

MAY AND JUNE 2006

COMMISSION DECISIONS AND ORDERS

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MAY AND JUNE 2006

Review was granted in the following cases during the months of May and June:

Secretary of Labor, MSHA v. Ronald D. Stokes, Docket No. WEVA 2006-35. (Unpublished Default order issued by Chief Judge Lesnick, March 23, 2006)

Secretary of Labor, MSHA v. Jimmy L. Williams, Docket No. WEVA 2006-39. (Unpublished Default order issued by Chief Judge Lesnick, March 23, 2006)

Secretary of Labor, MSHA v. Paul F. Becker Coal Company, Docket No. PENN 2006-9. (Unpublished Default order issued by Chief Judge Lesnick, March 23, 2006)

No petitions were filed in which Review was denied during the months of May and June:

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 2, 2006

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

v.

RONALD D. STOKES

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Docket No. WEVA 2006-35
A.C. No. 46-08909-70581 A

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DIRECTION FOR REVIEW AND ORDER

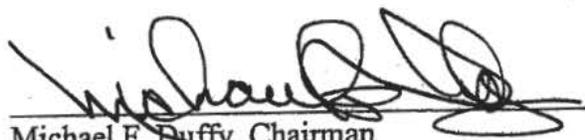
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 7, 2006, Chief Administrative Law Judge Robert Lesnick issued to Ronald D. Stokes an Order to Show Cause for failing to answer the Secretary of Labor's petition for assessment of civil penalty. On March 23, 2006, Chief Judge Lesnick issued an Order of Default entering judgment for the Secretary and directing Mr. Stokes to pay the proposed civil penalty immediately.

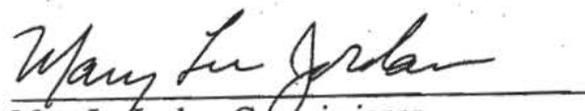
On April 7, 2006, the Commission received correspondence from Mr. Stokes which we construe to be a timely petition for discretionary review. In that petition, Mr. Stokes seeks to reopen the case and states that he was discussing settlement with the Solicitor's Office and "was confused about the fact I should have still made contact with the Commission." The Secretary states that she does not oppose granting Mr. Stokes' petition.

The Chief Judge's jurisdiction over this case terminated when he issued his default order on March 23, 2006. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Mr. Stokes' correspondence to be a timely filed petition for review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

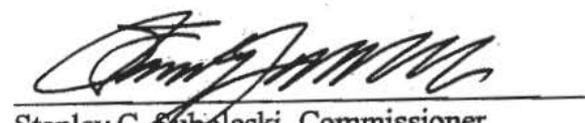
Upon review of the record, we have determined that the wording of the Order to Show Cause did not conform to the Commission's Procedural Rules. Accordingly, in the interest of justice, we hereby vacate the Order of Default and remand this matter to the Chief Judge for further appropriate proceedings. See *REB Enterprises, Inc.*, 18 FMSHRC 311 (March 1996).



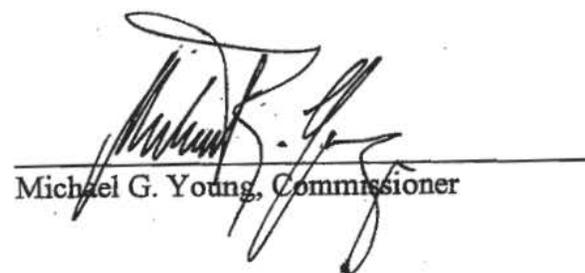
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 2, 2006

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

v.

JIMMY L. WILLIAMS

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Docket No. WEVA 2006-39
A.C. No. 46-08909-70580 A

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DIRECTION FOR REVIEW AND ORDER

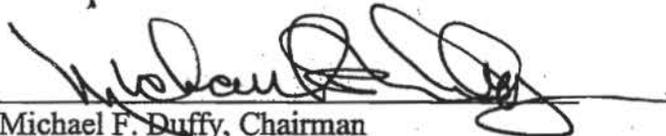
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 7, 2006, Chief Administrative Law Judge Robert Lesnick issued to Jimmy L. Williams an Order to Show Cause for failing to answer the Secretary of Labor's petition for assessment of civil penalty. On March 23, 2006, Chief Judge Lesnick issued an Order of Default entering judgment for the Secretary and directing Mr. Williams to pay the proposed civil penalty immediately.

On April 5, 2006, the Commission received correspondence from Mr. Williams which we construe to be a timely petition for discretionary review. In that petition, Mr. Williams seeks to reopen the case and states, among other things, that he "replied in writing before the 30 days was up." The Secretary states that she does not oppose granting Mr. Williams' petition.

The Chief Judge's jurisdiction over this case terminated when he issued his default order on March 23, 2006. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Mr. Williams' correspondence to be a timely filed petition for review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

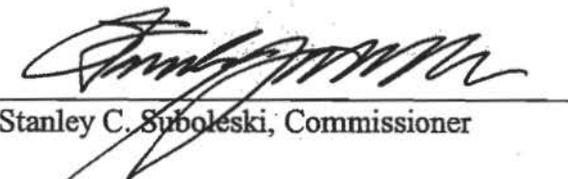
Upon review of the record, we have determined that the wording of the Order to Show Cause did not conform to the Commission's Procedural Rules. Accordingly, in the interest of justice, we hereby vacate the Order of Default and remand this matter to the Chief Judge for further appropriate proceedings. See *REB Enterprises, Inc.*, 18 FMSHRC 311 (March 1996).



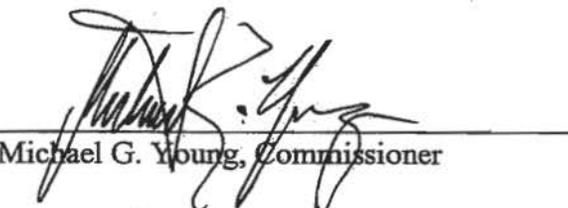
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 2006

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

v.

PAUL F. BECKER COAL CO.

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Docket No. PENN 2006-9
A.C. No. 36-06928-66470

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 3, 2006, Chief Administrative Law Judge Robert Lesnick issued to Paul F. Becker Coal Company ("Becker") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of civil penalty. On March 23, 2006, Chief Judge Lesnick issued an Order of Default entering judgement for the Secretary and directing Becker to pay the proposed civil penalty immediately.

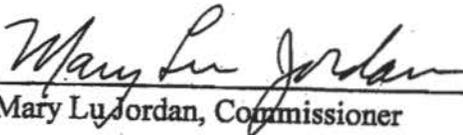
On April 10, 2006, the Commission received a notarized letter from Paula M. Becker, Becker's representative, which we construe to be a timely petition for discretionary review. In the letter, Becker states that the owner, Paul F. Becker, had been ill for some time and passed away on March 4, 2006. The Secretary has indicated that she does not oppose granting Becker's petition for review.

The judge's jurisdiction in this matter terminated when his decision was issued on March 23, 2006. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Becker's correspondence to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

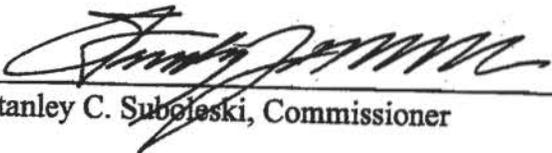
Upon review of the record, we have determined that the wording of the Order to Show Cause did not conform with the Commission's Procedural Rules. Accordingly, in the interest of justice, we hereby vacate the Order of Default and remand this matter to the Chief Judge for further appropriate proceedings. See *REB Enterprises, Inc.*, 18 FMSHRC 311 (Mar. 1996).



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 24, 2006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEVA 2006-310
 : A.C. No. 46-08224-61570
v. :
 :
NORTH STAR CONTRACTORS, INC. :

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 6, 2006, the Commission received a letter from the secretary and treasurer of North Star Contractors, Inc. ("North Star") requesting that the Commission reopen a penalty assessment of \$32,500.00 that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

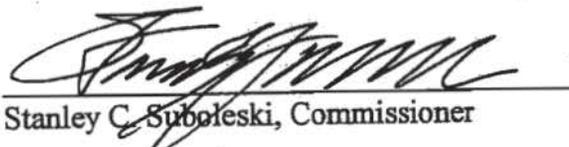
On July 12, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to North Star the proposed penalty assessment at issue. In its letter, North Star addresses the merits of the alleged violations underlying the proposed assessment. Although the company offers no explanation for its failure to timely contest the proposed assessment, it states that "we do get behind at times [in paying penalties] due to lack of profit and financial delays." The company also asserts that the penalties at issue "seem very unfair and unreasonable." The Secretary states that North Star "identifies no grounds for requesting reopening of the penalty assessments in question," and requests that the Commission direct North Star to provide a detailed explanation of why this matter should be reopened.

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

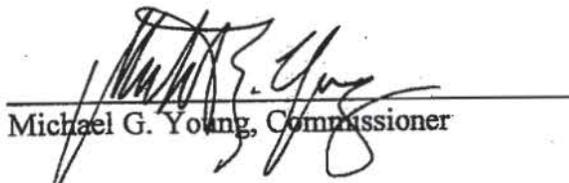
Having reviewed North Star’s letter, we agree with the Secretary that North Star must provide an explanation as to why reopening this matter is warranted.¹ Accordingly, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for North Star’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Stanley C. Suboleski, Commissioner

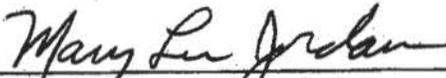


Michael G. Young, Commissioner

¹ The Commission also received from North Star a letter dated April 26, 2006, which again addresses the merits of the proposed penalty assessment at issue, but provides no explanation for its failure to timely respond.

Commissioner Jordan, dissenting:

I would deny the operator's request for relief from the final order. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, North Star has failed to provide any explanation to justify its failure to timely contest the proposed penalty assessment. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief). Accordingly, I find no grounds upon which relief could be granted in this case, and would deny the company's request and dismiss these proceedings without prejudice.



Mary Lu Jordan, Commissioner

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 25, 2006

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

v.

D.A.S. SAND AND GRAVEL, INC.

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Docket No. YORK 2006-45-M
A.C. No. 30-03254-77405

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 24, 2006, the Commission received a letter from the president of D.A.S. Sand and Gravel, Inc. ("D.A.S.") requesting that the Commission reopen a penalty assessment that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

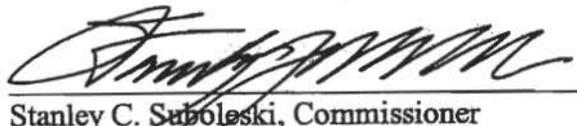
On January 17, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to D.A.S. the proposed penalty assessment at issue. In his letter to the Commission, the company president asserts, "It has been brought to my attention that your office has not received my paperwork requesting the right to contest these assessments." He alleges that he sent the paperwork to the Commission to contest the proposed penalty assessments on the same day that he received them. He explains, "I have religiously returned my paperwork to contest all of my assessments." The Secretary of Labor states that she does not oppose D.A.S.'s request for relief.

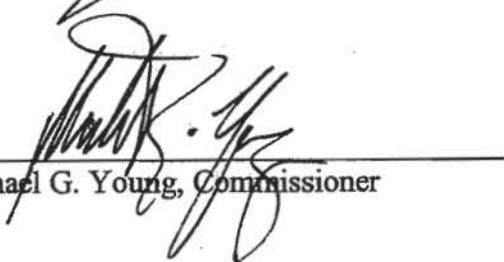
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

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


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Stanley C. Suboleski, Commissioner


Michael G. Young, Commissioner

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 30, 2006

| | | |
|------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket Nos. KENT 2002-42-R |
| ADMINISTRATION (MSHA) | : | KENT 2002-43-R |
| | : | KENT 2002-44-R |
| v. | : | KENT 2002-45-R |
| | : | KENT 2002-251 |
| MARTIN COUNTY COAL | : | KENT 2002-261 |
| CORPORATION and | : | KENT 2002-262 |
| GEO/ENVIRONMENTAL | : | |
| ASSOCIATES | : | |

BEFORE: Duffy, Chairman; Jordan, Young, Commissioners¹

DECISION

BY: Young, Commissioner²

This civil penalty proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involves citations and an order that were issued as a result of a slurry spill and a breakthrough at a coal waste impoundment owned and operated by Martin County Coal Corporation ("MCC") on October 10, 2000. Administrative Law Judge Irwin Schroeder affirmed four citations and dismissed four citations/orders issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") that were contested by MCC and its independent contractor, Geo/Environmental Associates ("Geo"). 26 FMSHRC 35 (Jan. 2004) (ALJ). The Secretary of Labor, MCC and Geo filed petitions for discretionary review appealing the judge's decision, which the Commission granted. For the reasons that follow, we affirm in part, reverse in part, vacate and remand in part.³

¹ Commissioner Suboleski recused himself in this matter.

² A majority of the Commissioners joins in each section of Commissioner Young's opinion, and therefore it constitutes the Commission's decision in this case. A footnote at the beginning of each section explains which Commissioners join in that section.

³ Administrative Law Judge Schroeder is no longer with the Commission. We therefore remand the proceeding to the Chief Administrative Law Judge for reassignment.

Factual and Procedural Background

MCC, a wholly owned subsidiary of A.T. Massey Coal Company, Inc., operated the Big Branch Slurry Impoundment located near Inez, in eastern Kentucky. 26 FMSHRC at 36; Jt. Stips. 1 & 3; Tr. 4-5.⁴ MCC developed the impoundment in the mid-1980s for storage of both coarse refuse and slurry (fine refuse). 26 FMSHRC at 37; Gov't Ex. 1, at 2. Prior to the 2000 breakthrough, the impoundment had a depth of 221 feet and a surface area of 68 acres. Gov't Ex. 1, at 2. It held 2.125 billion gallons of water. *Id.*

The impoundment was located adjacent to a preparation plant and two underground mines. *Id.* The preparation plant employed 23 persons and processed approximately 7,500 tons of clean coal daily from MCC's underground and surface mines. *Id.* An overland belt conveyor transported the coarse coal refuse from the preparation plant to the impoundment, where it was then pumped into the impoundment as slurry. *Id.*

MCC operated two underground mines adjacent to the impoundment, the 1-S (Stockton Seam) Mine and 1-C (Coalburg Seam) Mine. *Id.* The 1-S Mine had ceased mining by the time of the 2000 impoundment breakthrough and was not involved in the breakthrough accident. *Id.* The 1-C Mine employed six underground miners and two surface miners. *Id.* At the time of the breakthrough, most of the 1-C mine had been abandoned, and coal was not being produced. *Id.* The only active portions of the 1-C Mine were the Nos. 1-3 North Mains through which belt conveyors transported coal from various MCC mines to the preparation plant. *Id.* These mains were isolated from the abandoned workings in the 1-C Mine by seals. *Id.*; Jt. Ex. 3.

A. 1994 Breakthrough

On May 22, 1994, water and slurry broke into the abandoned mine workings of the 1-C Mine. 26 FMSHRC at 37-38; Gov't Ex. 1, at 13-14; MCC Ex. P. The water drained through the mine and resulted in discharges from the mine at three locations, including the South Mains Portal on the west side of the mine. MCC Ex. A1, at 012291; Gov't Ex. 1, at 14, Fig. 25. Nearly 112 million gallons of slurry and water were discharged. Gov't Ex. 1, at 14. The outflow in the 1994 breakthrough was mostly water and caused no significant downstream damage. *Id.* The void was filled with spoil material from the surrounding hillside, and the failure was plugged. *Id.*; MCC Ex. A1, App. 1 at 012302. According to the 1994 MSHA accident investigation report, the breakthrough occurred through an opening created by a collapse of the mine roof or by water from the impoundment penetrating a natural hill seam in the roof rock. Gov't Ex. 14, at 14-15. The report recommended that the impoundment plan be modified to prevent a recurrence. *Id.* at 15.

⁴ The transcript from the hearings held on June 9 through June 12, 2003 is referred to as "Tr." and the transcript from the hearings on August 4 through August 7, 2003 is referred to as "Tr. I."

B. 1994 Impoundment Sealing Plan

On May 23, 1994, the day after the breakthrough, Ogden Environmental & Energy Services ("Ogden"), a geotechnical engineering consulting firm hired by MCC, prepared an Impoundment Sealing Plan with remedial measures (the "May Plan"). 26 FMSHRC at 38; MCC Ex. 1, App. 1. MCC then submitted an Impoundment Sealing Plan to MSHA on August 10, 1994 (the "August Plan"), which incorporated the May Plan. Gov't Ex. 2; MCC Ex. A1, at 012289 & App. 1. After MSHA first reviewed the August Plan, it did not approve the plan. See Gov't Ex. 2A (letter of Sept. 9, 1994); MCC Ex. J. MCC provided additional information to MSHA on October 5, 1994, and the revised Impoundment Sealing Plan was approved by MSHA on October 20, 1994. 26 FMSHRC at 38; Gov't Ex. 2A.

The May Plan, under the heading of "Short Term Plan," stated:

Flow from the South Mains entry will be monitored daily, until remedial work at the seepage point is completed. Monitoring will be done during regular impoundment inspections after that. Any unusual change in flow quantity or quality that would indicate possible impoundment leakage will be reported immediately to MSHA and the appropriate mine management. All necessary remedial measures will be implemented.

MCC Ex. A1, App. 1 at 012303. The August Plan called for the construction of a seepage barrier around the perimeter of the impoundment except for those portions which did not have mine works below. 26 FMSHRC at 38. The seepage barrier was to be constructed using the spoil material from the Stockton Seam, which consisted of highly permeable shot sandstone material. *Id.*; Gov't Ex. 1, at 16-17; MCC Ex. A1, at 012295. The plan contemplated that once the seepage barrier was constructed, fine refuse material would be deposited on the barrier to decrease permeability of the barrier. 26 FMSHRC at 38. The plan provided that "fine refuse shall be directed along the barrier by periodically redirecting the discharge of fine refuse slurry." MCC Ex. A1, at 012297. Construction of the seepage barrier occurred between February and September of 1995. 26 FMSHRC at 39; Gov't Ex. 1, at 16.

The August Plan also required installation of reinforced seals separating the abandoned workings, which had been flooded by the 1994 breakthrough, from the active areas of the mine to protect miners in the event of another breakthrough. MCC Ex. A1, at 012297. However, because of construction difficulties, the seals were not constructed in accordance with that plan. Gov't Ex. 1, at 18; Tr. 436-38. On September 7, 1995, MCC submitted a revised seal plan that called for strengthening the existing seals with gunite and steel reinforcement. Gov't Ex. 1, at 18-19; Gov't Ex. 7. The revised plan was approved by MSHA on September 29, 1995. Gov't Ex. 1, at 18-19; Gov't Ex. 7; Tr. 437-39. The reinforced seals were constructed in February and March of 1996. Gov't Ex. 1, at 18.

C. Hiring of Geo to Monitor Impoundment, Including the South Mains Portal

In February 1996, MCC hired Geo, an engineering consulting firm employing several former Ogden engineers, to perform weekly impoundment monitoring and to prepare impoundment annual reports and certifications. Gov't Ex. 6; Tr. I 684-85, 693-95, 757, 762-63. Generally, the weekly inspections of the impoundment were performed and recorded by Eddie Howard, a field technician for Geo. 26 FMSHRC at 39, 41; Gov't Ex. 6. Howard provided the results of his inspection to both MCC and to his supervisors at Geo. 26 FMSHRC at 39, 41. One of the weekly measuring points was the flow of water from the South Mains Portal, which had been a discharge point in the 1994 breakthrough. *Id.*; MCC Ex. A1, at 012292, App. V (plan view showing South Mains as discharge point); Gov't Ex. 6. The amount of water from the South Mains area of the mine was determined by measuring the height of water in the outflow pipe from a small pond constructed at the foot of the South Mains Portal. 26 FMSHRC at 40. Howard recorded the flow in inches with a ruler. *Id.* at 40, 48-49.

D. 2000 Breakthrough

On October 10, 2000, at approximately 4:00 p.m., belt examiner Mathias Simpkins entered the 1-C Mine to examine and clean the belts. Gov't Ex. 1, at 3; Tr. 359-61. He remained in the mine until 11:50 p.m. Gov't Ex. 1, at 3. He then radioed the dispatcher to report that he had just left the mine. *Id.* While Simpkins was still talking to the dispatcher, Lovell Tony Bowen, an electrician who was working on an overland belt, radioed the dispatcher at 12:05 a.m. that the belt had stopped. *Id.* The dispatcher displayed the belt monitor screen on his computer, which indicated that the 2 North belt was off. *Id.* Simpkins unsuccessfully attempted to restart the belt. *Id.* Bowen traveled in his truck to the 2 North Portal where he observed slurry flowing out of the portal at high velocity and at a height of approximately 3 feet. *Id.* & Fig. 8. Bowen reported his findings to the radio dispatcher. Gov't Ex. 1, at 3. Bowen and Simpkins traveled to the South Mains Portal where they observed an outpouring of slurry greater than at the North Portal, creating a large gully just below the portal. *Id.* at 4 & Fig. 9; Tr. 351-52, 373-74. Simpkins reported the impoundment breakthrough to the foreman of the preparation plant. Gov't Ex. 1, at 4.

The dispatcher contacted the President of MCC, Dennis Hatfield, at approximately 1:15 a.m. *Id.* At 1:40 a.m., all miners were withdrawn from the preparation plant and it was closed. *Id.* Bulldozers began to push soil material into the breakthrough at approximately 2:00 a.m. and the breakthrough was plugged at approximately 4:30 a.m. *Id.* MSHA was contacted at 3:00 a.m. *Id.* As a result of the breakthrough, more than 300 million gallons of slurry-laden water had rushed out of the impoundment and into adjacent streams, eventually reaching the Ohio River. 26 FMSHRC at 41; Gov't Ex. 1, at 4, Figs. 10, 11. Some families were evacuated from their homes, but no lives were lost. Gov't Ex. 1, at 4; 26 FMSHRC at 41.

MSHA assembled a team of investigators and sent them to the scene. 26 FMSHRC at 42. An extensive investigation ensued, and one year later MSHA issued the following citations and order:

Citation No. 7144401, alleging a significant and substantial (“S&S”) and unwarrantable failure violation of 30 C.F.R. § 77.216(d) for failure to follow the approved plan because MCC failed to report to MSHA any unusual change in flow quantity or quality from the South Mains Portal;

Order No. 7144402, alleging an S&S and unwarrantable failure violation of section 77.216(d) for not following the approved plan that required MCC to periodically direct the fine refuse slurry discharge along the seepage barrier;

Citation No. 7144403, alleging a violation of section 77.216(d) because MCC failed to construct the underground mine seals in accordance with the approved plans;

Citation Nos. 7144404 and 7144408, alleging that MCC and Geo, respectively, failed to include reference to the underground seals in the annual report and certifications in violation of 30 C.F.R. § 77.216-4(a)(7);

Citation No. 7144409, alleging a violation of 30 C.F.R. § 77.216-3(d) for Geo’s failure to indicate the actions taken to abate the hazardous conditions after the impoundment breakthrough on the required 7-day examination report;

Citation No. 7144410, alleging that the annual reports prepared by Geo failed to include the maximum and minimum readings for the South Mains Portal outflow pipe in violation of 30 C.F.R. § 77.216-4(a)(2);

Citation No. 7144411, alleging that the weekly examinations conducted by Geo were performed by an unqualified inspector who had not received annual refresher training in violation of 30 C.F.R. § 77.216-3(a)(4).

E. Proceedings Before the Administrative Law Judge

A hearing was held in two parts before Judge Schroeder. A majority of the lay witnesses were heard during the week of June 9, 2003. 26 FMSHRC at 36. The expert witnesses and the remaining lay witnesses were heard during the week of August 4, 2003. *Id.* Prior to issuing his decision, the judge dismissed two of the Secretary’s claims: (1) Order No. 7144402, alleging that MCC violated section 77.216(d) for its failure to direct the slurry along the seepage barrier on the impoundment; and (2) Citation No. 7144409, alleging that Geo violated the requirement in section 77.216-3(d) to note the abatement measures on the 7-day examination report. 8/28/03 Order.⁵

⁵ At the end of the Secretary’s case on June 12, 2003, MCC and Geo moved to dismiss the Secretary’s case and the judge initially orally dismissed Order No. 7144402 and Citation No. 7144409. Tr. 1221, 1245, 1247. On July 2, 2003, the judge issued an Order Granting Partial Motion to Dismiss, memorializing his earlier ruling and dismissing the two claims. On August 4, 2003, in response to the Secretary’s motion for reconsideration, the judge agreed to

The judge issued his decision on January 14, 2004. 26 FMSHRC at 35. As a preliminary matter, the judge noted that he did not make a determination of the cause of the impoundment failure because it was not at issue in any of the citations or orders before him. *Id.* at 42. The judge found that MCC violated section 77.216(d) by not complying with the impoundment plan provision governing the reporting of unusual changes in water flow quantity from the South Mains Portal during September 1999. *Id.* at 46-47. He did not discuss the related S&S designation and also determined that the violation was not a result of unwarrantable failure. *Id.* at 47. The judge found that both MCC and Geo violated section 77.216-4(a)(7) by not including a reference to the underground seals construction in the annual certification reports.⁶ *Id.* at 48. The judge dismissed Citation No. 7144410, which alleged that Geo failed to include the readings for the South Mains Portal outflow pipe in the annual reports under section 77.216-4(a)(2). *Id.* at 48-49. The judge directed MCC to pay a civil penalty of \$5,600 and Geo to pay a civil penalty of \$100 for all of its violations. *Id.* at 50.

hear the testimony of the Secretary's expert witness. Tr. I 36. On August 7, after hearing the Secretary's witness, the judge again stated that the Secretary had not established a claim as to Order No. 7144402, regarding the redirecting of the slurry discharge along the seepage barrier. Tr. I 990-92. On August 28, 2003, the judge issued an Order Denying Motion to Reconsider Dismissal of Citations, which dismissed the order and the citation. Appendix A of the judge's decision also sets forth his reasoning for dismissing Order No. 7144402. 26 FMSHRC at 51.

⁶ Although Geo has filed an appeal of this violation, MCC has not. In addition, two other citations that are discussed in the judge's decision have not been appealed and are no longer at issue before the Commission. *See* 26 FMSHRC at 47-49 (Citation No. 7144403, in which the judge found a violation of section 77.216(d) for seals that were not constructed in accordance with the approved plan; Citation No. 7144411, in which the judge dismissed a violation of section 77.216-3(a)(4) for inspections by an unqualified inspector).

II.

Disposition

A. Summary Dismissal of Order No. 7144402⁷

The judge vacated the Secretary's order alleging a violation of section 77.216(d)⁸ for MCC's failure to comply with a provision of the Impoundment Sealing Plan that requires the operator to "periodically redirect" the coal refuse discharge along the seepage barrier. 26 FMSHRC at 51. In that order, the Secretary maintained that the failure to perform the task resulted in an inadequate seepage barrier which, in turn resulted in the impoundment failure. *Id.* The judge found that the Secretary never established a prima facie case. *Id.* He reasoned that the Secretary failed to establish that prudent mining engineers in 1994 would have understood the provision to require what the Secretary contended was necessary and that the slurry discharge methods that the Secretary alleged were required under this provision were "far from standard industry practice." 8/28/03 Order, at 4; *see also* 26 FMSHRC at 51.

The Secretary alleges that the judge prematurely dismissed Order No. 7144402 without considering documentary evidence and deposition testimony directly related to the violation. She further maintains that the judge failed to engage in any analysis with respect to the plain meaning or ambiguity of the "seepage barrier" provision that the Secretary advanced and with which MCC agreed. Additionally, the Secretary asserts that if the provision is ambiguous, her interpretation of the plan provision is reasonable and thus entitled to deference. MCC counters that the judge correctly dismissed the order at the proper time in the proceedings. It argues that the judge correctly found that it complied with the plain meaning of the provision. Additionally, MCC asserts that the Secretary is not entitled to deference in interpreting the plan provision.

Preliminarily, the first question we consider is whether the Secretary was fully heard on Order No. 7144402. Commission Rule 63(b) states in pertinent part: "A party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 29 C.F.R. § 2700.63(b). Federal Rule of Civil Procedure 52(c) entitled "Judgment on Partial Findings" states in part: "If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim . . . that cannot under the controlling law be

⁷ Commissioner Jordan joins Commissioner Young in Part. II.A of this opinion.

⁸ 30 C.F.R. § 77.216(d) provides:

The design, construction, and maintenance of all water, sediment, or slurry impoundments and impounding structures . . . shall be implemented in accordance with the plan approved by the District Manager.

maintained Such a judgment shall be supported by findings of fact and conclusions of law”⁹

The judge initially dismissed the Secretary’s claim prior to the time that all her evidence was presented (Tr. 1221, 1245, 1247; 7/2/03 Order). On June 12, 2003, at the hearing, the Secretary offered the deposition testimony of Steven Gooslin, the preparation plant foreman, which was admitted only minutes before the judge directed a verdict dismissing the Secretary’s claim. Tr. 1220, 1245. Nonetheless, on August 4, 2003, the judge agreed to hear the testimony of the Secretary’s remaining expert witnesses. Tr. I 36. Therefore, on balance, the judge had an opportunity to hear and address the Secretary’s entire case. The Secretary also faults the judge for failing to specifically address the evidence raised after his initial dismissal rulings. A judge, however, does not need to address every point of evidence and must only include findings and conclusions on “material issues of fact [and] law.” 29 C.F.R. § 2700.69(a). Accordingly, although the judge’s rulings were somewhat disjointed, he heard all the evidence presented relating to Order No. 7144402 and, under Rule 63, the Secretary was heard on all the facts.¹⁰

With regard to the plan provision at issue, the Impoundment Sealing Plan states “Following the completion of the ‘seepage barrier’ fine refuse shall be directed along the barrier by periodically redirecting the discharge of fine refuse slurry.” MCC Ex. A1, at 012297. It is well established that plan provisions are enforceable as mandatory standards. *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9

⁹ Commission Rule 1(b) states:

On any procedural question not regulated by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (“the Act”), these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

29 C.F.R. § 2700.1(b).

¹⁰ MCC incorrectly argues that the issue was not properly preserved for appeal under Federal Rule of Civil Procedure 59 because the Secretary failed to raise the argument that further proof was necessary prior to the judge’s June 12, 2003 dismissal. MCC Resp. Br. at 5. Rule 59 provides for new trials and the amendment of final judgments. *Building Indus. Ass’n of Superior CA v. Sec’y of Interior*, 247 F.3d 1241, 1245 (D.C. Cir. 2001) (providing that Rule 59 applies only to final judgments). However, the judge did not enter a decision in this case until January 14, 2004. 26 FMSHRC at 35. The Secretary properly brought her June 20, 2003 motion to reconsider the judge’s orders of dismissal at the interlocutory stage of the proceedings, and appropriately sought review of the issue by filing a petition for discretionary review with the Commission within 30 days of the judge’s decision. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a).

FMSHRC 903, 907 (May 1987) (“JWR”). As such, the law governing the interpretations of regulatory standards is applicable to plan provisions. *Energy West*, 17 FMSHRC at 1317.¹¹

The “language of a regulation . . . is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. See *id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary’s interpretation is accorded. See *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must “look to the administrative construction of the regulation if the meaning of the words used is in doubt”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

As the Secretary correctly asserts, the judge failed to evaluate what the provision plainly means and then to determine whether there was a violation of the provision. In dismissing the violation, the judge simply pointed to the fact that the Secretary failed to prove that the phrase “periodic redirecting” of slurry would have been understood by prudent mining engineers in 1994 to mean re-locating the slurry pipe. 26 FMSHRC at 51; 8/28/03 Order, at 4. The judge seemed to suggest that the Secretary was arguing that the slurry discharge pipe had to be re-located along the seepage barrier in order to fulfill the requirements of the plan provision. However, the Secretary’s argument was not so narrow. Her motion to reconsider the dismissal order states that the phrase “periodic re-directing” of slurry, in the circumstances of this impoundment, would mean to move the slurry discharge pipe or take “some equivalent action so that fine refuse is deposited between the impoundment pool . . . and the seepage barrier.” S. Mot. to Reconsider Orders of Dismissal (6/20/03), at 9. See also S. Br. at 20 (“To MSHA, physically moving the discharge pipe was the obvious and effective option to achieve coverage of the seepage barrier with fine refuse, but MCC could have used any other effective means to cover the seepage barrier.”); Tr. 9 (Secretary’s Opening Argument asserting that MCC “failed to ensure that fine

¹¹ We dispute the concurrence’s assertion that our “interpretative approach directly contradicts established Commission case law.” Slip op. at 28. See *Energy West*, 17 FMSHRC at 1316-17 (applying controlling Commission case law on regulatory interpretation to interpretation of ventilation plan). We need not address the concurrence’s assertion that plan provisions are treated “very differently from mandatory standards,” Slip op. at 28 (citing *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280-81 (Dec. 1998) and *JWR*, 9 FMSHRC at 906-08), or the deference arguments raised by the parties because we determine that the plan provision is plain. See *Exportal Ltda v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (“Deference . . . is not in order if the rule’s meaning is clear on its face.”))

coal refuse was deposited along the impoundment seepage barrier.”); *see also* Tr. I 20. Thus, the judge’s focus was incorrect and his analysis incomplete.¹²

“In determining the meaning of regulations, the Commission . . . utilizes ‘traditional tools of . . . construction,’ including an examination of the text and the intent of the drafters.” *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44-45 (D.C. Cir. 1990)). In a plain meaning analysis, the Commission also looks to the language and design of the Secretary’s regulations as a whole. *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996).

Based on its plain language, the plan provision requires the operator to place or cause to move fine refuse over the length of the seepage barrier by regularly changing the course of the slurry discharge. This plain meaning was also recognized by both MSHA and MCC. MCC Superintendent Larry Muncie testified that the Impoundment Plan required that the slurry be “repositioned and redistributed” so that it became part of the seepage barrier. Tr. 1170-75. MCC President and General Manager Dennis Hatfield also testified that one plan provision stated “as slurry was pumped into the impoundment . . . it would be redirected throughout the impoundment pool and effectively coat the seepage barrier.” Tr. 1312-13. Likewise, MSHA engineers who were part of the investigation team testified that the plan required the slurry fines to be distributed along the seepage barrier. Tr. 192, 486-87. The primary MSHA inspector for the impoundment, Robert Bellamy, testified that the plan required the operator to use whatever means necessary to direct the slurry discharge along the seepage barrier. Tr. I 639-41.

The Impoundment Plan clearly states the purpose of the seepage barrier. The plan provides that:

The purpose of the “seepage barrier” is twofold. The primary purpose for the barrier will be to reduce, to the extent practical, seepage from the impoundment that could contribute to the occurrence of another “breakthrough.” Secondarily, the barrier will provide bulk that will collapse into the subsided area in the event another “breakthrough” occurs and should form a “plug,” limiting the amount of fine coal refuse and water entering the mine.

MCC Ex. A1, at 012294. Inherent in the language of the impoundment plan is the requirement that the operator take the necessary measures to fulfill the purpose of the action mandated, as clearly set forth in the plan. Here, the plan required MCC to ensure that fine slurry was distributed along the length of the seepage barrier so as to prevent and limit the impact of another breakthrough.

Reading the provision at issue within the context of the overall plan is consistent with the Commission’s construction of mine plans in accordance with well-settled rules of construction.

¹² Our concurring colleague is similarly focused on the means used to comply with the clear mandate of the plan provision at issue. Slip op. at 27.

Mettiki Coal Corp., 13 FMSHRC 3, 7 (Jan. 1991) (“a written document must be read as a whole, and . . . particular provisions should not be read in isolation”). Because the plan contains an express purpose and the meaning of the provision is apparent, the operator, as we have previously held in *RAG Cumberland Resources, LP*, must carry out the activities required under the plan in an effective manner. See 26 FMSHRC 639, 647-48 (Aug. 2004), *aff’d*, *Cumberland Coal Res., LP*, 2005 WL 3804997, at *2 (D.C. Cir. 2005) (unpublished) (requiring compliance to be undertaken in an “effective manner.”). It is incumbent upon MCC to ensure that its compliance with the plan is effective, especially given its past history with impoundment failures.¹³ MCC does not sufficiently comply with the impoundment plan by merely pumping fine slurry into the impoundment without ensuring that the fines have accomplished the stated purpose, which is to adequately cover the seepage barrier “to reduce, to the extent practical, seepage from the impoundment that could contribute to the occurrence of another ‘breakthrough.’” MCC Ex. A1, at 012294. This interpretation of the plan provision is also consistent with the purpose of section 75.216, which governs impoundment plans. As the Commission found, the purpose of section 75.216 “is to assure the safety of impoundments and minimize the risk and effect of failure.” *Monterey Coal Co.*, 5 FMSHRC 1010, 1017 (June 1983).

According to the plain meaning of the plan provision, MCC was required to cover the seepage barrier with fines in order to fulfill the purpose of the provision. The judge, however, never addressed whether MCC adequately complied with the provision. The evidence in the record is not conclusive on this issue. Compare Tr. I 565 with Tr. 479 (Inspector Bellamy testifying that he saw the slurry discharge pipe being moved, whereas the MSHA investigation revealed that water level in the impoundment was above the slurry fines indicating inadequate fines against the barrier); MCC Foreman Gooslin Dep. Tr. 56-57 (testifying that there was clear water up against the seepage barrier in the pump area). Accordingly, we vacate the judge’s dismissal of Order No. 7144402. Furthermore, because fact-finding is not the province of the Commission, we remand the question of whether MCC provided effective coverage of the seepage barrier under the terms of the Impoundment Plan. See *Mid-Continent Res.*, 16 FMSHRC 1218, 1222-23 (June 1994) (holding that remand appropriate when judge failed to adequately address evidentiary record); *RAG Cumberland Res.*, 26 FMSHRC at 647-48. See also *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (Jan. 1994) (providing that attempting to comply with the provisions of a plan does not allow one to escape from liability). If the judge on remand finds a violation, it will then be necessary to determine whether the violation is S&S and the result of unwarrantable failure.

¹³ The questions relied on by our concurring colleague (e.g., must the fines “cover every square inch of the seepage barrier?” Slip op. at 27), to reach the conclusion that the provision is ambiguous are simply evidentiary matters best left to the judge on remand.

B. Summary Dismissal of Citation No. 7144409¹⁴

The judge found that there was insufficient evidence to establish a violation of section 77.216-3(d)¹⁵ for Geo's alleged failure to record the abatement of hazards in the 7-day impoundment examination report. 7/2/03 Order. He determined that Geo's impoundment inspector "very tersely" noted "that the impoundment breakthrough had been plugged." 8/28/03 Order, at 5. The judge found that this notation sufficiently met the requirement that a 7-day inspection report include, among other things, a report of the action "taken to abate hazardous conditions." *Id.* at 4-5.

The Secretary asserts that the judge erroneously dismissed Citation No. 7144409 because he found that the Geo inspector's report stated that the impoundment breakthrough had been plugged when it simply did not mention any abatement measure. Geo responds that the judge correctly dismissed the citation.

The 7-day report does not state that the impoundment breakthrough had been plugged, as the judge incorrectly held. Gov't Ex. 10. The report makes no mention of plugging or stopping the breakthrough that had occurred a day earlier. *Id.* The report only indicates that "all water and some fines were lost from slurry pool due to mine breakthrough." *Id.* Therefore, we conclude that the judge erred.¹⁶

We are not persuaded by Geo's assertion that its inspector did not have to mention any abatement measure because there was no hazard at the time of the inspection. Section 77.216-3(d) requires that the monitoring report include "the action taken to abate hazardous conditions." The plain language of the standard requires a reporting of "the action taken." Thus, under the standard's plain meaning, actions in the past, or at least since the last report 7 days ago, should be recorded. Additionally, the Secretary's interpretation of reporting actions taken since the last 7-day report provides a comprehensive picture of the impoundment from week to week. If one were to accept Geo's interpretation that it was required to report only hazards that existed at the time of the inspection, significant events would not have to be mentioned. Such a result would thwart the safety-promoting purpose of the standard and the Mine Act and must be avoided. *Consolidation*, 15 FMSHRC at 1557.

¹⁴ Chairman Duffy and Commissioner Jordan join Commissioner Young in Part II.B of this opinion.

¹⁵ 30 C.F.R. § 77.216-3(d) provides in pertinent part: "All examination and instrumentation monitoring reports . . . shall include a report of the action taken to abate hazardous conditions."

¹⁶ As discussed in the preceding analysis, the judge did have an opportunity to hear all of the Secretary's evidence relating to Citation No. 7144409 prior to finally dismissing the claim on August 28, 2003. Accordingly, we reject the Secretary's assertion that the judge committed a procedural error in granting the partial dismissal.

Of course, here, we note that MSHA issued an order pursuant to section 103(k), 30 U.S.C. § 813(k), at 9:00 on the morning following the breakthrough, and issued nine modifications of that order over the next several days. MCC Ex. CC. Consequently, not only was MSHA apprised of the ongoing abatement activity during the operative time period, the order required MCC to seek permission from the agency before each phase of the abatement could proceed. Thus, MCC was complying with the spirit, if not the letter, of the requirements of section 77.216.

Nevertheless, because the inspection report does not state that the impoundment breakthrough was abated, we reverse the judge and find a violation based on undisputed evidence. *American Mine Services, Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand unnecessary because evidence justified only one conclusion). In remanding the matter for an assessment of a civil penalty under Mine Act section 110(i), 30 U.S.C. § 820(i), we note that this is a bookkeeping violation of a de minimis nature, given that MSHA was at the scene the day after the failure, and because of the agency's ongoing awareness of all abatement efforts undertaken under the aegis of the section 103(k) order in force when this report was required to be written.

C. Citation No. 7144401

1. Violation¹⁷

The judge found that MCC violated section 77.216(d) by failing to report unusual changes in water flow quantity from the South Mains Portal during September 1999, as required by the Impoundment Sealing Plan. 26 FMSHRC at 46-47. He determined that the Impoundment Sealing Plan required the operator to report unusual flows to MSHA. *Id.* at 38, 46. He reasoned that the record was clear that there was a large increase in flow that occurred approximately a year prior to October 2000 and that neither MCC nor Geo evaluated or reported the flow data. *Id.* at 47. The judge determined that a "prudent" look at the data would have provided a warning that further study of the condition was warranted and that "much more could and should have been done here." *Id.* He also found that the failure to evaluate the South Mains Portal flow data contributed in some measure to the magnitude and timing of the impoundment failure. *Id.*

MCC asserts that the judge committed error in finding that the reporting provision, which was part of the short-term May Plan, was a requirement of the permanent Impoundment Sealing Plan. It also argues that the judge's determination of violation is not supported by substantial evidence. The Secretary responds that substantial evidence supports the judge's finding that MCC failed to report an "unusual" change in water flow. She maintains the text of the Impoundment Sealing Plan plainly requires monitoring of the South Mains. Additionally, the Secretary urges that her interpretation, that such monitoring was required under the Impoundment Sealing Plan, was reasonable and entitled to deference.

¹⁷ Chairman Duffy joins Commissioner Young in Part II.C.1 of this opinion.

Turning to MCC's first argument, we address whether the South Mains reporting requirement is part of the Impoundment Sealing Plan. The South Mains reporting requirement is found under the heading "Short-Term Plan" in the May Plan, which is incorporated into and designated as an appendix to the August Plan. MCC Ex. A1, at 012303. The judge found that the May Plan was part of the August Plan when he stated that the May 1994 plan "became an Impoundment Sealing Plan that was approved by MSHA on October 20, 1994." 26 FMSHRC at 38. Substantial evidence supports this preliminary determination.¹⁸

MSHA Inspector John Fredland, who has reviewed impoundment plans for 20 years, testified that "when a plan is approved in stages, the previous plan stays in effect and the new plan just covers changes" (Tr. 25, 223, 306), and that a long-term plan does not supercede a shorter-term plan, unless express changes are submitted. Tr. 305-06. Inspector Bellamy also considered the May short-term plan in effect and advised MCC to continue taking readings of the South Mains when he noticed that it had missed a few in 1999. Tr. I 592, 599-601, 627-28. In addition, MCC's actions support the view that the plan required South Mains monitoring because MCC continued to monitor the point after the August Plan was in place. Gov't Ex. 6.

It was within the judge's province to weigh the evidence and make any credibility determinations. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). The judge found, in agreement with the testimony of the MSHA inspectors, that "since the monitoring requirement has never been removed from the Impoundment Sealing Plan, the requirement is still present." 26 FMSHRC at 38. *See Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984) (providing that when a 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).

The judge also determined that the plain language in the May Plan required weekly monitoring of the South Mains to continue. 26 FMSHRC at 38. He pointed to the text, which said: "Flow from the South Mains entry will be monitored daily until remedial work at the seepage point is completed. Monitoring will be done during regular impoundment inspections *after that*." *Id.* (emphasis original). He reasoned that the phrase "after that" indicated monitoring was to continue after the short-term remedial measures and, since the monitoring

¹⁸ 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 mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

requirement was never removed from the Impoundment Plan, the requirement remained. *Id.* This holding is supported by the aforementioned testimony of MSHA witnesses.

The judge's holding is consistent with other language in the plan, which states that MCC was to continue to monitor the area of the breakthrough and the discharge points. MCC Ex. A1, at 012292. The South Mains was the major discharge location in the 1994 breakthrough and, as MCC witness Muncie testified, it was "the lowest elevation point of the Impoundment so if anything was amiss the South Mains discharge would be a good indicator of a problem that needed investigation." Tr. 1180. Thus, from a practical standpoint it made sense to continue to monitor this point.

As the judge found: "The purpose of the Plan was to contain the risk of failure of the pool structure as the pool level increased. The requirement for monitoring the flow of water from South Mains Portal was included in the Plan for the purpose of alerting responsible parties to the level of risk posed by the impoundment as time passed." 26 FMSHRC at 46. Thus, we agree with the judge that the requirement to monitor the South Mains and to report any unusual changes in flow quality or quantity that would indicate possible impoundment leakage to MSHA was part of the permanent Impoundment Sealing Plan.

With regard to the judge's conclusion that MCC violated the plan provision by failing to report unusual changes in water flow to MSHA, we believe that a remand is necessary. At the outset, we agree in large part with the basic approach taken by the judge to address the issue of whether a violation occurred. In particular, we agree with the judge that MCC should have assessed the water flow levels at the South Mains Portal with a heightened degree of scrutiny given the prior impoundment failure and the fact that "as the pool level rose the risk of failure rose." *Id.* at 47. As the judge stated, "[i]n the context of this increasing risk of impoundment failure, I would expect a reasonably prudent mining engineer to pay increasing attention to warning which might have been derived from the South Mains Portal flow data properly appreciated." *Id.*

However, we cannot uphold the judge's decision because he failed to explain what test he applied in determining whether "unusual changes" took place, to explain how he weighed competing testimony in the record, to make explicit findings to support his conclusion that a violation occurred, and to set forth a discernible path that allows the Commission to perform its review function.

The Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent*, 16 FMSHRC at 1222. The D.C. Circuit has explained that, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and adequate justification for the conclusions reached by a judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 300 (Feb. 1981) (citations omitted).

As an initial matter, the judge does not clearly explain what test he used to determine whether the Impoundment Plan was violated and how he applied any such test. In particular, he does not define the key phrase “unusual changes” in the context of the Impoundment Plan and does not explain how this definition is linked to his ultimate conclusion that MCC violated the Plan. The closest that he comes to setting forth a definition of “unusual changes” is his statement that “[w]eekly and even monthly changes in the flow amount, *in the absence of water quality changes or catastrophic increases in quantity*, were probably meaningless to the people who reviewed the information.” 26 FMSHRC at 47 (emphasis added). However, the judge does not explicitly apply this formulation as his test. Moreover, he states that “[i]t is significant that there was no change in the water quality, i.e., no coal refuse fines were being transported by the increased water flow” (*id.* at 40-41), and he nowhere finds that any increases in water flow were “catastrophic,” nor does he explain or define that term. This language appears to be dicta, as the standard merely requires reporting of “unusual” changes, not “catastrophic” shifts. The judge’s observation concerning the meaning attached to “[w]eekly and . . . monthly changes in the flow amount” is at odds with his conclusion that he would have expected a reasonably prudent mining engineer to more closely observe the flow data from the South Mains Portal. *Id.* at 47.

Beyond this, the judge failed to adequately address the evidence before him, to explain how he weighed the competing testimony in the record, and to make necessary factual findings. The relevant part of the judge’s opinion discussing the question of whether a violation occurred (*id.* at 46-47) contains no citations to any testimony, contains no credibility determinations, does not attempt to resolve the competing testimony in the record, and contains no findings that provide a clearly discernible basis for the conclusion that a violation occurred. In particular, although the judge concluded that the plan had been violated in some manner, he never explicitly found anywhere in his opinion that MCC had failed to report “unusual changes” in water flow to MSHA, which is the precise matter at issue here.

Similarly, while there is extensive documentary and testimonial evidence showing a sharp and sustained increase in flows from the South Mains Portal, and while the judge noted the context created by the 1994 breakthrough, the judge does not otherwise adequately explain what path he followed to reach his conclusion that a violation occurred. It is highly significant that perhaps the most important sentence in his opinion is badly garbled and is not even a complete sentence. The judge states at one point: “While I am persuaded by the testimony that the Fall 1999, flow data (even when related to various sources of rain fall information) does not prove that the failure began then or even at any particular time [sic].” *Id.* at 47. Key words were obviously omitted from this “sentence,” but we can only guess what they were and what the judge intended to say. Because of the uncertainty of what the judge attempted to say in this pivotal sentence and the surrounding text, a remand is warranted.

In summary, because the judge’s opinion fails to articulate the basis for his conclusion and omits necessary findings, we cannot affirm it. Although we take no position on whether the record demonstrates that there were “unusual changes” in water flow that should have been reported by MCC, the judge’s opinion falls far short of providing adequate support for his conclusion that the Plan was violated. We hereby remand this issue so that another judge can

review the evidence in detail and provide a coherent discussion of the legal issues involved. If the judge finds a violation, further analyses of the S&S nature and the unwarrantable failure of the violation will be warranted. The judge erred in his discussion of both the S&S and unwarrantable failure issues, and so we provide the following instruction.

2. S&S¹⁹

Although the Commission's test for an S&S violation is mentioned in a preliminary discussion in the decision, the judge did not address the S&S designation for the violation. 26 FMSHRC at 43-44, 47 (citing *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)). He merely stated that the failure to evaluate the South Mains Portal flow data contributed in some measure to the magnitude and timing of the impoundment failure. *Id.* at 47.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. 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*, 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.

6 FMSHRC at 3-4 (footnote omitted).

The judge never made findings as to whether the violation was S&S. Under Commission Rule 69(a), the judge is responsible for addressing “all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record.” The parties contend that the judge made findings that support each of their respective views. The Secretary states that the judge found the first two elements of the *Mathies* test whereas MCC argues that the judge did not find the violation to be S&S. Without explicit findings by the judge, it is impossible to evaluate his decision on this issue.

The Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent*, 16 FMSHRC at 1222. “Without findings of fact and some justification for the conclusions reached

¹⁹ Chairman Duffy and Commissioner Jordan join Commissioner Young in Part II.C.2 of this opinion.

by a judge, we cannot perform our review function effectively.” *Anaconda*, 3 FMSHRC at 300. Accordingly, if the judge newly assigned to this case finds a violation of section 77.216(d), we remand for a full *Mathies* analysis of whether the violation of section 77.216(d) contained in Citation No. 7144401 is S&S.

3. Unwarrantable Failure, Negligence, and Penalty²⁰

The judge found that the violative conduct did not amount to an unwarrantable failure “in the sense of wanton or reckless disregard for the risks to life and property.” 26 FMSHRC at 47. He assessed the negligence as moderate, found the \$55,000 penalty proposed by the Secretary to be excessive and assessed a penalty of \$5,500. *Id.* at 47, 49-50.

The Secretary argues that the judge erred in finding that the violation of section 77.216(d) was a result of moderate negligence and not an unwarrantable failure. She contends that, instead of applying the Commission’s test, the judge applied an incorrect unwarrantable failure test when he stated that MCC’s conduct was not “wanton or reckless disregard for the risks to life and property.” *Id.* at 47. The Secretary also asserts that the judge erred in assessing the penalty for the violation because he failed to: (1) make findings with respect to three of the six statutory criteria under section 110(i) of the Mine Act; and (2) explain why he reduced the proposed penalty by 90%. MCC submits that the judge’s moderate negligence finding is erroneous, as MCC was not negligent with regard to this violation. It also argues that the Commission should not overturn the judge’s determination of no unwarrantable failure and that the Secretary’s argument is hypertechnical. In addition, MCC contends that the judge’s penalty reduction is supported by the evidence.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator’s efforts, made prior to the issuance of the citation or order, in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Midwest Material*, 19 FMSHRC at 34; *Enlow Fork Mining Co.*, 19 FMSHRC

²⁰ Chairman Duffy and Commissioner Jordan join Commissioner Young in Part II.C.3 of this opinion.

5, 11-12, 17 (Jan. 1997). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

The judge failed to utilize the Commission's established test for unwarrantable failure. Notwithstanding MCC's argument, the judge's error was more than semantic. "Wanton" is defined as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences. In criminal law, wanton usu[ally] connotes malice . . . , while reckless does not." *Black's Law Dictionary* 1613 (8th ed. 2004). "Wanton" involves an element of malice, which is simply not required for a finding of unwarrantable failure. Malice denotes much more than aggravated conduct. Thus, the judge utilized too demanding a standard for unwarrantable failure.

In addition, the judge failed to examine any of the factors referred to above that the Commission reviews when determining whether a violation is a result of unwarrantable failure. As we noted earlier, the Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent*, 16 FMSHRC at 1222. Given the absence of any meaningful findings, we remand the determination of negligence and unwarrantable failure, again, should a violation of the standard be found.²¹

As to the penalty, the Commission's judges are "accorded broad discretion in assessing civil penalties under the Mine Act." *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.²² *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The

²¹ Because of the close relation between unwarrantable failure and negligence, on remand, if the judge finds a violation, he must make a complete analysis of unwarrantable failure under the correct standard and determine the proper level of negligence attributable to the violation. *See Emery*, 9 FMSHRC at 2001 (reasoning that unwarrantable failure constitutes more than ordinary negligence).

²² Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

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

judge must make “[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.” *Sellersburg*, 5 FMSHRC at 292-93. “[A]ssessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal.” *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). In reviewing a judge’s penalty assessment, we must determine whether the judge’s findings with regard to the penalty criteria are in accord with these principles and supported by substantial evidence.

The judge analyzed only three of the penalty criteria, finding that MCC is a large operator; that the \$55,000 penalty MSHA proposed would not hinder MCC’s ability to stay in business; and that MCC’s negligence in failing to report changes in the South Mains water flow quantity was moderate. 26 FMSHRC at 36, 47. Because we are remanding the issue of unwarrantable failure, we vacate the judge’s finding on negligence. In addition, the judge failed to address three other penalty criteria: the gravity of the violation; MCC’s history of violations; and MCC’s demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.²³

Accordingly, if a violation is found, we direct the judge on remand to address fully all six elements of the penalty criteria.

D. Citation No. 7144408²⁴

The judge found that both MCC and Geo violated section 77.216-4(a)(7)²⁵ by not referring to the underground seals construction in the annual reports and failing to provide certifications for the seals in those reports. The judge rejected Geo’s argument that it had no certification responsibility since it did not perform underground engineering. 26 FMSHRC at 48. The judge reasoned that even though Geo did not work underground, that was not a reason to omit underground features in the annual certification and that a certifying engineer should have at least noted the exclusion of the underground seals so that a supplementary certification of the

²³ The judge also failed to explain in any detail why he reduced the penalty significantly from \$55,000 to \$5,500. As stated in *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000), an explanation for a substantial divergence between the Secretary’s original penalty proposal and the judge’s penalty assessment is “particularly essential.”

²⁴ Chairman Duffy joins Commissioner Young in Part II.D of this opinion.

²⁵ Section 77.216-4(a) provides in pertinent part that “every twelfth month following the date of the initial plan approval, the person owning, operating, or controlling a water, sediment, or slurry impoundment . . . shall submit to the District Manager a report containing the following information: . . . (7) [a] certification by a registered professional engineer that all construction, operation, and maintenance was in accordance with the approved plan.”

seals could have been obtained. *Id.* The judge concluded that the degree of negligence was very low and assessed a civil penalty of \$100 each for both MCC and Geo. *Id.* at 48-50. MCC did not appeal the determination that it violated the certification requirement.

Geo argues that the judge erred in finding a violation against it because it was cited for a task, i.e., certifying the seals, that it was not hired to do and for something over which it had no control. It contends that the Secretary abused her enforcement discretion in citing it for the violation, when it is not “the person owning, operating, or controlling a water, sediment, or slurry impoundment” under section 77.216-4(a).²⁶ The Secretary responds that Geo, as an independent contractor, qualifies as a person operating an impoundment under the plain language and meaning of section 77.216-4(a). The Secretary asserts that if the standard is deemed ambiguous, her interpretation is reasonable and entitled to deference. Additionally, the Secretary argues that substantial evidence supports the judge’s finding that Geo was properly cited for the violation.

The threshold question with regard to this violation is who was required to file the annual report mandated by section 77.216-4(a). The judge erred by never analyzing the plain terms of section 77.216-4(a) to answer this question. *Dyer*, 832 F.2d at 1066 (citing *Consumer Products Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (holding that the “language of a regulation . . . is the starting point for its interpretation”). The language of the standard imposes the annual reporting requirement on “the person owning, operating, or controlling” an impoundment and states that this person will submit “a report” to the MSHA District Manager. 30 C.F.R. § 77.216-4(a) (emphasis added). Thus, the standard itself contemplates that a single person – the one owning, operating, or controlling the impoundment – is responsible for the submission and validity of a single annual report.

Further examining the regulatory language, we note that the phrase “owning, operating or controlling” is not defined in the regulation. Thus, we consider the ordinary meaning of the words. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 n.2 (July 2001). “Own[ing]” is defined as having “rightful title to.” *Webster’s Third New Int’l Dictionary* (Unabridged) (1993) at 1612. “Operating” is defined as “perform[ing] a work or labor; . . . manag[ing] and . . . keep[ing] in operation; . . . engaged in active business.” *Id.* at 1580-81. “Controlling” is “exercis[ing] restraining or directing influence over.” *Id.* at 496-97. Because we determine that the language of the regulation is plain, we need not address the Secretary’s arguments that her interpretation of the standard is entitled to deference. *Exportal*, 902 F.2d at 50.

²⁶ The Secretary argues that Geo failed to raise before the judge the contention that section 77.216-4(a) does not apply to it because Geo is not a “person owning, operating or controlling” an impoundment. Although it is true that Geo did not explicitly raise the argument below, the argument is sufficiently intertwined with Geo’s assertions to the judge that it was not the operator of the impoundment and should not be cited under the standard, such that the issue is properly the subject of review. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319-21 (Aug. 1992).

It is undisputed that MCC owned the Big Branch Slurry Impoundment. The record demonstrates that MCC was also responsible for managing the impoundment, for keeping it in operation on a day-to-day basis, and for controlling it. For example, the record reveals that the Superintendent of the adjacent MCC preparation plant, an MCC official, was responsible for the daily operation of the impoundment and the disposal of refuse from the plant into the impoundment. Tr. 1257. Among other things, the MCC Superintendent, Larry Muncie, had overall responsibility for carrying out the Impoundment Sealing Plan (Tr. 1167), for monitoring the condition of the impoundment (Tr. 1150), and for ensuring that the refuse went to the proper locations (Tr. 1150). He also decided whether and when to pump clear water from the impoundment to the preparation plant. Tr. 1188-90. He assigned each shift foreman to inspect the impoundment during each shift and to look for leakage, boils, erosion, or anything else abnormal. Tr. 1178. Muncie also personally inspected the impoundment at least once during each shift that he worked (Tr. 1206-07) and personally inspected the South Mains Portal at least three times per week (Tr. 1178). In addition, he reviewed the 7-day monitoring reports submitted to him by Eddie Howard, a Geo employee; signed the reports to finalize them; and was responsible for deciding whether problems raised by the reports needed to be addressed. Tr. 1151-1154. Thus, under the plain terms of section 77.216-4(a), MCC was clearly "the person owning, operating, or controlling" the impoundment. As a result, MCC was solely responsible under section 77.216-4(a) for submitting the annual report to MSHA.²⁷

The record also reveals that Geo was hired by MCC as an engineering consultant to monitor the condition of the impoundment and to provide annual certifications covering the Impoundment Sealing Plan. Tr. I 693-694, 762-763; Gov't Ex. 9. Geo, as the engineering consultant, prepared the annual reports for 1995 through 2000 on behalf of MCC. Gov't Ex. 9. Each report contained a description of the construction that MCC had undertaken during the preceding year, certain monitoring results from the impoundment, and certification by a registered engineer from Geo that, during the preceding year, all construction and maintenance activities had been carried out in accordance with approved plans. Tr. I 110-111; Gov't Ex. 9. Each year the reports, which expressly stated that they were prepared "on behalf of" MCC (Gov't Ex. 9), were initially submitted by Geo to MCC. Tr. I 117. Subsequently, MCC would either submit the report to MSHA itself or request that Geo send it directly to MSHA on its behalf. Tr. I 117-118. Accordingly, Geo's duties encompassed far less than controlling or operating the impoundment itself as contemplated by the standard. Geo, the registered engineer hired by MCC

²⁷ Indeed, as mentioned above, MSHA issued a citation to MCC alleging that the annual report was deficient because it did not contain a certification addressing the underground seals as required by section 77.216-4(a)(7). Citation No. 7144404. MCC did not appeal the judge's decision upholding that citation. We note that the judge incorrectly stated that Citation Nos. 7144404 (against MCC) and 7144408 (against Geo) pertained to the seal certification for 1995, when, in fact, the citations covered all reporting periods after the mine seal work was completed in 1996. 26 FMSHRC at 48.

to conduct certain monitoring and to make certifications, was not “the person owning, operating, or controlling” the impoundment. Thus, section 77.216-4(a) is inapplicable to Geo in this case.²⁸

We also reject the Secretary’s argument that Geo is covered by the standard because as an independent contractor, it is generally considered an “operator” under the Mine Act. Section 3(d) of the Mine Act defines an “operator” as including an “independent contractor performing services” at a mine. 30 U.S.C. § 802(d). The Secretary’s argument lacks merit because section 77.216-4(a) does not contain the word “operator.”²⁹ Instead, the regulation applies to “the person owning, operating, or controlling” the impoundment. If the Secretary intended for the statutory definition to apply, she could have simply used the term “operator” or defined the term “operating” in section 77.216-4(a) to include independent contractors. Indeed, the fact that the Secretary did not expressly include those terms in light of the well-known definition of “operator” leads us to conclude that something other than the statutory definition of “operator” applies in section 77.216-4(a).

Likewise, the Secretary’s use of the term “operator” in the preamble to the rule does not establish that all independent contractors fall under the reach of the standard. 57 Fed. Reg. 7468, 7469-70 (Mar. 2, 1992). First, a preamble is “not officially promulgated” and does not take precedence over the express words of the regulation. See *King Knob Coal Co., Inc.*, 3 FMSHRC 1417, 1420 (June 1981) (quoting *H.B. Zachry v. OSHRC*, 638 F.2d 812, 817 (5th Cir. 1981) (providing that “the express language of a statute or regulation ‘unquestionably controls’ over material like a . . . manual”). Under the plain terms of section 77.216-4(a), only “the person owning, operating, or controlling” the impoundment would be subject to the annual reporting

²⁸ Our dissenting colleague discusses Geo’s monitoring and certification duties and then concludes, without elaboration, that these duties constituted “manag[ing] and . . . keep[ing] in operation” the impoundment. Slip op. at 32. Among other things, this conclusion ignores the fact, as discussed above, that MCC owned the impoundment, operated it on a day-to-day basis, and made all final decisions regarding what actions should be taken at the impoundment. Moreover, the case cited by the dissent, *Bituminous Coal Operators’ Assoc., Inc. v. Sec’y of Interior*, 547 F.2d 240, 246 (4th Cir. 1977), does not support the position that Geo was operating or controlling the impoundment. In that decision, the court held that construction companies that are excavating and constructing portions of an underground mine are “controlling or supervising” a mine within the meaning of the Mine Act. *Id.* By contrast, the record in this case contains no evidence that Geo, an engineering consultant, engaged in any excavation or construction activities, supervised any MCC employees who were doing so, or otherwise supervised the operation of the impoundment.

²⁹ Even if section 77.216-4(a) applied to “operators” of an impoundment, which it does not, MSHA apparently did not cite Geo because it was the “operator” of the Big Branch impoundment. MSHA Engineer Theodore Betoney, the MSHA official who issued Citation No. 7144408 to Geo, was asked by the judge if he was suggesting that Geo was the “operator” of the Big Branch impoundment. Betoney answered “No.” Tr. 647.

requirement. Second, nowhere does the preamble expressly state or even imply that the rule applies to independent contractors.

Finally, the position that Geo could be cited as an independent contractor for violating section 77.216-4(a) ignores the specific nature of that standard. Section 77.216-4(a) creates an annual reporting requirement that, by its terms, is applicable to “*the person owning, operating, or controlling*” the impoundment (emphasis added). For purposes of this case, such a narrowly prescribed reporting requirement is very different from a more broadly worded, non-reporting safety standard. With regard to such a general safety standard (e.g., “Machinery and equipment shall be operated only by persons trained in the use of and authorized to operate such machinery or equipment”),³⁰ the responsibility for complying with the standard can rest with the production operator, an independent contractor, or both, depending on the circumstances. But the responsibility for complying with a specific reporting requirement such as that in section 77.216-4(a) rests solely with the person designated by the standard to submit the report, absent explicit regulatory language providing otherwise.

Under section 77.216-4(a), MCC was solely responsible for submitting the annual report, including engineering certifications, as “the person owning, operating, or controlling” the Big Branch impoundment. Therefore, we reverse the judge’s finding of violation against Geo and vacate Citation No. 7144408.

E. Citation No. 7144410³¹

The judge dismissed Citation No. 7144410, which alleged that Geo failed to include the readings for the South Mains portal outflow pipe in the annual reports under section 77.216-4(a)(2).³² 26 FMSHRC 48-49. He reasoned that the critical issue was whether the South Mains portal outflow pipe combined with a ruler constituted an “instrument” for purposes of this regulation, and therefore the readings had to be listed in an annual report submitted to MSHA.

³⁰ 30 C.F.R. § 77.404(b).

³¹ Chairman Duffy and Commissioner Jordan join Commissioner Young in Part II.E of this opinion.

³² Section 77.216-4(a) provides in pertinent part:

[E]very twelfth month following the date of the initial plan approval, the person owning, operating or controlling a . . . slurry impoundment . . . shall submit to the District Manager a report containing the following information:

.....
(2) Location and type of installed instruments and the maximum and minimum recorded readings of each instrument for the reporting period.

Id. The judge found that the pipe was not an “instrument” as it was not identified as such on the plan view.³³ *Id.*

The Secretary argues that the judge erred because he ignored the ordinary dictionary meaning of the term “instrument,” and because he failed to accord deference to the Secretary’s interpretation of her own standard. Geo responds that the judge should be affirmed because the drainage pipe was not an “instrument,” as it was not listed as an “instrument” in the plan view.

Section 77.216-4(a) requires that the annual report to MSHA contain the “[l]ocation and type of installed instruments and the maximum and minimum recorded readings of each instrument for the reporting period.” Both the parties and the judge overlook one of the plain requirements of the standard: the instrument must be “installed.” *See Dyer*, 832 F.2d at 1066 (providing that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written).

The evidence was undisputed that the Geo examiner utilized a ruler within a drainage pipe to measure the outflows from the South Mains. This type of measuring device would seem to fit the common definition of “instrument.” However, it clearly does not trigger the reporting requirement of section 77.216-4(a)(2) because the ruler, which was carried by the examiner, was not “installed” in any manner. Therefore, because only “installed” instruments are covered under section 77.216-4(a)(2), we reject as unreasonable the Secretary’s interpretation that the pipe and ruler should be listed in the annual report and the resultant readings should be included in the report. Accordingly, although we employ different reasoning, we affirm the judge’s dismissal of Citation No. 7144410 in result.

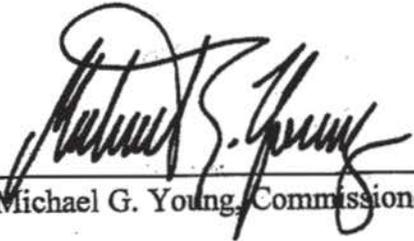
III.

Conclusion

With respect to Order No. 7144402 (redirecting the fines) against MCC, we vacate the judge’s dismissal of the order and remand consistent with the instructions in this decision. If the judge finds a violation, additional analyses of whether the violation is S&S and a result of unwarrantable failure will be necessary. As to Citation No. 7144409 (7-day report) against Geo, we reverse the dismissal, find a violation, and remand for the assessment of a civil penalty. With respect to Citation No. 7144401 (reporting of unusual changes in water flow) against MCC, we vacate and remand the finding of a violation, the negligence finding, the S&S determination, the unwarrantable failure determination, and the penalty determination. As to Citation No. 7144408 (certification of seals) against Geo, we reverse and dismiss. With respect to Citation No. 7144410 (inclusion of flow readings in the annual report) against Geo, we affirm in result the

³³ A plan view is a detailed dimensional drawing of an impoundment. *See, e.g.,* Jt. Ex. 2. Plan views must accompany a proposed impoundment plan and be submitted to MSHA. 30 C.F.R. §§ 77.216 & 77.216-2.

judge's dismissal. On remand, the judge may re-open the record to take additional evidence or for further briefing, as needed.



Michael G. Young, Commissioner

Chairman Duffy, concurring:

I join Commissioners Young and Jordan in vacating the judge's dismissal of Citation No. 7144402 and remanding the matter for further fact-finding. I would remand the "redirecting the fines" issue to the newly assigned judge because it is unclear what analysis the judge below used to conclude that no violation occurred. The judge concluded that the Secretary had failed to make a prima facie case on this issue, but the judge's discussion is so incomplete and confused that we can only guess as to the precise reasoning he used. Similarly, although it appears that the judge attempted to apply the "reasonably prudent person" test, there is no adequate explanation of how he concluded that the operator lacked sufficient notice of the interpretation relied upon by the Secretary.

While I agree that this matter should be remanded, I am concerned about the majority's approach to interpreting the provisions of the Impoundment Sealing Plan in addressing this issue. For example, the majority decision argues that the words of the plan provision in question are clear and therefore that a "plain meaning" approach must apply here. Slip op. at 9-11. However, the question is not whether each discrete word within the provision has a plain meaning based upon a review of dictionary definitions. Instead, the key question is whether it is clear what the statement "fine refuse shall be directed along the barrier by periodically redirecting the discharge of fine refuse slurry" meant in the context of this case where each side believes that its interpretation is consistent with the plain meaning of the words in a mutually agreed upon plan provision.

Although it is undisputed that the fines had to be periodically redirected, it is not clear from the words alone precisely what the phrase "periodically redirect" means here: Did MCC have to periodically move the outlet pipe itself? Was it sufficient if MCC instead periodically changed the direction in which the pipe was aimed without actually moving it? Was it sufficient if fines were being periodically redirected by the natural water flows within the impoundment? The issue is made even more complicated by the Secretary's position that the plan should be interpreted as requiring compliance by "either physically moving the discharge pipe *or* using some other method which covered the barrier with an adequate amount of fines to limit seepage from the impoundment into the mine." S. Br. at 25 (emphasis added). What is an adequate amount of fines? Were the fines required to cover every square inch of the seepage barrier? How high along the rim of the impoundment were the fines required to reach? A plain meaning analysis simply cannot resolve these kinds of questions.³⁴

Based on the foregoing, I think the conclusion is inescapable that the relevant words of the plan provision are ambiguous and/or silent with regard to key issues raised by this case. Because the plan provision is ambiguous and/or silent, the question is what is the correct

³⁴ My purpose in writing a separate concurring opinion in this case is not to endorse any particular answers to the questions I have raised above. Instead, my purpose is to demonstrate that a "plain meaning" approach to the words of the plan provision simply cannot be stretched to work in this case.

approach for the Commission to take in interpreting the provision. The majority opinion incorrectly states that, because a plan provision is enforced as a mandatory standard, the same rules of deference apply in interpreting a plan provision as would apply in interpreting a mandatory standard promulgated by the Secretary, i.e., the Secretary's interpretation should be upheld if it is reasonable. Slip op. at 8-9. As shown below, the majority's interpretive approach directly contradicts established Commission case law and ignores the fact that plan provisions are measures negotiated between MSHA and the operator,³⁵ not regulations promulgated by the Secretary.

The Commission has made clear that, in interpreting plan provisions, it will treat plan provisions very differently from mandatory standards promulgated by the Secretary. With regard to plan provisions, the Secretary has the burden of showing that a plan provision applies to an operator and that the condition or practice in question violated the provision.³⁶ *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280-81 (Dec. 1998); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 906-08 (May 1987) ("*JWR*"). As stated in *Harlan Cumberland*, "When a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement." 20 FMSHRC at 1280 (footnote and citation omitted). In *JWR*, the Commission ruled that the Secretary had failed to meet his burden in upholding his interpretation of a plan provision, where (1) the record contained "no detailed and consistent testimony from the Secretary's witnesses illuminating the meaning of the . . . provision" and (2) "the Secretary presented no evidence of any prior consistent enforcement of the . . . provision that might have established that [the operator] was on notice regarding the Secretary's interpretation of the

³⁵ As explained by the Commission, "[t]he ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord." *Jim Walter Res., Inc.* 9 FMSHRC 903, 907 (May 1987) ("*JWR*").

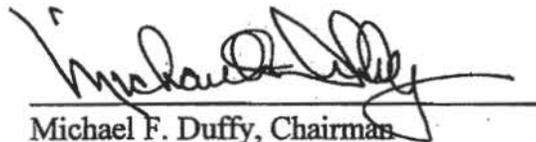
³⁶The majority decision cites *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995), for the proposition that plan provisions are interpreted in the same way as regulatory standards. Slip op. at 9. However, the majority greatly overstates the authority of *Energy West*, which simply states that plan provisions are "enforceable" as mandatory standards, but does not discuss the controlling Commission case law on burden of proof and deference in the context of plan provisions. The principle that the Commission should not defer to the Secretary's interpretation of plan provisions as though they were promulgated standards is underscored by the nature of the plan provision involved here. The provision was set forth in a bid proposal by an independent contractor that was subsequently submitted to MSHA and ultimately approved as the Impoundment Plan. Obviously much less deference is due to the Secretary's interpretation of a bid proposal drafted by a third party than in the case of a regulatory standard that is drafted and proposed by the Secretary, subjected to notice and comment rulemaking, and published as a provision of the Code of Federal Regulations.

meaning of the provision.” 9 FMSHRC at 907-08. *See also Harlan Cumberland*, 20 FMSHRC at 1281.

Accordingly, on remand, I believe the judge must determine whether the Secretary has met her burden of demonstrating the meaning of the plan provision in question through evidence of the history of the provision, e.g., contemporaneous memos or letters, testimony of persons involved in the negotiating and approval process, opinions from experts regarding whether the words had a generally accepted technical meaning, or evidence of consistent enforcement. Furthermore, as explained in *JWR*, 9 FMSHRC at 908, the operator must have been adequately put on notice as to MSHA’s intended meaning. Thus, a proper analysis based on the “reasonably prudent person” test (*see U.S. Steel Mining Co.*, 27 FMSHRC 435, 438-44 (May 2005)) should be conducted in conjunction with the analysis set forth in *Harlan Cumberland* and *JWR*. Once the meaning of the plan provision has been properly determined, the judge should engage in fact-finding to ascertain whether MCC complied with the provision.

Finally, I am also concerned about certain language in the majority decision stating that compliance with the plan provision in question must be carried out in “an effective manner.” Slip op. at 10-11. Although I agree that the fines had to be redirected in a way that was fully consistent with the intent of the plan provision – once that intent is determined – I believe that there is a danger that “effectiveness” might be equated with whether or not a breakthrough of the seepage barrier occurred. It is important to recognize that a breakthrough might have occurred through natural forces even though the fines were distributed along the seepage barrier as well as humanly possible. Conversely, the operator might have failed to comply with the plan provision even though no breakthrough occurred. Moreover, the plan itself stated that the seepage barrier served two separate purposes: (1) to reduce seepage from the impoundment that could contribute to the occurrence of another breakthrough; and (2) to provide bulk that would collapse if another breakthrough were to occur and form a “plug” that would limit the amount of refuse and water entering the mine. MCC Ex. A1, at 012294. Thus, the plan itself recognized that a breakthrough might occur even if fines were “effectively” distributed along the seepage barrier.

In summary, I agree with my colleagues that the judge’s decision vacating Citation No. 7144402 should be reversed and remanded to the newly assigned judge. However, I would direct that judge not to use a “plain meaning” approach to interpreting the plan provision and instead to follow established Commission precedents in ascertaining the meaning of the plan provision intended by the parties.



Michael F. Duffy, Chairman

Commissioner Jordan, concurring in part and dissenting in part:

Although I join in the remainder of the majority opinion, I do not agree with the decision of my colleagues to remand to the judge the issue of whether MCC violated the plan provision by failing to report unusual changes in water flow to MSHA, nor in their reversal of the judge's finding of violation against Geo for its failure to include references to the underground seals construction in the annual certification reports.

A. Citation No. 7144401 - Failure to Report Unusual Changes in Water Flow

I agree with the majority's ruling that the requirement to monitor the South Mains and to report any unusual changes in flow or quality or quantity that would indicate possible impoundment leakage to MSHA was part of the permanent Impoundment Sealing Plan. The next question is whether substantial evidence supports the judge's finding that MCC violated the provision by failing to report unusual changes in water flow to MSHA and by failing to implement necessary remedial measures. The record revealed that from 1994 to September 1999, the average flow measurement from the South Mains was 5.5 inches. Gov't Ex. 1, at 26 and Fig. 38; Tr. 298. In September 1999, the average flow rose to 8.6 inches. Gov't Ex. 1, at 26 and Fig. 38; Tr. 298-99, 811-15. The increase in flow represented a 56% increase in flow depth.³⁷ Tr. 502-03, 980-81. MSHA engineering expert Richard Almes testified that this change represented a marked increase and was unusual. Tr. I 333-36; *see also* Tr. 1067-70. MSHA Technical Support Inspector Fredland testified that the flow increase was significant and had roughly doubled. Tr. 131. He also explained that, as the increase was not accounted for by rainfall or other factors, the increase could indicate a possible leak in the impoundment. Tr. 131-32, 244-45. I conclude that a 56% increase in flow that occurred approximately a year prior to the October 2000 impoundment failure should be viewed as out of the ordinary, or "unusual."

It is true that evidence was introduced that calls this finding into question. MCC Preparation Plant Superintendent Muncie and the weekly Geo examiner Howard testified that the weekly data did not give them any indication of an unusual change, and its expert discerned no changes that would have been cause for concern. Tr. 1218-19; Tr. I 222-24. MCC expert engineer Chris Lewis reviewed the data and discerned no changes that would have given him concern. Tr. I 889-90. Barry Thacker, President of Geo, also testified that the increase in flow would have naturally occurred as the impoundment level increased. Tr. I 698-703, 780-81. MCC introduced evidence that showed that other factors, such as surface run-off from the surrounding watershed, affected the flow in the South Mains. MCC Br. at 9-10. MCC witnesses testified that for an unusual change to happen, the color of the water had to darken, which did not occur. Tr. I 68-69, 224, 464; 26 FMSHRC 35, 40-41 (Jan. 2004) (ALJ). Additionally, MSHA Inspector Bellamy, who regularly inspected the impoundment, also did not detect an unusual

³⁷ The judge excluded evidence of converting the flow measurements from inches to gallons per minute, which would establish an even greater increase in flow at the time of September 1999. Tr. 838-39, 981.

change in the weekly data and no citations were ever issued for failing to report an unusual change to MSHA. Tr. I 568-69.

However, the Secretary effectively rebutted this evidence. For example, as to the South Mains flow stemming from surface run-off, MSHA Inspector Fredland testified that the main contributor to the South Mains Portal pond was the impoundment, and there was only a small percentage of water coming from the mine or surface run-off. Tr. 226-28. MSHA witnesses also testified that an unusual change would not necessarily involve darker water or particles in the outflow because of the far distance between the impoundment and the South Mains portal and because the solids would settle out before arriving at the South Mains. Tr. 601-03. The record revealed, and the judge found, that MCC and Geo personnel never evaluated the readings over time and so never perceived any change in the data. Tr. 300-02, 504; 26 FMSHRC at 47. MSHA engineer Patrick Betoney testified that unless MCC or Geo monitored the flow by simply plotting the data, there would be no way to monitor the flow accurately. Tr. 505, 626-28. He believed this was especially important given the earlier breakthrough and one of the key items in the plan was monitoring the flow data. Tr. 505. Similarly, MSHA expert Almes testified that “any competent dam engineer . . . is very sensitive to seepage flows related to impoundments” and even more “particularly” “because of a history of a major breakthrough.” Tr. I 338.

As to the fact that the MSHA inspector also did not notice an unusual change, MSHA engineer Betoney testified that Inspector Bellamy was at the impoundment on a very infrequent basis – perhaps yearly. Tr. 628. He stated that the inspectors did not graph the flow, as they were not there on a daily or weekly basis. Tr. 626. He testified that an inspector ensures that the weekly inspection is performed in the first place and might look a few months back at the data, but the inspector is not familiar enough with the impoundment to make an overall assessment of the flow. Tr. 627-29. In addition, the Commission has repeatedly held that lack of previous enforcement of a safety standard does not constitute a defense to a violation, and that estoppel does not generally apply against the Secretary. *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1546-47 (Aug. 1993) (citing *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981); *Bulk Transp. Serv., Inc.*, 13 FMSHRC 1354, 1361 n.3 (Sept. 1991)).

Because the judge’s determination that MCC violated the plan provision requirements to monitor the South Mains and report unusual changes to MSHA (26 FMSHRC at 38, 47) is supported by substantial evidence, I would affirm his finding. *See Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) (providing that Commission cannot overturn judge’s findings that are supported by substantial evidence). Consequently, I believe that a remand is unnecessary. A remand to a new judge (which will be necessary because Judge Schroeder is no longer with the Commission) is particularly inappropriate in this case, as the second judge did not hear the live testimony of the witnesses, so he or she is in no better position than we are in that regard, and will simply have to comb the record for relevant evidence, as has already been done here.

I also disagree with the majority’s view that a remand is necessary because the judge “never explicitly found anywhere in his opinion that MCC had failed to report ‘unusual changes’

in water flow to MSHA, which is the precise issue at question here.” Slip op. at 16. On the contrary, MCC conceded, and the judge found, that “[n]o unusual flows were reported to MSHA.” 26 FMSHRC at 46; Tr. 7. Furthermore, the judge explicitly found that “[o]f particular significance is the large increase in flow that occurred approximately a year prior to the October 2000, impoundment failure.” 26 FMSHRC at 47.

Moreover, the majority insists on a remand because the judge did not clearly explain what test he used to find a violation, and did not define the phrase “unusual changes.” Slip op. at 16. I believe my colleagues are unnecessarily complicating this issue. I do not believe that any “test” need be applied here, and I believe that the judge need not have defined “unusual changes” because the plain meaning of the term is fairly obvious to any reader.³⁸

B. Citation No. 7144408 - Failure to Reference Underground Seals Construction in the Annual Certification Reports

The majority’s view that 30 C.F.R. § 77.216-4(a) does not apply to Geo is not consistent with the wording of the regulation, nor with the evidence in the record. The standard at issue provides in pertinent part that:

[E]very twelfth month following the date of the initial plan approval, the person owning, operating, or controlling a water, sediment, or slurry impoundment . . . shall submit to the District Manager a report containing the following information: . . . (7) [a] certification by a registered professional engineer that all construction, operation, and maintenance was in accordance with the approved plan.

30 C.F.R § 77.216-4(a). Even under the dictionary definition of the term “operating” employed by the majority, Geo fits squarely within the purview of this regulation.

The majority defines “operating” as “perform[ing] a work or labor; . . . manag[ing] and . . . keep[ing] in operation; . . . engaged in active business.” Slip op. at 21. Its own description of Geo’s actions at the impoundment demonstrate that Geo was managing the operation there.

³⁸ I believe my colleagues confuse the judge’s use of the term “catastrophic increases” in his opinion. The judge stated that “weekly and even monthly changes in the flow amount, in the absence of water quality changes or catastrophic increases in quantity, were probably meaningless to the people who reviewed the information.” 26 FMSHRC at 47. I believe he simply meant that the water flow data reviewed by MCC and Geo were probably meaningless viewed in a vacuum, and were only useful when compared to a long-term analysis of changes in flow over a period of time, and that absent such a long-term analysis, the reviewers would only have been alerted to problems if the water quality changed or if there were a catastrophic increase in quantity. Nowhere did he indicate that a change in water flow would only be considered “unusual” if it were “catastrophic.”

MCC hired Geo to take over the engineering consultant role, to perform weekly impoundment monitoring, and to prepare impoundment annual reports and certifications. Slip op. at 4. Furthermore, the majority recognizes that “Geo was hired . . . to monitor the condition of the impoundment and to provide annual certifications covering the Impoundment Sealing Plan.” Slip op. at 22. Yet in the next breath, and with no explanation or discussion whatsoever, it simply offers the conclusory statement that “Geo’s duties [were] far less than controlling or operating the impoundment itself as contemplated by the standard.” *Id.*

The evidence in the record does not support this assertion. As Geo itself explains, G. Br. at 2, it performed weekly inspections from early 1996 through October 2000 (Gov’t Ex. 6) and prepared annual reports for the impoundment for 1996, 1997, 1998, 1999 and 2000. Gov’t Ex. 9. The weekly inspections covered a wide variety of conditions at the impoundment (Gov’t Ex. 6), and Geo performed on a weekly basis periodic observation of construction, density testing of the compacted coarse refuse, and monitoring of the existing piezometers. Gov’t Ex. 9. In particular, Geo monitored the condition of the structure in regard to erosion, slope stability, cracks and problems with the dam structure itself; monitored flows discharged from the internal drains to see if there were changes indicating a problem, monitored the elevation of the pool and the fines around the embankment, and monitored the conditions of the impoundment itself along the barrier. Tr. I 93-94. Geo’s inspector was instructed to call Geo immediately if a change in the water flow occurred so that Geo could implement a plan for further investigation. Tr. I 95-96. In sum, Geo’s “function was to look after the impoundment.” Tr. 508. Geo’s extensive duties thus consisted of “manag[ing] and . . . keep[ing] in operation” the impoundment, consistent with the majority’s definition of “operating.”³⁹ In fact, the record does not reveal in any similar detail oversight at the impoundment by MCC during that time frame that would constitute management or operation of the facility. The tasks performed by Geo at the impoundment also support the view that Geo was “controlling” the impoundment. *See Bituminous Coal Operators’ Assoc., Inc. v. Sec’y of Interior*, 547 F.2d 240, 246 (4th Cir. 1977) (“[W]hen a construction company is sinking a shaft, excavating a tunnel, or building a tippie, it is controlling or supervising a coal mine . . .”). In sum, the record reflects that MCC had, for the most part, delegated oversight of the impoundment to Geo.

In addition, I reject Geo’s argument, G. Br. at 11-15, that it should not have been cited for its failure to certify the seals because it was not hired to do this task and was not permitted to work underground. The judge correctly ruled that simply because Geo did not work underground did not provide a valid reason for excluding underground features of an impoundment plan from the annual certification if the features (in this case, the seals) were part of the plan.⁴⁰ 26

³⁹ In light of this conclusion, I reject Geo’s argument, G. Br. at 20-21, that the Secretary abused her discretion in citing Geo, an independent contractor, as well as proceeding against the owner-operator, MCC.

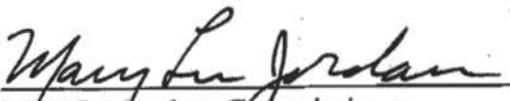
⁴⁰ Although Geo asserts that the seals were not part of the Impoundment Plan, G. Br. at 7-11, the evidence does not support this contention. The seals were included in the plan submitted on August 10, 1994, as part of the protection of miners against possible impoundment

FMSHRC at 48. In its annual report and certification, Geo stated: “[W]e hereby certify that for the [relevant] period . . . the Big Branch Slurry Impoundment was constructed and maintained in general accordance with the approved plans and any recommended changes required to suit field conditions consistent with the disposal concept.” Gov’t Ex. 9, at MCC004261. This broad statement could certainly lead any reasonable reader to assume that the seals had been examined. I agree with the judge that a certifying engineer should have, at a minimum, noted the exclusion of a feature from a submitted certification so that a supplement by another entity could have been submitted. 26 FMSHRC at 48.

In any event, the importance of the seals in ensuring the integrity of the impoundment was not a foreign concept to Geo. Although Geo attempts to distance itself from any involvement with the seals, in fact the record presents a different picture. For example, Scott Ballard, a senior project manager for Geo, Tr. I 40, had previously worked for Ogden (the predecessor to Geo, slip op. at 3-4). Tr. I 45. While employed by Ogden, he wrote the August 1994 Impoundment Sealing Plan, Tr. I 191, in which seals had initially been proposed. Tr. I 167. When the proposed seals were not accepted by MSHA, Ballard wrote to MCC, providing detailed comments about the seals, Gov’t Ex. 2A (October 3, 1994 letter) and MCC forwarded those comments to MSHA. Gov’t Ex. 2A (October 5, 1994 letter). Ballard testified that MCC contacted him and requested that he provide calculations for an alternative plan for the seals, which he did. Tr. I 90-91. *See also* Tr. 1297; Gov’t Ex. 7 (attachments to Campoy letter of September 7, 1995). Accordingly, given Ballard’s significant involvement with the impoundment and the issues involving the seals, the statement by Geo’s counsel at oral argument that “Geo actually didn’t even know the seals were built,” Oral Arg. Tr. 84, appears somewhat farfetched.

The judge’s finding that the annual reports and certifications did not include a reference to the underground seals is undisputed. Accordingly, for the reasons stated above, I would affirm the finding of a violation.

For the foregoing reasons, I respectfully dissent.


Mary Lu Jordan, Commissioner

break through. MCC Ex. A1, at 012293 (construction of the hydraulic seal will protect miners along the balkline from a slurry release). Although MSHA required some additional information relating to those seals, the entire Impoundment Plan, including the seal provisions, was approved on October 20, 1994. Gov’t Ex. 2A; Tr. 436-37. However, the hydraulic cement seal was never constructed. Tr. 436-38. Instead, on September 7, 1995, MCC submitted a modification to the plan to strengthen the existing mine seals using 1-foot-thick steel reinforced gunite material. Gov’t Ex. 7. MSHA approved this proposal and referred to the seals as modifications to the “previously approved impoundment seal plan.” Gov’t Ex. 7; Tr. I 204.

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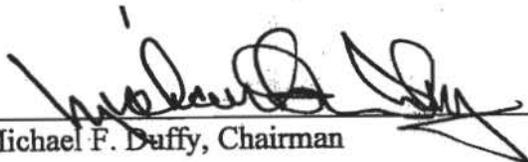
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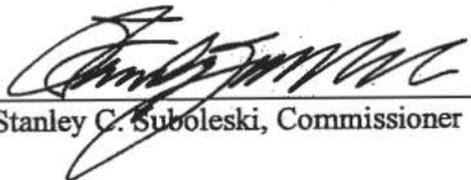
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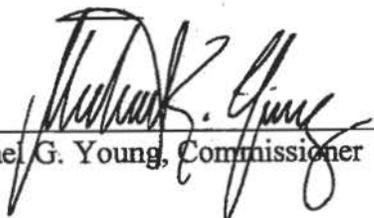
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

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


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Stanley C. Suboleski, Commissioner


Michael G. Young, Commissioner

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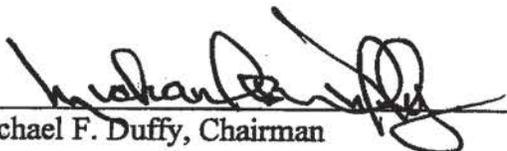
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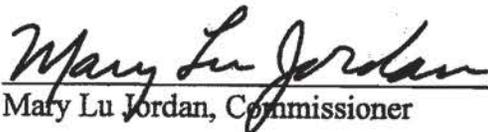
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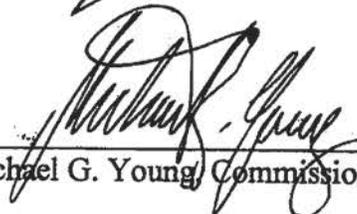
Walter Res., Inc., 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the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

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


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Stanley C. Suboleski, Commissioner


Michael G. Young, Commissioner

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Washington, D.C. 20001

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 2, 2006

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|------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. KENT 2006-261 |
| ADMINISTRATION (MSHA) | : | A.C. No. 15-17044-69425 |
| | : | |
| v. | : | Docket No. KENT 2006-262 |
| | : | A.C. No. 15-17044-72208 |
| KMMC LLC d/b/a | : | |
| VISION MINING INC. | : | |

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”).¹ On May 2, 2006, the Commission received from KMMC LLC d/b/a Vision Mining Inc. (“Vision Mining”) motions made by counsel to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

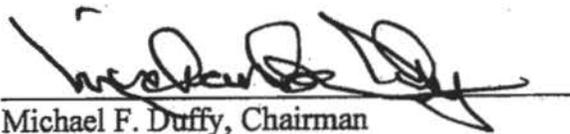
In its motions, Vision Mining states that on or about October 11 and November 15, 2005, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued the proposed assessments that it now seeks to reopen. Mot. at 2 (the two motions to reopen filed by Vision Mining are similar, and citations herein are to both motions). Vision Mining states that the employee responsible for processing proposed penalty assessments mistakenly determined that the two penalty proposals had been included in a global settlement reached with MSHA

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2006-261 and KENT 2006-262, both captioned *KMMC LLC d/b/a Vision Mining Inc.* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

covering several unrelated proceedings. Mot. at 2-3; Exs. A (Decl. of Thomas Hughes) & B (copies of decisions approving settlement in the several proceedings covered by the global settlement agreement). The company also states that it had “always intended to contest these proposed assessed penalties.” Decl. at 3. The Secretary states that she does not oppose Vision Mining’s requests for relief.

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

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



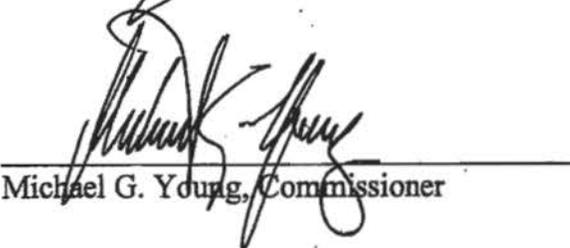
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 13, 2006

| | | |
|----------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. YORK 2006-50-M |
| ADMINISTRATION (MSHA) | : | A.C. No. 28-00546-59403 |
| | : | |
| v. | : | Docket No. YORK 2006-51-M |
| | : | A.C. No. 28-00546-64603 |
| WHIBCO OF NEW JERSEY, INC. | : | |

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").¹ On May 2 and 3, 2006, the Commission received from Whibco of New Jersey, Inc. ("Whibco") motions made by counsel to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

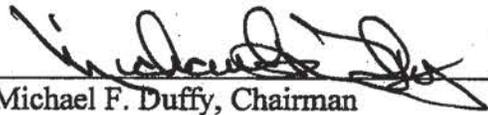
In its motions, Whibco states as follows: On June 14, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the first proposed penalty assessment at issue to Whibco. Mot. at 1. Whibco states that although it intended to contest the assessment, it failed to do so in a timely fashion because company personnel were unfamiliar with contest procedures. *Id.* at 1-2. On August 16, 2005, MSHA issued the second proposed penalty

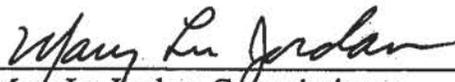
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers YORK 2006-50-M and YORK 2006-51-M, both captioned *Whibco of New Jersey, Inc.* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

assessment at issue to Whibco. Mot. at 1. Whibco states, however, that the proposed assessment “was mishandled by office personnel who subsequently resigned,” and thus, the company’s president “never saw the form.” *Id.* In the case of both proposed assessments, Whibco states that it learned of them when its counsel reviewed the company’s violation history on April 24, 2006. Mot. at 2. The Secretary states that she does not oppose Whibco’s requests for relief.

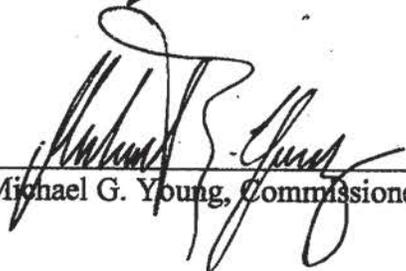
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

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


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Stanley C. Suboleski, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

June 13, 2006

| | | |
|--------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. YORK 2006-47-M |
| ADMINISTRATION (MSHA) | : | A.C. No. 28-00546-80198 A |
| | : | |
| v. | : | Docket No. YORK 2006-48-M |
| | : | A.C. No. 28-00546-80200 A |
| | : | |
| MARVIN R. BLETHEN, | : | |
| GENE GARRON, and | : | Docket No. YORK 2006-49-M |
| JOHN HUGHES, | : | A.C. No. 28-00546-80201 A |
| employed by WHIBCO, INC. | : | |

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").¹ On May 1, 2006, the Commission received separate (though largely identical) motions made by counsel on behalf of Marvin R. Blethen, Gene Garron, and John Hughes ("the respondents"), all employees of Whibco Inc., to reopen penalty assessments against each employee under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers YORK 2006-47-M, YORK 2006-48-M, and YORK 2006-49-M, in which all the respondents are employees of Whibco Inc., and which all involve similar procedural issues. 29 C.F.R. § 2700.12.

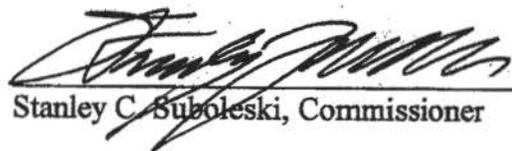
In their motions to reopen, the respondents state that when they received proposed penalty assessments from the Department of Labor's Mine Safety and Health Administration ("MSHA") during February 2006, they gave them to Whibco Inc. office staff "for processing." Mot. at 1. The respondents further state that although they intended to contest the assessments, they failed to do so in a timely fashion "due to staff turnover" at Whibco Inc., and that the "uncontested forms were only discovered when [the cases were] assigned to the undersigned counsel." *Id.* at 1-2. The Secretary does not oppose any of the respondents' requests for relief.

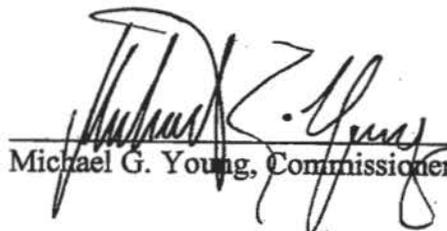
The Commission possesses jurisdiction to reopen uncontested assessments that have become final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of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

Having reviewed the respondents' motions, in the interests of justice, we remand these matters to the Chief Administrative Law Judge to determine whether good cause exists to reopen these proceedings. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Michael P. Duffy, Chairman


Mary Lu Jordan, Commissioner


Stanley C. Suboleski, Commissioner


Michael G. Young, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 13, 2006

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

v.

RIVERTON INVESTMENT CORP.

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:
:
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:
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:

Docket No. WEVA 2006-410-M
A.C. No. 46-00007-64806

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On April 26, 2006, the Commission received from Riverton Investment Corp. a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Riverton filed the motion on behalf of Essroc Cement Corp. (“Essroc”).

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

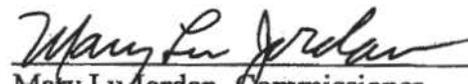
In its motion, Essroc states that on or about August 17, 2005, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) sent the proposed penalty assessment at issue to the company. Mot. at 2. Although Essroc states that it “fully intended to contest” the proposed assessment, a contest was not filed because the contest form was misplaced “through an inadvertent internal oversight.” *Id.*; Decl. of Randy Emery. The Secretary states that she does not oppose Essroc’s request for relief.

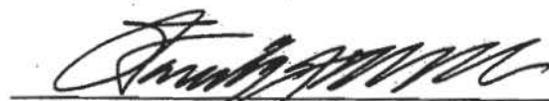
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim*

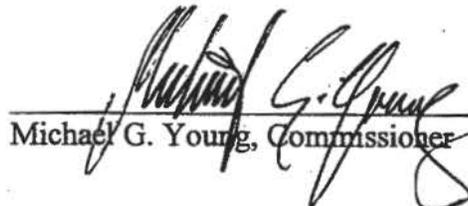
Walter Res., Inc., 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the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

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


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Stanley C. Suboleski, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 28, 2006

| | | |
|-------------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | |
| on behalf of | : | Docket Nos. KENT 2005-96-D |
| WENDELL McCLAIN, COY McCLAIN, | : | KENT 2005-97-D |
| WADE DAMRON, and GARY CONWAY | : | KENT 2005-98-D |
| | : | KENT 2005-99-D |
| v. | : | |
| | : | |
| MISTY MOUNTAIN MINING, INC., | : | |
| STANLEY OSBORNE, and | : | |
| SIMON RATLIFF | : | |

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This consolidated proceeding involves discrimination complaints filed by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") on behalf of Wendell McClain, Coy McClain, Wade Damron, and Gary Conway (collectively referred to as "the complainants" or "the miners") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2000) ("Mine Act" or "Act"),¹ against Misty Mountain Mining, Inc. ("Misty

¹ Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), provides in pertinent part:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine

Mountain”), Stanley Osborne, and Simon Ratliff.² Administrative Law Judge T. Todd Hodgdon determined that the miners were discharged twice in violation of the Mine Act. However, he awarded back pay in an amount lower than that proposed by MSHA and concluded that the miners’ right to reinstatement had ended once they turned down offers of reemployment following their second discharge. 27 FMSHRC 690, 697-98, 701-03 (Oct. 2005) (ALJ). The miners appealed the judge’s reduction in their back pay and his conclusion that they had no further right of reinstatement; the Commission granted review. The Secretary filed, and the Commission granted, a motion to intervene in the proceeding before the Commission. For the reasons that follow, we affirm the judge’s decision.

I.

Factual and Procedural Background

Misty Mountain was owned by Stanley Osborne. 27 FMSHRC at 691. Misty Mountain operated Mine No. 5, which was located in Letcher County, Kentucky, from July to November 13, 2004. *Id.* From July until October 14, superintendent Simon Ratliff was in charge of day-to-day operations at the mine. *Id.*

On August 1, 2004, Ratliff hired Gary Conway as an equipment operator. *Id.* Conway worked as a shuttle car operator for 3 days, and then was assigned to operate a roof bolter. *Id.* When he operated the shuttle car, he complained about the lack of brakes. *Id.* at 693. While assigned to the roof bolter, Conway complained to Ratliff about the need for new dust filters in the dust boxes and the failure of the automatic temporary roof support (“ATRS”) to extend to the roof. *Id.* at 693-94.

In mid-August, Wade Damron was hired to assist Conway on the roof bolter. *Id.* at 691. Damron told Ratliff that the dust filters on the roof bolter did not work. *Id.* at 694. Also in mid-August, Coy McClain was hired to operate the shuttle car and a scoop. *Id.* at 691. He complained to Ratliff about the lack of brakes on both the scoop and the shuttle car. *Id.* at 694. In addition, he reported that the ATRS on the roof bolter did not reach the roof in some places. *Id.* Following Coy McClain’s employment at Misty Mountain, Wendell McClain, Coy’s brother, was hired as a shuttle car operator. *Id.* at 691. Wendell also informed Ratliff that the shuttle car did not have any brakes and that the ATRS did not reach the roof. *Id.* at 694.

On August 30, Ratliff removed Conway and Damron from operating the roof bolter and assigned Coy and Wendell McClain to operate it. *Id.* at 691. Damron was then assigned to the scoop. *Id.* at 691. When the roof bolter became stuck in the No. 3 entry, Damron brought in the scoop to free it. *Id.* As the scoop approached the roof bolter, Damron was unable to stop by

² Both mine owner Stanley Osborne and mine superintendent Simon Ratliff were individually named in the complaint as “persons” under the Mine Act, rather than charged as agents under section 110(c), 30 U.S.C. § 820(c).

applying the brakes. *Id.*; Tr. 74-75. Damron began yelling, "No brakes!" and signaling with his helmet light to Ratliff, and Coy and Wendell McClain, who were standing in the entry. 27 FMSHRC at 691. Damron was able to stop the scoop by steering it into the rib about 20 feet from where Ratliff and the other miners were standing. *Id.*

Wendell McClain told Ratliff that "someone was going to be killed" if the brakes on the scoop were not fixed. *Id.* Ratliff responded that he was not going to let anyone disrespect him like that and told Wendell McClain that he would not be needed anymore. *Id.* Ratliff told Coy McClain to go with him. *Id.* Wendell and Coy McClain understood that to mean that they were fired. *Id.* That same day, they filed discrimination complaints with MSHA. *Id.* Also on August 30, superintendent Ratliff told Wade Damron and Gary Conway that they were "deadbeats" and to get their buckets and leave. *Id.* Damron and Conway understood this to mean that they were fired. *Id.* They filed discrimination complaints with MSHA on August 31. *Id.*

Coy McClain went back to the mine on August 31 and was allowed to return to work. *Id.* at 692. On September 27, the Secretary of Labor filed applications for temporary reinstatement for Wendell McClain, Damron, and Conway.³ *Id.* Before a hearing could be held on the applications, Misty Mountain agreed to reinstate the three miners on October 4. *Id.* Wendell McClain returned to work that day, and Damron and Conway returned to work on October 11. *Id.*

After the complainants went back to work, they were only permitted to work a few hours each day before Ratliff sent them home, while other miners continued working. *Id.* On October 14, Ratliff told the complainants that he could not work with them anymore. *Id.* Believing that to mean they were fired, they left the mine. *Id.* The same day, Ratliff quit his position as superintendent at Misty Mountain, and Mine No. 5 was closed until October 25, when a new superintendent was hired. *Id.*

On October 22, the Secretary filed an application for temporary reinstatement on behalf of Coy McClain. *Id.*; Appl. for Temp. Reins't, Docket No. KENT 2005-28-D. That same day, the Secretary also filed a Motion to Enforce Order to Temporarily Reinstate Wendell McClain, Gary Conway and Wade Damron. Docket Nos. KENT 2005-02-D; KENT 2005-03-D; KENT 2005-04-D. Shortly thereafter, Stanley Osborne spoke with MSHA special investigator Ricky Hamilton and told him that the complainants could return to work when the mine reopened. 27 FMSHRC at 692; Tr. 403-04; 528-29.

³ At that time, no temporary reinstatement application was filed on behalf of Coy McClain because he had returned to work. See Docket No. KENT 2005-28-D.

On October 24, Coy McClain called Osborne at home and told him that he had another job.⁴ 27 FMSHRC at 692. Neither Conway nor Damron returned to work on October 25 when the mine reopened. *Id.* On October 26 and 27, Osborne again spoke with the MSHA office and stated that he could place one of the miners at another mine. *Id.* On October 28, the secretary of MSHA investigator Hamilton called Osborne and told him that Conway and Damron had other jobs and would not be returning.⁵ *Id.*

Wendell McClain returned to work at Misty Mountain on October 25 and continued to work at Mine No. 5 until it closed on November 14, 2004. *Id.* When the mine closed, Osborne offered Wendell McClain a job at Misty Mountain Mine No. 2. *Id.* McClain turned down the offer on the grounds that it was too far from his home and that he had no money for gas to drive there. *Id.*

The Secretary filed discrimination complaints on behalf of the miners in which she sought reinstatement, back pay, and other damages related to their discharges. *Id.* at 693. The Secretary also sought civil penalties of \$20,000 against Misty Mountain, \$10,000 against Stanley Osborne, and \$10,000 against Simon Ratliff. *Id.* Thereafter, a hearing was held before the judge in which Misty Mountain, Osborne, and Ratliff appeared *pro se.* *Id.* at 690.

Based on these credited facts,⁶ the judge found that the complainants engaged in protected activity by making various safety complaints regarding the equipment at Misty Mountain Mine No. 5. *Id.* at 693-94. The judge further found that the complainants were fired on August 30

⁴ Subsequently, the Secretary moved to dismiss Coy McClain's temporary reinstatement application because he was working at another mine. 27 FMSHRC at 692; Order of Dismissal (Dec. 6, 2004), Docket No. KENT 2005-28.

⁵ The judge noted that Osborne's conversations with the MSHA office contained hearsay but that they were not disputed by the other parties. Osborne was not cross examined about them, and they were corroborated by MSHA investigator Hamilton. 27 FMSHRC at 700.

⁶ The judge stated the following with regard to the credibility of the witnesses:

On the whole, I found the main protagonists in this episode, Simon Ratliff, the McClains, Conway and Damron to be of doubtful credibility. Not only did they have obvious interests in the outcome of these cases, but their testimony, in addition to the specific instances already noted, was characterized by selective memory, inconsistencies and self-serving statements. I have tried to rely on their testimony only when it was supported or corroborated by other evidence.

because of their safety complaints. *Id.* at 694-98. The judge also found that, following their reinstatements during the week of October 11, the complainants worked fewer hours than other miners. *Id.* at 698. Finally, the judge found that on October 14 the complainants were fired for a second time as a result of their discrimination complaints.⁷ *Id.*

The judge held that the complainants were entitled to some back pay, but not to reinstatement and other monetary damages. *Id.* at 693, 699, 707. He determined that, following the October 14 terminations, "Osborne made a suitable offer of reinstatement to the four [c]omplainants. . . . [T]he fact that the offer was first made to settle the temporary reinstatement applications does not mean the offer was not suitable." *Id.* at 700. Accordingly, the judge concluded that, once the complainants refused reinstatement, they were not entitled to it again. *Id.* at 701 n.3. He also concluded that they were entitled to back pay only until the date when they refused reinstatement.⁸ *Id.* at 701. He rejected the Secretary's position that Midguard Mining, which was owned by Stanley Osborne's son and took over some of the Misty Mountain mines, was liable as a successor operator. *Id.* at 704. The judge also rejected liability for back pay by former superintendent Simon Ratliff because he was acting only as an agent of Misty Mountain. *Id.* at 704-05. However, the judge held that Misty Mountain owner Stanley Osborne was jointly and severally liable for back pay. *Id.* at 704.

Finally, the judge imposed a penalty of \$10,000, which was reduced from a proposed penalty of \$20,000 against Misty Mountain and its owner, Osborne. *Id.* at 705-06. The judge rejected the Secretary's further penalty proposals of \$10,000 against Ratliff and Osborne individually because there was no basis for their liability under section 110(c), 30 U.S.C. § 820(c), in this proceeding. *Id.*⁹

⁷ There has been no appeal from the judge's determination that the complainants were discharged twice as a result of their protected activity in violation of the Mine Act.

⁸ The judge awarded back pay to the complainants in the following amounts: Gary Conway – \$2,660; Wade Damron – \$2,660; Coy McClain – \$238; and Wendell McClain – \$1,860. 27 FMSHRC at 701-03, 707.

⁹ Both Osborne and Ratliff timely filed briefs with the Commission. However, to the extent that their briefs addressed issues not raised in the PDR, the Commission did not consider them in deciding this case. *See Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co., Inc.*, 21 FMSHRC 265, 284-85 n.25 (Mar. 1999) ("because these contentions were not raised by [a timely-filed petition for review], were not ordered by the Commission sua sponte for review, and attack the judge's orders . . . , they are not properly before the Commission."). Further, both Osborne and Ratliff refer to evidence that is not part of the record, including the recanting of testimony by a witness after trial and the results of a polygraph test, attached to Ratliff's brief. Because this evidence is not part of the record on review, it cannot be considered by the Commission. *Id.*; *see* 30 U.S.C. 823(d)(2)(A)(iii) ("no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been

The complainants filed a petition for review limited to the judge's reduction in their back pay resulting from their rejection of Misty Mountain's reinstatement offers and his determination that they had no further right of reinstatement once they had rejected those offers.

II.

Disposition

The petition for discretionary review, filed on behalf of the complainants, challenges the judge's determination that they "were not entitled to reinstatement." PDR at 1.¹⁰ More specifically, the petition appeals the judge's determination that Wendell McClain's entitlement to back pay ended on November 15, 2004; that Coy McClain's entitlement to back pay ended on October 24, 2004; and that Damron's and Conway's entitlement to back pay ended on October 25, 2004. *Id.* at 1-2. With regard to Wendell McClain, Damron, and Conway, the petition asserts that they were under no obligation to accept temporary reinstatement after their second discharge. *Id.* at 13. Further, the petition argues that Wendell McClain was not required to accept a transfer to another mine, when Misty Mountain No. 5 closed, because he was in temporary status. *Id.* With regard to Coy McClain, the petition challenges the judge's determination that McClain was not entitled to back pay and reinstatement once he took a job at another mine, because there is no evidence that Stanley Osborne made an unqualified offer of permanent reinstatement. *Id.* at 13-14. The petition argues that the judge's conclusion that Osborne made a suitable offer of reinstatement to the complainants is incorrect as a matter of law. *Id.* at 15. Finally, the petition concludes that the judge's finding that a bona fide offer of reinstatement was made and communicated to the complainants is not supported by substantial evidence. *Id.* at 15-16.

The Secretary asserts that the judge erred when he failed to explain how he determined that Misty Mountain's second offer of reinstatement was "bona fide." S. Br. at 1, 15-17. The Secretary further argues that, assuming the reinstatement offers were bona fide, the judge failed to explain how he determined that the complainants' rejection of the offers constituted rejection of any further reinstatement with Misty Mountain. *Id.* at 1-2, 20-23. In support of her position, the Secretary asserts that a miner has no obligation to accept temporary reinstatement in order to preserve his right to permanent reinstatement. *Id.* at 23 n.14. Contrary to the complainants' position on appeal, the Secretary argues that the offers of reinstatement, following the second discharge, were effectively communicated. *Id.* 17-19.

afforded an opportunity to pass." In addition, Ratliff filed two briefs with the Commission well after the expiration date of the briefing period, which ended on March 27, 2006. Briefing Order (Jan. 5, 2006). Those briefs have not been considered by the Commission.

¹⁰ The complainants designated their petition for discretionary review as their brief to the Commission. Letter (Feb. 3, 2006).

In challenging the judge's determination that the complainants were not entitled to reinstatement and that their back pay was cut off by Misty Mountain's offer of reinstatement following the second discharges, the complainants have placed squarely before the Commission the adequacy of those reinstatement offers.

A. Reinstatement Offers and Mitigation of Back Pay

The Commission applies the abuse of discretion standard when reviewing a judge's remedial order. *See Sec'y of Labor on behalf of Reike v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257-58 (July 1997). "Abuse of discretion may be found when 'there is no evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Id.* at 1258 n.3 (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998) (unpublished)). "A litigant seeking to establish . . . abuse of discretion bears a heavy burden." *Mingo Logan*, 19 FMSHRC at 249-50 n.5 (citing *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1844 (Nov. 1995)).

Under section 105(c), the Commission is authorized to "require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2).¹¹ Accordingly, the Commission endeavors to make miners whole and to return them to their status before the illegal discrimination occurred. *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (Dec. 1983). "Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Sec'y of Labor on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 143 (Feb. 1982). "Unless compelling reasons point to the contrary, the full measure of relief should be granted to" a discriminatee. *Bailey*, 5 FMSHRC at 2049 (quoting *Sec'y of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (Jan. 1982)).

The Commission recognized in *Dunmire and Estle* that the failure of a discriminatee to mitigate his damages is a compelling reason that could warrant less than complete relief. 4 FMSHRC at 144. Thus, the Commission has held that "back pay may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings' (fails to mitigate damages)." *Id.* (quoting *OCAW v. NLRB*, 547 F.2d 598, 602-03 (D.C. Cir. 1976)). Finally, the operator bears the burden of proof with respect to willful loss. *Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985).

¹¹ Under section 105(c)(2), upon investigating a miner's complaint of discriminatory discharge and finding that the complaint has not been "frivolously brought," the Secretary must apply to the Commission for an order for "the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission is required to grant the application if it finds the statutory standard has been met. *Id.*; *see generally Sec'y of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.*, 25 FMSHRC 585, 586-87 (Oct. 2003).

Disposition of the appeal in this proceeding turns on whether Misty Mountain made a suitable offer of reinstatement to the complainants following their second discharge. An offer of unconditional reinstatement to their jobs at Misty Mountain would toll the accumulation of back pay. *Munsey v. Smitty Baker Coal Co., Inc.*, 2 FMSHRC 3463, 3464 (Dec. 1980); *Bryant v. Dingess Mine Service, Inc.*, 10 FMSHRC 1173, 1180 (Sept. 1988). Thus, it is “only in ‘exceptional’ circumstances that a discriminatee’s rejection of an unqualified job offer [will] not end the back pay period.” *Bryant*, 10 FMSHRC at 1180-81. Finally, if a suitable offer of employment was made and refused, then the need to offer reinstatement is moot. *Munsey*, 2 FMSHRC at 3464.

B. Validity of Osborne’s Reinstatement Offers

Following the complainants’ second discharge on October 14, the mine was shut down from October 15 until October 25, when a new superintendent was hired to replace Simon Ratliff. 27 FMSHRC at 699. Sometime before October 25, Stanley Osborne, owner of the mine, conveyed an offer of reinstatement to the complainants through MSHA investigator Ricky Hamilton. Tr. 403-04; 528-29.¹² According to Osborne, he “told all four employees that there would be work for them.” Tr. 528. Only Wendell McClain returned to work on October 25. He continued working there until November 13, when the mine closed. 27 FMSHRC at 699.

While testimony in the record regarding the reinstatement offers is terse, there is nothing to suggest that the offers were conditional. *See* Tr. 403. Further, there is nothing in the record that would support the conclusion that acceptance of the offers would be futile, as the Secretary has argued. S. Br. at 15-16. Significantly, Ratliff, the principal source of friction who had initiated the prior terminations, had, by that time, quit his employment with the mine, resulting in the mine’s closing until a new superintendent could be hired and leaving Osborne to convey job offers to the complainants. *Compare Sec’y of Labor on behalf of Hyles, etc. v. All American Alphalt*, 21 FMSHRC 119, 141 n.28 (Jan. 1999) (operator’s placement of miner in a job before it was posted indicates that efforts of discriminatorily laid off miners to bid on the job when it was posted would have been futile). Thus, there is no circumstance that alters the plain words of Osborne’s reinstatement offers. Under these facts, once a suitable offer of reinstatement was made, that tolled the accumulation of back pay, and there is no further requirement to offer reinstatement. *See Munsey*, 2 FMSHRC at 3464.

¹² Counsel for the Secretary initially objected to testimony regarding the reinstatement offers because, as a matter of law, the complainants could refuse an offer of temporary reinstatement and, therefore, the testimony was irrelevant. Tr. 401-04 (Hamilton). Subsequently, counsel further objected to testimony regarding the reinstatement offers because they were part of settlement discussions. Tr. 528 (Osborne). The judge overruled the objections.

Before the judge, the Secretary argued that a reinstatement offer made to settle a temporary reinstatement complaint could never be "suitable." The judge rejected the Secretary's argument.¹³ 27 FMSHRC at 700. Now, before the Commission, the complainants argue that the judge's conclusion was incorrect and inconsistent with the Commission's decision in *Bryant*. In further support of their position, the complainants argue that temporary reinstatement can never be "unconditional" and is "contingent" and "places a condition upon one's employment status." PDR at 15.

These arguments must be rejected because they are at odds with the plain language of the Mine Act. In this regard, section 105(c)(2), 30 U.S.C. § 815(c)(2), makes no distinction between the "immediate reinstatement" which the Commission shall order following the Secretary's determination that a discrimination complaint is not "frivolously brought," and the reinstatement ordered by the Commission following a hearing and a determination of a violation. In other words, until a Commission judge has issued a ruling on the validity of the complaint, it is unknown whether the "immediate reinstatement" called for in section 105(c)(2) is temporary or permanent in nature. Thus, an operator's offer of reinstatement should be regarded as unconditional unless its terms expressly indicate otherwise.¹⁴

Nor does Commission case law support the position of the Secretary or the complainants that a reinstatement offer should be interpreted to mean something other than its plain language. In *Bryant*, cited by the complainants, the Commission held that an operator's offer to place a discriminatee on a recall panel coupled with the operator's guarantee that the discriminatee would be called back to work within two or three days was a bona fide offer of reemployment. 10 FMSHRC at 1180-82. The Commission further held that once the discriminatee turned down the offer, the right to back pay terminated. *Id.* at 1182. In this proceeding, Osborne's offer of work was unconditional. 27 FMSHRC at 699-700. On cross examination of Osborne, the Secretary's counsel tried to show that Osborne limited his offers of reemployment because they were made in the context of the Secretary's having filed temporary reinstatement complaints. Tr. 531-33. When asked if the reinstatement offers were made "pursuant to the temporary reinstatement

¹³ The dissenting opinion rests on the mistaken premise that the judge did not make a finding of suitability regarding Osborne's reinstatement offer. However, the judge clearly did so, noting in particular that the reinstatement offers were made to settle the Secretary's reinstatement applications. 27 FMSHRC at 700. Thus, although our dissenting colleague would have the judge further review the record testimony on remand to determine whether the offers were for "temporary" or "permanent" reinstatement, slip op. at 14, such a remand would be groundless and unnecessary. Moreover, even if one could conclude that the judge had not made such a suitability finding, Osborne's testimony is the only probative evidence on this issue, and it can only be read to support the conclusion that he made an unconditional offer of reemployment.

¹⁴ If events indicate that the offer of reinstatement is not bona fide, e.g., the complainant is treated adversely after reinstatement, the remedy is for the Secretary to seek additional relief from the judge.

cases,” Osborne responded, “I don’t know . . . I didn’t temporarily give them a job. I would have given them a job . . .” Tr. 532. Indeed, Osborne’s offer of reinstatement is more absolute and open-ended than the one that the Commission found acceptable in *Bryant*.¹⁵

The complainants further cite *Dunmire and Estle* and *Bowling* to support their argument that a discriminatee is not required to accept an offer of temporary reinstatement to mitigate damages. In *Dunmire and Estle*, a discriminatee, who had not sought a temporary reinstatement application, was nevertheless found to have made the necessary reasonable efforts to mitigate his damages when he found alternative but lower paying employment. 4 FMSHRC at 144. The Commission refused to hold that the discriminatee had failed to mitigate his damages because he would have earned more by obtaining temporary reinstatement to the position from which he had been discharged. *See id.* In *Bowling*, the Commission concluded that a discriminatee had not failed to mitigate his damages when he did not seek reopening of his temporary reinstatement application, where there was no evidence that he was aware that he had a right to ask the Secretary to refile his application. 21 FMSHRC at 284-85. Neither case can be read to support the Secretary’s and complainants’ position that an offer of reemployment, made pursuant to a temporary reinstatement application, cannot constitute an unconditional offer to return to work.

In sum, the positions of the complainants and the Secretary on appeal must be rejected.

C. Substantial Evidence Supports the Judge’s Findings

When Misty Mountain Mine No. 5 closed, Osborne offered to transfer Wendell McClain to Mine No. 2, and he agreed to take the position. 27 FMSHRC at 699. However, he never showed up at the mine, because, according to McClain, it was too far to drive or he did not have the money for gas. *Id.* The judge found that McClain’s excuses for not accepting the job at the mine were “inconsistent and nonsensical.” *Id.* The judge noted in particular that Osborne had paid McClain \$800, purportedly in settlement of his MSHA complaint, which he used to pay for Christmas gifts on lay-away, rather than for gas to go to work. *Id.* The judge concluded that Wendell McClain’s failure to report at the No. 2 mine was “not justified.” *Id.* Therefore, the judge further concluded that McClain was not entitled to reinstatement because he chose not to accept the offer of work at the No. 2 mine “without articulating a legitimate reason for doing so.” *Id.* at 701. The judge also held that McClain’s back pay should not run beyond the time he turned

¹⁵ The dissent’s transformation of Osborne’s unconditional offer of work to a conditional “temporary job offer,” slip op. at 16-17, is without basis in the record and appears to be a thinly veiled attempt to apply the holdings of cases decided under the National Labor Relations Act (“NLRA”). *See* slip op. at 17. However, those cases are readily distinguishable because there is no provision in the NLRA comparable to the immediate reinstatement provision in section 105(c)(2) of the Mine Act.

down the offer of work at the No. 2 mine. *Id.* at 702. We hold that substantial evidence supports the judge's findings.¹⁶

Additionally, the decision clearly rests on credibility determinations made by the administrative law judge. *See* slip op. at 4 n.6, *supra*. We will not disturb these determinations except in extraordinary circumstances not found here. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (Sept. 1992) (quoting *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 25 (Jan. 1984), *aff'd mem.* 750 F.2d 1093 (D.C.Cir. 1984)).

Further, the complainants argue that the reinstatement offer was not effectively communicated.¹⁷ However, the record indicates and the judge found that the offer was made by Osborne to MSHA investigator Ricky Hamilton and the Secretary's counsel. 27 FMSHRC at 699; Tr. 403; 529. Moreover, that the offer was made and communicated was borne out by Wendell McClain's return to work.

With regard to Coy McClain, Gary Conway, and Wade Damron, the judge found, as noted above, that Stanley Osborne made an offer of reinstatement, through Hamilton and the Secretary's counsel, following the second discharge. 27 FMSHRC at 699. The judge found that Coy McClain turned down the reinstatement offer because he had found a higher paying job.¹⁸ *Id.* at 700. The judge further found that Osborne made a similar offer of reinstatement to Conway and Damron but that they had found other jobs. *Id.* Neither the Secretary nor the complainants

¹⁶ 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 mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

¹⁷ The Secretary disagrees with the complainants that the reinstatement offer was not effectively communicated. *See* S. Br. 17-19 and PDR at 15-16. More specifically, the complainants assert that Osborne never told them directly that they could come back to work. We agree with the Secretary's position that there is nothing inherently improper with an operator's conveying a reinstatement offer through MSHA representatives. Indeed, in this case it appears that Osborne believed that he was required to communicate with the complainants through MSHA. Tr. 529.

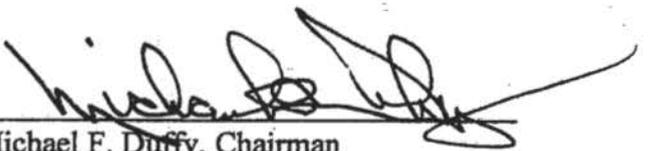
¹⁸ The judge noted that Coy McClain "professed not to recall this incident and . . . was very evasive when questioned about it." *Id.* (citing Tr. 173-75). However, the judge indicated that MSHA investigator Hamilton testified that Osborne had told him that Coy had quit to take a higher paying job (Tr. 397-98), and the payroll records in evidence showed that Coy was making more during his employment at McPeaks Energy during the period of October 17 to November 12. 27 FMSHRC at 700; Gov't Ex. 24.

challenge the judge's findings. In light of these uncontested findings, the judge's conclusion that "Osborne made a suitable offer of reinstatement" to the complainants, and "[a]ll four were offered a chance to return to Mine No. 5 or to transfer to other Misty Mountain mines and all four turned [the offers] down," is supported by substantial evidence. *Id.* at 700, 699.

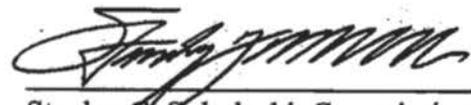
III.

Conclusion

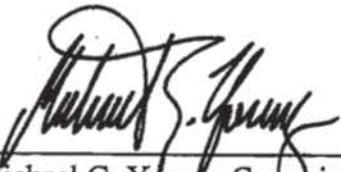
For the foregoing reasons, we affirm the judge's decision.



Michael F. Duffy, Chairman



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

Both the judge and my colleagues avoid the central issue in this case: were the job offers from Stanley Osborne to the miners offers of temporary reinstatement, or permanent job offers? The majority concludes that substantial evidence supports the judge's finding that Osborne made a suitable offer of reinstatement, but the key question determining the adequacy of the offer was not addressed, much less answered, in his opinion. Therefore, I would vacate the judge's decision and remand the case to him.

The Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res.*, 16 FMSHRC 1218, 1222 (June 1994). The D.C. Circuit has further explained that, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and adequate justification for the conclusions reached by a judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981) (citations omitted). In this case, the question of whether Osborne's job offer was "suitable," hinges in large part on the factual issue of whether the offer was for temporary or permanent employment. Without such a finding, I am unable to determine whether the judge's ultimate holding that a suitable job offer was made should be sustained.

According to the judge, "the fact that the offer was first made to settle the temporary reinstatement applications does not mean the offer was not suitable," 27 FMSHRC 690, 700 (Oct. 2005) (ALJ), but it is unclear what he meant by this statement. As the judge, noted, after the first firing, the miners went back to work in the same positions and at the same pay as they originally earned. *Id.* While these factors are generally a necessary component of a suitable offer, they do not equate to a permanent job offer. When the miners were fired a second time, "Osborne made it known to them that they could return to Mine No. 5 or to other mines that he operated." *Id.* The judge points to no evidence that would lead one to reasonably conclude that this second offer was any more permanent than the first.

The judge also relies on the fact that "after October 14, Ratliff, who seems to have been the catalyst for all of the problems at the mine, had resigned." *Id.* at 700-01. While this may be an appropriate factor to consider in making a determination as to whether a permanent job offer is suitable, it does not transform a temporary offer into a permanent one.

In any event, regardless of whether Osborne intended to offer a permanent, as opposed to a temporary job, it is unclear whether the miners would have any reason to think something other than *temporary* reinstatement was being offered. The offer at issue (the one after the second firing), was apparently made on October 22 (27 FMSHRC at 692, 699), the same day the

Secretary filed a Motion to Enforce Order to Temporarily Reinstatement Wendell McClain, Gary Conway and Wade Damron. Docket Nos. KENT 2005-02-D; KENT 2005-03-D; KENT 2005-04-D. The Secretary also filed an Application for Temporary Reinstatement for Coy McClain on that day. 27 FMSHRC at 692. Why should an offer to return the miners to work that day be viewed as anything more than an effort to comply with the judge's order requiring only *temporary* reinstatement? Why is it reasonable to conclude, without compelling evidence in support, that an operator who fired miners on two occasions in violation of section 105(c), and who, in between those firings illegally reduced their wages, was now offering to take action above and beyond what was required under the statute? Because the judge failed to address these key questions, I cannot affirm his decision. I would remand the case to him so that he could take these issues into account in deciding whether the job offer was temporary or permanent.

On remand, I would also ask the judge, in making a finding as to whether the offers were for temporary or permanent employment, to review the scant record testimony on this issue, including the testimony from Stanley Osborne (the only evidence relied on by my colleagues to support their finding that the offers were unconditional) wherein he states "I didn't temporarily give them a job. I would have given them a job" Slip op. at 10 (quoting Tr. 532);¹ *see also* Tr. 394. On the other hand, I would also ask the judge to consider Osborne's acknowledgment that before he made the job offers at issue, counsel for the Secretary had informed him that as part of the temporary reinstatement, he had to "put those four people back to work." Tr. 527.

Apparently, my colleagues believe that, when ascertaining whether an operator's job offer is "suitable," it does not matter whether the offer is for temporary or permanent employment. Slip op. at 9-10. According to the majority, whenever an operator offers immediate reinstatement following Commission agreement that a discrimination complaint is not frivolously brought, that reinstatement "should be regarded as unconditional unless its terms expressly indicate otherwise." *Id.* at 9. Put another way, my colleagues have deemed a job offer issued pursuant to the Commission's *temporary* reinstatement proceedings to be the equivalent of a permanent job offer. Such a ruling defies logic as well as the ordinary meaning of the term temporary reinstatement.

The majority relies on the language of section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), which it contends does not distinguish between "the immediate reinstatement," that the judge must order if he or she affirms the Secretary's determination that a discrimination complaint "is not frivolously brought," and the reinstatement ordered by that judge following a

¹ The fact that the majority relies on this testimony implies that it believes that, in calculating a back pay award, a judge should take into account whether a job offered to a miner was for temporary or permanent work. Otherwise, this testimony would not be relevant to the majority's determination of whether the job offer was "suitable." *But see* slip op. at 14-15, *infra*.

hearing and a determination that a violation of section 105(c) occurred.² Slip op. at 9. It points out that if the judge ultimately upholds the miner's section 105(c) complaint, the previously ordered immediate reinstatement becomes permanent in nature. *Id.* Because we do not know at the outset whether the immediate reinstatement will ultimately prove to be of a temporary or permanent nature, my colleagues conclude that this offer must be deemed unconditional unless its terms expressly indicate the contrary. *Id.*³

I disagree that the plain language of section 105(c) leads to the conclusion that offers of temporary reinstatement are unconditional offers to return to work. Section 105(c)(2) of the Mine Act provides that when a miner files a discrimination complaint deemed not frivolous, the Commission "shall order the immediate reinstatement of the miner *pending final order on the complaint.*" 30 U.S.C. § 815(c)(2) (emphasis added). In contrast, when the miner ultimately prevails on the complaint, the Commission is authorized to order whatever relief the Commission deems appropriate including "the rehiring or reinstatement of the miner to his former position, with back pay and interest." *Id.* There is no conditional language regarding the pendency of this reinstatement. Thus, the drafters of the Mine Act clearly recognized the important difference between these two concepts, a difference that for some reason my colleagues are attempting to blur.

Although the majority acknowledges that it is the operator who bears the burden of proof with respect to willful loss of earnings, slip op. at 7 (citing *Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985)), its analysis turns this burden upside

² The majority thus appears to disregard the Commission's own procedural rules, which explicitly recognize temporary reinstatement. Comm Proc. Rule 45, 29 C.F.R. § 2700.45.

³ My colleagues correctly rely on *Bryant v. Dingess Mine Service, Inc.*, 10 FMSHRC 1173 (Sept. 1988), for the proposition that a bona fide offer of reinstatement tolls the accumulation of back pay. Slip op. at 8. Notably, though, in that case, the Commission, in its discussion of "unconditional" and "bona fide" job offers, was referring to a permanent job rather than a job of shorter duration. This is demonstrated by its reference to an employment law treatise (10 FMSHRC at 1180), in which the authors stated that:

termination of the back pay period normally occurs when the discriminatee is unconditionally and in a bona fide fashion offered *the employment, reinstatement, or promotion at issue.* This can occur pursuant to a final court decree or pursuant to a voluntary bona fide offer of employment, reinstatement, or promotion *to the position at issue.*

B. Schiei and P. Grossman, *Employment Discrimination Law* 1432 (2d ed. 1983) (emphasis added) (footnotes omitted).

down. In effect, the majority has created a presumption that any job offer rendered by an operator is unconditional, and therefore cuts off a back pay award, unless the operator has taken care to clearly indicate that it is conditional.⁴ This is troubling because it significantly reduces the operator's burden of proof in establishing a willful loss of earnings. It is especially worrisome in a context such as the one presented in this case, where an offer of employment is made at the same time that the Secretary seeks a temporary reinstatement order from the judge. Why an operator's job offer at this juncture should be presumed unconditional (and permanent) is simply not explained by the majority.

My colleagues are correct, however, that until a judge issues a ruling on the validity of the discrimination complaint, it is impossible to know whether the "immediate" reinstatement is temporary or permanent. Slip op. at 9. That is precisely why a rigid rule truncating a miner's back pay recovery if he or she refuses temporary reinstatement is ill-founded: in a practical, rather than a merely theoretical world, a miner who has found alternative employment may be reluctant to discard it for a temporary job with a former employer, because at the time of the offer it is impossible to know whether the temporary job will, in fact, become permanent. Giving up steady, permanent employment and job security for a temporary job that may or may not become permanent after a period of litigation provides little solace for a miner. I doubt that the drafters of the Mine Act contemplated that a miner bringing a discrimination claim would be forced to gamble on his or her chances of litigation success in order to preserve back pay rights.

In addition, the majority fails to cite one Commission case directly in support of the novel principle that a refusal of a temporary job offer (which they consider to be "unconditional") automatically tolls a back pay award. The Commission has made it emphatically clear that a miner is not required to seek temporary reinstatement in the first place in order to mitigate his or her damages. See *Sec'y of Labor on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982); *Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 284 (Mar. 1999). If a miner cannot be penalized for failing to seek temporary reinstatement in the first instance, why should he or she automatically suffer a reduction in back pay for failing to accept a subsequent offer of temporary reinstatement?⁵

⁴ The majority dismisses the harsh consequences that could result from its presumption that offers are unconditional by stating that if an offer is in fact not bona fide, the Secretary may request relief from the judge. Slip op. n.14. This affords small comfort to a minor who has quit a job in reliance on an operator's presumably unconditional offer.

⁵ My colleagues assert that *Dunmire* and *Bowling* do not support the position that "an offer of reemployment, made pursuant to a temporary reinstatement application, cannot constitute an unconditional offer to return to work." Slip op. at 10. It is true that this precise question was not at issue in these cases. However, in both cases the Commission held that failure to seek a temporary job does not affect a miner's back pay award. The natural extension of this logic is that failure to accept a temporary job does not necessarily affect a miner's back pay award.

Furthermore, a holding that a refusal to accept a temporary job always extinguishes a miner's right to back pay directly contravenes well-established case law under the National Labor Relations Act.⁶ For example, in *Oil, Chemical and Atomic Workers International Union v. NLRB*, 547 F.2d 598 (D.C. Cir. 1976), the Court held that a willful loss of earnings was not incurred by workers' rejection of an employer's offer of temporary reinstatement. 547 F.2d at 604.⁷ Although the Court acknowledged that an "unreasonable rejection of a valid, interim offer might in some circumstances constitute a willful loss of earnings," it emphasized that the purpose of section 10(j), the provision of the National Labor Relations Act providing "appropriate temporary relief," 29 U.S.C. § 160(j) (2004), "might be undercut if a discharged employee's refusal of an offer of temporary reinstatement is found to constitute a willful loss of earnings." 547 F.2d at 604 n.7; *see also Morvay v. Maghielse Tool and Die Co.*, 708 F.2d 229, 232 (6th Cir. 1983) ("an offer is insufficient to terminate back pay liability . . . if the job which [an employee] is offered is temporary").

As the foregoing discussion illustrates, both the language of the Mine Act and cogent policy considerations require the judge in this case to determine whether Osborne's offers were for temporary or permanent reinstatement. But the judge's inquiry should not necessarily end there. Granted, if he were to conclude that the offers were for permanent employment, then his work would be completed, as his finding that the offers were "suitable" would be an appropriate one in this case. However, if he were to determine that the offers were only for temporary reinstatement, I would instruct him to take into account additional factors in deciding if the refusal of the temporary jobs constituted a failure on the part of the miners to mitigate their damages.⁸ This could include the fact that they had other jobs at the time of the offers, and the rate of pay at those jobs compared to their salary at Misty Mountain. *See, e.g., OCAW*, 547 F.2d at 604-05. If the judge were to determine that the miners did not fail to mitigate their damages, I would instruct him to recalculate their backpay awards accordingly.

⁶ As the Commission has acknowledged, "[b]ecause the Mine Act's provisions for remedying discrimination are modeled largely upon the National Labor Relations Act, [the Commission] ha[s] sought guidance from settled cases implementing that Act in fashioning the contours within which a judge may exercise his discretion in awarding back pay." *Metric*, 6 FMSHRC at 231.

⁷ The Court also took into account factors involving salary and job location. 547 F.2d at 604.

⁸ The factual analysis on remand would be different for Wendell McClain than for the other three miners, because he returned to the mine to work on October 25 until it closed on November 13, but did not report to work at a different Misty Mountain mine when he was subsequently offered a job there. 27 FMSHRC at 699.

In sum, for the foregoing reasons I would vacate the judge's decision and remand the case to the judge for a finding of whether a suitable job offer was made, and if necessary, for a recalculation of the back pay award.


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civil penalty for the first citation. 26 FMSHRC 873 (Nov. 2004) (ALJ). Both Sedgman and the Secretary of Labor filed petitions for review which the Commission granted.

I.

Factual and Procedural Background

In the spring of 2001, Jim Walter Resources (“JWR”) hired Sedgman as the general contractor on a project at JWR’s No. 4 Preparation Plant, in Tuscaloosa County, Alabama (“the prep plant”). *Id.* at 874; Gov’t Ex. 3 (MSHA Accident Investigation Report); Jt. Ex. 1 (JWR-Sedgman contract). The prep plant, which processes coal for JWR’s No. 4 Mine, is subject to four inspections each year by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Stips. at 2, ¶ 3.

Since its construction in the 1970’s, the prep plant has undergone various upgrades and modifications. 26 FMSHRC at 874. The 2001 project involved major modifications of the plant, including installation of heavy media cyclones and spirals. *Id.*; Stips. at 2, ¶¶ 5-6. Pursuant to the JWR-Sedgman agreement, Sedgman was to design and construct the prep plant modification. 26 FMSHRC at 874. At that time, Pro Industrial Welding, Inc. (“PIW”), a contractor from nearby Brookwood, Alabama, was already performing work for JWR at the prep plant, pursuant to a contract under which PIW would repair and replace deteriorated steel at the prep plant and at other JWR facilities. *Id.* at 874-75 & n.1; Stips. at 3, ¶ 9.

Consequently, Sedgman entered into a subcontract with PIW whereby PIW would provide labor, materials, equipment, and services for the prep plant modification project. 26 FMSHRC at 874. Pursuant to its pre-existing contract with JWR, PIW would continue to repair and replace steel that it discovered was deteriorated at the prep plant, in addition to the steel work involved in the modification process. *Id.* at 875.

PIW began demolition of some of the existing plant structure and removal of equipment. Stips. at 3, ¶ 11. Subsequently, in the first week of June 2001, David Gill, a Sedgman construction site manager, arrived at the project as Sedgman’s sole representative. *Id.*; 26 FMSHRC at 874.

There were a total of 39 PIW ironworkers, welders, pipe fitters, and general laborers at the JWR site. 26 FMSHRC at 875; Stips. at 3, ¶ 13. PIW’s construction supervisor was its President, Keith Crabtree, who was generally present at the site at least part of each day. 26 FMSHRC at 875. Daily direction of PIW’s construction activities was otherwise the responsibility of PIW “lead men.” *Id.*

The JWR-Sedgman contract contemplated that existing parts of the prep plant’s steel structure would be demolished in order to permit the construction of the new steel structures to

be added as part of the modification project. *Id.* at 874. Under the Sedgman-PIW contract, PIW was responsible for determining the exact method to be used to demolish such structures. *Id.*

Part of the plant modification involved connecting the steel skeleton that had been erected from the “decant” floor between the second and third floors into the existing fifth and sixth floor structure on the west side of the prep plant. *Id.* at 875; Stips. at 4, ¶ 20; Tr. 114. While doing so, on August 27, 2001, PIW encountered an overhang from the fifth floor to the seventh floor of the existing structure, which included a reinforced concrete landing extending out from the fifth floor. 26 FMSHRC at 875; Tr. 410-12. The landing, which supported a stairway between the fifth and sixth floors, was surrounded by opaque sheeting or siding. 26 FMSHRC at 875.²

PIW’s lead man at the time, Trevor Rhine, was relying upon drawings that did not include the landing, so he was surprised to encounter it. *Id.*; Tr. 410-11. Consequently, Rhine conferred with Sedgman’s representative Gill, and the two men went to the area. 26 FMSHRC at 875. The two men looked up at the landing from the second and fourth floors. *Id.* They agreed the landing would have to be removed. 26 FMSHRC at 875; Tr. 410-12.

When Rhine requested demolition advice, Gill recommended separating the landing into pieces, stringing cable slings through the pieces, and using the mobile crane on site to “fly” the pieces out. 26 FMSHRC at 875; Stips. at 5, ¶ 23. Two of the PIW workers assigned by Rhine to that part of the modification project, Ricky Fields and Gary McDonald, subsequently began the piecemeal dismantlement of the landing on the morning of August 29, 2001, while also working on connecting the steel skeleton to the existing structure. 26 FMSHRC at 875-76; Gov’t Ex. 3 at 3.

Fields and McDonald used a concrete saw to make two cuts across the width of the landing, isolating two pieces, each approximately 5 feet long. 26 FMSHRC at 876. The first piece of the landing was lifted out by the crane and cable without incident, while the second lift

² According to the judge:

The landing consisted of a steel framework covered by a concrete slab. One 19-foot channel formed the outer (west) edge of the support steel. Four cross channels, one at each end (north and south) and two intermediate channels formed the rest of the supporting steel structure below the landing.

The steel landing structure was supported by support members from above; these were attached to the outside edge of the landing at either end (north and south) and at mid-span of the 19-foot channel that formed the outer edge of the landing.

26 FMSHRC at 875.

occurred only after an oxygen-acetylene torch was used to cut a piece of rebar that had prevented separation. Stips. at 5, ¶ 25. Early in the afternoon, Fields and the PIW crane man rigged a single chain hoist intended to support the remaining landing. Stips. at 5-6, ¶ 26; Gov't Ex. 3 at 4.

At approximately 3:30 p.m., a JWR employee saw Fields on the outer edge of the remaining landing. Stips. at 6, ¶ 28. At first Fields was kicking at what appeared to be a toe plate, but then he left the landing and returned with cutting torches. *Id.* About 10 minutes later, McDonald, who was doing steel connection work, saw Fields kneeling on the remaining portion of the landing. *Id.* at 6, ¶ 29; Gov't Ex. 3 at 4. After McDonald looked away, the landing collapsed, and Fields fell approximately 34 feet to the two-and-a-half level floor. Stips. at 6, ¶¶ 29-30; Gov't Ex. 3 at 4. He was flown by emergency helicopter to a nearby hospital but died from his injuries during surgery. Gov't Ex. 3 at 4.

MSHA investigated the accident during the next 2 weeks, and issued a report on February 4, 2002. Gov't Ex. 3 at 5; Stips. at 9, ¶ 41. There is general agreement on how the collapse occurred. In addition to removing the two landing pieces, some of the steel that supported or formed the landing was removed or cut by either Fields or McDonald or both. Stips. at 6, ¶ 27. Specifically, the 19-foot channel of the steel framework was cut at the north end of the landing, eliminating any support for the outer edge of the channel at that end as well as the stability provided by the connection at that end of the channel. 26 FMSHRC at 876. An intermediate channel cross piece that provided stability to the structure, particularly to the 19-foot channel supporting the landing, was also removed. *Id.*

This reduction in support reduced the load bearing capacity of the 19-foot channel. *Id.* Cutting the north end of the 19-foot channel also eliminated the support provided by the outer edge north end hanger, reducing the number of hangers that supported the outer edge of the platform from three to two. *Id.* When Fields cut the middle hanger, the landing failed. *Id.*³

Along with the accident investigation report, MSHA issued separate citations or orders to JWR, Sedgman, and PIW on February 4, 2002. Each was alleged to have violated the requirement in section 77.200 that mine structures are to be maintained in good repair, as well as the requirement in section 77.1710(g) that miners are to wear a safety belt and line when there is a danger of falling. Stips. at 7-8, ¶¶ 31-37.

³ The judge also credited the testimony of Sedgman's expert witness, Albert Fill, that the chain hoist attached to help support the structure actually contributed to its collapse. 26 FMSHRC at 876 n.2. A second chain hoist was found amidst the wreckage, but apparently had never been rigged to the structure. Stips. at 6, ¶ 26.

With respect to the citations issued to Sedgman, MSHA designated the violation of section 77.1710(g) as significant and substantial (“S&S”),⁴ and on May 3, 2002, the Secretary proposed a penalty of \$160. 26 FMSHRC at 886-88; Stips. at 9, ¶ 42. The citation alleging that Sedgman violated section 77.200 was also designated as S&S and further alleged that the violation was due to Sedgman’s unwarrantable failure.⁵ 26 FMSHRC at 877-84. On December 31, 2002, the Secretary proposed a penalty assessment of \$35,000 for Sedgman’s violation of section 77.200, nearly 11 months after the citation for the violation was issued on February 4, 2002. *Id.* at 884; Stips. at 9, ¶ 44. During that time and beyond, MSHA conducted a special investigation that culminated on April 2, 2003, in charges being brought against Gill for the section 77.200 violation under section 110(c) of the Act, 30 U.S.C. § 820(c). *See* Stips. at 9-10, ¶¶ 46-55. On August 18, 2003, the Secretary proposed a penalty of \$3,500 against Gill. *Id.* at 10, ¶ 57.

After a hearing on the Sedgman citations, the judge affirmed the S&S section 77.1710(g) citation and assessed the penalty proposed by the Secretary for it. 26 FMSHRC at 886-88. With regard to the section 77.200 citation, the judge affirmed it and found that the violation was S&S, but was not persuaded that the violation was unwarrantable or that Gill should be held individually liable for it under section 110(c). *Id.* at 877-84. The judge assessed a penalty of \$1,000, but then vacated it on the ground that the 16-month time period between the accident and the Secretary’s proposed assessment was not reasonable. *Id.* at 884-86.

The Commission granted Sedgman’s petition for review of the findings of violation and the Secretary’s petition for review of the judge’s decision regarding the penalty assessment for the section 77.200 violation.

II.

Disposition

A. Interpretation of 30 C.F.R. § 77.200

In finding a violation of section 77.200, the judge rejected the idea that section 77.200 does not apply to structures being demolished, on the grounds that the regulation does not contain such an exception and that to create one would violate the protective purposes of the

⁴ 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.”

⁵ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

standard, as workers would be exposed to a hazard while working in and around unmaintained structures pending demolition. 26 FMSHRC at 877-78. The judge found that, because there were extensive conditions of rust, deterioration, and corrosion in the supporting steel that rendered it no longer whole or had significantly reduced its thickness, "it was more likely than not that the supporting structures had deteriorated to a condition that was hazardous," and concluded that Sedgman violated section 77.200. *Id.* at 880.

Sedgman maintains that the inherent logic and language of section 77.200 compels the conclusion that it does not apply to structures being demolished. Sedgman Br. at 12-16. The Secretary contends that the language of section 77.200 contains no exception for structures being demolished. Sec'y Br. at 11-13.

Section 77.200 requires that "[a]ll mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees." Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face.") (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

Here, the judge determined that because Sedgman was responsible for the structure at issue by virtue of the demolition contract, it could be cited for the deteriorated condition of the structure at the time of demolition. 26 FMSHRC at 879-80; *see also id.* at 883 (unwarrantable failure analysis). A close reading of the citations issued to JWR and Sedgman, as well as the penalties proposed for those citations,⁶ however, shows the Secretary was relying on more than the condition of the structure in alleging that Sedgman violated section 77.200. The judge quoted from that part of the citation issued to Sedgman that contained language similar to that found in the citation issued to JWR (26 FMSHRC at 877), but in reality the citation against

⁶ The Secretary proposed a penalty of \$1,270 for each of the two citations against JWR, with JWR agreeing, prior to the hearing on the Sedgman citations, to pay in a separate proceeding \$1,070 for the S&S section 77.1710(g) violation and \$655 for the S&S section 77.200 violation. Stips. at 7, ¶ 35; Jt. Ex. 5 (citations). In contrast, for the section 77.200 violations, each of which was designated S&S and unwarrantable, the Secretary assessed penalties of \$40,000 against PIW and \$35,000 against Sedgman. Stips. at 7-8, ¶ 36.

Sedgman, after referring to the condition of the structure, goes on to describe Sedgman's involvement with the demolition of the structure. The citation against Sedgman states:

The [No. 4 Mine] coal processing facility and structures were not being maintained in good repair to prevent injuries to employees. Areas of the coal preparation plant are currently under demolition and reconstruction by employees of [PIW] who are under advisement by an on-site manager of Sedgman. This employee [of Sedgman] examined the work area and discussed the demolition procedure with [PIW] prior to the accident. Steel members and supporting structure beneath and attached to the concrete deck area of the 5th floor level were not substantially maintained to prevent collapse of the structure. The steel beams and structure associated with the deck support showed signs of deterioration, corrosion, and fatigue which had seriously reduced their load carrying capacity. Sedgman had inspected this area of the plant during the design phase of this project. Actions by [PIW] in conjunction with the deterioration and lack of precautionary safety measures, resulted in the failure of the supports and structure. An employee of Sedgman regularly travels on, beneath, and in close proximity to the failed structure during the course of his regular duties.

Citation No. 7676881 (emphases added to highlight language not included in citation against JWR).⁷

The essence of the Secretary's allegation is that Sedgman violated section 77.200 because it had an important role in demolishing the structure, and the method of demolition that was ultimately employed exposed the PIW workers to the risk of accident or injury. Sec'y Br. at 13. According to the Secretary, under section 77.200 Sedgman, as the general contractor, was obligated to "maintain" the structure to prevent injuries and accidents to employees; that obligation continued through the demolition process for which Sedgman was responsible, and Sedgman failed in that obligation when it permitted the PIW workers to dismantle the structure in an unsafe manner. *See id.* at 16-17 ("Sedgman violated the standard because its chosen method of demolition exposed employees working on the stairwell and landing to hazards.").

⁷ Neither of the citations issued to Sedgman was submitted at the hearing, but a copy of each citation was attached to the respective penalty assessments in this case and are thus included in the record. The citation issued against JWR for the section 77.200 violation (Citation No. 7676879) was submitted by the parties with their Stipulations as Joint Exhibit 5.

We thus cannot agree with our dissenting colleague that the Secretary's theory of liability in this case is based "solely" on the deterioration of the steel. See slip op. at 26.⁸

As always, the "language of a regulation . . . is the starting point for its interpretation." *Dyer*, 832 F.2d at 1066 (citing *GTE Sylvania*, 447 U.S. at 108). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. See, e.g., *Thompson Bros. Coal Co.*, 6 FMSHRC 2091, 2096 (Sept. 1984). To "maintain" is "to keep in state of repair, efficiency or validity: preserve from failure or decline." *Webster's Third New International Dictionary* 1362 (1993). "[R]epair" when used as a noun means, among other things, "relative condition with respect to soundness or need of repairing." *Id.* at 1923.

Such definitions of the terms used in section 77.200 support the Secretary's reading of the standard and application of it to structures undergoing demolition. The concepts of "efficiency," "validity," and "soundness" are all relevant to a structure not only while it is in use prior to demolition, but during the demolition process as well, given the danger a structure can pose to those who are in its vicinity while it is being demolished. "[F]ailure" of a structure during the demolition process poses a danger to workers on or around the structure, including those employed by contractors, as this case demonstrates.⁹

Reading section 77.200 to prohibit demolition in an unsafe manner is particularly appropriate given that the standard plainly states its purpose: "to prevent accidents and injuries to

⁸ While the Secretary continues to contend the deteriorated condition of the structure is relevant to the citation against Sedgman for the section 77.200 violation, we note that the judge credited the testimony of Sedgman's expert Fill that, in this instance, even if the structure had been composed of new steel, such steel would not have been able to withstand the forces placed on the structure during its demolition, given the method of demolition that was used. 26 FMSHRC at 876 n.2. The Secretary does not argue that the judge erred in crediting Fill on this point.

⁹ Our dissenting colleague (slip op. at 27-28) states that "one of the central problems in this case" is that the Secretary has not promulgated separate safety standards applicable to construction activity at surface areas of mines, as section 101(a)(8) of the Mine Act mandates she do "to the extent practicable." See 30 U.S.C. § 811(a)(8)). However, the legislative history of that provision explains that "[t]he requirement that standards be separately promulgated does not relieve construction operators from complying with the requirements of the Act generally" S. Rep. No. 95-181 at 24-25 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 612-13 (1978) ("*Legis. Hist.*"). Section 77.200 is one of those requirements, and the Secretary is obligated to enforce it against contractor Sedgman, particularly in an instance such as this, where contractor employees were subject to the same hazards as miners. See *Bituminous Coal Operators' Ass'n v. Sec'y of Interior*, 547 F.2d 240, 244-45 (4th Cir. 1977) (upholding application of predecessor statute to Mine Act to contractors, including those involved in prep plant construction).

employees.” By employing only those methods of demolition which do not lead to accidents or injuries to employees — an obligation that is no way unreasonable — an operator will comply with section 77.200 during the demolition of the structure. See *U.S. Steel Mining Co.*, 14 FMSHRC 973, 975-76 (June 1992) (proof of hazard from failure to maintain structure is the only prerequisite to establishing violation of section 77.200). Moreover, and perhaps most significantly, in drafting section 77.200 the Secretary did not carve out an exception to the standard for structures being demolished. Indeed, the regulation provides just the opposite, as it states that it applies to “all” structures.

Consequently, we are not persuaded by Sedgman’s argument that once demolition of the structure began, section 77.200, by its terms, was no longer applicable. Sedgman contends that demolition of a structure is the very antithesis of “maintain[ing]” it “in good repair,” because a structure being demolished is one that is being removed from any potential for future use, and thus there is no longer any need to “maintain” it “in good repair.” See Sedgman Br. at 13, 16. As discussed, however, those terms can also be understood to support the continued application of the standard during the demolition process. Consequently, we reject Sedgman’s interpretation of section 77.200.

Sedgman also contends that the citation should not be affirmed on the ground that the demolition process employed violated section 77.200, because a reasonably prudent person would conclude that demolishing a structure is the remedy for a state of poor repair, and that therefore an operator should not be expected to recognize that section 77.200, a standard that is general in nature, was applicable in this instance. Sedgman Br. at 15 (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128 (Dec. 1982) and other Commission cases). According to Sedgman, all that a reasonably prudent person should have been expected to do in this instance would be to determine whether the landing was “in sufficiently ‘good repair’ to demolish.” *Id.* at 16. Section 77.200 is appropriately characterized as “general” in scope. See *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 360 (D.C. Cir. 1997) (“Although [section 77.200] is admittedly general, it is clear enough to provide notice of the conduct that it requires or prohibits.”). However, section 77.200 is not being interpreted to prohibit the demolition of the structure here, but rather the demolition of the structure in a manner that has been conceded to be unsafe. The citation charged Sedgman with complicity in the demolition, rather than merely holding it accountable for the pre-existing condition of the structure. Sedgman made no claim that a reasonably prudent person, taking into consideration the protective purpose of the standard applying to *all* structures, could have reasonably believed it could permissibly demolish a structure in a manner that creates a hazard to miners. Thus, the Commission’s “reasonably prudent person” test provides Sedgman no defense.¹⁰

¹⁰ Unlike our dissenting colleague, we do not consider statements in MSHA’s Program Policy Manual (“PPM”) regarding training regulations relevant to a reasonably prudent person’s interpretation of section 77.200. See slip op. at 30. The training regulations for miners working at surface mines and surface areas of underground mines explicitly exclude construction workers and shaft and slope workers under subpart C of Part 48. See 30 C.F.R. § 48.22(a)(1)(i). Thus,

While the judge failed to examine whether the actions taken during the demolition process violated the requirements of section 77.200, the evidence is such that it can only support the conclusion that, under the foregoing interpretation of section 77.200, a violation of section 77.200 occurred. As Sedgman's own brief outlines, based on uncontroverted testimony, the PIW employees took a number of actions contrary to demolishing the structure in a sound manner. The employees cut the main member support of the outside of the landing and removed the critical mid-span hanger before they had removed all of the concrete, thus cutting away at least two-thirds if not more of the support for the landing. Sedgman Br. at 17; Tr. 372, 595. Moreover the chain hoist they installed for support failed to supply any such support, and in fact put additional stress on the steel and connections. Sedgman Br. at 17-18; Tr. 381-82; 384, 594-97; Gov't Exs. 20-21.

The record thus supplying more than sufficient evidence to uphold the citation in this instance, remand is not necessary. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (citing *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand would serve no purpose because evidence could justify only one conclusion)). The judge's finding that section 77.200 was violated is therefore affirmed in result.

B. Abuse of Discretion

The judge found that the Secretary did not abuse her discretion in citing multiple operators for both the section 77.200 and section 77.1710(g) violations. 26 FMSHRC at 878-79, 887-88. With regard to the section 77.200 violation, the judge took note that JWR was responsible for maintenance of the structure while it deteriorated over the years, but the judge was persuaded that the Secretary did not abuse her discretion by also citing Sedgman because Sedgman's contract with JWR obligated Sedgman to comply with all safety laws and supervise the demolition project, and it was Sedgman that had contracted with PIW to perform the work. *Id.* at 879. With respect to the section 77.1710(g) violation, the judge concluded that the evidence established that Fields was not wearing fall protection when the landing that he was working on collapsed. *Id.* at 887. Accordingly, the judge found a violation of the requirements of section 77.1710(g) that miners wear a safety belt and line when there is a danger of falling, as there was in this instance because the part of the structure on which Fields was working had no guarding along its outer edge. *Id.* The judge further held that, given Sedgman's responsibilities under its agreement with JWR, Sedgman's right under its agreement with PIW to require PIW employees to comply with applicable safety regulations, and that Gill had on more than one occasion instructed PIW employees to stop working until they had secured adequate fall

the PPM, consistent with the standard it is interpreting, distinguishes between maintenance or repair, and construction or demolition. Moreover, the Commission's decision in *Black Diamond Construction, Inc.*, 21 FMSHRC 1188 (Nov. 1999), is also not pertinent here, because it was based on the Part 48 training regulations which explicitly exclude construction activities. In contrast, section 77.200 covers "all mine structures, enclosures or other facilities," with no stated exceptions.

protection, the Secretary did not abuse her discretion in citing Sedgman for the violation. *Id.* at 887-88.

Sedgman maintains that, under the Mine Act, an operator can be charged only for its own violation, and that even if multiple operators can be charged, as was done here, the Secretary abused her discretion in citing the independent contractor Sedgman. Sedgman Br. at 18-19. The Secretary responds that she has unreviewable discretion in deciding to cite an owner-operator, a contractor, or both, for the violation of a standard. Sec'y Br. at 21-26.

The judge issued his decision in this proceeding, and the parties briefed it on appeal to the Commission, before the Commission issued its decision in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005), *appeal docketed* D.C. Cir. No. 05-1124 (Apr. 15, 2005) ("*Twentymile II*"). In *Twentymile II*, the Commission rejected the argument made by the owner-operator there that section 104(a) of the Mine Act, 30 U.S.C. § 814(a), cannot be read to permit the Secretary to cite an owner-operator for its contractor's Mine Act violation. 27 FMSHRC at 263-64. The Commission reaffirmed that the Secretary can do so, but rejected the Secretary's contention that she has unreviewable discretion in deciding which operator or operators to cite for a violation. *Id.* at 264-66. The Commission's decision in *Twentymile II* fully answers the arguments raised by the parties here regarding whether the Secretary has the authority under the Mine Act to cite multiple operators for the same violation, and whether that authority is unreviewable by the Commission.

The Commission and courts have consistently recognized that, in instances of multiple operators, the Secretary generally may proceed against an owner-operator, an independent contractor, or both, for a violation of the Mine Act. *See id.* at 263 (citing cases). The propriety of the Secretary's decision regarding which party to cite in such an instance is reviewed by the Commission under an "abuse of discretion" standard. *Id.* at 266.

Sedgman argues that, as the general contractor for the renovation project, it should not be cited for a violation that was solely attributable to its subcontractor. Sedgman Br. at 20-21. However, as the Secretary points out (*see* Sec'y Br. at 27-29 & n.15), in *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991), the Commission held that under the Mine Act's general system of liability without fault, just as an owner-operator may be held liable for the violations committed by its contractor, a contractor may be held liable for the violative acts of its subcontractor, and that the Secretary's decision to cite the general contractor in such an instance would also be reviewed under the abuse of discretion standard.

With respect to the abuse of discretion standard, in *Twentymile II* the Commission stated that "[i]n applying this general test, the Commission must determine whether the Secretary's decision to cite" an operator or contractor for violations committed by another operator or contractor "was made for reasons consistent with the purpose and policies' of the Mine Act." 27 FMSHRC at 266 (quoting *Old Ben Coal Co.*, 1 FMSHRC 1480, 1485 (Oct. 1979); *Phillips Uranium Corp.*, 4 FMSHRC 549, 551 (Apr. 1982); *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (Jan.

1998)). The Commission summarized the principal factors it considers in determining whether such a decision is “consistent with the purpose and policies” of the Mine Act as follows:

(1) Whether the production-operator, the independent contractor, or another party was in the best position to affect safety matters. In this regard, one of the key questions is whether the independent contractor has adequate size and mining experience to address safety concerns.

(2) Whether, and to what extent, the production-operator had a day-to-day involvement in the activities in question. A closely related factor is “the nature of the task performed by the contractor.”

(3) Whether the production-operator contributed to the violations committed by the independent contractor.

(4) Whether the production-operator’s actions satisfy any of the criteria set forth in the Secretary’s Enforcement Guidelines. . . . The guidelines provide that enforcement action may be taken against a production operator for violations committed by its independent contractor in any of the following four situations: “(1) when the production-operator has contributed by either an act or an omission to the occurrence of the violation in the course of the independent contractor’s work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator’s miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement.” . . . [T]he four criteria overlap in certain respects with the factors separately applied by the Commission in such cases.

27 FMSHRC at 267 (citations omitted).¹¹

¹¹ The “Enforcement Guidelines” were issued by the Secretary as an appendix to regulations requiring that independent contractors provide certain information to production-operators before beginning work and establishing procedures under which independent contractors could obtain MSHA identification numbers. See III MSHA, Dep’t of Labor, *Program Policy Manual*, Part 45, at 10-16 (2003); 45 Fed. Reg. 44,494, 44,497 (July 1, 1980). The Enforcement Guidelines set forth four criteria to be used by MSHA inspectors in determining whether to cite a production-operator for the violations of its independent contractor. The Commission has repeatedly recognized that the Enforcement Guidelines are policy

Sedgman argues that the judge erred in finding that the Secretary did not abuse her discretion in citing Sedgman for the section 77.1710(g) violation. According to Sedgman, it did not supervise Fields, Gill did not observe Fields not wearing fall protection where he should have been wearing it, Gill's actions did not contribute to the violation, and before the accident, Gill had instructed PIW employees he observed lacking fall protection that they should be wearing such protection. Sedgman Br. at 19-20. Sedgman also maintains that Field's failure to wear fall protection was an aberration in this instance, and that punishing one operator for aberrational conduct of another serves no purpose under the Mine Act. *Id.* at 20.¹²

The Secretary contends that the findings of fact made by the judge demonstrate that the Secretary did not abuse her discretion in citing Sedgman for the section 77.1710(g) violation. Sec'y Br. at 27-29. The Secretary points to Sedgman's contract with JWR, which requires Sedgman to comply with all safety laws and supervise the prep plant renovation project, as well as Sedgman's contract with PIW, pursuant to which Sedgman had the right to order PIW to comply with safe work practices. *Id.* at 27-28. The Secretary also relies on evidence that Gill in fact did correct the safety practices of PIW employees on several occasions. *Id.* at 28.

The judge's decision issued, and the parties' briefs to the Commission were submitted, before the Commission's decision in *Twentymile II*, so neither the judge nor the parties addressed the extent to which the factors identified in *Twentymile II* with respect to owner-operators and their contractors are also applicable to contractors and their subcontractors. In *Bulk Transportation*, the Commission considered, among other things, the Secretary's Enforcement Guidelines in determining whether the Secretary abused her discretion in citing the independent contractor for its subcontractor's violation. 13 FMSHRC at 1360-61. To the extent the relationship between a contractor and its subcontractor is similar to the relationship between an owner-operator and its contractor, we will use the analytical framework we set forth in *Twentymile II* in applying the abuse of discretion standard.

We believe there is substantial evidence in the record, as we have examined it under *Twentymile II*, to support the judge's conclusions that the Secretary did not abuse her discretion in citing Sedgman with respect to both the section 77.200 violation and the section 77.1710(g)

statements that are not binding on the Secretary and do not alter the compliance responsibilities of production operators or independent contractors. *E.g., Mingo Logan Coal Co.*, 19 FMSHRC 246, 250-251 (Feb. 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998).

¹² Sedgman also contends that it should not be charged with a violation of section 77.200 in this instance, given that it was only a contractor, and not the operator of the plant, and it was the operator, JWR, that was responsible for the structure over the long period of time during which it deteriorated. Sedgman Br. at 20-22. As we have found, however, Sedgman was not cited by the Secretary due to the pre-existing condition of the structure, but rather because of the method employed in demolishing the structure. *See supra*, slip op. at 6-7.

violation.¹³ For instance, in *Twentymile II*, in determining whether the contractor or the owner-operator also cited for the violation was in the best position to prevent the violation, the Commission held that the contractor was, because the contractor was carrying out customized mining activities and performing those duties autonomously, and the violations involved the contractor's equipment. 26 FMSHRC at 268-69.

In contrast, the violations here revolve around the actions of PIW employees Fields and McDonald. There is no evidence that PIW was hired because of its special expertise to perform a unique task. Rather the evidence is that Sedgman decided to use PIW to supply, among other things, the labor for the prep plant project. 26 FMSHRC at 874; Stips. at 3, ¶ 9. Sedgman was obligated under its contract with JWR to supply such labor as was needed to complete the project, and to supervise the project to its completion. Jt. Ex. 2, Sec. 2.0 at 3. Consequently, the Sedgman-PIW agreement required that PIW "prosecute [its] work at such times and in such order as [Sedgman] considers necessary," and provided that if PIW did not do so Sedgman could ultimately declare PIW in default under the contract. Jt. Ex. 3 at 2 (Art. IV). Thus, unlike the relationship between the contractor and the owner-operator in *Twentymile II*, there is no evidence that PIW was operating autonomously from Sedgman.

In addition, consistent with those terms of the Sedgman-PIW agreement, there is ample record evidence that Sedgman had significant day-to-day involvement in the activities that led to the violations. Structural demolition was expressly within the scope of the work Sedgman agreed to perform for JWR. Jt. Ex. 2, Sec. 2.0 at 5. While the judge did find that PIW was responsible for determining the exact method that would be used to demolish various structures during the project (*see* 26 FMSHRC at 874), it is also true that PIW's lead man, Rhine, specifically consulted with and sought the advice of Sedgman's site manager, Gill, regarding the demolition of the structure in question here. *Id.* at 875; Stips. at 5, ¶ 23.¹⁴

Moreover, as the judge found, under the Sedgman-PIW agreement, Sedgman had the right to order PIW to correct unsafe practices, and if PIW failed to do so, Sedgman could have, in its discretion, terminated the contract with PIW. 26 FMSHRC at 888; Jt. Ex. 3 at 5 (Art. XVIII). As discussed by the judge, Gill, at various times during the project, ordered PIW employees who

¹³ 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 mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

¹⁴ Thus, this case is unlike *Twentymile II*, where the Commission found a total lack of evidence regarding the owner-operator's involvement in the violations. *See* 26 FMSHRC at 270-72.

should have been tied off to stop working and do so. 26 FMSHRC at 888.¹⁵ Thus, there is record evidence that Sedgman not only supervised the work of the PIW employees, but that the supervision included the employees' compliance with safe work practices.¹⁶

The foregoing also establishes that criteria in the Secretary's aforementioned Enforcement Guidelines have been satisfied in this case. Sedgman both supervised and worked intimately on the project with PIW. Its failure to observe and correct both violations was a significant omission on its part. If Gill, during the course of his supervision of the project that day, had at some point visited the landing and seen how it was being demolished, it is clear he would have stopped the PIW workers from using, or continuing in, the dangerous method of demolition they had undertaken. Tr. 539-42. Given the terms of Sedgman's contract with PIW, it is plain that Gill would have been acting well within Sedgman's right to stop the PIW workers from so proceeding. Thus, we also conclude that another criterion in the Enforcement Guidelines was met in this instance, as Sedgman had significant control over the conditions in question.¹⁷

Finally, we note that this is not a case in which the Secretary merely cast a broad net to cite all of the operators at the JWR plant. While the Secretary issued multiple citations in this case, each citation appears to have been carefully tailored to reflect the nature and extent of the involvement of the party cited in the section 77.200 and section 77.1710(g) violations. *See supra* slip op at 7 n.7; Jt. Exs. 4-5.

¹⁵ Consequently, we cannot agree with Sedgman's characterization of Fields' failure to wear a safety belt as aberrant conduct in this instance. *See* Sedgman Br. at 20.

¹⁶ Commissioner Suboleski notes that operators may assist contractors to comply with federal mining regulations without exercising substantial management control that would lead to liability by an operator for the violations of its independent contractor. As the U.S. Court of Appeals for the D.C. Circuit has reasoned, "Government regulations constitute supervision not by the employer, but by the state." *Local 777, Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978) (determination of status of taxi cab drivers as "employees" or "independent contractors" under the National Labor Relations Act). The court further explained that, "because the employer cannot evade the law . . . in requiring compliance with the law he is not controlling the [independent contractor]. It is the law that controls the [independent contractor]." *Id.*; *see also Bryant v. Dingess Mine Serv.*, 10 FMSHRC 1173, 1185 (Sept. 1988) (Commissioner Doyle, dissenting). Use of this reasoning avoids the paradoxical result that operators who assist their contractors in complying with the regulations to enhance miner safety receive dual citations, while those who ignore the potentially unsafe work practices of their contractors do not.

¹⁷ Gill's oversight of the project also means that he easily could have been on or around the structure while it was demolished, thus satisfying the additional criteria in the Secretary's Enforcement Guidelines that a Sedgman employee was exposed to the hazard posed by the section 77.200 violation.

For the foregoing reasons we affirm the judge's determinations that the Secretary did not abuse her discretion in citing Sedgman for the section 77.200 and section 77.1710(g) violations.

C. Penalty for Section 77.200 Violation

In assessing the penalty after finding that Sedgman had violated section 77.200, the judge found that the gravity of the violation was relatively serious, as he had detailed in concluding that the violation was S&S. 26 FMSHRC at 884. He also found, consistent with finding the violation not to be unwarrantable, that the level of negligence was less than that originally alleged by the Secretary in proposing the penalty. *Id.* Placing "considerable" weight on this factor, and "consider[ing]" the remaining penalty factors of section 110(i) of the Mine Act, the judge found a penalty of \$1,000 to be appropriate for the violation. *Id.*

The judge then addressed Sedgman's request to vacate the penalty because it had not been proposed within a reasonable time, as required by section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 26 FMSHRC at 884-86. The judge concluded that the time between the accident and the issuance of the accident investigation report (more than 5 months) and the nearly 11-month time period between the investigation report and the penalty proposal resulted in an unreasonable delay. Also finding that the Secretary had failed to provide support for her stated explanation for the 11 months taken to propose a penalty after issuing the citation for the section 77.200 violation, the judge vacated the penalty assessment. *Id.* at 885-86.

1. The Judge's Decision to Vacate the Penalty Assessment

The Secretary maintains that under the Mine Act, the Commission cannot vacate a penalty assessment based on a finding that there was an unreasonable delay in the proposal of the penalty, and that even if it can do so, it may not without a finding that the operator was prejudiced by the delay. Sec'y Br. at 30-42. According to the Secretary, the judge in any event erred in calculating the amount of time at issue in this case, and further erred in failing to recognize that the amount of time was reasonable given the particular facts and circumstances of this case. *Id.* at 43-48. Sedgman responds that the judge acted well within Commission authority under the Mine Act in vacating the assessment (Sedgman Br. at 32-33), and that he correctly followed Commission precedent on the issue. *Id.* at 22-31.

Section 105(a) provides in pertinent part that "[i]f, after an inspection or investigation, the Secretary issues a citation or order . . . , he shall, *within a reasonable time* after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed . . . for the violation cited" 30 U.S.C. § 815(a) (emphasis added). Consequently, the Commission has held that, while delay on the Secretary's part in proposing a penalty may not vitiate the civil penalty proceeding and the finding of a violation,¹⁸ an inordinate

¹⁸ The legislative history of the Mine Act states with regard to section 105(a) that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible,

and unjustifiable delay might well vitiate the imposition of the penalty itself. *Twentymile Coal Co.*, 26 FMSHRC 666, 682 (Aug. 2004), *rev'd on other grounds*, 411 F.3d 256 (D.C. Cir. 2005) ("*Twentymile I*"). The requirement in section 105(a) that the Secretary propose a penalty assessment "within a reasonable time" does not impose a jurisdictional limitations period, but rather turns on whether the delay is reasonable under the circumstances of each case, as the Commission examines whether adequate cause existed for the Secretary's delay in proposing a penalty and considers whether the delay prejudiced the operator. *Salt Lake County Rd. Dep't*, 3 FMSHRC 1714, 1716-17 (July 1981); *Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982); *Steele Branch Mining*, 18 FMSHRC 6, 13-14 (Jan. 1996); *Black Butte Coal Co.*, 25 FMSHRC 457, 459-61 (Aug. 2003).

The Secretary's argument that the Commission lacks the authority to vacate a penalty assessment on the ground that the penalty proposal was unreasonably delayed was essentially rejected by the Commission in *Twentymile I*. See 26 FMSHRC at 686-88. The reviewing court passed on the question when the Secretary repeated that argument on appeal. See 411 F.3d at 261-62.

The Secretary now maintains that *Tazco, Inc.*, 3 FMSHRC 1895, 1896-97 (Aug. 1981), in which the Commission stated that the Mine Act requires that some penalty must be assessed by the Commission for each violation found, prevents the Commission from vacating a penalty assessment in a case while allowing the underlying citation to stand. See Sec'y Br. at 35. In *Tazco*, at issue was a judge's decision, as part of approving a settlement, to sua sponte suspend a penalty in its entirety due to the operator's termination of the foreman responsible for the underlying violation. 3 FMSHRC at 1895-96. Consequently, we do not find *Tazco* controlling on the question of whether, once he has assessed a penalty, a judge may vacate the assessment due to the Secretary's delay in proposing the penalty. The Commission stated that under section 110 of the Mine Act, 30 U.S.C. § 820, the Commission "must assess some penalty" for each violation found" (3 FMSHRC at 1897), and that is what the judge did here, before vacating the assessment pursuant to section 105(a).¹⁹

and the [Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, at 34 (1977), *reprinted in Legis. Hist.* at 622 (1978).

¹⁹ By reducing the penalty to zero in *Tazco* on the grounds that he did, the judge there was, in effect, applying a factor not found within section 110(i), 30 U.S.C. § 820(i), to determine the penalty amount, a practice which the Commission has consistently found to be prohibited by the terms of the Mine Act. See *RAG Cumberland Res., LP*, 26 FMSHRC 639, 658 (Aug. 2004) (citing cases), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished). Thus, the broader pronouncements contained in *Tazco* were unnecessary to the decision the Commission reached. Moreover, we cannot ignore the import of the exact terms used in section 110 of the Mine Act. Section 110 provides that the Secretary "shall . . . assess[] a civil penalty," but with respect to the Commission it only states

In reviewing a judge's determination that there has been an unreasonable delay in the Secretary's proposal of a penalty under section 105(a), the Commission applies an abuse of discretion standard, though any factual determinations the judge made in arriving at his conclusion are subject to substantial evidence review. *Black Butte*, 25 FMSHRC at 459-60. The abuse of discretion standard includes errors of law. *Utah Power & Light Co., Mining Div.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991).

Because the judge here applied the Commission's decision in *Twentymile I*, and that decision was subsequently reversed on appeal, we must vacate the judge's order. However, even if our decision in *Twentymile I* were controlling, we would vacate the judge's decision here on the ground that he committed a clear error of law.

In *Twentymile I*, the court rejected the Commission's interpretation of how the time period at issue should be calculated. In *Twentymile I*, as the court recognized there was an accident and a subsequent week-long investigation that resulted in MSHA issuing an order to the operator alleging a violation of a Mine Act regulation. 411 F.3d at 258. The court did not mention, however, that the order was terminated 4 days later by the MSHA inspector who had issued it, after the operator took actions in response to the order. See 26 FMSHRC at 670. Instead, the court jumped forward 6 months, to the issuance of the accident investigation report. See 411 F.3d at 258.

The Secretary argued in *Twentymile I* that under section 105(a), the time period at issue did not start until the accident investigation report was issued. 411 F.3d at 261. The court found this interpretation of the Mine Act reasonable and because it came from the Secretary, deferred to it instead of to the Commission's interpretation. *Id.* at 262. The court based its conclusion on the language of section 105(b)(1)(B) of the Mine Act, which requires the Secretary in assessing a penalty to consider the operator's good faith "in attempting to achieve rapid compliance *after notification of a violation.*" *Id.* (quoting 30 U.S.C. § 815(b)(1)(B) (emphasis in decision)). The court apparently read "notification of a violation" to include any MSHA report issued regarding the events that gave rise to the violation, including an accident investigation report issued after the citation or order charging a violation was issued and even terminated. Believing that Congress included the operator's subsequent response to such a report among the relevant penalty criteria, the court held that it could not be plausible that any determination of the reasonableness of the time in which it took to assess the penalty could begin to run before the time an operator could respond to such notice of the violation. *Id.*

that "[t]he Commission shall have *authority* to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(a), (i) (emphasis added). The Commission in *Tazco* quoted these provisions, but did not recognize the difference in the language employed.

This case does not present the same issue as *Twentymile I*, because the accident investigation report was issued on the same day as the citation.²⁰ 26 FMSHRC at 884. The judge, however, did not calculate the period at issue with respect to that date. Rather, he included the 5 months between the accident and the issuance of the accident investigation report, even though up until the latter occurred, there was no citation or order for which a penalty could be proposed. See 26 FMSHRC at 884-86.

The judge thus clearly considered the accident as the “starting point” for determining the reasonableness of the time it took for a penalty to be proposed, but that is contrary to the plain meaning of the Mine Act. Section 105(a) designates the starting point of the period at issue as “the termination of such inspection or investigation” and “inspection or investigation” clearly refers to an inspection or investigation that leads to the issuance of a section 104 citation or order. 30 U.S.C. § 815(a). Here, where there is no evidence that there was a delay between the end of an investigation and the issuance of the citation or order,²¹ the starting point is the issuance of the citation or order for which the Secretary is proposing a penalty.²²

²⁰ In any event, we believe the Secretary’s interpretation deferred to by the court is contrary to the plain meaning of the Mine Act. The reference to “notification of a violation” in section 105(b)(1)(B) clearly refers not to investigation reports, but rather to citations and orders, as it is a citation or order that supplies an operator with “notification of a violation,” and provides the impetus for an operator’s “attempt[] to achieve rapid compliance” with the Mine Act. Investigation reports can issue regardless of whether an accident or incident results in any citation or order, and where there are citations or orders, such reports may be issued before, concurrent with (as occurred here), or well after (as occurred in *Twentymile I*) any citation or order issued as a result of the matter being investigated.

²¹ We note that 5 months is not an unreasonable amount of time during which to conduct an investigation of a fatal accident, particularly a complex one such as this, where the chain of events must be re-constructed.

²² In addition, another Mine Act provision directly governs the reasonableness of a time period before which a citation or order issues. Section 104(a), which provides only for citations and orders, and not penalties, states in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, *with reasonable promptness*, issue a citation to the operator.

30 U.S.C. § 814(a) (emphasis added). There has been no claim here that the Secretary failed to issue the citation to Sedgman “with reasonable promptness,” and below Sedgman limited its

Because the time period between termination of the investigation and the penalty assessment was less than 11 months in this case, remand for a determination of whether such a delay was reasonable under section 105(a) is not necessary. Such a delay in this case is not unreasonable, particularly given that there was a related ongoing section 110(c) investigation. *See Steele Branch*, 18 FMSHRC at 13-14 (11-month delay in case in which Secretary failed to proffer any explanation found not to be unreasonable in light of Commission's notice of Secretary's high caseload at the time); *see also Black Butte*, 25 FMSHRC at 458-61 (accepting Secretary's explanation for 13-month delay); *cf. Twentymile I*, 411 F.3d at 262 (holding 11-month time period the court considered to be at issue not unreasonable without further explanation).²³

2. The Judge's Penalty Assessment

We turn now to the penalty the judge initially assessed pursuant to section 110(i) of the Mine Act before vacating it under section 105(a). The Secretary argues that the judge erred in failing to explain why he reduced the penalty assessed from the proposed amount of \$35,000 to \$1,000, and in failing to make findings with respect to four of the six penalty criteria of section 110(i). Sec'y Br. at 48-49. Sedgman maintains there was ample reason for the judge to reduce the penalty as he did, and there is record evidence regarding each of the six penalty criteria that supports the penalty the judge assessed. Sedgman Br. at 36-39.

While Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.²⁴ *Westmoreland*

claim of unreasonable delay to the time period between issuance of the citation and the Secretary's penalty proposal. Sedgman Post-Hearing Br. at 34 n.11.

²³ Below, the Secretary stated that the reason for the passage of time with respect to both the Sedgman penalty proposal and the 110(c) charge against Gill was problems with the implementation of a new computer system for her assessments, and she promised to offer evidence in support of this claim. Stips. at 11, ¶ 62. As the judge discussed in his decision, however, no such evidence was ever submitted. *See* 26 FMSHRC at 885. Having promised an explanation, the Secretary should have further addressed the issue, instead of leaving the judge with no explanation.

²⁴ Section 110(i) states in pertinent part:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the

Coal Co., 8 FMSHRC 491, 492 (Apr. 1986) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). In *Sellersburg*, the Commission stated that “[w]hen an operator contests the Secretary’s proposed assessment of penalty, thereby obtaining the opportunity for a hearing before the Commission, findings of fact on the statutory penalty criteria *must* be made.” 5 FMSHRC at 292 (emphasis added). In addition, Commission Procedural Rule 30(a) provides:

In assessing a penalty the Judge *shall determine* the amount of penalty in accordance with the six statutory criteria contained in section 110(i) . . . and incorporate such determination in a written decision. The decision *shall contain findings of fact and conclusions of law on each of the statutory criteria*

29 C.F.R. § 2700.30(a) (emphases added). In reviewing a judge’s penalty assessment, the Commission determines whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000). While “a judge’s assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal” *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

Here, the judge made findings with respect to two of six factors, gravity and negligence, but not the other four. See 26 FMSHRC at 884. Three of those four factors were stipulated to — that Sedgman is a small operator, it had no previous history of violations, and the penalty would not affect Sedgman’s ability to continue in business. See Stips. at 13, ¶¶ 74, 76, 78.²⁵ However, the Commission requires the *judge* to make findings of fact on all of the section 110(i) criteria in order to provide the penalized party and the regulated community with the appropriate notice as to the basis upon which the penalty is being assessed, as well as to supply the Commission and any reviewing court with the information needed to accurately determine if the penalty assessed by the judge is appropriate, excessive, or perhaps insufficient. *Cantera Green*, 22 FMSHRC 616, 621 (May 2000) (citing *Sellersburg*, 5 FMSHRC at 292-93); see also *Hubb Corp.*, 22 FMSHRC at 612; *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000). Consequently, in *Jim Walter Resources, Inc.*, 19 FMSHRC 498, 501 (Mar. 1997), the

operator was negligent, [4] the effect on the operator’s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

²⁵ Sedgman cites the narrative filed with the penalty petition as evidence of the last factor, as it states the citation was abated within a reasonable period of time. Sedgman Br. at 38 n.6.

Commission vacated a judge's penalty assessment where the judge failed to "make specific findings on all six penalty criteria," including criteria that were the subject of stipulations by the parties.

The need for all six criteria to be addressed in the judge's decision is even more important in cases such as this, where the penalty assessed by the judge substantially diverged from the one proposed by the Secretary.²⁶ "If a sufficient explanation for [such a] divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg*, 5 FMSHRC at 293.

Here, it appears that the judge substantially diverged from the penalty the Secretary proposed because the judge concluded that the Secretary had failed to prove "high negligence" on the part of Sedgman. After finding the gravity of the violation to be high, which was consistent with his conclusion that the violation was S&S, the judge stated:

[F]or the reasons set forth above [where Sedgman's violation was found not to be unwarrantable] the level of negligence is less than that originally found by the Secretary as set forth in the narrative findings for a special assessment appended to the petition. Thus, in weighing the various factors set forth in Section 110(i) of the Act, I accord considerable weight to the less than high degree of negligence. Placing considerable weight on this factor, and considering the remaining factors in section 110(i) of the Act, I find that a penalty of \$1,000.00 is appropriate for this violation.

26 FMSHRC at 884. The narrative to which the judge refers simply states that the violation resulted from the operator's high negligence, an issue he decided in conjunction with the unwarrantable failure allegation. *See id.* at 882-84. The judge's analysis of the evidence of negligence was limited to Sedgman's knowledge of the condition of the structure prior to demolition work. *Id.*

The judge's analysis of Sedgman's negligence was thus consistent with his analysis of the underlying citation issued to Sedgman, which he read as being limited to the pre-existing condition of the structure. As we have found, however, the citation also was directed at Sedgman's involvement in the demolition of the structure. Consequently, the judge should have conducted a negligence analysis more in keeping with the conduct alleged by the citation to be violative. Because he did not, substantial evidence does not support his negligence finding.

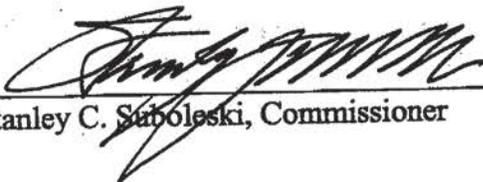
²⁶ The judge reduced the penalty proposed by the Secretary by approximately 97%. 26 FMSHRC at 884; Sec'y Br. at 48-49.

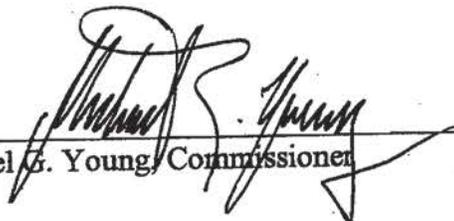
Given that, in determining the degree of Sedgman's negligence, the judge did not address Sedgman's conduct as it related to actions alleged in the citation to constitute a violation of section 77.200 — the demolition of the landing — we are vacating the \$1,000 penalty he initially assessed, and remanding the case to him. *Cf. U.S. Steel*, 6 FMSHRC at 1432 (vacating gravity and negligence findings due to lack of support in the record). On remand the judge can analyze the evidence of Sedgman's negligence consistent with the allegations contained in the citation, address that factor, as well as make explicit findings on all five other section 110(i) penalty criteria, and reassess an appropriate penalty.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that Sedgman violated 30 C.F.R. §§ 77.200 and 77.1710(g), vacate the judge's decision regarding the penalty to be assessed for the section 77.200 violation, and remand the case to him for a reassessment of that penalty consistent with the instructions contained herein.


Stanley C. Saboleski, Commissioner

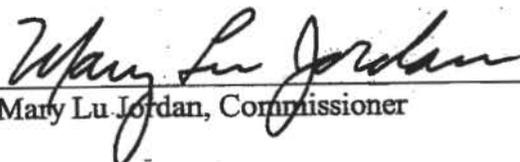

Michael G. Young, Commissioner

Commissioner Jordan, concurring:

I agree with the analysis adopted by Commissioner Suboleski and Commissioner Young in holding that 30 C.F.R. § 77.200 applies to structures in the process of being demolished, and that therefore they must be maintained in good repair. I also agree with their ruling that Sedgman violated this regulation. I am also in accord with their discussion and holding in section II.C.2. of their opinion, in which they vacate the penalty initially assessed by the judge and remand the case to him for reassessment.

I write separately, however, because, although I agree with the holding of my colleagues that the Secretary did not abuse her discretion in citing Sedgman for the violations of section 77.200 and 30 C.F.R. § 77.1710(g), I disagree with their analysis, which applies standards set forth in the majority opinion in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005), *appeal docketed* D.C. Cir. No. 05-1124 (Apr. 15, 2005) ("*Twentymile II*"). In my dissent in that case I expressed the view that the majority had erred in raising the level of the evidence necessary to support the Secretary's enforcement decision. *Id.* at 279, 282. Consequently, in this case I would apply the standards articulated by Commission precedent prior to the issuance of the *Twentymile II* decision in finding that the Secretary did not abuse her discretion in citing Sedgman. However, even applying the *Twentymile II* criteria utilized by my colleagues in this case, I agree with them that no abuse of discretion occurred here.

Regarding the judge's decision to vacate the penalty assessment, I agree with my colleagues that the judge erred in considering the accident as the starting point for determining the reasonableness of the time it took for the Secretary to propose a penalty, as in this case that point should be the issuance of the relevant citation or order. I also agree that because the time period between the termination of the investigation and the penalty assessment was less than 11 months, the delay was not unreasonable. Accordingly, I join in the holding of my colleagues to vacate the judge's order.


Mary Lu Jordan, Commissioner

Chairman Duffy, dissenting in part:

I dissent from my colleagues' decision on the question of whether Sedgman violated 30 C.F.R. § 77.200¹ because I believe that the majority decision is inconsistent with the language of the standard, MSHA's own interpretation of its regulations, and Commission precedent. The majority is attempting to uphold a citation issued to Sedgman, an independent contractor, based on a legal theory different from that relied upon by the Secretary. In doing so, the majority reads the standard in an unduly expansive way that is not logical and lacks legal support.

This case involves a tragic accident in which Ricky Fields, an employee of PIW, Sedgman's subcontractor, died when the landing on which he was kneeling collapsed and fell 34 feet. 26 FMSHRC 873 (Nov. 2004) (ALJ). Fields was located on the landing because he was in the process of demolishing it. The landing collapsed and fell after he cut the middle hanger supporting the landing — an illogical and unexpected action.² Even though Fields was standing and kneeling on a landing that was in the process of being demolished and could have lost his balance or fallen in any number of ways, he was not wearing a safety belt and line and had no other fall protection. 26 FMSHRC at 876.

In my view, the primary violation in this case was an extremely serious violation of 30 C.F.R. § 77.1710(g),³ which requires fall protection for miners at a surface work area. MSHA issued citations based on section 77.1710(g) to JWR, Sedgman, and PIW. I agree that Sedgman is liable for violating section 77.1710(g).⁴ Although Fields was an employee of PIW, Sedgman's on-site representative, David Gill, had previously observed PIW employees working without being equipped with necessary fall protection (26 FMSHRC at 888) and therefore was aware of the potential for serious injury. Moreover, I conclude that Gill was sufficiently involved in the planning of the demolition on the day in question (*id.* at 875-76) that Sedgman should be liable for the lack of fall protection.

¹ Section 77.200 provides that “[a]ll mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.”

² Earlier, Fields and another PIW employee had removed two portions of the landing platform and had cut two steel supports that were providing support and stability to the landing. 26 FMSHRC at 876.

³ Section 77.1710(g) provides that “[e]ach employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear . . . [s]afety belts and lines where there is a danger of falling.”

⁴ I also agree with my colleagues that the Secretary did not abuse her discretion in citing JWR, Sedgman, and PIW for the violation of section 77.1710(g).

The principal issue on review in this case involves the additional citations issued to JWR, Sedgman, and PIW for alleged violations of section 77.200. The Secretary argues that Sedgman is liable under this standard because "Sedgman [had] to do something so that employees working on the stairwell and the landing during demolition would be protected from the hazards of deteriorated steel." Sec'y Br. at 13. According to the Secretary, "Sedgman violated the standard because the evidence conclusively established that the supporting steel had deteriorated to a condition that was hazardous, and therefore, the supporting steel was not maintained in safe condition while employees were performing demolition work on the structure." *Id.* at 14 n.6 (emphasis in original). In other words, the Secretary's theory of liability is based solely on the fact that the steel supports holding the landing had deteriorated over the years, and she interprets the standard to apply to any work activities being conducted on the landing while the steel was in a deteriorated condition.⁵ Thus, the Secretary's theory of liability is based on the deteriorated condition of the steel supports; she does not contend in her brief that section 77.200 applies to the demolition process in and of itself.

I am firmly convinced that there is no legal or factual basis for finding Sedgman liable for violating section 77.200. The Secretary's theory as to Sedgman's liability simply makes no sense and appears to be an effort to find an additional violation because an accident resulted in a fatality. Although the Secretary argues that the violation resulted because of the deteriorated condition of the steel, Sedgman could not have become liable for more than 20 years of pre-existing deterioration simply because it signed a contract to demolish certain structures in the prep plant and to construct new ones. That deterioration could only be attributed to JWR, the

⁵ Notwithstanding the language from the Secretary's brief quoted above, my colleagues argue that the Secretary's theory is not based solely on the deteriorated condition of the steel supports by pointing to the following sentence: "Sedgman violated the standard because its chosen method of demolition exposed employees working on the stairwell and landing to hazards. Slip op. at 7 (quoting Sec'y Br. at 16-17). However, the context in which the sentence is contained indicates that the Secretary continued to base Sedgman's liability on the deteriorated steel. In the discussion preceding the sentence, the Secretary maintained that the varying interpretations of what constituted compliance with section 77.200 offered by MSHA personnel were consistent with the Secretary's position at trial and that there were different methods that could be used to achieve compliance (such as using sound vibration tests to determine whether the steel had deteriorated). The Secretary then states that "Sedgman did not violate the standard because it failed to follow the advice of MSHA personnel." Sec'y Br. at 16. After that comes the sentence relied upon by the majority: "Sedgman violated the standard because its chosen method of demolition exposed employees working on the stairwell and landing to hazards." *Id.* at 16-17. Read in this context, it is clear that the sentence means that Sedgman was liable because demolition proceeded before anyone had addressed the hazards posed by deteriorated steel.

owner and operator of the plant for that time period, or PIW, which had signed a separate contract with JWR under which it was to repair or replace deteriorating steel in the plant.⁶

The Secretary's theory of liability regarding Sedgman becomes even more problematic because the judge below credited the testimony of Sedgman's expert, Albert Fill, that the accident was *not* caused by the deteriorated condition of the steel (26 FMSHRC at 876 n.2) — a finding that the Secretary does not challenge on appeal. Rather, the accident was caused by the removal of critical support members from the landing while Fields was still standing or kneeling on it. If the landing would have fallen regardless of the condition of the steel, then the accident occurred not because structures associated with the landing had been allowed to deteriorate, but because the demolition activities themselves were being conducted in an unsafe manner.

The majority seeks to uphold the violation under an alternative theory not relied upon by the Secretary — that the “maintained in good repair” language in section 77.200 can be read to apply to the process of conducting demolition activities regardless of whether a structure is deteriorated or not. Slip op. at 6-8. In other words, the majority implicitly rejects the Secretary's theory that Sedgman is liable because of the deteriorated condition of the steel supports. However, in an attempt to show that the Secretary actually subscribed to their alternative theory as well, my colleagues point to certain language in Sedgman's citation that mentioned its role in demolishing the landing. They mistakenly assert that this language demonstrates that the Secretary is really arguing that Sedgman is liable because of the “unsafe manner” in which the PIW employees demolished the landing.⁷ Slip op. at 7. The majority then expansively reads the “maintained in good repair” language in section 77.200 to apply to any situation where a structure is in the process of being demolished.

I believe that interpreting section 77.200 to apply to demolition activities is an attempt to fit a square peg into a round hole and arises largely from the Secretary's confused theory of the case advanced at trial and reiterated on review before this Commission. More than that, it highlights what is one of the central problems in this case: the Secretary has never promulgated

⁶ I believe that section 77.200 could properly be applied to JWR or PIW because hazardous conditions existed at the landing irrespective of whether demolition activities were to take place.

⁷ The majority's characterization of the Secretary's theory as being based on unsafe demolition activities regardless of whether the structure was deteriorated is erroneous for at least three reasons. First, although Sedgman's citation does contain language that is different from the language used in JWR's citation, Sedgman's citation still emphasizes the allegation that Sedgman is liable because of the deteriorated condition of the steel supports. Slip op. at 6-7 (quoting Citation No. 7676881). Second, in her brief, the Secretary never relies upon, or even mentions, the different language in Sedgman's citation. Third, as discussed above (slip op. at 26), the language of the Secretary's brief makes clear that the Secretary's theory of Sedgman's liability is based on the deteriorated condition of the steel supports. Sec'y Br. at 13, 14 n.6.

construction/demolition standards for miners working at surface areas of mines, despite the requirement that she do so under section 101(a)(8) of the Mine Act, 30 U.S.C. § 811(a)(8),⁸ and she has never promulgated training standards for mine construction workers, even though section 115(d) of the Act, 30 U.S.C. § 825(d), expressly mandates that the Secretary promulgate such training standards. The absence of any applicable MSHA standards governing the demolition of structures at surface areas of mines was underlined when the Secretary sought to introduce evidence at trial regarding the requirements of construction standards of the Department of Labor's Occupational Safety and Health Administration ("OSHA") specifically addressing demolition activities. Tr. 468-71. The judge denied the request because he concluded that OSHA's standards were not relevant to a proceeding under the Mine Act.⁹ Tr. 479-80. In any event, as shown below, the majority's strained reading of the standard is contradicted by MSHA's official reading of its own standards and Commission case law regarding how those standards must be interpreted.

Commission case law makes it clear that when broad regulatory language such as that contained in section 77.200 — "[a]ll . . . structures . . . shall be maintained in good repair" — is to be applied in a particular case, the Commission utilizes the "reasonably prudent person" test to determine whether the operator had adequate notice of the meaning of the standard and its application under the circumstances of the case involved. *E.g.*, *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). However, in this case, the majority does not apply that test but instead simply declares how the standard should be read. The majority states that, despite Sedgman's contentions that demolition of a structure is the antithesis of maintaining it in good repair, the words of the standard "can also be understood to support the continued application of the standard during the demolition process." Slip op. at 9.¹⁰

⁸ My colleagues assert that the Secretary's failure to have promulgated construction/demolition standards is irrelevant because the legislative history of section 101(a)(8) indicates that "construction operators" must comply with "the requirements of the Act generally." Slip op. at 8 n.9. I do not disagree that Sedgman had to comply with "the requirements of the Act generally," as any independent contractor would be required to do so. Strictly speaking, however, section 77.200 is not a requirement of the Act. Instead, it is a safety standard promulgated by the Secretary, which, in my view, she is stretching beyond reason in order to cover gaps left by her failure to promulgate construction/demolition rules.

⁹ In 1979, MSHA preliminarily proposed adopting the OSHA construction standards as MSHA standards (44 Fed. Reg. 52,258 (Sept. 7, 1979)), but that initiative was later abandoned. 47 Fed. Reg. 48,548 (Oct. 28, 1982).

¹⁰ The majority asserts that the "reasonably prudent person" test provides Sedgman no defense here. Slip op. at 9. I disagree. The question presented in this case is whether a reasonably prudent person would have understood that section 77.200 applied to demolition activities at all, not whether a reasonably prudent person would have chosen the illogical, unsafe

I conclude that, under the “reasonably prudent person” test, Sedgman did not have adequate notice that section 77.200 applied to the demolition of the landing. Under the test, which is applied from the perspective of an objective observer familiar with the mining industry, the primary question is whether a “reasonably prudent person . . . would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *Alabama By-Products*, 4 FMSHRC at 2129. Among the factors to be considered would be any relevant “MSHA announcements or policy memoranda . . . that were . . . publicly available or brought to the attention of the operator.” *U.S. Steel*, 27 FMSHRC at 442. Application of the test in this case shows that a “reasonably prudent person” would have concluded that section 77.200 does not apply to structures that are being demolished.

First, the words of the standard are silent with regard to demolition activities. Although the majority emphasizes that “[a]ll structures” are to be maintained in good repair, this does not fully answer the question of whether the standard applies to demolition activities (as opposed to, say, the repair or replacement of deteriorated steel).¹¹ The key point is that maintaining a structure in good repair is antithetical to demolishing it. Try as they may, the majority cannot persuasively argue that a “reasonably prudent person” would understand that a structure must *simultaneously* be maintained in good repair and demolished.¹² The majority also urges that demolition must be carried out in a way that prevents accidents. That position is laudable, but the standard does not say that. The majority is really treating section 77.200 as a kind of “general duty clause” to encompass activities well beyond maintenance and repair. However, the Mine Act, unlike the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (2000), contains no such clause, and section 77.200 is not a general duty clause in any event.

Second, beyond the regulatory language, which does not specifically address demolition, a “reasonably prudent person” reviewing MSHA’s relevant policy pronouncements would conclude that demolition activities are not covered under the “maintained in good repair” language of section 77.200. Although section 77.200 was promulgated in 1971, MSHA has apparently never issued a single policy document or other official statement indicating that

method used.

¹¹ It is implicit in the standard that the “maintained in good repair” requirement would apply only to structures that are not being demolished, which is the opposite of being maintained in good repair. Similarly, if a standard provided that “all structures shall be demolished in a way that will prevent accidents and injuries to employees,” it would be understood that the requirement would not apply literally to all structures, but only to those that are being demolished.

¹² See also *The Industrial Co. of Wyoming*, 12 FMSHRC 2463, 2478-79 (Nov. 1990) (ALJ) (judge ruled that section 77.200 did not provide fair warning that it would apply to the construction of buildings because buildings under construction cannot be “maintained” and “repaired”).

demolition activities are covered by section 77.200. Given MSHA's silence for more than 30 years, a "reasonably prudent person" would not know that demolition activities are meant to be covered by the standard.

Third, MSHA, through its policy manual, has in fact stated that there is a clear distinction between maintenance or repair activities, on the one hand, and construction or demolition activities, on the other hand. III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 48, at 36-37 (2003) ("*PPM*"). In discussing training requirements for employees of independent contractors working at surface areas of mines, MSHA stated that "construction work" includes "demolition." *Id.* at 36. Furthermore, MSHA stated that "maintenance or repair work" includes "upkeep or alteration." *Id.* at 37. The major significance of this dichotomy is that an employee of an independent contractor engaged in construction or demolition work at a surface area is *not* required to receive training under 30 C.F.R. Part 48, while a similar worker engaged in maintenance or repair work must receive training under 30 C.F.R. Part 48. *PPM* at 37. Thus, MSHA's policy manual recognizes that maintenance or repair activities are mutually exclusive from construction or demolition activities: a worker at a surface area can be engaged in either construction/demolition activities or maintenance/repair activities, but not both simultaneously. *Because of this critical distinction, the "reasonably prudent person," upon reviewing MSHA's policy manual, would affirmatively conclude that section 77.200, which addresses maintenance and repair, does not apply to demolition activities.*

Finally, in *Black Diamond Construction, Inc.*, 21 FMSHRC 1188 (Nov. 1999), the Commission recognized the distinction between maintenance or repair work and demolition work. It upheld an award under the Equal Access to Justice Act, 5 U.S.C. § 504, against the Secretary because MSHA ignored that distinction when it issued a citation to an independent contractor. MSHA had issued the citation to an independent contractor because one of its employees who was engaged in demolition activities had not received training required for workers engaged in maintenance and repair activities. The Commission discussed the definitions of "maintenance or repair" and "demolition" set forth in MSHA's *PPM* and emphasized the clear distinction between the two types of activities. 21 FMSHRC at 1195-96. In concluding that the Secretary's position was not substantially justified, the Commission ruled that MSHA had ignored the language of the *PPM* in issuing the citation and stated that "giving undue emphasis to the hazards contractor employees are exposed to would render meaningless the exceptions to Mine Act coverage." *Id.* at 1197. The Commission expressly rejected the Secretary's argument that the *PPM* should be construed broadly because of the nature of the hazards to which a contractor's employee would be exposed. *Id.* In short, the Commission not only rejected the Secretary's attempt to disregard the distinction between "maintenance or repair" and "demolition," it ruled that such a position was not even substantially justified, i.e., "the Secretary's position was not reasonable in law or fact." *Id.* at 1198. Further, the Commission's decision makes clear that, regardless of the nature of the hazards to which contractors' employees

may be exposed, the language of MSHA's standards cannot be ignored or unduly stretched to apply to situations where there was originally no intent to do so.¹³

In summary, the majority's effort in this case to read the maintenance and repair language in section 77.200 as applying to demolition activities cannot be squared with the meaning of the words, the Secretary's own policy determinations, or the Commission's decision in *Black Diamond*. For all these reasons, I dissent from this portion of the majority's decision and would reverse the judge's ruling that Sedgman violated section 77.200.¹⁴



Michael F. Duffy, Chairman

¹³ My colleagues attempt to dismiss the significance of MSHA's *PPM* and the *Black Diamond* decision by stating that MSHA has explicitly treated maintenance or repair as being distinct from demolition or construction. Slip op. at 9-10 n.10. The majority's footnote actually makes my point. A reasonably prudent person, when faced with the question of whether a standard that requires structures to be maintained in good repair applies to demolition (which is antithetical to maintaining a structure in good repair), would determine, after reviewing MSHA's standards and *PPM*, that MSHA has consistently drawn a bright line between maintenance or repair and demolition or construction because they are mutually exclusive activities.

¹⁴ Notwithstanding my conclusion that Sedgman did not violate section 77.200, I concur with my colleagues' reasoning in vacating the judge's actions relating to the civil penalty for that violation.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 18, 2006

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|------------------------|---|------------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2006-219-M |
| Petitioner | : | A. C. No. 35-03600-76169 |
| v. | : | Freeman Brookings Wash Plant |
| | : | |
| FREEMAN ROCK, INC., | : | Docket No. WEST 2006-220-M |
| Respondent | : | A. C. No. 35-01041-76016 |
| | : | Freeman Portable Crusher |

DECISION

Appearances: John D. Perez, Conference and Litigation Representative, U.S. Department of Labor, Vacaville, California, on behalf of the Petitioner;
Catherine Yocum and Michelle McCormick, Freeman Rock, Inc., Brookings, Oregon, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Freeman Rock Inc. (Freeman Rock) with three violations of mandatory standards and proposing civil penalties for the violations. The general issue before me is whether Freeman Rock violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

Docket No. WEST 2006-219-M

Citation No. 6383282

Citation No. 6383282 alleges a violation of the standard at 30 C.F.R. § 56.14107 (a) and charges as follows:

A guard was not provided on the V-belt drive unit on the air-compressor located in the shop area. Guards shall be provided and maintained to prevent persons from contacting the moving machine parts. The unit was about five feet above ground level, about a 2 foot by 3 foot opening and turns at a high rate of speed. Employees are not required to be in the area when the unit is running. A person could be seriously injured if they where [sic] to get entangled in the V-belt drive unit.

The cited standard, 30 C.F.R. § 56.14107 (a) provides that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys, fly wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.”

David Small, an inspector for the Department of Labor’s, Mine Safety and Health Administration (MSHA), has five and a half years experience as a mine inspector and 30 years experience in the mining industry. He inspected the Freeman Brookings Wash Plant in November 2005 accompanied by foreman Greg Dexter. He observed that the cited compressor had no guard on the V-belt drive unit. Small observed that the moving parts rotate “fast”. He further observed that the building in which the compressor was housed was not locked nor was there a warning sign on the door. He further observed that the compressor would start automatically and noted that the compressor must be periodically drained by an employee. The drain was located about five feet lower on the tank and not near the V-belt drive (See Government Exhibit 219-4). Small also noted that the V-belt drive unit was located behind the compressor only two feet from the wall but the drive motor could nevertheless be reached by an individual who could get a finger caught therein. He found that it was unlikely for someone to be in the area and also unlikely for anyone to get their finger caught in the V-belt drive. He therefore found the violation to be of low gravity.

According to the operator’s receptionist, bookkeeper and safety secretary, Michelle McCormick, the cited compressor was located in a small room and that the State of Oregon “OSHA” inspector had not commented on nor cited the same compressor while it was located in a more exposed area.

Considering the above evidence, I conclude that, while there was indeed a violation of the cited standard, it was of low gravity. Based on the somewhat remote and protected location of the cited V-belt drive unit and the fact that a state safety inspector had not cited or commented on the V-belt drive unit when it was located in a more exposed area, I find the operator chargeable with but little negligence.

Docket No. WEST 2006-220-M

Citation No. 6383251

Citation No. 6383251 alleges a violation at 30 C.F.R. § 56.14100 (b) and charges as follows:

The front lights where [sic] not maintained in a functional condition on the D8H cat dozer, company # 4608. Defects affecting safety shall be repaired in a timely manner as not to create a hazard to the operator. This piece of mobile equipment operates on mine property during daylight hours. The equipment is exposed to outside conditions such as a [sic] rain and fog. The dozer works in the area of the highwall and there was no foot traffic or smaller vehicles in the area. A person could be seriously injured if struck by the dozer. The condition had not been reported.

The cited standard, 30 C.F.R. § 56.14100 (b), provides that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.”

Inspector Small testified, and it is undisputed, that the cited bulldozer in fact did not have functioning front lights. Small observed that the wiring and brackets for the lights were still in place and only needed light bulbs to become functional. According to Inspector Small, the bulldozer operates in fog and rain and returns where other persons work to the pit floor after the shift. Small testified that the foreman told him that the light bulbs had been removed because they did not think they needed them. Small reiterated that the bulldozer operated in dusty conditions and in foggy weather and noted that the mine was located only four to five miles from the ocean where it regularly experiences both light and heavy fog. He noted that the bulldozer also operated in the rain and he recalled that on the date of the inspection, October 27, 2005, the weather was overcast with rain.

Small testified that it was important during fog or rain to turn the headlights on so that others could see the bulldozer and for the bulldozer operator himself to see how close he is to the edge of the highwall. Small concluded that injuries were unlikely but that fatal injuries were possible if the bulldozer went over the highwall. He found the operator chargeable with moderate negligence in light of evidence that the company had been previously cited for failing to maintain headlights on a scraper at the mine on April 15, 2003. Under the circumstances, I conclude that indeed the violation was committed as alleged but that it was of low gravity and the result of moderate negligence. In connection with these findings I have also considered the testimony of Ms. McCormick that when the bulldozer was acquired some one and a half years before the condition herein was cited, it was not furnished with light bulbs although it did come equipped with the wiring and frame for the lights. In reaching the above findings, I have also considered the testimony of Ms. McCormick that the company stops operations when the weather is too inclement.

Citation No. 6383253

Citation No. 6383253 alleges a violation of the standard at 30 C.F.R. § 56.9300 (a) and charges as follows:

A berm or a gate with delineators was not provided on the access road leading to the upper benches of the highwall. A berm or other means such as a guard rail, [sic] gate with delineators shall be provided on the edge of roadways where the road is in-frequently [sic] traveled by small vehicles or service vehicles. The area is about 200 feet long, about three foot to 15 foot drop off's [sic] along the edges, about a 10 degree grade and exposed to outside conditions. The area is normally traveled by the dozer but small vehicles access the area in-frequently [sic]. A person could be seriously injured if a vehicle were to overturn.

The cited standard, 30 C.F.R. § 56.9300, provides that “[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.”

Inspector Small testified that, as he drove down the quarry access road, he observed that there were no berms or guardrails and that drop-offs from three to fifteen feet existed at various places along the road. He also observed that, in certain places, the road had a 10% grade. Small also observed that a pickup truck was being driven by operations manager Jake Jacobson on the lower part of the road. According to Small, Jacobson acknowledged that he was aware that there were no berms and admitted that he frequently used the road in his pickup truck. According to Small, the lack of berms or guardrails created a hazard of a vehicle overturning. He noted, however, that injuries were unlikely due to the infrequency of vehicles using the road. He also noted however that injuries, if sustained, could be fatal. According to the inspector, the road was 18 feet to 40 feet wide and the shoulders were muddy.

Ms. McCormick testified that the road was only 17 feet wide and no public access was permitted. Indeed she testified that the only person permitted to use the road was Jacobson and that a four-wheel-drive vehicle was needed to operate on the road.

Within the above framework of evidence, I conclude that indeed the violation is proven as charged. I accept the inspector's testimony, supported by the testimony of Ms. McCormick, that access to the road was limited and that injuries were unlikely. I therefore find that the violation was of low gravity. I accept the inspector's findings that the violation was the result of moderate negligence in light of operations manager Jacobson's admission that he was aware that the road did not have berms and in light of the obvious need for berms or guardrails along the road.

Civil Penalties

Under Section 110 (i) of the Act, the Commission and its judges must consider the following factors in accessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that the operator is small in size with a minor history of violations at only one of the facilities cited. There is no dispute that the violations were abated in a timely and good faith manner and no evidence has been presented as to the effect the penalties would have on the operator's ability to continue in business. The negligence and gravity findings have previously been discussed in the instant decision. Under the circumstances, the Secretary's proposed penalties of \$60 for each of the violations are appropriate.

ORDER

Citations No. 6383282, 6383251 and 6383253 are hereby affirmed and Freeman Rock Inc. is directed to pay civil penalties of \$180.00 (\$60.00 for each violation) within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

John D. Pereza, Conference & Litigation Rep., U.S. Department of Labor, MSHA, 2060 Peabody Road, Suite 610, Vacaville, CA 95687

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 23, 2006

| | | |
|---------------------------------------|---|----------------------------------|
| SUBURBAN SAND & GRAVEL, Contestant | : | CONTEST PROCEEDINGS |
| | : | |
| | : | Docket No. WEST 2004-464-RM |
| | : | Citation No. 6311794; 07/15/2004 |
| | : | |
| | : | Docket No. WEST 2004-465-RM |
| v. | : | Citation No. 6311795; 07/15/2004 |
| | : | |
| | : | Docket No. WEST 2004-466-RM |
| | : | Citation No. 6311796; 07/15/2004 |
| | : | |
| | : | Docket No. WEST 2004-467-RM |
| SECRETARY OF LABOR | : | Order No. 6311797; 07/15/2004 |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Suburban Sand & Gravel |
| Respondent | : | Mine ID 05-04428 |
| | : | |
| | : | |
| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2005-142-M |
| Petitioner | : | A.C. No. 05-04428-44707 |
| | : | |
| v. | : | |
| | : | |
| SUBURBAN SAND & GRAVEL, | : | Suburban Sand & Gravel |
| Respondent | : | |
| | : | |
| | : | |
| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2005-223-M |
| Petitioner | : | A.C. No. 05-04428-49161A |
| | : | |
| v. | : | |
| | : | |
| RUSSELL BARTZ, employed by | : | Suburban Sand & Gravel |
| SUBURBAN SAND & GRAVEL | : | |
| Respondent | : | |

| | | |
|-----------------------------|---|----------------------------|
| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2005-224-M |
| Petitioner | : | A.C. No. 05-04428-49160A |
| | : | |
| v. | : | |
| | : | |
| ROBERT K. HORN, employed by | : | Suburban Sand & Gravel |
| SUBURBAN SAND & GRAVEL | : | |
| Respondent | : | |

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor;
James J. Gonzales, Esq., Holland & Hart, Denver, Colorado, for Suburban Sand & Gravel, Russell Bartz, and Robert K. Horn.

Before: Judge Manning

These cases are before me on four notices of contest brought by Suburban Sand and Gravel (“Suburban”) and three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Suburban, Russell Bartz, and Robert K. Horn pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve citations and orders issued by MSHA following its investigation of an accident at Suburban’s pit. An evidentiary hearing was held in the Commission’s courtroom in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

At the time of the accident, Suburban operated a sand and gravel pit (the “pit”) in Adams County, Colorado. The pit includes an area where material is excavated as well as crushing, screening, and material storage areas. Suburban became the owner of the pit in January 2004. On July 15, 2004, Jose Adame, a laborer with Suburban, was at the top of a sand stacker conveyor (“sand conveyor” or “conveyor”) to grease the bearings on the head pulley when another employee started the conveyor. As the belt moved, Mr. Adame’s foot became caught in the metal scraper that removes any sand that has stuck to the belt. He received serious injuries to his ankle and foot before the belt was turned off. MSHA Inspector Brad Allen, who was scheduled to conduct a regular inspection of the mine that day, arrived shortly after the accident and conducted MSHA’s accident investigation. Inspector Allen issued a number of citations and

orders following his investigation. The parties settled all of these items except the four which are the subject of this litigation.

Adame testified through a Spanish/English interpreter that his primary job at the time of the accident was to remove mud, dirt, and debris from the sand conveyor. (Tr. 17). He also greased the bearings on the sand conveyor and other conveyors at the pit. Grease fittings were located at the head pulley and tail pulley. Adame has worked at the pit since January 2004, but he also worked there for a few months in 2003. In 2003, the pit was owned by Aggregates, Inc., which was not affiliated with Suburban. Many of the supervisors and hourly employees with Aggregates, Inc., started working for Suburban when it bought the pit. Adame helped grease bearings in conveyors in 2003. The bearings were greased about every other week in 2003. (Tr. 23). Adame testified that in 2003 he walked up the belts at the pit to grease the head pulley because that was how everyone else performed that task. (Tr. 24-25). Adame started greasing the head pulleys in this manner after "watching everyone else do it." (Tr. 25). Handrails were not provided on the conveyor and Adame did not use fall protection once he arrived at the top. In addition, he did not lock out the electrical switches to prevent anyone from starting the conveyor. Adame testified that he never observed anyone else using fall protection or locking out the circuit when greasing head pulleys in 2003. (Tr. 26).

Adame testified that when he returned to the pit in 2004, after it was purchased by Suburban, he greased the head pulley on the sand conveyor in the same manner "because everything was the same as it had been before." *Id.* He watched how others greased the pulleys and he did the same thing. (Tr. 50). He never walked up the pile of sand under the conveyor to reach the bearings on the head pulley. (Tr. 32). He could not recall anyone locking out the conveyor or using fall protection when greasing high conveyors. Adame testified that his supervisor at the pit in 2004 was Robert "Kenny" Horn, who had worked at the pit with Adame in 2003. In 2004, the bearings were greased about once a month. (Tr. 27). Horn spent most of his time loading trucks with product from the stockpiles under the stacker conveyors. (Tr. 29). Adame would make sure the sand conveyor was turned off, but he did not take any steps to lock out the conveyor or the generator that supplies power to the pit. Adame usually did his greasing on Saturdays, when the pit was not operating, or at the end of the shift after the generator was turned off. (Tr. 30, 51, 61). Adame testified that neither Horn nor Russell Bartz, the aggregate division manager for Suburban, told him that he should walk up the belt to grease the head pulley. (Tr. 47). Adame never discussed the procedure for greasing the pulleys with either of them. (Tr. 54).

When Adame arrived at the mine on July 15, 2004, Vincent Wallett told him to grease the sand conveyor. (Tr. 33-34). Wallett was not a management employee. Wallett operated the conveyors. Between 6:00 a.m. and 7:00 a.m., Adame walked up the belt to grease the bearings at the head pulley. Wallett was shoveling material from around the tail pulley on the sand conveyor when Adame walked up the belt. (Tr. 55-56). As Adame was greasing the bearings at the head pulley, the conveyor started. He subsequently learned that it was Wallett who turned on the sand conveyor. There was no warning or alarm to signal that the belt was going to start. (Tr. 42).

Adame thought he was going to fall off the end of the conveyor, but his foot got caught in the metal bar that scrapes sand off the conveyor. He screamed for help. Someone turned off the belt and Walleth ran up the conveyor to lift the sand scraper with a metal bar to free Adame's foot. Mr. Horn was loading trucks from a materials pile when the accident occurred. (Tr. 39). An ambulance took Adame to the hospital. Adame's ankle was pulled out of place and he had to undergo surgery. He was off work as a result of the injury for about six months. (Tr. 41).

Adame knew that the generator which supplied power for the pit had been turned on that morning. (Tr. 56). He testified that normally the sand conveyor was started from inside the control trailer at the pit. (Tr. 57-58). When that occurs, an alarm is sounded before the belt actually starts moving to warn everyone. In this instance, Walleth started the belt at a switch on the structure of the sand conveyor and no alarm sounded. None of the other belts had been turned on at the time of the accident. (Tr. 62). Adame assumed that the belt would not be started because Walleth had told him to grease the bearings on the conveyor and Adame walked right past Walleth as he stepped onto the belt. (Tr. 58).

The configuration of the sand conveyor is shown in photographs taken by MSHA Inspector Brad Allen. (Ex. P-1). The top of the sand conveyor was about 25 feet above the ground and the pile of sand under the conveyor was about five or six feet below the top of the conveyor. (Tr. 311, 314). The belt itself was 80 feet long and about 30 inches wide. There are two sets of controls for the sand conveyor: one set is in the control trailer and the other set is attached to the frame of the conveyor. (Tr. 42; Ex. P-1, pp. 7 - 9). Although a warning alarm can be activated from the trailer, there is no way to set off this alarm from the switch on the frame of the conveyor.

Steve Ludwig was a truck driver for Suburban Ready-Mix, a related company. He hauls sand and gravel from the pit to various cement plants. (Tr. 78). He was at the pit at the time of the subject accident. Mr. Horn is the individual who usually loads material into Ludwig's truck. On the morning of July 15, 2004, Ludwig drove into the pit to pick up a load of sand. He saw Adame walking up the belt on the sand conveyor. As Horn was loading his truck, Ludwig noticed that the sand conveyor started moving. He looked out his window and saw Adame with his foot caught in the sand scraper. (Tr. 82). He jumped out of his truck, yelled at Horn, and pointed to the top of the conveyor. When Horn saw what was happening, he yelled at Walleth to shut down the conveyor. (Tr. 82). Nothing in Horn's behavior at that time indicated to Ludwig that he knew that Adame was at the top of the conveyor. (Tr. 99). He helped in the recovery effort by getting a pry-bar and handing it to Walleth. (Tr. 104; Ex. R-1).

Inspector Brad Allen testified that he conducted the accident investigation for MSHA. Allen testified that, soon after he arrived at the pit, Mr. Horn told him it was common for a miner to walk up a conveyor belt to grease the head pulley. (Tr. 118-19). Inspector Allen testified that Russell Bartz told him that miners either walk up the stockpile or up the conveyor belt to reach the head pulley. (Tr. 120-121). Bartz stated that employees only walk up the belt if the stockpile is not high enough to reach the area of the head pulley.

Inspector Allen interviewed Vincent Wallett at the motel where he was living. (Tr. 125). Wallett told Allen that he turned on the conveyor because he needed to move the belt to remove sand that was packed around the roller of the tail pulley. (Tr. 127; Ex. P-2). Wallett apparently believed that Adame had gone to get another grease gun. Wallett stated that he “didn’t see him return to go up [the] belt to grease [the] top and wasn’t told.” (Ex. P-2). Wallett told Inspector Allen that the head pulley was about 12 to 15 feet above the sand pile. (Tr. 128). Allen also testified that Wallett told him that employees commonly walked up the belt to grease the head pulleys. Wallett told both the company and Inspector Allen that an alarm did not sound when he started the sand conveyor. (Tr. 129; Ex. P-2).

Inspector Allen testified that Russell Bartz filed a mine accident report with MSHA. (Tr. 129; Ex. P-3). Bartz’s office is in the scale house near the entrance of the mine. Allen testified that one can see most of the crushing, screening, and conveying portions of the plant from the window in his office. (Tr. 131).

Following his investigation of the accident, Inspector Allen issued a number of citations and orders. Three citations and one order of withdrawal are at issue in these cases.

A. Citation No. 6311794

Inspector Allen issued Citation No. 6311794 under section 104(a) of the Mine Act alleging a violation of section 56.14105 as follows:

Maintenance of 80 feet long Kolberg sand stacker conveyor was being performed with the power on and the machinery was not blocked against hazardous motion. A serious accident occurred when the conveyor was started while a miner was performing maintenance and became entangled between the headroller and the belt scraper mechanism. The miner received crushing injuries to his left lower leg.

Inspector Allen determined that an injury had occurred and that the injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was of a significant and substantial nature (“S&S”) and that Suburban’s negligence was moderate. The safety standard provides, in part, that “[r]epairs or maintenance shall be performed only after the power is off, and the machinery or equipment [is] blocked against hazardous motion.” The Secretary proposes a penalty of \$2,500.00 for this citation.

On March 25, 2005, I granted the Secretary’s motion to allege, in the alternative, that Suburban violated 30 C.F.R. § 56.12016. That section provides, in part:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall

be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it.

Inspector Allen testified that he issued the citation because the conveyor was not blocked against motion before Mr. Adame attempted to perform maintenance on the head pulley. (Tr. 134). He stated that the requirements of section 56.14105 would have been met if the conveyor or the generator had been locked out. (Tr. 216). He determined that the violation was S&S because it was highly likely that an injury could occur and that such an injury would be quite serious. (Tr. 137). A miner could become entangled in the sand scraper bar, as Adame did. He also believed that a miner could fall off the conveyor onto the ground below.

Suburban contends that undisputed evidence shows that the mine had implemented a lockout-tagout program and provided employees with locks and tags to use. Both Wallett and Adame were trained on these lockout-tagout procedures. Inspector Allen admitted that Adame could have locked out the conveyor before he climbed up the belt. (Tr. 187). The evidence also establishes that Mr. Adame usually greased pulleys on Saturday mornings when the plant was not operating or at the end of the day after the plant had been shut down. Thus, the Secretary failed to establish that it was a common practice for Suburban to grease the pulleys in a manner that violated either safety standard. Mr. Adame simply assumed that the conveyor would not be started because Wallett was working right there at the tail pulley on the base of the conveyor.

I find that the Secretary did not establish a violation of section 56.12016. Referencing *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1192-93 (9th Cir. 1982), the Commission held that the Secretary's lockout-tagout standards are directed to the hazard of electric shock. *Island Creek Coal Co.*, 22 FMSHRC 823, 826-28, 830-32 (July 2000).¹ As drafted by the Secretary, the lockout standards were put in place to prevent the accidental electrocution of miners while mechanical work was being performed on electrically powered equipment. Both the Ninth Circuit and the Commission held that the Secretary's lockout standards simply do not address the hazards arising from the accidental movement of electrically powered equipment while mechanical work is being performed. See also *Arkholo Sand & Gravel, Inc.*, 17 FMSHRC 593, 596-98 (April 1995) (ALJ). In this instance, there was no risk that anyone would be exposed to an electrical hazard while greasing the head pulley on the conveyor.

I find that the Secretary established a violation of section 56.14105. The safety standard requires that the machinery or equipment undergoing maintenance or repair must be (1) de-

¹ In *Island Creek*, the Secretary alleged that the mine operator violated section 75.1725, which is substantially similar to section 56.14105, because conveyor belts were not locked out or tagged out. The Secretary argued that the term "blocked against motion" means locked out and tagged out. Two of the Commissioners rejected this interpretation of the standard because it is inconsistent with its language and also because the lockout-tagout requirements are directed to electrical hazards. The remaining two Commissioners did not agree with this analysis.

energized and (2) blocked against motion. Greasing a head pulley qualifies as maintenance. The first question is whether the equipment was deenergized. Mr. Wallett used the control box attached to the conveyor structure to turn on the belt. Power enters the control box, travels through a breaker and then to the start button. The Secretary argues that the conveyor was not "off" because the evidence shows that Wallett simply pushed the start button to activate the belt. Because the start button was "hot," power to the conveyor was not off. The breaker at the control box would have to be in the off position in order to deenergize the conveyor. Since the breaker was in an on position, the equipment was not off. Although I tend to agree with the Secretary's interpretation, there is no evidence to establish that the breaker was in the on position before Wallett went to turn on the conveyor. It is possible that the circuit breaker was off and Wallett turned it on immediately before he pushed the start button. There is no credible evidence on this issue.

It is clear, however, that the belt was not blocked against motion. Suburban did not present any evidence to rebut the Secretary's evidence that the belt was not blocked against motion. As a practical matter, the most common means of blocking a belt against motion is to lock out the power source. A belt that is 80 feet long is not going to move on its own because someone is standing or walking on it and it will not move as a result of the maintenance that was being performed. The Secretary is not contending that the only means to block the belt against motion is to lock out the power source. Locking out and tagging out the circuit was simply a method that Inspector Allen would have accepted to block the belt against motion to comply with section 56.14105. (*Compare, Island Creek*, 22 FMSHRC at 833). Suburban did not argue that MSHA does not have the authority to require that conveyors be locked out and tagged out under section 56.14105. The fact that Suburban had a lockout-tagout policy and that locks were available for use does not eliminate the violation but is relevant to the negligence criterion.

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

A serious accident occurred in this instance which would have been prevented had Suburban complied with the requirements of 56.14105. I find that there was a reasonable

likelihood that the hazard contributed to by the violation would result in an injury of a reasonably serious nature.

I find that Suburban's negligence was quite low. Wallett was an hourly employee. Although he occasionally asked Adame to perform tasks, I find that he was not Suburban's agent. He did not supervise any employees, he was not a leadman, and he did not direct Adame's work schedule. Adame and Wallett worked together and would share tasks. In this case, Wallett asked Adame to grease the pulleys while he cleaned up the area around the tail pulley. It may well be that, because his principal language is Spanish, Adame granted Wallett a great deal of deference. Nevertheless, Wallett was not Adame's supervisor. I find that the negligence of Wallett should not be attributed to Suburban.

In addition, Wallett's decision to start the conveyor was totally unexpected. Suburban could not have anticipated that Wallett would start the conveyor that morning. The plant was not running at the time and it was Wallett who started the generator. Apparently, he started the generator because he believed that power was needed in the mechanical shop. The undisputed evidence reveals that the work being done in the shop did not require electricity and that the shop receives its power from the local electric utility, not from the generator. In addition, I find that it was highly unusual for Adame or anyone else to grease the bearings on the head pulley at the start of a shift while the generator was on. Although Adame testified that he never locked out the generator or the conveyor breaker when greasing the head pulley, it is important to note that he always greased while the plant was shut down. There is no evidence as to whether the generator was locked out by someone other than Adame when miners greased pulleys on conveyors, so I cannot enter a finding that Suburban had knowledge that conveyors were not blocked against motion while greasing was performed in this manner on other occasions. For these reasons, Suburban's negligence was very low with respect to this violation. A penalty of \$250.00 is appropriate.

B. Citation No. 6311795

Inspector Allen issued Citation No. 6311795 under section 104(a) of the Mine Act alleging a violation of section 56.14201(b) because the "80 feet long Kolberg sand stacker conveyor was started without providing a visible or audible warning prior to startup." The citation also describes the accident as set forth in the previous citation.

Inspector Allen determined that an injury had occurred and that an injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was S&S and that Suburban's negligence was moderate. The safety standard, entitled "Conveyor start-up warnings," provides, in part:

- (a) When the entire length of a conveyor is visible from the starting switch, the conveyor operator shall visually check to make certain that all persons are in the clear before starting the conveyor.

(b) When the entire length of a conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. . . .

The Secretary proposes a penalty of \$2,500.00 for this citation.

Allen testified that he issued this citation because there was no visible or audible warning given before the conveyor started up. (Tr. 139). If a warning had been given, it is less likely that the accident would have occurred. The inspector also testified that someone standing at the start switch used by Mr. Walleth could not see the top of the entire conveyor. (Tr. 139-40). The start switch used by Walleth is mounted on the frame of the sand conveyor under the belt. Allen testified that when he stood at the start switch he could not see the top of the belt on the sand conveyor. (Tr. 141). The inspector determined that the violation was S&S because a serious accident occurred. The standard is designed to warn miners to move away from equipment that is about to start. (Tr. 142).

Suburban maintains that it is undisputed that when the cited conveyor is started from the control trailer, the audible warning system is activated. It contends that the evidence shows that it is Suburban's practice and policy to sound this alarm whenever a belt is started. Suburban also argues that since the entire length of the conveyor is visible from the conveyor control switch that Walleth used, the citation must be vacated. The Secretary conceded that a mine operator is not required to use an audible warning when the entire length of the belt is visible from the start switch.

I find that the Secretary established a violation. It is quite clear that the intent of section 56.14201 is to ensure that a belt is not started if someone is in harm's way. In this instance, Inspector Allen stood at the control panel used by Walleth to start the conveyor to determine if he could see the entire length of the conveyor. Although he could see the framework of the conveyor and the bottom of the belt for the entire length, he could not see the top of the belt where Adame had been standing. Bartz admitted that a person standing at the start switch on the frame of the conveyor "probably . . . couldn't see the very top of the conveyor belt." (Tr. 386). I find that a person standing at the control panel attached to the frame of the conveyor system would not be able to see if someone were standing on or crouched at the top of the belt near the head pulley. Suburban's argument in this regard is simply playing with the semantics of the safety standard. Clearly, if Walleth were in a position to see the entire length of the belt, Suburban would have been in violation of subsection (a) of the standard because Walleth did not visually check to make certain that all persons were in the clear before he started the conveyor.

I find that the Secretary established that the violation was S&S for the same reasons as set forth with respect to Citation No. 6311794. Suburban's negligence was very low, for the reasons set forth for the previous citation. The evidence establishes that the policy and practice of Suburban is for employees to sound the alarm from the trailer before starting the conveyor.

Wallett's high degree of negligence in starting the conveyor cannot be attributed to Suburban. A penalty of \$250.00 is appropriate.

C. Citation No. 6311796

Inspector Allen issued Citation No. 6311796 under section 104(d)(1) of the Mine Act alleging a violation of section 56.11001 as follows:

There was no means of safe access provided on the elevated 80 feet long Kolberg sand stacker conveyor. No system was developed or used such as safety belts with lanyards or any other type of restraining device or two-sided railing to prevent or stop a fall of approximately thirty feet below to the hard, compacted sand floor. Employees enter the area once per week to perform maintenance, making the chance of an accident reasonably likely. Manager Russell Bartz stated that grease hoses on the head pulleys running to the ground were hard to maintain and that it was easier to have the miners go up the conveyors. Manager Russell Bartz engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of, and condoned, the common practice of walking up the conveyers to perform maintenance.

Inspector Allen determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S, that Suburban's negligence was high, and that the alleged violation was a result of Suburban's unwarrantable failure to comply with the standard. The safety standard provides that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of \$8,300.00 for this citation.

Inspector Allen testified that he issued the citation because Suburban did not provide a safe means of access to the head pulley on the sand conveyor. (Tr. 142-43). The employees typically walked up the conveyor belt to reach the head pulley. Because there may be sand on the belt, there is a risk that a miner may slip and fall while walking up the belt. There are no handrails along the belt. He determined that the violation was S&S because it was reasonably likely that a miner would slip or trip and fall while walking up the conveyor. Allen believed that if a miner fell, it was reasonably likely that he would suffer a serious injury. (Tr. 144). The inspector determined that Suburban's negligence was high and that its conduct was unwarrantable "due to the fact that manager Russell Bartz was aware of and condoned the unsafe practice of walking up and down those elevated conveyors at heights up to 30 feet above ground level." (Tr. 144). He also believed that Mr. Horn was also aware of this practice. Allen admitted that using a safety belt and lanyard would not be a feasible means of providing safe access to the head pulley via the belt. (Tr. 154-55). Handrails are the most common means of

providing safe access along an elevated belt. Suburban did not have any usable safety belts with lanyards on the property.

Suburban argues that Adame's decision to walk up the belt was an aberration that was not condoned by the company. The belt was not used to access the head pulley. Safety belts with lanyards could not be used by a miner walking up a conveyor belt because there was no structure to which to secure the lanyard. In addition, the conveyor was not designed to have handrails along the side. Suburban maintains that it was company policy and practice for miners to walk up the pile of sand to reach the head pulley. Consequently, Suburban provided a safe means of access. In addition, a miner could lower the top of the conveyor. Horn operated a loader and was the leadman on the crew. He testified that he has worked at the pit for 16 years, first for Aggregates, Inc., and now for Suburban. He stated that he never saw miners walking up a belt to grease a head pulley. A few months before the accident he observed Wallett walking up a belt. Horn testified that he told Wallett to get down and to never walk up a belt again. (Tr. 287, 320-21). Bartz testified that miners were not authorized to walk up the belts of conveyors and that he did not know that any miners, including Adame, had ever walked up a belt. (Tr. 353-54). He also testified that he did not know that Horn caught Wallett walking up a belt. The bearings were sealed so greasing could be delayed without damaging the equipment. (Tr. 332). The top of the conveyor was not a working place because miners were not allowed up there.

Arturo Lopez was a front-end loader operator for Suburban in 2004. He operated the loader to fill the hopper with raw material, so he normally worked in the pit rather than in the area where Adame worked. He assisted in training miners and acted as a translator during the safety training, as necessary. (Tr. 250-51). Jose Adame is Lopez's cousin. Lopez testified that miners were not trained or told to walk up conveyors. He said that miners were not supposed to do that. (Tr. 257). He further testified that he never observed Adame walking up a conveyor. After the accident, he asked Adame what he was doing on the conveyor. Adame told him that Wallett told him to grease the head pulley. (Tr. 252-53). He also testified that greasing is normally done on Saturdays or after the plant is shut down during weekdays. Lopez stated that it was not a practice to grease at the beginning of the shift.

I find that the Secretary established a violation of the safety standard. It is not disputed that Adame walked up the stacker conveyor to reach the head pulley. I find that the top of the conveyor belt was a working place because Adame traveled there to grease the head pulley. For the reasons described by Inspector Allen, it was not safe to walk up the conveyor to access the head pulley because there was a serious slip and fall hazard.

I find that it was a common practice for miners to walk up the belts at the mine to grease the head pulley. It was highly unlikely that a miner would bring down a stacker conveyor simply to grease a head pulley. To bring down a conveyor, the miner would first have to move the structure of the conveyor to the side so it would not be above the sand pile. Next, he would have to brace the structure with the bucket of a loader and remove pins that hold the structure up. Finally, he would have to use the hydraulics of the loader to gradually lower the bucket holding

the structure until the conveyor was at its lowest position. Although I do not doubt that miners walked up the sand piles to access the head pulley, the evidence established that they also frequently walked up the belts, as discussed above. Walking up a sand pile that is 19 to 20 feet high which is stacked at the angle of repose would not be an easy task. In addition, the miner would have to stand near the top of the pile and reach up to grease the bearings.

Inspector Allen testified that on July 15, 2004, both Horn and Bartz told him the miners sometimes walked up belts to grease head pulleys. (Tr. 118-21, 218-220, 227-28). After the accident occurred, Robert Horn prepared a report on Suburban's investigation of the accident, as required by 30 C.F.R. § 50.11(b). (Ex. R-2). The report was prepared on July 15-16, 2004. (Tr. 336-38). In the report, Horn states that Suburban took several actions in response to the Adame's accident. The report states that Suburban (1) "Terminated Vincent Wallett," (2) "Reviewed lockout tagout procedure," and (3) Re-trained all miners again on lockout tagout procedures." *Id.* The report was drafted before Inspector Allen issued the citations and order of withdrawal. (Tr. 318, 337-40). The citations and order were faxed to Bartz on or about July 21, 2004. Inspector Allen testified that he held a telephone close-out conference with Bartz sometime after the citations and order had been faxed. During the conference, Bartz adamantly denied that miners were allowed to walk up belts or that he told Allen that miners did so.²

At the time Horn wrote the report, he knew that Adame had walked up the belt to grease the head pulley. (Tr. 318). Yet Horn did not mention in the report that Adame walked up the belt or that he violated company policy in doing so. If such an action was against company practice or policy, Horn would have stressed that fact in the report and stated that miners were retrained on this policy. In the section in the report entitled "Action Taken," there is no mention that miners were retrained to not walk up belts. Horn could not provide any explanation for this omission and he did not testify that such instructions were given following the accident. (Tr. 318). Bartz testified that miners signed a company memo prohibiting them from walking up belts after the citations and order were issued as part of the abatement required by Inspector Allen. (Tr. 377-78). Based on the evidence in the record, I credit the testimony of Inspector Allen and Jose Adame on this issue. I find that Suburban did not have a policy that prohibited miners from walking up the stacker conveyors. The belt was used regularly to get to the head pulley and it was not a safe means of access.

I also find that the violation was S&S. It was reasonably likely that someone walking up the belt would have slipped and fallen, assuming continued mining operations. If a miner were to fall he would likely sustain serious injuries, such as a broken ankle or head injuries. The citation was abated when Suburban installed a grease line from the ground to the fitting on the head pulley. Miners can now grease the bearings on the head pulley from the ground level.

² Horn and Bartz testified that this conversation took place on July 15 or 16 before the citations and order was issued and that they never told Allen that miners walk up the belts at the pit. (Tr. 305-08, 370-72).

The Secretary contends that the violation was the result of Suburban's unwarrantable failure to comply with the safety standard. She argues that Suburban knew that miners were walking up the conveyors to grease head pulleys. Suburban knew that this practice had existed since it purchased the pit and did not stop it. The Secretary relies on the testimony of Adame that employees frequently gained access to the head pulley by walking up the belt. Adame felt no hesitation in walking up the belt in plain view of supervisors because that was the method employees often used. Inspector Allen testified that Messrs Horn, Bartz, and Walleit told him that walking up the belt was a practice at the mine. An operator's failure to take action to abate a known hazard is an aggravated circumstance which supports an unwarrantable failure finding. The Secretary argues that the hearing testimony of Bartz and Horn that they were surprised that employees frequently walked up belts should not be credited. She contends that they "backpedaled" from their previous statements only after they received the unwarrantable failure citation and order. (S. Br. at 9). The Secretary also notes that, after the accident, Suburban did not warn or remind employees not to walk up the belt.

As stated above, Suburban contends that its employees were not authorized to walk up the stacker conveyor to grease the head pulley. At the hearing, Bartz emphatically denied that miners were permitted to walk up conveyors or that it was a practice at the mine. Suburban further maintains that a safe means of access was provided in that employees were permitted to walk up the material pile to gain access to the head pulley and were also allowed to lower the conveyor. Suburban argues that Adame chose to ignore company policy and walk up the belt on the day of the accident. Suburban maintains that its actions did not constitute aggravated conduct.

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

I find that the Secretary established that this violation was the result of Suburban's aggravated conduct. There is no question that Adame was not wearing a lanyard when he walked up the belt and the conveyor was not equipped with handrails. As stated above, I credit the testimony of Mr. Adame that he always walked up the belts, that nobody ever told him not to do so, and that he observed other employees walking up the belts to grease the head pulley. I find that it was a common practice at the mine and that management was aware of this practice. I also

credit the testimony of Inspector Allen that both Bartz and Horn told him that miners walk up conveyors to grease the head pulleys. Miners had been walking up the belt for a long time. Lopez worked in the pit and admitted that he was not around the conveyors when they were greased so he had little knowledge of the actual greasing practices. Although Lopez never trained miners to walk up belts, that practice was not prohibited.

I believe that it is quite significant that, after the accident, Suburban's management did not warn or counsel employees not to walk up belts. As stated above, if Horn or Bartz were so surprised that Adame had walked up the belt to grease the head pulley, one would expect this key fact to be included in Horn's accident investigation report and that miners would have been retrained not to walk up belts. In addition, the accident report prepared by Bartz and submitted to MSHA on an official MSHA form also does not indicate that Suburban was concerned about Adame's presence on the belt. (Ex. P-3). Miners were told not to walk up the belts only after Inspector Allen required training on that issue to terminate his order of withdrawal. Wallett's statements to Inspector Allen are consistent with Adame's testimony on this issue.

I find that Suburban knew that miners walked up the belts at the mine. These miners were not specifically trained to walk up belts, but it was a common practice. Although Suburban's managers did not know that Adame would be walking up the belt early in the morning on July 15, they knew that when the bearings on the head pulley needed to be greased, it was reasonably likely that Adame or another miner would walk up the belt to perform the task. This practice had been ongoing. Given the significant slipping hazard, this method of getting to the head pulley did not provide safe access to a working place. Although, some miners may have walked up the sand pile, the Secretary did not charge Suburban with a violation of the safety standard for that method of access so it is not at issue in these proceedings.

Because of my unwarrantable failure holding, I find that Suburban's negligence was high. A penalty of \$6,000.00 is appropriate. I have reduced the penalty from the proposed penalty of \$8,300.00 because, although Order No. 6311797 discussed below does not duplicate this violation, the two violations are related with the result that there is "some overlap between the two." (S. Br. 16).

D. Order No. 6311797

Inspector Allen issued Order No. 6311797 under section 104(d)(1) of the Mine Act alleging a violation of section 56.15005 as follows:

A miner who had been performing maintenance on the 80 feet long Kolberg sand stacker conveyor had not been wearing a safety belt with a lanyard or any type of restraining device and/or railing to prevent or stop a fall of approximately thirty feet to the ground below. Falls of this nature can be serious and the chance of an accident, with greased components and the lack of proper hand and

foot holds, is reasonably likely. Manager Russell Bartz stated that grease hoses on the head pulleys running to the ground level were hard to maintain and that it was easier to have the miners go up the conveyors. Manager Russell Bartz engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the common practice of working on the elevated conveyors to perform maintenance without fall protection.

Inspector Allen determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S, that Suburban's negligence was high, and that the alleged violation was a result of Suburban's unwarrantable failure to comply with the standard. The safety standard provides, in part, that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling." The Secretary proposes a penalty of \$8,300.00 for this order.

Inspector Allen testified that the safety standard requires that miners working in elevated work areas be protected with safety belts and lanyards. Mr. Adame was not wearing any fall protection gear and he faced a danger of falling as he crouched at the top of the belt to grease the head pulley. (Tr. 144-45). Miners have been killed as a result of falling from heights less than 25 feet. He determined that the violation was the result of Suburban's unwarrantable failure based on the conversations he had with Horn and Bartz. (Tr. 148). Inspector Allen testified that when he asked to see Suburban's fall protection equipment, all that could be found was an old safety belt without a lanyard.

Suburban makes the same arguments with respect to this order as it did with respect to the previous citation. It maintains that it was Suburban's practice and procedure for miners to grease the bearings on the head pulley for stacker conveyors by walking up the pile of material directly under the conveyor. As a consequence, the top of the conveyor was not a working place and miners were not authorized to be up there.

For the reasons set forth with respect to the previous citation, I find that the Secretary established a violation. There can be no dispute that Adame was at the top of the conveyor without any fall protection on July 15, 2004. In addition, I find that the evidence establishes that miners were often at the top of the conveyor when greasing a head pulley. The company had no safety lines or lanyards to protect miners from falling. In addition, no handrails were at the top to eliminate or reduce the risk of falling. This violation does not duplicate the previous violation because the two standards impose separate and distinct duties upon the mine operator. *See Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). One deals with safe access to a working place and the other with working conditions at the work place. A mine operator could, for example, violate the safe access standard without violating section 56.15005 if the miner used fall protection at the top of the conveyor and handrails were not present along the side of the conveyor.

For the same reasons stated with the previous citation, I find that the Secretary established that the violation was S&S. It was reasonably likely that someone at the top of the conveyor greasing the head pulley would lose his balance and fall, assuming continued mining operations. If a miner were to fall, he would likely sustain a serious injury. As stated above, the violation was abated when Suburban installed a grease line to the fitting on the head pulley.

Finally, I find that this violation was the result of Suburban's unwarrantable failure to comply with the safety standard. The parties presented the same arguments with respect to this issue as in the previous citation. The reasoning for my unwarrantable failure finding for the previous violation is also the same for this violation. Mine management knew that miners stand on the top of the conveyor without fall protection to grease the head pulley.

Suburban's negligence is high. A penalty of \$6,000.00 is appropriate. I have reduced the penalty from the proposed penalty of \$8,300.00 because, although Citation No. 6311796 discussed above does not duplicate this violation, the two violations are related with the result that there is "some overlap between the two." (S. Br. 16).

E. Penalties Brought Against Russell Bartz (WEST 2005-223-M).

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, any agent of such corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to a civil penalty. 30 U.S.C. § 820(c). The Commission held that "knowingly" means "knowing or having reason to know." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan 1981); *aff'd* 689 F.2d 623 (6th Cir. 1982). "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Richardson*, 3 FMSHRC at 16. "If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." *Id.* "In order to establish section 110(c) liability, the Secretary must prove only that the individual knowingly acted not that [he] knowingly violated the law." *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

The Secretary proposed penalties against Mr. Bartz for the violations described in Citation No. 6311796 and Order No. 6311797. The Secretary argues that Bartz had actual knowledge that miners walked up the belt to grease the head pulley and he did nothing to stop them. In the alternative, she argues that he failed to act on the basis of information within his knowledge that gave him reason to know that miners walked up the belts. The Secretary relies heavily on the testimony of Adame and Inspector Allen. Allen testified that Bartz told him that employees usually walk up the stockpile to grease the head pulley but that they may walk up the belt if the stockpile is not high enough for a miner to reach the grease fitting.

Suburban contends that it was against company policy for employees to walk up conveyor belts, that it was not a practice for employees to walk up belts, and that Bartz had never observed anyone walking up a belt. Adame was not directed by Bartz to walk up the belt on July 15. In addition, Adame had not been trained or instructed by Bartz or anyone in management to walk up conveyor belts to grease the head pulley. Finally, Wallett did not have the authority to tell Adame to grease the pulley because Wallett did not have supervisory responsibility over him. Adame admitted that Wallett did not specifically ask him to walk up the conveyor to gain access to the head pulley; he just went that way because that was his practice. Because head pulleys must only be greased about once per month, Adame should not have been on the conveyor that morning and Bartz could not have anticipated that he would be on the belt. Bartz expected that any necessary greasing would be done on Saturday when the plant is shut down or after the plant is shut down at the end of the shift during a weekday.

The parties do not dispute that, as the aggregate division manager for Suburban, Bartz was an agent of Suburban. Suburban is a corporation. (Ex. P-5). There is no question that it was unusual for anyone to grease a head pulley after the generator had been turned on at the beginning of a shift. I find that Bartz could not have anticipated that Adame would walk up the conveyor at the start of the shift on July 15, 2004, and crouch down to grease the head pulley. Nevertheless, I find that Bartz knew that miners often walked up the belts to grease the pulley. Although miners also may have walked up the stockpiles from time to time, Bartz knew that miners also accessed the area by walking up the belts. I credit the testimony of Inspector Allen that, before he wrote any citations or orders, Bartz told him that miners sometimes walked up belts to grease head pulleys. (Tr. 120-21, 144). I also credit the testimony of Adame that it was a common practice at the mine. I find that Bartz, who had worked at almost every job at the facility, knew that employees walked up belts. This practice existed before Suburban purchased the pit and continued until this accident.

I also find it telling that the accident report required by 30 C.F.R. § 50.20 signed by Bartz and sent to MSHA did not mention that Adame violated company policy by walking up the belt and standing on the belt while greasing the pulley. Both that report and the company accident investigation report prepared by Horn mention that miners were retrained on lockout and tagout procedures but there is nothing about retraining miners on gaining access to head pulleys. (Exs. P-3 & R-2). The only evidence in the record of miners being trained not to walk up belts relates to the training required by Inspector Allen to terminate the order of withdrawal. I find the testimony of Inspector Allen and Mr. Adame to be significantly more credible than the testimony of Horn and Bartz with respect to these two citations. Mr. Lopez worked in a different area of the pit so he was not in a position to know the practices of miners who do the greasing on the conveyors. Finally, I must note that walking up a sand pile that is up to 20 feet high in order to grease a pulley would not be as easy or as trouble free as Bartz and Horn seemed to suggest at the hearing. Both Horn and Bartz testified that it was safe to walk up the pile of sand under a conveyor, reach up, and grease the head pulley.

In *Roy Glenn*, 6 FMSHRC 1583 (July 1984), several miners were instructed by their supervisor, Mr. Glenn, to weld a valve on an oxygen line in a mill building. To perform this welding, it was necessary to stand on an adjacent girder some distance above the floor. Rather than using a ladder to access the area, the miners climbed some stairs and walked along the girders without using safety lines to get to the work site. Glenn went to another area to check other valves and when he returned he saw one of the miners walking across the girder. He waived him down with a flashlight just as an MSHA inspector was entering the area. The Commission held that Glenn did not knowingly violate the safety standard. The Commission determined that the administrative law judge's finding that Glenn had reason to know that miners "might" or "could" walk across the girders was insufficient to establish a knowing violation. *Id.* at 1588. A supervisor always has "reason to know" that miners "might" perform tasks in an unsafe manner. *Id.* This "degree of knowledge is too contingent and hypothetical to be legally sufficient" under the test set out in *Kenny Richardson*. *Id.* The Commission went on to state:

Before personal liability under section 110(c) can be imposed on an operator's agent for "knowingly" authorizing, ordering, or carrying out a violation, the Secretary's proof must rise above the mere assertion that, at the time of assignment, an assigned task could have been performed by miners in an unsafe manner. Adoption of this rationale could mean that . . . an operator's agent could be held personally liable under section 110(c) for failing to anticipate the miner's unsafe actions and not giving specific instructions to each miner, at the time of the assignment, to avoid all hazardous approaches to a task that could be followed.

Id.

In *Roy Glenn*, the Commission tailored its *Kenny Richardson* analysis to those situations where a "violation of a mandatory standard does not exist at the time of the corporate agent's failure to act, but occurs subsequent to that failure." *Id.* at 1586. The Commission held as follows:

[A] corporate agent in a position to protect employee safety and health has acted "knowingly," in violation of section 110(c) when, based on the facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the strictures of the Mine Act.

Id.

Although the present case has some similarities with *Roy Glenn*, there are some important differences. Mr. Bartz was not present when Adame walked up the belt. More importantly, Bartz did not assign Adame the task of greasing the head pulley that morning. Nevertheless, Bartz knew that miners periodically greased head pulleys and, as stated above, he knew that miners often walk up the belts in order to perform this task. Citation 6311796 alleges that Bartz “was aware of, and condoned, the common practice of walking up the conveyers to perform maintenance.” Order No. 6311797 alleges that Bartz “was aware of the common practice of working on the elevated conveyors to perform maintenance without fall protection.” Inspector Allen did not premise the citation and order on the fact that Bartz ordered Adame to walk up the belt or on Bartz’s knowledge of Adame’s activities that particular day. Rather, the inspector issued the citation and order because mine management was aware of the common practice of walking up belts to grease the head pulleys. The Secretary brought the case against Bartz on the basis of that knowledge.

In *Warren Steen Construction, Inc.*, 14 FMSHRC 1125 (July 1992), the operator was moving a stacker conveyor to another location when it passed close to overhead power lines owned by the local public utility. A miner was electrocuted when the conveyor kept rolling and struck a power line. Mr. Steen argued that he was not liable under section 110(c) of the Mine Act because he was not at the mine at the time of these events. He also maintained that the company had placed conveyors within eight feet of these power lines in the past without receiving citations from MSHA. Mr. Steen also contended that he was not aware of a mandatory safety standard requiring ten feet clearance from the power line and that he did not knowingly or intentionally tell his employees to position the conveyor in such a fashion that it would be in violation of federal law. *Id.* at 1131. The Commission rejected these arguments. It held that “the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law.” *Id.* (citation omitted). The Commission also held that the fact that Mr. Steen was not at the mine at the time of the accident is no defense to the finding that he had knowingly authorized the move of the stacker conveyor. Steen gave the order to move the conveyor and knew that it would be close to the power lines.

In the present case, Bartz was not aware that Adame would be climbing up the belt on the morning of July 15, 2004, and he did not see him do so, but he did know that miners walked up the belt and greased the head pulley while standing at the top of the belt. Mr. Bartz was a person in a position to protect employee safety and health and he failed to act on the basis of information that gave him knowledge or reason to know that miners walked up conveyor belts to grease the head pulley for the belt. He never took any action to stop this practice prior to the time Suburban was issued the citation and order. As a consequence, he acted knowingly and in a manner contrary to the remedial nature of the statute. I find that the Secretary established that Bartz knowingly authorized the violations.

The Secretary did not present evidence with respect to the penalty criteria in section 110(i) for Mr. Bartz. According to the special assessment attachment to the Secretary’s petition for penalty, the amount of the proposed penalty is based, in part, on Bartz’s “position as

manager” at the time of the violations and any information Bartz provided at the safety and health conference concerning his ability to pay a penalty. Because the conference was by telephone and Bartz did not agree with the citation and order, there is no indication that any information was provided. I find that the violations were serious and Bartz’s negligence was high. Mr. Bartz has no history of previous violations. Indeed, this operation received two Holmes Safety Awards from MSHA while Bartz was managing the pit for Aggregates, Inc. (Tr. 349-50). Until Adame was injured, there had never been any accident, injury, or illness at this pit that was required to be reported to MSHA under 30 C.F.R. § 50.20(a). (Tr. 389-90). The cited conditions were rapidly abated in good faith when Bartz ordered the installation of a grease hose from the pulley to the ground.

In *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997), the Commission held that “judges must make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to individuals.” The “relevant inquiry with respect to the criterion regarding the effect on the operator’s ability to continue in business, as applied to an individual, is whether the penalty will affect the individual’s ability to meet his financial obligations . . . [w]ith respect to the ‘size’ criterion, . . . as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual’s income and net worth.” *Ambrosia Coal and Construction Co.*, 18 FMSHRC 819, 824 (May 1997) (*Ambrosia I*). The Commission further held that, if an individual is married, the judge should consider the individual’s share of the household net worth, income, and expenses. *Ambrosia Coal & Construction Co.*, 19 FMSHRC 381, 385 (April 1998) (*Ambrosia II*).

The Secretary did not present any evidence on the size criterion and Bartz did not present any evidence on the ability to continue in business criterion. I hold that, under the circumstances of this case, the remedy is not to further delay these cases by requesting additional information, but by entering a finding that Bartz is relatively “small” and that the penalty I assess will not adversely effect the Bartz’s “ability to continue in business. See *William A Hooten, Jr.* 21 FMSHRC 1083, 1091 (Oct. 1999) (ALJ). Taking into consideration all of the penalty criteria, I find that a penalty of \$200.00 for each violation is appropriate.

F. Penalties Brought Against Robert K. Horn (WEST 2005-224-M).

1. Horn was Suburban’s Agent.

Mr. Horn and Suburban argue that Horn was not a “director, officer, or agent” of Suburban as those terms are used in section 110(c) of the Mine Act. They contend that Horn was employed by Suburban as an hourly loader operator. He was not a manager or supervisor at the pit and he did not have authority to hire or fire, promote, discipline, or demote employees. Horn worked four days a week, ten hours a day, operating a front-end loader from 6:00 a.m. until 4:00 p.m. He received overtime pay if he worked more than 40 hours a week. (Tr. 330). He did not work on Saturdays when conveyors and other equipment were serviced and greased. The plant continued to operate when he was not present. Because of his operating experience, he provided

safety training to employees, but he was not Suburban's agent. Suburban states that Bartz was the only supervisor at the pit.

The Secretary argues that, although Horn did not have a management title, he functioned as a manager at the pit. She contends that, because the purpose of the Mine Act is to promote safety, the key question is whether the alleged agent's actions had the ability to affect safety and health. "[I]f a miner has been delegated the responsibility for giving assignments to other miners, and for telling those miners how a particular job is to be performed, and he has the ability to stop those miners if he does not approve of the manner in which they are performing their jobs, then he is an "agent" of the operator within the meaning of section 3(e) [of the Mine Act] regardless whether he [has a management job title]." (S. Supp. Br. at 3). She contends that Horn was an agent because he fits within this definition. In addition, Horn was listed as the "plant manager" on Suburban's legal identity report dated April 2, 2004. (Ex. P-5). Horn testified that he was the lead man. Adame considered Horn to be his boss. In addition, Horn had an office in a trailer at the scale house, he instructed Walleit to write out a statement about the accident, and he told Inspector Allen that he was the person in charge at the mine. (Tr. 343).

Horn testified that he has worked at the pit for 16 years, first with Aggregates, Inc., and now with Suburban. He has held most jobs at the pit from "mud picker" to operating heavy equipment. Since Suburban bought the pit, he had made recommendations to Mr. Bartz as to who should be hired or who should be fired, but Bartz made the final decisions. (Tr. 277). He could recommend that hourly employees should be given a raise in pay, but he could not authorize such a raise. Occasionally, Bartz would give him special assignments, such as calling vendors to come out to the mine. (Tr. 279). Horn was the primary trainer at the pit. He trained most newly hired employees and conducted refresher training courses. Most of the training was conducted using MSHA and OSHA training videos and Horn was available to answer any questions. Horn testified that his primary responsibility was to load sand and gravel into trucks using a front end loader for delivery to customers. He testified that he worked four days a week and he did not have any responsibility for supervising employees. (Tr. 286). Nevertheless, Horn was the senior miner at the pit and the lead man. (Tr. 342). He told Inspector Allen that he was the person in charge. *Id.* If he saw a miner committing an unsafe act, he would usually yell at them. Horn testified that he observed Walleit walking up a conveyor several months before the accident. Horn said that he told Walleit to get down and not walk up there again. When Walleit told him that he was checking a roller, Horn replied "you don't check a roller." (Tr. 287; 320-21). Horn also gave other employees warnings for safety infractions, such as for not wearing a hard hat. Horn gives them an oral warning for the first offense and writes a letter for a second offense. (Tr. 321). He has also delayed starting the crusher if guards were not in place. Horn has ordered that mobile equipment be shut down until the brakes are fixed. (Tr. 323). After the accident, Bartz and management from Suburban's central office discussed the incident with Walleit and decided that he should be terminated from his employment. (Tr. 305, 312). Horn did not participate in that decision.

It is clear that Horn was not a director or officer of Suburban, but the issue is whether he was Suburban's "agent." The term "agent" is defined in section 3(e) of the Mine Act as "any person charged with the responsibility for the operation of all or part of a coal or other mine or the supervision of miners in a coal or other mine." In considering whether a mine employee is an agent of the operator under the Mine Act, the Commission has "relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally assigned to management personnel." *Ambrosia I*, 18 FMSHRC at 1560 (citation omitted). I find that Horn's work at the pit was crucial to its operation and involved "a level of responsibility normally assigned to management personnel." *Id.* Both Horn and Suburban held him out as someone with management responsibility. Horn told Inspector Allen when he arrived to inspect the facility that he was in charge. (Tr. 342). He describes himself as a "lead man." Bartz testified that, although Horn did not have a title at the time of the accident, he functioned as "either plant manager or plant foreman." (Tr. 390).³ The legal identity report Suburban filed with MSHA listed Horn as the person in charge of health and safety at the pit and listed his title as "Plant Manager." (Ex. P-5). Horn "kept the paperwork and such for MSHA" in his desk in the scale house trailer. (Tr. 283). He prepared the company's report of its investigation of Adame's accident that is required by 30 C.F.R. § 50.11(b). (Tr. 312; Ex. R-3). Adame considered Horn to be his supervisor.

Although Horn did not have the authority to hire or terminate employees, he provided advice to Bartz on these decisions. Horn did not assign employees their work duties on a daily basis, but employees knew their job assignments. Excluding Horn, Bartz, and the person in the scale house, the pit employed about eight miners. (Tr. 316). In his testimony, Horn stated that he would verbally discipline a miner if he saw him committing an unsafe act. He would also report the problem to Bartz and write a letter if conditions warranted. (Tr. 321-22). Horn provides task and safety training to all new miners and he provides annual safety retraining. He also testified that he delayed the start-up of the plant when he found that guards for pinch-points needed to be replaced. (Tr. 323).

Based on the evidence of record, I find that the evidence establishes that Horn was Suburban's agent for purposes of section 110(c) of the Mine Act. I base this holding on Horn's wide range of responsibilities. Because Horn's responsibilities were not routine, he was required to exercise a great deal of discretion. Suburban relied on Horn to perform these responsibilities with a great deal of independence and little supervision. His responsibilities were not "tightly circumscribed" by Suburban and he was not "closely supervised" by Bartz. *Martin Marietta Aggregates*, 22 FMSHRC 633, 639 (May 2000) (citations omitted). I recognize that he did not have independent authority to hire and fire employees, but he could discipline them and correct their work practices. He had the authority to shut down the plant or a piece of equipment. When Bartz was not present, Horn was responsible for the operation of the pit. Horn represented himself to Inspector Allen as being in charge at the pit and Suburban advised MSHA on its legal

³ Horn testified that he was given the title "plant manger" by Suburban soon after this accident and a former employee was rehired to operate the loader. (Tr. 324-25).

identity report that he was the plant manager. Suburban delegated virtually total responsibility for safety and health to Horn. He interacted with MSHA inspectors, and he kept all required records. Even though Horn was paid at an hourly rate, I find that he was Suburban's agent.

2. Horn knowingly Authorized the Violations.

I find that Horn knowingly authorized the violations set forth in Citation No. 6311796 and Order No. 6311797 for the same reasons set forth with respect to Mr. Bartz. Horn was not aware that Adame would be climbing up the belt on the morning of July 15, 2004, and he did not see him do so, but he did know that miners at the pit walked up the belt and greased the head pulley while standing on top of the belt. Mr. Horn was a person in a position to protect employee safety and health and he failed to act on the basis of information that gave him knowledge or reason to know that miners walked up conveyor belts to grease the head pulley for the belt. He never took any action to stop this practice prior to the time Suburban was issued the citation and order. As a consequence, he acted knowingly and in a manner contrary to the remedial nature of the statute. I find that the Secretary established that Bartz knowingly authorized the violations.

As with Bartz, the Secretary did not present evidence with respect to the penalty criteria. I enter the same findings. The violations were serious and Horn's negligence was high. There is no history of previous violations for Mr. Horn. Suburban's pit has an excellent history of previous violations. There were no previous accidents, injuries, or illnesses at this pit. The conditions were rapidly abated. I find that Mr. Horn is a small operator and that the penalties I assess will not adversely affect his "ability to continue in business." Taking into consideration all of the penalty criteria, I find that a penalty of \$200.00 for each violation is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The parties stipulated that Suburban was issued eleven non-S&S citations and one S&S citation in the 12 months preceding the accident. In 2004, the mine worked about 21,211 hours, making it small mine. This was Suburban's only sand & gravel pit. All of the violations at issue in these cases were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Suburban's ability to continue in business. My gravity and negligence findings are set forth above. My findings with respect to the application of the penalty criteria to Messrs. Bartz and Horn are also set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

| <u>Citation/Order No.</u> | <u>30 C.F.R. §</u> | <u>Penalty</u> |
|---------------------------|--------------------|----------------|
|---------------------------|--------------------|----------------|

WEST 2005-142-M (Suburban)

| | | |
|---------|-------------|----------|
| 6311794 | 56.14105 | \$250.00 |
| 6311795 | 56.14201(b) | 250.00 |
| 6311796 | 56.11001 | 6,000.00 |
| 6311797 | 56.15005 | 6,000.00 |

WEST 2005-223-M (Russell Bartz)

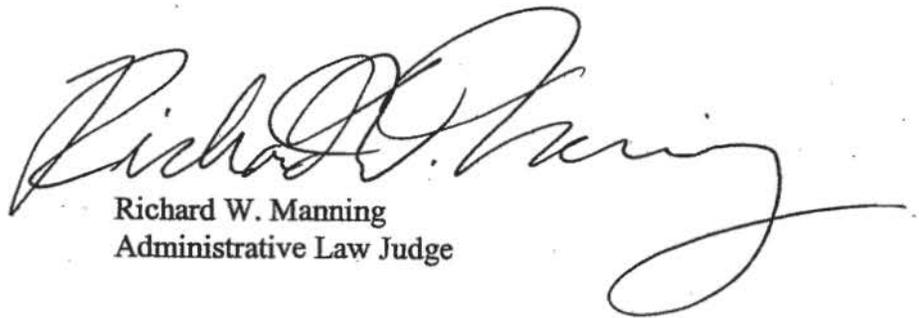
| | | |
|---------|----------|--------|
| 6311796 | 56.11001 | 200.00 |
| 6311797 | 56.15005 | 200.00 |

WEST 2005-224-M (Robert K. Horn)

| | | |
|---------|----------|--------|
| 6311796 | 56.11001 | 200.00 |
| 6311797 | 56.15005 | 200.00 |

For the reasons set forth above, the citations and order are **AFFIRMED** as written. Suburban Sand & Gravel is **ORDERED TO PAY** the Secretary of Labor the sum of \$12,500.00 within 30 days of the date of this decision.

For the reasons set forth above, Russell Bartz violated section 110(c) of the Mine Act and he is **ORDERED TO PAY** the Secretary of Labor the sum of \$400.00 within 30 days of the date of this decision. For the reasons set forth above, Robert K. Horn violated section 110(c) of the Mine Act and he is **ORDERED TO PAY** the Secretary of Labor the sum of \$400.00 within 30 days of the date of this decision. Upon payment of the penalties, the contest proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 26, 2006

| | | |
|--------------------------------|---|-----------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-294-M |
| Petitioner | : | A.C. No. 03-00257-05501 XSC |
| | : | |
| v. | : | Docket No. CENT 2003-26-M |
| | : | A.C. No. 03-00257-05505 XSC |
| PHILIP ENVIRONMENTAL SERVICES, | : | |
| Respondent | : | Arkansas Operations Mill |

DECISION¹

Appearances: Michael D. Schoen, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Steven R. McCown, Esq., Littler Mendelson, Dallas, Texas,
for the Respondent;

Before: Judge Feldman

¹ Disposition of these cases was delayed by the October 2001 anthrax attack on the U.S. Postal Service. Docket No. CENT 2000-294-M was stayed on January 19, 2001, for consolidation with any citations that may be issued upon completion of The Mine Safety and Health Administration's (MSHA's) accident investigation of a January 21, 2000, fatal demolition accident. The accident investigation resulted in the issuance of Citation No. 7894001. The Secretary of Labor's (the Secretary's) proposed \$15,000.00 civil penalty for Citation No. 7894001 was received by Philip Environmental Services (Philip) on September 12, 2001. Philip mailed its notice of contest to MSHA on October 1, 2001, but it apparently was never received because of the anthrax incident. Consequently, the proposed penalty assessment was deemed a final order of the Commission. 30 U.S.C. § 815(a). On March 19, 2004, the Commission remanded this matter to the Chief Administrative Law Judge (CALJ) to determine if Philip's contest should be reopened. The CALJ reopened this matter and assigned the case to me on August 16, 2004. After completion of discovery, these matters were scheduled for hearing on July 19, 2005. However, due to the retirement and unavailability of Philip's demolition expert, these matters were continued to enable Philip to retain a new expert. Neither Philip nor the Secretary allege prejudice as a result of this delay.

These civil penalty proceedings concern petitions for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor against the respondent, Philip Environmental Services. Philip has stipulated that it is “an operator” subject to the jurisdiction of the Mine Act as a contractor performing services at the Arkansas Operations Mill, a surface alumina mill owned by Alcoa World Alumina (Alcoa). (Tr. 18). 30 U.S.C. § 802(d).

The petition in Docket No. CENT 2000-294-M seeks to impose a total civil penalty of \$90.00 for Citation No. 7884114 for an alleged violation of the mandatory safety standard in 30 C.F.R § 56.11001. This safety standard requires that a safe means of access must be provided to all working places. The citation was issued because there were puddles of caustic material located on the ground outside the south side of the digestion building. Subsequent to the hearing, on March 2, 2006, the parties filed a Joint Motion to Approve Settlement wherein the Secretary agreed to vacate Citation No. 7884114. The parties’ settlement motion **IS GRANTED** and Docket No. CENT 2000-294-M shall be dismissed.

The remaining issue for resolution is the petition in Docket No. CENT 2003-26-M that seeks to impose a \$15,000.00 civil penalty for Citation No. 7894001. This citation alleges a significant and substantial (S&S) violation of the mandatory safety standard in 30 C.F.R § 56.16010 that requires that drop areas are cleared of personnel before material is dropped from an overhead elevation.² The citation was issued to Philip as a result of its performance of demolition work at Alcoa’s alumina facility. The citation was issued following a January 21, 2000, accident that occurred when David Gauthier, a Philip employee, was fatally injured when he was struck by a dust collector that fell from the seventh floor of a building undergoing demolition.

The hearing was conducted on February 7, 2006, in Little Rock, Arkansas. The parties’ post-hearing briefs and replies have been considered.

I. Statement of the Case

Section 56.16010 of the Secretary’s regulations provides:

To protect personnel, *material shall not be dropped* from an overhead elevation *until the drop area is first cleared of personnel* and the area is then either guarded or a suitable warning is given.

(Emphasis added).

² A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury. *Nat’l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

The dimensions of the “drop zone” are not defined in the regulation. Eyewitness accounts reflect that, at the time of the drop, the victim was standing to the side and in front of the building being demolished. Specifically, the victim was standing approximately 29 ½ feet to the side of the building, and 76 ½ feet in front of the building. (See Gov. Ex. 7; Gov. Ex. 38).³ The drop resulted in the dust collector impacting the ground, causing a plume of dust that totally obscured visibility. Attempting to flee to safety, the victim ran from his position in a southeasterly direction towards the building and into the path of the dust collector. He was struck by the dust collector at a location 120 feet from the base of the southwest corner of the building. (See App. I).

The central issue is whether the victim was standing within the “drop area” as contemplated by section 56.16010 of the Secretary’s regulations *immediately prior to the drop*. As discussed below, because the dust collector impacted the ground in close proximity to where the victim was standing, the Secretary has demonstrated that the drop zone was not cleared of personnel *before* demolition began. Consequently, Citation No. 7894001 shall be affirmed.

II. Findings of Fact

The essential facts are not in dispute. The Arkansas Operations Mill is located in Bauxite, Arkansas. The mill is situated in close proximity to Alcoa’s aluminum mine. (Tr. 30). Variations of four products were produced at the mill. The products were hydrate chemicals, calcined alumina, calcium aluminate cement and tubular. Hydrate chemicals are manufactured via a pressure digestion process. The Activated Alumina Division, that included the refinery and clarification areas, ceased operations in 1993.

Philip was hired as an independent contractor to demolish the abandoned portion of the plant and began its on-site work in August 1999. On the day of the accident on January 21, 2000, Philip was in the process of demolishing Building 70, a 103-foot tall, seven story steel bulk loading structure. (Gov. Ex. 2, p.1; Gov. Ex. 16, p.1). Philip employees were using a “cut and drop” or “cut and pull” method of demolition, a commonly used procedure in the demolition industry. (Gov. Ex. 2, p.2; Tr. 202-03). Using this procedure, after determining the direction of removal, sections of the building structure were pre-cut using an oxygen/acetylene torch. Complete torch cuts were made on all but one of the steel structural members of the building, thus creating a hinge point or “sticker” on the support. (Gov’t. Ex. 2, p.2; Gov. Ex. 16, p.2; Tr. 46, 48-9).

³ Gov. Ex. 7 and Gov. Ex. 38 have been appended to this decision and will be referred to hereafter as Appendix I and II, respectively. Gov. Ex. 7 is a diagram of the site conditions on January 21, 2000, depicting Philip’s designation of the location of its employees and MSHA’s measurements. Gov. Ex. 38 is Inspector Graham’s accident investigation field notes containing measurements taken at the accident site. (Tr. 175).

Wire cable was then attached to the cut section of the building and connected to the boom of a Caterpillar L-350 excavator. The operator of the excavator, positioned in an operator's compartment, used the controls to maneuver the boom to pull down the partially severed structural portion. After a pull by the excavator operator, the hinge point typically causes the pre-cut section to rotate, shear the "sticker," and topple to the ground. (Gov. Ex. 2, pp.2-3; Gov. Ex. 16, p.2; Gov. Ex. 26). Once the section is on the ground, the excavator operator, using an attached shearer, reduces the fallen debris to manageable-size pieces which are then removed from the area. (Gov. Ex. 2, p.3).

At the time of the accident, the excavator was positioned approximately 80 feet from the base of Building 70. (Gov. Ex. 2, p.3). The roof of Building 70 over the seventh floor had already been removed using the cut and pull method. (Gov. Ex. 2, p.3; Gov. Ex. 16, p.1; Tr. 54). The pre-cut section of the seventh floor to be "cut and pulled" was approximately 80 feet above ground level. The section of the floor measured approximately 20 feet wide, 24 feet in depth and the seventh floor was 12 feet in height. (Gov. Ex. 2, pp.2-3).

Positioned in the seventh floor was a Nor-blo 120-AS Series 39 dust-bin collector (dust bin) also known as a bag house. The dust bin was approximately 9 feet wide, 8 feet in length and 10 feet in height. (Tr. 75). A discharge cone was attached beneath the dust bin and a supply duct was attached to the top. The total height of the dust bin assembly was approximately 22 feet. (Gov. Ex. 2, p.3; Tr. 75, 222-24). The dust bin was positioned in an opening in the seventh floor. Approximately 8 feet of the dust bin protruded into the ceiling space of the sixth floor, and 10 feet of the dust bin was in the seventh floor space. (Gov. Ex. 2, p.3; Gov. Ex. 16, p.2; Gov. Exs. 21-23; Tr. 54-55, 294).

The dust bin was partially full and weighed approximately 5,000 pounds at the time of the accident. (Gov. Ex. 2, p.3; Tr. 75). Prior to the pull that resulted in the accident, the dust bin was not secured to the seventh floor because the mounting bolts had been cut off. (Gov. Ex. 2, p.3; Gov. Exs. 16, 17, 21; Resp. Ex. 2; Tr. 66, 70-1, 143, 282). It was Philip's standard operating procedure to first remove the bolts. (Resp. Ex. 2).

The Building 70 drop area was created by establishing an "exclusionary zone" that was demarcated by orange mesh which was placed behind the excavator. (Gov. Ex. 16, p.2, Gov. Exs. 22, 23, 25; Tr. 211-12). The purpose of the mesh was to define the general parameters of the drop zone and to warn personnel not to go into the drop zone. (Tr. 211, 275; Gov. Exs. 22, 23).

Chris Croniser, Philip's shift superintendent, was supervising the demolition activity on Building 70 on the day of the accident. Croniser's crew members were torch burners Bryan Hvizdak, Ramone Lopez and Ernesto Rosales. (Gov. Ex. 2, p.1; Gov. Ex. 16, p.2; Tr. 111).

At the time of the accident David Gauthier had been employed by Philip as a shift superintendent for approximately two years. Gauthier had approximately 30 years experience in the demolition industry. (Gov. Ex. 2). Earlier in the day on January 21, 2000, Gauthier had been working at another building located at the mine site. Gauthier joined Croniser's crew at Building 70 at approximately 3:45 p.m. (Gov. Ex. 2, p.1). Although Gauthier was also a shift superintendent, he apparently was working under the direction of Croniser at all times relevant to the accident. (Gov. Ex. 16).

To begin demolition of the seventh floor, Croniser directed Gauthier to operate the excavator to effectuate the pull while Hvizdak and Lopez moved to safety adjacent to the exclusionary zone to the southwest of the building, and Rosales moved to safety adjacent to the exclusionary zone to the southeast of the building. (See App. I). Croniser removed himself to a point approximately 100 feet to the west of the building. (Gov. Ex. 16). Gauthier mounted the excavator and began pulling on the structure with the cable by lowering the boom while simultaneously backing up the excavator. (Gov. Ex. 16, p.2). The pre-cut section of the seventh floor became stuck, or hung-up, compressing and listing downward at a 20 to 25 degree angle, rather than hinging and falling as intended. (Gov. Ex. 16, p.2; Gov. Ex. 20; Tr. 57, 301-02).

The dust bin also listed forward along with the canted pre-cut section of the seventh floor. The center of gravity of the dust bin was on the seventh floor. (Gov. Ex 2, p.3). Because the mounting bolts had been disconnected from the seventh floor, it was reasonably foreseeable that the dust bin could become dislodged from the seventh floor as demolition proceeded. (Tr. 309-10). In such an event, it was difficult to predict the path of the dust bin or its ultimate resting location. (Tr. 311-16; 319-21).

After the seventh floor section hung, Gauthier stopped attempting to pull and Croniser approached the cab of the excavator. After a brief discussion, Croniser and Gauthier switched places with Croniser assuming his position in the operator's compartment. Gauthier positioned himself 82 feet southwest of the southwest edge of the base of Building 70. (See App. I; Gov. Ex. 16, p.2). At this location Gauthier was 29 feet 6 inches due west of the point that was approximately 76 feet 6 inches south of the southwest corner of the building. (See App. II).

After getting the all clear sign from Gauthier, Croniser repositioned the excavator approximately 10 feet to the east of the position from where Gauthier previously had attempted the pull. (Gov Ex. 16, p.2). Croniser raised the excavator boom in an upward position causing the back of the pre-cut section to pull up slightly before stopping. (Gov Ex. 16, p.2). At that moment, the dust bin toppled over and rolled off of the seventh floor striking the taut steel pull cable. The dust bin continued down the cable as Croniser moved the excavator boom causing the dust bin to "flip" off of the cable in a southwesterly direction striking the ground at a point approximately 17 feet west of the building and 64 feet from the southwest corner of the structure. (See App. II; Tr. 76, 175). Striking the cable increased the dust bin's momentum as it hit the

ground and continued to roll past the side of the excavator. (Gov Ex. 16, p.2). The dust bin continued its rapid forward movement impacting the ground at a second point approximately 17 feet west of the building and 76 feet from the southwest corner of the building. (See App. II; Tr. 175). A dust cloud was created when the dust bin impacted the ground causing a complete lack of visibility. (Gov Ex. 16, p.2).

The initial direction of the dust bin momentum was towards Gauthier as demonstrated by the points of impact that were in close proximity to where Gauthier was initially standing. (App. II). Specifically, the second point of impact was 17 feet west of the building, only approximately 12½ feet from Gauthier's original position that was 29½ feet west of the building. (App. II; Tr. 175).

To flee from the approaching dust bin, witnesses saw Gauthier turn and run in a southeasterly direction. (App. I). Had Gauthier remained in his original position, he would not have been struck by the dust bin. (Gov Ex. 16, p.2). However, it is not difficult to imagine why Gauthier panicked and ran from the approaching dust collector.

As the dust cleared, Lopez began to scream as he approached the dust bin that had come to rest approximately 120 feet south of the southwest corner of the building. Croniser dismounted the excavator and found Gauthier under the south edge of the dust bin lying face down with obvious head injuries. (Gov Ex. 16, p.2). Gauthier was air lifted to a local hospital but he did not survive. (Gov. Ex. 2, p.2; Gov Ex. 16, pp.2-3).

MSHA was notified shortly after the accident at 5:12 p.m. An accident investigation team led by Willard Graham arrived at the mine site the following day. Graham and his team inspected the area, took measurements and photographs, interviewed witnesses and reviewed Philip's demolition procedures at the time of the accident.

As a result of MSHA's investigation, on April 3, 2000, Graham issued 104(a) Citation No. 7894001 alleging a violation of the mandatory safety standard in section 56.16010. The citation stated:

On January 21, 2000, a shift supervisor was fatally injured when he was crushed by a dust collector that fell from the 7th floor of a building being demolished. The victim was standing several feet away from a track-mounted backhoe that was attached to a wire rope being used to pull down the seventh floor. The drop area was not first cleared of personnel prior to dropping the floor.

(Gov. Ex. 4). The citation was terminated on May 4, 2000, after all employees involved in demolition were retrained in safe work practices regarding building demolition.

MSHA's accident investigation report was issued on May 24, 2000. The report concluded:

The cause of the accident was management's failure to clear the material drop area of personnel. *The root cause was the attempt to remove the decking and the unsecured dust bin with a single pull. This allowed the dust bin to separate from the decking and fall in an uncontrolled fashion.*

(Emphasis added) (Gov. Ex. 2, p.4).

Ronald Dokell testified as a demolition expert on behalf of Philip. Dokell was employed from 1957 until 1996 by Olshan Demolishing Company, a company with domestic and international operations located in Houston, Texas. During his tenure with Olshan, Dokell's duties included serving as a site supervisor on hundreds of demolition projects and a general supervisor overseeing several demolition projects at multiple job sites. (Resp. Ex. 1; Tr. 190-92, 197). He ultimately became President of the corporation. Dokell was also a past president of the National Demolition Association. (Tr. 192).

Dokell stated the cut and pull process was a common method of demolition. (Tr. 202-03). Dokell was responsible for determining the parameters of many drop zones during his professional career. (Tr. 195). He described the process of establishing a drop zone as a "simple" rather than a "scientific calculation." (Tr. 195). Dokell testified that the adequacy of a drop zone depends on the size of the structure being demolished by the cut and pull procedure. (Tr. 208). Dokell opined that, given the effect of gravity, ordinarily the length of a drop zone should be twice the depth of the structure being pulled.. (Tr. 209-10). Dokell explained:

Well, basically . . . a drop zone is . . . a place for the material you're going to cut and pull to drop. Now, where do things go when you cut them and pull them? And the answer, which we can't avoid because - - as gravity - - it is straight down. When you pull something, once you've got it past the 50 percent point, it comes down.

The cable, which is attached to the excavator and runs taut because it's pulling - - but the cable itself has no hydraulic power. It's just a piece of steel that's pulled tight. When you pull the piece of steel tight, you pull what you've attached it to. As soon as it - - the part you're pulling, which is this, has become past the point of 50 percent, it falls and the cable, of course, becomes loose. It no longer is doing anything. It just falls down. And you'll disattach [sic] your cables, cut up the steel on the ground that you've just pulled down, and start on the next piece. And this is standard cut and pull procedure.

(Tr. 205-06).

Given the fact that the seventh floor section of Building 70 to be pulled was 24 feet deep, Dokell opined that industry standards required a drop zone of 25 feet wide and 48 to 50 feet long.⁴ (Tr. 213-14). Dokell opined that Philip's drop zone of 48 feet was reasonable because it was twice as long as the depth of the flooring being demolished. (Tr. 215). Based on his experience, considering gravity, ordinarily he would expect the floor to fall within the first half of the drop zone. (Tr. 209). However, Dokell's calculation did not account for an unsecured dust collector.

Dokell conceded that it was reasonably foreseeable that an unsecured 5,000 pound dust bin could become dislodged during demolition. In such an event, Dokell altered his drop zone calculation by doubling the width to 50 feet and adding 50 percent to the original length resulting in a revised 75 feet long drop zone as measured from the base of Building 70. (Tr. 286, 317-18). Dokell stated that there were no personnel in his hypothetically expanded 50 by 75 feet drop zone. (Tr. 286). Dokell further conceded that his 50 feet by 75 feet parameter "worse case scenario" is based on the dust bin *not* hitting the steel cables before striking the ground. (Tr. 308-09).

Significantly, Dokell's testimony concerning a reasonably prudent drop zone of 50 by 75 feet given the circumstances in this case is flawed. Dokell opined that the probability of the dust collector deflecting off of the taut cable was unforeseeable because the demolition crew "thought [the dust collector] was not loose." (Tr. 309-10). However, there is no evidence to suggest that the crew was unaware that the dust bin's mounting bolts had been removed. (Gov. Ex. 2, p.3; Gov. Exs. 16, 17, 21; Resp. Ex. 2; Tr. 66, 70-1, 143, 282). In fact, MSHA determined that "it was probably normal operating procedures to cut the bolts." (Resp. Ex. 2). Philip did not present testimony from any of its employees, and it did not otherwise proffer any evidence concerning Philip's demolition procedures. In the absence of evidence to the contrary, it is reasonable to conclude that the mounting bolts had been disconnected by the demolition crew as part of their torch cutting procedures. (Tr. 289-90; 310).

Moreover, even Dokell's expanded "worse case scenario" drop area is inadequate. Dokell expanded the width of the drop zone by 25 feet, or 12½ feet on each side. However, the dust collector impacted the ground approximately 17 feet west of the building, 4½ feet outside Dokell's expanded drop area. (App. II; Tr. 175).

Accident investigation photographs reveal the steel cable was attached to the structure directly in front of where the dust collector had been in the opening in the seventh floor. (Gov. Exs. 18-20). Graham testified that he "didn't see any way the [dust collector] could avoid" the steel cable if it became dislodged from the seventh floor during demolition. (Tr. 171).

⁴ Dokell opined the width of the drop zone should be 25 feet because he believed the section of flooring to be cut was 25 feet wide. (Tr. 214). In fact, MSHA determined the cut section was 20 feet wide. (Gov. Ex. 2, p.2; Gov. Ex. 16, pp.1-2). Thus, using Dokell's calculations, under normal circumstances, the drop zone should have been 20 feet by 48 feet.

Dokell conceded that, after the dust bin hit the taut steel cable, “[y]ou really don’t know where it’s going to end up.” (Tr. 316). However, Dokell maintained it was not reasonably foreseeable that the dust bin would roll a distance of 120 feet. (Tr. 319). In the final analysis, Dokell agreed it would have been prudent to remove the unsecured dust bin separately prior to dropping the seventh floor. (Tr. 221, 227, 232-33, 276-77).

The Secretary has not specifically set forth what she believes are the appropriate dimensions of the drop zone in this case. Graham testified that establishing a drop zone is a dynamic process that depends on the unique circumstances of each pull. As noted, he opined that once the seventh floor became hung causing the dust bin to list forward, it was likely the dust bin would hit the cable in the event it became dislodged. (Tr. 170-71). In such an event, even Dokell conceded the path of the dust collector was unpredictable. (Tr. 316). It is in this context that Inspector Graham testified, “[i]f a piece of material or debris could come off this building and strike somebody, then the drop area would not be cleared.” (Tr. 92). Gauthier apparently fled his initial location in an attempt to seek sanctuary in the vicinity behind the excavator when he was struck by the dust bin. (Tr. 96, 119-132). Consequently, Graham believed the drop zone in this case included Gauthier’s initial location at the side of the building. (Tr. 120).

III. Further Findings and Conclusions

Citation No. 7894001 alleges a violation of the mandatory safety standard in section 56.16010. The citation stated:

On January 21, 2000, a shift supervisor was fatally injured when he was crushed by a dust collector that fell from the 7th floor of a building being demolished. The victim was standing several feet away from a track-mounted backhoe that was attached to a wire rope being used to pull down the seventh floor. The drop area was not first cleared of personnel prior to dropping the floor.

(Gov. Ex. 4).

Section 56.16010 of the Secretary’s regulations provides:

To protect personnel, *material shall not be dropped* from an overhead elevation *until the drop area is first cleared of personnel* and the area is then either guarded or a suitable warning is given.

(Emphasis added).

As a general matter, the Secretary does not contend that the basis for the alleged violation of section 56.16010 is Philip’s failure to either guard the general area or to provide a suitable warning. Rather, the Secretary maintains the cited standard was violated because Philip did not first clear the drop area of personnel.

a. Applicability of the Standard

As a threshold matter, Philip argues that the mandatory safety standard in section 56.16010 is inapplicable to demolition because the regulation “contemplates *dropping* materials from an overhead elevation, not the demolition of a structure.” (Emphasis in original). (*Philip post-hrg. br.* at p.4). Philip first argued that section 56.16010 is inapplicable in its post-hearing brief. Consequently, the Secretary did not have the opportunity to present evidence on this issue at the hearing. In her post-hearing response, the Secretary notes that Dokell, during his sworn deposition testimony, readily agreed that the provisions of section 56.16010 applied to Philip’s demolition activities. (*Sec’y Resp.* at p.5).

Notwithstanding Dokell’s admission during deposition, ensuring that a suitable “drop area” is unoccupied is virtually the only way of protecting personnel during demolition. Thus, an adequate drop zone is an indispensable part of the demolition process. Philip’s assertion that the “drop area” provisions of section 56.16010 apply to dropping materials from overhead rather than to demolition activities creates a distinction without a difference. Moreover, Philip’s assertion is belied by the testimony Philip elicited from Dokell at the hearing:

Counsel: Were you responsible for the calculation or configuration of drop areas or drop zones in the demolition activities that you supervised.

Dokell: I’ve approved many of them, yes, sir.

(Tr. 195).

Without belaboring this question, the relevant definition for the operative term “drop” is “a sudden fall.” *Webster’s New World Dictionary*, 428 (Second College Edition 1980). Falling material necessarily must originate from overhead. A sudden fall is the goal of demolition. Accordingly, Philip’s contention that section 56.16010 should be narrowly construed to exclude demolition from sites where material is “dropped from an overhead elevation” is lacking in merit and must be rejected.

b. Interpretation of the Standard

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning, or, unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). The terms of section 56.16010 are ambiguous in that the methodology for determining the parameters of a drop area is not defined.

If a regulatory standard is ambiguous, the analysis shifts to whether the Secretary's interpretation is reasonable. See *Energy West Mining Co. v. FMSHRC*, 40F.3D 457, 463 (D.C. Cir. 1994); accord *Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). Philip contends the Secretary's interpretation of section 56.16010 is unreasonable because the Secretary's position is that the dimensions of the drop zone can only be determined after demolition occurs.

The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3D 1324, 1327 (D.C. Cir. 1995) (citations omitted). Additionally, a regulation must be interpreted so as to harmonize with the objective it seeks to implement. See *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citation omitted).

Section 56.16010 requires a demolition contractor to establish an adequate drop zone without the guidance or pre-approval of the Secretary. Although the parameters of a drop area are not defined in the regulation, application of the standard requires consideration of the unique circumstances surrounding each demolition project. The Secretary's role under section 56.16010 is limited to determining whether the drop zone established by the demolition contractor is adequate under the circumstances, *i.e.*, whether a suitable area was first cleared of personnel. Thus, the Secretary has not delineated what she believes are the outer perimeters of the drop zone in this case, nor is she required to do so. The Secretary's interpretation of section 56.16010 is that it only requires her to demonstrate that, at the time of demolition, the drop area was not cleared because personnel were exposed to falling debris. (Tr. 92). This interpretation is reasonable in that it furthers the obvious regulatory concern of promoting the safety of demolition crews.

c. Fact of Violation

Philip's attempt to remove the unsecured dust bin and flooring with a single pull, rather than removing the dust bin separately, allowed the dust bin to fall in an unpredictable and uncontrollable manner. As Dokell stated, "[y]ou really don't know where [the dust bin is] going to end up." (Tr. 316). Since the path of the dislodged dust bin was unpredictable, the drop zone must encompass a broader area to account for the uncertainty. However, Philip relied on a standard drop zone of approximately 20 by 48 feet. Having failed to significantly expand the drop zone, Philip put its employees at risk.

If an employee is exposed to the hazard of being struck by debris, he is in the drop zone. The impact point of the dust bin, only 12½ feet from where Gauthier was standing, reflects that Gauthier was exposed to danger. Thus, the Secretary has demonstrated that the drop area was

not first cleared of personnel prior to the drop.⁵ Consequently, the Secretary has demonstrated that a violation of section 56.16010 occurred.

The violation was designated as significant and substantial. The Commission has explained an S&S finding requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). The Commission has also emphasized it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.* at 1868. The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508, 510-11 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508, 510-11 (April 1996). Here the violation was properly designated as significant and substantial as the violation resulted in a hazard, *i.e.*, exposure to falling debris, that caused a fatality.

With respect to negligence, even Philip's expert agreed that it would have been prudent to remove the unsecured dust bin separately before attempting to bring down the seventh floor with a single pull. Consequently, Philip's loss of control of the demolition area is attributable to a high degree of negligence.

d. Secretary's Attempted Citation Modification

Having determined Gauthier's presence in a drop area provides the basis for the section 56.16010 violation, for the first time, at the hearing, the Secretary alleged Croniser was also in the drop zone. Croniser was in the operator's cab approximately 80 feet south of the base of Building 70 when the attempted pull was made. (Gov. Ex. 2, p.3). Neither Citation No. 7894001 nor MSHA's accident investigation alleges that Croniser was in the drop zone at the time of the accident. Significantly, section 10(d) of Citation No. 7894001 designates the number of persons affected as "001."

I construe the Secretary's belated assertion that Croniser was in the drop area as an attempt to modify Citation No. 7894001. Although there is no provision in the Commission's Rules for amending citations, as a general proposition, modifications to citations should be liberally granted unless there is a "legally recognizable prejudice to the operator [that] would bar [an] otherwise permissible modification." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990).

⁵ It is noteworthy that Gauthier was located only 29½ feet west of the building although Croniser had positioned himself 100 feet west of the building during Gauthier's attempted pull. (Gov. Ex. 16; App. II).

It is undisputed that the cut and pull method is a common demolition practice. There is nothing in the record to demonstrate that the termination of Citation No. 7894001 required modification of Philip's cut and pull methodology with respect to cable length or the location of the excavator. Nor was any evidence proffered to establish that the position of the excavator on January 21, 2000, was contrary to industry standards. The Secretary's belated attempt to modify Citation No. 7894001 to include Croniser as a person affected precluded Philip's pre-trial discovery and preparation on the issue of proper excavator positioning during cut and pull demolition. Consequently, I find the attempted modification to be prejudicial. Therefore, I will not address whether Croniser was in the drop area at the time of the accident.

e. Constitutionality⁶

Finally, even if the evidence supports the fact of a violation of section 56.16010, Philip asserts that Citation No. 7894001 must be vacated because section 56.16010, as it applies to demolition, is unconstitutionally vague. In this regard, Philip asserts that the cited standard does not provide a fair and reasonable warning of the conduct it prohibits or requires because the Secretary is calculating the drop zone after demolition occurs.

Philip's reliance on a purported responsibility of the Secretary to articulate where a drop zone begins and ends is misplaced. The provisions of section 56.16010 impose no such duty on the Secretary. As previously noted, demolition contractors establish drop zones based on the unique circumstances of each demolition project without the Secretary's pre-approval. Thus, section 56.16010 does not require the Secretary to delineate the outer perimeters of a drop zone. Rather, section 56.16010 only requires the Secretary to demonstrate that the drop area was not first cleared of personnel.

To prevent exposure to the hazard of being struck by debris, the Secretary has fashioned section 56.16010, the terms of which are "simple and brief in order to be broadly adaptable to a myriad of circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). However, broadly written mandatory safety standards must provide fair notice of what is required. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983).

⁶ The hearing was held on February 7, 2006. Following the hearing, on February 21, 2006, Philip filed a Supplemental Answer to the Petition for Assessment of Civil Penalty seeking to argue that section 56.16010 is unconstitutionally vague. On February 27, 2006, the Secretary filed a Motion to Strike Philip's Supplemental Answer as untimely. Philip replied to the Secretary's Motion to Strike on March 10, 2006. The Secretary's Motion to Strike was denied during a March 21, 2006, telephone conference. At that time I advised the parties that I would permit the constitutional issue to be presented in Philip's post-hearing brief, and I would establish a briefing schedule for the Secretary's response brief and Philip's reply. The Secretary's response brief was filed by facsimile on June 2, 2006. Philip's reply was filed by facsimile on June 20, 2006.

The Commission addressed the issue of “fair notice” in *Higman Sand & Gravel, Inc.*, 24 FMSHRC 87 (January 2002). The Commission stated:

In “order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be ‘so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application’” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Lanham Coal Co.*, 13 FMSHRC 1341, 1343, (September 1991).

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

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. “The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard [she] has promulgated.” *Diamond Roofing Co. v. OSHRC*, 528 F.2D 645, 649, (5th Cir. 1976).

24 FMSHRC at 89-90.

Applying the “reasonably prudent person” test, it is obvious that section 56.16010 seeks to effectuate the protective purposes of a drop zone. To achieve this goal, it reasonably can be inferred that section 56.16010 requires control of the force and direction of debris from the structure to be demolished because that is the only means by which an adequate drop zone can be established. In other words, section 56.16010 requires a controlled drop.

Both MSHA and Philip’s demolition expert agree that Philip’s failure to separately remove the dust collector caused it to fall in an uncontrolled manner. (Gov. Ex. 2, p.4; Tr. 221, 227, 232-33, 276-77, 316). Having forsaken control for the apparent sake of the expediency of a single pull, Philip finds itself in the unenviable position of arguing that the uncertainty it created renders the standard unconstitutionally vague. Such an argument must be rejected.

Rather, a reasonably prudent person familiar with demolition would recognize that, given the uncertainties, Philip's reliance on the traditional drop zone calculation of the width of, and double the depth of, the structure being pulled was grossly inadequate. Even Dokell's expanded hypothetical drop zone was inadequate as Dokell failed to appreciate the distance the unsecured dust bin would travel. Obviously, Philip knew or should have known that establishment of an inadequate drop zone does not satisfy the requirements of section 56.16010.

As Inspector Graham stated, the provisions of section 56.16010 are violated "[i]f a piece of material or debris could come off this building and strike somebody [because] then the drop area would not be cleared." (Tr. 92). In the final analysis, it was reasonably foreseeable that the traditional drop zone should have been extended to include clearance of personnel from the general area impacted by the dust bin. Philip cannot credibly rely on a lack of notice as an excuse for its failure to ensure that a suitable drop area was kept free of personnel. Consequently, Philip has failed to demonstrate that section 56.16010 is unconstitutionally vague as applied by the Secretary in this case. **Accordingly, Citation No. 7894001 shall be affirmed.**

f. Civil Penalty

The Secretary has proposed a civil penalty of \$15,000.00 for Citation No. 7894001. Commission judges assess penalties *de novo* and are authorized to reduce or increase the penalty proposed by the Secretary as circumstances warrant. *Topper Coal Co.*, 20 FMSHRC 344, 350 n.8 (April 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). In determining the appropriate civil penalty, Commission Rule 30, 29 C.F.R. § 2700.30, requires the judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). In determining the appropriate civil penalty, section 110(i) provides, in pertinent part:

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

i. Size of Operator and Ability to Remain in Business

A Final Decree in Philip's reorganization plan under Chapter 11 of the United States Bankruptcy Code was entered on April 7, 2005. Bankr. S.D. Tex., Case No. 03-37718-H2-11. There is no evidence that Philip is currently relieved from debt due to its bankruptcy filing. Philip is a moderately sized contractor, and it does not contend that imposition of the proposed \$15,000.00 civil penalty in this matter will adversely impact its continuing business operations. (Tr. 19; Gov. Ex. 1, p.2).

ii. Negligence

With respect to negligence, the high degree of negligence attributed to Philip is amply supported by the record. Loss of control in demolition is a grave concern. In this regard, Philip's expert Dokell expressed disbelief that Philip would have disregarded the hazard associated with an unsecured dust bin if Philip knew the dust collector was "loose." (Tr. 309-10). However, the evidence reflects Philip knew or should have known that the dust collector was not secured. The negligence associated with a failure to ensure the drop area was first cleared of personnel, given the unpredictability of the path of the dust bin, was committed by Philip management personnel and is properly imputed to Philip. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1686 (October 1995) (Citations omitted).

iii. Gravity

The gravity penalty criterion contained in section 110(i) requires an evaluation of the seriousness of the violation. *Hubb Corporation*, 22 FMSHRC 606, 609 (May 2000) citing *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996); *Sellersburg*, 5 FMSHRC at 294-95. In evaluating the seriousness of a violation, the Commission focuses on "the affect of a hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Here, failing to ensure that the drop zone was clear of personnel exposed an employee to the hazard of falling debris that resulted in his death. Consequently, the violation is indicative of extremely serious gravity.

iv. History of Previous Violations

The Secretary does not assert that Philip has a relevant history of previous violations that would impact on the appropriate penalty to be assessed in this matter.

v. Good Faith Efforts at Abatement

Philip has precluded the possibility of a similar accident by providing proper training and it has modified its demolition practices in recognition of the hazards caused by unsecured structures during the demolition process.

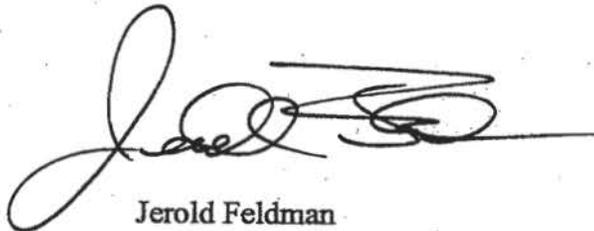
On balance, there are no significant mitigating factors to warrant reduction of the civil penalty proposed by the Secretary. In view of the high degree of negligence and serious gravity, I conclude that the Secretary's proposed civil penalty is appropriate. Accordingly, a civil penalty of \$15,000.00 shall be imposed for the violation of section 56.16010 cited in Citation No. 7894001.

ORDER

Accordingly, **IT IS ORDERED** that, pursuant to the parties' agreement, Citation No. 7884114 in Docket No. CENT 2000-294-M **IS VACATED**. Consequently, Docket No. CENT 2000-294-M **IS DISMISSED**.

IT IS FURTHER ORDERED that Citation No. 7894001 in Docket No. CENT 2003-26-M **IS AFFIRMED**.

IT IS FURTHER ORDERED that Philip Environmental Services shall pay a civil penalty of \$15,000.00 within 40 days of the date of this decision in satisfaction of Citation No. 7894001. Upon timely payment of the \$15,000.00 civil penalty, Docket No. CENT 2003-26-M **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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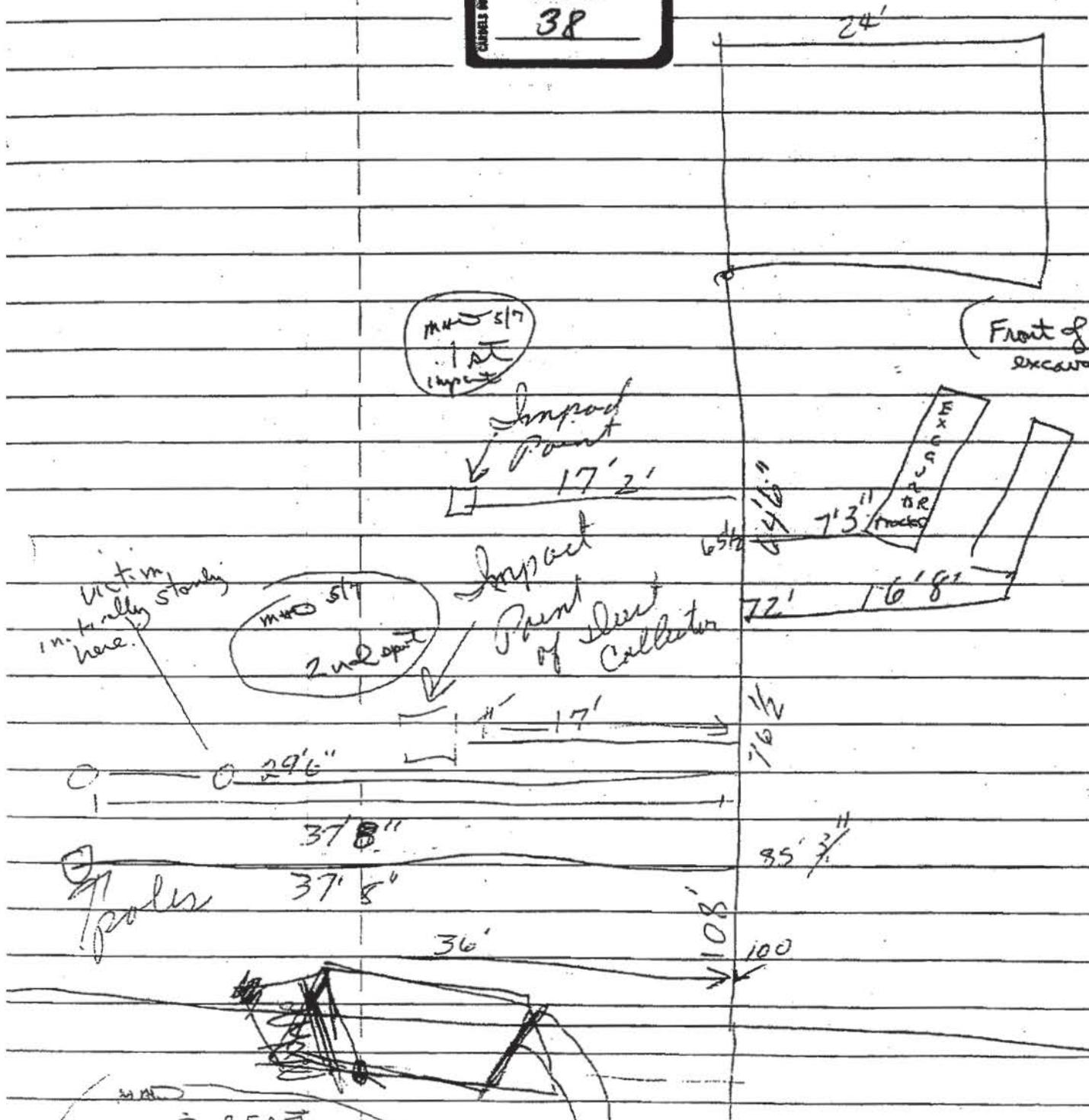
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GENERAL FIELD NOTES

Area(s)/Equipment

GOVERNMENT EXHIBIT 38

Comments



APPENDIX II

Page 1 of 41

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

May 2, 2006

| | | |
|---------------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2005-403-M |
| Petitioner | : | A.C. No. 45-03455-58446 |
| v. | : | |
| | : | |
| WASHINGTON ROCK QUARRIES, INC., | : | King Creek Pit |
| Respondent | : | |

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL DISCOVERY

In this civil penalty proceeding, the Secretary of Labor, on behalf of her Mine Safety and Health Administration, petitions for the assessment of a civil penalty of \$625.00 against Washington Rock Quarries, Inc. (WRQ). The Secretary alleges the company violated a mandatory safety standard, 30 C.F.R. § 56.3130, at its King Creek Pit when it failed to employ mining methods suitable to maintaining the stability of a high wall at the pit. WRQ denies the violation, as well as Secretarial allegations regarding the gravity of the violation, the violation's significant and substantial nature and the alleged negligence of the company. A hearing was scheduled to begin on May 10, 2006. On April 19, 2006, at the joint request of counsels, it was rescheduled to begin on August 15, 2006. The order rescheduling the hearing stated in part, "All discovery in this matter shall be completed on or before July 17, 2006." (Order Rescheduling Hearing and Discovery (April 19, 2006)).¹

The pretrial preparations of the parties have been dogged by various discovery disputes, some of which are ongoing. In the most recent dispute, Counsel for the Secretary moves to compel WRQ to take certain specific actions. Counsel wants the company to supplement its answer to one of the Secretary's interrogatories, to make its proposed expert witness available for deposition on one of three specified dates, and to produce documents referenced in the expert's report.

For the reasons set forth below, counsel for the Secretary's motion is **GRANTED IN PART** and **DENIED IN PART**.

¹ Previously, discovery was ordered to be completed by April 10, 2006, but the deadline was waived to allow the Respondent to depose two persons the Secretary listed as possible witnesses, an MSHA inspector and an expert witness. See Order Granting Motion to Permit Discovery (April 6, 2006).

The Motion As It Relates To The Secretary's Interrogatory

In Interrogatory No. 5, the Secretary asks WRQ to "identify . . . all individuals you intend to call as a witness at the hearing" and to provide "a detailed summary of each individual's anticipated testimony." Sec's Mot. to Comp. Disc., Exh. 1 at 2. The Secretary moves that WRQ be required to answer separately and fully this interrogatory. The request is based upon that fact that although WRQ has identified four individuals it may call as witnesses^[2] it has not, in the Secretary's view, adequately summarized their anticipated testimony.

In describing the anticipated testimony, the company has stated that one of the individuals "may testify about [WRQ's] mining methods and training, prior MSHA inspections, and other facts and circumstances relevant to the citation at issue," and that the other three may testify to these matters as well as to "conversation[s] with the MSHA inspector." Sec's Mot. to Comp. Disc. 7.

Counsel for the Secretary notes that Commission Rule 58 places WRQ under an obligation to answer the interrogatory "separately and fully." 29 C.F. R. §2700.58(a). Counsel complains that the answers given are so general that without supplemental answers it will be necessary to depose the four witnesses. However, with appropriately supplemented answers, all parties may be saved the expense and time of depositions. Sec's Mot. to Comp. Disc. 2-3.

Counsel for WRQ responds that it has not yet decided whom it intends to call as a witness; nor has it determined what testimony will be elicited. "Nevertheless, in an attempt to provide full disclosure, [WRQ has] provided [the Secretary] with the universe of persons that [WRQ] might call and [has] described as best it could what might be their testimony." Resp. Mot. to Comp. Disc. 2. In doing so, WRQ maintains it has complied with the interrogatory and that it "cannot provide information that it does not have." *Id.*

Ruling

Counsel for the Secretary's interrogatory requesting the name and contact information of those individuals WRQ intends to call as witnesses, is a proper interrogatory, and counsel for WRQ's response providing the names and contact information of four persons, all or any of whom it might call, is a proper response. In answering, WRQ has identified its possible witnesses. Given this response, WRQ may not call witnesses outside the universe of named persons without good cause shown, and without counsel for the Secretary having full opportunity to depose such additional witness or witnesses.³

² The individuals are Harry Hart, Lance Precour, Al Evans and Gordon Trolley. Sec's Mot. to Compel Disc., Exh. 1.

³ As noted previously, under the revised hearing schedule, discovery in this matter must be completed by **July 17, 2006**. This means that absent extraordinary circumstances and

In response to the interrogatory's request to provide a "detailed summary of each individual's anticipated testimony," WRQ has provided only the most general information regarding the subject areas about which the individuals may testify. The answers may reflect the state of the WRQ's case preparation at this point. However, the answers are so broad as to provide the Secretary with little or no knowledge of how to adequately prepare for the individuals' possible testimony. Therefore, within 20 days of the date of this order, WRQ **IS ORDERED** to supplement its answers to the interrogatory by summarizing the testimony the witnesses might give and by identifying the key facts about which the witnesses if called may testify.

Upon receiving the supplemental answers, counsel for the Secretary should promptly decide whether or not he wishes to depose the named individuals. If he believes depositions are in order, he and counsel for WRQ must together act to ensure the depositions are completed on or before **July 17, 2006**.

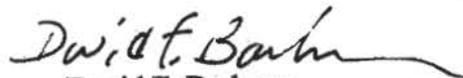
Motion As It Relates to WRQ's Expert Witness

The Secretary moves that WRQ be ordered to make its expert witness, Stephen Dmytriw, available for deposition on May 8, 9 or 10, 2006. Sec's Mot. to Comp. Disc. 4-5. The Secretary states that the deposition previously was scheduled to take place on May 10, but that counsel for WRQ recently stated he is not available on May 10 and that he does not know when Mr. Dmytriw will be available for deposition. *Id.* 4.

for good cause shown all depositions must be completed by that date.

Ruling

The motion is **DENIED**. Counsels are experienced and able. They have a duty to cooperate with one another and with the judge to insure a just result. Asking the judge to micromanage a matter they should be able to agree upon is demeaning to themselves and to their clients. There is more than adequate time between now and the conclusion of discovery for counsels to find a mutually acceptable date for the deposition of Mr. Dmytriw. Therefore, within ten days of the date of this order, Counsels **ARE ORDERED** to confer and to agree upon a date and time when the deposition can be taken. (If counsels are unable to agree, I will set an arbitrary date, time and place.)⁴



David F. Barbour
Administrative Law Judge
(202) 434-9980

Distribution: (Certified Mail and by Facsimile)

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/ej

⁴ Counsel for the Secretary also requests WRQ be ordered to provide copies of documents referenced in Mr. Dmytriw's expert report. Sec's Mot. to Comp. Disc. 3. Counsel for WRQ replies that the documents have since been provided and the issue is moot. Resp. to Mot. to Comp. Disc. 3-4. Counsel for WRQ is taken at his word. The part of the motion requesting an order requiring the delivery of specified documents **IS DENIED**.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 4, 2006

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| UNITED MINE WORKERS OF AMERICA, LOCAL 1248, Complainant | : | COMPENSATION PROCEEDING |
| | : | |
| | : | Docket No. PENN 2002-23-C |
| | : | |
| v. | : | |
| | : | |
| MAPLE CREEK MINING, INC., Respondent | : | Maple Creek Mine Mine ID 36-00970 |

**ORDER DENYING RESPONDENT'S
MOTION FOR SUMMARY DECISION**

This case is before me on a complaint filed pursuant to section 111 of the Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 821. The United Mine Workers of America, Local 1248 ("UMWA"), seeks compensation for miners idled by an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") requiring the withdrawal of miners from the Maple Creek Mine. The complaint was later amended to assert claims by miners who worked at Maple Creek's preparation plant who also were allegedly idled by the same order.¹ Respondent has moved for summary decision, and the UMWA has opposed the motion. As explained more fully below, the motion is denied.

The Issue to be Resolved

Miners typically are not paid if they do not work. MSHA enforcement actions that result in closing all or part of a mine can, therefore, have a significant economic impact on both the mine operator and any miners idled by the enforcement action. Section 111 of the Act provides limited relief to miners under certain conditions.² The first two sentences of the section provide

¹ Complainants' motion to amend the complaint was granted by order dated February 20, 2002. Respondent's motion to reconsider was denied by order dated October 5, 2005.

² Section 111 reads, in pertinent part:

If a coal or other mine or area of such mine is closed by an order issued under section [103], section [104], or section [107], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the

less than one shift's pay for miners idled by certain closure orders. That limited compensation is available regardless of the result of any review of such orders.

The third sentence of the section, upon which the instant claim is based, provides for up to one week's compensation for miners idled by orders entered under sections 104 or 107 of the Act, because of an operator's failure to comply with any mandatory health or safety standard, but only "*after all interested parties are given an opportunity for a public hearing, . . . and such order is final.*" The complaint here seeks compensation for miners idled by Order No. 7060223, which was issued pursuant to section 104(b) of the Act.

Maple Creek contends that Order No. 7060223 was later vacated in conjunction with settlement of a civil penalty proceeding and, consequently, that no compensation is available under the third sentence of section 111. The UMWA argues that compensation is due because the miners were, in fact, idled by the order and, since Maple Creek paid a civil penalty for the underlying citation, its culpability for the alleged violation has been conclusively established. The issue presented by the motion is whether Order No. 7060223 is "final" within the meaning of section 111. For the reasons set forth below, I find that the order was final and deny Maple Creek's motion.

Facts

On July 30, 2001, at 10:35 a.m., an MSHA inspector found that the bleeder system was not effectively ventilating a section of Maple Creek's mine, and issued Order No. 7082156, an "imminent danger" withdrawal order, pursuant to section 107(a) of the Act.³ The order noted that Citation No. 7082157, alleging a violation of 30 C.F.R. § 75-334(b)(1), would be issued for management practices that resulted in the condition. Citation No. 7082157 was issued at the

operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but not for more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section [104] or section [107] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled by such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. . . . [30 U.S.C. § 821].

³ A copy of Order No. 7082156 is attached as Exhibit 1 to Respondent's reply memorandum in support of its motion.

same time as the order and alleged a violation of the subject regulation, which requires that the bleeder system "continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings."⁴ While the "Condition or Practice" section of the citation stated that no abatement time was set, the citation included a notation that termination was due the following day by 2330, 11:30 p.m. MSHA conducted a ventilation survey of the mine the following day. As a result of that survey, Order No. 7082156 was terminated at 1:00 p.m. on July 31, 2001, by a different inspector. Further modifications to Order No. 7082156 and Citation No. 7082157 were made on January 4, 2002, eliminating language stating that the violation cited in the citation was a contributing factor to the condition prompting the imminent danger order.

The inspector who had issued the order and citation also returned to the mine on July 31, 2001, and found that virtually no steps had been taken to abate the violation alleged in the citation. At 4:10 p.m., he issued Order No. 7060223 pursuant to section 104(b) of the Act, based upon his conclusion that Maple Creek had expended "little or no effort" to correct the cited condition.⁵ The 104(b) order required that all miners be withdrawn from the "5 West longwall section and the 5 West, 6 West and 7 West bleeder system." The order was modified on August 2 to allow some power to be restored to the area, but no mining of coal was permitted. On August 4 the modification was rescinded, and the order was reinstated in its original form. The order was allegedly terminated on August 7, 2001, and mining operations were permitted to resume.

On February 25, 2002, MSHA issued proposed civil penalty assessments for various citations and orders issued to Maple Creek, including Citation No. 7082157, for which a penalty of \$9,000.00 was proposed. Maple Creek contested that and other proposed penalties on March

⁴ A copy of Citation No. 7082157 is attached as Exhibit 2 to Respondent's reply memorandum in support of its motion.

⁵ A copy of Order No. 7060223 is attached as Exhibit B to Complainant's opposition to the motion. Section 104(b) of the Act provides, in pertinent part:

(b) If, upon any follow-up inspection of a coal or other mine, and authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator or such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. [30 U.S.C. § 814(b)].

18, 2002. On May 3, 2002, the Secretary filed with the Commission a Petition for Assessment of Civil Penalties against Maple Creek, Commission Docket No. PENN 2002-116, which sought the imposition of civil penalties in the total amount of \$36,853.00, for 12 alleged violations of the Secretary's regulations prescribing mandatory safety standards for underground coal mines.⁶ Among the enforcement actions at issue was Citation No. 7082157.

The petition in PENN 2002-116 was served on Maple Creek and Local Union 1248 of the UMWA. By letter dated June 19, 2002, the UMWA sought and was granted party status in that case, presumably to protect its members' interests in the instant compensation claim.⁷ On July 29, 2003, the Secretary filed a Motion for Decision and Order Approving Partial Settlement, which sought Commission approval of a settlement of all but one of the violations at issue.⁸ Among the violations settled was Citation No. 7082157. The motion described the citation and added the following discussion:

A § 104(b) Order Number 7060223 was issued on July 31, 2003 [sic], for the Respondent's failure to correct the condition cited in Citation Number 7082157. A penalty of \$9,000.00 was specially assessed based on the high negligence rating and the § 104(b) Order.

After further discussions with the operator, the Secretary recommends that the citation should remain classified as high negligence but Order Number 7060223 should be vacated. While the negligence is still high, the parties submit that it is somewhat less than initially determined. Respondent was unsuccessfully attempting to correct the condition listed in Citation No. 7082157 at the time the 104(b) Order No. 7060223 was issued. Therefore, a reduction in the assessed penalty to \$2,000.00 is warranted.

Settlement Motion, at 2-3.

The UMWA was served with a copy of the motion, but did not file anything in response. On August 11, 2003, a Decision Approving Partial Settlement was entered, granting the Secretary's motion and approving the proposed reduction of the civil penalty assessed for Citation No. 7082157.⁹

⁶ A copy of the petition, excluding citations not relevant here, is attached as Appendix 1, to this order.

⁷ Copy attached as Appendix 2.

⁸ Copy attached as Exhibit 2 to Respondent's motion.

⁹ Copy attached as Exhibit 3 to Respondent's motion.

Discussion

The complaint for compensation, as amended, seeks up to one week's compensation, plus interest, for each miner idled by the issuance of Order No. 7060223, pursuant to section 111 of the Act. Based upon the representations in the Secretary's motion in PENN 2002-116, and the fact that the motion was granted, Respondent argues that Order No. 7060223 was vacated, i.e., never became final, and cannot, therefore, form the basis for an award of up to one week's compensation under section 111.

Section 111 stands apart from the interrelated structure for reviewing citations, orders and penalties created by section 105. The purpose of section 111 is to determine the compensation due miners idled by certain withdrawal orders, not to provide operators with an additional avenue for review of the validity of the Secretary's enforcement actions. *Local Union 2333, District 29, UMWA v. Ranger Fuel Corp.*, 12 FMSHRC 363, 370-71 (March 1990); *Local Union 1810, District 6, UMWA v. Nacco Mining Co.*, 11 FMSHRC 1231, 1239 (July 1989). The Secretary is a party in enforcement proceedings under section 105, whereas in compensation proceedings under section 111, only the miners, or their representatives, and the operator are parties. Consequently, the finality of any order, or modification thereof, must be determined by reference to the outcome of any relevant section 105 proceedings between the Secretary and the operator, and a claim for compensation under the third sentence of section 111 cannot be adjudicated until the subject order has become final under section 105.¹⁰

In *Nacco Mining*, the UMWA sought compensation for miners idled by the modification of a section 104(d)(2) withdrawal order. The order had been issued on December 10, 1984, but was modified almost immediately and two other times, such that it did not result in the idling of miners. On May 7, 1985, Nacco paid the civil penalty that had been proposed for the violation alleged in the order. However, the order had not been terminated because the underlying condition had not been completely abated. On October 2, 1986, 22 months after the order had been issued, MSHA determined that no further time should be allowed to abate the violation, and modified the order for the fourth time, resulting in the idling of miners. Neither the operator, nor the UMWA contested the issuance of the order or any of the modifications, including the one that resulted in the idling of miners, and the operator had not contested the proposed civil penalty. The Commission noted that since there was no new violation alleged in the critical modification, no new penalty assessment was to be forthcoming, and held that "because Nacco did not avail itself of the opportunities to contest in a timely manner pursuant to section 105 either the validity of the section 104(d)(2) order, or the penalty proposed for the violation, or the validity of any of

¹⁰ Proceedings in this case had been stayed pending resolution of enforcement proceedings related to this case, and to a companion compensation proceeding between the same parties. Motions for summary decision were filed by Respondent in both cases in February 2006. The cases were reassigned to the undersigned Administrative Law Judge on April 5, 2006. An order granting Respondent's motion in the companion case, Docket No. PENN 2002-24-C, was entered this date.

the subsequent modifications, it is precluded from raising such challenges” in this compensation proceeding. 11 FMSHRC at 1240.

The Commission later held, in *Ranger Fuel*, that an imminent danger withdrawal order issued pursuant to section 107(a) of the Act is “final and valid on its face for purposes of section 111 compensation proceedings” if not contested pursuant to section 107(e)(1). 12 FMSHRC at 373; *See also, Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 777 (D.C.Cir. 1990). The review provisions of section 107(e)(1), which afford operators an opportunity to contest and request a hearing on the validity of a section 107(a) order within 30 days of notification thereof, were described as “parallel to the section 105 scheme for contest and review of section 104 citations and orders and related penalty proposals.” 12 FMSHRC at 371. Civil penalties are not typically assessed for section 107(a) orders because they need not and typically do not allege violations. Section 107(a) specifically provides that “issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.” 30 U.S.C. § 817(a). The overriding purpose of an imminent danger order is the immediate withdrawal of miners, and the investigation and identification of any underlying violations will often be delayed until long after the order was issued. *Local Union 1889, District 17 UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1327-28 (Sept. 1986).

As noted in *Ranger Fuel* and *Nacco Mining*, section 105 creates a comprehensive scheme for contest and review of citations and orders issued pursuant to section 104 of the Act. Section 105(d) grants an operator the right to seek immediate review of a citation or order issued or modified pursuant to section 104.¹¹ Under section 105(a) an operator has a right to contest a citation or order after a civil penalty has been assessed. Hence, for a citation or order that alleges a violation, an operator will have two opportunities to challenge the enforcement action and request a hearing. Immediate review can be sought pursuant to section 105(d), and review can also be sought after the penalty is assessed under section 105(a). However, some orders, including typically orders issued under sections 104(b) and 107(a) of the Act, do not usually allege violations. Modifications of orders may also not allege a new violation. Under those circumstances, there will be no opportunity to seek review under section 105(a), and an operator wishing to contest the validity of the order or modification must exercise its right under section 105(d) to contest the issuance or modification of the order, or the order will be deemed final for purposes of section 111.

¹¹ Section 105(d) of the Act provides, in pertinent part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance . . . of an order issued under section 814 of this title, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary’s citation, order, or proposed penalty, or directing other appropriate relief. . . .

Neither Maple Creek nor the UMWA claim to have contested the issuance of Order No. 7060223, the section 104(b) withdrawal order, and Commission records do not show notification of any such contest. There was no new violation charged in the order and there was no civil penalty assessed with respect to the order. While the settlement motion in PENN 2002-116 discussed the order, neither the petition in that case, nor Maple Creek's answer or amended and substituted answer specifically mention Order No. 7060223.¹² In describing Citation No. 7082157, which was issued on July 30, 2001, the "Proposed Assessment," a copy of which was attached to the petition, noted that the "Type of Action" was "104A-104B," and that the Secretary had determined to specially assess a penalty of \$9,000.00 for the alleged violation. App. 1. Noting the fact that action under section 104(b) had also been taken with respect to the citation, i.e., for failure of the operator to timely abate the violation, was entirely appropriate because "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation" is one of the factors that the Commission must consider in fixing the amount of a civil penalty. 30 U.S.C. § 820(i). The Proposed Assessment does not purport to propose a civil penalty for Order No. 7060223, which was issued on July 31, 2001. The Decision Approving Partial Settlement did not mention Order No. 7060223. It simply approved the settlement of the civil penalty for Citation No. 7082157, which had been duly contested by Maple Creek.

As noted in *Westmoreland*, section 111 is remedial in nature and was not intended by Congress to be interpreted and applied narrowly. 8 FMSHRC at 1323. I find that resolution of the limited issue presented by the motion is governed by the cases discussed above. Because Maple Creek did not contest the issuance of Order No. 7060223 within 30 days of receipt, it became final for purposes of section 111. The validity of the order was not at issue in PENN 2002-116, and it was not affected by the settlement of the related citation. Consequently, Maple Creek's motion for summary decision must be denied.

ORDER

Upon consideration of the above, Respondent's Motion for Summary Decision is hereby **DENIED**.



Michael E. Zielinski
Administrative Law Judge

¹² The original answer was filed by Maple Creek's Safety Director. Maple Creek later retained counsel, who filed a Motion for Leave to File an Amended and Substituted Answer. By Order dated March 27, 2003, the motion was granted.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 4, 2006

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|---|---|---------------------------|
| UNITED MINE WORKERS OF AMERICA, LOCAL 1248, | : | COMPENSATION PROCEEDING |
| Complainant | : | Docket No. PENN 2002-24-C |
| | : | |
| v. | : | |
| | : | |
| MAPLE CREEK MINING, INC., | : | Maple Creek Mine |
| Respondent | : | Mine ID 36-00970 |

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case is before me on a complaint filed pursuant to section 111 of the Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 821. The United Mine Workers of America, Local 1248 ("UMWA"), seeks compensation for miners idled by an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") requiring the withdrawal of miners from the Maple Creek Mine. The complaint was later amended to assert claims by miners who worked at Maple Creek's preparation plant who also were allegedly idled by the same order. Respondent has moved for summary decision, and the UMWA has opposed the motion. As explained more fully below, the motion is granted.

The Issue to be Resolved

Miners typically are not paid if they do not work. MSHA enforcement actions that result in closing all or part of a mine can, therefore, have a significant economic impact on both the mine operator and any miners idled by the enforcement action. Section 111 of the Act provides limited relief to miners under certain conditions.¹ The first two sentences of the section provide

¹ Section 111 reads, in pertinent part:

If a coal or other mine or area of such mine is closed by an order issued under section [103], section [104], or section [107], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period

less than one shift's pay for miners idled by certain closure orders. That limited compensation is available regardless of the result of any review of such orders.

The third sentence of the section, upon which the instant claim is based, provides for up to one week's compensation for miners idled by orders entered under sections 104 or 107 of the Act, because of an operator's failure to comply with any mandatory health or safety standard, but only "*after all interested parties are given an opportunity for a public hearing, . . . and such order is final.*" The complaint here seeks compensation for miners idled by Order No. 7082610, which was issued pursuant to section 104(d)(2) of the Act.

Maple Creek contends that Order No. 7082610 was later modified to a citation issued pursuant to section 104(a) in conjunction with settlement of a civil penalty proceeding and, consequently, that no compensation is available under the third sentence of section 111. The UMWA argues that compensation is due because the miners were, in fact, idled by the order and, since Maple Creek paid a civil penalty for the as-modified citation, its culpability for the alleged violation has been conclusively established. The issue presented by the motion is whether Order No. 7082610 is "final" within the meaning of section 111. For the reasons set forth below, I find that the order did not become final and grant Maple Creek's motion.

Facts

On August 28, 2001, at 11:00 a.m., an MSHA inspector observed hazardous roof conditions in Maple Creek's mine and issued Order No. 7082606, an "imminent danger" withdrawal order, pursuant to section 107(a) of the Act. The order required the withdrawal of miners from an area described as "The 6 West bleeder system from the No. 15 crosscut to No. 18 crosscut and the 7 West bleeder system from No. 34 crosscut to No. 35 crosscut." The same day, at 4:30 p.m., the inspector issued Order No. 7082610 pursuant to section 104(d)(2) of the Act, alleging a violation of 30 C.F.R. § 75.370(a)(1), which requires that a mine operator develop and follow an approved ventilation plan.² Maple Creek's ventilation plan had been amended on August 8, 2001, to lower action levels for methane concentrations from 4.5% to 4.0%, Maple Creek had failed to implement the change.

they are idled, but not for more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section [104] or section [107] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled by such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. . . . [30 U.S.C. § 821].

² Copies of Order Nos. 7082606 and 7082610 are attached to the Complaint.

On March 27, 2002, MSHA issued proposed civil penalty assessments for various citations and orders issued to Maple Creek, including Order No. 7082610, for which a penalty of \$3,500.00 was proposed. Maple Creek contested that and other proposed penalties on April 9, 2002. On May 22, 2002, the Secretary filed with the Commission a Petition for Assessment of Civil Penalties against Maple Creek, Commission Docket No. PENN 2002-132, which sought the imposition of civil penalties in the total amount of \$59,550.00, for 19 alleged violations of the Secretary's regulations prescribing mandatory safety standards for underground coal mines.

The petition in PENN 2002-132 was served on Maple Creek and Local Union 1248 of the UMWA. The UMWA did not seek party status in that case. On December 12, 2002, the Secretary filed a Motion for Decision and Order Approving Settlement, which sought Commission approval of a settlement of all of the violations at issue.³ As to Order No. 7082610, the motion described the proposed settlement as follows:

Order No. 7082610 was issued on August 28, 2001 by CMI Anthony R. Guley, Jr. He cited a § 104(d)(2) violation of 30 C.F.R. § 75.370(a)(1) based upon his determination that Respondent was not in compliance with its ventilation plan. Respondent's examiners had detected methane in concentrations of up to 4.0% and 4/1%. Respondent took no action to correct this hazard. Three weeks prior, MSHA approved Respondent's amendment to its ventilation plan, which requires Respondent's examiners to take action when concentrations of 4.0% methane are detected. This action level was decreased from 4.5% in its prior plan.

The inspector assessed the gravity of the violation as "significant and substantial" and found that it was reasonably likely that an event would occur against which the standard is directed, lost workdays could be sustained from resultant injuries, and one miner was exposed to the hazard. The inspector found Respondent's negligence to be high. A penalty of \$3,500.00 was specially assessed based on the high negligence rating.

The parties submit that Respondent's negligence was not as high as initially determined. Respondent represents that it had inadvertently instructed its examiners that the action level was 4.5% methane and had failed to update its instructions to include the new 4.0% action level. Moreover, the gravity is somewhat less based on the incremental change in the action level which was also below the lower explosive limit of methane. Therefore, reclassification of the Order to a "significant and substantial" § 104(a) violation and a reduction in the specially assessed penalty to \$2,000.00 is warranted in these circumstances.

Settlement Motion, at 6.

³ Copy attached as Exhibit 2 to Respondent's motion.

The UMWA was served with a copy of the motion, but did not file anything in response. On December 17, 2002, a Decision Approving Settlement was entered, granting the Secretary's motion, specifically approving the proposed reduction of the civil penalty assessed for Order No. 7082610, and ordering its modification to a citation issued pursuant to section 104(a).⁴

Discussion

The complaint for compensation, as amended, seeks up to one week's compensation, plus interest, for each miner idled by the issuance of Order No. 7082610, pursuant to section 111 of the Act.⁵ Based upon the representations in the Secretary's settlement motion in PENN 2002-132, and the fact that the order granting the motion directed the modification of Order No. 7082610 from a section 104(d)(2) order to a citation issued under section 104(a) of the Act, Respondent argues that Order No. 7082610 never became final, and cannot form the basis for an award of up to one week's compensation under section 111.

Section 111 stands apart from the interrelated structure for reviewing citations, orders and penalties created by section 105. The purpose of section 111 is to determine the compensation due miners idled by certain withdrawal orders, not to provide operators with an additional avenue for review of the validity of the Secretary's enforcement actions. *Local Union 2333, District 29, UMWA v. Ranger Fuel Corp.*, 12 FMSHRC 363, 370-71 (March 1990); *Local Union 1810, District 6, UMWA v. Nacco Mining Co.*, 11 FMSHRC 1231, 1239 (July 1989). The Secretary is a party to enforcement proceedings under section 105, whereas in compensation proceedings under section 111, only the miners, or their representatives, and the operator are parties. Consequently, the finality of any order, or modification thereof, must be determined by reference to the outcome of any relevant section 105 proceedings between the Secretary and the operator, and a claim for compensation under the third sentence of section 111 cannot be adjudicated until the subject order has become final under section 105.

As noted above, Maple Creek duly contested Order No. 7082610 pursuant to section 105(a), after being notified of the civil penalty that had been assessed for the violation. The disposition of the violation, as stated in the Decision Approving Settlement entered in the penalty proceeding before the Commission, was that the order was modified to a citation issued pursuant to section 104(a) of the Act, i.e., the order was successfully challenged by Maple Creek and did not become final. The UMWA did not seek to intervene in that case, and expressed no objection to the proposed disposition.

⁴ Copy attached as Exhibit 3 to Respondent's motion.

⁵ The Complaint cited both Order No. 7082606 and Order No. 7082610 as the bases for compensation claims. However, in response to interrogatories, Complainant identified Order No. 7082610 as the sole basis for the claim. A copy of Complainant's responses to interrogatories is attached as Exhibit 1 to the motion.

The section 105 proceeding having been concluded, the claim for compensation may now be addressed.⁶ Because the section 104(d)(2) order upon which the claim is based did not become final, the claim for compensation under the third sentence of section 111 must be rejected.

Despite the clear wording of the statute, Complainant argues that section 111 is to be interpreted broadly and that its miners are entitled to compensation even though the order is no longer valid. However, its argument is directly rebutted by the statute. In construing a similar provision of the Federal Coal Mine Health and Safety Act of 1969, the court in *Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975) stated:

We believe that it is clear that in drafting § 820(a) Congress understood the difference between an order which is ultimately upheld and one which is ultimately vacated, and that in clause [2] [providing up to one week's compensation] Congress intended to compensate miners only where the order is ultimately upheld, but that in clauses [1] and [3] Congress intended to compensate miners even where the order is ultimately vacated. Any other reading of the section would be inconsistent with the section's overall design, since it would ignore the fact that clause [2] explicitly predicates compensation on the order's being held valid after a hearing, whereas clauses [1] and [3] have no such requirement.

In enacting the successor to this provision, section 111 of the Mine Safety and Health Act of 1977, Congress did not change the critical wording with respect to the finality of orders, except that a phrase was added in the first clause clarifying that such compensation was due "regardless of the result of any review of such order." That phrase incorporated into the legislation the holding in *Rushton*, i.e., that the short-term compensation provided in clause one was due whether or not the order was ultimately upheld.

The UMWA's argument that up to one week's compensation may be awarded, whether or not the subject order is ultimately upheld must be rejected. The order was timely contested and was ultimately modified to a citation issued under section 104(a). The statute does not provide for compensation based upon the issuance of a citation.

⁶ Proceedings in this case had been stayed pending resolution of enforcement proceedings related to this case, and to a companion compensation proceeding between the same parties. Motions for summary decision were filed by Respondent in both cases in February 2006. The cases were reassigned to the undersigned Administrative Law Judge on April 5, 2006. An order denying Respondent's motion in the companion case, Docket No. PENN 2002-23-C, was entered this date.

ORDER

Upon consideration of the above, Respondent's Motion for Summary Decision is hereby **GRANTED**, and the complaint for compensation is **DISMISSED**.



Michael E. Zielinski
Administrative Law Judge

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