of each individual witness, and make explicit credibility determinations.¹¹


Mary Lu Jordan, Chairman

¹¹ In *Morgan v. Arch of Ill.*, 21 FMSHRC 1381 (Dec. 1999), the Commission refused to affirm a credibility determination that ignored extensive record evidence tending to call the judge's finding into question. 21 FMSHRC 1381, 1391. We stated that "[a]lthough we will overturn a judge's credibility determination only in rare circumstances, we will not rubberstamp them." *Id.* at 1391-92. We noted that before a judge credits any testimony, he must reconcile all record evidence that is inconsistent with that conclusion. *Id.* at 1391. The same holds true when a judge refuses to credit a witness' testimony.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204-3582
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April 9, 2001

RAG SHOSHONE COAL CORP.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 99-342-R
v.	:	Citation No. 9895049; 7/8/99
	:	
SECRETARY OF LABOR	:	Docket No. WEST 99-384-R
MINE SAFETY AND HEALTH	:	Citation No. 4073211; 8/3/99
ADMINISTRATION (MSHA),	:	
Respondent	:	Shoshone No. 1
	:	Mine ID 48-01186

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Contestant;
Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Cetti

Contest proceeding No. WEST 99-342-R was commenced by the Contestant RAG Shoshone Coal Corporation (Shoshone) with the filing of a Notice of Contest against Respondent Secretary of Labor (Secretary) challenging the validity of Citation No. 9895049 in Docket No. WEST 99-342-R. That citation alleges a non S&S violation of 30 C.F.R. § 70.207(a) pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act). The citation charges Shoshone failed to send MSHA five valid respirable dust samples or a valid reason for not sampling the longwall MMU 008-060 for the bimonthly period May-June 1999.

MMU 008-0-060 is the mechanized mining unit for the longwall section of the Shoshone No. 1 mine.

About a month later the Secretary directed Shoshone to include code 060 longwall (return side face worker) designated occupation in its mine ventilation plan. Shoshone informed the Secretary it wished to challenge such requirement. The Secretary then issued Citation No. 4073211 to Shoshone on August 3, 1999, pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). That citation alleges a S&S violation of 30 C.F.R. § 75.370(a)(1) for mining without a valid mine ventilation plan based upon Shoshone's failure to include in its ventilation plan the 060 code for sampling the longwall mechanized mining unit (MMU 008-0-060). Shoshone contested the citation which is docketed at WEST 99-342-R.

Findings of Fact and Statement of Law

Shoshone operates the Shoshone No. 1 Mine, MSHA ID No. 48-01186 located in Hanna, Wyoming, and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (“the Act”). Shoshone’s operations affect interstate commerce.

The Shoshone No. 1 mine employs approximately 100 miners and produces coal on one 10 hour shift per day, four days per week. Equipment maintenance is performed on a separate nonproducing shift. Coal is mined by continuous mining machines and longwall mining equipment. The mine has one longwall working section which is at issue in this proceeding.

Underground coal mine operators are required to perform sampling for respirable coal mine dust. Under 30 C.F.R. § 70.207(a), each mine operator is required to take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period. A designated occupation is defined in 30 C.F.R. § 70.2(f) as:

the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration.

On its longwall section, which is at issue here, unless the district manager directs otherwise, the operator is required under 30 C.F.R. § 70.207(e)(7) to sample the designated occupation as follows:

(e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows:

* * * * *

(7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner; (emphasis added)

Section 30 C.F.R. § 70.207(e)(7), authorizes the district manager to direct the mine operator to sample a different designated occupation and authorizes him to direct the placement of the sampling device in the longwall section. The longwall designated occupation codes utilized by the Secretary in the underground coal mines as of July 30, 1999, are listed in the document received in evidence as Gov. Ex. 7. The parties stipulated that the Secretary may utilize other codes in addition to those listed in that document. (Stip. 14).

Shoshone, in sampling its longwall section sampled the designated occupation of the tailgate shearer operator, Code 044, since at least October 11, 1983. The parties stipulated the 044 designated occupation code had been in effect nationally since at least 1978.

Operators such as Shoshone conduct respirable dust sampling using respirable dust sampling apparatus which include a sampling pump, a hose at least 36 inches in length, and a cyclone assembly containing a filter cassette. The pump draws air into the cyclone which is designed to separate out nonrespirable or larger particles of dust which fall into the "grit pot." The air containing the smaller (respirable) dust particles is directed into the filter cassette. The particles enter the filter cassette and are deposited on the filter face. At the end of sampling, the filter cassette is removed from the cyclone assembly and sent to MSHA for weighing.

MSHA inspectors also conduct sampling on the longwall section at Shoshone. When they conduct such sampling they sample various occupation codes such as the shearer operator, jacksetters, and mechanics in addition to the designated occupation which Shoshone is required to sample. (Stip. 18).

On April 9, 1999, John Kuzar, District Manager for Coal Mine Safety and Health District 9, notified Shoshone that it would be required to conduct sampling of the 060 designated occupation rather than the 044 designated occupation in the longwall section. The reason for the change was set out in the notification letter in part as follows:

Currently, the DO on MMU 008-0 is the tailgate-side longwall operator (occupation 044). However, Agency sampling conducted between August 1997 and February 1999 shows the exposure of the tailgate-side longwall operator averaged 0.841 mg/m³, while the jacksetter (041) averaged 1.679 mg/m³ based on the averages of 7 different surveys during this time frame. More limited sampling also shows exposures on the mechanic (004) to be 1.232 mg/m³, the section foreman at 1.645 mg/m³, and the headgate-side longwall operator (064) at 1.52 mg/m³. These results show several other occupations to be exposed to significantly higher concentrations of respirable coal mine dust than the designated occupation (044). (Gov. Ex. 12).

The notification requires the respirable dust pump to be transferred between miners whenever necessary to make sure that the pump always remains with whichever miner is nearest the return air side of the longwall working face regardless of normal job assignment or occupation of that miner. It states in part:

[I]f a jacksetter or mechanic goes downwind of the tailgate side longwall operator, the pump must be switched to the jacksetter or the mechanic for the time that he or she is the miner working

nearest the return air side of the longwall working face. When the mechanic or jacksetter returns upwind of the longwall operator, the pump would then be switched back to the longwall operator, as that person would now be the person working nearest the return air side.

Shoshone wished to challenge the notification of the district manager that Shoshone would now be required to sample the 060 designated occupation. For that reason, Shoshone conducted sampling for the longwall section on the 044 designated occupation for the May-June 1999 bimonthly sampling period, just as it had done in the past, and submitted the code 044 samples to the Secretary. Shoshone did not sample the 060 designated occupation for the May-June 1999 bimonthly sampling period, nor were samples provided to the Secretary for the 060 designated occupation for that period. (Stip. 21).

Citation No. 9895049 (Invalid dust samples)

Citation No. 9895049 was issued on July 8, 1999, pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). It alleges a violation of 30 C.F.R. § 70.207(a). Under the heading and caption "Condition or Practice" the citation alleges as follows:

The Secretary has not received five valid respirable dust samples or a valid reason for not sampling MMU 008-0-060 for the bimonthly period May-June 1999.

Shoshone's contest of the citation is docketed at WEST 99-342-R.

Citation No. 4073211 (re ventilation plan)

The Secretary, almost a month after issuing Citation No. 9895049, directed Shoshone to include the 060 designated occupation in its ventilation plan for the Shoshone No. 1 mine. Shoshone did not include the 060 designated occupation in its ventilation plan as directed by the Secretary. Shoshone informed the Secretary it wished to challenge the requirement that Shoshone include the 060 designated occupation in its ventilation plan. Consequently, MSHA issued Citation No. 4073211 to Shoshone on August 3, 1999, pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). The citation alleged a S&S violation of 30 C.F.R. § 75.370(a)(1) for mining without an approved ventilation plan.

That citation under the heading and caption "Condition or Practice" stated:

After hand delivery of memo dated 02 Aug. 1999, production crews proceeded to their underground work areas to begin production.

This further mining activity is a violation of 30 CFR 75.370(a)(1), as there is not an approved ventilation plan in effect as of 02 Aug. 1999, at this operation.

Shoshone contested Citation No. 4073211 which is docketed at WEST 99-384-R.

MSHA's Program Policy Manual addresses 30 C.F.R. § 70.207. Excerpts from the Program Policy Manual were attached to the joint stipulations as Ex. E. The heading and item (e) are as follows:

70.207 Bimonthly Sampling; Mechanized Mining Units

(e) If the operator's mining procedures result in the changing of miners from one occupation to another during a production shift, the sampling device must remain on or at the designated occupation (DO). For example, if an operator alternates the duties of the continuous operator on a one-half shift basis between the continuous miner operator and helper, the dust sampler shall be worn for one-half of a shift by the continuous miner operator and the other one-half of a shift by the helper, while each is operating the continuous mining machine, or the sampler shall remain on the machine as required by this section.

A change in the designated occupation of an MMU will be considered after the results of samples collected by MSHA indicate that a work position other than those identified in this section should be designated for bimonthly sampling. When the results of a sampling inspection demonstrate appreciably higher respirable dust levels at a nondesignated occupation within an MMU, consideration should be given to changing the designated occupation.

The MSHA Policy Manual item No. 5 provides as follows:

70.208 Bimonthly Sampling; Designated Areas

Selection of Sampling Points Within DA:

The placement of the respirable dust sampling instrument within a designated area is critical to obtaining a representative measurement of respirable dust concentrations at the location. Dust sampling instruments should be positioned within designated areas so that the measurement is indicative of the highest dust

exposure to personnel who are required to work or travel in that area. (Emphasis added).

The parties stipulated the 060 designated occupation computer code for respirable coal mine dust units was established by MSHA in 1988. At the time of the hearing there were 55 active longwall units in the United States. Forty seven of these units sample the 060 designated occupation. In District 9, the first longwall unit that was required to sample the 060 designated occupation began to do so in 1994. (Stip. 30). Gov. Ex. 7 lists the mines with longwall mining units, their locations, and states the code used to sample the longwall section.

A drawing of the longwall face and the equipment on the face at the Shoshone No. 1 Mine was received into evidence as Gov. Ex. 2. The longwall face is ventilated by bringing intake air up the headgate, across the longwall face, and out the tailgate.

Shoshone asserts that the issue with respect to Citation No. 9895049 is whether Shoshone can be required to use the 060 designated occupation for respirable dust sampling of the longwall section. The Secretary, on the other hand, states the issue as simply whether Shoshone violated 30 C.F.R. § 70.207(a) when it failed to submit five valid respirable dust samples. The issue though worded differently by each party is basically the same identical issue.

Shoshone states that the issue with respect to Citation No. 4073211 is whether the Secretary can require Shoshone to include the 060 designated occupation for respirable dust sampling in its ventilation plan. The Secretary, however states the issue with respect to Citation No. 4073211 is whether Shoshone violated 30 C.F.R. § 75.370(a)(1) when mining on August 3, 1999, without having an approved ventilation plan requiring respirable dust sampling of the longwall using the 060 designated occupation. An additional issue with respect to Citation No. 4073211, if a violation of the cited standard is found, is whether such violation is properly characterized as significant and substantial.

The parties agree that if a violation is established with respect to Citation No. 9895049, that a violation is also established with respect to Citation No. 4073211. In that event Shoshone, would however continue to contest the significant and substantial designation of Citation No. 4073211.

The issues largely focus on the validity of the change in the designated occupation from the 044 code to the 060 code. The parties are not contesting the specific facts set forth in the bodies of the citations. Specifically with respect to Citation No. 9895044, Shoshone stipulates it did not submit samples for the 060 designated occupation code. With respect to Citation No. 4073211, Shoshone concedes it did not include the 060 designated occupation code in its ventilation plan even though the Secretary directed it to do so. The parties have agreed that the testimony of the inspectors issuing the citations is not necessary for a resolution of these matters. In fact, the parties at first filed a motion and a cross-motion for a summary decision stating no issue of material fact existed. Later Shoshone requested the matter be set for hearing.

Discussion

The basic question in this case as stated by the Secretary through counsel at the hearing is whether Shoshone failed to submit five valid respirable samples for the May-June 1999 sampling period. It is undisputed that Shoshone did in fact submit five respirable dust samples for the May-June 1999 sampling period for the tailgate shearer operator (code 044) and did not submit respirable dust samples for code 060. It is undisputed that for many years prior to May 1999 Shoshone, pursuant to 30 C.F.R. § 70.207(e)(7), had properly used code 044 prior to receiving the notice from the MSHA district manager to change from code 044 to code 060 in sampling its longwall section.

On April 9, 1999, John A Kuzar, District Manager, sent Shoshone a Designated Occupation Change Notice, MSHA Form 2000-96, that the DO for MMU 008-0 of Shoshone No. 1 Mine had been changed to occupation 060. The notice directed Shoshone as follows:

Notice is hereby given that the “designated occupation” on which sampling is required with respect to each working section by Title 30, Code of Federal Regulations, Part 70-Mandatory Health Standards-Underground Coal Mines, is changed as follows:

Changed from (occupation code) 044. Changed to (occupation code) 060 on MMU 008-0

Beginning with the next bimonthly period, you are hereby directed to initiate action to establish a bimonthly sampling cycle for the new “designated occupation” (060).

When collecting samples from DO 060, the sampling device shall remain at all times on the miner who works nearest the return air side of the longwall face. If individual miners rotate out of the DO position during sampling, the sampling device shall be shifted to and worn by the miner rotated into the DO position. For example, if all miners are upwind of the tailgate-side longwall operator, the particular miner doing that job becomes the DO because (sic) he/she is nearest the return air side of the longwall face. In this case, the sampling device shall remain with that miner during bimonthly sampling. However, if during the sampling shift another miner travels past the tailgate-side longwall operator toward the return air side, that miner would then become the DO and would wear the pump for the period of time during the shift that he/she spends downwind of the tailgate-side shearer operator. Failure to do so will result in the collection of invalid samples.

The Notice of Change to D.O. 060 was enclosed in a cover letter dated April 9 from the district manager to Harry Hales, Mine Manager for Shoshone stating the reasoning for the change to D.O. 060 as follows:

RE: Shoshone No. 1 Mine
ID No. 48-01186
Change in Designated Occupation
MMU 008-0

Dear Mr. Hales:

In order to provide reasonable assurance that all miners are equally protected against overexposure to respirable dust, the Mine Safety and Health Administration adopted the designated occupation (DO) concept. This concept is based on the reasoning that if the environment of those whose exposure is the greatest complies, then the environment of all other miners on the unit will comply

Currently, the DO on MMU 008-0 is the tailgate-side longwall operator (occupation 044). However, Agency sampling conducted between August 1997 and February 1999 shows the exposure of the tailgate-side longwall operator averaged 0.841 mg/m³, while the jack-setter (041) averaged 1.679 mg/m³ based on the averages of different surveys during this time frame. More limited sampling also shows exposures on the mechanic (004) to be 1.232 mg/m³, the section foreman at 1.645 mg/m³, and the headgate-side longwall operator (064) at 1.52 mg/m³. These results show several other occupations to be exposed to significantly higher concentrations of respirable coal mine dust than the designated occupation (044).

Therefore, in accordance with paragraph 70.207(e), Volume V, of the MSHA Program Policy Manual and consistent with section 70.207(e)(7) of Title 30, Code of Federal Regulations, you are being notified that the DO for MMU 008-0 has been changed to occupation 060, the miner who works nearest the return air side of the longwall working face. Please see the enclosed Designated Occupation Change Notice, MSHA Form 2000-96. Bimonthly samples taken at this location will provide a much more accurate indicator of whether all miners are being adequately protected from exposure to excessive levels of dust. This change becomes effective beginning with the May-June bimonthly period.

When collecting samples from DO 060, the sampling device shall remain at all times on the miner who works nearest the return air side of the longwall face. If individual miners rotate out of the DO position during sampling, the sampling device shall be shifted to and worn by the miner rotated into the DO position. For example, if all miners are upwind of the tailgate-side longwall operator, the particular miner doing that job becomes the DO because he/she is nearest the return air side of the longwall face. In this case, the sampling device shall remain with that miner during bimonthly sampling. However, if during the sampling shift another miner travels past the tailgate-side longwall operator toward the return air side, that miner would then become the DO and would wear the pump for the period of time during the shift that he/she spends downwind of the tailgate-side shearer operator. Failure to do so will result in the collection of invalid samples.

As previously stated when Shoshone sent respirable dust samples using the 044 code rather than the 060 code for sampling the longwall section for the bimonthly period May-June 1999, MSHA declared the samples were invalid and issued Citation No. 9895049.

In § 202(b)(2) of the Mine Act, 30 U.S.C. § 842(b)(2), Congress has enacted a statutory requirement that each operator must “continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust” (Emphasis added).

The statutory limitation of 2.0 milligrams of respirable dust specified in § 202(b)(2) of the Act is repeated in the Secretary’s regulations at 30 C.F.R. § 70.100(a) which states:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device (Emphasis added).

Congress expressly stated that the purpose of this respirable dust limitation in § 201(b) of the Mine Act, 30 U.S.C. § 841(b) is as follows:

“To provide to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period

of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period. (Emphasis added).”

The Secretary states that the basic question in this case is whether Shoshone failed to submit five valid respirable dust samples for the May-June 1999 sampling period and that all other issues hinged on the answer to that question.

Counsel for Shoshone in response pointed out that it did submit samples for the May-June 1999 sampling period for the tailgate shearer operator (code 044) just as it had properly done for many years before May 1999. Counsel for Shoshone stated the real issue is whether MSHA can require Shoshone to sample as the designated occupation the 060 code and require Shoshone to place in its ventilation plan the 060 code as the designated occupation to sample the longwall. It is Shoshone’s position that for reasons set forth in its brief that the 060 code is not a valid code and the Secretary’s imposition of the use of the 060 code upon Shoshone is “contrary to law, unreasonable, capricious, and an abuse of discretion.” Shoshone pointed out that § 202(b)(2) of the Act, 30 U.S.C. § 842(b) and 30 C.F.R. § 70.100(a) are directed at regulating the “average” concentration of respirable coal mine dust to which a miner is exposed during a shift and that the 060 code does not do that. The 060 code does not sample an average concentration of respirable dust to which any miner is exposed over the course of a shift. Shoshone’s counsel correctly pointed out that both the Act and the regulation § 202(b)(2) of the Act and 30 C.F.R. § 70.100(a)] have the identical language. Both the Act and the regulation state that each operator:

shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air (Emphasis added).

The Secretary in support of her position in this matter cites the Tenth Circuit Appellate Court decision in American Mining Congress v. Marshall (AMC), 671 F.2d 1251 (1982), Jim Walters Resources, Inc. 14 FMSHRC 83 (ALJ Koutras, January 1992), and Consolidation Coal Co., 9 FMSHRC 1509 (ALJ Weisberger, August 1987).

I agree that the reasoning of the judges as set forth in their respective decisions fully support the Secretary’s position in this matter.

The Tenth Circuit Court firmly established that the regulations promulgated by the Secretary, under the authority of the Mine Act, instituting a “designated area sampling” program, designed to measure concentrations of respirable dust to which coal miners were exposed as they worked and traveled outby areas of the mine, were not arbitrary and capricious in employing area sampling rather than personal sampling to measure compliance with respirable dust standards.

In American Mining Congress case, the petitioner (AMC) challenged the designated area sampling regulations promulgated by the Secretary. The Petitioner in that case argued that the Secretary's decision to employ area sampling rather than "personal sampling to measure compliance with the respirable dust standard is arbitrary and capricious." AMC argued that in passing the respirable dust regulation, "Congress was concerned with reducing the level of individual exposure to respirable dust. Since the only dust to which an individual miner is exposed is that dust within his breathing zone, and since area sampling does not sample the air within an individual's breathing zone, it fails to reflect the level of individual exposure and thus fails to achieve Congress' purpose."

The Tenth Circuit Court rejected the above quoted argument and stated its conclusion as follows:

We do not think that the Secretary's choice of the area sampling program was arbitrary, capricious, or an abuse of discretion under § 706(2)(A) of the APA.

The Court stated that in reviewing the Secretary's regulations, "we must constantly bear in mind that Congress delegated sweeping authority to the Secretary. The statute provides that "samples shall be taken by any device approved by the Secretary . . . and in accordance with such methods, at such locations, at such intervals, and in such manners as the Secretary prescribes, 30 U.S.C. § 842(a). Because Congress has conferred such wide ranging discretion on the Secretary, this court should be hesitant in imposing constraints on his power. The need for judicial restraint is further heightened by the realization that courts do not share the Secretary's expertise in this highly technical area. The ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

The Court emphasized the Secretary's sweeping authority by stating, "Since there is no perfect sampling method, the Secretary has discretion to adopt any sampling method that approximates exposure with reasonable accuracy. The Secretary is not required to impose an arguably superior sampling method as long as the one he imposes is reasonably calculated to prevent excessive exposure to respirable dust."

In Consolidation Coal Company v. Secretary of Labor, 9 FMSHRC 1509 (August 1987) Judge Weisberger relying on the plain language of 30 C.F.R. § 70.207(e)(7) held, in effect, that when a longwall miner No. 1 of X occupation wears the dust sampler because he is the miner nearest to the return air side of the longwall working face, goes on a fresh air break, and as a result, miner No. 2 of the same or different occupation than miner No. 1 becomes the miner who is nearest to the return air side of the longwall, the dust sampler must be passed from miner No. 1 to miner No. 2 and worn by Miner No. 2 as long as miner No. 2 remains the miner nearest to the return air side of the longwall. When miner No. 1 returns from his break and again becomes the miner who is nearest to the return air side of the longwall, the sampling device must be passed back to miner No. 1 by miner No. 2.

The third case which the Secretary cites as directly supporting her position is Judge Koutras' decision in Jim Walter Resources, Inc. v. Secretary of Labor, 14 FMSHRC 83 (January 1992). The primary issue in that case is the same issue we have in the instant case. In both cases, the operator of a mine argued that the Secretary acted "arbitrarily and unreasonably" when it mandated a change in the "designated occupation" to be used in sampling the longwall section from code 044 to code 060. Judge Koutras rejected these contentions and found that in mandating the change in the designated occupation, MSHA acted within its authority and in strict compliance with the sampling procedures found in § 70.207(e)(7), and in so doing, it acted reasonably in carrying out the intent of Congress and the Act to insure that miners are protected from excessive concentrations of respirable dust.

There appears to be some question as to the use of the word "occupation," "designated occupation," and "code." In that regard the testimony of Robert A. Thaxton discussing how and why occupation and code numbers came to be used in the regulations is of interest. Thaxton's testimony was presented as a "health expert" in the area of industrial hygiene with many years experience concerning respiratory dust sampling regulations.¹ (Tr. 16-18). He explained that originally there was only one designated occupation in the longwall section which was the headgate shearer (code 064) which MSHA still has. Thaxton testified that "changing technology" caused MSHA to create the 044 code which was the tailgate shearer operator and later the 060 code. Asked if there was any significance to these code numbers Thaxton testified:

The numbers are only computer codes so that we have a way of tracking the samples. They don't relate back to actual particular jobs per se. We try to locate them in relation to positions that mining companies typically use. When the initial codes came out, when the reg started in the 1970s, it was that we tried to use codes that were familiar to union mines because they had established work codes for people. (Tr. 82-83).

Thaxton testified that 060 code is the occupation code that most represents the highest dust concentration on the longwall face and the use of that code would result in all miners working in the area being protected as long as the 060 occupation is protected. (Tr. 120). He also stated you would normally expect the air downwind of the shearer to have a higher concentration than the air upwind. (Tr. 155-156).

Thaxton on further questioning testified:

Q. Why didn't MSHA put all operators on the 060 code back in 1988 when we added the 060 code.

¹ See Robert Thaxton's curriculum, Ex. G-1.

A. Even though we added the code and made it available, we still needed to evaluate each mine, each longwall, on a mine-by-mine basis.

Those changes weren't taken lightly. There was a change in technology, a change in mining systems. Not all mines, just because we created the code in 1988, were at a point where they needed to be on the 060 code. There are several mines even today that are still not on the 060 because it's not the appropriate code for the method of mining that they practice.

Q. Is the 060 code, based on what you know, the appropriate code to use at the Shoshone Mine?

A. From what I observed on the shift that I was there and what I have seen from inspector notes and talking with inspectors that have been present at the Shoshone Mine, the 060 code is the appropriate code for that particular longwall. (Tr. 166-167).

Q. (BY MS. FLOYD) Now there have been allegations in this case that the 060 code is not a designated occupation code but rather a composite code consisting of numerous job positions. Would you agree with that type of characterization?

A. No.

Q. Why not?

A. The designated occupation is not a compilation of codes. It does include multiple miners doing their normal tasks, and that's what the designated occupation was set out to do with the intent from the definition in the regulation. To say that it's a compilation of multiple codes would mean that we are taking a lot of different jobs and combining them into one, which we are not doing.

Q. So in your opinion is the 060 an appropriate designated occupation code?

A. Yes, it is.

Q. And why do you say that?

A. It actually follows the requirements of the regulation which was proposed and had notice of comment period. It also goes to exactly what Congress intended for us to do; that is, to select an area that would represent what miners are exposed to so that we can provide protection to wherever miners normally work or travel, to see that their concentrations are maintained at or below the applicable standard. (Tr 111-112).

Q. And the 060, to the extent that anybody is downwind of the shearer, keeps it down in that higher concentration of dust, does it not, or that is the intention?

A. The intention is to get the highest dust concentration on the section.

Q. And I gather that sometimes when you are sampling, the 060 is the highest, leaving out the 061, but the 060 is the highest on the face and sometimes it is not?

A. Generally speaking, yes, that's correct. Most of the time the 060 is the highest concentration. There are times when it will not represent the highest concentration, as indicated even on the sample results that we looked at earlier this morning.

With respect to the inspector's S&S finding in Citation No. 4073211, Thaxton on cross examination was asked:

Q. When in the spring, after Mr. Kuzar sent the letter on April 9th and said you should use the 060, that if they had gone ahead and used the 060, they wouldn't have been cited for not submitting valid samples, is that correct?

A. That's correct.

Q. So there would not have been a challenge?

A. That's correct.

Q. And by doing it the way they did, they had a citation that they could challenge?

A. Yes.

Q. And if after they were notified that the 044 samples were not being considered valid, if they had submitted five samples on 060 before the end of the bimonthly period, they would have been in compliance, would they not?

A. That's correct.

Q. They wouldn't have had a citation challenge?

A. In regard to the sampling, that's correct. (Tr. 133-134).

Thaxton on further questioning testified:

Q. Why didn't MSHA put all operators on the 060 code back in 1988 when we added the 060 code.

A. Even though we added the code and made it available, we still needed to evaluate each mine, each longwall, on a mine-by-mine basis.

Those changes weren't taken lightly. There was a change in technology, a change in mining systems. Not all mines, just because we created the code in 1988, were at a point where they needed to be on the 060 code. There are several mines even today that are still not on the 060 because it's not the appropriate code for the method of mining that they practice.

Q. Is the 060 code, based on what you know, the appropriate code to use at the Shoshone Mine?

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Shoshone correctly points out that the 060 code does not identify any specific occupation. If Shoshone is attempting to infer an inconsistency in 060 code, it fails because 30 C.F.R. § 70.207(e)(7), which was promulgated after public notice and comment also does not identify any specific occupation. It just uses the term "miner" and identifies that "miner" as the miner who works nearest the return air side of the longwall working face. There is no inconsistency in this regard between 30 C.F.R. § 70.207(e)(7) and the 060 code.

Shoshone asserts that the Secretary's adoption of the 060 designated occupation requires public notice and comment rulemaking on a nationwide basis. It is 30 C.F.R. § 70.207(e)(7), however, and not 060 code that establishes the district manager authority to direct where in the

longwall section the sampling device is placed in taking the designated occupation sample of the longwall section. That authority was specifically given to the district manager with the promulgation of that regulation, 30 C.F.R. § 70.207(e)(7). That regulation was promulgated only after public notice in the Federal Register and after opportunity for written and oral comment after five public hearings in various cities where there was opportunity for public discussion and comment. I find merit in the Secretary's assertion that the 060 code is the agency's interpretation of 30 C.F.R. § 70.207(e)(7). The implementation of the 060 code is a valid exercise of the authority given by 30 C.F.R. § 70.207(e)(7). It is also a permissible strategy for the agency to carry out the purpose and goal given to the agency by Congress to insure miners are protected from excessive concentrations of respirable dust.

A fair reading of 30 C.F.R. § 70.207(e)(7) clearly gives the district manager the authority to direct where the sampling device for sampling for the longwall section shall be placed. Under 30 C.F.R. § 70.207(e)(7) the district manager is authorized to direct the placing of the sampling device in taking the respirable dust sample for the longwall section. The regulation does not specify any occupation other than the "miner" who is working nearest the return air side "or who works" along the face of the return side within 48 inches of the corner." The Secretary's implementation of the 060 code is a reasonable and proper exercise of authority specifically given to the MSHA district manager by 30 C.F.R. § 70.207(e)(7). The 060 code is the agency's rationale interpretation of the regulation.

The Secretary's determination regarding the application of the Secretary's MSHA standards is entitled to deference. It is well established that if a regulation's meaning is not plain, an adjudicatory body should give great deference to the Secretary's interpretation of a regulation the Secretary has promulgated under a statute it is entrusted with administering. The Secretary's interpretation must be accepted as long as it is not plainly erroneous or inconsistent with the language or the purpose of the regulation. *Martin v. OSHRC*, 499 U.S. 144, 148-149 (1991); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460-461 (D.C. Cir. 1994); *Secretary of Labor v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414-1415 (10th Cir. 1984). In addition, it is well established that an adjudicatory body should give especially great deference to an agency's interpretation of a regulation when the regulation pertains to a complex and technical regulatory program. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 514 (1994); *Pauley v. Beth Energy Mines, Inc.*, 501 U.S. 680, 697 (1991). Finally, it is well established that a statute or regulation that is intended to protect the health and safety of individuals must be interpreted in a broad manner to actually achieve that goal. *Cannelton Industries*, 867 F.2d at 1435, and *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 959-960 (D.C. Cir. 1984) (both stating that a health and safety statute must be interpreted broadly); *Brennan v. OSHRC*, 491 F.2d 1340, 1344 (2nd Cir. 1974) (stating that a health and safety regulation must be interpreted broadly).

Conclusion re: Citation No. 9895049

In summary I find that the Secretary's implementation of the 060 code is not a substantive rule to which the APA's notice and comment provision apply. The Secretary complied with all the necessary procedural requirements including APA notice and comment provision before promulgating 30 C.F.R. § 70.207(e)(7), which gives the MSHA district manager authority to direct the placement of the sampling device in the longwall section of the mine in taking the bimonthly respirable dust sampling of the longwall section as required by 30 C.F.R. § 70.207(e)(7).

Thus I agree with the Secretary's position in this case. Shoshone's contention that MSHA acted unreasonably and arbitrarily when the district manager directed Shoshone to change the designated occupation from occupation code 044 to 060 for purposes of the bimonthly sampling of the longwall in Shoshone Mine No. 1 is rejected. I find that in mandating the change in the designated occupation, MSHA acted within its authority and in compliance with the sampling procedures found in § 70.207(e)(7), and in so doing, it acted reasonably in carrying out the intent of Congress and the Act to insure that miners are protected from excessive concentrations of respirable dust. The preponderance of the evidence and the record as a whole clearly establishes the violation charged in Citation No. 9895049 and that contested citation is affirmed.

Conclusion re: Citation No. 4073211

The parties jointly stipulated that if a violation is established with regard to Citation No. 9895049, Shoshone concedes that a violation with respect to Citation No. 4073211 is also established. (Stip. 38).

In view of the foregoing, the violation of 30 C.F.R. § 75.370(a)(1) is established as alleged in Citation No. 4073211 for mining activity on August 2, 1999, at which time there was no approved ventilation plan in effect for the Shoshone No. 1 Mine.

The citation, however, was issued as an S&S² violation and under stipulation No. 38 the parties agreed that Shoshone would continue to contest the significant and substantial designation of Citation No. 4073211.

It appears from Shoshone Ex. 1 that MSHA first instructed Shoshone to put the 060 in its ventilation plan and to submit the amended plan to MSHA by July 23, 1999. So up until at least July 23 the designated occupation in the mine's ventilation plan was 044. MSHA has a policy when there is an impasse in negotiations between the Secretary and the company regarding a change in the mine plan, the company can take a technical citation so that there can be a challenge to the plan and that is what Shoshone did. (Tr. 134-135).

In any event I find that the preponderance of the evidence presented in this case fails to establish the third element of the *Mathies* formula. Citation No. 4073211 is modified to delete the S&S finding and as so modified the citation is affirmed.

ORDER, DOCKET NO. WEST 99-342-R

The contested Citation No. 9895049 in Docket No. WEST 99-342-R citing a violation of 30 C.F.R. § 70.207(a), is **AFFIRMED**. The contest of that citation filed by Shoshone is **DENIED** and **DISMISSED**.

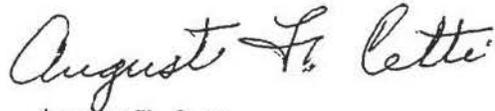
² A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. At 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

ORDER, DOCKET NO. WEST 99-384-R

The contested S&S Citation No. 4073211 in Docket No. WEST 99-384-R citing a violation of 30 C.F.R. § 75.370(a)(1) is modified to delete the S&S finding and as so modified is **AFFIRMED**. The contest of that citation filed by Shoshone is granted to the limited extent of deleting the S&S finding but in all other respects is **DENIED** and the case is **DISMISSED**.



August F. Cetti
Administrative Law Judge

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/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 16, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-201-M
Petitioner	:	A.C. No. 35-03489-05501
	:	
v.	:	Docket No. WEST 2000-202-M
	:	A.C. No. 35-03489-05502
RICHARD E. SEIFFERT RESOURCES,	:	
Respondent	:	Bailey Quarry

DECISION

Appearances: Paul A. Belanger, Conference and Litigation Representative, Mine Safety and Health Administration, Vacaville, California for Petitioner; Marcel Roy Bendshadler, Portland, Oregon, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Richard E. Seiffert Resources (“Seiffert Resources”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Portland, Oregon.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Preliminary Issues

Seiffert Resources operates the Bailey Quarry in Washington County, Oregon. On November 9-10, 1999, MSHA Inspector David Brown inspected the Bailey Quarry. MSHA was not aware of the quarry until it received a hazard complaint from an employee at the quarry. Inspector Brown was sent to the quarry to investigate the complaint. Inspector Brown determined that the quarry was subject to MSHA jurisdiction and he conducted an investigation. He also inspected the quarry for violations of the Secretary’s safety standards.

These cases involve 22 citations issued under section 104(a) of the Mine Act. Two of the citations allege that Seiffert Resources failed to notify MSHA that it had opened the quarry. These citations allege violations of 30 C.F.R. § 41.11 and §56.1000. Inspector Brown determined that the quarry had been in operation for about three months. (Tr. 38). Seiffert Resources contested one of these citations in WEST 2000-165-RM.

From the outset of these proceedings, Seiffert Resources took the position that MSHA does not have jurisdiction to inspect the quarry. In the related contest proceeding, the parties briefed the jurisdiction issue. The parties agreed that the fundamental facts surrounding the jurisdiction issue are not in dispute and that this issue was amenable to written presentations. In a decision issued on October 26, 2000, I held that the Secretary has jurisdiction under the Mine Act to conduct warrantless inspections of the Bailey Quarry. Seiffert Resources did not appeal that decision. My decision in WEST 2000-165-RM is binding in this case.¹

Seiffert Resources was represented by Marcel Roy Bendshadler at the hearing. He is not an attorney, but he calls himself a "Constitutional Counselor." I permitted Mr. Bendshadler to represent Seiffert Resources under 29 C.F.R. § 2700.3(b)(4). Seiffert Resources raised a number of jurisdictional issues at the hearing in these cases. Most of these arguments were previously raised and are rejected for the reasons set forth in my previous decision. It argues, for example, that the quarry is located in the "Republic of Oregon" and that the United States government does not have jurisdiction over private property within Oregon. This argument and others like it are rejected.

Seiffert Resources also raises a number of other issues. It argues that the material that it digs from the earth is not a mineral because it has no intrinsic value. It maintains that it digs up worthless rock and crushes it for use by customers. It argues that ordinary rock is not a mineral, as that term is used in section 3(h)(1) of the Mine Act.

For purposes of the Mine Act, the term "mineral" is very broadly defined. The term "mineral" is defined as "any of various naturally occurring homogeneous or apparently homogeneous ... solid substances (as ore ... sand, gravel ...) obtained for man's use usually from the ground." *Webster's Third New International Dictionary* 1437 (1993). The term may have many meanings depending on the context, and generally includes anything dug out of a mine or quarry, such as stone. Indeed, the term "rock" is defined as "an aggregate of one or more minerals" and the term "stone" is defined as "a mineral or group of consolidated minerals either in mass or in a fragment of pebble or larger size." *Dictionary of Mining, Mineral, and Related Terms* 464, 540 (American Geological Institute, 2d ed. 1997). I find that stone, rock, gravel, and sand are minerals as that term is used in the Mine Act.

Seiffert Resources suggested that all of the citations should be vacated because no employees were injured as a result of any of the cited conditions. It argues that because no employee had been injured, Inspector Brown should have honored the posted "No Trespassing" signs. The Secretary's jurisdiction to conduct warrantless inspections of quarries is not dependent on the presence of an injury. In addition, the Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a

¹ The Commission did not publish my decision in WEST 2000-165-RM. Consequently, that decision is attached as an appendix to this decision for publication.

mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. The Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

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

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in determining the amount of the penalty. Thus, if a safety standard is violated, a penalty is assessed even if there was no injury and the chance of an injury was not very great.

Seiffert Resources also argues that Title 30 of the United States Code does not have the force of positive law. (Tr. 166). It contends that since Title 30 is not positive law, it only applies within the United States and it was not established that the quarry is “within the United States.” (Tr. 57). As stated above, Seiffert Resources’ arguments concerning the jurisdiction of the United States government are rejected. Although Title 30 is not positive law, it is “prima facie evidence of the laws” contained within it. (Preface to the United States Code, 1994 Edition). The Mine Act itself is positive law and I have relied upon the Mine Act not Title 30 in rendering my decision in these cases. Any references to Title 30 in this decision are merely for the convenience of the reader.

Seiffert Resources also argues that the law of contracts, the Uniform Commercial Code, and the law of secured transactions applies in these cases. At the hearing, Seiffert Resources repeatedly asked me whether it is being “addressed” as a creditor or a debtor in these cases. (Tr. 5-20, 160). It also maintains that the concept of procuration applies. (Tr. 16-17). The term “procuration” simply refers to the act of appointing another as one’s attorney-in-fact or agent. Seiffert Resources seems to believe that it has been appointed as an agent of MSHA and the Commission. It states that it has “put forth paperwork [to] tell the people responding that we [Seiffert Resources] are going to do the work for you [the judge] since you seem not to be able to do your job on your own....” (Tr. 17; Ex. R-1). This argument is without merit. As I stated at the hearing, this proceeding has nothing to do with the law of contracts or the creditor-debtor relationship. It is a regulatory proceeding under the Mine Act which grants MSHA jurisdiction under Article I, Section 8, Clause 3 of the United States Constitution.

Seiffert Resources offered no testimony concerning the individual citations at the hearing. Mr. Richard E. Seiffert testified that he is the operator of the Bailey Quarry, that MSHA does not have jurisdiction over his quarry, and that he is declaring “diplomatic immunity.” (Tr. 163-64). When asked for the basis of his declaration of diplomatic immunity he simply stated “that’s for a matter that’s going to continue later.” *Id.* This argument is without merit. The “Republic of

Oregon” does not exist; Oregon is one of the several states over which MSHA has jurisdiction under the Mine Act.

In its opening statement, Seiffert Resources stated that Mr. Seiffert “would simply like to continue peacefully going about his existence, harming no other, as he expects others not to harm him.” (Tr. 23). The purpose of the MSHA inspection was to help Mr. Seiffert prevent accidents. One of his employees believed that Mr. Seiffert was not doing enough to provide a safe working environment so he called MSHA for help. Numerous fatal and serious accidents have occurred at small quarries like Mr. Seiffert’s. Thus, MSHA inspected the quarry to help Mr. Seiffert make sure that he, in fact, does not harm others.

B. Discussion of the Citations

At the outset of the inspection, Mr. Seiffert told Inspector Brown that he thought he had obtained all of the permits necessary to open the quarry. (Tr. 36). Mr. Seiffert was unaware of MSHA’s existence or the requirements contained in the Secretary’s safety standards. He was very cooperative during the inspection. (Tr. 50). At the hearing, the Secretary presented testimony with respect to each citation at issue in these cases. Seiffert Resources cross-examined the MSHA inspector but did not present any evidence as to the merits of the citations.

I affirmed Citation No. 7973945 in my decision in WEST 2000-165-RM.² I affirm Inspector Brown’s determination that the violation was not serious, was not of a significant and substantial nature (“S&S”), and that the negligence of Seiffert Resources was low. (Tr. 41). I assess a penalty of \$20. Citation No. 7973947 alleges that Seiffert Resources violated 30 C.F.R. § 56.1000 by failing to notify MSHA’s Metal/Nonmetal District Office that he was commencing operations. The Secretary established a violation of this standard. (Tr. 52-55). I affirm the inspector’s determination that the violation was not serious, not S&S, and that the negligence was low. I assess a penalty of \$20.

Inspector Brown issued Citation No. 7973946 in response to the hazard complaint. This citation alleges that there was a section of loose material that was about 15 feet high, 8 feet wide, and 4 feet thick in a high wall at the quarry. It states that one of the fractures in the rock was about eight inches wide. The citation further states that the fractured section was directly above the loading area in a narrow slot that was about 25 feet wide and several hundred feet long. The citation alleges a violation of section 56.3200, which requires that ground conditions that create a hazard to persons be taken down or supported.

Inspector Brown testified that if this condition were not corrected the loose material could have fallen in an area where people are required to work. (Tr. 43). He reached this conclusion because the area was cracked on both sides. The vibration of the equipment working in the area

² As a result of a typographical error, that decision refers to an incorrect citation number for this citation. The correct citation alleging a violation of section 41.11 is No. 7973945.

could have brought the material down. *Id.* He also testified that rain would tend to wash out the fine material making the high wall more likely to fall. (Tr. 44). The inspector stated that the narrow work area increased the hazard.

No equipment or employees were working in the area at the time he issued his citation. He observed fresh tracks in the slot between the two high walls that appeared to be from a track hoe and a haul truck. (Tr. 47-48). He was also told by Mr. Seiffert that they excavated material from within this slot. (Tr. 48). There were no barricades preventing anyone from entering the area. The inspector did not know when the cracks in the high wall developed. (Tr. 66). Inspector Brown determined that the violation was serious and S&S, and that the operator's negligence was moderate. The inspector testified that Mr. Seiffert immediately abated the condition.

Seiffert Resources believes that this citation should be vacated because the inspector did not know how long the cracks had been present nor did he have sufficient expertise to determine whether the high wall presented a hazard to employees. (Tr. 166). I find that the Secretary established a violation. As a result of his MSHA training and his prior experience working in quarries, Inspector Brown had sufficient expertise to determine that the high wall presented a hazard. In addition, Seiffert Resources did not offer any evidence to the contrary. I credit the inspector's testimony with respect to this citation.

I also find that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 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 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 fact that employees worked in a narrow 25-foot wide area between two high walls increased the chance that someone could be injured. The vibrations from the machinery and the rainy weather also increased the likelihood of an accident in which an employee could be

seriously injured. I find that the violation was serious and that the operator's negligence was moderate. I assess a civil penalty of \$113.

Citation No. 7973948 alleges that the electrical trailer contained several electrical control boxes that were open in the back, in violation of section 56.12032. Inspector Brown testified that 480-volt conductors entered these control boxes through these open backs. He determined that the violation was not S&S because the trailer was dry and well kept. He believed that an injury was unlikely. (Tr. 74, 76). He determined that the operator's negligence was moderate.

I find that the Secretary established a violation. The openings in the backs of the starter boxes created a hazard that moisture, dirt, or other foreign objects could create a short circuit. The inspector agreed that the risk was not high. I find that the violation was not serious and that the negligence of Seiffert Resources was moderate. The \$55 penalty proposed by the Secretary is appropriate.

Citation No. 7973949 alleges that the V-belt drives on the generator were not guarded, in violation of section 56.14107(a). Employees could become entangled in the pinch points. The citation states that the drives are adjacent to the start-up area for the generator. Seiffert Resources does not dispute that the pinch points were not guarded. (Tr. 80). The inspector determined that the violation was not S&S and that the negligence was moderate.

Seiffert Resources maintains that, because the manufacturer of the generator did not provide guards for the V-belt drives, Seiffert Resources should not be charged with a violation. It believes if anyone is charged with a violation of this standard it should be the manufacturer of the equipment. (Tr. 82-84). I find that the Secretary established this violation. Manufacturers often do not provide all the guards that are required by MSHA. It is the responsibility of the quarry operator to make sure that all pinch points are guarded. I affirm this citation in all respects and I assess a penalty of \$55.

Citation No. 7973950 alleges that the 110-volt wiring between two fluorescent light fixtures in the generator trailer contained a splice that was not insulated to a degree at least equal to the original and sealed to exclude moisture. (Tr. 85). The wires were attached using a twist on cap without any additional protection. The citation alleges a violation of section 56.12013(b). The inspector determined that the violation was not S&S and that the negligence was moderate.

Seiffert Resources stated that the wiring was in the cited condition when the generator trailer was purchased. It argues that the safety standard is too vague to be enforceable. I find that the Secretary established a violation. The splice must be insulated to the same degree as the original wiring or a junction box must be installed. (Tr. 87). The fact that Seiffert Resources purchased the trailer in this condition does not negate the violation. I affirm this citation in all respects and I assess a penalty of \$55.

Citation No. 7973951 alleges that the 480-volt power cord for a conveyor had pulled away from the fitting on the control box. It states that inner conductors in the power cord were exposed. (Tr. 9192). The citation alleges a violation of section 56.12008. The inspector determined that the violation was not S&S and that the negligence was moderate.

Seiffert Resources questions whether the conveyor was in operation at the time of the inspection. Through its cross-examination, it infers that the conveyor may have been under construction at the time of the inspection. (Tr. 94). Inspector Brown credibly testified that the conditions he observed showed that the conveyor was in an operable condition. *Id.* He testified that the conveyor was part of the crushing circuit that had been operating, at least for testing purposes. (Tr. 99). Although the crusher may not have been in production, the inspector believed that it had been run. (Tr. 101) The electrical circuit for the conveyor was not energized at the time of the inspection (Tr. 102). The citation states that the “conveyor was not in operation due to repairs to that portion of the plant and power at the main switch was in the ‘off’ position.” Seiffert Resources did not offer any evidence to contradict Inspector Brown’s testimony that the conveyor had been used. There was no testimony that Seiffert Resources was in the process of correcting the cited condition. I find that the Secretary established a violation because the power cord was not properly seated in the fitting. I affirm this citation in all respects and I assess a penalty of \$55.

Citation No. 7973952 alleges that the self-cleaning tail pulley for the rear conveyor was not provided with guards to protect employees from contacting the rotating tail fins. It states that the pulley was about 60 inches above the ground. There was spillage around the tail pulley. (Tr. 104). The citation alleges a violation of section 56.14107(a). The inspector determined that the violation was not S&S and that the negligence was moderate.

Seiffert Resources indicated that guards were not provided by the manufacturer. As stated above, it is the mine operator that bears the ultimate responsibility. I affirm this citation in all respects and I assess a penalty of \$55.

Citation No. 7973953 alleges that the power cord supplying power for the motor on the horizontal impact crusher was not securely fastened to the fitting. Electrical tape was used to secure the cord where it entered the junction box. (Tr. 108). The citation alleges a violation of section 56.12008. The inspector determined that the violation was not S&S and that the negligence was moderate. The Secretary did not propose a penalty for this citation. The citation is not included in “Exhibit A” attached to the Secretary’s Petition for Assessment of Civil Penalty. Under section 105(a) of the Mine Act, the Secretary is required to “notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited....” Because a penalty was not proposed by the Secretary, I do not have authority to assess a penalty for this citation.

Citation No. 79783954 alleges that the junction box on the end of the feed motor had a hole in the side of the box that would allow moisture and dust to enter the junction box. The

junction box was missing one of the knockouts. (Tr. 110). The citation alleges a violation of section 56.12032. The inspector determined that the violation was not S&S and that the negligence was moderate. I affirm this citation in all respects and I assess a penalty of \$55. Although the likelihood of an injury was low, the condition violated the safety standard.

Citation No. 7973955 alleges that a small quantity of flammable liquid was kept in a container that was not a safety can, in violation of section 56.4402. A safety can is defined at 56.2 as "an approved container ... having a spring-closing lid and spout cover." There is no dispute that the cited plastic container was not an approved safety can. The inspector determined that the violation was not S&S and that the negligence was low. The plastic container contained gasoline and was properly labeled. (Tr. 113, 115). Seiffert Resources suggests that the word "shall" in the safety standard means "maybe," citing Black's Law Dictionary. (Tr. 114). Its argument is rejected. The word "shall" means "has a duty to" or "is required to." *Black's Law Dictionary* 1379 (7th ed. 1999). I affirm this citation in all respects and I assess a penalty of \$20.

Citation No. 7973956 alleges that several fire extinguishers at the site had not been inspected on an annual basis in violation of section 56.4201(a)(2). Inspector Brown testified that the violation was not S&S and the operator's negligence was low. (Tr. 116-17). Seiffert Resources may have had other fire extinguishers that complied with the standard and other firefighting equipment may have been present. I affirm this citation in all respects and I assess a penalty of \$20.

Citation No. 7973957 alleges that none of the employees at the quarry had been given first-aid training as required by section 56.18010. Inspector Brown testified that the violation was not S&S and the operator's negligence was low. (Tr. 121-22). As with Citation No. 7973953, a penalty for this citation was not proposed by the Secretary. Consequently, this citation cannot be included within this decision.

Citation No. 7973958 alleges that toilet facilities were not provided that were readily accessible to employees, in violation of section 56.20008(a). The inspector testified that the violation was not S&S and that the operator's negligence was low. (Tr. 123). The inspector further testified that Mr. Seiffert advised him that there was a trailer at the site that he was going to equip with a toilet. (Tr. 124). I affirm this citation in all respects and I assess a penalty of \$20.

Citation No. 7973959 alleges that there were no documents at the quarry to show that work place examinations were being made, in violation of section 56.18002(b). Inspector Brown testified that the violation was not S&S and the operator's negligence was low. (Tr. 125-26). He stated that Mr. Seiffert was not aware of this record keeping requirement. I affirm this citation in all respects and I assess a penalty of \$20.

Citation No. 7973960 alleges that the brake lights on a GMC dump truck were not in working order, in violation of section 56.14100(b). Inspector Brown determined that malfunctioning brake lights were a defect that affect safety because other vehicles in the quarry

would not know when the truck was slowing down or coming to a stop. (Tr. 127). The inspector determined that the violation was not S&S and that the negligence was moderate. I affirm this citation in all respects and I assess a penalty of \$55.

Citation No. 7973961 alleges that the windshield wiper on the driver's side of this same dump truck was not functioning. The citation also charges a violation of section 56.14100(b). Inspector Brown determined that the malfunctioning wiper was a defect that affects safety. He also determined that the violation was not S&S and that the negligence was moderate. Inspector Brown was not sure if the wiper was vacuum operated or electrically operated. (Tr. 130-31). In order to test a wiper that is operated by vacuum, one must start the engine to build up air pressure. (Tr. 131). The mine operator advised Inspector Brown that the wiper had been working. (Tr. 132-33). The inspector testified that the passenger side wiper must have been working because he did not include that wiper in the citation. In addition, the truck was started during this inspection as evidenced by Citation No. 7973962. I find that the Secretary established that the cited wiper was not functioning. I affirm this citation in all respects and I assess a penalty of \$55.

Citation No. 7973962 alleges that the low air warning device on this same dump truck was not maintained in a functioning condition. The citation alleges a violation of section 56.14100(b). The low air warning device did not alert the inspector to low air pressure as the pressure was dropped to 0 psi. (Tr. 137). The inspector determined that the violation was not S&S and that the negligence was moderate. I find that the Secretary established that the malfunctioning warning device was a device that affects safety. The operator of the vehicle would not be aware if the air pressure became too low to operate the brakes. I affirm this citation in all respects and I assess a penalty of \$55.

Citation No. 7973963 alleges that the seatbelt installed on the 35 ton Mack haul truck did not meet the requirements of section 56.14130(h). The seat belt was an ordinary seat belt installed on trucks for use on public highways and it was in good condition. (Tr. 139-40). Mr. Seiffert was unaware that the existing seatbelt was not adequate. Inspector Brown testified that the violation was not S&S and the operator's negligence was low. I affirm this citation in all respects and I assess a penalty of \$20.

Citation No. 7973964 alleges that the air activated windshield wiper on this same haul truck was not functioning, in violation of section 56.14100(b). The operator of the vehicle could operate the wiper by hand. (Tr. 142). Inspector Brown testified that the violation was not S&S and the operator's negligence was low. I affirm this citation in all respects and I assess a penalty of \$20.

Citation No. 7973965 alleges that guards were not provided for the fan and V-belt drives in the engine compartment of this same haul truck. The citation alleges a violation of section 56.14107(a). Inspector Brown testified that it appeared that the truck had once been provided with the required guards. (Tr. 143). Inspector Brown testified that the violation was not S&S

and the operator's negligence was moderate. He stated that the areas that required guarding were within reach of a person checking the oil. (Tr. 144). I find that the Secretary established a violation. I affirm this citation in all respects and I assess a penalty of \$55.

Citation No. 7973968 alleges that the seats belts were not provided in the Caterpillar front-end loader. The citation states that the front-end loader was not in operation at the time of the inspection, but it had been used the day before. He obtained this information from mine personnel. (Tr. 151-52). The citation alleges a violation of section 56.14130(a)(3). Inspector Brown testified that the loader was built after 1969. (Tr. 147-48). He further stated that the quarry was fairly level. He also stated that because the suspension on this type of loader is rigid, the ride is not smooth. (Tr. 149). He determined that the violation was S&S because it was reasonably likely that the cited condition would contribute to an injury of a reasonably serious nature. *Id.* The inspector testified that the operator of the loader would be bounced around quite a bit and that, if the operator had to make a sudden stop, he could be injured. Inspector Brown determined that Seiffert Resources' negligence was moderate.

I find that the Secretary established a violation. I credit Inspector Brown's testimony. I affirm this citation in all respects and I assess a penalty of \$113.

Citation No. 7973969 alleges that guards were not present on the sides of the engine compartment on this same loader to protect employees from contacting moving machine parts. The citation alleges a violation of section 56.14107(a). This citation is similar to Citation No. 7973965. He did not consider the violation to be S&S. He determined that the operator's negligence was moderate. He testified that the likelihood of an injury was not great because of the exposure and location. (Tr. 153). He believes that normal maintenance is performed with the engine off. I find that the Secretary established a violation. I affirm this citation in all respects and I assess a penalty of \$55.

Citation No. 7973970 alleges that employees of Seiffert Resources had not been reporting and recording safety defects on mobile equipment. Section 56.14100(d) requires that safety problems on self-propelled equipment be corrected immediately or reported to and recorded by the mine operator. Inspector Brown testified that there were no records for any of the safety defects he found during his inspection. (Tr. 155). When he asked Mr. Seiffert for such records, he was advised that such records did not exist. *Id.* Inspector Brown testified that the violation was not S&S and the operator's negligence was moderate. I find that the Secretary established a violation. I affirm this citation in all respects and I assess a penalty of \$55.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that no citations were issued at the quarry during the two years preceding the inspection. Seiffert Resources is a small operator. All of the citations were abated

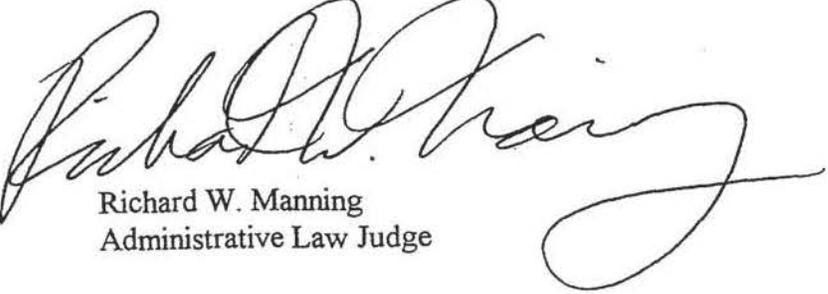
in good faith. The penalties assessed in this decision will not have an adverse effect on Seiffert Resources's ability to continue in business. The gravity of the two S&S violations is moderate, but the gravity for the other violations is low. My findings with regard to negligence is set forth above. I reduced the penalties for citations alleging low negligence. 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 No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2000-201-M		
7973945	41.11	\$20.00
7973946	56.3200	\$113.00
7973947	56.1000	20.00
7973948	56.12032	55.00
7973949	56.14107(a)	55.00
7973950	56.12013(b)	55.00
7973951	56.12008	55.00
7973952	56.14107(a)	55.00
7973954	56.12032	55.00
7973955	56.4402	20.00
7973956	56.4201(a)(2)	20.00
7973958	56.20008(a)	20.00
7973959	56.18002(b)	20.00
7973960	56.14100(b)	55.00
7973961	56.14100(b)	55.00
7973962	56.14100(b)	55.00
7973963	56.14130(h)	20.00
7973964	56.14100(b)	20.00
7973965	56.14107(a)	55.00
WEST 2000-202-M		
7973968	56.14130(a)(3)	113.00
7973969	56.14107(a)	55.00
7973970	56.14100(d)	55.00
	Total Penalty	\$1,046.00

Accordingly, the citations contested in these cases are **AFFIRMED** as set forth above and Richard Seiffert Resources is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,046.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

ATTACHMENT

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 2000

RICHARD E. SEIFFERT RESOURCES,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2000-165-RM
	:	Citation No. 7973945; 11/09/99
v.	:	
	:	
SECRETARY OF LABOR,	:	Bailey Quarry
MINE SAFETY AND HEALTH	:	Id. No. 35-03489
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Before: Judge Manning

This case is before me on a notice of contest filed by Richard E. Seiffert Resources (“Seiffert”) against the Secretary of Labor and the Mine Safety and Health Administration (“MSHA”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the “Mine Act”). Seiffert brought this case to contest the jurisdiction of the Secretary, MSHA, and this Commission over its operations at the Bailey Quarry. The citation at issue in this proceeding alleges a violation of 30 C.F.R. § 41.11 because Seiffert failed to notify MSHA when it opened the Bailey Quarry.

This case was initially set for hearing. Because there are no factual disputes and the jurisdictional issues are more amenable to a written presentation, I canceled the hearing at the request of the parties and required them to brief the issues. For the reasons set forth below, I find that MSHA has jurisdiction to inspect the Bailey Quarry and to issue citations for violations of its safety standards and regulations. I also affirm Citation No. 7973945.

I. BACKGROUND

Seiffert operates the Bailey Quarry in Washington County, Oregon. On November 9, 1999, MSHA Inspector David Brown inspected the Bailey Quarry. At the time of his inspection, the crushing plant was in operation, a haul truck was transporting material from the lower pit area to the crushing plant, and this material was being dumped in an area adjacent to the feeder for the crushing plant. A track hoe was picking up and placing this raw material into the crushing plant

for processing and a dump truck was transporting the finished product to the stock pile area, which contained inventories of crushed and sized rock products.

The Bailey Quarry consists of three areas. The upper level contains crushing, screening, and processing equipment. The crushing equipment includes a feeder, screening devices, crushing devices, and connecting conveyors. The middle level contains stockpiles of finished crushed product. The lower level is the pit area where the raw material is excavated with a track hoe. Inspector Brown observed a number of pieces of equipment being used at the quarry that were not manufactured in the State of Oregon, including a GMC haul truck, a Mack haul truck, a Komatsu dozer, and various pieces of Caterpillar equipment.

II. SUMMARY OF THE PARTIES' ARGUMENTS

C. Secretary of Labor

The Secretary contends that the Bailey Quarry is a mine subject to the jurisdiction of the Mine Act. She argues that the quarry is a "coal or other mine," as that term is defined in section 3(h)(1) of the Mine Act. Minerals are extracted from the earth and then crushed and screened at the quarry site in preparation for sale. The Secretary maintains that these operations clearly fit within the cited definition. She points to the fact that this definition includes the milling of minerals. According to the Secretary, the crushing and screening operations at the quarry qualify as mineral milling under this definition. Thus, she contends that the extraction and milling operations at the quarry are included within the definition of "coal or other mine."

The Secretary next argues that the Bailey Quarry meets the requirements of section 4 of the Mine Act because the products produced at the quarry enter or affect commerce. The Secretary emphasizes that the language of the Mine Act and the Mine Act's legislative history demonstrates that Congress intended to exercise its full power under the commerce clause of the U.S. Constitution when it enacted the Mine Act. The Secretary also maintains that the Bailey Quarry affects interstate commerce because it uses equipment manufactured outside the State of Oregon. Finally, she contends that the quarry affects interstate commerce because the Mine Act was passed to reduce the number of mining accidents and mining-related diseases in the nation's mines. She argues that disruption of a mine's production because of accidents and mining-related diseases affects interstate commerce.

D. Richard E. Seiffert Resources

Seiffert argues that the federal government does not have jurisdiction to regulate operations at the Bailey Quarry because the quarry is located on private property. Because Seiffert's argument in this case is about 145 pages in length, I can only briefly summarize its major points. Seiffert contends that MSHA has "jurisdictional authority within the District of Columbia and federal territories only with regard to activities that occur specifically 'within' federal possessions located inside the territorial boundaries of Oregon state." (Motion to Dismiss at 4). It further contends that, because the quarry is not located on federal property, MSHA does

not have territorial jurisdiction to inspect it. In support of this position, Seiffert cites a number of authorities including the U.S. Constitution, the *Federalist Papers*, court cases from the 19th and 20th centuries, and a report, apparently prepared in 1957 by the federal government in conjunction with state Attorneys General, that discusses federal and state jurisdiction over federal lands within the states.³ Seiffert cites other authorities as well. Its brief includes a discussion of the development of property rights from 15th century England to present day America and a discussion of Federal judicial authority from the colonial period to the present. Seiffert also filed a supplemental brief on October 23, 2000, which raises additional arguments.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Seiffert's arguments center around its interpretation of Federal jurisdiction. Its position, however, is based on a misinterpretation of the U.S. Constitution and the development of constitutional law over the past 60 years. I find that Congress granted the Secretary of Labor jurisdiction under the Mine Act to conduct health and safety inspections at privately owned mines within the states as long as the activities at the mines affect interstate commerce.

Seiffert places great reliance on the Report discussed above. The Report discusses Article I, Section 8, Clause 17 of the U.S. Constitution. That provision of the Constitution concerns the District of Columbia and lands over which the Federal government exercises exclusive jurisdiction. It provides, in pertinent part, that "Congress shall have power to ... exercise exclusive legislation in all cases whatsoever, over such District ... and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings..." Under this provision of the constitution, the Federal government cannot exercise exclusive jurisdiction over an area within a state without the consent of that state's legislature. This provision was designed to prevent the Federal government from purchasing lands within a state and displacing the state's authority without the consent of the state legislature. It does not deal with jurisdictional issues on private lands or jurisdictional issues on lands owned by the federal government where the federal government has neither sought nor been granted exclusive jurisdiction by the state legislature.

The federal government can acquire property in a state, but it can only acquire jurisdiction over that property if both the state and federal governments agree to that transfer. *See, e.g., Paul v. United States*, 371 U.S. 245, 264 (1963). Otherwise, the United States does not take

³ The report that Seiffert relies upon is entitled, *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States* (the "Report"). Seiffert did not provide a citation for this report. I have relied upon Seiffert's extensive quotations from the Report in analyzing the arguments presented in its brief.

jurisdiction over the property and is merely a proprietor of the property. If the United States has jurisdiction over property in a state, it is often referred to as a “federal enclave” and state law does not apply to that property. For example, in *Lord v. Local Union No. 2088*, 646 F2d. 1057, 1063 (5th Cir. 1981), *cert. denied*, 458 U.S. 1106, the court held that Florida’s right-to-work law did not apply to a federal enclave in that state. That federal enclave had been previously established with the consent of the Florida legislature.

Seiffert applies the concepts in the Report to all lands within a state, not just federally owned lands. For example, the Report, as quoted by Seiffert, states that the “federal government cannot, by unilateral action on its part, acquire legislative jurisdiction over any area within the exterior boundaries of a state.” (Brief in Support of Motion to Dismiss at 20). Seiffert uses that sentence to support its position that the Secretary lacks territorial jurisdiction over the Bailey Quarry. Article I, Section 8, Clause 17 of the Constitution, however, merely provides that federal enclaves cannot be created without the consent of the host state. It does not pertain to federal regulation of businesses located on private property. The Report merely discusses the implementation of that clause of the constitution to federal lands within a state. Thus, the above quote from the Report is taken out of context by Seiffert.

More importantly, the words “legislative jurisdiction” in the quote refer to exclusive legislative jurisdiction as specified in Article I, Section 8, Clause 17. The Secretary is not contending that the federal government has exclusive jurisdiction over the Bailey Quarry or that the quarry is a “federal enclave.” Laws passed by the State of Oregon are also applicable to the Bailey Quarry. Thus, the federal government has neither sought nor acquired “legislative jurisdiction” over the Bailey Quarry. Thus, I conclude that Article I, Section 8, Clause 17 of the constitution and the Report are irrelevant to this proceeding.

Seiffert’s other arguments also revolve around Article I, Section 8, Clause 17 of the U.S. Constitution. Seiffert cites criminal cases in which the issue is whether federal or state criminal statutes apply to federal military bases. For example, in *United States v. Lovely*, 319 F2d 673 (4th Cir. 1963), the defendant was convicted of sexual assault on a military reservation under a federal criminal statute. The defendant attempted to have his conviction reversed on the basis that jurisdiction over the reservation had not been properly ceded to the federal government by the state. Seiffert cites numerous cases discussing jurisdictional issues on federally owned lands or on ships at dock. (Motion to Dismiss 4-6; Brief in Support of Motion to Dismiss 11-20, 21-30).

From these cases, Seiffert reaches the conclusion that “federal jurisdiction extends only over the areas where it possesses the power of exclusive jurisdiction...” (Brief in Support of Motion to Dismiss 11). It believes that “to hold otherwise would destroy the purpose, intent, and meaning of the entire Constitution for the United States of America.” *Id.* Seiffert believes that these principles were made clear in *Unites States v. Bevans*, 16 U.S. 336 (1818) and have been followed by federal courts since that time. For example, in *Fort Levenworth R. Co. v. Lowe*, 114 U.S. 525 (1885), the court held the “consent of the states to purchase lands within them ... is

essential, under the constitution, to transfer to the [federal] government, with the title, of political jurisdiction and dominion.” *Id.* at 531. “Where lands are acquired without such consent, the possession of the United States ... is simply that of an ordinary proprietor ... subject to the legislative authority and control of the states equally with the property of private individuals.” *Id.*

In its supplemental brief, Seiffert set forth additional arguments that focus on jurisdiction over federal lands. It cites 40 U.S.C. § 255, entitled “Approval of Title Prior to Federal Land Purchases...” for the proposition that, because the federal government did not obtain title to the Bailey Quarry, MSHA must obtain the approval of the Governor of Oregon to “‘operate’ its scheme of warrantless inspections upon private property located within the external boundaries of Oregon....” (Supplemental Brief 2). It also makes broad constitutional arguments based on the relationship between the federal government, state governments, and the rights of citizens. For example, it cites cases in which the Supreme Court struck down the authority of the federal government to require states to administer federal regulatory programs. *See New York v. U.S.*, 505 U.S. 144 (1992); *Printz v. U.S.*, 521 U.S. 98 (1997).

Based on the Report and the cases cited in its briefs, Seiffert makes the following argument that is at the heart of its case:

Federal jurisdiction results only from a conveyance of state jurisdiction to the federal government for lands owned or otherwise possessed by ... the United States, and this federal jurisdiction is extremely limited in nature. There is no federal jurisdiction if there is no grant or cession of jurisdiction by the state to the federal government. Therefore, federal territorial jurisdiction exists only in Washington, D.C., the federal enclaves within the states, and the territories and possessions of the ... United States.

(Brief in Support of Motion to Dismiss 14-15).

These cases and the other cases discussed in Seiffert’s brief discuss a very narrow issue: federal and state jurisdiction on federal enclaves and other federal property. They do not consider the power of the federal government to regulate businesses, such as mines on private property. While it is true that the federal government can exercise *exclusive* legislative jurisdiction only with the consent of the states, it can exercise nonexclusive jurisdiction on private property under the commerce clause of the Constitution: Article I, Section 8, Clause 3. That provision states that “Congress shall have power to ... regulate commerce with foreign nations, and among the several states, and with the Indian Tribes....” As stated in section 4 of the Mine Act, the Mine Act was enacted under the authority of the commerce clause. Since the early 1940s, the commerce clause has been interpreted very broadly by the Supreme Court and the

inferior courts. For example, in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), the Supreme Court held that the federal government's power to regulate private economic activities under the commerce clause is not confined to the regulation of commerce between the states, but extends to a local activity if "it exerts a substantial economic effect on interstate commerce...." "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States...." *Fry v. United States*, 421 U.S. 542, 547 (1975). The commerce clause is an independent and distinct source of federal jurisdiction that is not based on the ownership of land.

Congress and the courts have determined that mines, including quarries, exert a substantial economic effect on interstate commerce. In *Donovan v. Dewey*, 452 U.S. 594, 602 (1981), the Supreme Court stated:

As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

The Court relied upon the legislative history and the preamble to the Mine Act in reaching this conclusion. The Court determined that MSHA had the authority to conduct a warrantless inspection of a stone quarry that was located on private property in Wisconsin.

The circuit courts have uniformly recognized MSHA's authority to inspect mines under the commerce clause. For example, in *U.S. v. Lake*, 985 F3d 265, 268 (6th Cir. 1993), the court of appeals held that "the language of the [Mine] Act, its broad remedial purpose, and its legislative history combine to convince us that Congress intended to exercise its full power under the Commerce Clause." I conclude that the arguments presented by Seiffert are irrelevant to this case because the Mine Act was enacted under the authority granted Congress under the commerce clause. Jurisdiction under the Mine Act is not dependent upon the authority of Congress to establish the District of Columbia and other federal enclaves under Article I, Section 8, Clause 17.⁴ In addition, the Mine Act does not require states to enact or administer any of the enforcement provisions of the Mine Act. Consequently, its argument that Congress cannot

⁴ Seiffert also refers to Article IV, Section 3, Clause 2 of the Constitution. That provision provides that "Congress shall have power to dispose of and make needful rules and regulations respecting territorial or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular state." This provision also deals with federal lands and, for the same reasons, it has no bearing on this case.

compel the State of Oregon to enforce the Mine Act is beside the point. I reject all other arguments presented by Seiffert that are not specifically discussed herein.

For the reasons set forth below, I find that the Bailey Quarry is a mine and that its operations affect commerce. An analysis of Mine Act jurisdiction starts with the definition of the term “coal or other mine,” in section 3(h)(1). A coal or other mine is defined, in pertinent part, as “(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, excavations, ... structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits, ... or used in, or to be used in, the milling of such minerals....” 30 U.S.C. § 802(h)(1). The undisputed facts demonstrate that the Bailey Quarry clearly fits within this definition. Minerals are extracted from the earth at the quarry and are milled at the site for sale to customers. The Bailey Quarry is a “coal or other mine” as that term is defined in the Mine Act.

Section 4 of the Mine Act, entitled “Mines Subject to Act,” provides that “[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.” 30 U.S.C. § 803. The facts set forth above demonstrate that the Bailey Quarry affects interstate commerce. The machinery and equipment used to produce the products at the quarry were manufactured outside the State of Oregon and the products of the quarry are sold to customers, which thereby affects interstate commerce. I conclude that Seiffert’s Bailey Quarry is subject to the provisions of the Mine Act. Consequently, the Secretary has the authority to conduct warrantless inspections of the Bailey Quarry, to issue citations and orders for violations of her safety and health regulations, and to propose civil penalties for those violations.

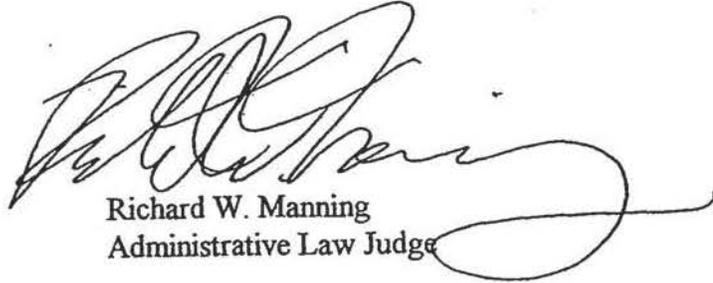
B. Citation No. 7973954

Citation No. 7973954 alleges a violation of 30 C.F.R. § 41.11 because the operator failed to notify MSHA within 30 days that it opened a new mine. Inspector Brown determined that the violation was not serious, was not of a “significant and substantial” nature, and was the result of Seiffert’s low negligence. Section 41.11 provides, in part, that within “30 days after ... the opening of a new mine ... the operator of a coal or other mine shall, in writing, notify the appropriate district manager of [MSHA] of the legal identity of the operator....”

The undisputed facts establish a violation. Seiffert opened a new mine and failed to notify MSHA of its existence within 30 days after it opened. Accordingly, the Secretary established the violation. I affirm the citation as written by Inspector Brown.

IV. ORDER

For the reasons set forth above, I hold that the Secretary of Labor has jurisdiction, as authorized by the Federal Mine Safety and Health Act of 1977, to conduct warrantless inspections of the Bailey Quarry in Washington County, Oregon, owned and operated by Richard E. Seiffert Resources. For the same reasons, I hold that this Commission has jurisdiction over this case under section 113 of that Act. 30 U.S.C. § 823. Citation No. 7973954 is **AFFIRMED** and the notice of contest filed by Richard E. Seiffert Resources in this proceeding is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

Settled Citation

At the beginning of the hearing, the parties advised that they had reached a settlement agreement with regard to Citation No. 4624967. The Secretary's representative stated that although the citation had been modified to non-S&S on December 20, 1999, that fact had not been considered by the assessment office when assessing a penalty of \$475.00. (Tr. 13-14.) The parties agreed to settle the citation for \$55.00. (Tr. 14.) The motion to approve the settlement was granted, (*Id.*), and the penalty will be ordered at the conclusion of this decision. The two remaining citations were contested at the hearing.

Background

The Ruffner Mine consists of a surface coal mine, underground coal mine and a preparation plant operated by Arch of West Virginia in Logan County, West Virginia. Sometime in the second half of 1998, John Metzger, the maintenance manager at the mine, concluded that damage to the company's fuel and lube trucks was being caused by their traveling at excessive speeds. Some of this damage resulted in citations being issued for violations involving the trucks during MSHA inspections. He decided to slow down the trucks in attempt to alleviate these problems.

Fuel truck No. 61462 (truck No.62) was purchased from Robinson Services. It was a rebuilt Mack truck with a Road Ranger transmission. The transmission has five low range gears and five high range gears. The gear shift lever has a button on it which is used to select the low or high range gears. Metzger requested that the air supply to the air valve enabling the high range gears be disconnected so that the high range gears could not be engaged. A short time later, fuel truck No. 61461 (truck No. 61) was sent to Robinson Services so that its Mack transmission could be replaced with a new Road Ranger transmission. Access to the high range gears was blocked in the same manner as truck No. 62. Operating with only the low range gears, the two trucks could travel at a top speed of between 13 and 20 miles per hour.

The fuel trucks are used to carry fuel to all areas of the three mile long surface mine. This requires them to travel over twenty-five to thirty miles of haulage roads, which they share with other mining vehicles.

Almost immediately, the fuel truck drivers began complaining about the slow speed of the trucks and noting in their pre-shift examination reports that the high range gears were disabled. Roger Horton, a fuel truck driver and miners' representative, discussed the matter with both an MSHA inspector and a West Virginia mine inspector. When he did not receive any satisfaction from them, he filed a grievance with the company. After the company declined to act on the grievance, Horton and two United Mine Workers of America (UMWA) international representatives obtained a meeting with the supervisor of the MSHA District Office in Logan and Inspector Sherman Slaughter to complain about the situation.

Shortly after the meeting, Inspector Slaughter went to the mine to investigate the complaint. He met with mine management and discussed the situation with the truck drivers. He then spent about three hours riding in truck No. 62. After his investigation, Inspector Slaughter offered the company an opportunity to “fix” the trucks by restoring the high range gears. When they declined to do so, he issued Citation Nos. 7185723 and 7185724 alleging violations of section 77.1606(c), 30 C.F.R. § 77.1606(c), because:

The high range gears of the transmission of the Mack fuel truck . . . being used at the mine was [sic] disabled so as to limit the maximum speed the truck could travel at the governed engine Rpm [sic] to approximately 13 mph. This was a defect affecting safety in that the slow speed of the truck impeded other traffic using the same roadways at the mine causing unsafe passing situations to develop, prevented the driver from moving out of the way of larger trucks on some steep grades where the ability of the larger truck to slow to the speed of the slower fuel truck was compromised, and would not permit the driver to maintain full control on slippery road surfaces when the truck reached maximum Rpm [sic] and began to break into a slide. Workers at the mine indicated the truck was manufactured to travel at speeds up to 45 mph.¹

(Jt. Exs. 1 and 2.) Section 77.1606(c) provides that: “Equipment defects affecting safety shall be corrected before the equipment is used.”

Findings of Fact and Conclusions of Law

To prevail in this matter, the Secretary must prove three things: (1) that disconnecting the air supply to the air valve which enabled the high range gears constituted an “equipment defect;” (2) that this defect was one “affecting safety;” and (3) that the operator failed to correct the defect before the equipment was used. *Allied Chemical Corp.*, 6 FMSHRC 1854, 1857 (August 1984).² I find that the Secretary has not proved either that lack of access to the high range gears was a defect or that the lack of access affected safety.

Was there a defect in the transmission?

¹ The two citations are identical except that one is for truck No. 61 and the other is for truck No. 62. The violations were alleged to be non-S&S.

² In the *Allied Chemical* case, the Commission was construing 30 C.F.R. § 57.9-2 which was worded identically to section 77.1606(c).

The Commission has held that:

In both ordinary and mining industry usage, a “defect” is a fault, a deficiency, or a condition impairing the usefulness of an object or part. *Webster’s Third New International Dictionary (Unabridged)* 591 (1971); U.S. Department of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* 307 (1968).

Id. In this case, the inability to access the high range gears did not result from a fault or a deficiency in the equipment and it did not impair the usefulness of the transmission or the fuel trucks.

Both parties agree that the high range gears were not damaged or removed from the transmission; they just could not be engaged because the air valve was disconnected. However, the Secretary argues that the fact that the high range gears did not function was a defect in the equipment. In fact, the high range gears could function if the air valve were connected, so it was not that they did not function, rather that they could not be used. Since there was nothing “wrong” with the high range gears, there was not a fault in the gears. Since the gears were present, there was no deficiency in the them. Finally, since the low range gears allowed the trucks to move and to travel any where they needed to go on the mine property, the lack of high range gears did not impair the transmissions’ usefulness.

Clearly, blocking the high range gears, by itself, does not create a defect in the transmission or the vehicle to which it is attached. In this connection, the company introduced into evidence several petitions for modification which were granted by MSHA. (Resp. Ex. 1.) All of them had to do with the operation of graders in underground coal mines and sought modifications of section 75.1909(b)(6), 30 C.F.R. § 75.1909(b)(6), of the rules, which have to do with the service brakes on the graders. In permitting the modification requested, most of the decisions stated that: “The maximum speed on the . . . grader must be limited to ten miles per hour or less by *physically blocking higher gear ratios.*” (*Id.*) (emphasis added.)

While it can be argued that there is an obvious difference between fuel trucks operating at a surface mine and graders operating underground, the fact remains that if MSHA thought that blocking the high range gear ratios created a defect in the equipment, it would not have required it to be done as a condition of granting the petitions for modification. That MSHA does not, in

fact, consider the blocking of high range gears to be a defect is further substantiated by the testimony of Inspector Slaughter, who candidly admitted that he is one of the few people in MSHA who believed that there were violations in this case. (Tr. 370.)³

Consequently, I conclude that the inability to use the high range gears was not a defect.

Did the slow speed of the trucks affect safety?

The Secretary argues that: "The defective transmissions affected the safety of all haulage equipment operators using the haul roads." (Sec. Br. at 10.) The Secretary asserts that the slow speed of the fuel trucks impedes traffic, causes unsafe passing situations, limits the maneuverability of the trucks, compromises the safety of larger rock trucks and makes the drivers unable to control the fuel trucks on slippery roads. However, as the Respondent has correctly pointed out, none of these hazards is the result of the alleged defect in the transmission.

First, it should be noted that the fuel trucks are not the only vehicles traveling on the mines' roads which are slow. Front-end loaders, bull dozers and drills all travel as slowly as, or slower than, the fuel trucks.⁴ In addition, Mr. Metzger testified that the Dresser 685 and 830 haulage trucks have a maximum speed of 16 miles per hour, when loaded. Thus, if slow speed is a safety hazard, then one would expect citations for these other vehicles. The fact that there are no citations, and that no reasonable person, including the Secretary, argues that there should be, reveals the weakness in the Secretary's case.

The Petitioner avers that the fuel trucks impeded traffic because they did not have the ability to travel at a prudent speed, consistent with the other traffic using the road. This proposition is based on rule 77.1607(c), 30 C.F.R. § 77.1607(c), which states that: "Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and the type of equipment used." The Secretary's interpretation turns the rule on its head, however. The rule does not mean that if the speed limit is 35 MPH, as it is at the mine, that all vehicles have to travel 35 MPH. Instead, it means that even if the speed limit is

³ The transcript of the hearing contains numerous errors, many of which were noted in a Motion to Correct Transcript filed by the Respondent. One error which was not included in the motion, was Inspector Slaughter's statement that he was one of the few people in MSHA who believed the blocking of the high range gears was a violation. The transcript actually states: "Im [sic] one of the few people to believe MSHA by the way." However, it is clear from the follow-up question, and from my recollection, that what he really said was: "I'm one of the few people in MSHA who believe it is a violation, by the way." Most, if not all, of the mistakes noted by the Respondent are well taken, however, a correction will be made, as here, only if the statement is used in this decision.

⁴ The drills actually travel so slowly, less than 2 MPH, that special precautions are taken when they are moved.

35 MPH, vehicle operators have to take the above factors, which includes slower vehicles, into consideration and may have to drive at a speed lower than 35 MPH.

Additional alleged hazards are that the fuel trucks create unsafe passing situations and contribute to "tailgating." Again, this argument focuses on the wrong party. Rule 77.1607(a), 30 C.F.R. § 77.1607(a), and common sense, require that: "Vehicles shall follow at a safe distance; passing shall be limited to areas of adequate clearance and visibility." Obviously, it is the overtaking vehicle which has to insure that it is safe to pass, not the fuel truck. Unsafe passing situations are created by a driver not complying with rules 77.1607(a) and (c), not the fact that the fuel trucks can only use the low range gears. Similarly, "tailgating" is the fault of the driver of the vehicle not following at a safe distance, not the driver of the vehicle being followed.

The compromised safety of the haulage trucks is another claimed hazard. This is based on the premise that a rock truck driver selects a speed when he begins descending a grade and if he comes around a "blind curve" and sees a fuel truck in front of him he will not be able to stop in time. (Sec. Br. at 15-16.) Once again, this assertion blames the wrong participant. All the haulage truck driver need do is select a speed which permits him to stop if he is surprised rounding a blind curve. This would seem particularly prudent in view of the fact that what he may be confronted with on a blind curve, in addition to a slower truck preceding him, is a faster vehicle coming toward him.

Finally, the Secretary maintains that the fuel truck drivers will not be able to pull out of a skid when going down steep grades. The theory behind this contention is that the fuel trucks descend the grade at their top speed and if they start skidding, they cannot speed up to get out of the skid. While there was evidence from the Secretary's witnesses that speeding up is a method for correcting a skid, there was also evidence from the Respondent that the way to correct a skid is to take one's foot off of the brake and to steer in the direction of the skid. None of the witnesses were experts in controlling a skidding vehicle. However, I find the Respondent's witnesses more persuasive.⁵ Moreover, even if speeding up is an appropriate way to correct a skid, all the fuel truck drivers have to do is not go down the hill at top speed.

In sum, all of the hazards alluded to by the Secretary are either within the control of someone other than the fuel truck driver, or, in connection with skidding, are within the control of the fuel truck driver. All of the hazards, including the last one, can be avoided by compliance with rules 77.1607(a) and (c).

In conclusion, the inability to use the high range gears does not make the transmission or the truck defective. Slow speed is not a defect. And neither the transmissions nor the slow

⁵ Perhaps this is because the method Messrs. Metzger and Dale Lucha, Manager of Safety and Labor Relations at the mine, detailed for recovering from a skid is the same method that is taught in driver training.

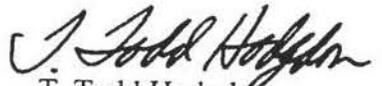
speeds adversely affect safety. Accordingly, I conclude that the Respondent did not violate section 77.1606(c) by blocking access to the top five gears on the fuel trucks and will vacate the citations.

Civil Penalty Assessment

The only penalty to be assessed is for Citation No. 4624967, which the parties settled. In connection with that citation, I have considered the representations and documentation submitted and conclude that the settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i).

Order

Accordingly, it is **ORDERED** that Citation Nos. 7185723 and 7185724 are **VACATED**, and that Citation No. 4624967 is **AFFIRMED**. It is **FURTHER ORDERED** that Arch of West Virginia **PAY** a civil penalty of **\$55.00** within 30 days of the date of this decision.


T. Todd Hodgden
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 19, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2000-159-M
Petitioner	:	A.C. No. 31-01940-05542
v.	:	
	:	Triangle Quarry
WAKE STONE CORPORATION,	:	
Respondent	:	Docket No. SE 2000-160-M
	:	A.C. No. 31-02071-05514
	:	
	:	Nash County Quarry

DECISION

Appearances: Melody S. Wesson, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Birmingham, Alabama, for Petitioner;
Roland Massey, Safety/Human Services Director, Wake Stone Corporation, Knightdale, North Carolina, for Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor against Wake Stone Corporation pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petitions each allege a single violation of the Secretary's mandatory health and safety standards and propose civil penalties totaling \$177.00. A hearing was held in Raleigh, North Carolina on February 15, 2001. For the reasons set forth below, I affirm the citations and assess penalties totaling \$100.00.

The Evidence — Findings of Fact

On January 24, 2000, Thomas P. Clarkson, an inspector employed by the Department of Labor's Mine Safety and Health Administration (MSHA), inspected Respondent's Nash County Quarry. As he inspected a Caterpillar 796C haul truck, company number 8019, he observed that there were no guards for the alternator pulley and v-belt in the engine compartment and issued Citation No. 7792135, charging a violation of 30 C.F.R. § 56.14107(a), which provides:

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

He concluded that the violation was “unlikely” to result in injury but that if an injury did occur, it would be permanently disabling. He assessed the degree of operator negligence as “moderate” and did not find the violation “significant and substantial.”

The location of the alternator pulley and v-belt in the Caterpillar truck’s engine compartment are clearly depicted in a series of pictures introduced into evidence as Respondent’s Ex. 4. The truck is a very large vehicle and a man can easily stand between the left front tire and the engine compartment. The v-belt drives and the alternator pulley are located 12-14 inches inside one of the truck’s frame members at approximately shoulder height and are directly accessible to anyone who might stand in that position.

On March 15, 2000, Darrell Brennan, another MSHA inspector, conducted an inspection of Respondent’s Triangle Quarry. As he inspected a Euclid R-22, water haulage truck, company number 8008, he observed that the v-belt drives in the engine compartment were not guarded and issued Citation No. 7792816, also charging a violation of 30 C.F.R. § 56.14107(a). He determined that the violation was “reasonably likely” to result in an injury that would result in lost work days or restricted duty. He concluded that the violation was “significant and substantial” and assessed the degree of operator negligence as “moderate.”

The Euclid R-22 truck is depicted in a series of pictures introduced into evidence as Respondent’s Ex. 5. It is smaller than the Caterpillar truck and access to the left side of the engine compartment, where the v-belt and pulley are located, is restricted by a fender/headlight assembly and a hose reel that is mounted on the forwardmost part of the trucks’ frame. In order to reach the v-belt and pulley, a person would have to stand in front of the fender and reach through the approximately 14 inch wide gap between the fender and the hose reel. The v-belt and pulley are located approximately 31 inches from the outermost edge of the hose reel. By standing sideways, however, a normal sized man could slip between the hose reel and the fender and get considerably closer to the v-belt/pulley.

Both inspectors based their assessment of the violation and gravity factors on the possibility that the truck’s operator might come into contact with the v-belt/pulley while performing a pre-shift inspection of the truck or investigating a problem with the truck, such as a fluid leak or belt noise. They opined that the operators would likely attempt to diagnose any such problem before reporting it to a mechanic, in order to more fully inform the mechanic of the problem. They testified that they have written other citations for similar violations on mobile equipment, although not at Respondent’s facility. The Secretary also introduced a listing of reported injuries involving v-belt drives and pulleys on mobile equipment in order to demonstrate that such injuries do, in fact, occur.

Wake Stone had purchased the Euclid R-22 truck in 1976 as a used vehicle and it did not have guards installed around the engine compartment v-belt drives. The hose reel was installed in 1986. The Caterpillar 796C truck had been purchased new in 1986. It did not have engine compartment v-belt drive guards installed, nor were such items listed as optional equipment in the list of specifications for the truck. In order to abate the violation on the 796C truck, Respondent consulted the manufacturer's more recent publications and was able to identify a v-belt drive guard for a front end loader that would fit the truck. It was purchased and installed. The company had been inspected by MSHA at least twice a year and the absence of v-belt drive guards in the engine compartments of these trucks had never been cited as a violation in the past, nor had any of Respondent's employees been injured due to the absence of guards.

Conclusions of Law and Fact

Respondent contends, in essence, that its truck operators virtually never put themselves into a position where they could contact the v-belt/pulley assemblies in the trucks' engine compartments and that there is no reasonable possibility of injury due to the absence of guards. The Secretary contends that truck operators or mechanics may, in fact, come into contact with the v-belt/pulley assemblies in examining or working on the engine.

In construing an analogous standard¹ in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission stated:

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

¹ 30 C.F.R. § 77.400

(a) Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

At issue in *Thompson* were citations issued for failure to guard cooling fan blades and air compressor belts and pulleys in the engine compartments of two Euclid R-50 dump trucks. The Commission affirmed the decision of an ALJ finding violations of the standard based on the possibility that a miner might come into contact with the exposed moving machine parts while examining or working on the engines while they were idling. While the possibility of such contact was determined to be "minimal" it satisfied the "reasonably possible" test.

I similarly find that, while the possibility of contact and injury presented by the unguarded v-belt/pulley assemblies was minimal, contact and injury was reasonably possible within the meaning of *Thompson*. There is no question that the v-belt/pulley assemblies were accessible to a miner or mechanic standing near the engine compartments of the subject trucks. The inspectors described a plausible scenario of a driver exploring some problem with a truck's engine and contacting the v-belt/pulley with a hand or clothing. A mechanic examining the engine while idling, even though trained to work in such conditions, could also inadvertently contact the unguarded v-belt/pulley resulting in injury.

Respondent also contends that the obligation imposed by the standard is to maintain guards furnished with the equipment, not to install new guards, except where an unusual hazard is presented. However, that contention is based only upon MSHA's past enforcement practices at its facilities and a citation to dicta in an ALJ opinion that appears to be at odds with an earlier opinion by the same ALJ.² It also ignores other ALJ decisions finding violations of this or a related standard based upon the failure to install guards on moving machine parts in the engine compartments of vehicles that were manufactured without such guards. See, *Nelson Bros. Quarries, Inc.*, 21 FMSHRC 1100, 1102-03 (Oct. 1999) (ALJ); *Riverton Corp.*, 16 FMSHRC 2082 (Oct. 1994) (ALJ); *Power Operating Co.*, 16 FMSHRC 591, 595 (May 1994) (ALJ). Respondent's contention is unfounded. *Thompson* and the cited ALJ opinions make clear that guards are required where contact and injury is reasonably possible.

Citation No. 7792816 - Significant and Substantial

In issuing Citation No. 7792816, Inspector Brennan determined that the violation was significant and substantial. A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a

² Compare *Newmont Gold Co.*, 19 FMSHRC 1640, 1642-43 (Oct. 1997) (ALJ) (stating in dicta that promulgators of standard intended that, except in a rare and exceptional case, there would be no requirement to supplement the existing guards that the manufacturer of a truck had installed in and around the truck's engine area) with *Walsenburg Sand & Gravel Co.*, 11 FMSHRC 2233, 2237-38 (Nov. 1989) (ALJ) (finding of violation for inadequate guarding of engine fan blade on road grader).

reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (footnote omitted)

See also, Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The critical issue here is whether there was a reasonable likelihood that the hazard contributed to will result in an injury. As noted above, Respondent has voiced concern about the consistency of MSHA's enforcement actions, noting that the conditions cited have existed for many years and have never before been cited. Respondent's concerns about consistency are further highlighted by differences in the two citations at issue here. Inspector Clarkson determined that it was "unlikely" that an injury would result from the violation he cited with respect to the Caterpillar 796C truck and concluded that the violation was not significant and substantial. Inspector Brennan, on the other hand, found that the violation on the Euclid R-22 truck was "reasonably likely" to result in an injury and was significant and substantial. The Secretary's representative explained that the difference in the gravity assessments was based upon the degree of accessibility. However, it is apparent from the pictures and related testimony that the v-belt/pulley assembly on the R-22 truck was considerably less accessible than that on the 796C truck cited by Inspector Clarkson.

I agree with Respondent and Inspector Clarkson that it is unlikely that an injury would result from the cited violations and find that the violation charged in Citation No. 7792816 was not significant and substantial.

Negligence

I find that the negligence of the operator with respect to these violations was low. It is undisputed that guards were not installed on the v-belt/pulley assemblies by the manufacturers of the trucks in question and that Respondent purchased the trucks in the cited condition. It is also undisputed that the violations were not cited in numerous prior MSHA inspections and that no injuries have resulted to Respondent's employees from the cited conditions. As noted above, I have found that the possibility of injury presented by the violations was minimal, or unlikely. Moreover, that portion of MSHA's Program Policy Manual addressing the standard here at issue,

makes no reference to mobile equipment. Only recently has MSHA apparently issued any specific guidance on applicability of the standard to mobile equipment.³ While there have been prior decisions by Commission ALJ's finding violations under circumstances similar to those presented here, I find that the degree of operator negligence with respect to these citations was low.

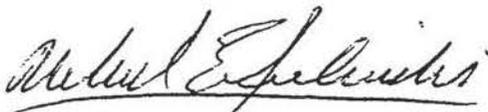
The Appropriate Penalties

The assessment sheets reflect that Respondent's quarries are medium sized and part of a small controlling entity. The assessment sheets also show that in the 24 months preceding the subject inspection that the Triangle Quarry had been inspected on 23 days and that only 11 citations had been written and that the Nash County Quarry had been issued only 4 violations in 15 inspection days, both very good records. The violations were promptly abated. Findings on the gravity and negligence associated with each sustained citation are also noted above.

Upon consideration of the factors itemized in § 100(i) of the Act, I impose the following penalties, which are appropriate to the size of Respondent's business. As to Citation No. 7792135, I assess a penalty of \$50.00, slightly lower than the penalty proposed by the Secretary because of the finding that the operator's negligence was low. As to Citation No. 7792816, I also assess a penalty of \$50.00, a reduction from the proposed penalty of \$122.00, because of the finding that the violation was not significant and substantial and that the degree of negligence was low.

ORDER

Based upon the foregoing, Citations numbered 7792135 and 7792816 are affirmed, as modified, and Respondent is ordered to pay a civil penalty of \$100.00 within 30 days.


Michael E Zielinski
Administrative Law Judge

³ The Secretary attempted to introduce into evidence an excerpt from a revision to an MSHA guarding guide, or book, to show that machine parts on mobile equipment need to be guarded to prevent contact during inspection and maintenance activities. Respondent's objection to the exhibit was sustained because the revision was not adopted and printed until late in the year 2000, after these citations had been issued.

Distribution:

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 24, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2000-98-M
Petitioner	:	A.C. No. 21-02669-05520
v.	:	
	:	
SHAMROCK ENTERPRISES,	:	
Respondent	:	Crusher 22-25

DECISION APPROVING SETTLEMENT

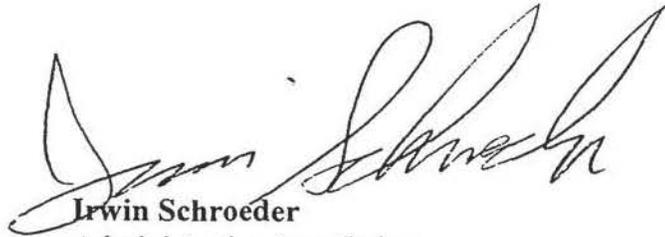
Before: Judge Schroeder

This case is before me on a Petition by the Secretary for the assessment of a Civil Penalty for alleged violations of safety regulations under the Federal Mine Safety Act. The Petition proposed a Civil Penalty of \$24,326.00 for alleged violations of two orders and seven citations in the operation of a sand and gravel facility in Minnesota. After receipt of an answer, I issued a prehearing order which required an effort at negotiation. On April 17, 2001, the counsel for the Secretary filed a Motion to Approve Settlement and Dismiss Proceedings. The Motion represents that the parties have negotiated a settlement which requires several actions.

First, the Respondent has agreed to pay a Civil Penalty in the reduced amount of \$11,117.00. Second, the Respondent has agreed to conduct an eight-hour meeting to instruct all mine personnel on proper policy and procedure to ensure compliance with health and safety regulations. Third, the Respondent has agreed to instruct equipment operator on specific operational and inspection issued. Fourth, the Secretary has agreed to vacate two Orders and one citation.

The agreement to a reduction in the Civil Penalty is based on a reevaluation by the Secretary of the facts and circumstances concerning the various orders and citations. I have reviewed the record. I find the settlement agreement is consistent with the penalty criteria in the Federal Mine Safety Act. I also find the settlement agreement is in the public interest. Therefore, it is

ORDERED that the Motion to Approve Settlement and Dismiss Proceeding is granted. The Respondent is directed to pay a Civil Penalty of \$11,117.00 within 30 days of this Order. The Respondent is directed to comply with the various undertakings in the settlement agreement. The parties are to bear their own costs. Upon receipt of the Civil Penalty directed by this Order, the Petition is **DISMISSED**.

A handwritten signature in black ink, appearing to read 'Irwin Schroeder', is written over a printed name and title.

Irwin Schroeder
Administrative Law Judge

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